COOPERATIVE SOVEREIGNTY

A fresh look at the Treaty of Waitangi

DUNCAN ROPER

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An essay
by Duncan Roper (1940-2016)
Edited by Petrus Simons and Steuart Henderson

Cooperative Sovereignty: A fresh look at the Treaty of Waitangi
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Foreword

It is an honour to write commending this posthumous publication by Duncan Roper, on which he had been engaged in one way or another for more than 20 years. Indeed, as he explains, it is rooted in reflections that stretch back into his youth. In this short publication the essence of much of Duncan's writing is revealed, and his memory is rightly honoured.

Readers are in for a treat in this volume, which showcases a keen mind dissecting and debating views which have become very widely accepted in New Zealand and underlie the work of the Waitangi Tribunal. His challenge of the logic of Ruth Ross's famous essays is extraordinarily important, because her findings have become the basis upon which the Māori version of Te Tiriti has been elevated at the expense of the constitutional and legal roots of the English version. Two whole generations of students have now been taught Ruth Ross's findings without any consideration of alternatives to her account of the differences between the two texts. The significance of this is now very evident in the findings of the 2014 interim Waitangi Report and in the writings of Margaret Mutu. If the latter is unlikely to achieve quite the status of Ruth Ross's work, the interim Waitangi Report on Northland is of huge significance for the future of Māori-Pakeha relations in New Zealand. Hence Dr Roper's eloquent analysis is of great importance.

Many who have come across Dr Roper's work have been charmed – even, dare one say, mesmerised – by his sharp mind and broad cultural references. The discussions of international law and of British values are elegant, apposite but never laboured. The discussion of Māori events

and texts is informed and shrewd. These small insights into Duncan Roper's enormous cultural and historical knowledge are supplemented with flashes of his characteristic irony and wit. But all these aspects of who he was serve here to reveal an even more profound aspect of his personality: his deep care for the good of the state and the wellbeing of Aotearoa-New Zealand. If this enduring motivation may have been overshadowed by other aspects of his personality in his conversation, it is moving to see it in evidence here.

I was delighted to be reacquainted with Duncan Roper upon his 2004 return to New Zealand in our combined respect for the figure of Tamihana Te Waharoa. Now it is a privilege to commend this work, tinged with the sadness of acknowledging how much more he longed to achieve had he been given more time.

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April 2018

Editors' preface

Two major distortions have plagued our understanding of the Treaty of Waitangi since its signing in 1840. Between 1860 and 1970 European settlers believed that they had obtained full sovereignty over New Zealanders: Māori chiefs had lost all their rights, and were basically 'settlers' like everyone else. This mistaken belief has inflicted a great deal of suffering upon the Māori people.

More recently, due to a 'mistranslation theory' proposed by Ruth Ross in 1972 and now supported by the Waitangi Tribunal (2014), groups of Māori believe that the Treaty meant the chiefs to retain their sovereignty; correspondingly, this theory asserts, the white settlers were given the right to their own 'White Chief'. This view is leading us down an increasingly thorny and obstacle-ridden path.

During the illness that claimed his life in October 2016, the late Duncan Roper worked on a book proposing a better interpretation of the Treaty of Waitangi, involving a concept of 'cooperative sovereignty' between Māori and Pākehā New Zealanders. We were given the task of unifying the drafts of the chapters Duncan had substantially completed at the time he died into a manuscript that could be published. We have done so, realising that he might have wished to polish up the manuscript, check quotations, etc.

Since the first chapter provides a fair summary of Duncan's argument, we have decided to publish it along with his preface and introduction as an essay on the meaning of the Treaty. To this we have added an epilogue of our own to highlight on the basis of a few examples that there is still a fair way to go before it might be said that in Aotearoa two

cultures are working harmoniously together, without one dominating the other.

We have decided upon this course of action because it was Duncan's desire that his views on the meaning of the Treaty of Waitangi – especially that it involved a cooperative sovereignty of Māori and the British Crown – would be debated in public. We hope that this shorter essay will meet this purpose.

Petrus Simons
Steuart Henderson

Introduction

The purpose of this introduction is to indicate how the author of this book has lived through the significant changes that have taken place in the overall ethos and climate involving the Treaty of Waitangi over the past fifty years.

I grew up in the New Zealand of the 1950s under the spectacle of the mountain that we Pākehā then exclusively knew as Mount Egmont. Its Māori name is Taranaki. According to Māori mythology, it was once estranged from its central North Island cousins Ruapehu, Ngauruhoe and Tongariro, to the northeast. The British colonial administration of New Zealand adopted Taranaki as the name for the province surrounding the mountain, but called this distinctive feature of its landscape Egmont.

From the age of eight I lived in what were then the outskirts of the suburb of Westown in New Plymouth. Not far away was a small lake whose shores were, in part, covered in native bush. Together with my younger brother and friends I sometimes used to visit this lake, sail on it, and trek through the bush around it. On one such occasion when I was about ten or eleven, we tramped all the way around the lake. On our way we spotted two Māori youths, some two years older than me, doing something similar. They were both respected senior school pupils at the school we all attended and, in the subsequent unfolding of events, we were not aware that they were within earshot. As we explored the bush-clad sections of the lakeside we disturbed some old rotten logs, home to a species of large black beetle which sought protection from such rude invasions by giving off a rather nasty odour. We had learned to refer to

these creatures as 'Māori bugs'. Accordingly, our response to the bad smell was to exclaim loudly, 'Pooh, Māori bugs!'

About ten minutes later we emerged from the bush onto a grassy clearing quite close to the lake. The two Māori boys were waiting for us. They said nothing. They simply pushed me into a gorse bush. My brother, only seven years old at the time, began to cry and show great concern, but was not touched. My two friends were forced into the water close to the shores of the lake – and the two youths prevented them from getting out for some considerable time. Our assailants did us no harm, but all four of us were terrified.

It wasn't until much later that I realised that the Māori boys' actions were the result of overhearing our exclamations and interpreting them as a derogatory reference to them personally. Of course our young band of Pākehā explorers was no paragon of innocence, but we certainly had no intention of trying to insult our senior school students. We stumbled into an ugly situation simply because we unthinkingly continued to call a beetle by a name that carried with it a nasty racial slur.

This story serves to illustrate the point that different meanings of terms, even without malicious intent, can cause deep social conflict. The Treaty of Waitangi is supposed to be the symbol of a peaceful accord between Māori and the Crown in New Zealand. But in recent decades the anniversary of its signing on 6 February 1840 has often sparked controversy that evokes elements of my childhood experience.

In the New Zealand of the 1950s we Pākehā never talked much about the Māori, and our knowledge of them and their history was scant. We thought of New Zealand largely as a Pākehā place. Indeed, the general expectation was that anything specifically Māori would either die out or else be absorbed into the wider Pākehā culture and social order. In this climate, we Pākehā were still able to stand tall in the unchallenged acceptance of the myth of a Treaty in which Māori had accepted the sovereignty of the British Crown to such an extent as to willingly surrender their national identity to embrace all the benefits of British civilisation. This assimilationist vision assumed we had no need to reassess either our history or our attitudes. It was the Māori who needed to adjust and

accept the full benefits of a civilisation brought to them from the other side of the world.

It wasn't until late in the 1960s that I began to realise that much of this Pākehā picture of New Zealand history was seriously distorted. New Zealand's reputation for the best history of race relations in the modern world relied greatly upon the ongoing myth of the benefits to Māori of their assimilation into the Pākehā British world of the settlers. I remember reading articles and books by people like Ranginui Walker. In one of these he discussed the first article of the Treaty of Waitangi, commenting that 'Because of serious discrepancies between the translated Māori version of that key article and the English version, the Treaty is a morally dubious document. The moral validity of the Treaty hangs on the translation of the word *sovereignty*' (Walker, 1989, p.263).

Like many other scholars of his generation, Walker was greatly influenced by an essay by Ruth Ross (1972, pp 129-157). As I began to read this essay and the responses to it over the ensuing decades, it seemed to me that statements such as the one just quoted – whether by Walker, or by the many other writers influenced by the 'Ross mistranslation theory' of the Treaty of Waitangi – all failed to ask one simple question: What does – and *did* – the word 'sovereignty' mean in English? I doubted that this term's meaning was as straightforward as the scholarly discussion largely seems to have assumed. And how could we possibly settle on the appropriate Māori term to translate it, unless we had a clear understanding of its English meaning at the time?

My Pākehā preconceptions about the Treaty of Waitangi suffered heavier blows during the 1970s. Before living in New Plymouth I had lived for two years at Bell Block, and used to travel by bus to a primary school in Waitara. But I was never told of the momentous events of the war in Taranaki that had taken place on my doorstep some ninety years earlier. The events of the 1970s forced me to examine the Pākehā myth that New Zealand had the best record for colonial race relations in the nineteenth century. I gradually came to realise that somehow this myth had managed to suppress the realities of its own history!

In 1977/78 the land at Bastion Point in Auckland was occupied by people protesting the Crown's alienation of this prime real estate without Māori consent. It was a prime area of city real estate immediately east of downtown Auckland. The occupation lasted 507 days before the protestors were evicted by police. It was one of the most widely publicised events of modern-day Māori protest, and an issue of international significance. It did much to awaken Pākehā New Zealanders, including me, from the slumber of an illusory history of benign and generous treatment of their Māori compatriots. I well remember reading the article by Ranginui Walker in the *New Zealand Listener* reflecting on the significance of the forced evacuation of the protestors from Bastion Point in 1979. It linked the Bastion Point event to the Parihaka invasion of the 1880s as well as to other ways in which Pākehā-dominated governments had forcibly thwarted the attempts of Māori to affirm what they saw as their treaty rights. I subsequently read Dick Scott's *Ask that Mountain* and discovered how, under the influence of the Pai Mārire religion, the South Taranaki prophets Tohu and Te Whiti had set up a settlement between the west coast of Taranaki and the mountain. In doing so they were trying to assert their right to develop their own rangatiratanga, drawing from the benefits of British civilisation as they saw fit. Part of their protest against government attempts to claim and survey their lands – without their consent – entailed employment of the kind of *satyagraha*[1] tactics later developed by Mahatma Gandhi in South Africa and India. The peaceful sit-in by women, children and others was forcibly broken up by government troops in November 1881.

I visited Parihaka with my family, where we were warmly welcomed as we began to explore the scene of the events which had taken place a century earlier. Now I could see much more of the human meaning of our cultural past. The landmarks and placenames I had long taken for granted took on a new life. John Hinchcliff (2004) cast this story into an historical novel. The roles of the main characters – Te Whiti-o-Rongomai, Tohu Kākahi, John Bryce, the Taranaki Premier Harry

1 'Satyagraha' simply means a non-violent protest that is willing to quietly accept the exercise of force, in the attempt to draw attention to unjust legal practices.

Atkinson and Tītokowaru – are related more or less factually. And with the help of a range of additional plausible characters, the story comes to life in a remarkable way, vividly portraying the passive and powerful resistance of Māori to the ongoing attempts of Pākehā-dominated governments to gain yet more land for the colonising settlers, using all the force of the law sanctioned by its parliament to achieve these ends.

During the 1970s I was also busy writing *Paradise Lost – Threats to Constitutional Democracy in New Zealand*. This raised for me the whole question of the Treaty-constitutional legitimacy of the invasion of the Waikato by the British Imperial Army under General Duncan Cameron in 1863. I read both *The Maori King* and *New Zealand Revisited* by John Gorst, and was deeply struck by the character and wisdom of Wiremu Tamihana Tarapipipi in the development of the King Movement. I was particularly impressed by the way in which Tamihana's life, thought and statesmanship were influenced by his reading of the Bible. The experience was rather novel, given that all my previous experiences of radicalism had been limited to anti-Christian sources! This was of particular interest to me when I later read Ranginui Walker's book *Ka Whawhai tonu mātou* or *Struggle without End,* which portrayed the Christianity of the missionaries as a colonial ploy of the British invader. The significance for me was that it was not Christianity itself that was discredited, but its misuse by the coloniser. In fact, the Tamihana story was part of a much bigger one. For the tribes of the King Movement had set aside the *utu* demands of their former religion to live out an indigenous form of Christianity (Buddle, 1998, pp.5-28), and had reluctantly concluded that if they were to preserve the unity of their newfound national identity, then they needed to fight the assimilationist colonialism of the settlers – even if it meant taking on the Imperial Army.

In its case of *Ngāti Apa v Attorney-General (2003),* the New Zealand Court of Appeal issued a judgment in favour of Ngāti Apa upon the proprietorship of the foreshore. This finding, paralleling Australia's 1992 *Mabo* case, was a significant event in the history of the interpretation of common law in New Zealand. For the majority Pākehā population,

however, it was just a threat to their right to walk on the beach. The adverse Pākehā response to this common law finding was an understandable kneejerk reaction to the previous thirty years of taking all the reproofs concerning Treaty violations on the chin. Enough was enough! The foreshore should be public land, accessible to all and owned by no one!

Some six months after the publication of this Court of Appeal finding on the foreshore, the then leader of the opposition National Party, Don Brash, gave a major speech at Orewa (Brash 2004, p.8). There he cited the words spoken by Captain Hobson to the chiefs assembled at Waitangi in 1840*:* 'He iwi tahi tatou' (we are now one people). The contemporary implication of quoting these historic words was that every New Zealand citizen should now dance the same steps as those choreographed by the Pākehā. All 'special privileges' for Māori should be removed, including the dedicated Māori seats in Parliament. The fallout from these events parallels my childhood experience of the confrontation between four Pākehā boys and two older Māori youths. For all the progress that has been made since the 1970s, our country learned that there were many, many basic problems yet to be resolved in our understanding of the significance of the Treaty of Waitangi. Chief among them was the lack of an understanding of our history – principally amongst Pākehā, but also amongst many Māori.

Since at least 1860 the Treaty of Waitangi had been understood very differently by Māori and Pākehā. More to the point, the Treaty had been understood differently by Māori and the Crown. For many years the view of the Crown had been, by virtue of the first article of the Treaty, that Māori freely acknowledged the sovereignty of the British Crown to hold them to exactly the same way of life, including its political and legal system, as Pākehā. The Māori view, on the other hand, takes its cue from the rangatiratanga clause of the second article in the 1840 Māori translation. As 'rangatiratanga' means chieftainship, and as the Treaty was supposed to guarantee its retention by Māori, it's hard to see how

it can allow for a system of common law imported from Britain without any qualifications.

Ruth Ross's 1972 allegations of discrepancies between the English and Māori texts of the Treaty found their explanation in her mistranslation theory. This theory, at least amongst most general historians of New Zealand history, has since become the dominant explanation of how Māori and the Crown have arrived at such different understandings of the Treaty. Its influence is well illustrated in the November 2014 Waitangi Tribunal Report on Stage One of the Te Paparahi o te Raki Inquiry:

> This article, entitled 'Te Tiriti o Waitangi,' stands as probably the single most important advance on the subject in modern times. Ross argued that, far from the solemn and far-reaching blueprint for the nation's development it was often portrayed to have been, the treaty transaction was characterised by confusion and undue haste. She made the important observation that sovereignty was translated by Henry Williams in a different way from his translation of 'all sovereign power and authority' in the declaration only a few years previously. She concluded that the Māori text was the true treaty and that what mattered was how it had been understood here, not what the Colonial Office had made of the English texts in London. Her rigorous empirical examination of the original documents exposed the unquestioning acceptance of myths about the treaty by an earlier generation of scholars. And she left her contemporaries with the uncomfortable realisation that a reliance on what was said in the English text alone was no longer intellectually honest (Waitangi Tribunal 2014, Ch 8, p.3).

However, from my prior explorations into the background of early New Zealand history concerning these matters, I increasingly felt that I had good reason to doubt the accuracy of at least some of the main features of this theory. Three major factors set me thinking on quite a different track as I began to explore the relevance of the history of the law of nations to the situation of New Zealand in the mid-nineteenth

century. The first was my reading of the essay *Nineteenth Century Notions of Aboriginal Title and the Influence on the Treaty of Waitangi* by Frederika Hackshaw (1989, p. 104). This alerted me to the significance of sixteenth and seventeenth century developments in the modern law of nations[2] by Francisco Vitoria and others in reaction to the horrors inflicted by the Spanish 'conquistadores' on the indigenous peoples of Latin America. In particular, it showed me how the common law applying to colonial territories had been influenced by these developments in the law of nations. This has huge implications for the meaning of 'sovereignty' in so-called 'treaties of cession' accompanying declarations of sovereignty by the British Crown over territories occupied by indigenous peoples in the nineteenth century and earlier.

Secondly, I was living in Australia during the time of the *Mabo v Queensland* judgment by the High Court of Australia in June 1992. This was significant because Australia, unlike New Zealand, has no history of a treaty with its indigenous peoples. Yet there, even with no treaty, the common law, enriched by developments in 'law of nations' thinking, was able to deal with (some of) the injustices of the way in which the Crown had declared sovereignty (on the grounds that the territory was a *terra nullius* – vacant land) over the East Coast of Australia in 1788 (Reynolds, 1992). A good summary of this case is given by Butt and Eagleson (1993).

By contrast, New Zealand, in 1877, partly as a result of Chief Justice Prendergast's judgment in the case *Wi Parata v Bishop of Wellington*, denied any suggestion that sovereignty had been transferred to the British Crown via the legal instrument of the Treaty of Waitangi. By taking this position the New Zealand state removed access to the full *ius gentium*

2 The 'law of nations', as developed by Francis de Vitoria (ca. 1483-1546) and later Hugo Grotius (1583-1645), drew extensively on the Roman Empire's pragmatic and enlightened *ius gentium*. This body of customary law (literally: 'law of the peoples'), separate to the Roman legal code, was understood to be held in common by all peoples in 'reasoned compliance with standards of international conduct' (Bederman, *International Law in Antiquity* 2004, p.85). It gave autonomy to indigenous peoples in lands conquered by the Empire, while the Romans took charge of law and order, defence etc. The former (autonomy for indigenous people, chieftainship) became known as the power of *dominium*; the latter as the power of *imperium* – or sovereignty.

conditions of the law of nations underpinning the design of the Treaty – principles which were part of British common law in 1840. It thus occurred to me that the principles of the law of nations – as developed by the likes of Francisco Vitoria in the sixteenth century, and subsequently adopted into the common law applying to colonial territories – might well be as important for the history of New Zealand as the Treaty itself.

Thirdly, I read James Anaya's work on *Indigenous Peoples in International Law* (1996) around the time that I began serious work on this project in the 1990s. His little book begins with a chapter called 'The Historical Context'. Its thesis reinforced the broad thrust of Fredericka Hackshaw's essay mentioned above, but (by implication) criticised many of its details. In particular, it drew my attention to the significance of the theories of Emmerich Vattel in what Anaya described as 'the three phases of the modern law of nations', but without giving his analysis this name. The first phase was pioneered by Vitoria and others already mentioned; the second phase revealed how the theories of Vattel concerning the new political order of the civilised nations of Western Europe after the Peace of Westphalia in 1648 had influenced the plight of indigenous peoples in the nineteenth century; and the third phase saw the effects of legal positivism on the developments of international law in the late nineteenth and early twentieth centuries.

Another surprising thing happened as a result of my discovery of the breadth of vision of Wiremu Tamihana, the leader of the 'peace party' of the King Movement. I had initially encountered this great figure of New Zealand history in an episode of TVNZ's portrayal of the life of George Grey in *The Governor,* in the late 1970s. Without having studied the history of European philosophy and legal theory, Tamihana showed profound insight into what I call the *ius gentium*[3] dimension of sovereignty promoted by Francisco Vitoria and others. In his imagery of 'the sticks', John Gorst, for example, wrote of Tamihana that:

> He placed two sticks into the ground and said 'One is the Māori king, the other the Governor.' He placed a third stick on top of the other two.

3 See footnote 2

> 'This is the law of God and the Queen.' A circle was then drawn around the sticks. 'That circle is the Queen, the fence to protect all' (Gorst 1908, p.141).

My claim is that both Tamihana's symbolism of the sticks and the Treaty of Waitangi itself provide for a united *imperium* (or sovereignty) with room for two forms of *dominium* – a (slightly) modified rangatiratanga for Māori, and the full gamut of British common law for settlers – both functioning within the one overarching legal framework. More to the point, in 1840 this view was supported by the background history to the common law applied to colonial territories as informed by the first phase of the law of nations developed from the sixteenth and seventeenth centuries.

In 2004, while writing a draft of an earlier book (unpublished), I was confronted by the events of both the Foreshore and Seabed Act and Brash's 'Now we are one people' speech, and their aftermath. Indeed, it was the coming together of these events that suggested a new title for the manuscript. Before then it had been tentatively called *The Sticks and the Treaty,* and had incorporated a major study of Wiremu Tamihana and his transformist vision, known as the King Movement, for the development of a Māori nation from the former warring tribes of the central North Island of New Zealand. The 2003-4 events of the *Ngāti Apa* case, the 'One People' speech and the Foreshore and Seabed Bill were making their substantial impact upon New Zealand public life, but my attempt to incorporate them into that draft of the book became too unwieldy, and I needed to 'get back to the drawing board'. I published an essay, however, on Tamihana's significance (Roper 2003).

But it was not until the release of the Waitangi Tribunal Report on Stage One of the Te Paparahi o te Raki Inquiry, in November 2014, that I began to work in earnest on the particular features of this current project. While my earlier work may have prepared me for it, the publication of this report brought a range of factors into perspective, and I re-entered the project from a new angle with renewed vigour.

In its own summary of its findings, the Waitangi Tribunal Report reads as follows:

> We have concluded that in February 1840 the rangatira who signed Te Tiriti did not cede their sovereignty. That is they did not cede their authority to make and enforce law over their people or their territories (Waitangi Tribunal, 2014, pp.2,3).

The first sentence of this statement appears to be a flat denial of the meaning of the English text. However, there is a sense in which the statement is not controversial. As the Treaty granted the continuing powers of rangatiratanga to the chiefs and tribes, there is some sense in which this included their powers to control the members of their tribes – to 'make and enforce law'. What *is* controversial is the extent to which this remained applicable after the Treaty signing, and in what sense they were supposed to have held sovereignty (as distinct from the mana of rangatiratanga) prior to signing the Treaty of 1840. Each tribe was independent, with their chiefly rule being applied strictly to the iwi or the hapū, and there had never been any form of overarching kingship amongst the Māori in the way exemplified by some other Polynesian cultures – such as Hawaii, Tahiti or Tonga. Furthermore, although the Māori text of Te Tiriti,[4] rather than the English text, is now deemed the principal text of the Treaty, no reference is made in this report to the meaning of the kāwanatanga (governorship) granted to the Crown as it applies to Te Tiriti. In this respect, the above cited summary of the Waitangi Tribunal Report goes on to say that:

> Rather, they agreed to share power and authority with the Governor. They agreed to a relationship: one in which they and Hobson were to be equal – equal while having different roles and different spheres of influence. In essence, rangatira retained their authority over their hapū and territories, while Hobson was given authority to control Pākehā (Waitangi Tribunal, 2014, pp.2,3).

4 As with many discussions of the Treaty of Waitangi, 'Te Tiriti' throughout this work always refers to the Māori language translation of the Treaty of Waitangi.

Again, there is a sense in which this is not controversial. The basic content of an early memorandum of the Executive Council of New Zealand speaks of three categories of subjects under British sovereignty in New Zealand in 1842 – under the terms of the Treaty (quoted by Stokes 2002, pp.113-114). British settlers comprised the first category: they were full British subjects, subject to the full gamut of English common law applied to New Zealand. The second and third categories were Māori who, respectively, *had* and *had not* signed the Treaty of Waitangi. The memorandum delineates in what ways members of each of these two latter categories were subject to British sovereignty:

> The natives alone who signed the treaty acknowledged the Queen's sovereignty, and *that only in a limited sense, the treaty guaranteeing their customs to them*; they acknowledge a right of interference only in grave cases, such as war and murder, and all disputes and offences between themselves and Europeans, and hitherto they have acted on this principle. The natives who have *not* signed the treaty consider that the British Government, in common with themselves, have a right to interfere in all cases of dispute between their tribes and Europeans, but limit British interference to European British subjects (Stokes 2002, pp.113-114, emphasis added).

It is clear from this that the Crown administration in 1842 (and earlier) concerned itself primarily with the European settlers. It is also clear that, for much the greater part, Māori rangatira continued to control the members of their tribes, and expected that they could also lead their tribes into intertribal warfare over matters of utu. Those tribes signing the Treaty had agreed to the prospect of accepting a rule of law over New Zealand that outlawed murder, warfare, cannibalism and slavery. Those who had not signed the Treaty were not yet ready to accept such a rule of law. The policy of the 1842 administration was to postpone government intervention amongst tribes who had not signed the Treaty until such time as they themselves were willing to accept such a rule of law.

Nonetheless, in choosing not to address the matter, the meaning of 'kāwanatanga' in this November 2014 Waitangi Tribunal Report has

been left open to interpretations that would appear to deny any Crown governance of the Māori signatories in 1840. Hence the need for the Waitangi Tribunal – as the body charged with determining the meaning and effect of the Treaty – to discuss and clarify its understanding of the Māori word 'kāwanatanga'[5] as used in the first article of Te Tiriti.

The word 'sovereignty' is much misunderstood. As we have seen, the Preamble of the Waitangi Tribunal Report on Stage One of the Te Paparahi o te Raki Inquiry summarises sovereignty as 'the power to make and enforce law'. Without further qualification, this suggests that its meaning is an *unrestricted* exercise of political power – and indeed, Paul McHugh's comment that 'most historians take "sovereignty" as a short-hand for "supreme unaccountable power" and have not probed deeply into its meaning' (Fletcher 2014, p.93) indicates that such an assumption is widespread. This state of affairs underlines our need to dig more deeply into the meaning of this now controversial word.

So, one of my objectives is to seek to develop an understanding of the meaning of the English word 'sovereignty' which enables a more adequate analysis of the problems facing the ongoing and future constitutional status of Māori in New Zealand.

5 Section 5 of the 1975 Treaty of Waitangi Act provides that 'the Tribunal shall have regard to the two texts of the Treaty ... and ... shall have exclusive jurisdiction to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them.'

The basic idea of a cooperative sovereignty

Two basic elements underlie the title of this essay:

(i) Māori rangatira exercised their rangatiratanga mana in 1840 'to *grant* the Crown the right to the governance of their lands'.

(ii) The Crown, having been granted the right to govern the overall territory of the islands of New Zealand by a significant body of Māori rangatira in 1840, went about this task by setting up a colonial administration in New Zealand which 'confirmed and guaranteed' the mana of Māori rangatiratanga.

The Crown's governance of the overall territory was to focus principally on providing the missing accountability to British law on the part of the settlers already in the islands, and to protect Māori from the injurious consequences of future European colonisation. These consequences had been documented by a British Parliamentary Committee in 1836 and 1837, creating sufficient consternation to result in the formation of the Aborigines Protection Society.

At this stage any expectations of assimilating Māori into the British institutions of the government of the settlers were distant ones – dependent upon Māori acceptance of and further interest in British civilisation (Fletcher 2014, p.1031). Furthermore, such interests were generally considered to follow on from the work of Christian missionary endeavour, without any wholesale Māori rejection of their cultural heritage.

Mana, which basically connotes power and authority, should be distinguished from *sovereignty*, the final, highest or supreme human

exercise of political authority and power within a human social order. In a tribal social order with no overarching kingship, the only human source of such political/legal power and authority is the rangatira (or chief). Without an overarching human authority such as a king, the maintenance of peace and order between tribes can be a serious problem. Furthermore, without a territorial legal system – supported by the infrastructure of policing, trying and punishing its alleged miscreants – there is no effective civil government over the tribes.

In such a situation the chiefs may each exercise their individual mana so that together they exercise a measure of overall mana over their lands, though the exercise of such political and legal power is not generally coordinated. While this does not amount to a civil governance of this overall territory, such a group of chiefs may nonetheless both aspire and plan to develop and implement the kāwanatanga (governmental) offices and infrastructure necessary for such a governance to function effectively. In the process they may realise that they do not have the immediate insight and resources necessary for dealing with the threats of warfare and other intertribal divisions that are very likely to thwart their goal in the short term.

So what are they to do? They might make a collective decision, in which each rangatira exercises his individual mana as chief, to invite a friendly and trusted 'civilised' political power possessing such resources to set up a government. However, the agreement reached with this 'civilised' power is not unconditional. The right to govern is given on the understanding that the mana of individual rangatira, together with that of their tribes, will be *confirmed and guaranteed* by the way in which the ongoing territorial legal system put in place by the state apparatus supports their ownership of land, their customary law and their chiefly authority.

This is a description of the establishment of what we might call a *co-operative sovereignty* over a territory whose indigenous inhabitants live in a social order comprising a large group of independent tribes. On the one hand, through the collective exercise of their individual mana

rangatira, the chiefs grant this 'civilised' political power the authority to govern the territory. On the other hand, the invitation to govern is conditional on this power exercising a sovereignty – as the political and legal power over the territory of the lands of these tribes – which is *limited*. The limitations are defined by the conditional terms of the treaty, backed up both by legally enforceable provisions founded in the treaty, and the common law provisions by which the 'civilised' nation exercises these overall governmental responsibilities. This means that the tribes should be legally protected from breaches of the treaty by an appropriate set of internal checks and balances – so that the exercise of sovereignty by this power will not unduly interfere with the jural/legal expressions of the mana of each of the rangatira. Thus the political and legal power of the state is designed by the 'civilised' power to cooperate with, and be mutually supportive of, the indigenous people's development of their way of life alongside that of the settlers who come from the homelands of this power.

Distinguishing between the *jural* and *legal* characters of this obligation is important. The jural aspect entails the need for the state structure of the 'civilising' power to recognise the legitimacy of the inherent rights of these indigenous peoples – as human beings – to responsibly reap the benefits of the land, and to order their communal lives through the social authority structures inherited from their ancestors. The legal aspect refers to the need to have these just rights recognised in a form of positive law, so that the state can utilise its powers of force to help fulfil the inherent jural norms of justice in these matters.

This description of cooperative sovereignty conforms to the basic jural character of the way in which the Treaty of Waitangi was understood and agreed to in 1840. In the eyes of the rangatira, their decision to invite the Crown to set up a government did not entail surrendering the mana of their rangatiratanga over their hapū, iwi or lands. If the 'ceding of their sovereignty' had involved the 'surrender of the mana of their rangatiratanga' (as, in the Māori translation of 1869, it officially came to mean), then the rangatira would never have signed the Treaty in 1840.

However, the second article of the English text – outlining the conditions under which the Crown is granted its first article sovereignty – entails 'the confirmation and guarantee' of rangatiratanga rights.

This reading of the Treaty borrows from both the English and the Māori texts in light of English common law. From the Māori text comes a recognition of the distinction acknowledged in common law between the Latin terms *imperium* (sovereignty) and a *dominium* that is tantamount to chieftainship. And the English text draws upon this common law background, summarising the rights to be retained by Māori in Article 2 of the Treaty as Māori chieftainship, which corresponds to *dominium* in the law of nations. This makes it plain that the Treaty right of the Crown to govern (i.e., to exercise kāwanatanga) has jural if not legal limits imposed on it. Moreover, this idea of *the confirmation and guarantee of their chieftainship* was clearly understood by both the 1840 Māori rangatira and the framers and translator of the Treaty (Fletcher 2014, pp.iii-iv; 757-790 and 1023-1079). They may have been unclear as to precisely what the setting up of a government entailed, but one thing they were quite sure about: the Treaty 'confirmed and guaranteed' their tino rangatiratanga, or full chieftainship. This was also well understood, throughout his period in office (1841-1858), by the first Chief Justice of New Zealand, Sir William Martin (1860/1998, p.10).

So the English text of the Treaty needs to be understood in light of the common law dictum that a declaration by the Crown of sovereignty (as *imperium*) over a territory leaves intact all the *dominium* rights of those inhabiting the territory. The new *imperium* (sovereignty) of the Crown could not legally set aside or overrule these rights insofar as they applied to the mana of rangatiratanga, or *dominium*. The 1869 retranslation of the first article of the English text of the Treaty into Māori under the direction of the Legislative Council – replacing the word 'kāwanatanga' of the first article of Te Tiriti with 'rangatiratanga', as the equivalent of 'sovereignty' – confirmed for many Māori the dishonouring of the Treaty by the Crown. It was this that led to the treks to Britain in the

1880s and 1920s to have Te Tiriti ratified, officially replacing the 1869 Māori text.

Thus, in the light of the historical background to the principles of English common law, the use of the words 'confirm and guarantee' in the English Article Two of the Treaty should be understood as a jural, if not legal, recognition by the Crown of the *dominium* or chieftainship rights already in existence prior to the coming of the Pākehā. Moreover, the Crown guaranteed the continuation of this rangatiratanga.

On behalf of the British Crown, Captain Hobson formally claimed British sovereignty over the islands of New Zealand in May 1840. This claim was morally buttressed by the Treaty signing in February 1840, in which a significant number of Māori rangatira in the north of New Zealand exercised the mana of their office to grant the right of the Crown to set up an overall government of the country. The subsequent exercise of Crown *imperium* in establishing this government proceeded from the consent, not the conquest, of this group of tribes. As we have seen, however, this consent was not given unconditionally. It was bounded by the terms of a treaty spelling out the nature of the two parties' cooperation and their mutual benefits. For Britain, those benefits were to be found in the proper governance of its lawless subjects already in New Zealand, a governance extending also to any further settlers coming to these shores under the protection of the Crown. For Māori, the benefits were further cultural contact with the advances of British culture and technology, a legally enforceable protection from the ugly side of British 'civilised life', and an encouragement by the British to cooperate with them in matters of trade and the overall governance of their country (*Ngāpuhi Speaks* 2012, p.113).

This formal declaration of sovereignty in May 1840 was addressed principally to the international community of 'civilised states', all party to the system of international law of the time. It signalled to all members that any further international political negotiations they might wish to undertake with the Māori needed to be conducted via the British Crown. These actions of the Crown took place within a political and

legal context bound both by international law *and* the way in which this law – as 'the law of nations' – had become incorporated into English common law as applied to British colonial territories. As already pointed out, this body of law placed important restrictions upon the way in which the Crown could jurally, if not legally, exercise its sovereignty with respect to an indigenous people. And some of these restrictions are specifically mentioned in the English text of the second article of the Treaty.

The two distortions of cooperative sovereignty

A healthy balance between the two elements of cooperative sovereignty, *imperium* and *dominium,* is fundamental to the meaning of the Treaty of Waitangi. Sadly, however, the greater part of New Zealand's history has been characterised by distortions which have unbalanced these elements. If the future constitutional course of the country is to regain the harmony it once enjoyed under the aegis of a (somewhat misunderstood) unity of the Treaty, we will all need to come to terms with the two major kinds of historical distortions of these common law principles articulated in the Treaty signing.

The initial distortion of these principles did not fully emerge until the late 1850s and 1860s: the idea (promoted by the majority of the settlers and the Crown in New Zealand) that Māori acceptance of Crown sovereignty also ceded all powers of rangatiratanga to the Crown. This Pākehā distortion may be summed up as the assertion that the change in the *imperium* of 1840 carried with it the overriding understanding (supposedly based upon the third article of the Treaty) that *all dominium* (or rangatiratanga) rights of Māori were fully and unconditionally subject to the Crown. Under the subsequent exercise of unrestricted British sovereignty, the Crown in New Zealand came to deny Māori their rights both to national self-determination and to the exercise of their rangatiratanga in such matters as a tribe's decision about whether to sell its land to the Crown. This view played havoc in the wars and conflicts of the 1860s and after, and remained virtually unchallenged until the 1970s.

Beginning in the 1880s, however, an ongoing protest gathered momentum amongst many Māori, taking issue with the Crown and settler distortion of the Treaty unilaterally set out by the Crown in its 1869 retranslation of the Māori version of the Treaty. Ngāpuhi and the Waikato in the 1880s, and Ratana in the 1920s, journeyed to Britain with the express purpose of making their case before the Crown in England (as the original Crown signatories to the Treaty) for the proper limiting of Crown sovereignty (Orange 1987, pp.205-234). They did this because the Māori text, Te Tiriti, clearly envisages an ongoing authority role for the rangatira in the life of Māori, particularly at the local level. This history of protest revived in the 1960s, growing considerably in strength. It was also joined by many Pākehā.

The Crown's failure to listen to these early calls to have the 1840 Māori text ratified over the 1869 revision has helped engender a second major distortion of the balancing principles underpinning the idea of cooperative sovereignty. This distortion is the polar opposite of the unlimited or strong view of the exercise of sovereignty cited above, in that it denies any claim that the Treaty entailed the granting or ceding of sovereignty – as the right to govern – to the Crown. Professor Margaret Mutu's opening essay of the volume *Weeping Waters* (2010) sets out this view. It is also the general stance of the multiple authors of *Ngāpuhi Speaks* (2012), a volume that forms a significant background to the Waitangi Tribunal Report of 2014. Many features of the latter report itself add support to this understanding of the Treaty.

This perspective, expressed as far back as the Māori treks to Britain in the 1880s, has many precedents. Two of its more important recent subscribers are Ruth Ross's article 'Te Tiriti – Texts and Translations', published in the *New Zealand Journal of History* in 1972, and the New Zealand Parliament's passing of The Treaty of Waitangi Act of 1975, together with its establishment of the Waitangi Tribunal in the same year. Broad acceptance of the main points of Ross's article has set the stage for a widespread belief that the meaning of the Māori text, Te Tiriti, is different enough from the English text to warrant its being deemed a

mistranslation. The formation of the Waitangi Tribunal in 1975 not only gave equal statutory credence to the two texts, English and Māori; it also gave the Waitangi Tribunal the statutory powers to determine the meaning and effect of the Treaty signed in 1840, based on these two texts.

The Waitangi Tribunal Report of November 2014

Ruth Ross's 1972 article repositioned the 1840 Māori text on the centre stage of Treaty scholarship, a welcome development. Its downside was its promotion of the idea of a supposedly radical difference between the English and Māori texts of the Treaty. This assertion has had a significant impact, providing additional fuel for the long history of Māori protests. A new, articulate group of Māori scholars took up this notion of radical difference, linking the protest movement with more traditional understandings of Māori history and social order. These developments fed into some significant submissions to the Waitangi Tribunal concerning the meaning and effect of the 1840 Treaty signing. On November 14 2014 the Waitangi Tribunal Report on Stage One of the Te Paparahi o te Raki Inquiry absorbed all this to such a degree that its findings may also be considered a contribution to this second distortion of the idea of cooperative sovereignty.

The reason for suggesting this is simple. The Ngāpuhi, Waikato and Ratana representations to the British Crown did not deny that their forebears, in signing the Treaty, had given a right to the Crown to govern. Rather, they were claiming that the Treaty *condition* – the ongoing recognition of tino rangatiratanga in the second article (both texts) – under which they had agreed to this governance by the Crown, had been denied them through the sequence of the events of the 1860s, culminating in the 1869 retranslation of the Māori Treaty.

By contrast, more recent approaches to this question effectively deny that the Treaty 'agreement' of 1840 gave the Crown the right to govern. Māori scholar Professor Margaret Mutu of Auckland University, for example, espouses the view that Māori considered the Crown rule of the

settlers to have (effectively) joined 'the confederated form of Māori tribal social order' of Te Whakaminenga.[6] In Mulholland and Tawhai (2010, pp.13-40) Mutu outlines the view that Māori rangatira accepted the idea of the kāwana (governor) as the Queen's representative in the form of a Big White Chief over the settlers (my terminology, I hasten to add, not hers). The implicit key point to her argument is that the word 'kāwana' does not connote such a figure as the Governor of New South Wales or the Roman Prefect of Judea, Pontius Pilate (whom Māori met in the translation of the New Testament of the Bible into their own language), who would have been familiar to the Ngāpuhi and other Northern tribes. In her view, a kāwana is a Pākehā figure with strong analogies to a Māori chief exercising control over the members of his tribe. A 'Big White Chief' seems to me an apt way of describing what she has in mind: a figure concerned exclusively with controlling the lawless conduct of a significant group of the Pākehā settlers.

Mutu's essay is but the opening contribution to Mulholland and Tawhai (2010). All contributors discuss the possibilities of a Māori contribution to the question of the constitutional future of New Zealand, and their arguments need to be well understood by Pākehā like me before offering any criticism. Indeed, much of the background to the various Māori understandings brought to the Waitangi Tribunal hearings on the Te Paparahi o te Raki Inquiry comes from the various deliberations of groups of Māori themselves – especially from the Ngāpuhi and other tribes in the north of New Zealand (*Ngāpuhi Speaks* 2012). The 2014 Waitangi Tribunal Report contains many features of fundamental importance to the statutory task given to it by the New Zealand Parliament in the Treaty of Waitangi Act of 1975.

It is as a step in the fulfilment of this statutory task, as stated on the second page of its Preamble to Stage One of the Te Paparahi o te Raki Inquiry, that the main significance of this Report of the Waitangi Tribunal emerges. Its central finding concerning the meaning and effect of the Treaty is as follows:

6 Te Whakaminenga, the Confederation of United Tribes, denotes the Northern tribes who signed the Declaration of Independence (He Whakaputanga) in 1835.

> We have concluded that in February 1840 the rangatira who signed Te Tiriti did not cede their sovereignty. That is, they did not cede their authority to make and enforce law over their people or their territories. Rather, they agreed to share power and authority with the Governor. They agreed to a relationship: one in which they and Hobson were to be equal – equal while having different roles and different spheres of influence. In essence, rangatira retained their authority over their hapū and territories, while Hobson was given authority to control Pākehā (Waitangi Tribunal 2014, pp.2-3).

We may note the following four basic points concerning this summary statement as it relates to the two Treaty documents themselves:

(i) A definition of sovereignty as 'the authority to make and enforce law';

(ii) The Māori rangatira at Waitangi in 1840 did not cede their sovereignty in this sense;

(iii) Questions about the possible meaning of Te Tiriti 'granting the Crown the right to govern' in its first article have been effectively sidestepped in this Tribunal Report. The expression may be rendered in English as 'the rangatira shall cede or grant for ever the government of their lands' (Orange 1987, p.262). The only way in which the kāwanatanga of the Crown receives any reference in the Report is by its disputed (according to Ruth Ross) link with the English text referring to 'sovereignty'. It is the latter, not the 'kāwanatanga' of the Māori text, that the Waitangi Tribunal Report denies being 'ceded by the Māori rangatira'. In the light of the translation of Te Tiriti given to us by Mutu (2010, pp. 24-28), we are left wondering just what the Waitangi Tribunal – as the statutory body charged with determining the meaning and effect of the Treaty on the basis of its two documents – actually understands by the word 'kāwanatanga' in the Māori text, Te Tiriti.

(iv) Hence, rather than consenting to the idea of entering into an agreement of cooperative sovereignty in the form of a unified state

under the auspices of the Crown in 1840, the Waitangi Tribunal claims that the Māori rangatira:

> ENTERED INTO A relationship of equality with the Crown, one in which Māori retained the authority over their hapū and territories, while the Governor was given the powers of controlling the Pākehā settlers (Waitangi Tribunal 2014, pp.2,3).

Again, in light of Professor Mutu's essay already quoted, the meaning of the word 'kāwanatanga,' as used in the first article of Te Tiriti (now taken to be the legally definitive text), is in need of clarification.

The significant role played by Ruth Ross's 1972 essay in this Waitangi Tribunal Report (2014) has already been noted in the Preface. Her remarks, as summarised by the Tribunal, are as follows:

(i) Far from being the solemn and far-reaching blueprint for the nation's development it was often portrayed to have been, the Treaty transaction was characterised by confusion and undue haste.

(ii) The word 'sovereignty' was translated by Henry Williams in a different way from his translation of 'all sovereign power and authority' in the Declaration of Independence only a few years previously.

(iii) The Māori text was the true Treaty and what mattered was how it had been understood here, not what the Colonial Office had made of the English texts in London.

(iv) Ross's rigorous empirical examination of the original documents exposed the unquestioning acceptance of myths about the Treaty by an earlier generation of scholars. And she left her contemporaries with the uncomfortable realisation that a reliance on what was said in the English text alone was no longer intellectually honest (Waitangi Tribunal 2014, Ch.8, p3).

Whilst we may endorse much of what is claimed here, Ruth Ross's important contributions, especially her main thesis, need themselves to be critically examined. It is certainly true that the emphasis of the Māori text of 1840 differs greatly from the way in which the English text was

predominantly read from 1860 until 1970. However, that does not mean that this reading of the English text was correct. Furthermore, her work has given many Māori and other scholars a basis on which to vent their moral anger at the alleged deceptions of the Crown at the signing of the Treaty in 1840 (Walker 1989, pp.263-279). Whilst such expressions of anger are not entirely without justification, they have been largely misdirected – with an unjustified focus upon people like the missionary Henry Williams at the time of the treaty signing. In the longer run, Ruth Ross's mistranslation thesis seems to have undermined the integrity of the vision of cooperative sovereignty central to the historic meaning of the Treaty.

Such moral anger would be far better directed toward people like Governor Sir George Grey and Governor Thomas Gore-Browne, not to mention the whole apparatus of the New Zealand Company. From the 1840s through to the 1860s, their influence generally undermined the *ius gentium* sovereignty fundamental to the meaning of both the English and Māori Treaty texts. Ruth Ross correctly points out the significant difference between the Māori text Te Tiriti, and the way in which Governors Grey and Gore-Browne and the large majority of settlers reinterpreted the Treaty in the late 1850s and 1860s – reading into the first article of the English text a strong or unrestricted meaning of the word 'sovereignty', while simultaneously neglecting or misrepresenting the content of its second article. She claims, however, that this unrestricted or strong view of sovereignty is its actual connotative meaning in the English text of the Treaty. I see this instead as a tragic, opportunistic change of course from the cooperative sovereignty envisioned in both the Māori *and* English versions of the 1840 Treaty.

We have also considered the seemingly deliberate refusal of the 2014 Waitangi Tribunal Report to deal with the meaning of the word 'kāwanatanga' in the context of Te Tiriti. In addition, we need to note its discussion of the response of the overall scholarly community in New Zealand to what the Report itself describes as 'the marked shift in the scholarship about the meaning and effect of the Treaty from the early

1970s' (2014, Ch. 8, p.4). In particular, the body of the Tribunal Report acknowledges a group of scholarly contributions – including those of Bill Oliver, Michael Belgrave, Lyndsay Head, Paul McHugh, Andrew Sharp, Alan Ward and Samuel Carpenter – not altogether in agreement with its own radical questioning of whether the Treaty actually granted the Crown the right to govern. These scholars have not simply reiterated the dominant line of argument prior to 1970, the Report recognises, 'but rather employed the Māori text in their argument for sovereignty being ceded' (Waitangi Tribunal 2014, Ch 8, p.4).

So how legitimate are we?

I reject Ruth Ross's conclusion that the Māori and English texts of the Treaty of Waitangi were so different in meaning that the Māori text should be called a mistranslation – and that as a result Māori have been misled for generations, right back to 1840. Rather, this misconception or distortion took place in the 1860s. The full mistranslation thesis, tracing the flaw right back to the Treaty itself in 1840, contributes substantially to the second distortion of the Treaty's vision of cooperative sovereignty.

By an Act of Parliament in 1975, the Waitangi Tribunal was given exclusive statutory powers to determine the meaning and effect of the Treaty as embodied in its two texts. In carrying out these statutory responsibilities, the 2014 Waitangi Tribunal Report has asked serious questions about whether the signing of Te Tiriti in February 1840 entitled the Crown to set up a state infrastructure in New Zealand. If not, then we face even more serious questions regarding the constitutional legitimacy of our present state infrastructure, flowing as it does in historical continuity from its establishment in 1841, supposedly legitimated by the signing of the Treaty of Waitangi.

In raising these questions, it should be noted, the Waitangi Tribunal's Report is at variance with the New Zealand Court of Appeal. In its *Ngāti Apa v Attorney-General* case of 2002, the Court of Appeal endorses both the application to the Treaty of background *ius gentium* sovereignty

ideas adopted in English common law, and Sir Hugh Kāwharu's back translation of the text of Te Tiriti (Kāwharu 1989).

Claudia Orange (1987, pp.234-254) records a brief history of Waitangi Day. The first Waitangi Day Act, subsequently revised in 1973, 1976 and 1985, was passed in 1960. In 1973 its name was briefly changed to New Zealand Day, but this did not last long. The MPs who drafted these provisions did so in the belief that Waitangi Day would symbolise the harmony of a nation based upon the mutual appreciation of the founding of modern New Zealand, in an annual celebration of the cooperative sovereignty agreed to by a significant group of Māori tribes with the Crown on 6 February 1840. Over the last forty or so years, however, Waitangi Day has been marked by a significant degree of anger and division which is very foreign to the cooperative sovereignty arguably instantiated in both texts of the Treaty of Waitangi.

Needless to say, all this has created a situation of considerable complexity. This complexity is bound up with the historical development of the sovereignty of the modern nation-state, together with the various ideas that are central to it. There are many points at which Māori traditions regarding social and political organisation do not sit easily with this complex of ideas. This incompatibility created a somewhat difficult situation in the Waitangi Tribunal hearings concerning Stage One of the Te Paparahi o te Raki Inquiry, with much of the criticism levelled at expert witnesses of the Crown who demonstrated a gulf of misunderstanding regarding these matters (*Ngāpuhi Speaks* 2012).

The ideas of the political and legal sovereignty of the nation-state affect us all, whether we like them or not. They lie behind the virtual universality of the sovereign nation-state system which shapes the international character of our contemporary political and legal world, and it will pay us to consider how they might illumine and modify some of the more traditional British and Māori conceptions brought to our considerations of the Treaty. The historic Treaty of Waitangi, in both its Māori and English texts, can still serve as a beacon drawing us all on to its two noble objectives: a united and cooperative sovereignty, in which a very

significant place is given to indigenous people to continue to live out and develop their unique cultural heritage in these lands of their forefathers.

Meet the neighbours: Māoridom encounters the sovereignty of the Western colonising state

Clarifying concepts of 'sovereignty' and 'nation'

The word 'sovereignty', at least in New Zealand, seems to have become an academic/political swear word connoting 'supreme unaccountable power', as Paul McHugh has commented (Fletcher 2014, p.93). The kind of political sovereignty defended at great cost over the past one hundred years or more is very different to that espoused by the authoritarian/totalitarian sovereignties which emerged in Russia, Italy, Germany and Japan during the 1920s and 1930s. Yet all sovereign states may be (insufficiently) described as having 'the power to make and enforce law'.

We need a deeper understanding of sovereignty if we are to develop a more adequate analysis of the problems facing the ongoing constitutional status of Māori as a distinct indigenous national community sharing a common citizenship with the various Pākehā and other groups living in New Zealand. To this end, let us examine how the traditional forms of Māori social order had to confront (for both good and ill) the political realities which Western colonialism brought to New Zealand – together with their associated ideas of political and legal sovereignty.[7]

7 In this respect, the major focus of Pākehā historians has been upon the processes by which British colonial patterns not only took root in New Zealand, but also provided the matrix within which the patterns of the internal development of Māori social order were effectively stunted or stopped in their tracks.

In two regions of nineteenth century New Zealand the internal development of the Māori social order of independent tribes began to show signs of a more national character. The earlier of these occurred from around 1820 to 1840 among the tribes of the north of New Zealand linked to the Ngāpuhi, as described by Manuka Henare (2003). The latter, among the tribes of the Waikato, was linked to the development between 1840 and 1865 of what is usually called the King Movement. This has been documented by Evelyn Stokes (2002) and John Gorst (1864/1959).

But these internal developments within the Māori social order were disrupted from the outside. This was largely the result of the wholesale attempt on the part of the Crown in New Zealand (in the form of Governors Grey and Gore Browne), together with the large majority of the settler citizens of the fledgling colonial state, to incorporate or assimilate Māori into the settler social, lingual, political and cultural order – by force if necessary. Governor Browne justified this at the Kohimarama Conference in Auckland in July-August, 1860, summarised by Claudia Orange as follows:

> The governor opened by dwelling at length on the treaty's clauses, repeating the pledges made in 1840 by the Crown and by the chiefs, and stressing that the treaty was the first fruit of a new British policy towards indigenous races, one which invited them to unite with the colonists and 'become one people under one law' (Orange 1987, p.145).

Pākehā myopia has tended to ignore these internal developments within nineteenth century Māori social order. But the Auckland Māori academic Manuka Henare's Ph.D. thesis has contributed a significant scholarly corrective (Henare 2003). With special reference to the developments from independent tribes to the basic features of nationhood in New Zealand's north from 1820 to 1840, the nub of his work is that Māori of the nineteenth century had their own perspective on how their social order was changing and adapting to the British colonial venture taking place in their midst. This was not confined to the Ngāpuhi of the north; it was also very much a focus in the Waikato from 1835 to 1865.

Indeed, the serious conflicts of the 1860s played out in Taranaki and the Waikato were prefaced by some remarkable indigenous developments, as separate warring tribes showed movement toward prospects of Māori nationhood. And in Governor Browne's 1857 reaction to a spectrum of Māori stances toward the King Movement we clearly discern the clash of views which culminated in the wars of the following decade.

In May-June of 1857, tribes in the Waikato with diverse stances on the King Movement met at Ihumatao on the Manukau. On the one hand, Wiremu Nera represented 'the loyal natives'. On the other were the two factions of the King Movement itself: Te Heuheu, representing the 'war party' of the King Movement, and Wiremu Tamihana, representing the 'peace party'. At the conclusion of their month-long meeting, having failed to achieve agreement on the status of the trans-tribal leadership of Pōtatau (Te Wherowhero), the leaders all went to Auckland to meet with Governor Browne. Despite their differences about the status of Pōtatau as the Māori King, most of them affirmed their desire to remain within the orbit of the British Queen. But all voiced a desire for their own representative assembly, expressive of their distinct (but not separate) nationality. Gorst comments on the response of the Governor to this meeting as follows:

> The Governor was at last thoroughly roused to a sense of danger. He felt that the establishment of a distinct nationality in any form, would end sooner or later in collision; and that, if the agitation for a king were persisted in, it would bring about a conflict of races, and become the greatest political difficulty we had yet to contend with in New Zealand (Gorst 1864/1959, p.64).

Clearly Governor Browne's idea of a nation was exclusively the political nation of the community, bound by a common citizenship. This idea had indeed been (implicitly) declared in the third article of the Treaty signed in 1840, echoing the meaning of the much-quoted phrase of Governor Hobson subsequent to the signing of the Treaty: 'We are now one people' ('He iwi tahi tatou'). But the same Treaty had also affirmed something else: the ongoing recognition of the tino rangatiratanga (full

chieftainship) of Māori. Māori in the first half of the nineteenth century had embarked on a process in which various iwi, hapū and their rangatira were forming into a nation (or possibly regional nations) linked by ethnic, cultural, lingual and religious factors. Wiremu Nera and the loyalists had gone so far as to recognise Pōtatau as 'mana Māori' or a symbol of the fatherhood of their nationhood (Buddle 1860, p.15). Supporters of the King Movement, for their part, had come to recognise Pōtatau as the Māori King.

Governor Browne's approach to the meaning of the word 'nation' shows almost as much ambiguity as to the meaning of the word 'sovereignty'. Understanding the phrase 'sovereignty of the nation' therefore becomes doubly difficult. Does this mean an idea of nationhood that seeks to embrace all those of a common ethnicity, culture, language and history in its own political sovereignty, as exemplified by the Italian and German cases of political unification in the second half of the nineteenth century? Or does it mean the kind of political sovereignty associated with the nation as the community of common citizenship that is able to embrace a diversity of ethnic/cultural nationalities – as exemplified in Great Britain, with its common citizenship coupled to the national identities of England, Wales, Northern Ireland and Scotland?

By clarifying the diverse meanings of both 'nation' and 'sovereignty' we are better able to assess the significance of the Treaty of Waitangi for the past, present and future of the New Zealand social order, with special reference to Māori. For this reason, let us focus upon the meanings of 'nation' and 'political sovereignty' within the social orders of the sovereign nation state that developed in Europe after the Peace of Westphalia in 1648, and which confronted Māori tribal social order in nineteenth century New Zealand.

History, sovereignty, and the rights of indigenous peoples

A modern world map reveals the boundaries between the lands of the earth by the lines enclosing them and the various colours differentiating

them from one another. These mark out the territories ruled by different political/legal authorities. Whether or not relations between these various state authorities are friendly or hostile, the boundaries between them are rigorously policed by rules of law maintained by their internal authorities.

Today, virtually all of the land (and much of the water) is bounded by the invisible borders between states (Philpott 2001, pp.3-149). Within such borders, supreme political and legal authority is foundational to the ways peoples conduct their lives. The political and legal character of the supreme authority within such borders may take a variety of forms – a liberal constitution, a theocracy, a communist regime, or a military dictatorship. In each such instance we are confronted with a form of political and legal sovereignty that is characterised by a group of common features, including an overriding rule of law over the whole territory enclosed within its borders; a police system to maintain the laws within that territory; a standing military protecting the borders from invasion by a hostile power; a court system; as well as many others.

There is an immense variety of ways in which the overriding rule of law applies within the territory of a state. The case of the United Kingdom involves the traditional national variations of the English, Scots, Welsh and Irish within their respective traditional territories. In the United States and Australia, a federal political unity works in conjunction with state systems. In Switzerland, lingual-ethnic-cultural diversities are maintained within an overall unity. In the case of Ceylon and India, nineteenth century British rule supported a plurality of legal systems linking the various communities within the overall territory to their religious-lingual-ethnic heritages. In some polities, the overall legal system may apply to all who live in or pass through the territory, but the rights of citizenship – as these are linked to religious/ethnic/political communities within their territory – are highly biased. Nazi law is a case in point. Under Russian communist rule there were many 'citizens' who, because of their (present or past) opposition to the particular form

of the state in power, had to forfeit all rights to the protection of the state, even though they were subject to its law.

We might summarise all of this by saying that political and legal sovereignty embodies the final *human* source of the power of a state to make and enforce law. This is the calling to realise a unified but multifaceted justice for all institutions and persons who, as citizens or visitors, live in or pass through its territory – noting that the issues of justice and injustice applying to citizens vary immensely.

Moreover, in the modern world we are all familiar with the idea that such internal sovereignty is complemented by various external features. These entail the rules and conventions by which the international family of sovereign states interacts in the process of conducting trade, tourism and a wide range of cultural exchanges. Central to the 'balance of power between such sovereign states' is the idea that war between them is highly undesirable. So they all need to adopt conventions that collectively encourage both the responsibility not to interfere unduly in the affairs of other states, as well as their right to self-defence.

To this we might add 'the self-determination of peoples'. However, while the word 'people' here can legitimately be equated with the word 'nation', 'nation' can also be equated with 'the community of citizens' belonging to a state. Historically, this ambiguity of meaning was responsible for the kind of nationalism that swept Europe in the nineteenth century and led to the political unification of Germany and Italy, as well as to the break-up of empires like Austria-Hungary after the First World War. The more specific racial connotations of the all-embracing idea of 'the nation' led to the racist character of Nazi Germany, as well as to the political ideology of apartheid.

States are powerful legal and political entities that impose their sovereignty over all those living in or passing through their territory. While the term 'nation' is commonly used to describe the collective entity of the people living in the territory of such a state, this entity basically means the collective body of the citizens of such a state, as these are bound by its laws and common traditions. Peoples – as nations – usually

have ethnic, lingual, historical and cultural bonds that are not necessarily directly aligned with the political unity of states. Indeed, from 1707 the islands of Britain became a multinational state, with Scotland joining the then existing (political) unity of England, Wales and Ireland to form the state of Great Britain. This was done, at least on paper, in ways that continued to recognise the ongoing national characters of its constituent nations.

This dual usage of the word 'nation' is of some importance to our exploration of the rightful place of Māori nationhood in New Zealand. The policy of rapid assimilation, developed by Governor Grey and effectively initiated under his successor Governor Gore Browne, met a brick wall in the Māori of the King Movement in the late 1850s. Many Māori leaders, regardless of their views about Māori becoming a 'political nation' through the King Movement, recognised themselves as a distinct ethnic/lingual/cultural and historical people. As such, they all desired their own parliamentary assembly – to enable them to agree on common issues of importance and voice their concerns to the Governor.

Interpreting the word 'nation' exclusively as a 'political nation' in which Māori would be fully assimilated into Pākehā institutions and cultural patterns, Governors Browne and Grey (with the nearly full support of the settlers) effectively denied Māori the sense of national self-determination that the Treaty arguably guaranteed them. This national self-determination can also be described as 'national sovereignty'. In describing it this way, however, we can easily run into serious difficulties that are presented by the dual usage of the term 'nation'. This matter will arise as we discuss the issue of Māori sovereignty.

This ambiguity in usage of the term 'nation' extends to the meaning of the phrase 'the nation-state'. Both the idea and, to some extent, the concrete reality of the sovereign nation-state were born out of the struggles and wars of the Reformation era – the late sixteenth and early seventeenth centuries. While in such cases as Britain, France, the Netherlands, Portugal and Spain, it had a reasonably well-defined meaning, in others – such as Prussia (Germany) and Austria-Hungary – it did

not. Indeed, nineteenth and twentieth century attempts to bring about a closer alignment of states with their constituent lingual-ethnic-cultural-historical nations was a highly significant source of social upheaval in the German, Italian and Austrian nations/states.

It was during the late Reformation era that early modern theorists of sovereignty such as Bodin (1576), Grotius (1625) and Hobbes (1651) began to develop the theory of political and legal sovereignty which has subsequently come to characterise the international character of the modern world. The first stage of this development was the result of Western colonial expansion from the time of the Peace of Westphalia in 1648 (Philpott 2001, pp.75-122). From this time the international sovereign state system had its beginnings, developing further in the eighteenth and nineteenth centuries. Debate about its character has continued from the seventeenth century into modern times. The most significant practical statement of the way in which this family of nation-states would operate was by the eighteenth century Swiss theorist, Emmerich Vattel (1758). His treatment of the *ius gentium* obligations of sovereignty on the part of these nation-states, however, is seriously deficient in many respects (Anaya 1996, pp. 13-38).[8]

The second stage in the development of the international community of sovereign states may be said to have begun with the end of World War II (Philpott 2001, pp.151-250). The two principal features that enabled its widespread influence were the establishment of the United Nations and the movement of many indigenous peoples from colonial rule to political independence.

The political systems so established involved an authority operating territorially – within the borders of a state. People living in or passing through such territory may be natives of another region of the earth, or they may have an allegiance to the (sovereign) ruler of another kingdom. Nonetheless, while in the said territory, their primary civic responsibility is to the rule of law that operates universally within that territory. This, it should be noted, runs counter to any kind of primary personal allegiance based upon the membership of a tribe, a nation, a

8 The overall history has been sketched by Nussbaum (1953, pp. 115-85).

kingdom, a family dynasty or a religion. Since the time of the Peace of Westphalia, the people within the borders of a sovereign state are not viewed by that state as bound by the ties of ethnicity, language, culture or religion. Rather, they are bound by the political and legal rule of law applying universally to all who live in or pass through the territory as ruled by its sovereign authority (Philpott, 2001, p.17).

The aforementioned Bodin, Grotius and Hobbes were all concerned, in one way or another, with the question of maintaining the peace of the realm against threats of civil war. Unsurprisingly, then, one of the main features of the nation-state is its maintenance of a monopoly force of arms in both its internal policing of the realm as well as via the standing armed forces, which have the responsibility of protecting the realm from the threat of invasion from without. This monopoly force does, of course, raise serious questions when the sovereignty of a state becomes dominated by either a strong military government or a strong ideological thrust to oblige its subjects/citizens to adopt and live by a particular ideology – such as Communism or Fascism.[9] It also raises the question of the legitimacy of a colonial power compelling an indigenous people under its rule to fully adopt its colonial culture and political institutions in a process of wholesale assimilation.

This leads us to that feature of the modern sovereign state referred to in the Introduction as *ius gentium* sovereignty, which pledges to 'confirm and guarantee' the ongoing *dominium* or chieftainship rights of the indigenous people living within its boundaries. Suffice it to say that the nineteenth century saw a range of ways in which sovereign states of the Western world moved to undermine and curtail these rights, though they were part and parcel of their inherited legal systems (Anaya 1996).

The indigenous peoples of New Zealand were living on ancestral lands and were not primarily dependent upon hunter-gathering for their food and general wellbeing. They desired to develop a semi-independent

9 The case of the fragile Weimar Republic of Germany that emerged after World War I illustrates these dilemmas well. However, it was finally the combined strength of the military wings of both the Nazis and the Left-wing elements, together with the weakness of the forces of the Weimar Republic, that ushered in a totalitarian rule championing the idea of sovereignty as 'the power to make and enforce (totalitarian) law'.

form of civil life that would incorporate what they saw fit from the fruits of the Western civilisation fast encroaching upon them; but at the same time they wanted to deal with it on their own terms. They were prevented from achieving these aims as the result of the actions of Western 'civilised' governments.

Consequences for New Zealand of the historical advance of state sovereignty

The national and international system of sovereign nation-states entered its second phase from the end of World War II and the subsequent development of the United Nations in the decades immediately after it (Philpott 2001, pp.151-250). Up until World War II, peoples of the colonial Western Empires were still governed by these powers. But in 1947, the way India was granted its political independence heralded a new future for colonised peoples. While continuing its membership in the British Commonwealth of Nations, independent India acknowledged both the problems and the benefits of British colonial rule. Soon, other British colonial territories in Africa, Asia, the West Indies and the South Pacific were also granted their political and legal independence. These newly independent states also remained within the British Commonwealth after it was established in 1949, again acknowledging the good, the bad and the ugly of British colonial rule.

This second phase in the development of the modern national and international system left many of the aspirations of the indigenous peoples of South Africa, the Americas, Australia and New Zealand largely unrealised, as elaborated by Kent McNeil (2009, pp.257-61). This general situation is significant for an understanding of the broader backdrop confronting New Zealand. The *ius gentium* rights of the indigenous Māori people to New Zealand were supposed to be guaranteed by the Treaty of Waitangi. Moreover, the New Zealand case of an indigenous people inhabiting a former British settler colony presents features that are somewhat unique, making it different from the cases of South Africa, the Americas and Australia.

The first of these unique features arises as a consequence of Christian missionary efforts in New Zealand from the early 1800s onward. Two of the more significant priorities of the Anglican Church Missionary Society (CMS) were the translation of the Bible into Māori and the missionaries' learning of the Māori language so as to teach the indigenous people to read in their native tongue. This made possible the writing of the Treaty of Waitangi in both English and Māori. And of course, it was the Māori text – Te Tiriti – that was signed by most of the ancestors of present-day Māori. Problems regarding the relationship between the meanings of the Māori and English texts of the Treaty have, at least since 1970, created sore contention between Māori and the Crown.

The second unique feature of the relationship between the indigenous Māori people and the Crown is the forcible wholesale attempt to assimilate Māori into the social and cultural order established by the settlers under the auspices of the Crown. In the nineteenth century, British settler colonies in South Africa, Australia and the Americas were not generally inclined to incorporate the indigenous people into their life. The racial prejudice prevalent among Europeans in the nineteenth century meant there was little support for wholesale attempts of this nature; and, when attempted, they were generally pursued out of motives that were well meaning but nonetheless tainted by attitudes of cultural superiority.

The British settlers in New Zealand fully shared such attitudes. Nonetheless, under Sir George Grey's governorship between 1845 and 1853, they adopted his policy of attempting to integrate Māori into settler patterns of life. Both the background and the basic content of Grey's proposals date from his early sojourn in the Australian colonies in the late 1830s, and were influenced by his experience of the problems of attempting 'to civilise' the Australian Aboriginal peoples. This has all been briefly summarised and described as follows:

> In 1840 he [Grey] wrote a report for Lord John Russell, the new Secretary of State for the Colonies, showing how the amalgamation of two races could speedily be effected. The aborigines were to be converted (to

> Christianity), brought under British law, and employed by white settlers, while the children were to be educated in boarding schools. This theory of compulsive assimilation so impressed the Secretary that he sent Grey's report to the Governors of the Australian and New Zealand colonies (*Dictionary of New Zealand Biography*, Vol. I, p.160).

It should be noted that Grey's report in the last months of 1840 to the new British Secretary of State for the Colonies postdated the signing of the Treaty of Waitangi in February 1840. This means that later attempts in the 1850s and 1860s to reinterpret the Treaty in terms of Grey's ideas later formulated as British policy 'to share its advanced culture and social order with aboriginal peoples,' and as stated by Governor Browne at the Kohimarama Conference of 1860 (Orange 1987, pp.145-46), have little or no foundation in the original understandings of the Treaty texts themselves. Thus assertions such as those by Dr Don Brash (2004) – that assimilationist policies supposedly constitute the meaning of the Treaty of Waitangi – are thoroughly anachronistic. The words of Governor-elect Hobson spoken to the Māori after the Treaty signing – 'He iwi tahi tatou' ('We are now one people') – indicated a harmony of good 'brotherly' relations. This entailed working together in ways that would overtly uphold the second clause of the Treaty, in which the Crown pledged to recognise the ongoing character of Māori rangatiratanga, as discussed by Fletcher (2014, pp. 780-81). The prior level of harmony developed between the British monarchy and the Ngāpuhi community of Te Whakaminenga also laid a very significant precedent for the Treaty of Waitangi, as acknowledged by the Ngāpuhi people themselves (*Ngāpuhi Speaks* 2012, pp.65-80).

Moreover, strong evidence from both the Māori and settler sides demonstrates the measure of agreement between the Governor and Māori rangatira concerning the degree of cooperation at both the tribal level and the level of overall governance of the country (Ward 1973, p.84; Orange 1987, p.134). This evidence is well illustrated by an 1848 letter of the young Waikato chief Tāmati Ngāpora to Governor Grey, and the lengthy reply to its contents which Earl Grey, the British Colonial

Secretary, wrote to his namesake, the Governor in New Zealand. The Earl was himself a strong supporter of eventual Māori assimilation to the ways of the British. This, however, did not blind him to the immediate needs concerning the just treatment of Māori. By contrast, Sir George Grey appears to have simply ignored the words of the despatch from Earl Grey, his superior in London, neither minuting nor replying to it (Ward 1973, p.85).

Governor Grey's commitment to his theories on the civilisation of indigenous peoples as set out in his Report to Lord Russell of 1840 was considerable, and he was indeed an extremely complex figure. Bernard Cardogan (2014) has ably characterised the complexity of the man and the era in which he lived:

> Grey genuinely desired civic rights and equality for non-white and indigenous peoples. He was courageous at times in how he stood up for those rights. That future however, would occur at the cost of indigenous self-determination and economic self-sufficiency. Non-white and indigenous peoples were absorbed into the settler colony. That led to appalling suffering and betrayal of trust, to the abuse of power, and to the dislocation of peoples over generations. It was not good for white settlers either, who were left with the prolonged fantasies of apartheid South Africa, 'white Australia' and white dominion New Zealand. Grey himself paid heavily, in his career, in his health, and with the corruption that great power wrought on him (Cardogan 2014, p.5).

Indeed, Grey appears to have begun his first governorship of New Zealand determined that, through one means or another, he would work toward an effective reduction in the power of the Māori rangatira recognised by the Crown at the time of the signing of the Treaty. This is again illustrated by contrasting his policies with those of his namesake in London.

On the one hand Earl Grey, the Colonial Secretary, was sympathetic to the 1846 campaign by settler organisations for a Constitution of New Zealand, to give them a measure of representative government. On the other hand, he also strove to safeguard the interests of Māori from

a settler-dominated legislature by authorising a temporary demarcation of Native Districts in which Māori custom would be given the force of law as upheld by formally appointed chiefs, backed by the Crown Courts in the respective provinces (Ward 1973, p.85).

Governor Grey's response to the complexities of the 1846 situation, however, was to postpone the adoption of the NZ Constitution Act for a further five years – by which time, he claimed, his amalgamation policies would be likely to close the gap between settlers and Māori, and thus improve the chances of a representative government's success (Ward 1973, p.85). At the same time, however, he rejected Earl Grey's idea of temporary Native Districts because they would perpetuate 'the barbarous customs of the native race'. The Governor feared that a separate system of law, once established in the form of Native Districts, would become entrenched and ineradicable. Thus he sought and secured an alteration to his instructions, enabling him to enforce English law in ways that took less account of the local indigenous cultural milieu. In other words, he requested and obtained the freedom to implement the resident magistrate system in Māori Districts, initiating the application to Māori of English common law as it functioned in England (Ward 1973, p.86).

Reporting on the 'success' of this amalgamation policy to the Colonial office in 1852, Governor Grey reported that:

> The amalgamation of the two races inhabiting these islands, which is taking place, as evidenced by the considerable Māori population which each European settlement has now attracted to its vicinity, or contains mixed up with its white inhabitants, in which cases both races already form one harmonious community, connected together by commercial and agricultural pursuits, professing the same faith, resorting to the same courts of justice, joining in the same public sports ... thus forming one people (quoted from *British Parliamentary Papers* by Williams 2011, p.163).

But when the new Governor – Thomas Gore Browne – arrived in the colony in 1855, he quickly realised that amalgamation was not

taking place and had, in fact, been misrepresented in Britain. Seeking the advice of longstanding settlers, including the missionaries, the new Governor was advised that governmental control of Native Affairs should be retained directly by the imperial government. Māori would be suspicious of any policy that gave the direct control of Native policy to the settler assembly (Orange 1987, pp.139-40). Moreover, the rise of the King Movement in the mid-1850s presented Governor Browne with a crisis concerning Grey's amalgamation policy among a large body of the indigenous people themselves.

Writing in 1906, John Gorst makes it clear that Wiremu Tamihana – the kingmaker and leader of the peace party of the King Movement – had no wish to separate from the Queen, even though he, along with the vast majority of the tribes of the Waikato, had not become signatories to the Treaty in 1840 or after (Gorst 1908, p.141). As he put it, 'they wanted to be a distinct, but not a separate nation', proceeding to illustrate this by his famous parable of the sticks (Gorst 1908, p.141).

That this aspiration of 'a distinct but not separate nation' was popular among Māori leaders, whether or not they were sympathetic to the King Movement, was made plain to Governor Browne in 1857 in their post-Ihumatao meeting described above – during which they all voiced their desire for their own representative assembly, as expressive of their distinct (but not separate) nationality.

In 1857 or earlier, the Governor might have taken the bold step of initiating a cooperative venture with this overall movement, in the form of setting up a representative Māori assembly. Such a move would have allowed the various Māori parties to have their say in their own future development as a people, bringing recommendations for their overall situation to the attention of the Governor. Instead, however, the settler and imperial government leaders focused singularly on the amalgamation policy that was, in effect, at loggerheads with the option of the development of the tino rangatiratanga policy set out in the Treaty of 1840, as understood by both Wiremu Nera and Wiremu Tamihana.

An important speech to the Colonial Parliament in 1858, delivered by the then Native Minister, C.W. Richmond, demonstrated the enduring significance of Sir George Grey's 'civilising policies' for New Zealand. The Colonial Parliament was introducing the Bills concerning the future of Native Districts whose constitutional character had already been provided for in the 1852 Constitution Act. But Sir George Grey had firmly instilled his opposition to them in ways that lived on after he left New Zealand in 1853 to take up his next governorship in South Africa. In the speech just mentioned, according to Carpenter (2008):

> [Richmond] considered three options for governing Native matters: the first was to recognise Native customs, advocated by Lord Stanley (as Colonial Secretary) and the former Aborigines Protector, George Clarke; the second was to enforce British law advocated by the younger Sir George Grey's early paper on the civilizing of Australian Aborigines; and the third to insinuate or induce the acceptance of British law, the latter being Grey's revised notions with respect to New Zealand, as sourced from his first Governorship. Richmond reviewed the three options and argued that the third was best (Carpenter 2008, pp.23-24).

The policies enunciated in this speech were adopted by the colonial parliament in 1858. Clearly, by this time the settlers and the Crown in New Zealand considered the future social order of Māori to lie entirely under the will and power of the settler parliament. Richmond makes no reference to any obligation on the part of the government to consider the rights or desires of Māori as the indigenous inhabitants of the territory under the principles of *ius gentium* sovereignty which the Crown had agreed to in the Treaty. It is also clear that Governor Grey's theories regarding the 'civilising' of indigenous peoples, and the influence of these ideas among the settlers, were of great significance in shaping Crown policy in New Zealand concerning Māori assimilation – as well as profoundly conforming the way that the Treaty came to be viewed with those theories.

War in Taranaki broke out in 1860. The settler parliament responded with a 'stick approach' to the problem of assimilating Māori into the

settler institutions. Richmond's speech to Parliament had emphasised a preference for the 'carrot approach' taken by Governor Grey during his first term of office – but the Taranaki War changed all that. The settlers and the Crown in New Zealand became locked in a conflict over what was entailed in sovereignty, particularly with regard to the Māori of the King Movement in the Waikato.

In this situation, Governor Browne called for a conference involving 'loyal Māori' and the government, known henceforth as the Kohimarama Conference of 1860. In his opening address, Governor Browne spoke at length regarding both the Treaty of Waitangi and 'the new British policy toward indigenous people' (Orange 1987, pp.145-46). This policy simply reiterated plans for implementation of 'the civilising policies' proposed by George Grey in his first term as Governor. The government saw this as a generous offer from the British to share its advanced culture and civilisation with indigenous peoples; but while many Māori gladly accepted, there was an equally strong resistance. Claudia Orange writes of Browne's understanding of the link between the Treaty and these new British policies in the following terms:

> The Governor opened [the Kohimarama Conference] by dwelling at length on the treaty's clauses, repeating the pledges made in 1840 by the Crown and by the chiefs, and *stressing that the treaty was the first fruit of a new British policy towards indigenous races, one which invited them to unite with the colonists and 'become one people under one law'* (Orange 1987, p145, emphasis added).

Samuel Carpenter notes that a distinct change occurred in the parliamentary debates as to how 'civilisation' should effectively be brought to the Māori as a result of the Waitara dispute of 1860:

> From a policy that provided for Māori assent or self-government and the growth of British forms of property and government, Members began to speak of the necessity for forceful imposition of British rule and authority (Carpenter 2008, p.5).

Whether or not Māori wanted to assimilate with the settlers, the parliamentary debates between 1860 and 1862 show that the legislature considered Crown sovereignty gave them the right to impose British civilisation upon the King Movement by force. And not just the legislature. Governor Browne called the Kohimarama Conference in Auckland in 1860 for the express purpose of discussing the crisis caused by the Waitara dispute and the threat of the King Movement (Orange 1987, p.145). The Māori 'rebels', however, were not invited.

Governor Browne told those assembled at Kohimarama that 'Every Māori is a member of the British Nation . . . protected by the same law as his English fellow subject' (Orange 1987, p.145). In his farewell message to Māori following his first governorship in 1853, Governor Grey had urged them to:

> co-operate with the government in the unique experiment of racial amalgamation; it would be a model for indigenous races elsewhere, if only Māori could prove it possible (Orange 1987, p.136).

This was the 'carrot approach' to Grey's civilisation (or assimilation) policy, the one favoured by Native Minister Richmond in his speech to Parliament in 1858. Browne's remarks at Kohimarama emphasised Grey's achievement by stressing that:

> the treaty was the first fruit of a new British policy towards indigenous races, one which 'invited' them to unite with the colonists and become one people under one law (Orange 1987, p.145).

Like Grey before him, Browne said at Kohimarama that the Treaty offered Māori an *invitation* to unite with the settlers and become one people with them. But an invitation can normally be declined without a reprisal; an invitation 'that cannot be refused' is actually a veiled threat. The latter reveals itself in the constitutional sting in the tail of Governor Browne's renewed 'invitation'. All Māori were now considered by the Governor to be fellow members of 'the British nation'. So, the 'invitation' to unite with the settlers – in the eyes of the executive and legislature, as well as the settlers – was now considered a constitutional

obligation. As members of the British nation they were already subject to the same law, and on these grounds were obliged to keep the common law in exactly the same way as it functioned in England. Unfortunately, this novel official constitutional understanding was not made clear to Māori until the Māori retranslation of the Treaty sought from the Native Department by the Legislative Council was announced in 1869.

The only meaning of the word 'nation' countenanced by Governor Browne was 'the political nation of citizens (or subjects)'. This is a very strange position, especially as applied to 'the British nation'. Great Britain was primarily a state rather than a nation. As such – to use Wiremu Tamihana's phrase – it comprised 'distinct but not separate nations'. But certainly the policy of the Crown in New Zealand toward the Māori in general and the King Movement in particular can be likened to nineteenth century English imposition of their form of governance on the Irish by force, replicating earlier English attempts to impose specifically English rule over the Scots.

Governor Browne issued his stern warning in the final remarks of his speech at Kohimarama. He referred to those who would not cooperate with the government in Grey's assimilation plan as 'rebels', and threatened them with Crown confiscation of their lands. In other words, the carrot favoured by Richmond in 1858 gave way to Grey's original stick, which he returned to wield in his second term as Governor of New Zealand (1861-1868).

Grey resumed his leadership of the 'great civilising project' begun in his first term of office. But his innovative assimilation policy left little or no room for any genuine rangatiratanga leadership on the part of Māori. His refusal to compromise in this matter during the 1860s, supported by the large majority of settlers and their parliamentary representatives, quickly led to war between imperial troops and the King Movement, with disastrous consequences for New Zealand for more than a century. And beneath this conflict and its aftermath lay a particular view of sovereignty held by the Crown and settlers in New Zealand which lasted, without serious challenge, until the 1970s.

With its wars and other deepseated conflicts between the Crown and settlers (with the support of many Māori) against the 'traitorous and rebellious Māori', the decade of the 1860s was a watershed in Māori-Crown relations. The Crown's rejection of Māori tino rangatiratanga in the Māori retranslation of the English text of the Treaty of Waitangi in 1869 forced many Māori to the conclusion that these provisions of the Treaty would never be properly honoured by the Crown in New Zealand. Accordingly, in the 1880s two major expeditions were launched by different groups of Māori to Britain in an effort to have the 1840 Māori text ratified by the Crown in Britain, the party with whom it had originally been made. In both instances, the officers of the Crown in Britain approached by these expeditions took the easy course of directing their Māori representatives back to the Crown in New Zealand. This was done on the grounds that the responsibilities for handling native affairs in New Zealand had, by then, been transferred to the colonial government. A further Māori expedition undertaken in the 1920s under the leadership of Rātana produced a similar result (Orange 1987, pp.205-25).

Since the late 1850s Governors Browne and Grey had justified their actions and policies by appealing to a misinterpretation of the Treaty's first article, claiming that 'Māori had ceded their sovereignty' to the British Crown in 1840. In an effort to explain to Māoridom their understanding of the meaning of 'sovereignty', the Legislative Council in 1869 commissioned the Native Department to draft a new translation of the English text of 1840. This text conformed the meaning of the word 'sovereignty' with the construction the Governor put on the term at the Kohimarama Conference in 1860, alongside his warnings of the possible consequences for any sections of Māoridom rejecting these overtures (Orange 1987, p.146).

Many aspects of this revisionist understanding of the English word 'sovereignty' – providing a basis for the actions of Governor Browne in the events leading up to the Taranaki War of 1860 – were addressed by Sir William Martin in his book *The Taranaki Question,* published in that

same year. Although he did not analyse the situation in exactly these terms, it was this change in the outlook of the Crown in New Zealand, supported by the large majority of the settlers, that led to the wholesale adoption of the kind of sovereignty which effectively robbed Māori of a *ius gentium* dimension. They were being denied the say in their overall future development as a distinct but not separate nation which had been so fundamental to the Treaty.

The Māori word 'rangatiratanga' had been used in the second clause of Te Tiriti to indicate what would be 'confirmed and guaranteed' to Māori rangatira through the English text of the Treaty. In the Native Department's new translation of 1869 (Orange 1987, pp.263-265), this same Māori word, 'rangatiratanga', was used in the first article to translate the English term 'sovereignty'. Thus the very feature of most significance to Māori in the Treaty – the retention of their tino rangatiratanga (full chieftainship), set out very clearly in Te Tiriti – was now denied them. Instead, the new translation asserted that the Crown in New Zealand had effectively gained sovereignty in the sense of both the kāwanatanga mentioned in the first article of Te Tiriti, *and* the rangatiratanga in the first article of the retranslation of 1869.

Ostensibly grounded in the notion that in signing the Treaty Māori had ceded their sovereignty to the Crown, assimilation shaped social, political and cultural policy governing the Māori of New Zealand for the next century. Many, if not most, Māori lost touch with their cultural heritage. But when after World War II the countries of Asia, Africa and elsewhere began to gain their political independence, these winds of change also stirred Māori and their historical experience of indigeneity.

The situation of Māori in New Zealand in the nineteenth century is one more example of the long history of Western colonialism's effects on non-Western peoples exposed to the characteristic assumptions of Western supremacy. But the peoples whose progeny became those of Western Europe in the age of discovery and colonisation were not always as civilised as they later claimed to be. Indeed, the processes at work in the 'civilising' of the Celts and Germans (including the Anglo-Saxons)

under Roman rule were remarkably similar to those active amongst Polynesians in the nineteenth century.

There was, however, one significant difference. In general, the Romans allowed the peoples of their Empire to adopt the equivalent of 'civilisation' at a pace and to a degree with which they themselves were happy. Had the British settlers in New Zealand adopted an attitude more in tune with the better features of the *ius gentium* sovereignty originating from Roman law, then the colonial problems faced by the King Movement in the Waikato, for example, might have had a different outcome. New Zealand might instead have seen the development of a Native Province which maintained its Māori identity while simultaneously being transformed by both the civilisation of the British and the biblical precepts it sought to follow (Buddle 1860/1998, pp.24–28 and Gorst, 1864/1959, pp.251–62).

As things stand, however, the advent of the assimilation policy, the exploitation of Māori and the unrestricted view of sovereignty in the first article of the Treaty have all been blamed upon an alleged disparity between the two Treaty texts. This has simply exacerbated the problems arising from the distortions of the cooperative sovereignty that is basic to the Treaty. It is surely impossible to get some kind of Treaty agreement after a flow of more than one hundred and fifty years of history, when it is now alleged that the two documents that were once supposed to express a covenantal agreement were virtually irreconcilable at the time they were signed.

Having surveyed how the Treaty's idea of cooperative sovereignty was abrogated by the settlers and the Crown in New Zealand within two decades of its signing, let us now consider the lingual and other issues related to the second major distortion outlined in the Introduction.

The problem of the meaning of Te Tiriti

We have already met the problems of transliterating Te Tiriti back into English in our Introduction, noting that two quite different versions have been authored by two very competent Māori scholars: Professor

Margaret Mutu in 2010, and Professor Sir Hugh Kāwharu in 1987. A similar but slightly different problem of adequate translation arises with respect to the relationship between the two documents of 1835 – the Māori text known as He Whakaputanga, and the English text known as the Declaration of Independence. Both texts are set out by Claudia Orange (1987, pp.255-56). The received historical wisdom, issuing from mainly Pākehā scholars, is that James Busby penned the English text first, and that it was then translated into Māori by the missionary Henry Williams. However, the Māori scholars authoring *Ngāpuhi Speaks* dispute this priority of the English over the Māori text (*Ngāpuhi Speaks* 2012, pp.81-142).

In the case of Te Tiriti, there is no question as to which of the two texts has priority: the English text clearly precedes it. In the dispute over the priority in the case of He Whakaputanga/the Declaration, however, the central issue is not dependent upon which of the two texts has historical precedence. Rather, it depends upon the meanings of the words used in each language, and in particular how they were understood in English at the time by the British Foreign Office and Colonial Office respectively. The words 'governance' and 'sovereignty' are both used in the second article of the English text of the Declaration; and their equivalents in the Māori text are 'kāwanatanga' and 'kingitanga i te mana te wenua o te Whakaminenga' respectively.

The proper connections between these two pairs of texts relate to traditional tribal Māori society's confrontation with the ideas and legal realities of the sovereign nation-state system common to the various 'civilised' powers of the day. Hence the need to understand these nuances in the meanings of the English words 'state', 'sovereignty', 'governance', '*imperium*', 'kingship', 'power' and 'authority' when compared with their Māori counterparts 'iwi', 'hapū', 'mana', 'kingitanga' and 'kāwanatanga'. This section addresses the matter of the back-translation of Te Tiriti into English by comparing the two major offerings proposed by Professors Margaret Mutu and Sir Hugh Kāwharu, focusing upon the meanings of 'kāwana'. This will later be extended to the relationship between roles

played by He Whakaputanga in the Confederation of Tribes known as Te Whakaminenga in the north of New Zealand, and the Declaration of Independence in the Foreign and Colonial Offices in Britain in the 1830s.

A summary look at two back-translations of Te Tiriti

Professor Mutu's contribution understands 'kāwana' in terms drawn mainly from a traditional tribal social order, while Sir Hugh Kāwharu relates it instead to the political and legal meanings of 'state' and 'sovereignty'. For the purposes of both careful and simple comparative analysis we reproduce the two texts here.

MARGARET MUTU'S TRANSCRIPTION OF TE TIRITI INTO ENGLISH (Mutu 2010, pp.24-27):

Article the First

The heads of the tribal groupings of the Confederation and all the leaders of tribal groupings who have not entered that Confederation allow the Queen of England all the kāwanatanga/control of (her subjects?) of their lands.

(**Margaret Mutu's comments:** This was what the rangatira had been seeking for some time: that the Queen of England take control of her subjects now living throughout New Zealand.)

Article the Second

The Queen of England agrees and arranges for the heads of the tribal groupings and all the people of New Zealand, their paramount and ultimate power and authority over their lands, their villages and all their treasured possessions. However, the Chiefs of the Confederation and all the Chiefs will allow the Queen to trade for [the use of] those parts of land which those whose land it is consent to, and at an equivalence of price as arranged by them and by the person trading for it (the latter being) appointed by the Queen as her trading agent.

(**Margaret Mutu's comments:** Once again this confirms the Queen's formal recognition of the paramount power and authority of the rangatira throughout the country. It also confirmed that in terms of the allocation of rights to use lands, the rangatira would allow the Queen or her agent to trade for those rights with those whose land it was, but only for a price that had been arranged between the land owners and the Queen's agent. This would carry on the practice of allocating temporary land use rights that was a very old Māori and Pacific custom.)

Article the Third

This is also the arrangement for the agreement to the kāwanatanga/(control of subjects?) of the Queen – the Queen of England will care for all the Māori people of New Zealand and will allow them all the same customs as the people of England.

(**Margaret Mutu's comments:** In this third article the Queen of England made an undertaking that even though her main purpose for entering the agreement was to be allowed to control her own subjects living in New Zealand, she would still reciprocate the care that Māori had afforded Pākehā who came here and care for Māori as well, ensuring that they could access the ways of her English subjects. This again is something the rangatira sought for their people at this time: reciprocity that gave Māori access to those Pākehā technologies and skills that could be welcome additions to and complement those of Māori, in exchange for Pākehā continuing to reside in the territories and under the mana of the hapū and their rangatira.)

SIR HUGH KĀWHARU'S TRANSLATION OF TE TIRITI (Kāwharu 1989, p.321):

Article the First

The Chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.

Article the Second

The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.

Article the Third

For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.

Now let us refer again to the second part of the summary statement of the Waitangi Tribunal Report considered in the Introduction, inviting you to consider the way this summary of the Waitangi Tribunal Report fits with each of these two back-translated versions of Te Tiriti into English.

> *They* [the rangatira] *agreed to share power and authority with the Governor. They agreed to a relationship: one in which they and Hobson were to be equal – equal while having different roles and different spheres of influence. In essence, rangatira retained their authority over their hapū and territories, while Hobson was given authority to control Pākehā* (Waitangi Tribunal 2014, pp.2-3).

We also need to look at the arguments for and against the truth of these two back-translations. If we accept the idea that the major difference between them derives from the meanings attributed to the Māori word 'kāwana', then I suggest that both the priority of the original English text and the intent of the translator – Henry Williams – makes it clear that the intention behind the text of Te Tiriti was to convey

the meaning of the English word 'sovereignty' by means of the Māori semi-transliteration of the English word 'governor'.

There is no need with regard to this discussion to enter the dispute about the suitability of this word for this particular purpose. For her part, Professor Mutu enters into a quite different argument concerning the meaning conveyed by 'kāwanatanga'. This involves several steps.

First, Professor Mutu points out that 'kāwanatanga' is not a Māori word, but rather a word created by missionaries by borrowing from the English word 'governor' to form 'kāwana' and then appending the derived noun suffix 'tanga'.[10] I have no basic problem with this.

She then goes on to point out that 'kāwanatanga' is used to convey the meaning of 'governor' or 'governance' in the second article of He Whakaputanga. Again, I have no basic problem.

However, she then writes that 'Māori, in 1840, having little or, for most, no experience of a governor or of the practicalities of governorship, the word would have had little meaning.' This is where the argument begins to come unstuck. First, if the meaning of 'kāwanatanga' was little understood in 1840, then it must have been even less understood in 1835. This can only imply that Māori themselves, in 1835, had little understanding of 'kāwanatanga' as it applied in Article 2 of He Whakaputanga. Secondly, the main Māori word (or better transliteration) used in He Whakaputanga to convey the meaning of 'sovereignty' is 'kingitanga'. Māori had had even less direct experience of kingship than of governorship. What then did Māori, in 1835 and 1840, understand by 'sovereignty'?

Professor Mutu then suggests that we ask ourselves the question: 'What was the thing that the Pākehā paramount Chief wanted?' She answers this question by saying that 'The answer, for Māori, was clear: control over her lawless subjects living throughout New Zealand.' As it was also what Māori wanted her to have, the sentence requesting that 'kāwanatanga be granted to Captain Hobson meant just this – the

10 It is a matter of interest that the Māori word 'iwi' (large tribe) is the only term used in Te Tiriti to describe the Queen's people as British subjects. The term 'tona iwi' occurs only in the Preamble (Kāwharu 1989, p.319).

Māori granting the Crown the powers "to keep the British riff-raff under control".'

Now, it was undoubtedly the case that the conduct of these lawless British settlers was high on the agenda of both Māori and the British Resident James Busby – together with New Zealand missionaries like Henry Williams. But for Professor Mutu to base her whole argument upon the assumption that this was the sole concern of all parties is a classic case of begging the question. That this single issue did not exhaust the agenda is clear from the concern expressed by many of the Māori speakers at Waitangi on the sixth of February, 1840, concerning whether or not they wanted 'the prospective kāwana to stay or go' (Colenso 1999). We need to remember that a British Resident had been stationed in Waitangi since 1833 with the mandate of keeping the settlers in order, but he had many problems fulfilling this mandate. One of the most significant of these was the fact that British law did not apply over the territory of New Zealand, and Māori law applied only on a personal basis – between chief and tribal member. Furthermore, the musket wars were still raging, with their resulting enslavement and cannibalisation of the losers. The darker side of human nature did not show itself only among the Pākehā.

If the author of Te Tiriti had had either a Māori background or else was clearly motivated to render the meaning of the word 'kāwana' with the kind of twist that Professor Mutu tries to bring to it, then she would have a case requiring further investigation. As it stands, however, it is a tall order to have to accept that Henry Williams' failure to convey the English word 'sovereignty' correctly was because he also tried to convey the idea that a 'kāwana' could be likened to a 'White Māori Chief'!

Some of the force of this argument depends, of course, on my rendering of Mutu's 'kāwana' as 'Great White Chief'. While tendering a partial apology for this, I nonetheless consider that it is valid. The issue is whether a 'kāwana' is correctly construed as a figure within a Māori cultural background or a figure with a broadly Western if not British background. This is a matter of historic interpretation. However, to

consider that Henry Williams had a Māori figure in mind when he used the word 'kāwanatanga' in his translation of the Treaty, or that Māori were so ill-informed as to think that the proposed 'kāwana' was simply a magnified version of the British Resident, stretches the imagination somewhat.

No doubt Mutu would simply reply that Williams' intentions are irrelevant; what counted was what was actually understood by Māori at the time. Fair point, but this is exactly the issue, and her 'single issue hypothesis' regarding both the British and the Māori does not adequately explain the actual meaning of the Māori text, Te Tiriti, as it has come down to us. Two things are clear. One is that the arrangement she considers to be put in place by the Treaty is very similar to the one which had been in operation for some seven years, and had proved ineffectual: that of the British Resident working closely with the Chiefs of Te Whakaminenga. The other is that the discussion by Māori at the Treaty signing indicates a realisation that something new was afoot, and that they had to choose either to accept that the kāwana stay, or else send him away. Furthermore, subsequent history bears witness to the fact that the Māori who signed the Treaty understood themselves to have pledged loyalty to the Crown in a way not shared by those who chose not to sign it. One could think, for example, of the way in which Wiremu Nera spoke of this loyalty at the King Movement meeting at Paetai in May 1857, as documented by Gorst (1864/1959, p.61) and Buddle (1908, p.11). Wiremu Tamihana, on the other hand, never signed the Treaty.

Thus, if Professor Mutu's claims with regard to the Māori understanding of the Treaty are true, why then was the Māori sense of allegiance to the Crown on the part of those who signed the Treaty such a major issue among Māori themselves, and why has it been such a significant part of their history? There can be little doubt that Ngāpuhi had been developing an advantageous relationship with the British since the 1790s. This was an important preamble to the more overt colonial history of New Zealand which began with the formal establishment of a Crown administration in 1841. And although this government administration was

mainly concerned with the British settlers, it was also clearly concerned from the beginning with protecting Māori from the injurious practices of the settlers, as well as dealing with the internal matters of murder and tribal warfare among Māori.

A territorial or personal legal system – the *Elizabeth* Affair

There is a central political and legal point concerning the difference between the two back-translations of Te Tiriti just discussed: the difference between a legal system that applies *territorially,* and one that applies merely *personally* between the ruler and the ruled. The islands of New Zealand, prior to 1840, had no territorial legal system. They had a plurality of tribal personal legal systems applying between a chief and the members of his tribe. When a member of one tribe travelled through lands belonging to another tribe, he or she was not accountable to a different legal system applying on these lands. That tribal member's prime responsibility continued to lie with the Chief of his or her tribe. We can illustrate what is involved with the jurisdiction of a territorial legal system with reference to what is usually called the *Elizabeth* Affair, which occurred in New Zealand in 1830. In this incident, Captain William Stewart of the British ship *Elizabeth* transported Te Rauparaha and his warriors from their base on Kāpiti Island just north of Wellington to Akaroa on Banks Peninsula, east of Christchurch. The purpose of this trip was to slaughter and cannibalise the Ngāi Tahu inhabitants of Akaroa as an act of utu, or revenge-killing.[11]

Following reports of these events to Governor Darling in Sydney, the authorities seized the vessel *Elizabeth* and charged Stewart and others with murder. Stewart appeared before the Sydney Court in 1831, but the case against him was abandoned when it became apparent that all the Crown witnesses had disappeared. Furthermore, at that time the Crown Solicitor offered the opinion that 'the New Zealand tribes, having been engaged in what may be regarded as legitimate warfare

11 For details see: http://www.teara.govt.nz/en/1966/elizabeth-incident-of-brig.

according to the usages of their own country… the captain and crew of the *Elizabeth* could not be charged as accessories to murder.' However, shortly after Stewart and the *Elizabeth* left the colony, Darling informed Lord Goderich[12] that the details of the Banks Peninsula crime were worse than had been supposed. As a consequence, in 1832 the Colonial Office overruled the Crown Solicitor of New South Wales and indicated the legal grounds upon which Stewart should be tried. But by this time Stewart had disappeared; the *Elizabeth* had returned to England under a new captain.

Whether or not Stewart was guilty of acting as an accessory to murder for his actions in this affair need not concern us here. Rather, given both the distance of the journey from Kāpiti Island to Akaroa from both Sydney and London, together with the fact that, in 1831, New Zealand was not British territory, *how* was the British legal system able to bring him to trial at all? The ship under Stewart's command – the *Elizabeth* – was not owned by the Crown, and the company owning it had its own set of rules for dealing with the misconduct of its employees. So how was the Crown able to get involved with the whole sorry business?

The answer to this question lies in the fact that British law was, and is, applied *territorially*. The *Elizabeth* may not have been Crown property; nonetheless its decks were British territory, subject to British law. Thus the actions of its captain and crew aiding and abetting the slaughter of innocent persons were committed on the British territory of the decks of the *Elizabeth*. These acts were deemed contrary to the state law of Britain, and could therefore be brought before a British court, whether in Sydney or in London. Moreover, it was not *the person,* William Stewart the British subject, whose suspect behaviour caused him to be 'brought before the Queen' to have his conduct curtailed and corrected. Rather, it was in his office as captain of the *Elizabeth* that his actions assisting Te Rauparaha in the utu reprisals were brought before the law. Whoever may have held this office – whether or not they were personally British

12 In 1830 Lord Goderich became the Secretary of State for War and the Colonies in Earl Grey's ministry but in 1833 he was pressed to give up his post and accept the post of Lord Privy Seal instead.

subjects – would have met with the same territorial exercise of British law had they similarly assisted anyone anywhere in the world to carry out such actions. Although New Zealand was not then under British sovereignty, the ship *Elizabeth* was owned by a company registered in Britain. The ship may well have been remote from London in 1831. But even though the *dominium* rights of the ship may have belonged to the company owning it, its decks nonetheless remained British territory, and the jurisdiction of British state law applied to it.

Now, of the several significant points that impinge upon the meaning of sovereignty as it applies to the modern nation-state system of international relations, the issue of the *territorial* character of the administration of its legal system is fundamental, as pointed out, for example, by Philpott (2001, pp.16-19). In the contexts of both nineteenth century New South Wales and the first century Roman Empire, exercise of the legal system applied territorially over a wide region, promoting political and legal unity and stability. In the case of Judea in the first century, the Judeans were also subject to their traditional Jewish law, but this applied to all Jews wherever they lived, and was not territorial in character. The word 'kāwanatanga' as back-translated into English by Professor Kāwharu, therefore, carries with it the connotations of the kind of territorial legal system that the Crown would develop on the basis of the Treaty's signing in 1840. The *personal* application of Jewish law to the Judeans would also have parallels in the way the mana of the rangatira applied the law of each particular Māori tribe *personally* between its rangatira and the various tribal members, wherever they might be.

By contrast, in the scenario envisaged by Professor Mutu, the legal systems of both the Māori tribes and the nascent 'white tribe of the settlers' applied only on a *personal* basis between the chief (kāwana) and each subject. Of course, the precise nature of the Māori social order envisaged by Professor Mutu is not discussed in her back-translation of the Māori text into English. However, the point at issue can be illustrated with a further, more detailed reference to her analysis as presented

in her essay 'Constitutional Intentions: The Treaty of Waitangi Texts' (Mutu 2010, pp.13-40).

Professor Mutu introduces her Māori constitutional perspective with an attempted exploration of the original intentions of all parties to the Treaty negotiations in 1840. She writes that 'both the Queen of England and the rangatira of the iwi and hapū, are "very clear" in their wish that there be peace and good order between the Queen's subjects and the Māori people' (Mutu 2010, p.35). The only hindrance she mentions to the achievement of this peace and good order is the unruly conduct of many of the Queen's subjects already living in Aotearoa. The prospect of more of Her Majesty's subjects coming to New Zealand made it therefore very important that both the present as well as the possible future lawless conduct of Pākehā be brought under control. To this end, writes Mutu:

> [The British Queen] asked the rangatira of Te Whakaminenga as well as other rangatira, to allow her to exercise this power through the introduction of a mechanism called kāwanatanga, with William Hobson [Wiremu Hopihanga] the person negotiating this arrangement to do this on her behalf (Mutu 2010, p.35).

As we have already discussed, Professor Mutu envisages kāwanatanga as the means by which the Crown would exercise its authority over settlers only. This claim does not entail the view that Te Tiriti upholds what would, in the parlance of state sovereignty, be called a *divided imperium/sovereignty*. Rather, it presumes that He Whakaputanga sets out a collective 'confederacy' that leaves all Māori rangatira powers fully intact over their respective tribes, with the Crown supposedly agreeing to become an honorary member of this confederacy, assuming its responsibility for controlling the settlers. She continues:

> If the rangatira agreed to this then she [the British Queen] would respect and uphold their tino rangatiratanga and hence their mana, their ultimate and paramount power and authority over all their territories and people (Mutu 2010, p.35).

The question we need to ask regarding the claims made here is: what was the *extent* of the ultimate and paramount power (i.e. mana) exercised by the tino rangatiratanga of the tribes signing the Treaty? Based on receipt of the English text of the Declaration of Independence from James Busby, the British Colonial Office had recognised New Zealand as an independent sovereign state, under the auspices of the northern United Tribes. But although this recognition carried with it a respect for Māori rangatiratanga (in the sense of the political and legal sovereignty of a modern sovereign state), this respect also harboured some serious qualifications, if not misgivings. Though the text of Lord Normanby's memorandum to Captain Hobson states that 'We acknowledge New Zealand as a sovereign and independent state' in acceptance of the statement of He Whakaputanga/the Declaration of Independence, it goes on to say: 'insofar at least as it is possible to make such an acknowledgement in favour of a people composed of numerous, dispersed, and petty tribes who possess few political relations to each other, and incompetent to act, or even deliberate in concert' (Normanby).

In particular, the British Crown recognised that the actual exercise of political and legal power by the United Tribes fell short of their ability to police, try and punish the British riff-raff living among them. In a modern sovereign state, such an inability would signal a very serious deficiency in the actual political sovereignty claimed by such a state – bringing into question whether it could be deemed an independent sovereign state at all.

However, it would seem that Professor Mutu's understanding of the word 'sovereignty', as the mana associated with Māori 'ultimate and paramount power and authority over all Māori territories and people', ignores whether or not the political and legal features of Māori social order could actually deal with the problem of British settlers' lawlessness. Rather, it seems that the sovereignty of the tribes entailed: (i) the ability of their respective chiefs to keep their *own* members under control; and (ii) within the context of the Confederation of Tribes (Te

Whakaminenga), the responsibility of their leader or 'Chief' to keep the settlers under control.

The following section explores this matter in greater detail.

Who should police the English riff-raff?

For present purposes, we might summarise Professor Mutu's argument as saying that the British Crown was:

(i) accepting full responsibility for the misconduct of the British subjects living in New Zealand;
(ii) seeking the permission of the tribes of Te Whakaminenga, as well as other tribes, to appoint a kāwana as her representative, to bring these British subjects into conformity with British law;
(iii) acknowledging the overall mana claimed by Te Whakaminenga in the text of He Whakaputanga, to hold sovereignty over the territory of the United Tribes.

Let us now consider a counterargument by way of a modern example to further illustrate a legal system's territorial rather than personal application. It is also a case that involves the misconduct of British riff-raff. As the modern international system of sovereign states is characterised by the territorial system of state law inherited from the development of political and legal sovereignty from the time of the Peace of Westphalia, this exploration will give us some genuine insight into the kind of political and legal order that Māoridom encountered in the nineteenth century.

English football hooligans riot in France. Who has the responsibility for dealing with this situation so that peace and order might prevail? The British police have no mandate to operate on French territory. Quite clearly, in the modern system of sovereign states, it is the responsibility of the French police to apprehend the offending English football fans and to charge them with offences against the law of the land and to bring these charges before the French Courts. The authorities of the British state may assist in this matter by providing legal counsel to the British subjects and supporting the application of French law with regard to

British citizens. The British state authorities may remind their fellow citizens of their responsibilities to keep French law (which in this matter is not all that different from its counterpart in Britain) while visiting French territory. However, it is not their responsibility to bring them into line by endeavouring to control their conduct through the exercise of British control or force on French soil. As a political and legal sovereign state, control of their conduct is France's sole responsibility.

Now let us return to the claims made above regarding the way in which the British Queen supposedly acknowledged the tino rangatiratanga of Te Whakaminenga (Confederation of Tribes) and other tribes. *She*, not the individual British subjects concerned, allegedly accepted responsibility for the misconduct of her British subjects in New Zealand. Accordingly, *she* (not 'the state' allegedly under the auspices of the Confederation of Tribes) was taking the initiative to exercise control of her misbehaving subjects on the lands belonging to the respective Māori tribes. This involved the institution of the kāwana as a Big White Chief to keep her subjects under control. Furthermore, this was all supposed to be happening in recognition of the political and legal sovereignty of Te Whakaminenga over New Zealand.

If we now return once more to our French example, these kinds of moves begin to look very much like an attempt by the British Queen to do obeisance to the French for the sake of turning the British riff-raff into the core of a semi-independent British colony on French soil. However, such a conclusion can only be drawn on the assumption that these somewhat imaginary visions of the nations of France and Britain are modern sovereign nation-states, each having a legal system that is territorial in character. Following the initial conquest of England by William the Conqueror, a number of territorial enclaves within the boundaries of what is now France were subject to the kings and queens of England. Calais, the last of these French enclaves, was lost by England during the reign of Queen Mary, in 1558. These enclaves, of course, were the residue of territories held by English sovereigns because of their dual right of inheritance on both French and English soil. Indeed, it was this

dual right of inheritance which led William to invade England in 1066, advancing his claim as Duke of Normandy to the throne of England.

I suggest that if we are to properly understand the kind of social order envisaged by Professor Mutu, then we need to give up the idea of its being characterised by any overriding territorial legal system assisted by a policing system bringing alleged miscreants before a court system to receive a fair trial and be appropriately dealt with if found guilty. In other words, we are not dealing with what we would call the sovereignty of a nation-state. Rather, we are dealing with a group of semi-autonomous tribes in some form of mutual agreement, each governed by their own chiefs exercising a form of law that applies personally between the ruler and the ruled.

If this was indeed the case, any British overtures seeking the consent of the Māori rangatira to grant the Crown the right to govern could not be readily adapted to such a confederated tribal structure of politically independent tribes governed by chiefs exercising personal legal systems over their members. There were only two basic structural possibilities for the introduction of British rule over the settlers. The first entailed the settlers becoming a 'white tribe' with a 'Not-so-great-white-chief' exercising the mere shell of British law – without its territorial application, policing and judicial system. The second entailed the effective wholesale adoption of its territorial legal system in a way that would give political and legal stability to the whole territory, rendering the five-year-old alliance between the British monarch and Te Whakaminenga permanent. Among other things, this would have provided an effective freedom for the Māori chiefs to continue to exercise the mana of their rangatiratanga.

Looked at this latter way, the Treaty of Waitangi proposal invited the Māori rangatira to consider the British introducing a unified system of law applying to the whole country. This system of law, however, was not a wholesale imposition of English common law in the way that it applied in Britain. All Pākehā subjects would immediately come under its full jurisdiction. It would also apply in a *limited* way – with regard to murder

and warfare – to those tribes who had signed it and thus acknowledged the British Queen. For those tribes who didn't sign it, British sovereignty would mean only that no other 'civilised' power – such as France, or the USA – could claim sovereignty over the territories of these tribes. However, any attempt to apply the law to bring intertribal warfare under the control of a superior Crown force would have to be postponed until such time as these tribes abandoned such practices of their own volition, and became amenable to such law.

James Busby on 'rangatiratanga' and 'kāwanatanga'

The understanding of James Busby, one of the key figures in the whole exercise of the Treaty signing, hinges on the *parallel political structure* of Te Whakaminenga (the Confederation) and the individual rangatira/tribes of that alliance, as discussed by Fletcher (2014, pp.1036-1048).

In Busby's understanding, the sovereignty over their joint lands claimed by the chiefs in their collective capacity could be seen as an aspiration to the kind of sovereignty of a modern nation-state, including a territorial legal system. However, as matters unfolded between 1835 and 1840, both Busby and the chiefs of Te Whakaminenga concluded that the problems of instituting such a legal system to encompass such matters as the traditions of tribal warfare were too difficult at that stage of their history. Hence, on the basis of the relationship established between them and the British monarch over the previous five years (*Ngāpuhi Speaks* 2012, pp.65-80), the chiefs were amenable to granting the Crown the right to set up such a governance, provided that it recognised the ongoing authority of the mana of their rangatiratanga.

This meant that the collective powers aspired to by the Confederation – a collective of chiefs and tribes – were to be passed on to the Crown. At the same time, however, the mana of each rangatira was retained. The anticipated Crown administration was indeed expected to concern itself principally with the lawlessness of the settlers, and the associated protection of Māori. In other words, Busby understood that the sovereignty or kāwanatanga of the Crown would work in parallel with the rangatiratanga of each individual chief. Furthermore, the Māori *ceded their*

aspirations to the mana of collective political kāwanatanga, but with no intention to cede their mana rangatiratanga to the Crown. Nor did they cede the sense of national identity that had been building through joint commercial and other forms of enterprise, under the symbolism of the flag given to them by the British King earlier in the decade. Rather, it was by exercise of their mana rangatira that they granted the powers of kāwanatanga to the Crown in the first article of the Treaty – a mana that they had aspired to, but had never actually exercised.

That this kind of territorial legal system could not be readily accommodated to the kinds of personal systems operating between each chief and the individual tribal member is further evidenced by the events that took place at Hokianga less than a week after the Treaty signing at Waitangi.

An encounter: Hobson and Maning at Hokianga

Waitangi is situated on the east coast of the north of New Zealand, on the Bay of Islands. On virtually the same latitude, almost directly across the land on the western coast, lies Hokianga with its significant harbour. On February 11 1840 an event took place there that replicated many of the features of the Treaty signing at Waitangi some days earlier. In the midst of these proceedings a Māori Chief by the name of Papa Haiga[13] rose to speak to Captain Hobson; subsequently Hobson called upon the Englishman whom he suspected had been speaking with this chief to come forward. The man's name was Frederick Maning,[14] and what follows is Hobson's account of these events, as recorded by Louis Chamerovzow:

13 In Ruth Ross's expanded version of this story Papa Haiga is identified as Taonui, and little is made of the political and legal significance of Hobson's remarks concerning the territorial character of legal sovereignty (Ross 1958, pp. 34-36).

14 Frederick Maning was a colourful character. Born in Dublin, Ireland, around 1810, he and his family migrated to Tasmania, and travelled to New Zealand in 1833, landing in Hokianga. He wrote several books on early colonial New Zealand after the incident with Governor-elect Hobson, including *Old New Zealand: a tale of the good old times*, published in 1863. See the article by David Colquhoun in the *Dictionary of New Zealand Biography,* Volume One, reprinted by Bridget Williams Books and Department of Internal Affairs, 1995, pp.265-66.

> Towards the close of the day one of the Chiefs, Papa Haiga, made some observations that were so distinctly of English origin, that I called on him to speak his own sentiments like a man, and not allow others, who were self-interested, to prompt him: upon which he fairly admitted the fact, and called for the European who had advised him to come forward, and tell the governor what he had told him. The call was reiterated by me, when a person named Maning presented himself.
>
> I asked his motive for endeavouring to defeat the benevolent object of Her Majesty, whose desire it is to secure to these people their just rights, and the European Settlers peace and civil government. He replied, that he believed that the Natives would be degraded under our influence; and that, therefore, he had advised them to resist; admitting at the same time, that the laws of England were requisite to restrain and protect British subjects, but to British subjects alone should they be applicable.
>
> I asked him if he was aware that *English laws could only be exercised on English soil?* He replied, 'I am not aware; I am no lawyer', upon which I begged him to resume his seat (Chamerovzow 1848, p.112).

The misconduct of British subjects on New Zealand soil is clearly an important point lying behind the concerns of both Papa Haiga and Frederick Maning. We have noted that political and legal responsibilities for such matters as the misbehaviour of modern English soccer fans in Europe lie with the officials of the host nation administering the law of the land. The fans are British subjects misbehaving in territory over which another independent sovereign state exercises its *imperium* by means of its own legal system. Since the British Crown does not have sovereignty over the foreign territories in which the English team is playing, it is quite inappropriate for Crown representatives to apprehend or try to control the offending fans. Whatever responsibility they may feel, in non-British territory the British authorities must respect the right of the non-British power to rule over the territory of its *imperium*. Moreover, whether they be in modern France, Italy, Germany, or the New Zealand of 1840, English soccer fans – or their equivalent

in 1840 New Zealand – need to exercise their responsibilities in a way that respects the sovereignty of the foreign power over the territory of its state.

Our exploration of the status of sovereignty over New Zealand at the time of the Treaty signing raises an important associated question: had the sovereignty claimed by Te Whakaminenga, according to the English text of the Declaration, actually assumed a territorial jurisdiction at some time between 1835 and 1840? If this had indeed been the case – so that a genuine state sovereignty over New Zealand had been established by the United Tribes during this time – we would expect to find evidence of it.

One way to read the claims of He Whakaputanga – principally indebted to its companion English text – is to understand the terms 'state' and 'sovereignty' as indeed connoting the political ideas pertaining to a modern sovereign state. This would mean, among other things, that there *was* a territorial exercise of a legal system over the territory of that 'state'. Such a development would involve a significant move beyond the kind of personal application of law between ruler and subject generally pertaining among the Māori. It would also take us well outside Professor Mutu's interpretation of the word 'kāwanatanga' as a personal 'chief-like control' of British settlers to be applied by the newly appointed governor, paralleling the exercise of the 'rangatira control' of Māori hapū and iwi.

This would lead us to a discussion about the meanings of the Māori terms used in He Whakaputanga to convey the ideas of 'sovereignty' and 'state'. However, let us instead proceed directly to the *territorial*, as opposed to the *personal*, application of a legal system between ruler and ruled – in the form of the incident in Hokianga on 11 February 1840.

A big IF: testing the argument

It might be best to summarise the overall argument being followed here.

For the moment, we are positing (i) that He Whakaputanga expresses, in Māori, the full connotations of the modern meanings of state sovereignty that have developed in history since the Peace of Westphalia in

1648; and (ii) that it is in these terms that many Māori and other scholars wish to assert that Te Whakaminenga held sovereignty over New Zealand in 1840. If these two assumptions are valid, then we would expect to see some concrete evidence of this kind of sovereign state structure operating in the north of New Zealand between 1835 and 1840.

One of the things that we would expect to see, if these assumptions are correct, is an understanding on the part of the Māori rangatira that it was *their responsibility* to bring the misconduct of British subjects to trial and, if found guilty, to punishment. That this was not the case is actually fully acknowledged by Professor Mutu's back-translation of Te Tiriti considered above.

By the same token, it would appear that the British were decidedly ambivalent in their acceptance of the status of New Zealand as an independent sovereign state in their response to the Declaration of Independence of 1835. The British Colonial Secretary Lord Normanby's despatch to Captain Hobson on the eve of his departure in 1839 may be cited in evidence:

> I have already stated that we acknowledge New Zealand as a sovereign and independent state so far at least as is possible to make that acknowledgement in favour of a people composed of numerous dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act or even deliberate in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty's predecessor, disclaims for herself and her subjects every pretension to seize on the Islands of New Zealand, or to govern them as a part of the Dominions of Great Britain unless the free intelligent consent of the natives, expressed according to their established usages, shall first be obtained.

The Foreign Office, however, rejected the Declaration of Independence's claim of New Zealand's sovereign statehood in no uncertain terms (King 2003, pp.154-55). Understandably, this rejection is very injurious to the sensibilities of many Māori today. But we need to

appreciate that the Foreign Office's particular responsibility was to decide whether or not an organisation proclaiming itself to be a sovereign state power over a territory was both a genuine contender for such a claim, and one that would be of some significance to Britain. One of the criteria for such recognition would have been the existence and effective jurisdiction of a legal system over the whole territory which included the means of dealing with foreign offenders under that system. Hence, it is highly likely that the Foreign Office's denial of the status of sovereign statehood to the New Zealand of the United Tribes simply meant that, in its eyes, it did not meet the criteria for such recognition. On the other hand, the sovereign status of New Zealand under the United Tribes *was* recognised, albeit very reluctantly, by the Colonial Office in 1839. The main problem for modern Māori is the apparently pejorative character of British remarks about matters of Māori aspirations. All of this is very understandable. Nonetheless, the truth surrounding the whole sorry business needs to be faced by all parties.

Another issue concerns the Māori terms used in He Whakaputanga to parallel the English text of the Declaration of Independence. Irrespective of which of these texts had priority, it was James Busby who was responsible for using the terms 'state' and 'sovereignty' to describe the aspirations of the Ngāpuhi rangatira (together with some aspirations of his own) regarding Te Whakaminenga in New Zealand. The Māori terms used, in somewhat different contexts of the same document, were 'kingitanga' and 'kāwanatanga'. Furthermore, it is clear that since the visit of Hongi Hika to England in 1820 establishing the significant relationship between the British monarchy and the Ngāpuhi, connection between the meanings of 'chieftainship' and 'kingship' became a very important factor in Ngāpuhi tradition and folklore (*Ngāpuhi Speaks* 2012, pp.65-80).

However, while it may once have been the case – in the seventeenth century under King Charles I, for example – that kingship might be considered (at least by the Royalists and the Tories) synonymous with sovereignty, this was certainly not the case in nineteenth century England.

Indeed, parallels between kingship and chieftainship drawn by the Ngāpuhi did not really help them gain a proper idea of how actual realities of British legal and political sovereignty worked out. It is highly likely that Hongi Hika was captivated by the pomp and circumstance of the British monarchy. At the same time, however, it is equally unlikely that he would have recognised the degree to which the powers of the monarch had to take account of parliament, the civil service, the judiciary, the Prime Minister and the Cabinet ministers, as well as the navy and the army. All of these departments and branches of state had to have their say in the way that the Crown, as distinct from the monarch, governed the country and the Empire.

We might, for example, contrast the powers of the Kaiser of Germany in the late nineteenth century with those of Britain in 1820. Whereas the British Prime Minister required the majority support of Parliament to be able to lead a government, the equivalent powers of the German Chancellor were dependent only upon the support of the monarch. The Reichstag, at that stage of German history, had much more limited powers than those of the British Parliament. It is highly likely that Hongi would have misinterpreted the British system as functioning in more royalist terms.

Thus, the force of this overall conditional argument leads us to conclude that Te Whakaminenga did not actually have the kind of sovereignty over New Zealand between 1835 and 1840 that exhibited among other things a common territorial legal system which it took the responsibility to administer. Hence, as the details of the argument all depend upon the validity of the premise that the United Tribes *did* hold such authority concerning such a nation-state, there is only one conclusion that we can draw: whatever the rangatira may have understood by the term 'sovereignty' at the time, Te Whakaminenga was not a fully sovereign state at any time between 1835 and 1840. This deficiency was indeed recognised by the Chiefs of the Confederation (Fletcher 2014, pp.21-23).

In the circumstances, therefore, once the Colonial Office had made its decision to seek the support of Māori rangatira to form a civil

government in New Zealand, it had little option but to accept and work with the terms set out in He Whakaputanga – possibly as translated into the Declaration of Independence. If they had responded in the manner of the Foreign Office, then there would have been little hope of securing any agreement with the same basic Māori fraternity that had proposed or approved this document only five years previously.

One way of construing their strategy in 1840 would be to consider the parameters of its historical context. Because of the various factors that had been brought to light in the British Parliament between 1835 and 1840 – through the Parliamentary Select Committee on Aborigines in British Possessions, in particular – the Colonial Office considered that it was both morally and legally necessary for the Crown to seek a treaty with the indigenous people of New Zealand. It was for these reasons that it resisted the temptation to gain political and legal sovereignty over New Zealand by the means of discovery and subsequent settlement – as vociferously recommended by Wakefield and other representatives of the New Zealand Company (Fletcher 2014, pp.842-858). Gaining the trust and confidence of the Māori with respect to British good faith in these matters was considered paramount. In addition to these moral considerations, the Colonial Office considered it necessary to follow through on the legality of what was a relatively commonplace matter of entreating a 'cession of sovereignty'. This entailed both an acceptance of the Te Whakaminenga claim to sovereignty and a treaty proposal for the Māori rangatira to cede that sovereignty (i.e. kingitanga, from the point of view of Te Whakaminenga).

The above arguments do raise some important questions concerning the accuracy of Busby's description of the claims of the United Tribes (as expressed in the Māori of He Whakaputanga) in its companion English text as '(political and legal) sovereignty'. It is perhaps ironic that if James Busby had not used the word 'sovereignty' in the English text of the Declaration of Independence in 1835, then it might have been possible to draft an English text of the Treaty of Waitangi without the words 'Māori ceded their sovereignty to the Crown'. Significantly, Hinsley

specifically mentions Busby's efforts to propose to the Colonial Office in 1835-1840 that the United Tribes form themselves into a sovereign and independent state, and comments that this is an example of 'instinctively applying the concept of the sovereign state and the notion of international sovereignty to conditions in which these ideas remained alien ideas' (Hinsley 1966, p.206).

Without Busby's use of the word 'sovereignty', the first clause of the Treaty might well have read something more like: 'The Māori Chiefs grant to the British Crown the right, in cooperation with the continuing exercise of the mana of their rangatiratanga at the local level, to set up a government under the sovereignty, recognised in International Law, of the British Crown'. The second clause would have been much the same – affirming that 'The British Crown confirms and guarantees Māori *dominium* or rangatiratanga'. However, even this formulation of the Treaty agreement includes a reference to the issue of political and legal sovereignty involved with the governance of New Zealand. Significantly, this overall formulation is much less open to the unrestricted, strong implications of sovereignty which from 1860 officially brought the mana rangatira of Article Two of the Treaty within the orbit of what was 'ceded' in Article One.

Thus it was the phraseology of Māori *ceding* their sovereignty to the Crown in the first article of the Treaty which opened the way for the settlers and the officers of the Crown in New Zealand to misconstrue it all during the 1850s and 1860s. This has left us today with a substantial intellectual mess (not to mention the emotional, political and property messes) in the lap of the Waitangi Tribunal.

In truth, the political and legal reality of the 1830s – as evidenced by the lack of any organised Māori state apparatus capable of dealing with the misbehaviour of British subjects – was that Māori did not have full political and legal sovereignty over New Zealand (in the sense that they were in charge of a legal system having territorial jurisdiction over even the full extent of their own lands, let alone the rest of the country). He Whakaputanga may have aspired to such a claim to political and legal

sovereignty. But Te Whakaminenga had not taken the necessary actions to appoint the officers to carry out the 'kingitanga mana' (as opposed to the traditional 'rangatiratanga mana' of the iwi or hapū) necessary to begin putting such aspirations into effect.

The evidence of the above cited incident at Hokianga strongly suggests that it was not only Māori who lacked any understanding of *territorial* rather than *personal* application of a legal system. Ignorance of this issue extended to many of the better-informed British settlers, including Frederick Maning. In his statement to Governor-elect Hobson, Maning had effectively made two principal points concerning the proposals outlined in the Treaty of Waitangi:

(i) The British Crown should indeed presence itself in New Zealand – so as to restrain the conduct of British settlers by means of the application of British law.

(ii) However, British sovereignty over New Zealand was not necessary for British law to apply. Furthermore, Maning felt – probably on the basis of his knowledge of the Australian case – that this would result in a degradation of Māori.

In Maning's mind, therefore, British sovereignty and the application of British law to British subjects in New Zealand could be separated. In this his words echo Professor Mutu's understanding of Te Tiriti discussed above. Accordingly, we might interpret Maning as saying to Hobson that: 'We need a person of power and influence who, by bringing English law, can apprehend British subjects who engage in unlawful conduct in Aotearoa. But a Crown declaration of sovereignty over the territory would most likely result in the loss of Māori mana over their lands and rangatiratanga, with the subsequent British degradation of Māori.'

In 1839, without the sanction of the Colonial Office, the New Zealand Company sent a ship, the *Tory,* with prospective settlers to New Zealand. Clearly, whatever the British Colonial Office did, New Zealand was going to become a colony of British people halfway around the world. Like the Foreign Office, the Colonial Office had come to the conclusion

that the claims made to sovereign statehood in He Whakaputanga – through no particular fault of Māori – lacked both the substance and understanding of the political and legal system of sovereign states then applying to much of the world under Western influence. Hence, given the clear intentions of the New Zealand Company, the officers of the Colonial Office thought they had little choice but to act in a way that would seek the formation of a civil government over the territory, so that both the indigenous Māori and the British settlers would be able to pursue their respective interests in ways that had effective legal and political oversight.

The proposals set out in the English text of the Treaty document asked the Māori rangatira – as those who, severally and individually, currently held the final social authority (mana) over their respective rangatira lands (both those of Te Whakaminenga tribes and others) – to grant the Crown the right to govern New Zealand. This governance would involve British law applying territorially over the country. The full force of the common law would then apply to British settlers in the same way it did in Britain; the force of the common law would apply to Māori in a way that recognised their status as indigenous inhabitants of a British colonial territory. This would mean that all of their *dominium* rights – to land and rangatiratanga – would be unchanged by the transfer of the territorial rights of the sovereignty to the Crown.

In other words, the two issues that Maning tried to separate – calling upon the Crown to deal effectively with the unruly behaviour of the British renegade settlers in Aotearoa, and a declaration of British sovereignty – were inseparable according to British (and international) law. It was a fundamental feature of the systems of law applying in all European and other developed states at that time that, in the exercise of political/legal power over the territory of their *imperium,* no other such sovereign power was able to exercise any independent political or legal power in that territory. The British Crown was no exception. In all the circumstances in which the Crown had to deal with the misbehaviour of British

subjects on non-British territory, she had to respect the sovereignty of the power with the territorial authority.

Professor Mutu suggests that this is what the Crown was doing in the Queen's petitioning of the collective rangatira for the powers to discipline these miscreant subjects. But this is not how a sovereign state operates. The problem was that although the Māori rangatira had the mana of rangatiratanga over their individual tribes and lands, they also recognised that they did not – in their collective capacity at that stage of their history – have the requisite skills and infrastructure necessary for the corporate exercise of a unified territorial system of law, accompanied by the policing, court and other requirements of civil government over the single territory of the United Tribes – let alone the territory of New Zealand.

Clearly, if the proposals regarding state, sovereignty and governance set out in the English equivalent of He Whakaputanga had been effectively implemented by Te Whakaminenga between 1835 and 1840, there would have been no need for the British to exercise an overall governance of New Zealand. Had such a system been seen to be working properly, then the misconduct of British subjects would have been dealt with by the organs of the civil government set up by the state apparatus of the powers of the Confederation of the United Tribes, working in conjunction with the powers invested in the British resident, James Busby. Indeed, the latter might then have assumed the office of either British Ambassador or British High Commissioner, and the office of a British Governor would have been redundant.

The overriding concern of the British Colonial Office regarding New Zealand in the 1830s was to see it effectively governed – so that British miscreants would be brought to account, and some progress made toward bringing the seemingly habitual warfare among the Māori tribes under control.[15] It did not matter, in one sense, just who might

15 See the full text of the Secretary of State for the Colonies, the Marquis of Normanby to Captain Hobson at, for example, http://nzetc.victoria.ac.nz/tm/scholarly/tei-Mac01Comp-t1-g1-t5-g1-t2-g1-t6.html and also Fletcher (2014) Abstract Chapter Two, Notes 7 and 8.

be responsible for developing such a state apparatus. However, in 1839 the intent and conduct of the New Zealand Company effectively forced their hand.

Thus the problem addressed by the Treaty of Waitangi's proposals went a lot deeper than a further attempt to deal with the misbehaviour of British subjects by bringing the Crown into the loose Māori confederate tribal structure's political status quo. This was because, in the view of both the British and Busby,[16] the political structure of the status quo was unable to deal with the problems it faced. The Colonial Office recognised that this problem comprised (i) a British Resident attempting to deal with the problems of British renegades in conjunction with (ii) a claim to administering a territorial sovereignty under the supposed fledgling New Zealand State of the United Tribes which had not in fact been set up with the effective infrastructure to achieve this kind of purpose.

Both Māori and law-abiding settlers were well aware of the inability of this possible Māori Confederate State, working in conjunction with the Queen's representative, to control the offending members of the 'Queen's tribe'. The British purpose in the Treaty of Waitangi negotiations was not to replace James Busby with William Hobson and leave everything else intact – a de facto Māori confederacy of the kind asserted in *Ngāpuhi Speaks* (2012, pp.22-115). Rather, it was predicated on the analysis that, whatever the title and whoever the person might be, the New Zealand Company's plans for the British settlement of New Zealand would require a lot more than a British Resident – representing the Crown – trying to assist Te Whakaminenga to keep order among the British offenders. This kind of political setup had already proved ineffectual, and was only likely to get worse if renegade settlers were not brought within the rule of law, and more settlers were to migrate to these shores. In particular, Māori had not fully appreciated what was entailed in exercising the kind of sovereignty that had been claimed in the English counterpart of He Whakaputanga. A proper understanding of the political sovereignty of the English version of He Whakaputanga

16 As reported by Orange (1987, pp.21-31), Adams (1977, pp.134-71) and Fletcher (2014, pp.21, 22).

would have required them to set up a state apparatus capable of administering a legal system over the whole territory of New Zealand, giving *them* the responsibility of bringing Pākehā settler troublemakers to heel. In this light, in its historical context, the proposals set out in the English text of the Treaty of Waitangi are to be understood as follows:

(i) The replacing of the office of the British Resident with the office of a Governor;

(ii) The putting in place of the corporate *imperium* powers of a state set up by the Crown (through the exercise of kāwanatanga/kingitanga mana). The basic idea for a Māori state of this kind may have been set out in He Whakaputanga (the Declaration of Independence) but the implied political and legal consequences of its proposals had not been implemented by Te Whakaminenga. Hence, notwithstanding the claims set out in He Whakaputanga, Te Whakaminenga did not in fact have kāwanatanga or governorship mana over New Zealand prior to February 1840.

(iii) In accord with both international law and English common law, the proposed Treaty (of Waitangi) arrangement would entail the rangatira of Te Whakaminenga, as well as all other rangatira, retaining their individual tribal (rangatiratanga) mana. No specifically political or legal offices with the appropriate mana or powers had been set up with appointed persons to act on behalf of the United Tribes in their collective political capacity. This implied that whatever proposals there might have been to set up a modern sovereign nation-state with its territory (in principle, the whole of New Zealand, as documented in He Whakaputanga), these had not, in fact, been carried out at any time between 1835 and 1840.

(iv) Rather, as in the text of Te Tiriti, each rangatira of the United Tribes, as well as the independent tribes, would continue to retain the tribal mana of this office. This would entail his giving support to the Crown for the establishment of a civil government over the whole of New Zealand, and giving up his traditional right to make wars of utu against other tribes. At the same time, the

Crown 'confirmed and guaranteed' the continuance of the rangatiratanga of the individual tribes, and would cooperate with the rangatira in furthering and supporting this continuation of Māori rangatiratanga – as aspired to by Te Whakaminenga in the north – in the ongoing development of the newly discovered national life of trade and commerce, sailing to the foreign shores of Australia and beyond.

Ngāpuhi Speaks (2012) may be appreciated, first and foremost, as an aspiration to a renewed sense of nationhood discovered in the cooperative venture of the various Ngāpuhi and other hapū, in conjunction with the support and encouragement of the British monarch, which developed between 1820 and 1840 (*Ngāpuhi Speaks* 2012, pp.25-115). It is important to realise that its effectiveness does not require the realisation of the political issues of sovereignty and statehood that we have discussed here. The powers of the mana of rangatiratanga, managed by wise Pākehā and Māori leadership, could have readily developed into one or more needed Māori national groupings, en route to a more effective form of longer term amalgamation which avoided the coercion of the 1860s. Indeed, some seventeen years after the Treaty was signed, when the leading rangatira of the Upper and Lower Waikato met with Governor Browne in Auckland, they were all agreed on the need for a truly national assembly of Māori, paralleling the Pākehā settler parliament – even while differing on the issue of whether executive governance would operate via the Governor or the Māori King.[17]

This may give us an understanding of what the Crown thought it was doing. The next, perhaps more important question, is just what the Māori rangatira understood *themselves* to be doing in February 1840. The most telling evidence on this score might well be what the Māori signatories to the Treaty did *not* do in the early years of the Crown administration. It was quite clear to all concerned that the Crown had set up a governmental administration in New Zealand in 1841 (superseding the interim

17 See John Gorst (1864/1959, pp.63-64). For a Māori perspective upon the development of the nationhood associated with Te Whakaminenga, see *Ngāpuhi Speaks* 2012, pp.25-115.

arrangement under New South Wales), in which Hobson had the office of Lieutenant Governor as of 1840. This included a Legislative Council, an Executive Council, a Court system, and an Aborigines Protection Agency. Furthermore, these agencies had taken various kinds of action – including those of the Executive Council in 1842 with regard to inter-tribal warfare between tribes who had not signed the Treaty.

If the Crown and the Māori rangatira had indeed agreed to a kind of tribal confederacy arrangement that had no effective overall political and legal sovereignty, then surely Māori would have registered their objections to what did in fact take place. Furthermore, these objections would more than likely have moved beyond the verbal to armed resistance once the administrative structure of the new state in New Zealand was set up in 1841.

In summary

'Sovereignty' is defined as the final, highest or supreme human exercise of political authority and power within a human social order. Since the Peace of Westphalia of 1648, modern nation-states are deemed to exercise such authority over a distinct territory, according to the prescriptions of a legal system, which is subject to (at least nominal) democratic control as well as to a basic law or constitution. Such a system functions by means of parliaments, courts, police and an army to defend the state against foreign armed intervention. This requires a great deal more than the power to make and enforce law.

In a tribal society such as that of Māori in the New Zealand of 1790-1840, there is neither an overarching human authority such as a king, nor a territorial legal system. Thus there was no effective civil government. Instead, each Māori chief (rangatira) exercised power (mana) over his subjects in accordance with the tribe's own customs and traditions.

The tribes in the north of New Zealand, Te Whakaminenga, came together as a group in the 1830s at the instigation of the English Resident (James Busby) to explore how they might structure something like a state, leading to a Declaration of Independence (He Whakaputanga) in

1835. But though they aspired to such a political structure, the group lacked such necessary attributes of a modern sovereign state as a legal system, police, and army. In the meantime there were ongoing problems with British riff-raff; and amongst Māori, the musket wars were still going on.

To deal more effectively with the problems, the British proposed to the Māori chiefs in 1840 a treaty by which the latter would grant the British Crown the right to govern New Zealand (kāwanatanga) on the understanding that the mana of the Māori rangatira would be confirmed and guaranteed such that the ongoing territorial legal system to be put in place by the state apparatus would support their ownership of land, their customary law and their chiefly authority (tino rangatiratanga). The Treaty of Waitangi of 1840 expressed these points in Articles 1 and 2; Article 3 said that all people in New Zealand would be British subjects. In this way the Treaty complied with the *ius gentium* principles of the law of nations, whereby the chiefs granted the right of *imperium* to the British Crown, and were guaranteed their right of *dominium* or chieftainship over their tribes and territory. This is the principle of co-operative sovereignty.

This principle, however, has been distorted in two distinct ways. The first became prevalent amongst settlers since the 1860s, culminating in a retranslation of the Treaty, whereby the chiefs were now supposed to have ceded not only their *imperium* but all their powers of rangatiratanga – i.e. their rights of *dominium* – to the Crown. Governors Grey and Gore Brown and settlers now expected Māori to be fully assimilated into Pākehā institutions and cultural patterns. As Māori saw this as a betrayal of the Treaty, the scene was set for the wars of the 1860s.

The second distortion is the polar opposite of the first, inasmuch as it denies that the Treaty entailed the granting or ceding of sovereignty, as the right to govern, to the Crown. This position has been held by the Waitangi Tribunal in 2014 as well as by Margaret Mutu and *Ngāpuhi Speaks* (2012). In this interpretation the Governor is a 'kāwana', a chief

who is in charge of the particular (tribe) of British settlers – and sovereignty is no more than the authority to make and enforce law.

This view, as represented by the Waitangi Tribunal, is at variance with the 2003 judgment of the Court of Appeal in the Ngāti Apa case, which held that the transfer of sovereignty under the Treaty did not affect customary property rights – thus interpreting the Treaty of 1840 in accordance with the *ius gentium* principles of the law of nations embedded in the British common law.

And so we are left with a critical and urgent question: in what way can the Treaty's original principle of cooperative sovereignty be implemented in the 21st century?

Editors' epilogue

Although we believe that the late Dr Duncan Roper has cogently demonstrated how essentially the principle of cooperative sovereignty is embedded in the Treaty/Te Tiriti, as signed on 6 February 1840 in Waitangi, his argument has primarily been a legal/historical one.

Important though this is, we also need to realise that, even when accepted by both Māori and Pākehā, cooperative sovereignty still requires implementation now and in the future by two distinct yet interacting cultures. Anne Salmond has shown how difficult and conflictual this often is in her recent book *Tears of Rangi; experiments across worlds* (Auckland University Press, Auckland, 2017). In Chapter 9 she provides a detailed account and analysis of the background to the Treaty claims to the Whanganui River and the settlement of this claim with the New Zealand government (pp.291-316), by which the river was 'legally rec-ognised as a living being, the first waterway in the world to gain this status' (p. 293).

She summarises the freshwater debates, focused around the privatisation of local power companies proposed by the National government. In the Western mindset there is a distinction between nature and culture such that human activities that change nature are regarded as culture and subject to legal (private) ownership, whereas those parts of nature that cannot be interfered with by humans are called 'nature'. Hence, wa-ter cannot be owned, although a governing authority might issue rights to the use of water.

In contrast, in the Māori view of the world, rivers are living beings. For them: 'earth and sky, mountains and rivers are powerful beings upon whom people depend, and where river taniwha act as kaitiaki (guardians) for people, not the other way around' (Salmond 2017, p.307). However, 'outside the context of these debates, many Māori regard rivers in ways that differ little or not at all from other New Zealanders' (Salmond 2017, p.308).

This said, Salmond offers a fascinating insight into how concepts from Māori and Western worldviews may constructively interact. She calls this an 'idea of weaving an argument from diverse strands' which 'echoes the way in which ancestral Māori and modernist ideas entangle in debates about fresh water in New Zealand' (Salmond 2017, p.308). Thus, she quotes Morris and Ruru who suggested that rivers might be recognised as legal persons in New Zealand:

> The beauty of the concept is that it takes a western legal precedent and gives life to a river that better aligns with a Māori worldview that has always regarded rivers as containing their own distinct life forces. Furthermore, the legal personality concept recognises the holistic nature of a river and may signal a move away from the western legal notion of fragmenting a river on the basis of its bed, flowing water, and banks (Salmond 2017, p.309).

Significantly, Salmond notes that:

> In many spheres of life in New Zealand, Māori ancestral conceptions are being deployed, often without translation. Some non-Māori New Zealanders, for instance, have begun to think of themselves as kaitiaki, or guardians, for rivers, beaches and endangered species, and talk about these as taonga, ancestral treasures. As Māori terms increasingly shift into New Zealand English, and vice versa, European and Māori ways of thinking alike are being transformed (Salmond 2017, p.313).

Underlying many of the debates – such as that about fresh water – are the designs of modern technology, and its applications in industrial agriculture, such as genetic engineering of plants and animals. In this area,

subject to its own dialectics, Māori are often more readily opposed (for example, to genetic engineering)) than Pākehā, though the latter also have their own divisions. Modern technology is at the heart of issues such as international trade agreements, as business corporations seek markets that allow them to sell the volumes they require to finance their technological innovations. As they conquer markets, they help change culture. Hence the growing concern about such agreements, which can often be detrimental not only to Māori ways of life, but also to those of Pākehā. The constitutional future and the type of prosperity New Zealand may enjoy will hinge on how well its two cultures manage to strengthen each other in the face of these challenges. The implementation of the Whanganui river settlement may exemplify how this might happen.

We conclude by highlighting three further recent events which have a bearing on the future of cooperative sovereignty. They are:

(i) On 4 February 2016, New Zealand signed the Trans Pacific Partnership Agreement (TPPA) in the face of strong opposition from individuals and groups representing a cross-section of New Zealand society, including Māori iwi and hapū. The latter sought an urgent hearing in the Waitangi Tribunal, which reported its findings on 17 June 2016 (Waitangi Tribunal 2016: Wai 2522).

(ii) The Mayor of New Plymouth, Andrew Judd, decided not to stand again for that position in the October 2016 local elections. This was because of the opposition raised by his proposal to introduce special Māori seats on the Council, after he had become aware of the historic events at Parihaka. On 17 June 2016 'he led 500 people on to Parihaka Pa, after a three-day "Peace Walk" from New Plymouth' (*Taonga*, 2016:10-13). In speeches he gave on various occasions he described himself as a 'recovering racist'.

(iii) In October 2016 Geoffrey Palmer, a previous Prime Minister and chair of the Law Commission, and Andrew Butler, a lawyer, published their book: *A Constitution for Aotearoa New Zealand*. They

propose that all the obligations entered into by the Crown in 1840 should be taken on by the state of Aotearoa New Zealand.

In 2018 the authors published a follow-up book (Geoffrey Palmer and Andrew Butler: Towards democratic renewal; ideas for constitutional change in New Zealand. Victoria University Press, Wellington 2018), in which they reviewed and revised their 2016 work based on feedback received. Most comments concerned their proposals regarding the Treaty of Waitangi, ranging from outright rejection to proposals for an entirely new constitution based upon Māori values. The latter were formulated by Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation, convened in 2010 by Professor Margaret Mutu and Moana Jackson and based upon He Whakaputanga and Te Tiriti.

We comment on each of these events, as follows.

International trade agreements

Agreements such as the TPPA have been negotiated in recent years by various countries and groups of countries such as the European Union. They go well beyond the scope of previous free trade agreements, which provided for the elimination or reduction of tariffs and some non-tariff barriers under the aegis first of the GATT (General Agreement on Tariffs and Trade) from 1946 to 1993, and then since 1995 of the World Trade Organisation (WTO), with a central body charged with arbitrating trade issues.

In contrast, recent free trade partnership treaties aim at removing all non-tariff barriers to international trade, including barriers to investment. Should, for instance, a country outlaw the importation of genetically modified food, then a business corporation manufacturing and selling such food could demand the removal of such legislation or, failing this, the imposition of a substantial fine.

This is one of the reasons why many people decided to protest, in addition to widespread, strong misgivings about the secrecy in which the negotiations had taken place.

The TPPA would continue what Canadian philosopher John Ralston Saul has called a systematic tendency in inter-state relations toward 'reconceptualizing civilization through the prism of economics'. Increasingly the WTO exists to ensure that any international exchange can be judged through that prism, so 'that issues that were not fundamentally commercial could now be reduced to the utilitarian system of measurement' (Saul 2005:115). By way of example he mentions that in international trade, food is not something to eat, but rather an object to be imported or exported. Decisions bearing upon cross-border trade could amount to 'interference with the primary question of competing agricultural industries' (Saul 2005:116).

The 2001 Doha attempt to start a new general round of trade negotiations has turned out to be a very lengthy process. Instead, various countries have been concluding bilateral agreements. New Zealand and Singapore concluded one known as the New Zealand-Singapore Closer Economic Partnership, which came into effect in 2001 and featured a Māori exception clause. The New Zealand government managed to include the same clause in a number of such agreements and, significantly, also in the TPPA. It says that:

> nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment of Māori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.
>
> The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement (Wai 2522: p.3).

Just after the signing of the TPPA, the Waitangi Tribunal heard a set of claims from groups and individuals concerned that the agreement would 'diminish the Crown's capacity to fulfil its Treaty of Waitangi obligations to Māori'. The claimants considered that the exception clause would not be adequate to protect their interests. They argued that 'the

Crown's consultation process fell far short of its partnership obligations under the Treaty' (Wai 2522: p.1).

In light of the discussion in this book, it is worth noting that various claimants referred to the Te Raki Tribunal's stage 1 report. For example, the Ngāpuhi claimants: 'question the assumption that the Crown had the right to unilaterally decide upon negotiation and entry into the TPPA' (Wai 2522: p.6). The Crown did not accept this point of view, believing 'that the Treaty exception was entirely sufficient' (Wai 2522: p.6).

So, how did the Tribunal decide?

They concluded: 'that the exception clause is an effective protection of Māori interests. The applicable Treaty standard is a reasonable degree of protection, not perfection' (Wai 2522: p.38).

The Tribunal then went on to discuss 'next steps' (TPPA had been signed by New Zealand, but not yet by other countries; and ratification was still a long way off). One of the issues it identified is the matter of consultation. Basically, the Crown had consulted Māori as stakeholders rather than Treaty partners (Wai 2522: p.39). The Tribunal suggested: 'that the Crown include dialogue about the Treaty exception in its review of engagement with Māori'.

If we accept the vision of cooperative sovereignty outlined above as the correct way of interpreting the Treaty of Waitangi, we believe that when the Crown was considering taking part in the TPPA negotiations they should have put this proposal to Māori, with a request to appoint Māori negotiators and provide them with a brief in terms of matters that should not be the subject of negotiations. In this way, the New Zealand negotiating team would have been much more broad-based. The subsequent halt to the original TPPA and its replacement in 2018 by the 11-member CPATPP does not alter our view of how cooperative sovereignty should be implemented here.

Reserved Māori council seats

In the run-up to the local body elections that were to take place in October 2016, the Mayor of New Plymouth, Mr Andrew Judd, proposed

that the Council should have a Māori ward, with a number of seats reflecting the population of that ward. A citizens' referendum was held to consider this proposal. It was voted down.

The Mayor had come to his proposal after learning of the terrible way in which the Māori community at Parihaka, settled peacefully there after the Land Wars, was brutally attacked and dispersed in 1881 by a military force of 1589 men. Though the people of Parihaka were dedicated to peaceful resistance in their opposition to the confiscation of Māori land, about 1,500 men, women and children were unjustly arrested and six imprisoned, including their leader, the prophet Te Whiti. It was the discovery of how racism had been part of his upbringing that led the Mayor to propose the formation of a Māori ward.

Opposition to his proposal revealed that many citizens had misgivings about 'Māori privilege'. So, having discovered what had really happened at Parihaka, and disturbed by the intensity of opposition to his proposal, Mr Judd gave many speeches to various churches in his town, announcing: 'I am a recovering racist'. Lloyd Ashton wrote in the Anglican magazine *Taonga:* 'Andrew's moves on Māori representation have proven so divisive that he's decided he won't stand again' (Ashton, 2016: p.10-13).

The New Zealand Parliament has had Māori seats since 1867. But clearly, this recent controversy shows that there is a long way to go before New Zealand as a whole embraces the concept of cooperative sovereignty. Of course, Māori seats by themselves do not usher in cooperative sovereignty –the body as a whole must be prepared to govern in this way. This would require the Mayor, the representatives of the other wards and the Chief Executive Officer to take into account the views of Māori people as represented by the Māori councillors. Māori opposition to industrial or agricultural developments which threatened the water quality of rivers, for instance, could lead to the design of an ecological framework for all developments, with strict criteria regarding the use of land, water and air so as to preserve these resources for the next generations, both Māori and Pākehā.

A Constitution for Aotearoa New Zealand

In October 2016, former Prime Minister and Chair of the Law Commission Geoffrey Palmer and lawyer Andrew Butler proposed a written, codified Constitution for New Zealand.

Their proposed Constitution would incorporate both the English and Māori texts of the Treaty of Waitangi. There would also be provisions that the Treaty could not be amended, and that it would always speak. The obligations of the Crown would all be transferred to the State of New Zealand.

As to the meaning of the Treaty, the authors quote Matthew Palmer in agreement, as follows:

> Since this agreement involves a continuing relationship akin to partnership between the Crown and Māori, the parties should act reasonably and in good faith towards each another, consulting with each other, compromising where appropriate, and reasonably redressing past breaches of the Treaty (Palmer & Butler, 2016: p.156).

They add that the Supreme Court: 'can further assist under the new, proposed Constitution and provide thoughtful analyses of how the Treaty fits into the modified institutional framework we are proposing' (Palmer and Butler, 2016: p.156).

Their endorsement in 2016 of Matthew Palmer's summary of current jurisprudence regarding the Treaty notwithstanding, the authors realised that their original proposals should be amended so as to allow 'New Zealanders to have a proper conversation on what the Treaty means now', using 'the techniques of deliberative democracy' in the hope of achieving 'some kind of reasonable common ground among the many various views that currently exist' (Palmer and Butler, 2018 p.201). They 'believe that it is preferable to begin the discussion before a crisis point is reached' (Palmer and Butler, 2018: p.200).

We offer hereby Duncan Roper's book, hoping that it may help achieve a peace based upon justice, a cooperative sovereignty in Aotearoa.

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