

**EMILY BLINCOE**

**THE MYTH OF CESSION: PUBLIC LAW TEXTBOOKS  
AND THE TREATY OF WAITANGI**

**LLB (HONS) RESEARCH PAPER  
LAWS 522: PUBLIC LAW: STATE, POWER AND  
ACCOUNTABILITY**

**FACULTY OF LAW**

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI



**2015**

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### ***Abstract***

*The Waitangi Tribunal has recently found that the te Tiriti o Waitangi, as signed and understood in 1840, was not a cession of sovereignty, thus confirming the views of a generation of historians. Although some legal scholars have agreed with this view, mainstream public law scholarship – and Pākehā constitutional discourse more broadly – have not yet caught up. Three textbooks, Joseph’s Constitutional and Administrative Law, Palmer and Palmer’s Bridled Power and Morris’ Law Alive each portray the treaty as a cession of sovereignty. They do this by overlooking Māori law, history and motivations for signing, and by portraying the meaning of the English text as “the” treaty. This is particularly problematic because of the authoritative and normative role that textbooks have in shaping discourses, both for students and for the general public. The myth of cession obscures the violent reality of how the Crown actually acquired its power and prevents meaningful constitutional dialogue.*

### ***Word length***

*The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 14,930 words.*

### ***Subjects and Topics***

Treaty of Waitangi  
Constitutional law  
Textbooks

## *I Introduction*

The myth that the treaty was a cession of sovereignty is the dominant Pākehā narrative of the founding of New Zealand. In this narrative, Māori are understood to have given up their sovereignty in art 1 in exchange for property rights in art 2 and equality in art 3. The treaty is portrayed as a benign act that has benefitted Māori, and as the moral or political basis for the Crown's sovereignty.

On 14 November 2014, the Waitangi Tribunal (“the Tribunal”) announced the key finding of its *Te Paparahi o te Raki Stage One Report*: that in signing te Tiriti o Waitangi, the rangatira of Ngāpuhi did not cede sovereignty.<sup>1</sup> This finding was nothing new to the generations of Māori who have asserted this claim and to the growing numbers of Pākehā and other tauwi (non-Māori) activists and scholars who have supported them. In fact, the Tribunal itself noted that its finding “represents continuity rather than change”.<sup>2</sup>

It is significant, however, that this finding was made by a Crown institution. As Andrew Sharp wrote about an earlier report, the significance of the Tribunal's finding lies in the fact that it “if adopted by others in official positions, [it] would deny legitimacy to the official constitution under which [the Tribunal] is empowered.”<sup>3</sup> This statement is even truer of this report, because it is the most detailed inquiry of the Tribunal into the meaning and effect of the treaty.

The myth that the treaty was a voluntary cession of sovereignty pervades Pākehā discourses of constitutionalism and national identity. Despite this, the majority of contemporary New Zealand historians agree that the treaty was not a cession of sovereignty, and a large body of research has developed in this area.<sup>4</sup> Legal scholarship on the treaty also presents a range of nuanced views on the past, present and future of the treaty's meaning and its role in New Zealand's constitution – in some cases, on the basis

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<sup>1</sup> Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Waitangi Tribunal, Wai 1040, November 2014).

<sup>2</sup> Waitangi Tribunal, above n 1, at 526-527.

<sup>3</sup> Andrew Sharp “The Treaty in the Real Life of the Constitution” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) 308 at 315.

<sup>4</sup> See discussion in Waitangi Tribunal, above n 1, at ch 8.

that it was not a cession of sovereignty.<sup>5</sup> However, this work does not appear to have had a significant impact on discussions of the treaty in New Zealand’s general scholarship on constitutional law.

Analysis of the entirety of this scholarship would be a massive undertaking. Instead, this essay focuses on three public law textbooks as an illustration of the portrayal of the treaty in Pākehā constitutional law discourses. The three textbooks I have chosen are Phillip Joseph’s *Constitutional and Administrative Law*,<sup>6</sup> Geoffrey Palmer and Matthew Palmer’s *Bridled Power*<sup>7</sup> and Grant Morris’s *Law Alive*.<sup>8</sup> Each suggests that the treaty was a cession of sovereignty.

In this paper, I use “te Tiriti” or “the Māori text” to refer to the document that was written in te reo Māori and signed by around 500 Māori rangatira and Governor Hobson, on 6 February 1840 and subsequently. I use “the English text” to refer to the document in English signed by 39 rangatira. When talking about both texts together, I use the phrase “the treaty”. While it is doubtful whether it is appropriate to refer to the two documents together in this way, I use this term because the *idea* of “the treaty” is common and the use of this concept is significant to my analysis. Direct quotes retain the terminology used by their authors, but it is generally obvious which document they are referring to. In

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<sup>5</sup> See, for example, ETJ Durie “The Treaty in Maori History” in William Renwick (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 156; Moana Jackson “The Treaty and the Word: The Colonization of Māori Philosophy” in Graham Oddie and Roy Perrett (eds) *Justice Ethics and New Zealand Society* (Oxford University Press, Oxford, 1992) 1; Jane Kelsey *A Question of Honour? Labour and the Treaty 1984-1989* (Allen & Unwin, Wellington, 1990); Ani Mikaere *Colonising Myths Māori Realities: He Rukuruku Whakaaro* (Huia, Wellington, 2011); Magaret Mutu “Constitutional Intentions: The Treaty of Waitangi Texts” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 13; Nan Seuffert “Colonising Concepts and the Good Citizen, Law’s Deceptions, and the Treaty of Waitangi” (1998) 4 *Law Text Culture* 69; David V Williams “Te Tiriti o Waitangi – Unique Relationship Between Crown and Tangata Whenua?” in IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives on the Treaty of Waitangi* (Oxford University Press, Oxford, 1989) 64; and Joe Williams “Not Ceded But Redistributed” in William Renwick (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 190.

<sup>6</sup> Phillip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014).

<sup>7</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand’s Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004).

<sup>8</sup> Grant Morris *Law Alive: The New Zealand Legal System in Context* (3rd ed, Oxford University Press, Melbourne, 2015).

keeping with the Tribunal's style,<sup>9</sup> Māori words are spelt according to modern spelling, apart from direct quotes.

In relying heavily on the Tribunal report as a source of history, I am aware of its limitations. In particular, the nature of this particular report means that it is focused on Ngāpuhi. Other iwi and hapū have their own histories. Some aspects of each history will be the same, and others not. It is outside the scope of this essay to investigate the understanding of every signatory to te Tiriti. However, it is not a stretch of the imagination to suggest that if Ngāpuhi did not cede their sovereignty, then most, if not all, other iwi and hapū also did not cede sovereignty. Another limitation is that there are several places where the Tribunal discusses an issue at length, without explicitly coming to its own conclusion.

As a Pākehā writer with limited understanding of both tikanga Māori and te reo Māori, it is inevitable that I cannot adequately understand or portray Māori histories or Māori perspectives, and nor would it be appropriate for me to claim to do so. Yet at the same time, it is of paramount importance that Pākehā engage with Māori perspectives on te Tiriti in order to understand the continuing injustices of colonisation. It is also the responsibility of Pākehā to critically engage with dominant Pākehā narratives on te Tiriti, as this work should not be left to Māori alone.

The treaty relationship is of course, not a binary relationship between Māori and Pākehā (or Māori and the Crown on behalf of Pākehā). The portrayal of it as such leaves out those who identify as both Māori and Pākehā, as well as tauiwi who are not Pākehā. The emphasis on Pākehā discourses in my paper is a result of the position of power that Pākehā occupy in this country – because these discourses are the most entrenched and powerful, they are the ones that must be critiqued.

In Part II, I set out the historical context and language of te Tiriti, largely drawing on the Tribunal's report. This shows that Māori could not have voluntarily ceded sovereignty. It was not possible in Māori law for them to do so, and it did not make sense politically at the time. The Māori text, which the rangatira signed, does not convey a cession of sovereignty; but rather a retention of it, while making room for a Governor for Pākehā.

In Part III, I describe why public law textbooks matter as a subject of critical analysis. I suggest that they have an authoritative and normative role in shaping constitutional

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<sup>9</sup> Waitangi Tribunal, above n 1, at 11.

discourses. In Part IV I turn to the textbooks portrayal of the treaty as a cession of sovereignty. This assumption is bolstered by all of the authors' failure to engage with Māori history, law and motivations. The myth of cession is also underpinned by the authors' portrayal of the English text as *the* treaty, which is not accurate, given that the Māori text was signed.

Finally, in Part V, I turn to the significance of the myth that the treaty was a cession of sovereignty. I argue that this narrative helps to shape constructions of Pākehā constitutional identity which legitimises the Crown's sovereignty, masks the violence of colonisation and hinders the possibility of meaningful dialogue and change.

## *II The Treaty was not a Cession of Sovereignty*

In this Part, I set out why the treaty was not a cession of sovereignty. There are three key reasons for this. First, it was not possible in Māori law to cede sovereignty. Secondly, the context shows that this would have been highly undesirable for Māori at the time – ceding sovereignty simply would not have made sense. Thirdly, the text of te Tiriti itself is clear that sovereignty was not ceded, and this is supported by the oral discussions. At the end of this Part, I briefly turn to how the Crown did in fact assert its sovereignty over New Zealand.

In the discussion that follows, I draw heavily on the recent Tribunal report *Te Paparahi o Te Raki*, which is the most comprehensive report of the Tribunal on the meaning and effect of the treaty. The Tribunal concluded that “the rangatira did not cede their sovereignty in February 1840; that is, they did not cede their authority to make and enforce law over their people and within their territories.”<sup>10</sup> Ngāpuhi's account to the Tribunal is further documented in the book *Ngāpuhi Speaks* which is the work of an independent panel commissioned by Ngāpuhi kuia and kaumātua.<sup>11</sup>

As with earlier reports, the Tribunal relied on both Māori oral tradition and written European/Pākehā sources to form their historical narrative, while recognising the limitations of each. It noted that written accounts by European observers “were often self-serving, one-sided, and based on mistranslations and on European cultural

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<sup>10</sup> Waitangi Tribunal, above n 1, at 526-527.

<sup>11</sup> Susan Healy, Ingrid Huygens and Takawai Murphy *Ngāpuhi Speaks: He Wakaputanga and Te Tiriti o Waitangi Independent Report on Ngāpuhi Nui Tonu Claim* (Te Kawariki and Network Waitangi Whangarei, Whangarei, 2012).

perspectives.”<sup>12</sup> On the other hand, Māori oral traditions “ha[ve] their ‘vagaries’ but nonetheless may contain ‘inner truths’.”<sup>13</sup> The findings of the Tribunal were based on all the evidence before it, including the large body of existing historical research. For this reason, the Tribunal did not see its decision as radical.<sup>14</sup>

In the following two Sections, I draw on the Tribunal report to sketch a historical narrative that gives some insight into the pre-1840 context. The Tribunal recognised the fundamental importance of understanding this context:<sup>15</sup>

To determine what the treaty meant to its signatories in February 1840, we must first understand the parties themselves, and their relationships with each other. We must understand how their systems of law and authority worked; the challenges each faced as a result of the contact they had prior to February 1840; and their motives and intentions as they came to debate and sign te Tiriti. Only then can we determine what those parties understood the treaty to mean, and what they believed its effect was.

In particular, the Tribunal noted that “[t]hose who have made the assumption that the rangatira ceded sovereignty in February 1840 have largely ignored the Māori understanding.”<sup>16</sup> This point becomes relevant in relation to my discussion of the textbooks in Part V. To reject the view that the treaty was a cession of sovereignty, it is therefore particularly important to understand the context from the perspective of Māori and drawing on Māori sources.

### *A Not Possible to Cede Sovereignty in Māori Law*

The first reason why the treaty was not a cession of sovereignty is that it was not possible for Māori to cede sovereignty according to Māori law. Māori law was discussed in detail by the Tribunal, which found that “mana, tapu and utu can be seen as fundamental aspects of a system of law and authority that applied long before Europeans arrived.”<sup>17</sup> In

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<sup>12</sup> Waitangi Tribunal, above n 1, at 9.

<sup>13</sup> At 9.

<sup>14</sup> At 527.

<sup>15</sup> At 498.

<sup>16</sup> At 527.

<sup>17</sup> At 25.



Māori law, through whakapapa, “all people and all elements of the physical and spiritual worlds were seen as related at a fundamental level.”<sup>18</sup>

Māori understandings of mana illustrate why ceding sovereignty would have been impossible. Mana can be described as “power and authority that is endowed by the gods to human beings to enable them to achieve their potential, indeed to excel, and, where appropriate, to lead”.<sup>19</sup> Because mana derived from whakapapa, mana “could not be broken or transferred”.<sup>20</sup> For this reason, according to Moana Jackson, “mana was absolutely inalienable.”<sup>21</sup> Jackson submitted to the Tribunal that “to even contemplate giving away mana would have been legally impossible, politically untenable, and culturally incomprehensible.”<sup>22</sup> Anne Salmond also pointed out that the mana of the rangatira “came from the ancestors, and was not theirs to cede”.<sup>23</sup> The Tribunal concluded that both the claimants, and “most scholars since the 1980s” agreed that ceding mana would have been impossible in Māori law.<sup>24</sup>

It was also impossible to give up tino rangatiratanga. This was described by Margaret Mutu as “the exercise of ... leadership in order to enhance the mana of the people”, and as “the exercise of paramount and spiritually sanctioned power and authority.”<sup>25</sup> She pointed out that both mana and rangatiratanga are broader than the English concept of sovereignty, because sovereignty only derives from human sources while mana and rangatiratanga have spiritual elements.<sup>26</sup> It would have been impossible to give up either in Māori law. This means that it was also impossible to give up “sovereignty”.

## ***B Context and Motivations for the Treaty and te Tiriti***

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<sup>18</sup> At 20.

<sup>19</sup> Margaret Mutu, above n 5 at 26, quoted in Waitangi Tribunal, above n 1, at 454.

<sup>20</sup> Waitangi Tribunal, above n 1, at 24.

<sup>21</sup> Moana Jackson “Brief of Evidence” (Wai 1040 Doc D2, Waitangi Tribunal, 2010) at 13 in Waitangi Tribunal, above n 1, at 454.

<sup>22</sup> At 13 in Waitangi Tribunal, above n 1, at 454.

<sup>23</sup> Anne Salmond “Brief of Evidence” (Wai 1040, Doc A22, Waitangi Tribunal, 2010) at 24-25 in Waitangi Tribunal, above n 1, at 461.

<sup>24</sup> Waitangi Tribunal, above n 1, at 514.

<sup>25</sup> Margaret Mutu, above n 5 at 26, in Waitangi Tribunal, above n 1, at 454.

<sup>26</sup> Above n 5 at 26, in Waitangi Tribunal, above n 1, at 454.

The second reason why the treaty was not a cession of sovereignty is that it would not have made sense in the political context of 1840. In pre-colonial Māori society, hapū were the primary unit of political organisation. Hapū had rights over land, natural resources such as fishing beds, and assets such as whare tūpuna (meeting houses) and waka.<sup>27</sup> Hapū were led by rangatira, who coordinated communal activities, mediated disputes, facilitated decision making, allocated land, entered into diplomatic relationships with other hapū, and led military efforts.<sup>28</sup> The mana embodied by rangatira belonged to their ancestors, and could grow or shrink depending on the rangatira's capabilities as a leader. The status of rangatira had to be earned, and could be lost if the rangatira was no longer supported by the hapū.<sup>29</sup>

Hapū had extensive trading and diplomatic relationships with each other, and these expanded to include Europeans from the late 18<sup>th</sup> century. Ngāpuhi's diplomatic relationship with the British crown began with Tuki and Huru's stay with Governor King in Norfolk Island in 1793,<sup>30</sup> Te Pahi's visit to him in Sydney in 1805,<sup>31</sup> and Maatara's visit to London in 1807, when he met the royal family.<sup>32</sup> In 1820, Hongi Hika and Waikato went to England to work on a Māori language dictionary and to visit the King. The meeting that they had with King George IV was a diplomatic one. They had a friendly discussion, and Hongi and Waikato were presented with gifts. Hongi understood this meeting to be a meeting of equals.<sup>33</sup> He felt that it established a personal diplomatic relationship between himself and the King.<sup>34</sup>

Ngāpuhi had a long tradition of hosting rangatira representing hapū from throughout the land for the purposes of building alliances. According to Ngāpuhi oral tradition, an assembly or alliance called te Whakaminenga began meeting in 1808, as a forum to bring hapū together to discuss relationships with Europeans. Meetings were hosted by different Ngāpuhi hapū in order to share the burden. Over time, an increasing number of hapū joined. Te Whakaminenga was a new form of political authority, which operated alongside the authority of iwi and hapū.<sup>35</sup>

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<sup>27</sup> Waitangi Tribunal, above n 1, at 30.

<sup>28</sup> At 30.

<sup>29</sup> At 31.

<sup>30</sup> At 69-70.

<sup>31</sup> At 72-75.

<sup>32</sup> At 76.

<sup>33</sup> At 96-99.

<sup>34</sup> At 106.

<sup>35</sup> At 153; 176-179.

In 1831, frustrated with increasing Pākehā lawlessness and breaking of tikanga, the rangatira of te Whakaminenga wrote a petition to King William IV. They noted the positive trading relationship that they had with Pākehā, but expressed concern about Pākehā troublemakers. They asked King William to become a friend and guardian, and to control the Pākehā.<sup>36</sup> The response to this letter came with James Busby in 1833, who became the official British Resident.<sup>37</sup> Ngāpuhi understood his role to be about controlling Pākehā lawlessness, as they had requested.<sup>38</sup>

In 1830, a ship built in New Zealand was seized in Port Jackson (Sydney) because it was not registered. This caused concern to northern rangatira.<sup>39</sup> In response, Busby presented three flags to a hui of rangatira.<sup>40</sup> The flag that was chosen on 20 March 1834 is known as “Te Kare” or “The flag of Te Whakaminenga”.<sup>41</sup> It was recognised by the British King in December 1834.<sup>42</sup> It was also recognised in Australia, America, Canada and France.<sup>43</sup> Patu Hohepa, in his evidence, stated that the recognition of the flag was an important “step in the recognition of Māori mana motuhake or tino rangatiratanga or sovereignty as defined explicitly in Māori terms”.<sup>44</sup> Busby described the King’s approval as an acknowledgement of “the Sovereignty of the Chiefs of New Zealand in their collective capacity.”<sup>45</sup>

The next important step in the relationship between Ngāpuhi rangatira and the Crown was the Whakaputanga, the English version of which is called the Declaration of Independence.<sup>46</sup> Busby’s intention for the Declaration was to establish a national congress of rangatira who would make laws for all Māori, and to then use this congress to increase Britain’s authority and control.<sup>47</sup> His other immediate motivation for Busby was

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<sup>36</sup> At 114-115.

<sup>37</sup> At 123-124.

<sup>38</sup> Healy, Huygens and Murphy, above n 11, at 71.

<sup>39</sup> Waitangi Tribunal, above n 1, at 128-129.

<sup>40</sup> At 129.

<sup>41</sup> Healy, Huygens and Murphy, above n 11, at 56.

<sup>42</sup> Waitangi Tribunal, above n 1, at 133.

<sup>43</sup> Healy, Huygens and Murphy, above n 11 at 55-56.

<sup>44</sup> Patu Hohepa “Linguistic Evidence” (Wai 1040 Doc D4, Waitangi Tribunal, 2010) at [82] in Healy, Huygens and Murphy, above n 11, at 56.

<sup>45</sup> Waitangi Tribunal, above n 1, at 133.

<sup>46</sup> Note that the original document is spelt without an “h” in the name, because this is how the “wh” sound was written at the time. See Waitangi Tribunal, above n 1, at 11.

<sup>47</sup> Waitangi Tribunal, above n 1, at 157; 499-500.

to mitigate the threat from the French baron, De Thierry, who had claimed sovereignty in the Hokianga.<sup>48</sup> The rangatira, on the other hand, wanted the benefits of European technology, ideas and relationships, while ensuring that the rangatira maintained control and the newcomers complied with tikanga.<sup>49</sup>

Busby wrote a draft Declaration in English, which was translated into Māori by Henry Williams. Busby took this Māori draft to te Whakaminenga, who spent two days debating and re-crafting the text.<sup>50</sup> This document, the Whakaputanga, was signed by 34 rangatira on 28 October, and another 18 in the next four years.<sup>51</sup> The Tribunal found that because “only the Whakaputanga was debated, and only the Whakaputanga was signed ... the Māori text must be seen as authoritative.”<sup>52</sup>

In the Whakaputanga, the rangatira of te Whakaminenga declared their “rangatiranga o to matou wenua”, that is, sovereignty or absolute power in their lands. They declared that the kingitanga and mana of their land resided with them, and that no-one else could frame laws, and no governor could be established, unless appointed by te Whakaminenga. They agreed to meet at Waitangi in the autumn of each year to make laws (“ture”) that would apply to Europeans and to relationships between Māori and Europeans, and they asked the King for protection.<sup>53</sup>

The English text expresses Busby’s intention to create a centralised law-making body that would have exclusive capacity to make laws, but this was not agreed to in the Māori text, which only excludes the law-making power of foreigners.<sup>54</sup> The Tribunal found that there was no intention of the rangatira to give up the mana and rangatiratanga they exercised on whanau, hapū, and iwi levels, and there was no intention to create the supreme legislature that Busby envisaged.<sup>55</sup> Indeed, this would have been impossible, as they explained to Busby at the time.<sup>56</sup> Rather, te Whakaminenga was an additional form of authority, which

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<sup>48</sup> At 159-160; 499-500.

<sup>49</sup> At 157.

<sup>50</sup> At 163- 165.

<sup>51</sup> At 154.

<sup>52</sup> At 199.

<sup>53</sup> At 171-183; 500-502.

<sup>54</sup> At 182; 500.

<sup>55</sup> At 201; 499-500.

<sup>56</sup> At 501.

existed alongside, and did not undermine, the authority that already existed.<sup>57</sup> The Declaration was officially acknowledged by Britain on 25 May 1836.<sup>58</sup>

He Whakaputanga, the Tribunal concluded:<sup>59</sup>

... was an unambiguous declaration that hapū and rangatira authority continued in force – as, on the ground, it undoubtedly did – and that Britain had a role in making sure that state of affairs continued as Māori contact with foreigners increased.

He Whakaputanga foreshadowed the possibility of Te Whakaminenga delegating some of its authority in the future. Te Tiriti is therefore intrinsically linked to he Whakaputanga. It builds on rather than replaces it.<sup>60</sup> By 1840, even though there were only about 2000 Pākehā residing in New Zealand, Māori were growing increasingly frustrated with their disrespect for tikanga. The rangatira felt that it was not a good use of their time to have to deal with the lawless Pākehā, so they decided to delegate this responsibility to the Crown.<sup>61</sup> For Māori, the treaty was a strategic alliance, which build on the relationship that had been developing since at least 1820.<sup>62</sup>

The Crown's motivations were somewhat different. The British Crown was initially reluctant to formally colonise New Zealand, although this changed in the late 1830s.<sup>63</sup> Busby's dispatch in June 1837, which exaggerated the lawlessness of British settlers and their impact on Māori, contributed to this change in policy.<sup>64</sup> The other main element was The New Zealand Company's plans for private colonisation.<sup>65</sup> Hobson was sent to New Zealand with instructions from Lord Normanby to acquire sovereignty. The instructions acknowledged the sovereignty of the rangatira and required him to acquire their "free and intelligent consent" before claiming sovereignty.<sup>66</sup>

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<sup>57</sup> At 501-502

<sup>58</sup> At 184-185.

<sup>59</sup> At 502.

<sup>60</sup> Healy, Huygens and Murphy, above n 11, at 148-149 and 188-192.

<sup>61</sup> Waitangi Tribunal, above n 1, at 524.

<sup>62</sup> At 525.

<sup>63</sup> At 505.

<sup>64</sup> At 505.

<sup>65</sup> At 505-506.

<sup>66</sup> At 316-317.

The events leading up to 1840, and in particular the Whakaputanga, illustrate that hapū were strong, independent and flourishing. They were engaging with the British on their own terms and for their own purposes, in ways that strengthened their mana and authority. The text of the treaty, discussed in the next section, must be understood in light of this history.

### *C Meaning of the Text and Oral Discussions*

In this Section, I discuss the meaning of te Tiriti as it was understood by its signatories. The Ngāpuhi claimants stressed that te Tiriti must be understood as a whole document, and emphasised its overall intent and meaning.<sup>67</sup> As I will outline, the overall meaning of the English text was that Māori would cede sovereignty, and their property rights would be protected. The overall meaning of the Māori text was to retain mana and rangatiratanga, while establishing that a Governor would govern Pākehā. I expand on these meanings and the differences between them in this Section.

Hobson arrived in the Bay of Islands on 29 January 1840 with Lord Normanby's instructions and draft notes for a treaty. He sent these notes to Busby, who made some amendments, notably to art 2. Hobson then sent the draft to missionary Henry Williams for translation. Williams was assisted by his son, Edward, in this task.<sup>68</sup> Williams translated the text into Māori overnight, and was aware of the difficulties in doing so.<sup>69</sup> On 5 February, te Tiriti was presented to the rangatira and it was debated – which I discuss in more depth below. Te Tiriti was signed by 43 rangatira and by Hobson on 6 February and subsequently around the country, bringing the total number of signatories to around 500.<sup>70</sup>

The English text was not discussed at Waitangi or at most of the other signings around the country, and nor was its content debated.<sup>71</sup> The version which is known as “*the English text*”<sup>72</sup> was sent to Henry Maunsell, a missionary, for signings at Waikato Heads and Manukau. He was the only person sent this text rather than te Tiriti for signing. Ani Mikaere writes that the reason for this has never been adequately explained, but it was

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<sup>67</sup> At 452.

<sup>68</sup> At 342-344.

<sup>69</sup> At 512.

<sup>70</sup> At 388.

<sup>71</sup> At 515-519.

<sup>72</sup> It is set out as such in Schedule 1 to the Treaty of Waitangi Act 1975.

probably an error.<sup>73</sup> The English text was signed by 32 rangatira at Waikato Heads, and a further seven at Manukau. It is important to note that they signed on the basis of oral discussions in Māori, which did not convey the meaning of the English text.<sup>74</sup>

The English text contains a cession of sovereignty in art 1. Article 2 is a guarantee of property rights and gives the crown pre-emption (the exclusive right to buy land). Article 3 gives Māori the rights and privileges of British subjects. The Tribunal found that it was clear from this text that Hobson intended for Māori to cede their sovereignty to the Crown.<sup>75</sup>

All of the Ngāpuhi claimants dismissed the English text as irrelevant, because it was neither understood nor signed by their tūpuna (ancestors). They argued that te Tiriti and the English text were completely different documents.<sup>76</sup> The Tribunal felt that because of its empowering legislation, that they were “bound to regard the treaty as comprising two texts.” This illustrates the limitations of using Tribunal reports as a source of history. It did, however, add that:<sup>77</sup>

We consider that, once we have considered the English text with an open mind, we are under no obligation to find some sort of middle ground and meaning between the two versions.

The Tribunal added that the Māori text should be given “special weight ... in establishing the treaty’s meaning and effect” because it was the text that was signed and understood by the rangatira. They also stated that “in the case of any ambiguity between the two texts”, “significant weight” should be placed on the Māori text.<sup>78</sup> This emphasis on the Māori text is evident in the Tribunal’s overall finding that the treaty was not a cession of sovereignty.

The Tribunal drew on six modern back-translations of te Tiriti,<sup>79</sup> although it did not set these out in its report. Each approaches the translation from a slightly different angle. The precise nuances of each translation are not the focus of this essay, so I have chosen one of

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<sup>73</sup> Mikaere, above n 51, at 130.

<sup>74</sup> At 130-131.

<sup>75</sup> Waitangi Tribunal, above n 1, at 509.

<sup>76</sup> At 452-455; 503.

<sup>77</sup> At 522.

<sup>78</sup> At 522.

<sup>79</sup> At 348.

them to convey a general understanding of what te Tiriti meant to Ngāpuhi in 1840. The one that I quote below is Manuka Henare's, reproduced from *Ngāpuhi Speaks*. It comes from his brief of evidence to the Tribunal, which is based on his 2003 PhD thesis. This is a "historical-semantic" translation, meaning that it attempts to capture the meaning that the text had to the rangatira at the time.

Henare translated art 1 of te Tiriti as follows:<sup>80</sup>

The chiefs of the Confederation and also all the Chiefs who have not yet entered into that confederation, give completely (tuku rawa atu) to the Queen of England for ever all the Governorship [kawanatanga] of their lands.

Ngāpuhi scholars emphasised the understanding that their tūpuna had of "kāwanatanga". Patu Hohepa pointed out that it meant governorship in the sense that "the governor will govern Pakeha people ... and any lands obtained by or given to the Queen" rather than "governing through government".<sup>81</sup> The Tribunal agreed with this view, concluding that "the rangatira understood kāwanatanga primarily as the power to control settlers and thereby keep the peace and protect Māori interests accordingly."<sup>82</sup> It also found that "few if any rangatira would have envisaged the Governor having authority to intervene in internal Māori affairs,"<sup>83</sup> and that the rangatira "did not agree that the Governor should have ultimate authority."<sup>84</sup>

The reason for Williams' translation of "sovereignty" in art 1 to "kāwanatanga" is central to debates about the treaty. A few historians have argued that "kāwanatanga" was an appropriate translation, because "kāwanatanga" equated to civil government, which equates to sovereignty.<sup>85</sup> Many more historians argue that "mana" would have been a more accurate translation of Hobson's intentions, but would never have been agreed to by the rangatira.<sup>86</sup> The Ngāpuhi claimants similarly argued that "mana, kīngitanga or rangatiratanga would have been more accurate translations of sovereignty, and that no

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<sup>80</sup> Manuka Henare "Brief of Evidence" (Wai 1040 Doc B3, Waitangi Tribunal 2010) at [368] in Healy, Huygens and Murphy, above n 11, at 200.

<sup>81</sup> Hohepa, above n 44 at 52-53 in Waitangi Tribunal, above n 1, at 454-455.

<sup>82</sup> Waitangi Tribunal, above n 1, at 523.

<sup>83</sup> At 523.

<sup>84</sup> At 524.

<sup>85</sup> At 513.

<sup>86</sup> At 414.



chief would have ceded these.”<sup>87</sup> The Tribunal agreed with this view, stating that “a straightforward explanation of sovereignty could not have avoided the use of the word ‘mana’”, because Williams himself had used mana, rangatiratanga and kīngitanga in the Whakaputanga to express the highest level of authority and independence, which “is the essence of sovereignty.”<sup>88</sup> Further, ceding mana or rangatiratanga would have been impossible in Māori law.<sup>89</sup>

There are two sentences in the art 2. Henare translates the first as:<sup>90</sup>

The Queen of England will put in place (wakarite) and agrees (wakaae) that the Chiefs, the tribes, and all the People of New Zealand, have full (absolute) authority and power [te tino rangatiratanga] of their lands, their settlements and surrounding environs (kainga), and all their valuables (property) (taonga).

As mentioned above, te tino rangatiratanga encompasses but is broader than sovereignty. According to Mutu, “it includes aspects of the English notions of ownership, status, influence, dignity, respect and sovereignty, and has strong spiritual connotations.”<sup>91</sup> The first part of art 2, therefore, is an explicit recognition and strengthening of the sovereign power and authority of Māori. The Tribunal broadly agreed with the claimants’ views on this, concluding that art 2 meant that “rangatira would retain their independence and authority as rangatira, and would be the Governor’s equal”.<sup>92</sup>

Some of the claimants argued that the kāwanatanga of the Crown was subject to the authority of the rangatira, while others argued that the Crown’s authority would be equal – the Crown would control Pākehā, and the Crown and the rangatira would act jointly in relation to interactions or disputes between Māori and Pākehā.<sup>93</sup> The Tribunal acknowledged that this difference of opinion was not surprising, and reflected the different intentions and motivations of the rangatira in 1840. In any case, the Tribunal found that “few if any rangatira would have envisaged the Governor having authority to intervene in internal Māori affairs”, and that issues involving both Māori and Pākehā

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<sup>87</sup> At 477.

<sup>88</sup> At 514.

<sup>89</sup> At 514.

<sup>90</sup> Manuka Henare “Brief of Evidence” (Wai 1040 Doc B3, Waitangi Tribunal 2010) at [368] Healy, Huygens and Murphy, above n 11, at 201.

<sup>91</sup> Margaret Mutu, above n 5 at 26, in Waitangi Tribunal, above n 1, at 454.

<sup>92</sup> Waitangi Tribunal, above n 1, at 523.

<sup>93</sup> At 523.

would be negotiated on a case-by-case basis.<sup>94</sup> It was clear that the signatories understood that Hobson would be a Governor for Pākehā and not for Māori.<sup>95</sup>

Williams' motivation in using the term "rangatiratanga" in art 2, has also been the subject of intense debate. Historians have written that the mistranslation was deliberately deceitful re-writing of the treaty in order to persuade Māori to sign; a creative reworking.<sup>96</sup> Others have suggested that Williams *did* understand the term to be akin to possession of land and other property, so was not deliberately deceitful in his translation.<sup>97</sup> The Tribunal rejected this last suggestion, because "rangatiratanga" had been used for "kingdom" in the Bible, and Williams himself had used "rangatiratanga" to denote "independence" in the Whakaputanga.<sup>98</sup> In addition, it was used shortly after the treaty was signed by the British to express the sovereignty that they themselves had claimed.<sup>99</sup>

Therefore, the Tribunal concluded that:<sup>100</sup>

While Williams *may* have been honest in his choice of 'kawanatanga' to translate 'sovereignty', he must, however, have known that tino rangatiratanga conveyed more than what was set out in the English text.

The Tribunal further found that Williams changed the meaning because he "understood what it would take to convince Māori to sign".<sup>101</sup> That is, the mistranslation was deliberate.

The second part of the article is an agreement to sell land to the Queen. In the Māori text, this is not a monopoly right.<sup>102</sup>

Henare's translation of art 3 states:<sup>103</sup>

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<sup>94</sup> At 523.

<sup>95</sup> At 524.

<sup>96</sup> At 416.

<sup>97</sup> At 416.

<sup>98</sup> At 514.

<sup>99</sup> At 514.

<sup>100</sup> At 514. Emphasis added.

<sup>101</sup> At 515.

<sup>102</sup> At 350-351; 513.

<sup>103</sup> Manuka Henare "Brief of Evidence" (Wai 1040 Doc B3, Waitangi Tribunal 2010) at [368] in Healy, Huygens and Murphy, above n 11, at 201.

In recognition of this agreement to the Governorship of the queen, the queen of England will protect (tiaki) all the Māori people of New Zealand and offers (tukua) all the same English customary rights (tikanga) she offers her people of England.

This is controversial to the extent that it is unclear whether it imposes obligations as well as conferring benefits and entitlements. If it imposes obligations, then it is inconsistent with rangatiratanga in art 2.<sup>104</sup>

The oral discussions support the interpretations discussed above. The Tribunal summarised Hobson's message as "Give me the authority to protect you and control the settlers."<sup>105</sup> Hobson's explanations in English suggested that signing the treaty was a technicality, which would not impact on their rights or independence.<sup>106</sup> Williams' explanations in Māori focused on the treaty being an act of protection, which would, according to the Tribunal, "preserve their property, rights and privileges" and safeguard them from France.<sup>107</sup> The Tribunal found that neither Hobson nor Williams conveyed the concept of ceding sovereignty, or that English law would apply to Māori. In fact, Hobson gave numerous assurances to the rangatira that their authority would be protected.<sup>108</sup>

The recorded speeches of the rangatira focused on whether there would be a Governor, and how much power he would have. Some of the rangatira expressed concern that the Governor would be "above" them, which the Crown argued meant that they consented to the Governor's supremacy.<sup>109</sup> The Tribunal rejected this, pointing out that the purpose of such speeches was to get Williams to clarify that this was not the case.<sup>110</sup> The oral statements of Williams and the other missionaries assured the rangatira that the Governor would not have power over Māori and must be understood as part of the agreement.<sup>111</sup>

In relation to the oral discussions, the Tribunal concluded:<sup>112</sup>

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<sup>104</sup> Waitangi Tribunal, above n 1, at 351; 513.

<sup>105</sup> At 515.

<sup>106</sup> At 515-516.

<sup>107</sup> At 516.

<sup>108</sup> At 515-517.

<sup>109</sup> At 518.

<sup>110</sup> At 518.

<sup>111</sup> At 518-519.

<sup>112</sup> At 524.

It is clear that the rangatira did not agree that the Governor should have ultimate authority. Rather, many explicitly sought assurances that they and the Governor would be equals, and appear to have signed te Tiriti only on that basis.

The Tribunal found that there was a common agreement reached in the treaty. It found that the treaty's "meaning and effect came from the Māori text, on the one hand, and the verbal explanations and assurances given by Hobson and the missionaries, on the other."<sup>113</sup> This was because the oral agreement and the written Māori text were substantially similar, which shows that the two sides did in fact agree.

The Māori text and accompanying speeches make sense in light of Māori law and history discussed in the previous Section. The Tribunal found that the rangatira understood that the Governor would have "the power to control British subjects and thereby keep the peace and protect Māori",<sup>114</sup> which is what Māori desired, as explained above. Hobson "would be the Pākehā rangatira in an alliance that had been developing for decades between Bay of Islands and Hokianga rangatira and the Crown."<sup>115</sup> It was a strategic alliance and diplomatic relationship, that built on the meeting with King George IV, the petition to King William IV, and the Whakaputanga.<sup>116</sup>

#### ***D Aftermath – How Did the Crown Acquire Sovereignty?***

The Tribunal's report focused only on the meaning and intent of the treaty in 1840; and not on subsequent breaches of it – which will be the focus of its Stage 2 report. However, for my purposes it is necessary to ask – if sovereignty was not acquired as a result of Māori voluntarily ceding it through the treaty, then how was it acquired? I do not intend to undertake a detailed analysis here, but it is necessary to point out that given that British sovereignty was not consented to, it must have been established by another means. Sovereignty was actually imposed through the violent process of colonisation.

On the 21 May 1840 Hobson proclaimed sovereignty over New Zealand on the basis of cession of the North Island and discovery of the South Island.<sup>117</sup> The proclamation ignored even the English text. At this point only some of the treaty sheets had been

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<sup>113</sup> At 526.

<sup>114</sup> At 519.

<sup>115</sup> At 519.

<sup>116</sup> At 524.

<sup>117</sup> At 387

returned to Hobson.<sup>118</sup> After some major southern rangatira had signed, sovereignty over the South Island was proclaimed on the basis of cession.<sup>119</sup> In addition, since some hapū refused to sign and some never had the opportunity, Hobson cannot possibly have thought that he had achieved the general “free consent” that he had been instructed to obtain. As the Tribunal pointed out, according to English law, “Britain acquired sovereignty when it said it had.”<sup>120</sup>

However, this did not mean that the Crown actually exercised sovereign power in 1840. The population in 1840 was around somewhere between 90,000-100,000 Māori to 2,000 Pākehā,<sup>121</sup> and the Crown could not have taken the country by force at that time. Rather, it was over the next several decades that the Crown asserted its sovereignty through various violent means.<sup>122</sup> James Belich has described the military invasions of the 1860s as the Crown’s way of imposing “substantive” rather than “nominal” sovereignty.<sup>123</sup> Vast amounts of land were alienated through the Native Land Court, meaning that by 1891 Māori retained only about 40 per cent of land.<sup>124</sup> Introduced disease had a significant impact in shifting the population balance:<sup>125</sup> by 1901, Māori made up just 5.5 per cent of the population.<sup>126</sup>

As Jackson has pointed out, these forms of physical violence were accompanied by the imposition of institutions, laws and values, and an attack “on the indigenous soul”.<sup>127</sup> Of course, Māori were by no means passive in this history: in fact many Māori have resisted both the Crown’s violence and the Crown’s sovereignty.<sup>128</sup>

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<sup>118</sup> At at 389.

<sup>119</sup> At 389.

<sup>120</sup> At 525.

<sup>121</sup> Claudia Orange *The Treaty of Waitangi* (2nd ed, Bridget Williams Books, Wellington, 2011) at 16-17.

<sup>122</sup> See generally: Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (2nd ed, Penguin, Auckland, 2004) at ch 6, 7, 8; James Belich *Making Peoples: A History of the New Zealanders From Polynesian Settlement to the End of the Nineteenth Century* (Penguin Books, Auckland, 1996) at ch 10, 11; Mikaere above n 5, at ch 7.

<sup>123</sup> James Belich *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland University Press, Auckland, 1986).

<sup>124</sup> Belich, above n 122, at 259.

<sup>125</sup> Mikaere at 151.

<sup>126</sup> Belich, above n 122, at at 250.

<sup>127</sup> Jackson, above n 5, at 3.

<sup>128</sup> See generally Walker, above n 122, at ch 8,9,10,11; Belich, above n 122, at ch 10-11; Waitangi Tribunal above n 1, at 407.

In this Part, I have discussed why the treaty was not a cession of sovereignty. Māori law made it impossible to cede sovereignty; it would have not made sense to do so in the political context of 1840; and sovereignty was expressly preserved in both te Tiriti and in the oral discussions. Those who signed the English text did so on the basis of their understanding of the Māori text. A large body of existing historical research supported the Tribunal's decision. However, public law textbooks have not caught up with these developments. I turn to these texts in Part IV. In the next Part, however, I introduce these textbooks and outline the concept of textbooks as a subject of scholarly critique.

### *III Public Law Textbooks as a Subject of Critique*

In this Part, I introduce the idea of public law textbooks as a subject of scholarly critique. I have chosen to analyse general public law texts, rather than works focusing on the treaty, because it is my view that general works about constitutional law are a useful means of examining the portrayal of the treaty in Pākehā constitutional discourse more broadly. Discussing the entirety of this mainstream constitutional law scholarship would be an enormous task, which is why I have chosen textbooks as my focus. In this Part, I introduce the three textbooks and their intended audience, and outline the value of using textbooks as the subject of critical legal analysis.

#### *A Introduction to the Public Law Textbooks*

In this section, I briefly introduce the books I have chosen: *Constitutional and Administrative Law*, *Bridled Power* and *Law Alive*. My intention in this paper is not to criticise the particular authors – I am more interested in the similarities between these texts than their differences; and I am interested in what they suggest about the state of Pākehā constitutional discourse. Nor is my project to contextualise each textbook within the historical or political context of its writing, the life of its author(s), or the authors' other work. It is interesting to note in passing, however, that each of these authors have also written specifically about the treaty.<sup>129</sup>

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<sup>129</sup> See, for example, Philip A Joseph “The Treaty of Waitangi: A Text for the Performance of Nation” (2004) 4 Oxford U Commw LJ 1; Geoffrey Palmer “The Treaty of Waitangi – Where to from here? (2007) 11 Otago LR 381; Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008); and Grant Morris “James Prendergast and the Treaty of Waitangi: Judicial Attitudes to the Treaty During the Latter Half of the Nineteenth Century” (2004) 35 VUWLR 117.

*Constitutional and Administrative Law* was last published in 2014. It is certainly the longest and most comprehensive of the three books, at 1466 pages. It “is used extensively in the law schools, is a primary resource for central government and is regularly cited in the judgments of the courts”,<sup>130</sup> according to its back cover; and no doubt this claim is accurate, due to its comprehensive nature.

*Bridled Power* is the oldest of the three texts, having been last updated in 2004. *Bridled Power* says it “will be of value to anyone interested in government, as well as to judges, law practitioners, academics, government departments and politicians, and law and political science students”.<sup>131</sup> This broad audience is reflected in the author’s desire to “offer a stimulus to public debate”.<sup>132</sup> The book intends to be “practical ... but with a critical and reformist approach”.<sup>133</sup> This perhaps explains its focus on contemporary issues – as will be discussed below, it engages in historical accounts far less than the other two books.

*Law Alive* is not a public law text as such, but rather an introductory text on the New Zealand legal system as a whole (although about half of the topics covered by the book could be classified as public law). It is intended for first year law students.<sup>134</sup> The most recent edition was published in 2015. Unlike the other books, one of its goals is to provide a contextual account of the legal system.<sup>135</sup> This means it has more of an interdisciplinary approach than many law textbooks.

Although each textbook has a different audience, between them their audience is very broad – from the general public, to law students, to practitioners. This underpins the influential role they have, which I turn to in the following Section.

### ***B Textbooks as a Subject of Critique***

In this Section, I argue that the purpose and function of legal textbooks, which is to be comprehensive and neutral sources on a given area of law, means that the choices made by textbook authors have a direct impact on the reader’s understanding of the subject

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<sup>130</sup> Joseph, above n 6, back cover.

<sup>131</sup> Palmer and Palmer, above n 7, back cover.

<sup>132</sup> At ix.

<sup>133</sup> At ix.

<sup>134</sup> Morris, above n 8, at vii.

<sup>135</sup> At vii.

matter. These choices are in fact normative, and help to construct the law as well as reflect it. However, the values and assumptions underpinning a textbook are often not acknowledged by the authors themselves.

Although textbooks are not a particularly common subject of critique by legal scholars, some critical analysis of textbooks does exist. Textbooks covering substantive areas like contract,<sup>136</sup> torts,<sup>137</sup> and criminal law<sup>138</sup> have been critically analysed. Within public law, such analysis has tended to focus on administrative rather than constitutional law.<sup>139</sup>

Textbooks, by definition, aim to provide “a coherent, relatively comprehensive synthesis” of a particular area of law.<sup>140</sup> Textbooks, in general, claim to be both comprehensive and neutral. There is a general distinction between them, and books which are not textbooks: the latter have a specific focus, and tend to argue a particular view. There are, of course, some books which do both.<sup>141</sup>

Legal textbooks have an influential role because of their wide audience.<sup>142</sup> I have discussed above the audience of each of the public law textbooks – which, between them, is wide-ranging. Textbooks are also influential because they are thought to be authoritative. Unlike works with a specific focus, textbooks are used as a point of reference by anyone who wants to understand the subject matter in general terms.<sup>143</sup> Joseph’s textbook claims to be “the authoritative text on public law in New Zealand”,<sup>144</sup> and given that it is the most comprehensive text on New Zealand public law, this is a reasonable claim.

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<sup>136</sup> Mary Joe Frug “Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook” (1985) 34 Am U L Rev 1065.

<sup>137</sup> Carl Tobias “Gender issues and the Prosser, Wade and Schwartz *Torts Casebook*” (1988) 18 Golden Gate U L Rev 495.

<sup>138</sup> Mary Irene Coombs “Crime in the Stacks, or A Tale of a Text: A Feminist Response to a Criminal Law Textbook” (1988) 38 J Legal Educ 117.

<sup>139</sup> See, for example, Michael Taggart “Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: the Case of John Willis and Canadian Administrative Law” (2005) 43 Osgoode Hall LJ 223; Peter Leyland and Terry Woods “From homogeneity to pluralism: The textbook revisited” (1999) 33(1) The Law Teacher 18; D J Galligan “Judicial Review and the Textbook Writers” (1982) 2 Oxford J Legal Stud 257.

<sup>140</sup> Coombs, above n 138, at 119-120.

<sup>141</sup> At 121.

<sup>142</sup> Taggart, above n 139, at 235-236.

<sup>143</sup> Coombs, above n 138, at 121.

<sup>144</sup> Joseph, above n 6, back cover.



Textbook authors must, by necessity, make difficult choices as to what content to include and what to omit. Textbooks cannot be expected to cover every topic from every perspective; however, the difficulty of synthesising large amounts of information does not in itself make the author immune from criticism. Authors make decisions about what material to include, exclude or de-emphasise, guided by their own view of what is important.<sup>145</sup>

In Taggart's context of administrative law text in the 1960s and 1970s, he noted that the textbooks were insular and resistant to looking outside the law or to interdisciplinary approaches.<sup>146</sup> In my view, many legal textbooks remain narrow in their approach; focused on purely legal scholarship at the expense of contributions from other disciplines; and even then focused on orthodox legal writing rather than critical contributions from within the legal discipline. This is certainly evident in the public law textbooks' treatment of the treaty, which overlook several decades of historical research as well as interdisciplinary work within legal scholarship. This is discussed further in the next Part.

Rosemary Hunter writes that it is a product of choice for an author to ignore an entire body of critical work in a particular area.<sup>147</sup> In her context of labour law textbooks, "the endorsement of the dominant paradigm renders [the textbook authors] complicit in the entrenchment of women workers' legal invisibility"<sup>148</sup> That is, if authors choose to ignore critical work in a field and only engage with writing that fits within the dominant paradigm, then they are playing a role in continuing to marginalise those who are overlooked, marginalised or oppressed by that paradigm. This is because these choices then play an important role in how readers think about that area of law.<sup>149</sup>

All of this means that textbooks, while claiming to be neutral, do in fact have an important normative role. Because textbooks are assumed to be a neutral statement of the law as it is and are consulted for this purpose, they are not only reflective of an area of law; they also help to constitute it.<sup>150</sup> This means that textbooks have an important role in shaping the paradigms in which a discipline is understood. These paradigms are

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<sup>145</sup> Rosemary Hunter "Review Article: Representing Gender in Legal Analysis: A Case/Book Study in Labour Law" (1991) 18 *Melb U L Rev* 305, at 305; see also Coomb, above n 138, at 120.

<sup>146</sup> Taggart, above n 139, at 229.

<sup>147</sup> Hunter, above n 145, at 305.

<sup>148</sup> At 305.

<sup>149</sup> Frug, above n 136, at 1069.

<sup>150</sup> Taggart, above n 139, at 228; Hunter, above n 145, at 308-309.

internalised by students, or others, relying on the textbook as their source of information.<sup>151</sup>

This is particularly the case in the context of constitutional law, because constitutions, especially unwritten ones, are constructed – at least in part – by those who write about them. Public law textbooks have a particular role in shaping the paradigms and discourses of constitutionalism. This means that their treatment of the treaty directly influences the reader’s understanding of the treaty’s meaning and role in both existing and future constitutional arrangements.

Finally, critical analysis of textbooks allows the possibility of articulating assumptions and myths that the books are based on. Coombs argues that uncovering assumptions can reveal views that are “often so deeply embedded that they are felt as ‘natural’ and are thus included in such ‘objective’ texts almost inadvertently.”<sup>152</sup> By bringing these assumptions to the surface, they can be properly engaged with and critiqued. Taggart writes that “legal study and the practice of law are particularly susceptible to the perpetuation of myths.”<sup>153</sup> In my view, this is especially true in the area of constitutional law.

I have defined textbooks as books that readers presume to be both comprehensive and neutral. Because of this function, they have particular influence and authority. Textbook authors must make choices about what content to include, and these choices can reinforce dominant paradigms or challenge them. The choices the authors make will directly impact the reader’s impression of the subject matter. This means that textbooks have an important normative role in actually *constructing* the subject matter. Textbooks also include unacknowledged assumptions and myths, which – when articulated – can be critiqued. I turn to the assumptions and myths of the treaty content of three public law textbooks in the next Part.

#### *IV The Textbooks*

In this Part, I discuss the three textbooks and their portrayal of the treaty. Each author either states or strongly implies that the treaty was, or purported to be, a voluntary cession of sovereignty. This claim relies on, first, a lack of engagement with Māori history, law

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<sup>151</sup> Hunter above n 145, at 309.

<sup>152</sup> Coombs, above n 138, at 121.

<sup>153</sup> Taggart, above n 139, at 231.

and context, which, as outlined in Part II, shows that a cession of sovereignty would have been impossible. Secondly, the idea that the treaty ceded sovereignty relies on downplaying the differences between the texts and assuming that the English text is “the” treaty.

### *A The Myth that the Treaty Was a Cession of Sovereignty*

All three of the texts express the idea that that “the treaty”, as in the document signed on 6 February 1840 and subsequently, was a cession of sovereignty by Māori to the Crown. Each author has a slightly different approach to this point. Joseph writes that the Treaty purported to be a treaty of cession, but was not one, because Māori lacked the legal capacity to enter such treaties. Palmer and Palmer suggest that it was a treaty of cession, without making the claim explicitly. Morris suggests explicitly that the treaty was a cession of sovereignty. These are discussed in turn.

Joseph argues that although “[t]he Treaty purported to cede to the British Crown territorial sovereignty over New Zealand”,<sup>154</sup> it was not actually a treaty of cession. This is because he doubts whether “Maori tribal society possessed ‘statehood’ for cession of sovereignty.”<sup>155</sup> He dedicates seven pages to the question of whether Māori had the capacity to cede sovereignty according to the international law of the time. He begins by listing the requirements for a treaty of cession.<sup>156</sup> He then sets out the “orthodox view” that Māori did not possess the requisite statehood, meaning that the treaty was not one of cession according to international law.<sup>157</sup> To support this view, Joseph primarily cites works published in the 1950s and 1960s<sup>158</sup> – and an “authoritative work” from 1926.<sup>159</sup>

Joseph then turns to the “contrary view”, which is that Māori did have international capacity and therefore were able to, and did, cede sovereignty. He cites the works of Kenneth Keith, Paul McHugh and Ian Brownlie, which were published between 1990 and 1992.<sup>160</sup> Ultimately, however, he rejects this view, preferring the view that New Zealand was legally claimed on the basis of occupation and settlement, not cession.<sup>161</sup> This is

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<sup>154</sup> Joseph, above n 6, at 51-52.

<sup>155</sup> At 59.

<sup>156</sup> At 59.

<sup>157</sup> At 60.

<sup>158</sup> At 60, n 61-71.

<sup>159</sup> At 61.

<sup>160</sup> At 62-63.

<sup>161</sup> At 42 and 47.

because, he argues, although the treaty purported to cede sovereignty, Māori did not possess the requisite statehood to do so.<sup>162</sup>

Palmer and Palmer do not have such a clear view. In the first paragraph of their treaty chapter, they write that “the Treaty symbolises rights and obligations of Māori and the undertakings that were given to them when the Crown assumed authority.”<sup>163</sup> They go on to state that “[i]n one sense, New Zealand’s right as a nation to make laws, to govern, and to dispense justice can be said to spring from that 1840 compact between the Crown and the Maori.”<sup>164</sup> It is possible that these quotes could be interpreted to mean that the treaty was not a cession of sovereignty. The words “in one sense” and “spring from” could suggest that the treaty itself was not a cession of sovereignty – and it is possible that the authors deliberately chose these words to distance the Crown’s acquisition of sovereignty from the treaty itself.

However, in my view, this is not the effect of Palmer and Palmer’s choice of words. First, they do not discuss any other potential sources of the Government’s power to make laws, govern and dispense justice. Secondly, even if the sovereignty of the Crown is something that “springs from” the treaty rather than directly resulting from it, this still suggests that the treaty was a cession of sovereignty. The absolute sovereignty currently assumed by the Crown cannot credibly be derived from a document that preserved the tino rangatiratanga, or sovereignty, of Māori while allowing for a Governor for Pākehā. It can only be derived from the treaty if it is assumed that the treaty was a cession of sovereignty.

In *Law Alive*, the myth of cession pervades the entire chapter. Morris writes that Māori and the Crown signed a treaty in 1840 “transforming New Zealand into a British colony,”<sup>165</sup> which suggests that the treaty itself had the effect of Britain acquiring sovereignty. In discussing reasons for the treaty signing, Morris writes that “the 1835 Declaration of Independence also posed a problem for the British Crown” and that “it was necessary for Britain to recognise the declaration in the treaty and then nullify its provisions through the cession of sovereignty in Article 1.”<sup>166</sup> Notably, he is the only

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<sup>162</sup> At 60.

<sup>163</sup> Palmer and Palmer, above n 7, at 333.

<sup>164</sup> At 333.

<sup>165</sup> Morris, above n 8, at 58.

<sup>166</sup> At 59.

author to mention the Declaration at all. This is followed by an acknowledgement that sovereignty might not have been ceded:<sup>167</sup>

If sovereignty was indeed ceded through Article 1, then the declaration no longer has direct relevance to the New Zealand legal system. If only governorship was ceded, then any sovereignty established by the declaration could still conceivably exist.

This suggestion that the treaty might not have ceded sovereignty is an advance on the other authors' understanding; but not particularly convincing in light of the rest of the chapter, which suggests, in more authoritative language, that the treaty *did* cede sovereignty.

The treaty is also described as a cession of sovereignty elsewhere in the book. In the legal history chapter, Morris writes that “several constitutional measures” were taken from 1839 onwards to “confirm British sovereignty over New Zealand, independently of the treaty.”<sup>168</sup> Morris states that a proclamation dated 14 January 1840, which extended the boundaries of New South Wales to include New Zealand, “preceded the events at Waitangi by several weeks, but in effect was contingent on Māori ceding sovereignty through the treaty.”<sup>169</sup> This passage suggests that while Morris disclaims the treaty as the *legal* basis of sovereignty, he does portray it as a necessary step – at least in moral or political terms – for Britain to acquire sovereignty by proclamation. It also, once again, is a clear statement of Morris's view that the treaty was a cession of sovereignty.

All three of the textbooks portray the idea that the treaty was (or purported to be) a cession of sovereignty. Although “legal” sovereignty is said to be acquired by other means, the treaty is portrayed as a necessary step and as a signal of Māori consent to that sovereignty. This is either explicit, in the case of Joseph and Morris, or implicit, in the case of Palmer and Palmer. The myth that the treaty was a cession of sovereignty is bolstered by focusing only on British/Pākehā history, law and motivations, and focusing on the English text, while downplaying the differences between that text and te Tiriti. These are discussed in the following two sections.

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<sup>167</sup> At 59.

<sup>168</sup> At 32.

<sup>169</sup> At 32.

### ***B Failure to Engage with Māori History, Law and Motivations***

One of the two main elements supporting the narrative that the treaty was a cession of sovereignty is a failure to engage with Māori history, law, and motivations for signing te Tiriti. As outlined in Part II, in Māori law it was impossible to give up mana or rangatiratanga, so Māori could not have intended to give up their sovereignty when they signed te Tiriti. In addition, the political context of the time suggests that Māori wanted to strengthen their relationship with the British, and have a governor to control Pākehā – not give up their autonomy to a foreign ruler. The claim that the treaty was a voluntary cession of sovereignty is therefore directly linked to this overlooking of Māori history, law and motivations.

Each of the authors takes a slightly different approach to this: Joseph explores British motivations in depth but makes no mention of Māori motivations; Palmer and Palmer have no history or context of either side; and Morris does have some limited discussion of Māori motivations and Māori law.

Joseph discusses British historical context at length in the chapter “Establishment of British Rule”.<sup>170</sup> He describes Britain as a “reluctant colonising power” who “succumbed finally to increasing pressure to acquire New Zealand.”<sup>171</sup> The requirement in Normanby’s instructions to acquire the “free and intelligent consent of the natives” was, quoting historian Keith Sinclair, “a new and noble beginning in British colonial policy”,<sup>172</sup> that, in Joseph’s words “distinguished the history of New Zealand from that of earlier settlement colonies”.<sup>173</sup>

Joseph then sets out the British history in and relating to New Zealand at length. He begins with Abel Tasman’s voyage in 1642 and James Cook’s in 1769. He then discusses the 1830s, where he describes Britain’s policy of “strict non-intervention” in New Zealand.<sup>174</sup> He then mentions Britain’s legislative attempts at controlling its subjects and Busby’s appointment.<sup>175</sup> He describes the increasing pressure on Britain to intervene: the

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<sup>170</sup> Joseph, above n 6, at 42-46.

<sup>171</sup> At 42.

<sup>172</sup> At 42, quoting Keith Sinclair *A History of New Zealand* (rev ed, Penguin Books, Auckland, 1980) at 68-69.

<sup>173</sup> Joseph, above n 6, at 42

<sup>174</sup> At 43.

<sup>175</sup> At 43-44.

increasing European population, unchecked lawlessness and humanitarian concerns; the impending establishment of settlements by the New Zealand Company; and the threat of France annexing New Zealand. Normanby's instructions are then set out, followed by a brief mention of the treaty (which is expanded on in the next chapter), Hobson's May 1840 proclamations, and the subsequent gazetting of these proclamations in London.<sup>176</sup>

Notable by its absence in this discussion is any mention of Māori history, context or motivations for signing te Tiriti.

Joseph also discusses extensively whether the treaty was one of cession according to international law, as already noted in the preceding Section. He does not discuss whether it was a treaty of cession according to *Māori* law.

*Bridled Power*, perhaps unsurprisingly given how short the chapter is, does not discuss historical context at all, British or Māori. The brief section on constitutional history early in the book begins in 1840.<sup>177</sup> In the treaty chapter, the only reference to historical context prior to the treaty is "Māori came to Aotearoa before Pakeha."<sup>178</sup> There is no discussion of the motivations for either side, and there is also no discussion of the legal status of the treaty in British/international law, or Māori law. Rather, the chapter is very focused on the contemporary meaning and application of the treaty.

In *Law Alive*, Māori law is mentioned very briefly in the legal history chapter, which acknowledges that "the English system dominated and effectively excluded the Māori system"<sup>179</sup> and that from 1840, "Māori customary law, which had operated in New Zealand since the arrival of Polynesian voyagers approximately 700 years before, was swept aside."<sup>180</sup> These two quotes do at least acknowledge the existence of a Māori legal system, and suggest the aggressiveness with which English law dominated – although it the portrayal of the timeframe for this is not particularly accurate.

Māori law is discussed in more depth later in the book, in the section on Māori dispute resolution. Morris writes that Māori had "a complex system of legal concepts and

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<sup>176</sup> At 44-46.

<sup>177</sup> Palmer and Palmer, above n 7, at 6.

<sup>178</sup> At 333.

<sup>179</sup> Morris, above n 8, at 31.

<sup>180</sup> At 31.

regulations” which “is as much law as the English system.”<sup>181</sup> Key concepts are defined, and there is a brief discussion about how some of them applied in pre-colonial Māori society. It is emphasised that Māori dispute resolution focuses on the collective rather than the individual.<sup>182</sup> Apart from an acknowledgement that “Māori customary law was largely ignored by the colonists”<sup>183</sup> there is no discussion of how Māori legal systems were violently displaced by colonisation.

Most of the section focuses on contemporary applications of Māori dispute resolution. The possibility of a parallel system is discussed, in light of the over-representation of Māori in prisons. Morris notes that a parallel system “would fulfil the promise of te tino rangatiratanga in Article 2 of the Treaty of Waitangi, but could possibly undermine the idea of ‘one law for all’.”<sup>184</sup> This is the only mention of the relationship between Māori law and the treaty.

While Māori law is mentioned in the legal history chapter and the dispute resolution chapter, it is not mentioned at all in the chapter on the treaty. This means that the question of whether it was possible for Māori to cede sovereignty according to their own law is not addressed.

Morris also fails to adequately address Māori reasons for signing te Tiriti. One of the objectives of the treaty chapter is that students should be able to “outline the main reasons why the treaty was signed (from both British and Māori perspectives)”.<sup>185</sup> However, under the heading “How and Why was the Treaty Signed?” the focus is almost entirely on British motivations. Like Joseph, Morris begins with Britain’s reluctance to acquire New Zealand and then describes the factors that caused this to change. This includes humanitarian concerns, financial motivations, rivalry with France, and the land purchases of the New Zealand Company.<sup>186</sup> The section also includes a mention of the Declaration of Independence, a “problem” which it was necessary to “nullify” by the treaty.<sup>187</sup>

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<sup>181</sup> At 166.

<sup>182</sup> At 167.

<sup>183</sup> At 166.

<sup>184</sup> At 168.

<sup>185</sup> At 57.

<sup>186</sup> At 58-59.

<sup>187</sup> At 59.



The only discussion of Māori motivations is in the context of discussions on 5 February 1840, as follows:<sup>188</sup>

Arguments for and against the treaty were put forward by different chiefs. Some argued that the treaty would unnecessarily cede too much to the Crown. After all, Māori outnumbered Pākehā by approximately forty to one in 1840. Others argued that signing the treaty would allow Māori to call upon British protection and increase trade opportunities. A particularly convincing argument was made by Tāmāti Wāka Nene. He argued that Britain was so powerful that its control of New Zealand was a foregone conclusion and that it was better to accept this act and work with it than to fight in vain against the inevitable.

This is problematic, because apart from the reference to protection and trade opportunities, the rest of the quoted passage appears to describe motivations to sign a treaty of cession. This is not what the discussions were about, because the document put to Māori on 5 February, te Tiriti, was not a treaty of cession at all.

Additionally, it is inaccurate to describe Nene's argument as "particularly convincing". The Tribunal has commented on his speech often being portrayed as representative. It commented that "it is a mistake to regard his intervention as decisive simply because Hobson (and other Pākehā) described it as such."<sup>189</sup> It was convenient for Hobson to describe Nene's speech in this way, but "it does not necessarily follow that the position Nene articulated was the understanding of each rangatira when stepping forward to sign."<sup>190</sup>

Māori intentions are mentioned against in the next section: "From the Māori perspective, the main purpose was to retain a degree of chieftain authority and confirm Māori possession of land and taonga."<sup>191</sup> Again, this suggests Māori intentions in relation to the English text, not actual Māori intentions, which, were to retain sovereignty while allowing for a Governor for Pākehā.

*Law Alive* is the only textbook of the three to engage at all with Māori law and Māori motivations for signing. It does not, however, do an adequate job of this. As I have outlined, Māori law is primarily discussed in the dispute resolution chapter, in relation to

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<sup>188</sup> At 60.

<sup>189</sup> Waitangi Tribunal, above n 1, at 524.

<sup>190</sup> At 524.

<sup>191</sup> Morris, above n 8, at 61.

its application in contemporary contexts. There is no discussion of what the treaty meant in the context of Māori law at the time. Like Joseph, Morris outlines British history and British motivations. Morris does not engage with Māori history, and his discussion of Māori motivations is limited and misleading.

The failure of all three texts to adequately engage with Māori history, law and motivations for signing te Tiriti helps to bolster their explicit or implicit claims that the treaty was a voluntary cession of sovereignty. If the treaty is only understood in light of British intentions and motivations and in light of Eurocentric assumptions, it becomes possible to claim that the treaty was a voluntary cession of sovereignty. However, as discussed in Part II, for Māori, ceding sovereignty was both legally impossible and politically undesirable. If this was acknowledged by the authors, then the myth that the treaty ceded sovereignty would be severely weakened.

### *C Downplaying of Textual Differences and English Text as “the” Treaty*

As I have discussed, the narrative that the treaty was a treaty of cession is premised on a lack of engagement with Māori history, law, and motivations for signing the treaty. The second theme underpinning the authors’ suggestions that the treaty was a cession of sovereignty is a focus on the English text. This entails, in each case, a failure to set out a translation of the Māori text, a downplaying of the significance of the textual differences, an inadequate or no discussion of the reasons for mistranslation, a failure to acknowledge that the Māori text was signed by most rangatira (in two of the books) and using the phrase “the Treaty” (or for Morris, “the treaty”) to refer to the content of the English text. I focus on the authors’ discussions of arts 1 and 2 because these are the main source of contention.

Each author sets out both the English text in English, and te Tiriti in te reo Māori.<sup>192</sup> None of them provides a translation of te Tiriti in English – only translations of key terms. This means that readers who do not speak te reo Māori cannot read te Tiriti for themselves, and are reliant on each author’s interpretations. It also means that the English text is seen as the default, and te Tiriti is assessed against it, rather than the other way around. Finally, it means that the overall meaning of each text is not the focus of the discussion. Rather, the meanings of particular words are emphasised. As outlined in Part II, reading modern translations of te Tiriti, alongside an understanding of its context,

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<sup>192</sup> Joseph, above n 6, at 53-55; Palmer and Palmer, above n 7, at 398-400; Morris, above n 8, at 62.

gives a much better sense of the document as a whole. Te Tiriti was about Māori retaining sovereignty while allowing a Governor to govern Pākehā. The English text was a cession of sovereignty. This difference is difficult to adequately convey without a full and accurate translation of te Tiriti.

Each author does acknowledge the differences between the two texts. Joseph writes that:<sup>193</sup>

Language difficulties beset articles 1 and 2, which ceded sovereignty and guaranteed the Crown’s protection. Article 1 accomplished the Crown’s objective (cession of sovereignty) but the translation of the word ‘sovereignty’ raises questions as to what Māori actually ceded at Waitangi.

He points out that “kāwanatanga” meant “governorship”, which he describes as “the Crown’s right to impose law and order”.<sup>194</sup> He also notes that “‘rangatiratanga’ ... was a closer approximation to sovereignty than ‘kawanatanga’ used in art 1.”<sup>195</sup> The differences between the texts are downplayed, with statements like, “The Maori language text was *not an exact translation* of the original English text approved by Hobson.”<sup>196</sup>

In *Bridled Power*, the discussion of the texts is brief. The authors write that “[t]he first article expresses the cession of ‘sovereignty’ or ‘kawanatanga’ (which may be translated as ‘governorship’) by Māori to the Crown.”<sup>197</sup> They do not explain what “kawanatanga” may have meant to Māori in 1840. They do not explain their translation to “governorship” or how “governorship” may differ from “sovereignty”. “Rangatiratanga” in art 2 is translated as “full chieftainship” while acknowledging that it can also be translated as sovereignty.<sup>198</sup>

Palmer and Palmer then then turn to the issue of “the balance to be struck between the sovereignty/kawanatanga of the Crown and te tino rangatiratanga/chieftanship of Māori”.<sup>199</sup> They state that “[m]ost debates concerning the Treaty’s meaning involve the

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<sup>193</sup> Joseph, above n 6, at 56.

<sup>194</sup> At 56.

<sup>195</sup> At 56.

<sup>196</sup> At 55.

<sup>197</sup> Palmer and Palmer, above n 7, at 334.

<sup>198</sup> At 334.

<sup>199</sup> At 334.

application of this question.”<sup>200</sup> This language suggests that sovereignty and kāwanatanga are analogous concepts; and that rangatiratanga can be equated to chieftainship. This undermines the attempt to distinguish these concepts in the preceding paragraph.

Palmer and Palmer then do briefly turn to the difference between sovereignty and rangatiratanga. They write that:<sup>201</sup>

The rhetoric of ‘sovereignty’ versus ‘rangatiratanga’ is symbolic and abstract. A confrontational battle between the two could go on for years without the participants being sure whether they disagree.

This overlooks that the assertion of rangatiratanga against the unfettered sovereignty of the Crown is one key element of Māori struggles for justice in New Zealand. Māori, and their tauīwi supporters, are clear about the meanings of sovereignty and rangatiratanga. To suggest that each side of this debate is unsure “whether they disagree” demonstrates a lack of understanding on the part of the authors as to the nature of this debate.

*Law Alive* does a better job than the other textbooks of outlining the textual differences – although this is still limited to particular words and not the overall meaning. The words “kāwanatanga” and “rangatiratanga” are described as being flawed translations, and it is acknowledged that the two texts contradict each other “in key areas”.<sup>202</sup> In relation to “kāwanatanga”, Morris writes that “[m]any experts believe it means a limited form of administrative government”.<sup>203</sup> He writes “[t]he argument runs that many Māori thought the Governor would have only limited power”, which extended only over British citizens and would be subject to the authority of rangatira.<sup>204</sup>

He also notes that “‘te tino rangatiratanga’ ... denotes absolute sovereignty ... [and] probably should have been used in Article 1 to describe Crown sovereignty.”<sup>205</sup> As a result of this, “Māori could well have believed that they were allowing the Crown a limited form of sovereignty”, while a more powerful sovereignty was retained.<sup>206</sup>

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<sup>200</sup> At 334.

<sup>201</sup> At 334.

<sup>202</sup> Morris, above n 8, at 61.

<sup>203</sup> At 61.

<sup>204</sup> At 61.

<sup>205</sup> At 61.

<sup>206</sup> At 61.

On the page where the translation is set out, particular words in each text are highlighted, with accompanying text. In relation to “sovereignty” and “kāwanatanga”, the text includes “Māori *may have believed* they were allowing the British to govern while retaining sovereignty in Article 2”. In relation to “te tino rangatiratanga”, the text includes, “Māori *may have believed* they were retaining sovereignty”.<sup>207</sup> The use of “may have believed” in relation to Māori suggests a downplaying of Māori understandings while British understandings are portrayed as authoritative.

In sum, the authors of all three textbooks acknowledge the differences between te Tiriti and the English text, and engage in some explanation of these difference. However, they also downplay them. This downplaying is exacerbated by each author’s discussion of the reason for the mistranslation. Joseph writes:<sup>208</sup>

For *some historians*, the Maori language text did not convey the true intentions of the colonising power. Maori did not understand European legal and literary traditions to embrace British conceptions of sovereignty and ownership.

The use of the word “some” is misleading because it suggests that contemporary historians who argue that the mistranslation was deliberate are a minority, when actually most contemporary historians have this view.<sup>209</sup>

Joseph then rejects the view that the contested history of the treaty is caused by haste or lack of expertise.<sup>210</sup> He claims that “[t]hese explanations discount the legal coherence that underpins that Treaty” and that “[e]ach of the instrument’s articles assimilated existing common law doctrines or principles”,<sup>211</sup> which he explains in some detail. He concludes that this “symmetry” between the treaty and common law “belies historians’ claims that the treaty was ‘contradictory’, the work of ‘amateurs’ and the cause of its contested history.”<sup>212</sup> On the contrary, he argues that “[i]ts survival as a national symbol owes much to the dedication of its architects.”<sup>213</sup>

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<sup>207</sup> At 62. Emphasis added.

<sup>208</sup> Joseph, above n 6, at 56. Emphasis added

<sup>209</sup> Waitangi Tribunal, above n 1, at 413-418; 513-514.

<sup>210</sup> Joseph, above n 6, at 57.

<sup>211</sup> At 58.

<sup>212</sup> At 59.

<sup>213</sup> At 59.

In my view, the English text reflecting common law doctrines is entirely unsurprising and unremarkable. What is actually contested about the treaty is the differences between the meaning and effect of the English text compared with the Māori text. The two texts contradict each other, as was explained in Part II. Joseph's analysis of how the English text reflects the common law does nothing to explain the differences between that document and te Tiriti.

Palmer and Palmer make no mention at all of the reason for the differences between the texts. This is unsurprising, given that they are dealing with the contemporary application of the treaty rather than its historical context.

Morris suggests, in relation to the textual differences, that it “is not clear from the historical records whether this was a calculated ploy to encourage Māori acquiescence or just poor translating”.<sup>214</sup> Like Joseph, he overstates the extent to which historians are divided on this point. He also goes as far to suggest that “[t]he other possibility is that Māori *did understand that they were ceding complete sovereignty* over New Zealand.”<sup>215</sup> This view does not make sense in light of Māori law and context. It also does not address that on its clear face, the Māori text was not a cession of sovereignty.

A further element of emphasising the English text is a failure to acknowledge that it was the Māori text which was actually signed. Joseph does not make any mention of which text was signed, but, as discussed further below, his emphasis on the English text strongly implies either that the English text was signed or that both texts had the meaning of the English text.

Palmer and Palmer fail to note that the Māori text that was signed by the majority of rangatira. They write, “Māori and English versions of the Treaty were signed at Waitangi on 6 February 1840” and subsequently “in many different places in New Zealand by the Crown and over 200 Māori chiefs.”<sup>216</sup> This is misleading and inaccurate: as noted above, it was only the Māori text that was signed at Waitangi and by a total of around 500 rangatira. The English text was only signed by 39 rangatira, but it was signed on the basis of oral discussions in Māori that did not convey the meaning of the English text.

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<sup>214</sup> Morris, above n 8, at 63.

<sup>215</sup> At 63. Emphasis added.

<sup>216</sup> Palmer and Palmer, above n 7, at 333.

Morris is the only author to point out that “it is important to remember that nearly all the chiefs signed the Māori version.”<sup>217</sup> This is somewhat undermined by his emphasis on the English text elsewhere.

Finally, all of the authors use the phrase “the Treaty” (or “the treaty”) to refer to the meaning of the English text. Joseph, for example, writes that “the Treaty is a short, sparse document, comprising ... three articles of cession”.<sup>218</sup> Further on in the book, reflecting on the potential contemporary role of the treaty, he describes it as “an instrument of cession from colonial times.”<sup>219</sup> In addition, as discussed above, Joseph’s emphasis on the “legal coherence” illustrates his emphasis on the English text.

Palmer and Palmer are clearly referring to the English text when referring to “the Treaty” as a general concept. For example, they write that “the Treaty symbolises the rights and obligations of Maori and the undertakings that were given to them when the Crown assumed authority,”<sup>220</sup> and that “the substantive content of the Treaty lies in the safeguarding of Māori interests, balanced against the general interests of the government of New Zealand.”<sup>221</sup> These quotes suggest a reliance on the English text, because it was only according to the English text that the Crown assumed sovereignty over the whole country.

Morris also uses “the treaty” as a general concept to refer to the English text. As noted above, his discussion of Māori reasons for signing suggests Māori reasons for signing a treaty of cession. In the introduction to the chapter, it is claimed Māori and the Crown signed “a treaty transforming New Zealand into a British colony.”<sup>222</sup> Later in the chapter, when discussing native title, Morris writes that “the treaty is a specific document of cession.”<sup>223</sup>

The use of “the Treaty” to refer to a cession of sovereignty, that is, the meaning of the English text could imply that the English text was actually signed. It could also indicate that the texts were substantially similar, that is, both texts were a cession of sovereignty. Either interpretation undermines each author’s attempts to outline the differences

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<sup>217</sup> Morris, above n 8, at 60.

<sup>218</sup> Joseph, above n 6, at 46.

<sup>219</sup> At 149.

<sup>220</sup> Palmer and Palmer, above n 7, at 333.

<sup>221</sup> At 335.

<sup>222</sup> Morris, above n 8, at 58.

<sup>223</sup> At 69.

between the texts, and Morris' acknowledgement that the Māori text was in fact signed. The failure of each author to set out a translation of the Māori text, the general downplaying of the differences and a lack of thorough engagement with the reasons for mistranslation also suggests an emphasis on the English text and the suggestion that "the treaty" was a voluntary cession of sovereignty.

The downplaying of the significance of the differences between the texts and reliance on the English version of the treaty is one of the themes underpinning the myth that the treaty was a cession of sovereignty. The other theme, discussed in the previous Section, is a lack of engagement with Māori law, history, and motivations for signing te Tiriti. These two themes underpin, in slightly different ways, each author's chapter on the treaty. They both bolster the explicit or implicit claim that the treaty was a cession of sovereignty. The myth of cession in turn underpins the claim that the treaty is, at least to some extent, the basis for the legitimacy of the Crown's absolute sovereignty in New Zealand. I turn to this in the next Part.

## *V Treaty Myths and Pākehā Constitutional Discourse*

So far, I have explored historical accounts of the context and meaning of the treaty and demonstrated the failure of public law texts to engage with these accounts. These texts perpetuate the myth that it was a treaty of cession. I have also discussed the important normative and pedagogical role of textbooks, which underpins my particular concern about how the treaty is represented in public law textbooks.

In this final Part, I turn to *why* the myth that the treaty ceded sovereignty is so harmful – in public law textbooks and in general. The primary reason is because our understandings of the past shape the parameters of discussions about the present. The myth that the treaty ceded sovereignty is part of a broader narrative that the treaty legitimises, at least in part and in a political sense, the sovereignty that the Crown presently exercises. This narrative can be seen in each of the textbooks. It enables the continued reluctance of Pākehā to engage with the violent realities of colonisation. It also makes it difficult for Pākehā to engage in genuine conversations about how the treaty should be reflected in constitutional arrangements.

### *A The Treaty as a Basis for the Crown's Legitimacy*



In Pākehā constitutional discourses, the treaty is generally seen as legitimising the Crown’s sovereignty. The textbooks illustrate this. Although none of the textbook authors present the treaty as the *legal* basis of sovereignty, they do all use it as a basis for a moral or political claim as to the legitimacy of that sovereignty.

As discussed above, Joseph explicitly rejects the treaty as the legal basis for sovereignty. However, he does rely on the treaty as the basis for the legitimacy of the Crown’s sovereignty. In the chapter titled “Establishment of British Rule”, Joseph writes that:<sup>224</sup>

... New Zealand came under British rule by settlement, albeit contingent upon the free consent of Māori. The Treaty of Waitangi was benign in intent but did not achieve for the colonial authorities the full and unqualified acquisition of the new territory. Its purposes were more ethereal, importing the concept of the honour of the Crown and ultimately legitimising the Crown’s assumption of sovereignty.

This is an express claim to constitutional legitimacy. The idea of “free consent” illustrates a misunderstanding of the treaty and reliance on the English text as already noted in Part IV. Joseph expressly says that the treaty provides legitimacy to the Crown’s sovereignty, and the description of Britain’s intentions as “benign” further reinforces this. Elsewhere, Joseph describes the treaty as New Zealand’s “founding instrument”,<sup>225</sup> and writes that it has “national and symbolic importance,”<sup>226</sup> further bolstering the idea that it provides legitimacy to the Crown’s sovereignty.

Palmer and Palmer also make explicit claims of legitimacy of the Crown based on the treaty. At the beginning of their treaty chapter they write that “the legitimacy of the system of government we have in New Zealand today owes much to the Treaty of Waitangi entered into between the Crown and Māori in 1840”.<sup>227</sup> This is a claim to at least partial legitimacy. At the end of the chapter Palmer and Palmer make a stronger statement: “the Treaty is a key source of the New Zealand government’s moral and political claim to legitimacy in governing the country.”<sup>228</sup> Further, they write that “the Treaty of Waitangi is an integral part of New Zealand’s constitutional arrangements”<sup>229</sup>

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<sup>224</sup> Joseph, above n 6, at 48.

<sup>225</sup> At 51.

<sup>226</sup> At 53.

<sup>227</sup> Palmer and Palmer, above n 7, at 333.

<sup>228</sup> At 346.

<sup>229</sup> At 346.

Morris, on the other hand, does not expressly state that the treaty provides legitimacy to the Crown's sovereignty. He does, however, describe the treaty as New Zealand's founding constitutional document on several occasions.<sup>230</sup> He also states that "the influence of our founding constitutional document can be seen in nearly every area of the legal system."<sup>231</sup> Read alongside his explicit statements that the treaty ceded sovereignty, the treaty is implicitly portrayed as the foundation for the Crown's sovereignty. This means that *Law Alive* also suggests, albeit more subtly, that the Crown's sovereign legitimacy stems, at least to some degree, from the treaty.

Until the 1980s, the Crown did not look to the treaty as the moral or political basis for its sovereignty. However, growing challenges from Māori in the 1970s and 1980s forced the Crown to re-articulate this. This was supported by a shift in academic opinion. The Tribunal observed that from the 1970s "historians acknowledged that the rangatira signed and understood the Māori text of the treaty, and not the English one."<sup>232</sup> This had the effect of shifting the scholarship to better acknowledge Māori perspectives and has opened up debates about the nature of the treaty and its contemporary application.<sup>233</sup> This activism and scholarly attention to the treaty led to what Nan Seuffert has described as a "crisis of unity" in the construction of the nation, forcing the Crown to re-articulate its position.<sup>234</sup>

This pressure resulted in a discursive shift from the 1980s onwards. The Crown's view of its sovereignty as expressed in its submissions to the Tribunal is that the treaty, while not the legal source of Crown sovereignty, was a necessary step in the process; and was the Crown's means of fulfilling its self-imposed condition of acquiring Māori consent.<sup>235</sup> The view that Māori consented to British sovereignty is based on the continued minimising of the meaning of the Māori text and the Whakaputanga, and reliance on the English text and Pākehā interpretations of history.

Paul McHugh has written that the Crown's evolving construction of its own sovereignty in this period is a "struggle to inject a modern sense of historical legitimacy into a set of constitutional arrangements built upon a contrary foundation."<sup>236</sup> This is because the

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<sup>230</sup> Morris, above n 8, at 32, 82.

<sup>231</sup> At 82.

<sup>232</sup> Waitangi Tribunal, above n 1, at 441.

<sup>233</sup> At 441.

<sup>234</sup> Seuffert, above n 5, at 89.

<sup>235</sup> Waitangi Tribunal, above n 1, at 483.

<sup>236</sup> At 72.

Crown, judiciary, and academic writers increasingly emphasize the foundational nature of the treaty. At the same time, “the treaty” has been redefined in those same contexts to mean the “principles” of the treaty.<sup>237</sup> This makes it possible to both claim that the treaty is foundational, and to continue to ignore the Māori text. For this reason, Mikaere writes that rather than “minimising the significance of the Treaty and ignoring Te Tiriti altogether, the Crown now embraces both,” while ensuring that its sovereignty “remains undisturbed”.<sup>238</sup>

All three textbooks acknowledge the recent emergence of the orthodoxy that the treaty is foundational. For example, Joseph writes that “[t]he Treaty has not always enjoyed the national reverence it is currently accorded”, and that it has not generally been a focus of debate for Pākehā.<sup>239</sup> Palmer and Palmer note that “judicial attitudes to the Treaty of Waitangi have undergone a remarkable transformation in the last 100 years.”<sup>240</sup> Morris states several times that the treaty is now recognised as New Zealand’s founding constitutional document, while emphasising that this has not always been the case.<sup>241</sup> All three books make explicit comparisons between the attitudes expressed in the *Wi Parata*<sup>242</sup> and *Lands*<sup>243</sup> cases.<sup>244</sup> This suggests that, despite past flaws which can be relegated to history, New Zealand now has a progressive approach which recognises the treaty as foundational.

The dichotomising between present, enlightened, treaty jurisprudence, and explicitly racist views in the past has been discussed at length by David Williams in the context of his analysis of *Wi Parata*. He writes that, “Distancing modern law from the colonial past, we seem to want to reject ‘a simple nullity’ as often and as vehemently as possible.”<sup>245</sup> The decision is “convenient”, because it “enables us to lambast the awful nineteenth-century past, and implicitly praise our current more enlightened views.”<sup>246</sup> Williams points out that the orthodoxy that the treaty is only recognisable to the extent that it is

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<sup>237</sup> See generally Kelsey, above n 5.

<sup>238</sup> Mikaere, above n 5 at 138.

<sup>239</sup> Joseph, above n 6, at 51.

<sup>240</sup> Palmer and Palmer, above n 7, at 346.

<sup>241</sup> Morris, above n 8, at 32, 58, 74 and 82.

<sup>242</sup> *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).

<sup>243</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

<sup>244</sup> Joseph at 51-53; Palmer and Palmer at 346; Morris at 68.

<sup>245</sup> David V Williams *A Simple Nullity? The Wi Parata case in New Zealand Law & History* (Auckland University Press, Auckland, 2011), at 4.

<sup>246</sup> At 231.

incorporated by statute “is not all that far distant from continuing to categorise the treaty itself as a simple nullity.”<sup>247</sup>

Ranginui Walker has that argued that “[w]hile the government acknowledged the Treaty as the foundation of nationhood, it did so in a prevailing social climate of historical amnesia.”<sup>248</sup> As I have discussed, the same is true of the textbook writers. Pākehā orthodoxy, as reflected in the textbooks, claims that the treaty is the foundation of our constitutional arrangements and legitimises the Crown’s sovereignty; while continuing to downplay or overlook the meaning of the Māori text. The overlooking of history is in itself deeply problematic, as I discuss in the following Section.

### ***B The Hidden Violence of Colonisation***

Colonisation involves both the physical violence, and philosophical and institutional violence in the form of redefining and reconstructing reality. Moana Jackson has argued that colonisation “is a story of the imposition of a philosophical construct as much as it is a tale of economic and military oppression.”<sup>249</sup> He notes that unlike military power or disease, “the process of institutional imposition was always cloaked with a subtle and high-sounding rhetoric.”<sup>250</sup> This rhetoric masks the inherently violent nature of colonisation. The redefinition of the treaty in recent decades “is a story that has more to do with a continuing but covert colonization than it does with acknowledging the truth.”<sup>251</sup> This is because it continues to ignore the Māori text and assume the sovereignty of the Crown as self-evident.

Writing in the Australian context about the *Mabo* court’s refusal to address questions of sovereignty, Penelope Pether has argued that scrutinising the discourses of constitutional law and national identity allows us to unmask the mythologies of constitutional identity which repress the violence of colonisation.<sup>252</sup> She writes that by “analysing that space

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<sup>247</sup> At 232.

<sup>248</sup> Ranginui Walker “The Treaty of Waitangi in the Postcolonial Era” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) 56 at 57.

<sup>249</sup> Jackson, above n 5, at 2.

<sup>250</sup> At 3.

<sup>251</sup> At 7.

<sup>252</sup> Penelope Pether “Principles or Skeletons? *Mabo* and the Discursive Constitution of the Australian Nation” (1998) 4 *Law Text Culture* 115 at 134.

within law which asserts or legitimates its legality, a space of self-evidence and so of forgetting”, it may be possible to return to the repressed question of indigenous sovereignty, and generate a postcolonial constitutional theory.<sup>253</sup> I have attempted to unmask the constitutional discourse which says that the treaty ceded sovereignty in my analysis of the textbooks in Part IV.

Seuffert, writing in New Zealand, has also described constitutional repression and violence. She argues that the fictional unity of the New Zealand nation state is built on deception and violence. This began with the deceptive translation of the treaty, and has continued through the repression of the Māori text.<sup>254</sup> She argues that this repression is a necessary part of the unified narrative of New Zealand’s constitutional identity, that is, the narrative which says that New Zealand was founded on a cession of sovereignty by Māori.<sup>255</sup> She argues that legal deceptions “are not marginal asides in the dominant story, they are integral to that story”.<sup>256</sup> In my view, the textbooks also enact these legal deceptions; and as Seuffert writes, these deceptions are integral to the overall narrative of constitutional identity.

### ***C The Possibility of Imaginative Constitutional Transformation***

Constitutional transformation is the term used by Moana Jackson to describe the deep shift that is necessary in order to build a constitution grounded in the Whakaputanga and the Tiriti – as opposed to constitutional change, which involves tinkering with current arrangements.<sup>257</sup> The main discourse of constitutional change in New Zealand is strongly premised on the idea that Parliamentary sovereignty is a foundational concept that cannot be questioned. This means that the questions asked are narrow, and are about tinkering with the existing Westminster-style system; excluding the possibility of Tiriti based constitutional relationships, while continuing to emphasise the supposedly foundational

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<sup>253</sup> At 134.

<sup>254</sup> Seuffert, above n 5, at 69.

<sup>255</sup> At 77.

<sup>256</sup> At 93.

<sup>257</sup> Moana Jackson “Constitutional Transformation: An Interview with Moana Jackson” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 325.

nature of the treaty. As O'Hagan has pointed out, Parliamentary sovereignty is fundamentally irreconcilable with te Tiriti o Waitangi.<sup>258</sup>

The clash between “change” and “transformation” was apparent at a conference called “Building the Constitution” in 2000. Mikaere noted the strong resistance from the Pākehā attendees towards Māori contributions that centered te Tiriti. She noted that the Māori participants came up with a range of imaginative solutions, and that “By contrast, the feature that marked many of the Pākehā contributions to the discussion was a staggering lack of imagination and profound resistance to change.” There was a strong theme of “if it ain't broke don't fix it”, completely overlooking the continued insistence of the Māori attendees that the constitution was in fact broken.<sup>259</sup> This conference produced a book with 47 papers, six of which focused on the treaty.<sup>260</sup> Interestingly, the book resulting from the follow-up conference in 2010 contains 28 papers, only one of which is about the treaty.<sup>261</sup>

Another illustration is the recent Constitutional Conversation. In its background paper, “The Conversation so Far”, the treaty is not listed as an “element” of the constitution, but it is noted that it is increasingly “regarded as the founding document of government in New Zealand.”<sup>262</sup> Under the heading “foundations of the constitution”, are listed the rule of law, representative democracy and responsible government, and separation of powers.<sup>263</sup> The treaty is the next sub-heading. The information there claims that it “enabled the British to establish a government in New Zealand”.<sup>264</sup> In the chapter on the treaty, its recent history and contemporary role are set out, but there is no discussion of its context, meaning or effect in 1840.<sup>265</sup> For these reasons, in her submission to the Constitutional Advisory Panel, Susan Healy argued that “knowledge of the country's constitutional history is vital to informed discussion about our constitution”.<sup>266</sup>

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<sup>258</sup> Lydia O'Hagan “Parliamentary Sovereignty as a Barrier to a Treaty-Based Partnership” (LLM Research Paper, Victoria University of Wellington, 2014).

<sup>259</sup> At 88.

<sup>260</sup> Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Victoria University of Wellington, Wellington, 2000).

<sup>261</sup> Caroline Morris, Jonathan Boston and Petra Butler (eds) *Reconstituting the Constitution* (Springer, London, 2011).

<sup>262</sup> Constitutional Advisory Panel *New Zealand's Constitution: The Conversation So Far* (Ministry of Justice, September 2012) at 7.

<sup>263</sup> At 7-8.

<sup>264</sup> At 8.

<sup>265</sup> At 36-40.

<sup>266</sup> Susan Healy “Constitutional Conversation, Dr Susan Healy Contribution” at 2.

Jane Kelsey has written that “we as a Pākehā nation need to take our own debate about nation building seriously”.<sup>267</sup> She argues that colonial attitudes and patronising views towards Māori should not be acceptable “as a basis for nation building in the face of a documented history of colonial dispossession and cultural genocide.”<sup>268</sup> However, as Mikaere points out, genuine nation building is not possible if Pākehā continue to ignore uncomfortable history. She argues that “Pākehā need to own up to the truth about how they have come to occupy their position of dominance in this country – and to deal with it.”<sup>269</sup>

In my view, Kelsey and Mikaere are correct. It is vital that Pākehā learn the truth about the history of this country if we want to have meaningful conversations with Māori about appropriate constitutional relationships going forward. One aspect of learning the truth of New Zealand’s history is learning about the true context, motivations, and meaning of te Tiriti.

What is the role of public law textbooks in all of this? Tim Howard has pointed out, in canvassing the ways forward for Pākehā in response to the Tribunal’s finding, that education is particularly important. He writes that education “grounded in the real history of Aotearoa” is lacking both schools and universities.<sup>270</sup> Education about this history is necessary so that “younger people will be in more of a position to review how we Pākehā can be better in our relationships with tāngata whenua.”<sup>271</sup> Legal textbooks have a key role to play in this education, because as discussed in Part II, they are used as a general reference by many people; as well as shaping the discourses in which law students – potential future constitutional lawyers – learn about the constitution.

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<sup>267</sup> Jane Kelsey “Māori Political Legitimacy and Nation Building” (paper presented to Nation Building and Māori Development Conference, Hopuhopu, 30 August-1 September 2000) at 14, in Mikaere, above n 5 at 90. See also Jane Kelsey “Te Tiriti is the Constitution” in Heather Came and Amy Zander (eds) *State of the Pākehā Nation: Collected Waitangi Day Speeches and Essays 2006-2015* (eBook ed, Network Waitangi Whangarei, 2015) 34.

<sup>268</sup> At 14, in Mikaere, above n 5 at 90.

<sup>269</sup> Mikaere, above n 5 at 91.

<sup>270</sup> Tim Howard “A place in the circle” in Heather Came and Amy Zander (eds) *State of the Pākehā Nation: Collected Waitangi Day Speeches and Essays 2006-2015* (eBook ed, Network Waitangi Whangarei, 2015) 152 at 157.

<sup>271</sup> At 157.

Each of the textbooks gives give readers the sense that, first, the treaty was a cession of sovereignty; and secondly that it provides at least some of the basis for the legitimacy of the absolute sovereignty of the Crown. This contributes to discourses about constitutional change being confined within a narrow scope. Genuine constitutional transformation which honours te Tiriti requires an understanding of history and a willingness to engage – but the textbooks’ perpetuation of the myth of cession denies this possibility.

## *VI Conclusion*

As the Tribunal has confirmed, the treaty was not a cession of sovereignty. It would have been both legally and politically impossible for Māori to cede sovereignty in 1840. In the text of te Tiriti, the document that was signed by around 500 rangatira and Hobson, “rangatiratanga”, which can be roughly equated to sovereignty, was expressly retained – while making room for a Governor for Pākehā. For these reasons, the treaty cannot be the moral or political basis for the undivided sovereignty of the Crown.

The Tribunal’s finding was consistent with several decades of scholarly work – especially of historians but also some legal academics – on the treaty. Despite the existence of this scholarship, the three main public law textbooks all portray the treaty as a treaty of cession. This is concerning given the wide audience that these textbooks have, and the influence that they have in both describing and also shaping constitutional discourses.

The textbooks’ portrayal of the treaty as a cession of sovereignty is explicit, for Joseph and Morris, and more subtle for Palmer and Palmer. All three texts have two themes underpinning this narrative. First, they all fail to engage at all (Joseph and Palmer and Palmer) or adequately (Morris) with Māori law, history, and motivations for signing. Secondly, they all portray the English text as *the* treaty – in particular by downplaying the differences between the texts and the reasons for these differences; and by referring to the meaning of the English text as “the Treaty”.

The myth that the treaty ceded sovereignty is pervasive in Pākehā constitutional discourse, and the textbooks illustrate this. Each textbook uses the treaty as at least a partial basis for the legitimacy of the absolute sovereignty of the Crown. This allows the violent colonial process through which the Crown actually gained its power to remain hidden. It also has the effect of narrowing the parameters for discussions of future constitutional arrangements; making imaginative discussions of Tiriti-based constitutional transformation completely outside the scope of most Pākehā discussions.



By shedding light on these myths, it is my hope to open up space for Pākehā to engage with alternative constitutional discourses. The treaty *can* provide for a legitimate place for Pākehā and other tauwiwi in New Zealand – that is exactly what was intended. However, Pākehā have claimed far more than what was agreed to in 1840. Pākehā need to learn our own history and understand how we came to hold a position of dominance in this country. Only then can we engage in meaningful conversations with Māori about how this relationship might work moving forward.

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