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**THROUGH THE LOOKING GLASS: HOW TREATY OF
WAITANGI SETTLEMENTS REDEFINE THE CROWN**

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“When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean — neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master — that’s all.”

- Lewis Carroll *Through the Looking-Glass, and What Alice Found There*¹

I Introduction

A TREATY OF WAITANGI SETTLEMENTS

Treaty of Waitangi settlements for historic grievances are an unusual feature of New Zealand’s constitutional landscape. Constitutional scholarship since the inception of the Crown’s negotiated Treaty settlement policy in the late 1980s has tended to focus on its political origins,² its practical flaws,³ its effects on reconciliation and justice,⁴ and its justiciability.⁵ Each of these is important, but I wonder if, in focusing on these details, we have neglected to consider the constitutional changes these curious instruments effect.

Sir Kenneth Keith’s introduction to the Cabinet Manual above indicates that “policy and procedure in [the Treaty of Waitangi] area continues to evolve” but does not explicitly

¹ Lewis Carroll *Through the Looking-Glass, and What Alice Found There* (Macmillan, London, 1871).

² See generally Claudia Orange *The Treaty of Waitangi* (Bridget Williams Books, Wellington, 2011); Nicola R Wheen and Janine Hayward (eds), *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012).

³ See generally Carwyn Jones “The Treaty of Waitangi settlement process in Māori legal history” (PhD Thesis, University of Victoria (Canada), 2013) at 284-285; Craig Coxhead “Where are the negotiations in the direct negotiations of Treaty settlements?” 10 *Waikato Law Review* 13; Ani Mikaere “Settlement of Treaty Claims: Full and Final, or Fatally Flawed?” (1997) 17 *NZULR* 425; Malcolm Birdling “Healing the Past or Harming the Future? Large Natural Groupings and the Waitangi Settlement Process” (2004) 2(2) *NZJPIL* 259.

⁴ See generally Andrew Sharp *Justice and the Māori: The Philosophy and Practice of Māori Claims in New Zealand since the 1970s* (2nd ed, Oxford University Press, Auckland, 1997).

⁵ See generally Jessica Andrew “Administrative Review of the Treaty of Waitangi Settlement Process” (2008) 39(2) *VUWLR* 225.

refer to the Treaty of Waitangi settlement process or the settlements themselves.⁶ Parliament's recent inquiry to review New Zealand's existing constitutional arrangements makes only one mention of the Treaty of Waitangi settlement process in its survey of the sources and elements of New Zealand's constitution, and this only in the context as a trigger in the early 1990s for a different political conversation about Māori sovereignty generally.⁷

In Parliament, Members have spoken about the impact of Treaty of Waitangi settlements on New Zealand's national identity,⁸ and the opportunity they provide to record the history of Treaty of Waitangi breaches,⁹ but there has been very little reference to the process by any Member as being an exercise of any constitutional significance or an example of constitutional change, and no reference at all from a sitting Minister.

Some writers however, do signpost Treaty settlements and the Treaty settlement process as constitutional in character as distinct from the Treaty of Waitangi itself. For example, Mai Chen characterises Treaty settlements as “political accommodations that impact the status of the Treaty of Waitangi, other than through the vehicle of a major constitutional review”,¹⁰ and John Dawson describes the Ngāi Tahu settlement as a “constitutional property settlement”,¹¹ and Richard Boast observes that “a vital dimension of the Crown-Māori relationship since the Treaty of Waitangi has been the written agreement”.¹²

Boast's observation is thought-provoking in light of Jack Hodder's argument that writing down a constitution is an “act of politics” that “increases stress on pre-existing political

⁶ Cabinet Office *Cabinet Manual 2008* at 2.

⁷ Constitutional Arrangements Committee *Inquiry to review New Zealand's existing constitutional arrangements* (2005) AJHR I.24A at [48].

⁸ (13 August 2015) 707 NZPD 5831.

⁹ (11 June 2013) 691 NZPD 10907.

¹⁰ Mai Chen “The Advantages and Disadvantages of a Supreme Constitution for New Zealand: The Problem with Pragmatic Constitutional Evolution” in Caroline Morris, Jonathon Boston, Petra Butler (eds) (Springer, Berlin, 2011) 123 at 135.

¹¹ John Dawson “A Constitutional Property Settlement Between Ngai Tahu and the New Zealand Crown” in Janet McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 1999) 207.

¹² Richard Boast “Recognising Multi-Textualism: Rethinking New Zealand's Legal History” (2006) 37(4) VUWLR 547 at 581.

accommodations [and] presupposes the production of rules”.¹³ The Treaty of Waitangi is unquestionably constitutional but remains “unwritten” in New Zealand’s constitution, while Treaty settlements, superficially secondary, are codified in law. What is going on?

B PAPER OUTLINE

Carwyn Jones explains how Māori legal traditions influence the Treaty settlement process, and how Māori engagement with the “machinery of the state” in turn influences Māori legal traditions.¹⁴

In this paper I will argue that the reverse is also true, that the Crown, in its development of the Treaty settlement process over the past few decades, has engaged with Māori, Māori groups, Māori histories, and Māori world-views to such an extent that it has begun to take on their qualities. It has fallen through the looking glass.

To support this proposition I will briefly describe New Zealand’s constitutional arrangements, and explain how, viewed through a realist lens, they are always changing. I will then attempt to locate the Treaty of Waitangi and the Treaty settlement process within those arrangements, focusing on three features that I think are interesting:

1. The fundamental difficulty of identifying or defining the Treaty partners for the purposes of negotiating settlements;
2. The use of Treaty settlements as a tool for cultural redress; and
3. The implementation of Treaty settlements and their innovative instruments and institutions in legislation

Finally, I will argue that the operation or resolution of each of these features in practice effects significant constitutional change, especially in the way they distort or redefine our conceptions of the Crown.

C MARKING OUT THE CONSTITUTIONAL FIELD

1 Ordering and disordering

Definitions are important. They have an arbitrary and unsatisfying character but, in including and excluding matters, they “mark out a field”. The acts of inclusion and

¹³ Hodder, Jack “Limits to and Constraints on Writing Down a Constitution in a Small Society Used to Informality in its Politics” in James, Colin (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 434 at 434.

¹⁴ Carwyn Jones “The Treaty of Waitangi settlement process in Māori legal history” (PhD Thesis, University of Victoria (Canada), 2013) at 104.

exclusion themselves influence the matters being included or excluded.¹⁵ And so the classification of a document or rule as “constitutional” has normative force.

Llewellyn characterizes the constitution as “not the governmental machine at large, but rather its *fundamental* framework”, and notes that the difficulty for constitutional scholars was in “marking off how much and which portions are to be regarded as basic to the whole”.¹⁶

This accords with Salmond’s characterization of the distinction as one of degree, resolved for a given rule by evaluating how “important, fundamental, and far-reaching” it is.¹⁷ And both Llewellyn and Salmond, in agreeing that the exercise is one of making a distinction, harmonize with Griffith, who states, perhaps prosaically, that “the constitution is no more and no less than what happens [and] if nothing happened that would be constitutional also”,¹⁸ but observes that it was “in the conflicts” where politics happens, and that law is but one way of continuing or resolving those conflicts.¹⁹ Then there is the Unicorn, who, in a brief intermission from its own fight for a Crown, advises Alice how to manage Looking-glass cakes: “Hand it round first, and cut if afterwards.”

Palmer’s account is something of a synthesis of the ideas of Llewellyn, Salmond, and Griffith. Following Llewellyn, he argues that a constitution “continually exists in the actions, understandings and inter-relationships of those who operate it.”²⁰ In his view, a rule is constitutional in character if “it plays a significant role in influencing the generic exercise of public power”.²¹ More importantly, he suggests that there is “an important group of ‘public office-holders’ who are the primary interpreters, authoritative in practice, of an important set of New Zealand’s constitutional elements”.²²

¹⁵ Karl N Llewellyn “A Realistic Jurisprudence – The Next Step” (1930) 30(4) *Columbia Law Review* 431 at 432.

¹⁶ Karl N Llewellyn “The Constitution as an Institution” (1934) 34(1) *Columbia Law Review* 1 at 26.

¹⁷ Sir John Salmond and PJ Fitzgerald *Jurisprudence* (12th ed, Sweet & Maxwell, 1966) at 83.

¹⁸ JAG Griffith “The Political Constitution” (1979) 42(1) *MLR* 1 at 19.

¹⁹ *Ibid* at 20.

²⁰ Matthew Palmer “What is New Zealand’s constitution and who interprets it? Constitutional realism and the importance of public office-holders” (2006) 17 *PLR* 133 at 135.

²¹ *Ibid* at 137.

²² *Ibid* at 149.

2 *Marking out the constitutional field in New Zealand*

According to Colin James, New Zealand's constitution is "essentially British", and reflects British legal norms and values such as the rule of law.²³ It is "partly written and wholly uncodified",²⁴ "provisional from its inception",²⁵ and its development has proceeded in line with a sort of "incremental pragmatism".²⁶ Jack Hodder suggests that this type of untidy, unwritten, and informal incremental constitutional change is an appropriate custom in a small, diverse, and historically distinctive society.²⁷ The consequence of this approach, however, is that, sometimes, it is difficult to know that the constitution has changed, or even to say with any certainty what it is and was before.

So, what is constitutional and what is not? In New Zealand, we have a wealth of eloquent and authoritative statements, most of which contradict each other in some way. Read together, however, we might develop an intuition for where the field's boundary hedges might be. We might start with Sir Kenneth Keith's introduction to the Cabinet Manual, arguably a constitutional document itself:²⁸

A constitution is about public power, the power of the state. It describes and establishes the major institutions of government, states their principal powers, and regulates the exercise of those powers in a broad way.

He sets out a number of ways that constitutional changes might arise in New Zealand, and suggests that:²⁹

Some matters are better left to evolving practice rather than being the subject of formal statement. But such development, like other changes to the constitution, should always be based on relevant principle.

Colin James describes constitutional matter as ordering – of rights, decision-making, and politics.³⁰ Philip Joseph suggests that for a document to be known as "the Constitution" it

²³ Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) at 4.

²⁴ Constitutional Arrangements Committee, above n 7, at 84.

²⁵ Alex Frame "Beware the Architectural Metaphor" in James above n 23, 434 at 437.

²⁶ James, above n 23 at 10.

²⁷ Jack Hodder "Limits to and Constraints on Writing Down a Constitution in a Small Society Used to Informality in its Politics" in James, above n 23, 434 at 434.

²⁸ Cabinet Office, above n 6 at 1.

²⁹ Cabinet Office, above n 6 at 6.

³⁰ James, above n 23 at 3.

must be the “wellspring of the State’s authority”, the “source of its legitimacy”, and widely acknowledged”.³¹

There is Dicey’s definition that constitutional law “appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power”.³² So, while Dicey recognised that the “legal sovereignty” of Parliament” may be “subordinate to the political sovereignty” of the people, he did not recognise that it could be subject to any other constraint. In this view of the constitution there are no fundamental principles beyond those incorporated in convention or law – the Courts cannot look behind the veil of Parliament’s legislative competence.

This is an attractive analysis in the context of New Zealand’s more authoritarian Parliament, but it may be inadequate to account for the impacts world war, privatization, and globalisation have had on the operation of public power in reality. First, public power is no longer exercised exclusively by the sovereign in New Zealand – if it ever was. Reforms especially since the 1980s have established the dominance of economic norms and disciplines in the provision of public services. A fetishisation of efficiency, and a drive for deregulation, corporatisation, contracting out, and privatisation have blurred the distinction between public and private power.³³ There is now a general acceptance that the character and subject-matter of a particular power or action, rather than its source, is what makes it public for the purposes of transparency and justiciability.³⁴ Second, we can observe plain practical, political, and, possibly, legal constraints on Parliament.³⁵

In New Zealand, however, a Constitutional Advisory Panel, reporting in 2013, found no real public enthusiasm for any erosion of Parliamentary sovereignty, even where fundamental human rights were concerned.³⁶ So, despite the courts’ increasing use of

³¹ Philip Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Company, Sydney, 1993) at 99.

³² AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, New York, 1960) at 23.

³³ Philip Joseph “Constitutional Review Now” (1998) NZLR 85 at 88.

³⁴ See generally Mullan R0166 at 160; Thwaites R0188 at 35; Cane R0106 at 122; etc..

³⁵ See generally Joseph, above n 33; Jeffrey Goldsworthy *Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty* (2005) 3 NZJPIL; Sian Elias “Sovereignty in the 21st Century: Another Spin on the Merry-go-round” (2003) 14 PLR 148; Jeffrey Jowell “Parliamentary Sovereignty under the new constitutional hypothesis” (2006) PL 562.

³⁶ Constitutional Advisory Panel *New Zealand’s Constitution: A Report on a Conversation Report* (2013) at 54-55.

international instruments and norms as interpretive tools,³⁷ extrajudicial and obiter dicta murmurings for decades, strong academic voices, and Parliament’s scandalous violation of the rule of law in passing the New Zealand Public Health and Disability Amendment Act in 2013,³⁸ Parliament theoretically remains inflexibly supreme. And, Palmer notes, New Zealanders appear to continue to value Parliamentary sovereignty as a constitutional norm.³⁹

In New Zealand’s confusing constitutional landscape, where nothing is static and documents are always changing, the persistence of the doctrine, or at least the belief in it, might be better understood as a way of centering or locating power. This was the approach of the United Kingdom House of Lords in 2005 they rejected the doctrine on the basis of its inflexibility, but reaffirmed it as a “general principle” of the constitution instead. Another way to understand it might be to understand supremacy of law and supremacy of place as distinct, as Andrew Butler observes:⁴⁰

[S]upremacy of legislation is the principle that all legislation shall be regarded as valid and that none may be set aside by the courts... By contrast, parliamentary sovereignty is the principle that Parliament is the apex of the constitutional structure: it is the source of supreme law...

As McHugh notes, “Dicey’s “myth” has been useful even though it is rapidly becoming overtaken by the facts of modern-day (political) life.”⁴¹

This might seem altogether too abstract from our subject, but it is important. Beverley McLachlin, the Chief Justice of Canada, referring to New Zealand’s constitutional arrangements, describes how constitutions are “best understood as providing the normative framework for governance” and that this framework includes “unwritten” rules that are “essential to a nation’s history, identity, values and legal system”.⁴² It is

³⁷Mark Gobbi “Making Sense of Ambiguity: Some reflections on the use of treaties to interpret legislation in New Zealand” (2002) 23(1) Statute Law Review 47 at 47, 56; see also Melissa A Waters “Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties” (2007) 107(3) Colum. L. Rev. 628.

³⁸ Joseph, above n 33.

³⁹ Ibid.

⁴⁰ Andrew Butler “The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 is a Bad Model for Britain” (1997) 17 OJLS 323 at 340.

⁴¹ Paul McHugh “Constitutional Myths and the Treaty of Waitangi” [1991] NZLJ 316 at 317.

⁴² Beverley McLachlin “Unwritten constitutional principles: What is going on?” (2006) 4 NZJPIL 147 at 149.

important because, as a number of scholars of constitutional law have argued,⁴³ the Treaty of Waitangi, while “unwritten” in New Zealand’s law, “may indicate limits in our polity on majority decision making”.⁴⁴ As I will argue, Treaty of Waitangi settlements plainly do.

3 *Locating the Treaty of Waitangi in New Zealand’s constitutional landscape*

Dame Sian Elias observes that the notion of Parliamentary supremacy is not founded in logic or fundament in anything more than the peculiar political and legal history of England. She argues that the Treaty of Waitangi makes no mention of Parliamentary supremacy, and that:⁴⁵

On any view, the Treaty of Waitangi is critical in the history of New Zealand and its constitutional development. The application of theories based on historical tradition which is only in part ours should not be assumed.

Robin Cooke described the Treaty of Waitangi as “simply the most important document in New Zealand’s history”.⁴⁶ This speaks to its normative force but says little about its precise legal or constitutional effect. On that there is little consensus.⁴⁷ Joseph suggests that the Treaty is an instrument of cession with “enduring constitutional significance”, a “text for the performance of nation”.⁴⁸ Elsewhere, Keith has inquired whether there might be some types of decisions that are “in breach of the very basis of the argument that brought the Māori people into the Empire”.⁴⁹

⁴³ See generally Sian Elias “Something old, something new: Constitutional stirrings and the Supreme Court” (2004) 2(2) NZJPIL 121; Joseph, above n 33; Keith, above n 5; but see David Williams “The Treaty of Waitangi: A ‘Bridle’ on Parliamentary Sovereignty?” (2007) 22 NZULR 598 where his calls for such limits implies their absence.

⁴⁴ Cabinet Office, above n 6 at 2.

⁴⁵ Sian Elias “The Treaty of Waitangi and the Separation of Powers in New Zealand” in BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (1995) 206 at 213.

⁴⁶ Robin Cooke “Fundamentals” (1988) 5 NZLJ 1 at 1.

⁴⁷ Matthew SR Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008) at 359; Claudia Orange *The Treaty of Waitangi* (Bridget Williams Books, Wellington, 2011) at 11.

⁴⁸ Philip Joseph “The Treaty of Waitangi: a text for the performance of nation” (2004) 4(1) Oxford University Commonwealth Law Journal 1 at 1.

⁴⁹ Kenneth Keith “The Role of the Tribunal, the Courts and the Legislature” in Geoff McClay (ed) *Treaty Settlements: The Unfinished Business* (NZ Institute of Advanced Legal Studies and the Victoria University of Wellington Law Review, Palmerston North, 1995) 39 at 49.

An interesting characteristic of these arguments, as well as those of other leading constitutional scholars, is their lack of technical specificity. While this is partly a result of the Treaty's absence from New Zealand's "written" law, it is also likely a function of the Treaty's historical, cultural, and political significance.

So, Palmer argues, it is of little practical worth to evaluate the constitutional place of the Treaty of Waitangi "purely in abstract theoretical terms",⁵⁰ or, as Jackson puts it, "esoteric quibbling ... divorced from the real world".⁵¹ Similarly, Edward Durie, former Chief Judge of the Māori Land Court, observes that the Treaty "lacks the precision of a legal contract", instead describing it as a political compact "more in the nature of an agreement to seek arrangements along broad guidelines".⁵² We can, from these observations, those of participants in the settlement process, and those of the Court of Appeal in their various encounters with the Treaty principles, discern a theme. It recalls to us the wisdom of the White Queen that "It's a poor sort of memory that only works backwards." Instead, to understand the Treaty and its place in New Zealand's constitutional arrangements as a framework for a forward-looking partnership we must understand "the reality of how power is exercised in practice".⁵³

This realist analysis might be the approach that takes most into account the reality that, whatever the Treaty did or said it did, when Māori lodge claims in the Waitangi Tribunal they do not do so merely on the basis of alleged breaches of a document of uncertain legal status. They do so within a marked out field of political and negotiated dispute resolution within a marked out field of political and historical Treaty issues. More importantly, despite their uncertain legal position, they lodge their claim partly on the basis of what they believe the political, institutional, and constitutional actors will do in fact.

4 Felt importance, the judicial-executive dialogue, and the negotiated settlement policy

Llewellyn's wider criteria for designating a practice as "constitutional" are existence, highly probably continuance, felt importance, and constitutional function.⁵⁴ Palmer argues that this approach "regards the reality of the behaviour and beliefs of those who

⁵⁰ Palmer, above n 4747, at 19.

⁵¹ Moana Jackson "Where does sovereignty lie?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000).

⁵² Joseph, above n 48 at 5.

⁵³ Palmer, above n 47 at 19.

⁵⁴ Llewellyn, above n 16 at 26.

operate a constitution as telling us what the content of the constitution *really is*".⁵⁵ This approach might also be seen as an implicit recognition of the political sovereignty of the electorate because the behaviour and beliefs of non-judicial constitutional actors tend to be filtered or distorted by political accountability.

In that vein Jeremy Waldron inquires whether New Zealand has gradually redefined the Treaty and its constituents and charges sufficiently to excuse the Crown's performance of it as frustrated by a change in circumstances. He refers, among other things, to the fact that "the way New Zealanders talk about the Treaty indicates that it is not immune from the impact of changes in circumstances."⁵⁶ But Waldron's inquiry is based on a false premise. Williams has identified "an overt process of constitutionalising the Treaty" in both legislation and common law in New Zealand's legal history, especially since 1975.⁵⁷

This deliberate development of the Treaty's constitutional status in the last quarter of the 20th century was, in part, a reaction to increasing Māori political influence, which itself was partly influenced by international developments – decolonisation in Africa, Asia, and the Pacific, indigenous and human rights movements in the United States and Canada, and the changing focus of the United Nations.⁵⁸ Māori, through a combination of organic and organised engagements with the still distinctly British state, educed symbolic and substantial changes.

As Hickford explains, these types of "indigenous engagements" have the potential to challenge established discourses and constitutional norms. This disruption has been observed to transform the "politics of accommodation or recognition" of indigenous polities into a "politics of reconciliation or intersection".⁵⁹ And, as I will argue later, this transformation extends beyond politics to the very character of the executive.

⁵⁵ Palmer, above n 20 at 20.

⁵⁶ Jeremy Waldron "The Half-Life of Treaties: Waitangi, Rebus Sic Stantibus" (2006) 11 Otago Law Review 161 at 166.

⁵⁷ Richard Dawson *The Treaty of Waitangi and the Control of Language* (Institute of Policy Studies, Wellington, 2001).

⁵⁸ Orange, above n 2 at 225-234.

⁵⁹ Mark Hickford "The Historical, Political Constitution – Some Reflections on Political Constitutionalism in New Zealand's History and its Possible Normative Value" (2013) 4 New Zealand Law Review 585 at 595.

This transformation is visible in two important developments: the Court of Appeal's 1987 exposition of the "principles" of the Treaty of Waitangi in the *Lands* case;⁶⁰ and the 4th Labour government's initiation of a negotiated settlement policy.

There is extensive literature about the *Lands* case.⁶¹ For our purposes it is enough to state that it concerned a statutory reference to the "Principles" of the Treaty of Waitangi in the State-Owned Enterprises Act 1986, and the Court of Appeal's lucid articulation of what those principles might be. Superficially, the *Lands* case appears to be of limited scope – the Treaty principles only apply where Parliament makes express reference to them – but the Court of Appeal's framing of the matter as one of constitutional importance was significant in the minds of officials.⁶² They perceived a political likelihood of the Treaty principles being given legal force and so acted in anticipation to accommodate this new perceived reality. Government agencies began to make visible efforts to review their policies, procedures, and publications for compliance with their perception of the Treaty principles. McHugh writes:⁶³

This was less a result of the actual court decisions ... than the outcome of the spectre that the cases seemed to be raising ...

And:⁶⁴

[I]t was a case of constitutional actors perceiving an obligation and adjusting their behavior in light of it.

Former Minister of Treaty Negotiations Mark Burton reflects that, for him as a decision-maker, the principles articulated in the *SOE* case and the reports of the Waitangi Tribunal were indelible.⁶⁵

This accords with Palmer's account of constitutional interpretation,⁶⁶ and his observation that "much of the effect of the Treaty of Waitangi on the reality of the operation of New

⁶⁰ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

⁶¹ See generally Jacinta Ruru (ed) "*In Good Faith*": *Symposium proceedings marking the 20th anniversary of the Lands case* (New Zealand Law Foundation, Wellington, 2008).

⁶² Paul McHugh "Treaty Principles: Constitutional Relations Inside a Conservative Jurisprudence" (2008) 39(1) VUWLR 39 at 67.

⁶³ *Ibid.*

⁶⁴ *Ibid* at 68.

⁶⁵ Mark Burton "Impact on Government – A Political Perspective" in Jacinta Ruru (ed) "*In Good Faith*": *Symposium proceedings marking the 20th anniversary of the Lands case* (New Zealand Law Foundation, Wellington, 2008) 51 at 53-54.

Zealand's constitution in the past twenty years has occurred through its effect on executive government."⁶⁷ This should not be surprising – this type of change is a feature of New Zealand's constitutional arrangements.⁶⁸

D WHY IS THIS IMPORTANT?

Palmer provides a lucid account of the importance of understanding whether something is constitutional.⁶⁹

Whether a matter is “constitutional” can affect the behaviour and decisions of those able to make decisions in relation to that matter – politicians, officials and judges. And, relatedly, whether a matter is “constitutional” can also affect the public scrutiny that constitutional issues engender.

History provides another: the occasionally sudden and often gradual dispossession of Māori land and, with it, mana, emerged from New Zealand's incremental, piecemeal, pragmatic constitutional background.

The Treaty of Waitangi settlement process in practice both engages and removes constitutional rights of large natural groupings of Māori, often arbitrarily, in pursuit of ends – fast-tracking, fiscal-caps, finality – which may not justify the means. As a matter of economic reality and legislative fact, a Treaty settlement represents a large redistribution of resources to Māori post-settlement entities, which are constituted to promote a “strong autonomous economic base” for their members.⁷⁰ As a matter of political reality, assessing a community's economic base can be a useful heuristic for evaluating its political power.⁷¹

⁶⁶ Palmer, above n 20.

⁶⁷ Palmer, above n 47 at 263.

⁶⁸ See for example the change in the attitudes of public agencies and public servants as a result of Parliament's articulation of the principles of open government in various pieces of legislation: Sir Kenneth Keith “Open Government in New Zealand” (1987) 17 VUWLR 333 at 335. Another example might be the *Saxmere v Wool Board* [2009] NZSC 72 line of cases which continue to influence risk-averse public agencies beyond the apparent scope of their ratios.

⁶⁹ Palmer, above n 47 at 263.

⁷⁰ *Ibid* at 252.

⁷¹ Meredith Gibbs “New Zealand's Treaty of Waitangi Settlement Process” in Mark Gibney, Rhoda E Howard-Hassman, Jean Marc Coicaud, Niklaus Steiner (eds) *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, 2008) 154 at 165.

Wilson notes that a disproportionate number of people who are economically dependent on the state for welfare are Māori, and that one of the impacts of New Zealand's economic policies has been that dependents "are not entitled to the same rights of citizenship".⁷² The allocation of rights of citizenship is unmistakably constitutional in character. Finally, Treaty of Waitangi settlements have the potential to effect significant constitutional change – for example, redrawing cultural and political borders, the creation of new types of statutory entities, the redefinition of sovereignty, and arguably enlarging New Zealand's constitutional preamble - with little guiding principle.

In this context it seems unusual that we do not appear to have a full understanding of the Treaty settlement process let alone a comprehensive account of its constitutional impacts. This paper does not remedy that, but I hope it signals that the process, artefacts, and outcomes of the process are significant in New Zealand's constitutional arrangements.

II Identifying the Treaty partners

A MARKING OUT THE FIELD

It seems axiomatic that negotiations are (or at least begin as) a dialogue about an exchange between more than one entity. And it seems to follow that if we seek to understand or assess a negotiation and its outcomes against any criteria then we must be able to clearly identify the participating entities. And of the Treaty of Waitangi the common understanding and certainly the common lexis is that of a compact between Māori and the Crown. Unhappily, the reality is far less clear.

Fencing off definitions for the Treaty partners is no easier than marking out the constitutional field. It is obscured by the Treaty text, the corporate nature of the Crown, Crown actors' incidental and occasionally deliberate obfuscation of the phrase "the Crown", and the complex social, cultural, historical, and demographic aspects of Māori society. In fact, even proposing a broad definition for Māori society is difficult – the demonym "Māori" itself is a relative term, initially used as a signifier of ordinariness in response to the arrival of European settlers.⁷³ And, not surprisingly in the context of New Zealand's constitutional arrangements, any definition is subject to the same inconstancy as its markers we use to derive it. Those markers – institutions, documents, individuals,

⁷² Margaret Wilson "A Path to Constitutional Change" in Ken S Coates and PG McHugh (eds) *Living Relationships: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 247 at 250.

⁷³ Sharp, above n 4 at 52; and see generally Mason Durie *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Oxford, 1998).

groups, relationships, and evidence of felt importance – in turn are subject to reflected distortion by the definition itself.

Yet identifying the Treaty partners is both morally and procedurally important. If the Treaty is a fundamental document then the existence and identity of its parties must be fundamental also. Rights and duties are contextual and we conceive of them differently at different levels of corporate abstraction. If the Treaty operates as a high source of rights, privileges, duties or obligations, fiduciary or otherwise, then we should be able to identify to whom those attach. And we should be able to articulate on whom and at what level of abstraction the articles or the principles of the Treaty of Waitangi are incumbent. Put another way: Who has standing and who can they petition for justice?

More vexingly, for political and practical reasons, identifying the Treaty partner is not the end of the inquiry. Identifying the appropriate *negotiating* partner is even more fraught and controversial.⁷⁴ First, there is no requirement for the identity or membership of the negotiating entity to align with that of the Treaty partner. Second, the suitability of an entity to participate in settlement negotiations is determined entirely by the Crown. This makes the very definition of the Māori negotiating partner subject to negotiation.

In this section I will describe some of the difficulties in identifying the Treaty partners and negotiating entities, and explain how these difficulties and their resolutions have a distorting effect not just on Māori and Māori legal institutions but on the constitution and the Crown as well.

B THE CROWN TREATY PARTNER

1 Obfuscation

In New Zealand, the executive and the legislature have been historically cavalier, if not deliberately obfuscatory, in their use of the phrase “the Crown”. The definition is further complicated by the many forms and sources of executive power – even relatively simple Māori issues might engage multiple government and quasi-government agencies at local and central levels.

⁷⁴ Worse, as Craig Coxhead observes, the term “negotiating” may be more aspirational than descriptive; see Craig Coxhead “Where are the negotiations in the direct negotiations of Treaty settlements?” 10 *Waikato Law Review* 13.

Noel Cox notes that legislation refers to “Her Majesty the Queen” and “the Crown” apparently interchangeably,⁷⁵ and that the Crown is now understood as “the umbrella under which the various activities of government are conducted, and the representative with whom ... Māori may negotiate as a Treaty of Waitangi partner.”⁷⁶ Hickford notes that the phrase “the Crown” itself is dangerous in its concealment of the diverse range of interests and motivations of its constituent parts.⁷⁷ Hayward argues that the executive has engaged in this aggregation (or, more accurately, part-aggregation) in using the phrase “the Crown” to imply that “something ‘other than’ government is the Treaty partner”.⁷⁸

This rhetorical transformation appears to have been effective, but it has not solely been the endeavour of the executive. A pilot study by Cris Shore and Margaret Kawharu found that both Māori and the Crown make tactical use of the concept because “its ambiguity is itself a political resource” as a “convenient ‘Other’ for both parties”.⁷⁹ Hickford recounts that “for some Māori politicians, the incoming Crown from 1840 was also *their* Crown” as “a metaphor to be invoked”.⁸⁰ And, Philip Joseph argues, the participation of the Crown adds gravitas to the Treaty settlement process despite the Crown possibly being a different entity than the Crown that signed the Treaty in 1840.⁸¹

Nevertheless, Dawson argues, the government’s use of the phrase “the Crown” has negative effects on the public’s understanding and potentially serious implications for Māori.⁸²

⁷⁵ Noel Cox “The theory of sovereignty and the importance of the Crown in the realms of the Queen” (2002) 2(2) *Oxford University Commonwealth Law Journal* 237 at 238.

⁷⁶ *Ibid* at 242.

⁷⁷ Mark Hickford “John Salmond and Native Title in New Zealand: Developing a Crown theory on the Treaty of Waitangi, 1910-1920” (2007) 38(1) *VUWLR* 853 at 904.

⁷⁸ Janine Hayward “Who Should Be Head of State?” in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000), 267 at 274.

⁷⁹ Cris Shore and Margaret Kawharu “The Crown in New Zealand: Anthropological Perspectives on an Imagined Sovereign” (2014) 11(1) *Sites: New Series* 17 at 35.

⁸⁰ Mark Hickford “The Historical, Political Constitution – Some Reflections on Political Constitutionalism in New Zealand’s History and its Possible Normative Value” (2013) 4 *New Zealand Law Review* 585 at 592.

⁸¹ Joseph, above n 48 at 18.

⁸² Dawson, above n 57 at 194.

many of whom ... have an alternative conception of the Crown and whose progress in treaty negotiations may be inhibited by the prevailing interpretations of the Crown and the obstacles to future development which these interpretations create.

We can see a stark example of Māori's "alternative" conception of the Crown in Māori groups' travelling to England in the early 20th Century to petition the Queen in person for protection. And we can see a telling example of the Crown's reinforcement of the ambiguity in the fact that apologies in Treaty settlements are attributable to the New Zealand Crown. So, when Queen Elizabeth II delivered a spoken apology to Waikato Māori in 1995 it was not attributable to her personally,⁸³ and had, in fact, been agreed by the New Zealand Crown negotiators as part of the settlement deed some months earlier.⁸⁴

2 *In international relations*

The ambiguous treatment of the term "the Crown" may also be a factor in the conception of the Treaty and subsequent negotiations and settlements as "quasi-diplomatic"⁸⁵ as between the Crown's international or corporate personality and Māori polities rather than as administrative as between government decision-makers and subjects. This also has potentially serious implications for Māori and Māori groups affected by Crown decisions throughout the negotiation, settlement, and post-settlement process. I will discuss this in more detail below.

3 *A simpler approach?*

Meredith Gibbs answers the question simply on the basis that the British party to the Treaty was Queen Victoria, and that there was a transfer of responsible government in Māori matters from the Queen to New Zealand in 1863:⁸⁶

Therefore, the enduring notion of "the Crown" can clearly be established, and the present entity responsible for providing redress for breaches of the Treaty is the Crown in right of New Zealand, in practice the government of the day.

⁸³ Noel Cox "The "The Treaty of Waitangi and the Relationship between Crown and Maori in New Zealand" (2002) 28(1) Brooklyn Journal of International Law 123 at 149.

⁸⁴ Her Majesty the Queen in right of New Zealand / Waikato-Tainui *Deed of Settlement* (22 May 1995).

⁸⁵ Kirsty Gover and Natalie Baird "Identifying the Māori Treaty Partner" (2002) 52(1) The University of Toronto Law Journal 39 at 39.

⁸⁶ Meredith Gibbs "New Zealand's Treaty of Waitangi Settlement Process" in Mark Gibney, Rhoda E Howard-Hassman, Jean Marc Coicaud, Niklaus Steiner (eds) *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, 2008) 154 at 158.

This approach is useful because it acknowledges practice and appears to be the closest approximation of the reality that Māori groups experience. For example, hapū seeking to challenge the negotiation process might variously petition their neighbouring hapū, the iwi organisation involved, the Tribunal in its judicial function, a Parliamentary select committee, or the Courts, but it will be a Minister of the government of the day that signs the deed and puts the Bill to Cabinet. However, it is unsatisfactory in that it begs the question in avoiding a definition of the Crown beyond its presumed embodiment in the Queen.

4 *A holist realist approach?*

We might instead adopt and adapt Sir Kenneth Keith's "bottom-up" view of power. He reflects that there are "areas of power, of autonomy, of influence, even of law, created by groups of individuals, distinct from states, coming together for mutual advantage".⁸⁷ These groups may have existed, in form or substance or both, before the state itself, and maintain, within their bounds, their own rules and repositories of knowledge. In the context of Māori, he recognises that "autonomous Māori institutions can and do have a role within the wider constitutional and political system".⁸⁸ This is an attractive view but I suggest that it does not go far enough to recognise and account for the potential (and proven capability) of these groups, and in fact any group, to inform and redefine power and effect significant constitutional change.

It is almost self-evident that groups, in their interactions with individuals and states, change them and are changed themselves. The changes range from trite – for example, before the interaction the histories of the state and the group did not record an interaction, now they do – to fundamental – for example, the group is now incorporated into the state. And the groups, through their existence and operation and interactions, frame, animate, and in some ways become the state.⁸⁹

⁸⁷ Keith, above n 49 at 40.

⁸⁸ *Ibid* at 47.

⁸⁹ This recalls a passage from GWF Hegel's *Philosophy of Nature* (Vol 3, Routledge, New York, 1970) at 368:

The relation of one individual to another of its kind is the substantial relationship of the genus. The nature of each permeates both, and both find themselves within the sphere of this universality... Consequently, a contradiction occurs; the universality of the genus, which is the identity of the individuals, is different from the particular individuality of these individuals.

In this way we might conceive of Treaty relationships as distinct from the Treaty text or even the Treaty partnership. They are the mauri or animating force of New Zealand's constitution. Through this lens we observe Māori groups recognising and interacting with and redefining the Crown in all its forms, from without as Treaty partners and within as subjects,⁹⁰ and we see a Crown that exists today not only because it has endured in law, but also because Māori, as subjects and parties to the relationships continue to recognise something like it as existing. Finally, their recognition of the Crown, as it exists today, as the Treaty partner is strengthened by the fact that they have bought into it, changed it, and, to distort a phrase, mixed their labour with it. They are stakeholders.

C THE CROWN NEGOTIATING PARTNER

For claimants, identifying the Crown *negotiating* partner seems relatively simple. It is the Minister for Treaty of Waitangi Negotiations in right of the Crown of New Zealand.

The Minister appoints a negotiating team and proceeds within a loose, but relatively stable, policy framework with the advice and support of the Office of Treaty settlements (“OTS”). OTS publishes a statement of the policy framework in *Ka tika ā muri, ka tika ā mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*,⁹¹ popularly referred to as “*The Red Book*”.

This framework articulates the Crown's negotiating “guidelines” intended to ensure that settlements are “lasting and acceptable to most New Zealanders”. These are:⁹²

- That the Crown will “explicitly acknowledge historical injustices” arising prior to 1992;
- That settlements will not “create further injustices”;
- That the Crown must act in the interests of all New Zealanders;
- That settlements must be “fair, achievable, and remove the sense of grievance”;
- That the Crown will deal “fairly and equitably” with claimants;

⁹⁰ Treaty of Waitangi, art 3.

⁹¹ Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (2015) [*The Red Book*].

⁹² *Ibid* at 24.

- That settlements will not affect Māori entitlements as New Zealand citizens or their ongoing rights under the Treaty; and
- That settlements will “take into account fiscal and economic constraints and the ability of the Crown to pay compensation”.

These are “complemented” by the Crown’s negotiating “principles” “intended to ensure that settlements are fair, durable, final and occur in a timely manner.” These are:⁹³

- That negotiations will be “conducted in good faith, based on mutual trust and co-operation towards a common goal”;
- That any settlement will restore and strengthen the relationship between the Crown and Māori;
- That any redress will “relate fundamentally to the nature and extent of breaches

The guidelines and principles are similar to but distinct from the principles of the Treaty of Waitangi articulated in the *SOE* case and elsewhere in Crown-Māori discourse. These principles and guidelines have their source in the executive’s swift response to the Courts’ articulation of the principles in the *SOE* case discussed above.⁹⁴ It is notable also that the wording and relative position of the guidelines and principles in the text seem to indicate that the principles are subordinate to the guidelines.

OTS has a number of statutory functions but its authority to issue *The Red Book* and to oversee and participate in the mandating, negotiation, and drafting of the Treaty of Waitangi settlements is non-statutory.⁹⁵ The actual source of these powers, and the power of the Minister to negotiate settlements at all, is unclear. Baden Vertongen suggests that the authority resides in the prerogative power,⁹⁶ while John Dawson argues that *The Red Book* “is not issued under ... any obvious prerogative power”.⁹⁷ Fostering this ambiguity may be a deliberate strategy to ensure the Treaty settlement process remains outside the

⁹³ Ibid at 25.

⁹⁴ Nicola R Wheen and Janine Hayward “The Meaning of Treaty Settlements and the Evolution of the Treaty Settlement Process” in Nicola R Wheen and Janine Hayward (eds), *Treaty of Waitangi Settlements* (Bridge Williams Books, Wellington, 2012) 13 at 19.

⁹⁵ Baden Vertongen “Legal Challenges to the Treaty Settlement Process” in Wheen and Hayward, above n 94, 65 at 68.

⁹⁶ Ibid.

⁹⁷ John Dawson and Abby Suzko “Courts and Representation Disputes in the Treaty Settlement Process” (2012) *New Zealand Law Review* 35 at 52.

supervision of the courts, although it is interesting to note that the Waitangi Tribunal is developing its role as a supervisor of the negotiation process using its limited judicial function. It also seems clear that the Crown, with or without the Office of Treaty Settlements, could decide to refine or change the general settlement process unilaterally, even during a negotiation established under the existing process.

The Crown negotiating team usually consists of a core group of senior Crown officials – an OTS manager and, commonly, representatives from Treasury and the Department of Conservation – and is led by a Chief Crown Negotiator, usually a contractor.⁹⁸ The OTS manager coordinates the negotiations and engages specialist advisors, independent facilitators, lawyers, and other interested parties as required.⁹⁹ Before 2008 Chief Crown Negotiators took instructions from OTS but they now report directly to the Minister and have a much broader mandate to use their influence, experience, and networks to seek novel and sustainable settlement outcomes.¹⁰⁰ This unheralded change itself has a significant impact on the Treaty settlement process in practice.

To avoid complications and duplication of effort relating to delegation and devolution of Crown power OTS requires an “all-of-Government” approach to settlement negotiations. It believes that the government is the only party capable of delivering an agreed settlement in an efficient way.¹⁰¹ There are good reasons for this approach. It arguably maps more closely to the Treaty conception of the Crown as a single personal or corporate entity, and this is confirmed by accounts from participants in the Treaty settlement process.¹⁰² It also allows the negotiating team and the Minister to more easily co-ordinate, trade-off, and balance engagements and post-settlement work across a range of Ministerial portfolios and agencies. However, it also has a tendency to flatten the dispute by failing to recognise the different motivations and histories of different corporate Crown personae.

⁹⁸ *The Red Book*, above n 91, at 57.

⁹⁹ Interested parties commonly include the Treasury, the Department of Conservation, the Crown Law Office, the Ministry of Fisheries, the Ministry for the Environment, the Ministry for Culture and Heritage, and Land Information New Zealand.

¹⁰⁰ Dean Cowie “The Treaty Settlement Process” in Nicola R When and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) 48 at 50.

¹⁰¹ *The Red Book*, above n 114, at 97; Ministry of Justice *Briefing for the Incoming Minister Vote Treaty Negotiations* (October 2014) at 18.

¹⁰² See generally Crown Forestry Rental Trust *Māori Experiences of the Direct Negotiation Process* (Wellington, 2003).

D THE MĀORI TREATY PARTNER

1 Overview

Orsman, drawing on Schmitt’s theory of constituent power, argues that the Treaty of Waitangi represents a “fundamental political decision” by Māori to constitute (or at least contribute to the constitution of) the New Zealand state with reservations for customary authority over Māori.¹⁰³ If this interpretation is correct, we might conceive of the entire constituency of Māori as the Treaty partner. Against this, Paul McHugh argues that the Treaty was not a compact between a race and some conception of the Crown, but “between a group of tribal political formations represented through their customary leaders”.¹⁰⁴ While McHugh’s account is likely closer to historical truth, it is difficult to reconcile with executive, legislative, or judicial truths. In legislation Parliament recognises a “special relationship” between the Crown and Māori,¹⁰⁵ and the general vocabulary of Treaty matters in the public sector tends to focus on Māori as a unified and cohesive political group. In the judiciary, courts are limited in their scope to disputes between parties, and complicated issues of standing and jurisdiction over Māori affairs means the matter is considerably confused.

2 The Waitangi Tribunal as a source of truth

The Waitangi Tribunal has ‘exclusive authority’ to determine the meaning and effect of the Treaty as embodied in the 2 texts’.¹⁰⁶ In its 1998 *Te Whānau o Waipareira Report* the Tribunal stated:¹⁰⁷

The Treaty of Waitangi was signed by rangatira of hapu, on behalf of all Māori people, collectively and individually.

...

An approach that limits Māori rights by reference to the tribal arrangements of 1840 is no more justifiable in our view than one that would limit the Crown’s right of governance to governance according to 1840 standards. At the time of the Treaty, everything lay in the future...

¹⁰³ Jessica Orsman “The Treaty of Waitangi as an Exercise of Māori Constituent Power” (2012) 43 VUWLR 345 at 357.

¹⁰⁴ McHugh, above n 62 at 50.

¹⁰⁵ Te Ture Whenua Māori Act / Māori Land Act 1993.

¹⁰⁶ Treaty of Waitangi Act 1975, s 5(2).

¹⁰⁷ Waitangi Tribunal *Te Whānau o Waipareira Report* (Wai 414, 2007) at [sum.6]

Brookfield argues that, as a matter of historical fact, it is almost certainly incorrect that rangatira of hapū intended to sign “on behalf of all Māori people, collectively and individually”.¹⁰⁸ As a matter of political and historical reality, however, regardless of the intent or understanding of the constitutional effects of the Treaty in 1840, its actual effect was to gradually subject all Māori to the Crown.¹⁰⁹ This creeping colonial dominion applied even to hapū that did not sign the Treaty, including some which were subsequently at war with the Crown and signed separate instruments of international character with the Crown post-1840.¹¹⁰

The Tribunal’s characterisation of Māori as a single polity at 1840 is a maneuver. Although the Treaty of Waitangi Act allows any Māori individual to lodge a claim,¹¹¹ the intent of the maneuver appears to be to broaden the scope of its moral jurisdiction, an assertion of its moral authority to hear claims and make declarations relating to urban Māori who are no longer closely involved with their ancestral hapū but for whom the effects of Treaty breaches remain deeply felt. In the context of a Treaty settlement process subject to intense scrutiny it appears an effective way to grant the Crown political cover to negotiate with an entity that by definition could not possibly have existed in 1840 let alone signed the Treaty.

This conclusion suggests that we cannot and should not conceive of the Treaty partners as static, and, confusingly, it suggests that rights and duties, of both Māori and British origin, descend from the original Treaty partner by some unknown thread or principle – perhaps whakapapa, perhaps poverty or pain. One way of resolving this confusion might be to understand the Treaty text and its principles and penumbra as no longer a compact between entities but as fundamental custom underlying the constitution. We might conceive of this as an extension or annex to Moana Jackson’s conception of a constitution as:¹¹²

¹⁰⁸ FM Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999) at 105.

¹⁰⁹ Richard Boast, above n 12 at 548.

¹¹⁰ *Ibid* at 547.

¹¹¹ Treaty of Waitangi Act, s 6(1).

¹¹² Malcolm Mulholland and Veronica Tawhai “Constitutional Transformation: an Interview with Moana Jackson” in *Weeping Waters: the Treaty of Waitangi and Constitutional Change* (University of Hawaii Press, Wellington, 2010) 325 at 325.

... just a kawa or the rules that people make to govern themselves. The kawa of the marae is the constitution of a marae; it's the rules that govern how people should behave on a marae.

The Tribunal's statement, then, becomes more than simply a practical use of its interpretive power, but recognition of the Treaty of Waitangi as a "constitutional standard".¹¹³

There remains the problem, however, of the location of the Waitangi Tribunal itself. We might ask whether a statutory commission of inquiry, superficially independent, but a function of the executive, is an appropriate source of truth about the nature or identity of the Māori Treaty partner. Consider Commons' observation that changing definitions is the simplest and most natural way to change a constitution, one that allows people to "go on believing in unchanging entities, and yet be practical." It is, he wrote, "this tightening of procedure which gradually converted the prerogative of the King into the sovereignty of the citizen".¹¹⁴ Recall also Hodder's comment that writing down a constitution is an "act of politics". Is the definition of the Māori Treaty partner for the executive to decide?

The Tribunal's jurisdiction is subject to significant distortions. First, its legal authority to determine meaning is limited to the scope of its enabling legislation.¹¹⁵ And, as Brookfield observes, a judicial body "can only uphold the legal order of which it is a part".¹¹⁶ Second, its pronouncements and recommendations are, with few exceptions, non-binding on the claimants or the executive, and rarely subject to judicial review, enabling it to exercise the type of creative didactic revisionism not unknown to Treaty jurisprudence at common law. This is not surprising, as McHugh argues, judicial bodies can only examine the past through the lens of the claims and evidence in front of them,¹¹⁷ but it is distorting.

Third, while the Tribunal appears to exercise judicial and constitutionally important functions, its continued scope, powers, and existence are not guaranteed. It is funded by

¹¹³ Brookfield, above n 108 at 166.

¹¹⁴ John R Commons *Legal Foundations of Capitalism* (MacMillan, New York, 1924) at 373.

¹¹⁵ Treaty of Waitangi Act 1975, s 5(2).

¹¹⁶ Brookfield, above n 108 at 166.

¹¹⁷ PG McHugh "The Historiography of New Zealand's Constitutional History" in Philip Joseph *Essays on the Constitution* (Brookers, Wellington, 1995) 344 at 358.

the Crown, and, to borrow a phrase from Sorrenson,¹¹⁸ governments have been “clipping the wings” of the Tribunal in a number of ways.

The most obvious of these is that Parliament frequently amends the Treaty of Waitangi Act, and government have threatened to amend or repeal peripheral legislation to curtail Tribunal jurisdiction.¹¹⁹ Initially these amendments expanded the Tribunal’s jurisdiction: first to consider historical claims;¹²⁰ then to grant special powers relating to state-owned land.¹²¹ However, since 1992, when Parliament implemented the first major post-Tribunal settlements in legislation, Settlement Acts have included finality provisions to remove the jurisdiction of the Tribunal to consider settled claims.¹²²

Governments have also developed strategies to avoid the Tribunal’s jurisdiction altogether, for example, selling only the rights to use land in a specific way to avoid the Tribunal’s statutory supervision over the selling of Crown land.¹²³ Successive governments’ elevation and fast-tracking of the Treaty settlement process is another way the Crown lessens the influence of the Tribunal. As a result of these developments, the Tribunal is arguably less likely to make declarations or recommendations that contradict current government policy or challenge perceived norms of the majority without strongly considering the political repercussions.¹²⁴

Carwyn Jones presents another critique related to the location of the Tribunal. He observe that, while the Tribunal adopts Māori procedures and has credibility amongst Māori, it is

¹¹⁸ MPK Sorrenson *Ko te whenua te utu / Land is the price: Essays on Maori history, land and politics* (Auckland University Press, Auckland, 2014) at 262.

¹¹⁹ See Bill to repeal State Enterprises (Treaty of Waitangi) Act, and also debate re Resource Management Act.

¹²⁰ Treaty of Waitangi Amendment Act 1985.

¹²¹ Treaty of Waitangi (State Enterprises) Act 1988.

¹²² Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s 40; Treaty of Waitangi Act 1975, ss 6 – 6A.

¹²³ Sorrenson, above n 118.

¹²⁴ This particular distortion is not limited to the domain of the Tribunal. New Zealand courts since *Fitzgerald v Muldoon* [1976] 2 NZLR 615 have shown what appears to be a Diceyan deference to the norm of Parliament’s sovereignty tempered by a pragmatic recognition of the executive’s control of Parliament, but what is probably more accurately described as an awareness of the futility and practical costs of challenging the political reality. Note, however, that the Supreme Court 40 years later in *Turahui* (above n **Error! Bookmark not defined.**) declined to make a principled declaration. The implications of this decision are unclear.

ultimately an institution of the state and “does not actually articulate a Māori voice.”¹²⁵ It is, in effect, the Crown defining Māori, not Māori.

Jones argues that it is “Māori understandings of the Treaty, its guarantees and the partnership that it entails, which have shaped Māori conduct in relation to their interactions with the Crown and institutions of the state”.¹²⁶ The reality appears bleaker, especially in the context of the Treaty settlement process. Māori understandings obviously have some influence on these interactions, but the dominance of the Crown politically, financially, and as the focus of the dispute resolution process,¹²⁷ irrevocably distorts the identity and actions of the Māori Treaty partner. These distortions extend beyond matters of identity.

E THE MĀORI NEGOTIATING PARTNER

1 Overview

Safely identifying a Māori negotiating partner is a critical part of the settlement process. The Crown dedicated approximately a quarter of the government’s controversial early proposal document, the *Crown Proposals for the Settlement of Treaty of Waitangi Claims*, to representation and governance issues.¹²⁸

In theory, the Crown will negotiate only with individuals and entities who have lodged claims with the Waitangi Tribunal.¹²⁹ As a matter of policy, the Crown will negotiate only with mandated representatives of “large natural groupings” of claimants. In practice, this tends to mean entities representing iwi. This inconsistency leads to difficulties where, for example, there are multiple claimants relating to overlapping areas, or where there are claims by different Māori individuals who associate with what the Crown might prefer to consider as a single group.

Finally, Dean Cowie identifies that Māori group leaders or representatives with better political networks, capacity, and influence are likely to be able to better influence the

¹²⁵ Carwyn Jones “Book Review: The Treaty of Waitangi in New Zealand’s Law and Constitution” (2009) VUWLR at 370.

¹²⁶ Ibid at 371.

¹²⁷ See generally Jones, above n 3.

¹²⁸ Therese Crocker *Mandating Matters: Māori Representation and Crown Policy in the Early Treaty Settlements Processes, 1988 – 1998* (Treaty of Waitangi Research Unit, 2013) at 8.

¹²⁹ Jessica Andrew “Administrative Review of the Treaty of Waitangi Settlement Process” (2008) 39(2) VUWLR 225 at 230.

negotiation and settlement process.¹³⁰ As I will explain below, OTS' repeated failure to engage with Māori sources of knowledge and tikanga means it is less able to make impartial and informed decisions about the appropriate group, groups, or amalgamation of groups to negotiate with. This is particularly disadvantageous for Māori groups with fewer resources or members, or whose members are more geographically dispersed.

2 *Lodging a claim*

There is no requirement for the claimants to progress their claim through the Tribunal process – although the Tribunal may investigate the claim in parallel or release preliminary reports with the intent of facilitating negotiation. Ultimately the finality provisions of any resulting settlement legislation will have the effect of barring the Tribunal from making further inquiries. However, as discussed above, while the Tribunal's recommendations are limited in legal scope and effect, in practice they tend to function as a reference for both negotiating partners – for the Crown they might provide an indicator of what an acceptable settlement range might be, and for Māori they might provide some moral force to support their claims.

During the process, the Tribunal may become a second negotiating table, often with different parties. This occurs particularly in the context of mandating. Problems arise, however, due to the restricted jurisdiction of the Tribunal, which only permits claims against the Crown. Māori groups with grievances against other Māori groups have no forum and may need to reframe their claims as against the Crown to access the Tribunal. This has a distorting effect on both Māori Crown relationships and Māori Māori relationships.¹³¹

3 *Mandating*

If a claimant seeks to proceed with a negotiated settlement at any stage they must be able to demonstrate a mandate from the group they represent.¹³² The process is not entirely negative. Jones notes that the process may often strengthen tribal identity as a result of the research, publication and validation of tribal histories.¹³³ However, there are a number of distorting issues with the mandating process.

¹³⁰ Cowie, above n 100, at 51.

¹³¹ Baden Vertongen "Legal issues" at 70.

¹³² *The Red Book*, above n ?, at 35.

¹³³ Jones, above n 3 at 8.

First, there is strong evidence that Māori society's basic governance units were hapū and, to a lesser extent, whanau.¹³⁴ This is supported by the historical fact that the Treaty was signed by rangatira of hapū. In effect, the Crown has transformed the Māori Treaty partner into the Māori negotiating partner, and the Māori negotiating partner from hapū to iwi, and then from iwi to a corporate approximation of iwi. It is unclear what the full implications of this transformation will be, but, if its effects are divisive or lead to arbitrary disparity of outcomes for different hapū then it will almost certainly affect the durability of settlements.

Second, like the Tribunal's jurisdiction over settled claims, the mandate itself becomes obsolete and irrelevant when the settlement legislation is implemented.¹³⁵ That is, regardless who participated in the negotiation and settlement process, the beneficiaries of the settlement are defined in the Act, usually they are entities that meet the Crown's strict criteria for post-settlement governance entities set out in *the Red Book*.

Third, the Crown prefers Māori groups to resolve questions of identity and mandating between themselves. This can cause tensions between Māori groups over issues of representation, history, and the moral right of one group over another to participate in negotiations.¹³⁶ This approach also leads to potential conflicts of interest. As the Tribunal reported in *The East Coast Settlement Report*:¹³⁷

There are inherent risks in a mandating process that is determined by the organisation that is seeking the mandate. Systems and processes [within the organisation] are likely (even if not deliberately) to be tailored to produce the desired positive outcome, The question to be voted on [by the members] may be formulated so it is more likely to achieve this end.

There is also the procedural possibility of Māori making claims on behalf of groups without the members of those groups even being aware that a claim has been made.¹³⁸ The implications for these members of any "full and final" settlement being agreed and implemented in legislation are similar in effect to a Bill of attainder.

¹³⁴ Crocker, above n 128 at 1.

¹³⁵ Ani Mikaere "Settlement of Treaty Claims: Full and Final, or Fatally Flawed?" (1997) 17 NZULR 425 at 454.

¹³⁶ Andrew Sharp "Special Maori rights in New Zealand since 1980" (paper presented at the inauguration of the New Zealand Studies Network (UK and Ireland), London, 8 July 2011) at [5].

¹³⁷ Waitangi Tribunal *The East Coast Settlement Report* (Wai 2190, 2010) at 54.

¹³⁸ *Ibid* at 42-43.

Only the Crown, through the Minister and OTS have a full view of all claims that have progressed to direct negotiation. Troublingly, however, the Crown has repeatedly breached its own guidelines and principles as set out in *The Red Book* in relation to mandating. In *The Tamaki Makaurau Settlement Process Report* the Tribunal found they OTS processes “fell short of the standard required for a good administrative process in Treaty terms”,¹³⁹ and suggested that persistent procedural failings could create “new wrongs”.¹⁴⁰

The Waitangi Tribunal has also repeatedly found that OTS negotiators have failed to engage with Māori knowledge to be able to reasonably assess hereditary and customary information during the mandating and negotiation process.¹⁴¹ This makes OTS more susceptible to influence. The Tribunal has also criticized the provisions in *The Red Book* relating to mandating and overlapping claims as “summary and unhelpful”. It notes that the Crown’s unprincipled “silo approach” to dealing with overlapping claimants combined with the incentives to complete settlements speedily has led to groups being treated differently.¹⁴²

Of more significance, perhaps, for the identity and definition of the Māori negotiating partner is the Crown’s tendency to view its engagements with negotiating entities as commercial.¹⁴³ Again, this seems calculated to avoid judicial oversight, but it also has the effect of reinforcing the corporatisation of Māori groups and distorting or discarding Māori legal traditions.

In practice, the political maneuvering, negotiation, compromise, and resolution of these ambiguities between Māori groups has the effect of forever changing them. For two neighbouring hapū to amalgamate for the purposes of forming a governance entity they must, to some extent, relinquish aspects of their uniqueness and histories. These distortions are even starker in the formation, membership, and operation of post-settlement governance entities which become a proxy identity for the settling groups.¹⁴⁴

¹³⁹ Waitangi Tribunal *The Tamaki Makaurau Settlement Process Report* (Wai 1362) at 86.

¹⁴⁰ *Ibid* at 2.

¹⁴¹ Waitangi Tribunal *The Tamaki Makaurau Settlement Process Report* (Wai 1362, 2007) at 93; Waitangi Tribunal *The Port Nicholson Block Urgency Report* (Wai 2235, 2012).

¹⁴² Waitangi Tribunal *The Port Nicholson Block Urgency Report* (Wai 2235, 2012) at 63.

¹⁴³ *Ibid* at 43.

¹⁴⁴ See generally Kirsty Gover “The Politics of descent: adoption, discrimination and legal pluralism in the Treaty claims settlement process” (2011) 2 NZ Law Review 261 at 288-289. Kirsty Gover “Tribal

F THE TREATY RELATIONSHIP

As a result of these varying and confused definitions of the Treaty partners no clear description of the Treaty relationship emerges. While government Ministers and entities conceive of the Treaty relationship as binary as between the Crown and Māori it is arguably more appropriate to describe a large number of relationships, both formal and informal, between Crown and Māori personalities and individuals described above.¹⁴⁵ **In this section I will attempt to bring together some of these threads to**

1 The focus of Treaty relationships

First, it is important to understand that, in practice, the focus of Treaty relationships is the Crown, and the language of the relationship is power. The Crown does not actively return land or make cultural redress, it provides a forum, the Waitangi Tribunal, for Māori make claims. As a result, the initial burden of research, defining and incorporating a claimant group, and building a consensus within that group falls entirely on claimants.

Ian Macduff observed at the beginning of the Treaty settlement era that New Zealanders have “limited experience of genuine bargaining, of dialogue, in our political and intercultural lives”.¹⁴⁶ Twenty years later, there appears to be little room for true negotiation about the shape and value of Treaty settlements. To enter negotiations, a Māori group must meet a number of Crown-decided criteria, and we can largely anticipate the structure and content of new settlements by reading the *Red Book* and reviewing earlier settlement agreements.

Furthermore, the Crown could change the settlement process at any time without repercussion because of the courts’ reluctance to treat the Settlement process as anything other than political and therefore non-justiciable.

2 The location of Treaty relationships

Second, it is important to understand where the relationship lies. A number of constitutional scholars argue that whatever Māori polity may have existed before the

constitutionalism and membership governance in Australia and New Zealand: Emerging normative frictions” 7(2) NZJPIL 19; Malcolm Birdling “Healing the Past or Harming the Future? Large Natural Groupings and the Waitangi Settlement Process” 2(2) NZJPIL 259; “Post-Settlement Dispute Resolution: Time to Tread Lightly” 10 Auckland U L Rev 1.

¹⁴⁵ Gover, above n 85 at 39.

¹⁴⁶ Ian Macduff “The Role of Negotiation: Negotiated Justice?” in Geoff McClay (ed) *Treaty Settlements: The Unfinished Business* (NZ Institute of Advanced Legal Studies and the Victoria University of Wellington Law Review, Palmerston North, 1995) 54 at 56.

Treaty of Waitangi ceased to exist at the time it was executed “as a result of its intended effect”.¹⁴⁷ Māori at that time became subjects of the Crown. If these interpretations are correct then it seems to follow that the Crown is the only entity legally competent to represent the Māori Treaty partner, whoever that is, in negotiations. The government, therefore, Richard Dawson argues, “in assuming the position of the Crown, is playing two roles at once as both protector and accused subjugator of Māori rights under the Treaty.”¹⁴⁸

As a result, any Māori individual or entity entering into negotiations with the Crown about Treaty of Waitangi issues appears to be, in essence, merely petitioning or lobbying the government to develop a policy that will eventually be implemented as legislation. Put another way, Māori political entities participating in the Settlement process appear to be undertaking political activities. This is a constitutional role of sorts but seems a long way from partnership as envisioned by the Treaty and judicial and executive statements and discourse in the 150 years since.

The logical consequence of this apparent Treaty partner monism is that, legally, any negotiation and settlement activity between so-called partners in reality amounts to a Crown soliloquy about its shortcomings as a sovereign, presumably to quell Māori dissatisfaction and colonial guilt. While this appears to be a correct legal analysis, it seems inadequate as an account of the statements and actions of the relevant actors. The constitutional realist view appears more complete.

Kirsty Gover’s view is that Māori polities, regardless of their legal status, continue to exist to some extent outside the New Zealand body politic as a matter of political and practical reality, and that they have a “quasi-international” character. As a result, the Crown performs “feats of special representative agility” when addressing Māori polities in the context of the Treaty and negotiating settlements.¹⁴⁹ This is consistent with McHugh’s account of Crown dealings with Māori “as a series of tribal polities that were *imperia in imperio*”.¹⁵⁰ He explains that while the common law developed an account of the Treaty that emphasized its extralegal and non-justiciable status, the political reality was that the Crown interacted in a quasi-diplomatic way with Māori “as a series of tribal

¹⁴⁷ Waldron, above n 56 at 164; Brookfield, above n 108.

¹⁴⁸ Dawson, above n 82, at 194.

¹⁴⁹ Kirsty Gover “The Politics of descent: adoption, discrimination and legal pluralism in the Treaty claims settlement process” (2011) 2 NZ Law Review 261 at 288-289.

¹⁵⁰ Paul McHugh “Treaty Principles: Constitutional Relations Inside a Conservative Jurisprudence” (2008) 39(1) VUWLR 39 at 51, 63.

polities”.¹⁵¹ The surprising conclusion, then, might be that the Crown’s status as a Treaty partner is independent of whatever sovereignty it might have or declare it has. It is instead constituted or elevated by the willingness of the Māori Treaty partner to engage with it.

I hope it is not a cop out to suggest that maybe the true situation of sovereignty, and, perhaps, supremacy, in New Zealand is that it is distributed irregularly and dynamically between a number of constitutional entities in a way not amenable to demarcation, and subject to considerable flux.

3 Conclusion

McHugh describes the Treaty relationship as having the character of a “unique internalised legalism”,¹⁵² and agrees with Palmer that the constitution “constitutes itself more fundamentally through the relevant actors conducting themselves on a regularised basis and in a manner they regard as obligatory”.¹⁵³ Within the bounds of this legalism, the notion that a Treaty settlement between a Minister acting in right of the Crown and a small incorporated entity representing some number of Māori could redefine the very nature of the Crown might not seem so radical. Certainly the Treaty process itself, or at least the actors involved in it, appear to be capable of effectively redefining the Treaty partner, sometimes by exclusion, sometimes by expansion.

Brookfield concedes that it might be possible to abolish the Crown by “technical” revolution,¹⁵⁴ but that the Crown, as party to the Treaty is a “fundamental postulate” of the constitution.¹⁵⁵ Sir Robin Cooke observes that “[a]s a matter of elementary fairness, good faith, and national honour, it is hard to see how we could cut our links to the Crown without [sufficient Māori] concurrence”.¹⁵⁶ Implicit in this observation is a recognition of the Crown as “other”. But if the Crown is the “other” then who is the “us”? With whom are Māori groups settling? I do not have an answer, but I wonder whether the ongoing

¹⁵¹ Ibid.

¹⁵² McHugh, above n 62 at 67.

¹⁵³ Ibid.

¹⁵⁴ FM Brookfield *Republican New Zealand: Legal Aspects and Consequences* (a paper presented at Hobart at a conference of the Australian Law Teachers Association, September 1994) cited in Robin Cooke “The Suggested Revolution Against the Crown” in Philip A Joseph (ed) *Essays on the Constitution* (Brookers Ltd, Wellington, 1995) 28 at 36.

¹⁵⁵ Ibid at 38.

¹⁵⁶ Cooke, above n 154 at 38.

definition and redefinition of the Treaty partners, by themselves and by each other, will answer the question conclusively in the fullness of time. And I wonder if the answer will be that the Crown is, as Jack Oliver-Hood argues in the context of administrative law, “significantly indigenous”.¹⁵⁷

III Apologies

A INTRODUCTION

All Treaty settlement Bills contain provisions in the nature of preambles. In earlier settlements the “preamble” classification was explicit but, since 2012, these matters tend to be included in the body of the legislation with headings such as “Purpose”, “Summary of historical account”, “Acknowledgements”, and “Apology”. The latter three of these provisions together make up the official apology.

OTS describes the official apology as a formal expression of the Crown’s “regret for past injustices suffered by the claimant group and breaches of the Treaty of Waitangi and its principles”.¹⁵⁸ Government Ministers have spoken of official apologies as creating an understanding that future relations will be as envisaged by the Treaty. As we will see, the reality as experienced by Māori groups is less positive.

In this section I will briefly set out a framework for understanding official apologies and explain how, in the context of Treaty settlements, and New Zealand’s “unwritten” constitution, they appear to have similar structures, purposes, and normative effect as constitutional preambles. In this way, I will argue, they effect significant constitutional change and, by implication, limit the supremacy of Parliament.

B OFFICIAL APOLOGIES

Apologies are “complex social phenomena”¹⁵⁹. According to Jean-Marc Coicaud and Jibecke Jönsson they are expressions of “regret, sorrow and remorse for having wronged,

¹⁵⁷ Jack Oliver-Hood “Our significantly indigenous administrative law: The treaty of Waitangi and judicial review” 19 Auckland U L Rev 53.

¹⁵⁸ *The Red Book*, above n 114, at 80.

¹⁵⁹ Michael Freeman “Historical Injustice and Liberal Political Theory” in Mark Gibney, Rhoda E Howard-Hassman, Jean Marc Coicaud, Niklaus Steiner (eds) *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, 2008) 44 at 44.

insulted, failed and/or injured another.”¹⁶⁰ They also “imply a certain relationship between someone who has caused another pain ... and someone who has been wronged”.¹⁶¹

Janna Thompson argues that an apology is “intrinsicly an act of respect”. In the context of official apologies by state entities she argues that they convey, at least symbolically, that the perpetrator of injustices takes responsibility for its actions or inactions that relate to the injustices.¹⁶² Maureen Hickey proposes that official apologies also have a normative function in that they set a standard for future partnership.¹⁶³ For an official apology to be “genuine” its content and presentation should be influenced and endorsed by the victims of the injustices, and the historical account and acknowledgements that found the apology should be recorded in the nation’s official history in some way.¹⁶⁴

Marrus argues that we might also conceive of official apologies as a tool for incorporating the victim’s narrative of historical injustices into the official narrative as a basis for reconciliation.¹⁶⁵ Understood purely on this basis, it follows that it may not be necessary for the agreed historical account or acknowledgements to be complete or even accurate to be effective. There may be historical points of contention, difficulties quantifying the impact of injustices, or disagreement about the extent to which the actions and inactions of the perpetrator caused the injustices. For whatever reason it may be easier to focus on the aspects the parties can agree in the current political landscape and either resolve the remainder incrementally or defer it entirely.

So, Hickey argues, the process by which the parties negotiate and articulate this narrative is as important as its content. An apology developed in consultation with the victims is more likely to use the right language, tone, and cultural signifiers and is therefore more

¹⁶⁰ Jean-Marc Coicaud and Jibecke Jönsson “Elements of a Road Map for a Politics of Apology” in Gibney, above n 71, 77 at 78.

¹⁶¹ Ibid.

¹⁶² Janna Thompson “Apology, Justice, and Respect: A Critical Defense of Political Apology” in in Gibney, above n 71, 31 at 34.

¹⁶³ Hickey, above n 139, at 114-115.

¹⁶⁴ Ibid at 41.

¹⁶⁵ Michael R Marrus “Official Apologies and the Quest for Historical Justice” (2007) 6(1) *Journal of Human Rights* 75 at 96.

likely to resonate with the victims' community.¹⁶⁶ This resonance might also confer or strengthen the legitimacy of any related settlement or implementing legislation.

In reality, however, any imbalance of political power between the groups is likely to influence the combined narrative to favour the dominant group. The combined narrative may become something that the parties can "live with" but, ultimately, will "fall short of justice".¹⁶⁷ In the Treaty settlement context the imbalance is a function of not only political power but also the strength of alternatives to negotiation available to each party.¹⁶⁸ Michael Coyle describes three alternatives available to Māori negotiating groups: acceptance, litigation (to the extent that any aspect is justiciable), and exercising political pressure.¹⁶⁹

As I will explain below, experiences of apology in the Treaty settlement process vary, but, regardless of the success or safety of the final apology, it is implemented in legislation as some sort of truth.

C APOLOGIES IN TREATY SETTLEMENTS

Apologies in Treaty settlements are negotiated,¹⁷⁰ and of "great symbolic importance".¹⁷¹ They usually consist of:

- (1) A historical narrative, usually setting out the injustices perpetrated by the Crown;
- (2) A Crown acknowledgement of actions and inactions that caused the injustices;
and
- (3) An apology.

While they appear to meet Thompson's criteria for genuineness, this is undermined by the focus of the Treaty settlement negotiation process on the Crown, and the practical limits imposed by the Crown's preferences for quick and final settlements with

¹⁶⁶ Maureen Hickey "Negotiating History: Crown Apologies in New Zealand's Historical Treaty of Waitangi Settlements" (2006) 13 Public History Review at 85.

¹⁶⁷ Marrus, above n 165.

¹⁶⁸ Michael Coyle "Transcending Colonialism? Power and the Resolution of Indigenous Treaty Claims in Canada and New Zealand" (2011) 24 New Zealand Universities Law Review 596 at 608.

¹⁶⁹ Ibid at 603.

¹⁷⁰ Hickey, above n 166 at 85.

¹⁷¹ Cox, above n 75 at 149; Joseph, above n 48 at 19.

convenient groupings of Māori. This inadequacy is supported by the published experiences of participants in Treaty settlement negotiations:¹⁷²

... it was very confrontational, very litigious. Crown, especially on the history, and especially over the Crown apology and what the Crown were actually saying sorry for.

We'd worked out that if we could get them to say sorry for certain things that was tantamount to an admission of guilt over various issues, and so we worked very hard on getting them to say certain things. Which they resisted.

And:¹⁷³

... but at the end of the day, the Crown determined and wrote their own historical account that forms the basis of their apology. The only choice available to us was to go back to the Tribunal and have the Crown account tested but even if the Tribunal rejected their submissions there is nothing to force the Crown to concede.

Another significant feature of the Crown's policy is that it only incorporates matters relating to the relationship between the Crown and the claimant group, and only to the extent that those matters found the breakdown of the relationship or the claims themselves. The Tribunal has found that some of the substantive outcomes of this process, in particular the choice to only record the historical narrative as agreed between the mandated group and the Crown, represented "a denial of the reality of history in Aotearoa".¹⁷⁴

The direct origin of the apology and historical account provisions is the negotiations between the Crown and the settling group, but they really represent a selective synthesis of histories, sources, and statements of the settling group. The Tribunal has expressed the opinion that the narrative aspects of apologies in Treaty settlements are "more accurately characterised as an accommodation between the parties in the context of a settlement negotiation, rather than a robust history."¹⁷⁵ Still, their ultimate manifestation as legislation, and their symbolic significance to many Māori suggest that we may need to understand them as something more than an accommodation.

¹⁷² Crown Forestry Rental Trust *Māori Experiences of the Direct Negotiation Process* (Wellington, 2003) at 38.

¹⁷³ *Ibid* at 13.

¹⁷⁴ Waitangi Tribunal *The Tamaki Makaurau Settlement Process Report* (Wai 1362, 2007) at 94

¹⁷⁵ *Ibid*.

D PREAMBLES

Preambles are autobiographical.¹⁷⁶ We can identify them by their formal heading, their position in the document, or their substance.¹⁷⁷ Typically they narrate the origins of the document they introduce and set out its purposes, principles, justification, and interpretive pragma. Plato described preambles as necessary dialogues between the legislator and the “person whom he addressed”, that they “might more intelligently receive his command”.¹⁷⁸ Their recognition in law, however, is uncertain, and appears to depend largely on the constitutional culture in the particular jurisdiction.

1 United States

In the United States, courts have cited the constitutional preamble as an interpretive tool but, as Liav Orgad explains, the references “are inconsistent, rhetorical, and far from conferring independent constitutional rights”.¹⁷⁹ Sanford Levinson argues that the dominant view of key actors at the founding of the constitution was that the preamble was declarative of their views, but had no legal effect.¹⁸⁰ He also recounts the judgment of the Supreme Court in the 1905 case *Jacobsen v Massachusetts* over a hundred years later which stated that “[a]lthough the preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power”.¹⁸¹

2 Australia

In Australia the prevailing academic view of the status of the constitutional preamble at the beginning of the 20th century was that it “may be of valuable service and potent

¹⁷⁶ Tom Ginsburg, Nick Foti, and Daniel Rockmore “‘We the Peoples’: The Global Origins of Constitutional Preambles” (Coase-Sandor Institute for Law & Economics Working Paper NO. 664, 2013) at 102.

¹⁷⁷ Liav Orgad “The preamble in constitutional interpretation” (2010) 8(4) *International Journal of Constitutional Law* 714 at 715.

¹⁷⁸ Plato *The Dialogues of Plato, vol 5. (Laws, Index to the Writings of Plato)* (3rd ed, Oxford University Press, 1892) at 723.

¹⁷⁹ Orgad, above n 177 at 718.

¹⁸⁰ Sanford Levinson “Do Constitutions Have a Point? Reflections on “Parchment Barriers” and Preambles” in Ellen Frankel Paul, Fred D Miller Jr, and Jeffrey Paul *What Should Constitutions Do?* (Cambridge University Press, Cambridge, 2012) 150 at 158.

¹⁸¹ *Jacobsen v Massachusetts* (1905) US. 111, 22, cited in Levinson, *ibid.*

effect” as an interpretive aid.¹⁸² In practice, while the courts will treat statements of fact in the preamble as “prima facie evidence of the truth”, they do not consider them to be lawmaking,¹⁸³ except to the extent that they reinforce other constitutional provisions.¹⁸⁴ Nor does it appear that courts will allow the preamble to override Parliament’s express legislative intent.¹⁸⁵ However, McKenna, Simpson, and Williams argue that the “bland” and “inconsequential” nature of the preamble means the courts have largely avoided having to settle this matter conclusively.¹⁸⁶

In spite of this, the question remains interesting - at various times since the mid-1980s there have been calls for reconsideration of Australia’s constitutional preamble variously to better articulate certain democratic values, to restate the values of Australian citizenship, and to recognise Aboriginal and Torres Strait Islander peoples.¹⁸⁷ In 1988 the Constitutional Commission recommended against change, citing, among other things that the proposed preamble could only be regarded “as an aid only in the event of ambiguity in the substantive provisions of the Constitution”,¹⁸⁸ that the High Court was unlikely to take notice of any new preamble,¹⁸⁹ that it was difficult to isolate “the fundamental sentiments which Australians of all origins hold in common”,¹⁹⁰ and the difficulty of choosing the right words.

After the 1992 decision in *Mabo v Queensland [No 2]*¹⁹¹, which recognised native title, there was a popular concern that the courts would be unafraid to “discover” new

¹⁸² John Quick and Robert Randolph Garran *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, Sydney, 1901) at 286.

¹⁸³ Anne Winckel and Kristyn Glanville “Recognising Indigenous peoples in the Preamble: implications, issues and interpretation” (2011) 7(25) *Indigenous Law Bulletin* 22 at 23.

¹⁸⁴ See generally *Australian Capital Television* (1992) 177 CLR 106 at 210; *Leeth v Commonwealth* (1992) 174 CLR 455; and *Kruger v Commonwealth* (1997) 190 CLR 1.

¹⁸⁵ Megan Davis and Zrinka Lemezina “Indigenous Australians and the Preamble: Towards a more inclusive constitution or entrenching marginalization?” (2010) 33(2) *University of New South Wales Law Journal* 239 at 260.

¹⁸⁶ Mark McKenna, Amelia Simpson and George Williams, “First Words: The Preamble to the Australian Constitution” (2001) 24 *University of New South Wales Law Journal* 382 at 392.

¹⁸⁷ *Ibid* at 393.

¹⁸⁸ Constitutional Commission (Australia) *Final Report [Volume 1]* (1988) 18 *IndigLRes* at [3.40].

¹⁸⁹ At [3.41]

¹⁹⁰ At [3.42]

¹⁹¹ (1992) 175 CLR 1.

interpretations or rights on the basis of any new constitutional preamble.¹⁹² The 1998 Constitutional Convention reiterated this concern and recommended that any new preamble should be drafted so as to minimise the risk of its use as an interpretive tool. The resulting proposal, put to a failed national referendum in 1999, would have explicitly proscribed the use of the preamble as an interpretive tool.¹⁹³

Regardless of its form or substance it seems that any future development of Australia's constitutional preamble is unlikely to lead to any significant legal reinterpretation of the constitution. However, applying statutory interpretation principles, the various attempts to explicitly restrict the scope of any new preamble seem to imply executive recognition of some intrinsic potential interpretive and transformative power. And, applying Llewellyn's "felt importance" sieve, and considering the observed behavior of New Zealand officials in light of the *SOE* case, we might inquire whether and how the strength and clarity of any preambular statements about indigenous people might influence the thoughts and actions of Australian public office-holders.

3 *Canada*

In the Canadian context, Kent Roach argues that the legislature uses preambles "as a vehicle ... to provide its own interpretation of the law or the constitution" and as a way of opening a "dialogue" with the courts.¹⁹⁴ This use of the word "dialogue" is not accidental. Hogg and Bushell have argued that, as a result of the Canadian Charter granting power to the courts to strike down legislation, there has been an emerging dialogue between the judiciary and the legislature.¹⁹⁵

The dialogue is characterised, first, by the courts' striking down of legislation inconsistent with the Charter and providing the legislature with suggested alternative approaches, and second, by the legislature responding promptly with a "legislative sequel".¹⁹⁶ Moreover, since the Charter, the legislature has begun to engage in "Charter speak", using preambles and purpose clauses to engage in a "self-conscious dialogue"

¹⁹² McKenna, Simpson, and Williams, above n 186 at 397.

¹⁹³ Constitution Alteration (Preamble) 1999 (Cth), s 4.

¹⁹⁴ Kent Roach "The uses and audiences of preambles in legislation" (2001) 47(1) McGill Law Journal 129 at 154-155.

¹⁹⁵ Peter W Hogg and Allison A Bushell, "The Charter Dialogue between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75.

¹⁹⁶ *Ibid* at 96-97.

with the judiciary.¹⁹⁷ Palmer notes that, where there are inter-branch disagreements in Canada, these are resolved in only a few iterations.¹⁹⁸ Interestingly, this dialogue is not incumbent on the existence of inter-branch “conflict” – it has become the norm.¹⁹⁹ In this sense, Canada seems to have heeded Plato’s Athenian stranger.²⁰⁰

4 The normative and legitimising force of constitutional preambles

Finally, Roach classifies preambles as a tool for legitimation, especially when used in international or quasi-international contexts. They represent an opportunity for the drafters to “establish a narrative of the interaction that led to the legislation”. He argues further that the use of such narratives in legislation is an “implicit concession” that the legitimacy of legislation is not wholly granted by legislative passage.²⁰¹ As we will see below, in the context of apologies in Treaty settlements, this is plainly true.

E HOW CAN WE UNDERSTAND APOLOGIES IN TREATY SETTLEMENTS?

Despite the flaws with the apology process in New Zealand, there are many positive accounts of them. In Parliament Nanaia Mahuta described Treaty of Waitangi settlements as having “transformed the national identity of our nation”,²⁰² and Pita Paraone, referring to the same settlement Bill, suggested that:²⁰³

This whole process of Treaty settlements does provide an opportunity for this country to have recorded the actual history of what happened to Maori when the Europeans came to this country.

Ngai Tahu, in the wake of the apology in the Ngai Tahu Settlement Act 1998 expressed their satisfaction with the outcome:²⁰⁴

The Crown’s apology is fundamental to the settlement. It acknowledges the validity of the claims that our people have made over seven generations. It begins the

¹⁹⁷ Ibid at 101.

¹⁹⁸ Matthew Palmer “Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution” (2006) 26(1) Dal LJ 1 at 39.

¹⁹⁹ Hogg and Bushell, above n 195 at 104.

²⁰⁰ Plato, above n 178.

²⁰¹ Roach, above n 194 at 139.

²⁰² (13 August 2015) 707 NZPD 5831.

²⁰³ (11 August 2015) 707 NZPD 5664.

²⁰⁴ Gibbs, Gibney at 165

positive process of rebuilding, whilst not forgetting the past. The Apology marks the end of the grievance period. The healing process can begin.

On that point, Palmer asked whether we have “properly examined the mechanisms and modes through which judiciary and legislature converse”, and whether there are more than the obvious “unilateral processes” of legislation and judgments.²⁰⁵ I say that we have not, and that all of the branches are speaking all of the time, and not just speaking but mirroring and changing each other.

IV Implementation and innovation

A SETTLEMENT LEGISLATION

1 Overview

Although Treaty settlement Acts have varied slightly in form and substance since the 1990s, their core structure and features remain. The common structure and language of settlement Acts is a strong early indicator of the normative effect of the earlier settlements, and the development of arguably constitutional drafting conventions.

There is normally a part containing provisions relating to preliminary matters, purpose, interpretation, the apology as discussed above, various technical and jurisdictional matters, and the finality of the settlement. Then there are cultural redress provisions relating to cultural protocols for the management of resources and taonga, as well as the creation of special statutory instruments that formally recognise the named group’s interest in and association with certain lands and resources. Then there are economic redress provisions relating to land. Usually the Act will not make provision for payments of specific financial redress – those payments are made on settlement and then when the implementing Act is passed.

The Act’s purposes tend to be sparse - simply to record the acknowledgements and apology in the deed of settlement – and the interpretation provisions expressly incorporate the deed.

In this section I will describe these instruments and institutions, explain how they effect significant constitutional change without constitutional upheaval, and argue that, in doing so, subtly but permanently redefine the Crown. In this section, however, I will review a number of statutory innovations that John Dawson describes as offering “administrative

²⁰⁵ Palmer, above n 198 at 40.

and property law solutions to constitutional problems”.²⁰⁶ I will argue that the Crown is becoming significantly more Māori.

2 *Incorporation of Treaty principles*

It is interesting that settlement Acts include very few explicit references to the Treaty of Waitangi principles (in any form). Usually the Crown acknowledgements refer to historic breaches of “the Treaty of Waitangi and its principles” and the interpretation section defines “historical claims” as founded on rights arising from, among other things, “the Treaty of Waitangi or its principles”, but the interpretation provisions tend to only incorporate the principles indirectly. A typical example states:²⁰⁷

It is the intention of Parliament that the provisions of this Act are interpreted in a manner that best furthers the agreements expressed in the deed of settlement.

The relevant part of the deed of settlement states:²⁰⁸

[T]he settlement is intended to enhance the ongoing relationship between Ngāruahine and the Crown (in terms of the Treaty of Waitangi, its principles, and otherwise).

This drafting pattern is common in Treaty of Waitangi settlements and implementing legislation and seems to reflect an intention to demote the status of Treaty of Waitangi principles to things historic, left behind by the ongoing, forward-looking relationship between the Crown and the mandated negotiating entity.

3 *Drafting conventions*

A brief word about drafting conventions. The Ngāi Tahu Claims Settlement Act 1998, discussed in detail below, was one of the earlier major settlements, but its structures and features are remarkably similar to later settlement legislation. This similarity itself alludes to the normative force of what might, at the time, appear to be unimportant decisions by OTS, negotiators, drafters, and Māori negotiators. I cannot explore this point in detail here, but I suggest that, through a constitutional realist lens, the structure and drafting style of these Acts might be constitutional in its own right.

²⁰⁶ John Dawson “A Constitutional Property Settlement Between Ngai Tahu and the Crown” in Janet McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 2008) 207 at 210.

²⁰⁷ Ngāruahine Claims Settlement Act 2016, s 12.

²⁰⁸ At 4.1.4

B THE IMPLEMENTATION PROCESS

By convention Parliament affords special status to Treaty of Waitangi settlement legislation.²⁰⁹ Also by convention, the Parliament’s Māori Affairs Select Committee “cannot, by way of amendment to a bill, impose an agreement on parties that they have not reached themselves.”²¹⁰ The Committee’s role in this context is not unlike that of the Waitangi Tribunal – it may assess the safety of mandate and the robustness of the procedures for ratification, it may comment on or critique the settlement, and it may make recommendations about technical or common-sense amendments with the consent of the parties to the deed of settlement, but the decision to proceed is with the parties.²¹¹

Palmer notes that the legislative process for settlement Bills affords the public very little opportunity to comment, and this only at a stage when comment can likely only have symbolic effect.²¹² In a recent example, a Taranaki hapū, Āraukūkū, petitioned the Committee considering the Ngāruahine Settlement Bill in relation to a decade-long mandate dispute with a larger neighbouring group Ngāruahine. Āraukūkū acknowledged the “limited capacity of [the] Select Committee” but noted that it had “exhausted all other avenues except the Court of Appeal and Supreme Court”.²¹³ It invited the Committee to:²¹⁴

- (a) acknowledge that the evidence confirms that Āraukūkū hapu has not been provided the opportunity to negotiate its historical treaty claims with either Ruanui or Ruahine;
- (b) take whatever measures required in order to protect all Āraukūkū hapu historical treaty claims;
- (c) advise the Crown of the clear Treaty breach associated with extinguishing Āraukūkū hapu claims; [and]
- (d) advise the Crown to exhaust all political and or judicial options before completing settlement.

²⁰⁹ David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Limited, Wellington, 2005) at 380.

²¹⁰ *Ibid.*

²¹¹ Cowie, above n 112, at 54.

²¹² Palmer, above n 23, at 261.

²¹³ *Lewis Ata Turahui v The Waitangi Tribunal and Ors* [2016] NZSC 157 [*Turahui*].

²¹⁴ Māori Affairs Committee *Ngaruahine Claims Settlement Bill 2015 (45-2)* (23 March 2016) at 4.

The Committee's report acknowledged Āraukūkū's concerns, lamented the inefficacy of the Treaty settlement process for addressing these types of issue, and suggested that the Crown could address a small part of the Āraukūkū's grievance by making public statements about the process and certain lands at public ceremonies about the Ngāruahine Settlement.²¹⁵

While I was writing this paper, the Supreme Court issued a sympathetic judgment recognising that there were a number of issues with the decisions of the lower courts and the Tribunal that would likely have warranted a grant of leave to appeal. It noted that this was "particularly the case because ... Āraukūkū stands to see its Ngāruahine based claims extinguished without its consent, or even participation. However, the Court held that a grant of leave was not appropriate for practical reasons: the Ngāruahine Claims settlement Bill had passed its third reading and any decision would therefore be ineffective. Incongruously perhaps, it cited the Committee's suggestion above and assurances from the Ngāruahine settlement entity that Āraukūkū would have some involvement in entity governance.

McGee suggests that it remains open for Parliament to decide not to give legislative effect to deeds of settlement.²¹⁶ This view is supported by comments made by Ministers of Treaty of Waitangi Negotiations and Members of the Māori Affairs Committee in reports on settlement Bills. However, the Supreme Court's restraint in *Turahui* suggests that this is not the case. While it is difficult to speculate what Parliament might do, if the court had allowed the appeal and found significant injustice or national importance the political landscape may have provided cover for Parliament to delay the settlement or recommend that the executive revisit the details with Ngāruahine and Āraukūkū.

Even if Parliament decided not to give effect to the legislation it is almost certain that it would not substantially modify the content of the agreed narrative, acknowledgements, or apology provisions. As McGee explains, Parliament recognises that these provisions have "independent origin" and will not amend them except where the amendment is consistent with the purposes and where the parties to the agreement have consented.²¹⁷ In this sense they might be analogous to international treaties.

²¹⁵ Māori Affairs Committee, above n 18, at 4.

²¹⁶ McGee, above n 130, at 380.

²¹⁷ McGee, above n 130, at 323-324.

Nevertheless, Parliament's ability to make technical amendments, and Parliament's potential ability to abandon the convention of non-interference arguably have a distorting effect at the negotiating table during the preceding settlement process.

C THE NGĀI TAHU SETTLEMENT

In 1997 the Crown signed a deed of settlement with Ngāi Tahu, which was implemented in legislation in the Ngāi Tahu Claims Settlement Act 1998. The instruments included an apology,²¹⁸ economic and cultural redress,²¹⁹ and the settling of peripheral claims of individuals that would otherwise have been discounted under the "large natural grouping" policy.

The settlement was interesting for a number of reasons. One of those reasons is that the Crown had previously purportedly reached a "final" settlement with Ngāi Tahu in 1944.²²⁰ Malcolm Birdling suggests that this experience reflected the fact that the original settlement was so unfair that it was "incapable of being full and final".²²¹ Another is that it included instructions that the Prime Minister must not recommend bringing the Act into force until receiving a letter of assent from Ngāi Tahu.²²²

What is most interesting about the Ngāi Tahu settlement for our purposes is its extensive use of statutory innovations and instruments as a means of providing cultural redress. The Act contains more than 60 "Statutory Acknowledgements" as schedules.²²³ Each schedule defines an area and recites a Crown acknowledgement of Ngāi Tahu's "cultural, spiritual, historic, and traditional association" to the area, supported by a narrative. In reality the instruments are limited in scope – they are not to be taken into account in, the exercise of any public power, duty, or function with the exception of the settling entity and certain consent authorities. Ngāi Tahu members may cite Statutory

²¹⁸ Ngāi Tahu Claims Settlement Act 1998, Part 1.

²¹⁹ Ngāi Tahu Claims Settlement Act 1998, Parts 4-11.

²²⁰ Implemented in legislation in the Ngaitahu Claim Settlement Act 1944; see also Taranaki Maori Claims Settlement Act 1944; and see generally Richard Hill *Settlements of Major Māori Claims in the 1940s: A preliminary historical investigation* (Department of Justice, Wellington, 1989).

²²¹ Malcolm Birdling "Healing the Past or Harming the Future? Large Natural Groupings and the Waitangi Settlement Process" (2004) 2(2) NZJPIL 259 at 276.

²²² Palmer, above n 47 at 260.

²²³ Ngāi Tahu Claims Settlement Act 1998, s 206 and schs 14-77.

Acknowledgements in certain proceedings but the content is not “binding as deemed fact”.²²⁴

The Act also provides for a special type of “overlay classification” for conservation land,²²⁵ called Tōpuni.²²⁶ The concept of Tōpuni is derived from Ngāi Tahu tradition and, according to Te Rūnanga o Ngāi Tahu are intended to be “public symbols of Ngāi Tahu mana and rangatiratanga over some of the most prominent landscape features and conservation areas in Te Waipounamu.”²²⁷ Like Statutory Acknowledgements, Tōpuni do not override existing classifications but are to be taken into account by the Department of Conservation and visitors.

Finally, the Act provides for bilingual naming conventions throughout the South Island of New Zealand, and a symbolic gifting and return of the New Zealand’s largest mountain Aoraki / Mt Cook.

D THE TŪHOE AND WHANGANUI SETTLEMENTS

In 2013 the Crown settled a number of historic grievances with Tūhoe and in 2014 gave legislative effect to the Tūhoe Settlement by passing the Te Urewera Act 2014.²²⁸ The legislation was notable for its declaration of Te Urewera, formerly a national park, as “a legal entity” with “all the rights, powers, duties, and liabilities of a legal person”.²²⁹ Te Urewera is managed by a Board constituted to incorporate Māori, specifically Tūhoe, legal traditions and management concepts.²³⁰ It is a particularly interesting development because of its parallels with a provision in the Urewera District Native Reserve Act 1896 to establish Tūhoe self-government,²³¹ itself an outcome of what might best be described as a quasi-international treaty outside the Treaty of Waitangi sphere.²³² Membership of

²²⁴ Dawson, above n 11 at 217.

²²⁵ Ngāi Tahu Claims Settlement Act 1998, ss 237-252 and schs 80-93.

²²⁶ Literally “cloak”.

²²⁷ Te Rūnanga o Ngāi Tahu “Mana Recognition” <www.ngaitahu.iwi.nz/ngai-tahu/the-settlement/settlement-offer/cultural-redress>.

²²⁸ See generally Jacinta Ruru “Tūhoe-Crown settlement – Te Urewera Act 2014” (2014) 10 Māori Law Review <<http://maorilawreview.co.nz/2014/10/tuhoe-crown-settlement-te-urewera-act-2014/>>.

²²⁹ Te Urewera Act 2014, s 11(1).

²³⁰ Te Urewera Act 2014, s 18(2).

²³¹ Brookfield, above n 108.

²³² Boast, above n 12.

the Board is initially shared equally between Tūhoe and the Crown, but in 2017 will change to a 2:1 ratio.²³³

In 2014 the Crown settled with Whanganui iwi, and at the time of writing the Te Awa Tupua (Whanganui River Claims Settlement) Bill has progressed to the Select Committee stage. Like the Te Urewera Act 2014, the Bill creates a statutory legal person in a geographical feature, and constitutes a Board to manage it, in this case the Whanganui River and its tributaries and surrounds.

Superficially, these instruments incorporate Māori legal traditions and concepts into New Zealand law in a narrow way and with the mapping risks that entails, but as I will explain below, we might also be able to understand them as having the reverse effect.

E HOW TREATY SETTLEMENTS EFFECT CONSTITUTIONAL CHANGE

In the previous section I explained how Māori interact with the Crown at various layers of corporate abstraction. It is not unusual for Māori issues to simultaneously engage central government, local government, and quasi-government agencies like state-owned enterprises. These agencies exercise public power. They are constituted and ordered by legislation, and, in practice, the “unwritten” Treaty principles, and are also engaged in ongoing constitutional interpretation. It seems reasonable to suggest that any reordering or emphasis or gloss that new legislation creates is constitutional also. It also seems reasonable to suggest that this applies to the creation of new types of public agencies, especially where they are constituted to administer large tracts of land and resources. This seems more certain when the new agencies are conceived in such a way as to recognise or incorporate some approximation of tikanga and a Māori world-view.

Treaty settlement Acts’ “independent origin”, “quasi-international” status, and conformance to a now decades-long tradition of drafting and implementation establish them as different from ordinary legislation. This status is strengthened, I think, by their emergence from the complicated but undoubtedly constitutional domain of the Treaty of Waitangi, and confirmed by the constitutional changes they effect.

V Conclusion

But what of the Crown? In this paper I argued that the Treaty settlement process has the following outputs:

- (1) Ongoing incremental and practical definition, redefinition, and reconstitution of the Treaty and negotiating partners;

²³³ Te Urewera Act 2014, s 21.

- (2) Crown acknowledgement and declaration of sympathetic, albeit flawed, narratives and apologies;
- (3) Crown attempts to incorporate some approximations of Māori concepts and legal traditions in statute.

In these ways, I think, a significant outcome of the Treaty settlement process is a reconceptualisation of the Crown Māori relationship as more of a merger than a partnership. Each settlement in some way modifies, reduces, or expands the scope of the Crown in some way, be that Māori legitimisation of its borders, acknowledgement of practical restrictions on its ability to legislate against contemporary agreements, or restructuring of “British” legal institutions to approximate or incorporate Māori legal traditions.

Joe Williams cites a Māori proverb:

He pukenga wai he nohanga tangata, he nohanga tangata he whakawhitiwhiti korero.

At the confluence of a river, people come together, and where people come together, there is inevitably discussion and debate.

We might add the words “*and they are changed*”. The changes are not always principled or consistent or good – the Crown’s co-option of Māori legal traditions, for example, arguably continues the colonisation process of the last two centuries. Nor are they quick or comprehensive or complete. But they are happening, incrementally and pragmatically, and, apparently, without the awareness of the participants.

Finally, while the Crown is the focus and guardian of the Treaty settlement process, the constitutional changes that result are not necessarily those that the Crown or many of its constituents desire or intend. But we are interested in reality, and this accords with Alex Frame’s description of law, that it:

tends to develop organically, and will resist the attempts of technicians to force it into shapes designed to serve the interests of ‘social engineering’, although it will respond and adapt to the dynamic forces of culture, including art and political and spiritual ideas manifested in the life of the people.²³⁴

As New Zealand’s population becomes more Māori, so the Crown, and, when Alice signed the last Treaty settlement,

[S]he put her hands up to something very heavy, and fitted tight all round her head.

“But how *can* it have got there without my knowing it?” she said to herself, as she lifted it off, and set it on her lap to make out what it could possibly be.

²³⁴ Frame, above n 25 at 428.

It was a golden crown.

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