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Stories of Relegation

The Treaty of Waitangi and the Judicial Role in Aotearoa's Administrative Law

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Abstract

Projects of constitutionalism, nation-building, and law-making are woven together by exercises of storytelling. Underneath administrative law's doctrinal facia, stories guide its development and animates its application. Administrative law, therefore, cannot be properly understood without reference to the stories it receives from wider constitutional, political, and social landscapes. With an understanding of those stories, we can recognise the trajectory of the law to its current state and how the law might be carried forward, in new directions. This paper examines Aotearoa's administrative law doctrine as it relates to the Treaty of Waitangi and determinations of the judicial role. It situates doctrine in wider narratives and argues the core of Aotearoa's administrative law is structured around dominant colonial stories of inferiority and superiority that relegated the Treaty of Waitangi to a peripheral role. While colonising stories were once recounted overtly, their effects persist by way of minimalism, inertia, and adherence to constitutional principles brought to Aotearoa through colonisation. Even as the Treaty's constitutional significance has been, and continues to be, recognised, it is not afforded a role that displaces the colonial orthodoxy or shapes the judicial role. Despite the colonial orthodoxy, this paper identifies pockets of judicial departure from those stories. In scattered spaces, the Treaty has found influence, grounding an impulse to expand the judicial role and reformulating the boundaries of substantive legitimate expectation and relevancy. Though eschewing the colonising stories that relegate the Treaty, judicial treatment has not yet replaced them with a cogent alternative narrative. The departures, consequently, remain ad hoc and comparatively weak. This paper ultimately closes with a call for judges to consciously adopt new narratives–ones that are already told–reflecting a constitutionalism where the Treaty is honoured.

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I Introduction

In legal terms, constitutionalism and nation-building might be understood as bare projects of institutional design. At their richest, however, they are projects of storytelling and mythmaking. They are enlivened by the push and pull of competing narratives that provide constitutional rhythms and guide doctrinal development. Even constitutions that ostensibly "emerge from the mists of time", and "deny that they have identifiable origins in specific human actions" can be traced to "observable acts of human will".[1] That is, they can be traced back to stories told.

The narratives animating constitutionalism provide both forward-looking blueprints and backwards-looking explanatory tools. They allow a listener to recognise the constitutional pathways trodden to arrive at the present and allow prediction of where those pathways might lead into the future.

Since colonial arrival in Aotearoa, two stories of have competed: one of coloniality, one of indigeneity. Moana Jackson offered these stories might be understood as two houses.[2] His metaphor understood "colonisation as the process of replacing one house with another," where each house represented a society that provided "a secure shelter for the people who live in that house".[3] It continued, "each society has a house with similar foundations, but each is organised differently, based on the people's specific beliefs, history, environment and resources".[4] Constructing the house proceeded "over centuries of change and improvement", where "each house is adorned by its own art, traditions, etiquette, myths, [and] stories."[5]

The houses comprising a nation are many-roomed. While each room fulfils a different function, they nevertheless feature similar stylistic adornments. Influences bleed across thresholds. This paper looks to the adornments found in the rooms that hold administrative law in Aotearoa.

This paper focusses primarily on the way narratives surrounding the Treaty of Waitangi have adorned the judicial space, animated the judicial role, and calibrated intensity of review.[6] As one might expect, narratives are readily identifiable and not unified. Rather, competing stories of the Treaty's relegation and rediscovery have found differing degrees of judicial favour. The

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1 Andrew Sharp "The Treaty in the Real Life of the Constitution" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Victoria, 2005) 308 at 310.

2 Mike Ross "The Throat of Parata" in Bianca Elkington and others *Imagining Decolonisation* (Bridget Williams Books, Wellington, 2020) 21 at 22.

3 At 22

4 At 24.

5 At 24.

6 Throughout this paper, I refer to "the Treaty of Waitangi" and "the Treaty". I use this terminology to reflect the common judicial approaches, the frequent engagement with "Treaty principles", and other influential scholarship. In general, references to the Treaty are references to both the Treaty and te Tiriti, jointly. Where the differences between the Treaty and te Tiriti are salient, and where I intend to refer to just one of the documents, the distinction is made plain in the body of the text.

dominant story has been and remains one of displacement and colonisation, relegating the Treaty to the peripheries of Aotearoa's administrative law with little influence over the judicial role. Increasingly, however, judicial departure from that story can be found scattered across Aotearoa's administrative law. While it reflects a rediscovery and centralisation of the Treaty in Aotearoa's administrative jurisprudence, an emergent story to displace colonial narratives has not yet emerged.

While stories of displacement and colonisation no longer exclusively capture the judicial ear, they remain amplified. Fragmented, ad hoc judicial departure makes clear that until an alternative story finds conscious judicial reception and provides a stable core for departure, that amplification of colonising stories will continue.

In examining the stories that animate Aotearoa's administrative law, Part II considers the relationship between administrative law, constitutionalism, and the judicial role and Part III looks briefly to the Treaty of Waitangi's place in Aotearoa's constitutional origins. Part IV examines the Treaty's relegation, situating it in wider projects of colonisation, before Part V considers recent judicial rediscovery of the Treaty alongside the contemporaneous constitutional narratives being told. Part VI ultimately reflects on the stories' comparative strength, calling for judicial reception and amplification of other storytellers.

II Constitutionalism, Administrative Law, and the Judicial Role

To recognise the narratives that shape them, the interaction between administrative law, constitutionalism, and the judicial role must be considered. Doing so explains why the judicial role and intensity of review provides a focal point or understanding the stories told.

A Constitutionalism, Administrative Law, and Storytelling

Constitutionalism and administrative law operate in tandem. If constitutionalism designs a polity and distributes public power, administrative law monitors the power's exercise, enforcing designated boundaries.[7] Healthy relationships between constitutionalism and administrative law are characterised by free-flowing discourse of reciprocal influence in which "the constitution shapes administrative law and in turn is shaped by it".[8] Where one speaks, the other listens.

Scrutiny of "standard [administrative] law doctrine", therefore, allows "elaboration of what lies beyond"[9] and uncovers "nothing less […] than a fully-fledged constitutional theory".[10] Professors Carol Harlow and Richard Rawlings unflinchingly argue judicial review cannot be

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7 See: Harry Woolf and others *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, London, 2013) at [1-013].

8 At [1-013].

9 David Dyzenhaus "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 SAJHR 11 at 19.

10 At 19.

understood separately from constitutional theory. It is not "endowed with its own discrete, integral history, its own 'science', and its own values which are treated as a single block sealed off from general social history, from politics, and from morality".[11] Rather, as the "normative discourse through which constitutions are justified, defended, criticised, denounced, or otherwise engaged with", constitutionalism drives administrative law's growth.[12] Put simply: "behind every theory of administrative law there lies a theory of the state."[13]

Storytelling finds its role in the constitutionalism that guides administrative law and brings understanding. Dr Matthew Palmer observed "the structure and static substance of a constitution do not reveal all of the nature of its life".[14] While the law's black-letter shapes constitutional life—indeed, this paper focusses closely on doctrinal articulation—to understand a constitution's guiding forces "it is the kernel that matters, not the legal husk; the inner life of the law, not the letter".[15] The judicial landscape "like other features of social life, adapt and develop in response to changes in matters such as community values, technology, and the environment."[16] It is those values, technologies, and environments that shape the stories told.

Understanding constitutionalism as a process of storytelling allows it to be linked to conscious "acts of constitutional creation", "the authority … claimed to create them, and the intentions they had in constructing them".[17] Little artificiality is required in speaking of constitutional 'intention'.

B The Judicial Role, Intensity of Review, and Storytelling

The scope of the judicial role provides a focal point for recognising which stories shape Aotearoa's administrative law. Consequently, this paper focusses on narratives which have operated to expand and contract the judicial role in Aotearoa's administrative law. By understanding the form and intensity of judicial scrutiny brought to bear—the bounds of the judicial role—the stories finding judicial currency might be inferred.

The stories animating administrative law are most readily found in the formulations of the judicial role due to the constitutional need to justify judicial intervention. In private law disputes, "[t]he judge's role needs no justification because laws are hardly self-interpreting,

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11 Carol Harlow and Richard Rawlings *Law and Administration* (Cambridge University Press, Cambridge, 2009) at 3.

12 Paul G McHugh "Living with Rights Aboriginally: Constitutionalism and Māori in the 1990s" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Victoria, 2005) 283 at 283.

13 Harlow and Rawlings, above n 11, at 1.

14 Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 238.

15 Sharp, above n 1, at 308.

16 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vanvouver, 2016) at 5.

17 Sharp, above n 1, at 310.

and it is uncontroversial that we need a body of officials like judges in any legal order."[18] The site of authority for interpreting law is plainly located within the judiciary. Judicial intervention in administrative law, however, involves judicial disruption of authority deliberately situated elsewhere. In constraining that power, the judiciary must justify their claim to authority and intervention.

Conscious that "each public body has its own proper role and matters which it is to be trusted to decide for itself",[19] the judicial approach is anxious to avoid improper intervention that might come without rigorous justification. It is careful to avoid improperly usurping or interfering with the role and authority of other constitutional actors. Comity, therefore, underpins Aotearoa's constitutional landscape and changes the "structure of reasoning" through which intervention is justified.[20] It requires engagement with "a supporting justificatory foundation",[21] comprised of so-termed "justificatory principles".[22] Those principles are not based on a decision's quality or correctness.[23] Rather, they are Aotearoa's constitutional principles. This is to say, judicial intervention is not justified simply where it would improve a decision. Intervention is governed by whether it is constitutionally proper.

Judicial anxiety to avoid overreach generates a presumptively "supervisory" judicial role. The judicial role is presumed to eschew inquiry into a decision's merits,[24] and judicial inquiries are not typically whether a decision is optimal or even correct.[25] Rather, the judicial role is presumptively limited to that of procedural scrutineer.

The judicial role is, however, dynamic and the presumption might be displaced.

At times, the judicial role does deploy the "forbidden method"[26] and form "its own judgment on the evidence",[27] substitute its own view for that of the decision-maker,[28] or otherwise

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18 Dyzenhaus, above n 9, at 22.

19 Michael Fordham *Judicial Review Handbook* (6th ed, Hart Publishing, Oxford, 2012) at [15.1].

20 See: Nicole Roughan *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford University Press, Oxford, 2013) at 23.

21 Nicole Roughan "Polities and Relative Authorities" (2018) 16 ICON 1215 at 1216.
See also: Woolf and others, above n 7, at [1-013].

22 Dyzenhaus, above n 9, at 22. See also: Roughan, above n 20, at 23, which termed such justificatory reasons as "secondary reasons".

23 Timothy Endicott "Comity Among Authorities" (2015) 68 CLP 1 at 4 and 10.

24 *Aorangi School Board of Trustees v Ministry of Education* [2010] NZAR 132 (HC) at [8]. See also: *CREEDNZ v Governor-General* [1981] 1 NZLR 172 (CA) at 211; and *New Zealand Fishing Association v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552.

25 *New Zealand Fishing Association v Minister of Agriculture and Fisheries*, above n 24, at 552.

26 See: Fordham, above n 19, at ch 15.

27 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 517 (PC) [*Broadcasting Assets (PC)*] at 524.

28 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 136. See also: *Thompson v Treaty of Waitangi Fisheries Commission* [2005] 2 NZLR 9 (CA) at [164].

consider a decision's correctness. A shade more supervisory, but nevertheless still interventionist, the judicial role at times takes a "hard look",[29] where scrutiny is approached with a "less tolerant eye",[30] and the circumstances considered "carefully" or "closely".[31] In either instance, a decision-maker is afforded less freedom, and a conscientious judicial role brings greater intervention.

At other times, the judicial role takes a more deferential posture. The approach is coloured by "tolerance",[32] a "degree of deference",[33] or a "wide margin of appreciation".[34] At its most constrained, a court will consider there is no appropriate judicial role and will refuse to engage, judging circumstances "non-justiciable".[35] Where constitutional considerations require, courts will step back. They may engage reluctantly or diffidently, if at all.

In any given case, the extent of the judicial role arises from the melting pot of constitutional principles. It is contextual and reflects a "mediated compromise" between the competing impulses of vigilance and restraint, whether "neither of these two competing themes necessarily prevails absolutely".[36] On the one hand, an impulse towards "restraint" is grounded in stories centring the separation of power.[37] It recognises "issues about the legitimacy of the courts to definitively adjudicate on [certain] matters",[38] and renders a court "cautious about intervening".[39] On the other hand, other stories urge "vigilance", underpinned by the rule of

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29 *Discount Brands v Northcote Mainstreet* [2004] 3 NZLR 619 (CA) at [50].

30 *Pring v Wanganui District Council* (1999) 5 ELRNZ 464 (CA) at [7]. See also: *New Zealand Public Servant Association* [1997] 1 NZLR 36 (HC) at 34–35.

31 *Wolf v Minister for Immigration* [2004] NZAR 414 (HC) at [65]; *Discount Brands v Northcote Mainstreet* [2005] NZSC 17, [2005] 2 NZLR 597 at [116]; *Whata-Wickliffe v Treaty of Waitangi Fisheries Commission* [2005] 1 NZLR 388 (CA) at [70]; and *Thompson v Treaty of Waitangi Fisheries Commission*, above n 28, at [214].

32 *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA) at 77.

33 *B v Waitemata District Health Board* [2016] NZCA 184, [2016] 3 NZLR 569 at [32]; and *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZCA 259, [2009] 3 NZLR 713 at [153].

34 *Conley v Hamilton City Council* [2007] NZCA 543, [2008] 1 NZLR 789 at [75]; and *Unison Networks v Commerce Commission* CA284/05, 19 December 2006 at [58].

35 *Manukau Urban Maori Authority v Treaty of Waitangi Fisheries Commission* HC Auckland CP122/95, 28 November 2003 at [48]. See also: *Commissioner of Inland Revenue v Lemmington Holdings* [1982] 1 NZLR 517 (CA) at 521; and *Hamilton City Council v Waikato Electricity Authority* [1994] 1 NZLR 741 (HC) at 757.

36 Dean R Knight "Mapping the Rainbow of Review: Recognising Variable Intensity" [2010] NZ L Rev 393 at 413.

37 Knight, above n 36, at 412. See also: Dean R Knight *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, Cambridge, 2018); and Dean R Knight "Modulating the Depth of Scrutiny in Judicial Review: Scope, Grounds, Intensity, Context" [2016] NZ L Rev 63.

38 Knight *Vigilance and Restraint*, above n 37, at 243.

39 Knight, above n 36, at 413.

law and desires to protect the rights, interests and expectations of citizens.[40] When listening to these stories, "courts will strive to intervene" and expand their role.[41]

Different stories, and the constitutional principles they centre, are amplified differently in different circumstances and "[t]he court will fashion the mode of control that suits the occasion".[42] There is "no generic analytical solution" explaining which story finds judicial favour in each circumstance.[43] Rather, the "circumstances of different cases lead to the court placing different emphases on the competing notions of judicial vigilance and restraint and, thus, the depth of scrutiny differs."[44] "So much depends" on the nature of the authority scrutinised, the circumstances in which it operates, and the decision's implications.[45] In an oft quoted axiom, when constructing the judicial role in administrative law, "context is everything".[46]

The bounds of the judicial role are, consequently, dynamic, and the same approach will not always be appropriate. Instead, the scrutiny brought sits somewhere on an available spectrum.[47] At its simplest, that spectrum measures how interventionist the judicial role will be. The principles that take precedence and influence the degree of intervention on each occasion, and the patterns that emerge across such occasions, reflect the comparative strength of the stories animating administrative law. As Dr Carwyn Jones observed, "[judicial] decisions often mirrored the political context of the time".[48] Decisions as to the judicial role are no exception.

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40 At 412.

41 At 412.

42 *Air New Zealand v Wellington International Airport*, above n 33, at [157].

43 Endicott, above n 23, at 2.

44 Knight "Modulating the Depth of Scrutiny in Judicial Review", above n 37, at 63. See also: Knight *Vigilance and Restraint*, above n 37, at 1.

45 Endicott, above n 23, at 2.

46 Most famously, see *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 AC 532 at [28]. For incorporation in Aotearoa's judicial canon, see: *McGuire v Hastings District Council* [2000] UKPC 42, [2002] 2 NZLR 577 at [4]; *CREEDNZ v Governor-General,* above n 24, at 197-198; *Discount Brands v Northcote Mainstreet*, above n 29, at [50]; and *Air New Zealand v Wellington International Airport*, above n 33, at [147] and [155].

47 This spectrum has been referred to with varying language. For the language of spectrum, see: *Ports of Auckland v Auckland City Council* [1999] 1 NZLR 601 (HC) at 606; *Commissioner of Inland Revenue v Chatfield & Co Ltd* [2019] NZCA 73, [2019] 2 NZLR 832 (CA) at [46]; and *Tamil X v Refugee Status Appeals Authority* [2009] NZCA 488, [2010] 2 NZLR 73 at [269]. For the language of a "sliding scale": *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [116]; *Moxon v Casino Control Authority* HC Hamilton M324/99, 24 May 2000 at [134(b)]; and *Manukau Urban Maori Authority v Treaty of Waitangi Fisheries Commission*, above n 35, at [48]-[49]. For language of "continuum", see: *Z v Police* HC Auckland R 145-01, 14 November 2001 at [17]. See also: *Mihos v Attorney-General* [2008] NZAR 177 (HC) at [101] which drew on Taggart's "rainbow".

48 Jones, above n 16, at 14.

III The Treaty of Waitangi in Aotearoa

While numerous motifs recur across stories animating Aotearoa's administrative law, this paper focusses on the Treaty of Waitangi. Stories of the Treaty have echoed plentifully across Aotearoa's history. It is unsurprising given, among other things, the Treaty has been described as "simply the most important document in New Zealand's history".[49]

Similarly unsurprising, stories featuring the Treaty occupy a prominent position in Aotearoa's *constitutional* psyche. The Treaty was and remains a "founding document and fundamental charter, and it has been widely held to be (or denied to be) the 'foundation document' of the 'nation', 'society', or 'constitution'."[50] Indeed, it has been said to "[pave] the way for the introduction of colonial government in New Zealand".[51] From the beginning, The Treaty occupied a constitutional role. Even on the most conservative view, where "the source of the state's authority over the Māori people is the sovereignty of the Crown", the extension of that sovereignty to Aotearoa "arises from the consent given by the Treaty of Waitangi".[52] The Treaty formed and forms the "framework for the relationship between Māori and the New Zealand government" and still "informs discussions in New Zealand public life that relate to constitutional powers and limitations".[53]

While the Treaty's precise legal status might remain unsettled—it has been variously characterised as "a legal instrument, a political tool, and a historical document",[54] a treaty of cession or a treaty of protection,[55] but is perhaps something else entirely—its role in constitutional stories is independent of its legal status. Rather, "[w]hatever the Treaty said or did or was, it said something about who should exercise power in New Zealand."[56] It follows, therefore, that the Treaty has a role in legitimating or constraining claims to authority in Aotearoa.

The role, or lack of a role, the Treaty has played in legitimating claims to judicial authority has varied, just as its influence in contested political contexts has waxed and waned.

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49 Robin Cooke "Introduction" (1990) 14 NZULR 1 at 1.

50 McHugh, above n 12, at 309.

51 Jones, above n 16, at 42.

52 Paul G McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at 2. It is worth noting, however, that McHugh's view of the Treaty as a pathway through which the Crown might claim sovereignty, alongside a suite of his other views, have been criticised as overly conservative or otherwise not properly making space for Māori voices and mātauranga Māori: Moana Jackson "The Māori Magna Carta: New Zealand and the Treaty of Waitangi" [1993] 15 Sydney L Rev 275; and Robert Enright and Cherie Phillips "The Māori Magna Carta: New Zealand and the Treaty of Waitangi" (1992) 7 Auckland U L Rev 232.

53 Jones, above n 16, at 7.

54 At 7.

55 Palmer, above n 14, at ch 4.

56 At 31.

Two stories are found in Aotearoa's constitutional narrative, reflecting the "two (contradictory and competing) identifiable origins" asserted by different storytellers.[57] One view develops a "legal" or "official" constitutionalism,[58] whereby New Zealand's constitutional arrangements find their genesis in royal will, with subsequent transformation at the hands of a parliament and judiciary "firmly rooted in an increasingly egalitarian and democratic political culture".[59] The other view reflects a "Treaty constitutionalism",[60] and "asserts an origin in the Treaty of Waitangi … and the need for a return to Treaty origins".[61]

The competing stories reflect the disputed intention, consequence, and effect of the Treaty. While the Treaty was undoubtedly "the mechanism through which two systems of law would be formally brought together in some sort of single accommodation", changing times have raised questions, "was it intended that one system would dominate at the expense of the other? Or was mutual survival expected or even guaranteed?".[62] This paper is unapologetic in its view that the Treaty was never intended, nor can it be understood, as a mechanism through which Māori agreed to the extinguishment of their social, cultural, legal, and constitutional frameworks,[63] and Aotearoa's administrative law ought to reflect that. The answers found in Aotearoa's administrative law, however, equivocate. "It is," as Palmer observed, "no surprise then, that New Zealand's law and constitution embody simultaneously conflicting attitudes to the Treaty of Waitangi".[64]

The conflicting attitudes and resultant stories are not equally influential, nor found in equal parts. Rather, the dominant story is a colonising one, resulting in judicial relegation of the Treaty. This is writ large across Aotearoa's legal doctrine. Despite its dominance, it has not had absolute capture of Aotearoa's administrative law. Scattered judicial departure from that story might be found, with a nascent space emerging that new stories might find room. This paper turns first to the prevailing orthodoxy, and then to the space recently created.

IV The Prevailing Story and a Colonising History

The prevailing story found in Aotearoa's administrative law grew from colonising projects that established a colonial legal system. The most influential principles in Aotearoa's administrative law, consequently, reflecting a colonial legacy rather than a jurisprudence developed in

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57 Sharp, above n 1, at 310.

58 At 309.

59 At 312.

60 Sharp, above n 1, at 209.

61 At 310.

62 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 4 Wai L Rev 1 at 7.

63 This follows findings, for example, of the Waitangi Tribunal in *He Whakaputanga me te Tiriti: the Declaration and the Treaty* (Wai 1040, 2014), that Māori signatories to the Treaty cannot have properly been understood as ceding sovereignty.

64 Palmer, above n 14, at 24.

Aotearoa.[65] The result is an administrative law in which the "orthodox view [is] that Treaty rights are what valid law says they are, and the Treaty relationship of Māori with the Crown is what the Crown … declares it to be".[66]

At their worst, dominant stories denied the Treaty legal cognoscibility. It was a "political instrument with no direct legal enforceability".[67]

In recent times, more commonly, the Treaty is recognised but relegated to a peripheral influence. Plainly cognisable, constitutional, but nevertheless, with little force shaping administrative law. Despite its ordinary flexibility, administrative law has adhered to colonising stories and in stood firm against the Treaty's potential influence. As a result, the Treaty "[cannot] be vouchsafed any more recognition than current legal authority gives to it".[68]

A The Colonising Story[69]

At its core, the colonising story is one of violent displacement, usurpation, and imposition.

Bianca Elkington and Jennie Smeaton offered that "colonisation was and is … the forceful taking of land, languages, culture and autonomy without permission … the imposition of one group's will on another."[70] Attempting "a broad definition of colonisation", they offered it is "a process of one group imposing their ideas about the world view on another group, taking away the things that make life possible and good".[71] Moana Jackson similarly and plainly offered: "colonisation necessarily involved brutal taking of indigenous peoples' lands and lives".[72]

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65 For similar discussion, see: Dean R Knight "Importation and Indigeneity: The Quartet in New Zealand Administrative Law" in TT Arvind and others (eds) *Executive Decision-making and the Courts: Revisiting the Origins of Judicial Review* (Hart Publishing, Gordonsville, 2020) 291.

66 Sharp, above n 1, at 313.

67 Jones, above n 16, at 8 and 13. Jones relied on the disputes surrounding the seabed and foreshore in the early 2000s as an example of the precarity of Māori rights under the Treaty. There, he observed, Māori rights guaranteed under the Treaty were subject to the vagaries of political while, where "the government decided it would be better to appropriate Māori property rights to the foreshore and seabed than to risk upsetting non-Māori voters."

68 Sharp, above n 1, at 313.

69 To the extent it might be possible, I am the wrong writer to, and this paper does not, attempt to comprehensively recount the processes of colonisation. Explaining our administrative law would, however, be hollow without a conception of the colonising processes and so this paper relies on a characterisation of the colonising process, rather than a recount.

70 Bianca Elkington and Jennie Smeaton "Introduction" in Bianca Elkington and others *Imagining Decolonisation* (Bridget Williams Books, Wellington, 2020) 7 at 8.

71 At 18.

72 Moana Jackson "Where to next? Decolonisation and the Stories of the Land" in Bianca Elkington and others *Imagining Decolonisation* (Bridget Williams Books, Wellington, 2020) 133 at 133–134.

Colonisation's effect was profound. It presented "an unexpected threat to the survival of Aotearoa and its people".[73] This threat is reflected in population changes, in land possession, in language health, and in the existence and erasure of cultural spaces. It has left a "scar on the landscapes and on the people."[74]

When settlers came, "Pākehā ideas about society and land and relationships were imposed on Māori".[75] The process of colonisation "fomented injustice: a systematic privileging of the Crown and a relationship in which it assumed it would be the sole and supreme authority."[76] It established Eurocentric structures that remain dominant,[77] and led to "a state built upon the taking of another people's lands, lives, and power".[78]

Colonising stories had "no time for the niceties of tikanga" or te ao Māori.[79] Rather, colonising storytellers brought a "different story to tell", and "had a different view about treaties, as well as of relationships and the land".[80] The stories of connection preceding colonisation were displaced by stories of ownership, individualism, and transaction. The ongoing displacement became progressively more extreme: "with each new story and each new consolidation of power, the colonisers took less care to listen to stories that were already in the land."[81]

The ongoing and increasing displacement saw stories told and retold. Jackson observed, "colonisation has always been a many rendered thing",[82] and "since the beginning of the European dispossession of the world's Indigenous peoples, the colonisers have defined and redefined it in a vast story archive."[83]

Somewhere along the way, storytellers endeavoured to make the story fit for judicial consumption. To justify "the brutal taking of indigenous peoples' lands and lives, [colonisation] has been reframed and justified in stories that range from pseudo-scientific and legal rationalisations, to blatantly racist generalisations".[84] In a process of sanitation and "in order to justify their use of violence, the colonisers objectified Māori people and dismissed their practice as primitive, inferior, unintelligent, ignorant, uncivilised, violence, inhumane,

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73 Mike Ross, above n 2, at 22.

74 Ocean Ripeka Mercier "What is Decolonisation?" in Bianca Elkington and others *Imagining Decolonisation* (Bridget Williams Books, Wellington, 2020) 40 at 40.

75 Elkington and Smeaton, above n 70, at 7.

76 Jackson, above n 72, at 145.

77 Elkington and Smeaton, above n 70, at 18.

78 *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (Matike Mai Aotearoa, 2016) [*Matike Mai*] at 29.

79 Jackson, above n 72, at 144.

80 At 143.

81 At 146.

82 At 133.

83 At 133.

84 At 133–134.

and degrading to women."[85] The resultant stories resemble those lingering today, of inferiority and superiority and of civilising projects. Settlers "regarded themselves as superior and their society as better than that of their [Māori] neighbours",[86] with "successive government policies of racial amalgamation, assimilation, and integration from 1840 right through to the early 1970s all assum[ing] that civilisation and integration were a one-way process."[87]

So, the story went, there was nothing (administrative) law could learn from mātauranga Māori.

Indeed, where the stories first entered the judicial landscape, Māori capacity to create a legally enforceable Treaty was doubted.

B Early Questions of the Treaty's Validity

Early judicial treatment explicitly deployed of narratives of inferiority and incapacity. Justice Williams, writing extra-judicially, observed that "in the 19th century and for most of the 20th century, the law avoided framing this debate as a legal debate by rejecting the Treaty as an instrument having any legal effect."[88] In this time, "[settler] law, at its positivist height, rejected the legal relevance of the Treaty", acknowledging it "only as a temporary expedient in the wider project of … cultural assimilation".[89]

Themes of inferiority and incapacity are plainest in *Wi Parata v Bishop of Wellington*,[90] which relied on stories of indigenous incivility and benevolent British colonisation. Chief Justice Prendergast observed that "on the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law".[91] He continued:[92]

> there is no doubt that during a series of years the British Government desired and endeavoured to recognise the independent nationality of New Zealand. But the thing neither existed, nor at the time could be established. The Maori tribes were incapable of performing the duties, and therefore of assuming the rights of a civilised community.
>
> …
>
> In fact, the Crown was compelled to assume in relation to the Maori tribes … these rights and duties which, jure gentium, vest in and devolve upon the first civilised occupier of a territory thinly peopled by barbarians without any form of law or civil government.

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85 Mike Ross, above n 2, at 30.

86 At 25.

87 David Williams "Unique Treaty-Based Relationships Remain Elusive" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Victoria, 2005) 366 at 373.

88 Williams, above n 62, at 7.

89 At 10.

90 *Wi Parata v Bishop of Wellington* (1887) 3 NZ Jur (NS) 72 (SC).

91 At 77.

92 At 77-78.

…

> Had any body of law been capable of being understood or administered by the courts of a civilised country, been known to exist, the British government would surely have provided for its recognition.

This story was fatal to the Treaty. Where, on Prendergast CJ's view, "no body politic existed capable of making a cession of sovereignty, nor could the thing itself exist",[93] no basis existed by which Māori could be party to a valid treaty. The Chief Justice consequently held, in an articulation echoing through time, that "the pact known as the 'Treaty of Waitangi' … must be regarded as a simple nullity".[94]

The story to which Prendergast CJ's ascribed is clear. Woven inextricably throughout his judgment is the colonising story, neglecting established indigenous constitutional structures, minimising indigenous agency, and rejecting indigenous capacity.

The most pernicious elements of Prendergast CJ's story quickly fell from judicial favour. It took just 24 years for the Privy Council to conclude *Wi Parata* "goes too far".[95] It was "rather late in the day" to argue there was "no customary law of the Maoris [sic] of which the Courts of Law can take [cognisance]".[96]

Despite that judicial rejection, the narratives it was based on took root in law, characterising early judicial treatment of the Treaty. Matthew Palmer observed that "historically, the key questions of the status of the [T]reaty at international law has been whether Māori tribes had the 'capacity' … to conclude binding international treaties."[97] Stories of British civilisation justified a "restrictive definition of 'civilisation' as a requirement for the possession of capacity to enter into binding international legal obligations".[98] While Palmer doubts that British signatories to the Treaty ever genuinely held views of Māori incapacity,[99] it nevertheless became a story adorning the judicial landscape, providing a hook on which Prendergast CJ hung his judicial relegation of the Treaty, echoed in later judgments.

It took until the new millennium to see *Wi Parata* conclusively discredited in modern jurisprudence.[100] It established a "prevailing legal principle [that] stood for over a century …

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93 At 78.

94 At 78.

95 *Nireaha Tamaki v Baker* [1901] AC 561 (PC) at 577.

96 At 577.

97 Palmer, above n 14, at 155.

98 At 155.

99 At 167, and 153–168.

100 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [25] and [86], per Elias CJ. For ongoing reliance on *Wi Parata v Bishop of Wellington* before *Attorney-General v Ngati Apa*, but subsequent to *Nireaha Tamaki v Baker*, see: *Waipapakura v Hempton* (1914) 33 NZLR 1065 (SC); and *Re Ninety Mile Beach* [1963] NZLR 461 (CA).

that Māori relationships with the Crown were political and non-justiciable."[101] Indeed, this remains the prevailing legal position.

While judicial cognisance of the Treaty has re-established, its incapability of grounding rights without legislative basis remains. In *Hoani Te Heuheu Tukino v Aotea District Māori Land Board*, the plaintiff relied on the Treaty of Waitangi as a "solemn compact" between Māori and the Crown, arguing that it generated rights "cognisable in the courts".[102] The argument was resoundingly rejected. It was "well settled", the Privy Council said, that rights conferred by the Treaty "cannot be enforced in the courts, except in so far as they have been incorporated into municipal law".[103] Without statutory support, "so far as the appellant invoke[d] the assistance of the court, it is clear that he [could] not rest his claim on the Treaty of Waitangi".[104] Over time, there has been little judicial appetite to challenge this orthodoxy.[105]

This approach reflects orthodox interactions between international and domestic law, where international obligations have no direct enforceability. There are only two sources of enforceable law: legislation and common law.[106] It follows that "local courts cannot enforce any right associated with the Treaty of Waitangi unless there is … some statutory or common law means at hand", and as a result, "the legal source of Māori rights, then, is not the Treaty of Waitangi itself, but the statutory or common law means by which those rights have or may become part of our legal landscape".[107] The judicial method "has its accustomed rules of recognition",[108] which have remained unchanging in light of Aotearoa's unique constitutional stories. They neglect the qualitative difference of the Treaty, that it is different to generic international law obligations. Its unique constitutional position has not yet stimulated meaningful re-evaluation of the orthodoxy's application.

The uncritical acceptance and treatment of the Treaty as analogous to other international instruments illustrates a common theme in the judicial method: the Treaty is afforded insufficient force to displace established doctrine. The judicial method takes a presumptive approach, with two outcomes: a case succeeds or fails on established doctrine. It neglects that

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101 McHugh, above n 12, at 285.

102 *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC) at 323.

103 At 324.

104 At 325.

105 See, for example: *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 [*Might River Power*] at at [93]; *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA) [*Commercial Radio Assets (CA)*] at 168; *Broadcasting Assets (PC),* above n 27, at 515 and 524; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 [*Lands*] at 667 and 691; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 198; and *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA) [*Broadcasting Assets (CA)*] at 591.

106 McHugh, above n 52, at 11.

107 At 11.

108 At 12.

the common law's flexibility provides a third option: doctrine might be extended, established, or reshaped. Indeed "the genius of the common law" has been described as its "dynamism".[109] It has always retained the ability to flex and adapt to the circumstances. Where the Treaty could be appropriately understood as a suis generis document, questions might be asked whether orthodox commonwealth jurisprudence is fit-for-purpose. They remain unasked, however, and the potential for new stories to influence the law is subsequently precluded.

C Orthodox Avenues from Judicial Rediscovery

Even where the latter half of the 20th century saw judicial rediscovery of the Treaty, lingering effects of colonising stories continued to minimise its influence. It remained enforceable, only through orthodox pathways.

The flashpoint of judicial recognition was *Huakina Development Trust v Waikato Valley Authority*.[110] Sidestepping questions of the Treaty's legal status,[111] Chilwell J recognised "the Treaty was essential to the foundation of New Zealand",[112] and in an oft-cited observation,[113] held "there can be no doubt that the Treaty is part of the fabric of New Zealand society".[114] Recognising its constitutional character, Chilwell J looked favourably upon submissions the Treaty "occupies a fundamental place of some constitutional significance in the New Zealand legal system".[115]

That constitutional character was subsequent affirmed, where the Treaty was said to give an issue a "constitutional flavour", and issues were "not simply legal, but political too. As well, constitutional implications arose".[116] The Privy Council, the then apex judicial body, further observed that "the Treaty records an agreement executed by the Crown and Māori which over 150 years later is of the greatest constitutional importance to New Zealand".[117] More recently, still, Aotearoa's now-domesticated Supreme Court observed it was "not surprising, given the

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109 Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [8].

110 *Huakina Development Trust v Waikato Valley Authority*, above n 105.

111 At 206.

112 At 210.

113 For judicial citation, see: *New Zealand Film Commission v Broadcasting Tribunal* HC Wellington CP783/87, 16 September 1988 at 10; *Dixon v David Bateman Ltd* [1999] DCR 120 at 136; *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* [2003] 1 NZLR 779 at 805 (HC); *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843 at [590]; and *Te Whana Whanau Trust v Hawera District Council* HC Wellington AP157/90, 3 September 1991.

114 *Huakina Development Trust v Waikato Valley Authority*, above n 105, at 210.

115 At 196.

116 *Broadcasting Assets (CA)*, above n 105, at 587.

117 *Broadcasting Assets (PC)*, above n 27, at 516.

Treaty's constitutional significance" that no argument made was aimed at "ousting Treaty principles".[118]

On its face, this recognition might have signalled an emergent story of Treaty-based constitutionalism and administrative law taking root. The influence of such stories, however, was rapidly curtailed.

While judicial recognition of the Treaty's place in Aotearoa proved enduring, "much still remain[ed] in order to develop a full understanding of the constitutional, political, and social significance of the Treaty in contemporary terms".[119] In light of that uncertainty, "[t]he way ahead call[ed] for careful research, for rational positive dialogue, and above all, a generosity of spirit."[120] On canvassing the suite of cases catalysed by state-privatisation of the 1980s, however, the Court of Appeal observed that "such dicta bearing on the wider questions [of the implications of the Treaty's significance] as are to be found […] can be no more than obiter, for the subject of the foundation of the New Zealand constitutional system remains unargued, except that occasionally (as in the present case) it has been lightly touched on".[121] They did not signal a new constitutionalism.

Despite this recognition, the judicial role remain unchanged. Ultimately, the judicial approach to engaging with the Treaty still relied on orthodox aides to statutory interpretation,[122] standard relevancy grounds of review,[123] and recently, invoking the well-established principle of legality.[124]

Judicial recognition secured a place for the Treaty in Aotearoa's legal and constitutional landscape, but it was an ornamental adornment only. It had no effect on the nature of the space. Few legal implications flowed, and the judiciary remained ill-at-ease receiving stories of the Treaty that would reshape Aotearoa's administrative law. The Treaty's recognition had little or no substantive effect on contours of the judicial role.

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118 *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2021] NZSC 217, [2021] 1 NZLR 801 at [150]–[151].

119 *Lands,* above n 105, at 672.

120 At 673.

121 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 305.

122 See: *Huakina Development Trust v Waikato Valley Authority*, above n 105.

123 See: *Broadcasting Assets* (PC), above n 27.

124 See: *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board*, above n 118; *Students for Climate Solutions v Minister of Energy and Resources* [2022] NZHC 2116; Dean R Knight "New Zealand: Te Tiriti o Waitangi norms, discretionary power, and the principle of legality (at last)" (2022) Public Law (forthcoming); and Alister Hughes "*Trans-Tasman Resources* and presuming consistency with te Tiriti o Waitangi" [2022] NZLJ (forthcoming).

D The Lingering Effects of Colonising Stories

Even as the Treaty receives judicial recognition, and stories in modern social, political, and constitutional landscapes are less overt in their invocation of superiority and inferiority, they nevertheless reflect the lingering effects and continuing processes of colonisation.

While historical in origin, colonisation is unmistakably a continuing process. Even as the government celebrated the Treaty through the 20th century—in a "top-down, unilateral development"—they remained obtuse to "the depth of the transgressions by its nineteenth century forebears".[125] Modern storytelling developed "in a prevailing climate of historical amnesia"[126] and modern Treaty recognition remains "predicated on a sanitised view of New Zealand's colonial history".[127]

A sanitised view of history gave rise to a sanitised view of the present. Even as the government celebrated, it remained "unaware that many of its existing policies continued to transgress the Treaty. For the Māori, there was little to celebrate in the destruction of their language, cultural identity, and economic power by the alienation of ninety-five percent of their land in a matter of 120 years",[128] with modern structures aimed at addressing that harm continuing cycles of dispossession.[129]

The "meta-narrative of conversion of savages to Christianity and the civilising mission of British imperialism overrode Māori epistemology" remained the influential.[130] The colonial narrative is recounted in less overt terms, but through its overarching capture on the judicial consciousness, still leaves little room for counternarratives to develop.

Constitutionally, even as the Treaty was rediscovered, and indeed, even as it might have come to be understood as a "foundation document",[131] it took that status only in the sense that it "it precede[d] and ma[de] eligible" the extension of the Crown's sovereignty to Aotearoa.[132] It is not, however, understood to constitute that sovereignty, and signing the Treaty was not a constitutive act with "legal force in that creation".[133]

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125 Ranginui Walker "The Treaty of Waitangi in the Postcolonial Era" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Victoria, 2005) 56 at 56.

126 At 56. See also: Elkington and Smeaton, above n 70.

127 Walker, above n 125, at 56.

128 At 56–57.

129 See, for example, Elkington and Smeaton, above n 70, at 7 and 12, where for example, they consider the process of regaining forcibly confiscated land, where iwi have been required to purchase that land. Similar critiques are levied at the capture the Crown retains over the ability to dictate the process to be followed leading to and following Treaty settlements.

130 Walker, above n 125, at 57.

131 Sharp, above n 1, at 311.

132 Sharp, above n 1, at 311.

133 At 310–311.

These continuing stories remain mirrored in judicial approaches. It is to these ongoing judicial approaches that this paper now turns.

E Expressly Defining the Judicial Role

The stories capturing the judicial ear are most clearly demonstrated in explicit discussions setting the scope of the judicial role or calibrating intensity of review.

These discussions "bring questions of the depth of scrutiny to the foreground. The hallmark of this style of review is the explicit calibration of the depth of scrutiny as a preliminary step in the supervisory process".[134] "Openness in the reasoning and calibration process is prioritised",[135] and justificatory discussions occur plainly. The engagement with different constitutional principles operates to illustrate the judicial adherence to respective stories.

Evident in these discussions is the Treaty's relegation to a peripheral role. Where constitutional principles sourced from colonial jurisprudence are deployed as a justificatory basis, the Treaty remains largely absent. Judicial readiness to engage with colonial principles and judicial failure to engage the Treaty reflects the lingering effects of colonising narratives.

1 Reliance on Orthodox Colonial Principles

A survey of authority that expressly contemplates the judicial role reveals references to the full suite of justificatory principles found across wider commonwealth jurisprudence, grounded in colonial stories: adherence to supervisory postures, polycentricity and procedural adequacy, expertise, Parliament's supremacy and constitutional presumptions, and stare decisis.

(a) Presumptively Supervisory Postures

With reference to the Treaty, the judicial role retains steadfastly committed to its presumptive supervisory posture. *Radio Frequencies* provides, perhaps, the best example.[136] The challenge required engagement with the impacts of a policy-based decision to sell radio frequency licences with selective, and it was argued inadequate, reservations for Māori ownership and access. There, the Court observed:[137]

> wide-ranging and persuasive submissions often seemed to be directed to showing the Minister came to the wrong decision. But unless the decision was plainly unreasonable

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134 Knight "Modulating the Depth of Scrutiny in Judicial Review", above n 37, at 77 and 78; and Knight Vigilance and Restraint, above n 37, at 147.

135 Knight "Modulating the Depth of Scrutiny in Judicial Review", above n 37, at 78–79.

136 *New Zealand Maori Council v Attorney-General* [1991] 2 NZLR 129 (CA) [*Radio Frequencies (CA)*] at 144.

137 At 144. See also: *New Zealand Māori Council v Attorney-General* HC Wellington CP785/90, 21 September 1990 [*Radio Frequencies (HC)*] at 8; and *Ngai Tai Ki Tamaki Tribal Trust v Minister of Conservation* [2017] NZHC 300, [2007] NZAR 485 at [40].

> that is no business of the court. The court's role is to ensure that in coming to his decision, he acted lawfully, in accordance with well-known administrative law criteria.

Evident in this observation is resistance to an expanded judicial role. The Court was invited to engage closely with the decision's merits, assessing both probable outcomes and their desirability. It was, in essence, an invitation to eschew the axiom that the judicial role focusses on "process" and not "merits",[138] and instead to undertake a more intense review of elements of decisions ordinarily not scrutinised. Accepting that invitation would have brought judicial scrutiny of the probity and quality of the policy.

Despite those invitations, the axiom steeped in long traditions of British administrative law prevailed. The constitutional stories centring the separation of powers or orthodox representative democracy, inherited from Britain alongside constitutional relationships, roles, and competencies, reified the supervisory posture. The colonial stories of default power distribution and remained influential.

(b) Polycentricity, Procedural Adequacy, and Expertise

Often rationalised in similar ways, questions of polycentricity, procedural adequacy, and expertise typically constrain the judicial role. These constraints are deployed with some force against judicial intervention in Treaty-based contexts.

Te Runanga o Raukawa v Treaty of Waitangi Fisheries Commission saw these principles engaged to limit judicial scrutiny of allocations of limited commercial fishing quotas, with influential reference to international scholarship.[139] Drawing on an analogy developed by Lon Fuller, the Court echoed an "apt illustration of a polycentric situation […] as being like a spider web where a pull on one strand will distribute tensions after a complicated pattern through the web as a whole".[140] This has found particular currency in situations engaging interests guaranteed by art II of the Treaty.[141] Such interests often engage a "multiplicity of competing claims of many, each to be affected by any decision in favour of any one or other, result in the decision-maker facing a problem often unsuited to adjudication by a traditional process".[142] It

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138 See, for example: *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*, above n 24, at 557; *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 127; and *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606 (HC) at 625.

139 *Te Runanga o Raukawa v Treaty of Waitangi Fisheries Commission* HC Wellington CP322/96, 7 August 1997 [*Te Runanga o Raukawa v Treaty of Waitangi Fisheries Commission (HC)*] at 11; and *Te Runanga o Raukawa v Treaty of Waitangi Fisheries Commission* CA178/97, 14 October 1997 [*Te Runanga o Raukawa v Treaty of Waitangi Fisheries Commission (CA)*] at 10–11.

140 *Te Runanga o Raukawa v Treaty of Waitangi Fisheries Commission (HC)*, above n 139, at 11, drawing on Lon Fuller and Kenneth Winston "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353 at 395.

141 For example: *Thompson v Treaty of Waitangi Fisheries Commission*, above n 28, at [174]; and *Te Runanga o Raukawa v Treaty of Waitangi Fisheries Commission (HC)*, above n 139, at 11.

142 *Te Runanga o Raukawa v Treaty of Waitangi Fisheries Commission (HC)*, above n 139, at 11.

was for that reason the Court considered the Treaty of Waitangi Fisheries Commission, rather than the Courts, was "best suited" to "devise solutions".[143]

These concerns are commonly based on the limitations of the adjudicative judicial processes.[144] Leading English textbooks observe the narrow focus on represented parties renders the judicial process ill-equipped to make decisions that "involve the interests of those who were not represented",[145] or which "cannot be resolved independently and sequentially".[146] A litigious approach is appropriate for determining the positions of parties vis-à-vis one another, not the position of an individual with reference to society at large.[147]

Concerns predicated on procedural capability commonly bleed into questions of expertise, reflecting similar stories. They ask how "well-equipped" a court might be to scrutinise a particular decision.[148] Echoed across the commonwealth, they turn to a decision-maker's knowledge, or ability to access, digest, and apply knowledge, compared to a court's. It accounts for technical knowledge,[149] practical wisdom,[150] or the familiarity and experience with the recurring issues raised within the scope of a particular discretion, and ostensibly goes to the respective competence to "[assess] specialised material".[151]

Expertise as a constraint on the judicial review is similarly engaged in Treaty-related review. Alongside polycentricity and procedural adequacy, the Court in *Te Runanga o Raukawa* observed that "the complexities of the competing interests and different considerations" but were "well-known to the Commission and within its specialised expertise and knowledge".[152] The Treaty of Waitangi Fisheries Commission had "all [the] information before it and

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143 At 11.

144 *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 1 (CA) at 46; *Thompson v Treaty of Waitangi Fisheries Commission*, above n 28, at [174]; and *Te Runanga o Raukawa v Treaty of Waitangi Fisheries Commission (HC)*, above n 139, at 11. See also: Paul Daly *A Theory of Deference in Administrative Law: Basis, Application, and Scope* (Cambridge University Press, Cambridge, 2012) at 92.

145 Woolf and others, above n 7, at [1-044]. And American scholars, see Fuller and Winston, above n 140.

146 Daly, above n 144, at 90.

147 See: Richard Wright "Substantive Corrective Justice" (1992) 77 Iowa L Rev 625; and Ernest Weinrib "The Special Morality of Tort Law" (1989) 34 McGill LJ 403.

148 See: *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 414; *Wellington City Council v Woolworths (No 2)* [1996] 2 NZLR 537 (CA) at 546; *CREEDNZ v Governor-General*, above n 24, at 197-199*; Diagnostic Medlab v Auckland District Health Board* [2007] 2 NZLR 832 at [328]; *Air New Zealand v Wellington International Airport* [2009] NZAR 138 (HC) at [35]; and *Mihos v Attorney-General*, above n 47, at [107].

149 Daly, above n 144, at 74.

150 At 72–73.

151 *Petrocorp Exploration Ltd v Minister of Energy*, above n 144, at 46. See also: *NZI Financial Corp v NZ Kiwifruit Authority* [1986] 1 NZLR 159 (HC) at 173; *Unison Networks v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [55]; and Daly, above n 144, at 76.

152 *Te Runanga o Raukawa v Treaty of Waitangi Fisheries Commission (HC)*, above n 139, at 22.

specialised knowledge that it brought to bear on the issue".[153] The issue therefore fell for "the [decision-maker] in its expertise",[154] rather than the Court.

Together, these principles operate pragmatically, aiming to optimise decision-making, in accordance with conventional stories of where expertise lies. The aim to situate authority with a decision-maker best placed to exercise it and, ostensibly, are appropriately engaged in Treaty-based contexts.

The principles reasoning cannot, however, be adopted uncritically. Attention should be paid to the source of the multiple interests arising under art II and engaged in disputes. The Treaty provided a guarantee to all Māori and a framework of active protection has developed through which that guarantee might be understood. The promises to one signatory were not qualified with reference to other signatories, nor is it a baseless or political policy-based promise undertaken of the government's own volition. It is a promise inextricably tied to the Treaty relationship with a legally cognisable, if not-yet-justiciable, yardstick found in the Treaty relationship. There is, therefore, a unique imperative in Aotearoa to develop a judicial role fit for adjudication of such disputes, grounded in stories centring the Treaty, or at the very least, an impetus to re-rationalise concerns of polycentricity with reference to these new stories.[155] Despite this, the uncritical adoption reflects a continuing adherence to a solely adjudicative judicial role with its roots in colonising stories, where generic justifications are offered, rather than justifications bespoke to Aotearoa.

The ostensible and uncritiqued applicability of these principles to Aotearoa has, however, stymied any impetus to develop new, judicially-available, expertise or acknowledge alternative sites of knowledge outside both the decision-maker and the court.[156] It eschews engagement with wider constitutional narratives, neglecting opportunities to listen to tailored stories originating within Aotearoa.

(c) Parliamentary Supremacy and other Constitutional Principles

Unlike the factors just canvassed which aim to optimise decisions, parliamentary supremacy and other constitutional principles go to a decision-maker's legitimacy.

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153 At 30.

154 At 29.

155 By analogy, in cases of bankruptcy or liquidation, courts readily grapple with a competing interests and claims that spill into and implicate the others. However, in that instance, each individual promise is scrutinised and the reasonableness of a defaulting debtor's action towards one creditor is assessed with reference to its implications on another creditor. The material point is that the reticence to engage in complex disputes with competing claims is not universal, even without a constitutional imperative to ensure that the behaviours are appropriate.

156 For example, the unique expertise to be found vested within iwi, hapū, whānau, or other Māori claimants by virtue of their engagement with mātauranga Māori.

The judicial role is most forcefully constrained by principles of non-interference and parliamentary supremacy. Foundational to colonial constitutionalism, courts will not interfere with Parliament. Courts readily accept submissions that they must avoid "unwarrantable intrusion into the function of parliament",[157] and have declined application for review framed in standard administrative law principles where it was "in reality […] an attack on the legislation".[158] The legislative focus took the challenge "outside the proper functions of the court".[159] Even with judicial acknowledgment "the exact scope and qualifications [of the principle of non-interference] are open to debate",[160] the principle has been unyielding.[161]

To the extent non-interference's doctrinal foundation has been tested in a Treaty-based context, it traces to the Australian High Court as "the corollary of the principle […] that an implied right to freedom of expression in relation to public and political affairs necessarily exists in a system of representative government".[162] As a result, Parliament could legislate freely, and "[w]hether or not it would be wise to do so and whether there [was] a sufficient 'mandate' for any such legislation [were] political questions for political judgment. The Court [was] not concerned with such questions."[163]

More commonly, however, the principle rests on presumptive parliamentary supremacy[164] and its democratic and electoral or sovereign legitimacy,[165] a fundamental feature of Aotearoa's colonial constitutional stories.

Parliamentary supremacy reaches non-parliamentary decisions, too. In *Ngai Tai ki Tamaki Tribal Trust v Minister of Conservation*, the Court considered it was "not an occasion for the Court to assume any authority given by Parliament to a government department to make a

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157 *Mighty River Power Case,* above n 105, at [72], relying on *Commercial Radio Assets (CA)*, above n 105, at 166.

158 *Commercial Radio Assets (CA)*, above n 105, at 166. See also: *Might River Power,* above n 105, at [74]. See also: *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.

159 *Commercial Radio Assets (CA)*, above n 105, at 166. See also: *Mighty River Power,* above n 105, at [74].

160 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*, above n 121, at 307–308.

161 See: *Milroy v Attorney-General* [2005] NZAR 562 at [14]–[16].

162 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*, above n 121, at 308, citing *Australia in Nationwide New Pty Ltd v Wills* (1992) 17 Leg Rep 1 (HCA) and *Australian Capital Television Pty Ltd v Commonwealth* (No 2) (1992) 18 Leg Rep 1 (HCA). See also: *Ngāti Whātua Ōrākei Trust v Attorney-General*, above n 158, at [47] and per Elias CJ dissenting; and Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 533–534 observing that "doubts have arisen about the exact nature of the principle of non-interference.

163 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*, above n 121, at 309.

164 Joseph, above n 162, at 515–516, and 530; and William Wade and Christopher Forsyth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) at 21.

165 See: Paul Daly *Understanding Administrative Law in the Common Law World* (Oxford University Press, Oxford, 2021) at 17.

decision".[166] There was a presumption that Parliament's deliberate delegation should be respected.

While accepted uncritically in that judgment, the presumption echoes other jurisdictions and is grounded in colonial stories. It is premised on understandings that legislative allocation of discretion reflects the "considered choices of a parliamentary majority".[167] The discretion was deliberately allocated to a decision-maker other than the courts,[168] and usurping or conditioning that authority through an interventionist judicial role would frustrate parliamentary allocation.[169] Authority should, presumptively, sit where allocated, in the form allocated.[170]

Alongside parliamentary supremacy, other general constitutional presumptions impact the scope and form of the judicial role. Courts have rejected to consider arguments that would "take [them] into the very heart of the policy formation process of government".[171] Their role ensures policy does not exceed legal constraints imposed, but stops short of providing substantive guidance as to what that policy should be.[172] Even faced with expansive pleas for relief, "there are constitutional limits to the assistance the courts can give".[173]

These commonly deployed constitutional principles have grounded an "architecture of judicial review requir[ing] consideration of … the principle of the separation of powers, the rule of law, [and] the principle of constitutionality".[174]

Traced back, the principles have their roots in colonial narratives, finding their home in "the Westminster constitutional system, developed in the particular cultural circumstances of England. Its hierarchical structure headed by a Crown or sovereign is a cultural product that grew out of the historical tensions".[175] Whether grounded in conceptions of electoral and democratic legitimacy to the exclusion of other sources of legitimacy, or based on other principles still, it reflects a constitutionalism shaped by narratives paying no heed to the Treaty

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166 *Ngai Tai ki Tamaki Tribal Trust v Minister of Conservation*, above n 137, at [40].

167 Daly, above n 165, at 17.

168 Daly, above n 144, at 53–54.

169 Daly, above n 165, at 109–110.

170 At 109–110.

171 *Milroy v Attorney-General*, above n 161, at [11].

172 *Broadcasting Assets* (PC), above n 27, at 524.

173 *New Zealand Maori Council v Attorney-General* HC Wellington C40/96, 29 March 1996 [*Commercial Radio Assets (HC)*] at 21. See also: *Peters v Davison* [1999] 3 NZLR 744 (HC) at [88], observing "the Courts and Parliament are both astute to their respective constitutional roles."; *and Peters v Davison* [1999] 2 NZLR 164 (CA) at 188 observing "the central constitutional role of the Court to rule on questions of law." See also: *Broadcasting Assets (CA)*, above n 105, at 580, observing "it is elementary that review of government policy is not part of the ordinary functions of the court".

174 Johan Steyn "Democracy Through Law" (Robin Cooke Lecture 2002, New Zealand Centre for Public Law, Wellington, September 2002) at 4.

175 *Matike Mai,* above n 78, at 31–32. See also: Harald Bauder and Rebecca Mueller "Westphalian vs Indigenous Sovereignty: Challenging Colonial Territorial Governance" (2021) Geopolitics 1.

of Waitangi. Their applicability to Aotearoa is by reason of dominant colonial structures. They do not originate here.

Indeed, the tensions that arise among the dominant colonial structures might continue to justify these presumptions. However, the uncritical, wholesale acceptance of the principles and dominant structures reflects a lack of appreciation of Aotearoa's own unique circumstances or constitutional origins. It continues an unconscious adherence to colonial narratives, and a reification of their force.

Judicial consideration of how those presumptions of legitimacy might be impacted by Aotearoa's distinct constitutional context is sparce. Despite this, where the Treaty grounded and conditioned authority in Aotearoa, it necessarily has a part to play in legitimising authority. Acknowledgment of such conditions is conspicuously absent where the orthodox legitimacies persist, with little foothold for stories from Aotearoa to be found.

(d) Stare Decisis

Finally, preserving if not bolstering colonial narratives, is the determination of the judicial role through adherence to stare decisis.

In *Ngai Tai ki Tamaki Tribal Trust*, Fogarty J noted, perhaps with some attraction, arguments postured in favour of an expansive "constitutional review" driving more intervenist judicial roles. He ultimately concluded, however: "I do not think sitting in the High Court I can adopt constitutional review as judicial authority to effect directly Crown policy to apply natural law values".[176]

Constraining the judicial role in that manner preserves those positions arrived at without reference to the Treaty.

(e) Conclusions on Orthodox Principles

From the survey of justificatory principles deployed, two central observations flow.

The first is perhaps superficial but remains important. The authorities canvassed demonstrate a judicial readiness to engage with constitutional principles, in general. However, the Treaty remains absent. It is not a reticence to evaluate their role against a constitutional framework, but a reticence to include the Treaty in that evaluation. Despite its constitutional character and its role grounding authority in Aotearoa, the Treaty of Waitangi has not been deployed to shape the judicial role. The principles at the heart of the Treaty relationship are no less constitutional than any others in Aotearoa's, but they have found no space in judicial discussion. Legitimacy derived from, or guaranteed by, the Treaty is no less remarkable than that which is electorally sourced.

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176 *Ngai Tai ki Tamaki Tribal Trust v Minister of Conservation*, above n 137, at [41]–[43].

Introducing the Treaty into the calculus informing the judicial role does not, inherently, invalidate or disrupt the other justificatory principles to be included. Rather, it would engages a fuller conception of Aotearoa's constitutional landscape. Without the Treaty the calculus is necessarily incomplete. Principles derived from and preserved in the Treaty must feature in the determination of the judicial role for it to be robust. In their exclusion, thus far, stories of colonisation and relegation make their presence felt.

The second observation goes somewhat further in disrupting established judicial approaches. The uncritical acceptance of principles flowing from colonising narratives ought to be re-examined.

To be clear, this does not argue that current justificatory principles have no utility. Pragmatically, Aotearoa's constitutional structures stand on colonial foundations, and some analysis of the resulting inherited tensions will reflect those similarities. If judicial approaches remain adjudicative, for example, procedural concerns will likely persist. However, just as similarities must be reflected, so too must differences. Unlike other circumstances where the judiciary has no framework against which to assess, or impetus to engage with, polycentric disputes, the Treaty supplies both. The exercise ought also go one step further to engage judicially imaginative processes and ask whether the presumptions on which institutions stand—for example, the adjudicative posture—might yet be displaced.

Disrupting their uncritical acceptance may not displace the ultimate product of existing legitimacies, but those legitimacies require re-rationalisation Aotearoa's unique constitutional context. Principles resembling the separation of powers, the rule of law, or parliamentary supremacy might persist, but they ought to find their footing in narratives that reflect the Treaty of Waitangi. This disrupt their foundations or borders, with implications for how they grow into the future. It might, additionally, change the weight principles carry and how they might be applied. Without that re-justification, it cannot be said with confidence that Aotearoa's administrative law is fit for purpose.

In thus far eschewing this task, whether consciously or unconsciously, judicial approaches have allowed colonial narratives to persist as an administrative law orthodoxy. The spaces that the Treaty ought to occupy remain untouched, with the Treaty crowded out by stories making no room for it, undermining some confidence in Aotearoa's administrative law.

2 Missed Opportunities

Authority canvassed thus far shows lingering colonial narratives occupying a significant space in the judicial consciousness. The clearest relegation of the Treaty, however, is seen in authority where the opportunity to engage with new constitutional stories was squarely presented but not taken up. These occasions make plain the lack of traction alternative held by stories that centre the Treaty, compared to colonial orthodoxies.

(a) *Thompson v Treaty of Waitangi Fisheries Commission*

Thompson v Treaty of Waitangi Fisheries Commission sits as a conspicuous example.[177]

The case challenged the Treaty of Waitangi Fisheries Commission, a body established "as a result of an interim settlement of Māori claims with regard to commercial fishing in New Zealand".[178] Its functions included, allocating "assets acquired under the interim settlement […] known as pre-settlement assets" and making recommendations about final settlement provisions to the Minister, "including a procedure for allocating the benefits from the assets which are known as post-settlement assets".[179] The Commission authored a report, *He Kawai Amokura*, setting out the proposed allocation systems and other recommendations.[180]

The applicant challenged the Commission's recommendation to establish Te Putea Whakatupu Trust,[181] "designed to deal with the situation of [Māori] who are not able to or do not wish to access the settlement through their iwi".[182] The proposed provision allocated Te Putea $20 million, out of a total settlement value of $700 million.[183] Accepting that the Trust was "an appropriate vehicle for the delivery of benefits of the settlement to those who cannot or will not receive benefits through their iwi",[184] the applicant challenged the Trust's level of funding and "uncertain future".[185]

Setting *Thompson* apart from most, if not all, other cases canvassed, the Court expressly considered the "standard of review that should be applied" in response to submissions from counsel.[186]

The applicant aimed to centre the Treaty, submitting a "heightened scrutiny [was] necessary, involving as it does economic and *Treaty rights*".[187]

This submission encountered arguments predicated on orthodox justificatory principles. The respondent argued that as a specialist body, the Commission's recommendations deserved "due deference",[188] or a "high degree of deference"[189]. The recommendations required considering "not just the interest of non-affiliated Māori and affiliated Māori", but also of "coastal iwi,

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177 *Thompson v Treaty of Waitangi Fisheries Commission*, above n 28.

178 At [1].

179 At [3].

180 At [5].

181 At [6].

182 At [6].

183 At [6].

184 At [104].

185 At [104].

186 At [163]. See also [204], where Hammond J, dissenting, considered: "it is imperative to clearly establish what standard of review is appropriate to the proceeding."

187 At [105] (emphasis added).

188 At [120].

189 At [133].

inland iwi, populous iwi, less populous iwi, proponents of a population-based allocation, those who support allocation, and those who support retention, and so on".[190] It was, fundamentally, a polycentric decision of resource allocation. As a result, the argument went, "[t]hese [were] not matters that a court [was] well-equipped to scrutinise",[191] and the Commission was better placed to make decisions requiring "compromise", "pragmatism", and "balance".[192]

Accepting the respondent's submissions, the Court continued to relegate the Treaty.

A judicial impulse towards intense review was grounded in orthodox rights-based implications.[193] Despite submissions to the contrary,[194] the Court considered the fact the rights were "collective rights" could not render them "less worthy of protection".[195] To the contrary, as rights "of whānau and hapū" and "as that is where fishing rights were traditionally held", they were of "paramount importance".[196] The paramountcy was grounded in the nature and significance of customary interests and the importance of protection such rights. While welcome recognition, and perhaps small footholds for new stories centring te ao Māori, emphasis might be placed on what was left unsaid and the reasons not deployed to justify the rights' importance.

Despite submissions by counsel, no emphasis was placed on the art II guarantee in the Treaty of Waitangi and Te Tiriti o Waitangi, extending expressly to the present interests. Those Treaty guarantees might have been expected to go some way to imparting a "constitutional flavour" to,[197] or increasing the significance of, the rights, or at the very least, required judicial comment. The Court, however, plaid little or no heed to the Treaty's substance, and in so doing declined the opportunity to shape the judicial role with reference to Aotearoa's specific circumstances. It continued to neglect stories that centre the Treaty, instead preserving its ongoing relegation where determining the judicial role.

An unwillingness to rely on the Treaty to calibrate the judicial role is found elsewhere in similar contexts. Where the Manukau Urban Maori Authority similarly challenged the Fisheries Commission, McGechan J acknowledged that "there is a developing jurisprudence to the effect that there should be close scrutiny of matters of constitutional importance".[198] He observed that "[he could] see merit in that for individualised human rights matters, but [left] the Treaty aspect open",[199] and made no further observation nor offered any further support. Rather, he

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190 At [120].
191 At [133].
192 At [120] and [133].
193 At [163]. See also: [213].
194 At [120].
195 At [163].
196 At [163].
197 As they did in, for example, *Broadcasting Assets (CA)*, above n 105, at 687.
198 *Manukau Urban Maori Authority v Treaty of Waitangi Fisheries Commission*, above n 35, at [49].
199 At [49].

"approach[ed] determination orthodox lines, bearing in mind that the scale of scrutiny varies according to context".[200]

Consistently, even as elements counselling towards intervention provided a ready entry point for the Treaty, it remained excluded.

(b) Richardson J in *Lands*

Justice Richardson's judgment in the *Lands* decision grounds similar observations in relation to judicial approaches to the relationship between ss 9 and 27 of the State-Owned Enterprises Act 1986.[201]

Rejecting a reading of s 9 that would substantially deprive it of force, Richardson J concluded there was no reason to narrow its application,[202] and outlined "three further reasons why s 9 must be given full effect and must not be shorn of any possible application to land".[203] First, "the *importance the legislature attached* to compliance with the principles of the Treaty is reflected in the enactment of s 9 as a *governing principle of the legislation*."[204] Second, land was a primary concern to both Māori and the Crown and "[t]o exclude land from s 9 would defeat rather than give effect to a *clear intention* to protect the application of the principles of the Treaty."[205] Finally, "rather than viewing s 9 as a provision outwardly raising expectations than dashing them by a process of inference from other provisions, its *true function in the Act* should be recognised as constituting a general proscription of any conduct in breach of the principles of the Treaty".[206]

Notably, little independent reference is made to the Treaty. While other members of the Court arguably positioned the Treaty and its constitutional significance more centrally in support of a generous approach to ss 9 and 27,[207] Richardson J did not. The Treaty was, in this passage, rendered significant by parliamentary intention, not through its inherent character. While his interpretation allows an interventionist judicial posture, it relies on orthodox approaches, not on the Treaty as a constitutional instrument influencing the judicial role.

It is notable that even *Lands*—a "case … of the greatest public importance"[208]—relegated the Treaty and minimised its influence on the judicial role. Even as the Court focussed upon the Treaty, and even as its significance and constitutional character was reified, it was afforded

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200 At [49].
201 *Lands*, above n 105,
202 At 679.
203 At 680.
204 At 680 (emphasis added).
205 At 680 (emphasis added).
206 At 680 (emphasis added).
207 For example, at 655.
208 At 668.

little force. It did not reconstruct or reshape recognised constitutional arrangements, nor disrupt stories of coloniality.

F Judicial Minimalism and Orthodox Grounds

Observers might have expected the enduring judicial recognition of the Treaty and its constitutional role, beginning with *Huakina Development Trust* and *Lands*, to destabilise Aotearoa's administrative law and displace early relegation of the Treaty. However, rather than relying on the Treaty to undertake a more ambitious task of developing bespoke administrative law tools, the judicial method continues to rely on orthodox grounds of review. There has been an unwillingness to reformulate grounds with reference to the Treaty.

The degree of scrutiny and scope of the judicial role is more covert than overt when mediated through grounds of review.[209] Recognising the scrutiny begins from the basic recognition that the chosen ground of review shifts judicial focus.[210] It provides the legal framework against which behaviour is analysed, with the ground's doctrinal formulation capturing a particular depth of scrutiny and qualitatively defining the inquiry's scope.[211] In this way, the grounds engaged expand and contract the judicial role. The judicial role is not consciously articulated with reference to justificatory principles, but rather, with depends on the ground of review.

The judicial role is, therefore, calibrated in four ways. The first, *classification*, depends on the "selection of the applicable grounds of review",[212] where, as discussed, the depth of review is determined by the ground engaged.[213] The second, *evolution*, "generates different depths of scrutiny as alternative grounds of review manifesting different degrees of intensity are recognised".[214] The third, *reformulation*, reflects how grounds "may be reformulated to express a different balance between vigilance and restraint",[215] where "recast[ing] the grounds of review" brings more precise calibration.[216] Finally, available grounds may be *circumscribed*, where "access to the traditional grounds of review [is] restricted", totally or in part, and judicial scrutiny is curtailed.[217]

The dominant judicial approach presents a failure to finely-tune or develop unique judicial tools with reference to the Treaty. The distinctive and unique character of Treaty-based contexts has had little bearing on the judicial role, with an ongoing reliance on orthodox

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209 Knight, above n 36, at 399.

210 Knight "Modulating the Depth of Scrutiny in Judicial Review", above n 37, at 70; and Knight Vigilance and Restraint, above n 37, at 75.

211 Knight "Modulating the Depth of Scrutiny in Judicial Review", above n 37, at 70.

212 At 74.

213 At 70.

214 At 75; and Knight Vigilance and Restraint, above n 37, at 88.

215 Knight "Modulating the Depth of Scrutiny in Judicial Review", above n 37, at 76.

216 Knight Vigilance and Restraint, above n 37, at 99.

217 Knight "Modulating the Depth of Scrutiny in Judicial Review", above n 37, at 77; and Knight Vigilance and Restraint, above n 37, at 99.

grounds and cases succeeding or failing on those orthodox grounds. The ordinary flexibility of the common law allowing more ambitious judicially driven shifts in law has not been reflected in minimalist approaches to review. Grounds developed in colonial contexts continue to shape the judicial task, reflecting a persistent, if muted, colonial influence in doctrinal shape. Little room is made for fresh stories to guide doctrinal development.

(a) *Lands*

Reliance on orthodox grounds is found at the heart of Aotearoa's judicial Treaty jurisprudence.

Lands has been described as "a circuit-breaker which founded New Zealand's modern Treaty jurisprudence",[218] and a "historic case" or "landmark decision".[219] The Court itself observed it was "perhaps as important for the future of our country as any that has come before a New Zealand court".[220] Indeed, in many ways, *Lands* catalysed Aotearoa's modern judicial instrumentalisation of the Treaty, contributing clarity, colour, and substance to the Treaty principles. In this, it contributed significantly to judicial understanding and implementation of the Treaty relationship between Māori and the Crown.

Despite this, *Lands* has also, appropriately, been described as "an exercise in utterly orthodox statutory interpretation".[221] Without minimising the contribution the Court made to Treaty jurisprudence, the case saw little adjustment to the judicial role. It was, at its core, an orthodox, statutorily-based, error of law review.

A more conservative reading of *Lands* begins with the recognition that the Treaty principles were not judicially invented, nor do they provide a standalone ground of review. While judicially defined, their origin is legislative invention. Section 9 of the State-Owned Enterprises Act provided that "[n]othing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi." Through this incorporation of "unelaborated" principles,[222] the legislature "pass[ed] responsibility for determining what the Treaty means to statutory decision makers and ultimately the courts".[223] The task of judicial interpretation was catalysed by parliamentary intent.

The judgment itself emphasised this point. President Cooke was anxious to eschew suggestions of judicial creativity. Closing his judgment, he wrote:[224]

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218 Joseph, above n 162, at 51.

219 Richard Boast "*New Zealand Maori Council v Attorney-General*" [1987] NZLJ 240 at 240.

220 *Lands,* above n 105, at 651.

221 Boast, above n 219, at 241. See also: Hughes, above n 124.

222 See: Palmer, above n 14, at 92.

223 Te Arawhiti | The Office for Māori Crown Relations "Providing for the Treaty of Waitangi in Legislation and Supporting Policy Design" (March 2022) at [52]. See also: Palmer, above n 14, at 182.

224 *Lands,* above n 105, at 668.

> I have called this a success for the [Māori Council], but let what opened the way enabling the court to reach this decision not be overlooked. Two crucial steps were taken by Parliament in enacting the Treaty of Waitangi Act and in insisting on the principles of the Treaty in the State-Owned Enterprises Act. If the judiciary has been able to play a role to some extent creative that is because the legislature has given it the opportunity.

Professor Richard Boast made similar comment, offering a more subdued celebration of *Lands* than other contemporaries.[225] He considered that "this case belongs to a select group where the moral, historic, and emotional significance of a decision may equal or even surpass its importance as a precedent considered more narrowly as a legal text".[226] The development was made possible by legislative invitation,[227] and to the extent that the judicial approach in *Lands* was interventionist, the intervention was on questions of law orthodoxly falling within the judicial remit, even in the restrictive judicial approaches.[228]

Justifying judicial intervention in *Lands* required no or little departure from earlier stories and the judicial role can be understood without any apparent stretching of colonial constitutional relationships between the legislature, the judiciary, and the executive. Parliament designated space for the executive to operate, and the judiciary clarified and enforced those restrictions. The conscious and strict adherence to orthodox principles preserved the colonial orthodoxies.

(b) Related Cases

Similar themes permeate the suite of cases stemming from the same privatisation of state assets to which *Lands* responded, including *Broadcasting Assets,* the only case reaching the Privy Council—Aotearoa's then apex court—and *Radio Frequencies*.

In *Broadcasting Assets*, the substantive ramifications of privatising broadcasting assets were to be adjudicated with reference to wider, polycentric, social and economic landscapes. While at first blush it might have appeared to be a substantive, and more interventionist, inquiry, it was ultimately statutory interpretation and application. The Privy Council made clear, however, that its role was only to assess behaviour against the statutory framework: "the conduct of the Crown was only not permitted if it fell foul of s 9".[229] Adjudicating "the manner in which the Crown chooses to fulfil its obligation" was not for the Court, so long as it remained within statutory boundaries.[230] There was no recalibration of the judicial role and as an issue of law, it was naturally, "a matter on which the courts must form its own judgment on the evidence before the courts".[231]

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225 Boast, above n 219, at 240.

226 At 240.

227 At 245.

228 See: *Peters v Davison,* above n 173.

229 *Broadcasting Assets* (PC), above n 27, at 524.

230 At 524.

231 At 524.

The *Radio Frequencies* case similarly exhibits judicial minimalism, albeit in statutory frameworks without express Treaty reference. The majority made explicit that the review "[did] not in [their] view call for separate consideration of the terms of principles of the Treaty of Waitangi".[232] It avoided comment, even obiter, on "elaborate, wide-ranging, and far-reaching argument heard from [counsel] in relation to the Treaty"[233] and focussed instead on "conventional administrative law questions … it [was] a matter of determining from the scheme and purpose of the legislation what was the intention of the legislature".[234] Again, the Court's role was orthodox, developed without the Treaty being engaged.

That wider suite of cases has been broadly observed as being "explained by new legislative provisions that provide[d] a basis for litigation."[235] Dr Carwyn Jones similarly offered that "the Courts treated these cases as orthodox judicial review applications" and "the reasoning generally rested on established principles of administrative law."[236]

(c) Early minimalism and *R v Symonds*

Modern judicial minimalism echoes that in the earliest iterations of judicial engagement, and non-engagement, with the Treaty, leading into the height of the colonising project where *Wi Parata* excluded the Treaty from judicial consciousness.

R v Symonds tested the Governor's ability to waive the requirement title to land must stem from Crown grant.[237] Two judicial avenues existed to uphold the view that title exclusively stemmed from crown grant[238]: via the relationship grounded in the Treaty, or through colonial, common law. They chose the latter pathway.

While the conclusion was "consistent with the pre-emption clause in the Treaty of Waitangi, the Court found that the clause simply reflected the long-standing common law principles of Aboriginal title".[239] In his reasoning, Chapman J drew primarily on "the intercourse of civilised nations" and legal principle that "has been imported with the mass of common law, into all of the colonies settled by Great Britain".[240] Similar to *Lands,* the judgment pre-empted suggestion of judicial creativity, making clear that it turned on concepts "found among the earliest settled

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232 *Radio Frequencies (CA)*, above n 136, at 140 and 142 per Richardson J.

233 At 140 and 142, per Richardson J.

234 At 140, per Richardson J; at 142 per Casey J; at 144 per Hardie Boys J; and at 144, per Bisson J. It was only Cooke P who undertook a more Treaty-based analysis.

235 Jones, above n 16, at 17.

236 At 18.

237 *R v Symonds* (1847) NZPCC 387 at 387–388. See also: Jones, above n 16, at 14.

238 *R v Symonds*, above n 255, at 392, per Chapman J, and 298 per Martin CJ.

239 Jones, above n 16, at 14.

240 *R v Symonds*, above n 255, at 388.

principles of our law".[241] They were not "new creation or vague invention of the colonial courts. They flow not from … 'the vice of judicial legislation'."[242]

Chief Justice Martin went further still in tethering the decision to colonial common law, rather than the Treaty of Waitangi. In his view, the principles relied on were found in not just English law, but across "all the colonizing states of Europe".[243] Though considering "the colonization of New Zealand has differed from the mode pursued in many of the older colonies",[244] he nevertheless considered it could not displace or supersede the applicable legal principles.[245] He made explicit: "this right of the Crown … is not derived from the Treaty of Waitangi; nor could that treaty alter it."[246]

While some limited discussion of the Treaty's pre-emption clause occurred,[247] it had no bearing on the judicial approach. Rather than deploying the Treaty of Waitangi as a bespoke justification of the legal principle in Aotearoa,[248] and in so doing reflecting Aotearoa's unique circumstances, the Court adopted colonial law wholesale. Though they could have made room for a story where the Treaty bore on the development and application of law, the Court instead relied on well-rehearsed verses found across the colonised world.

G Conclusions on Lingering Colonial Stories

Evident in the foregoing analysis, stories that relegate the Treaty of Waitangi to a peripheral role permeate Aotearoa's administrative law landscape.

Modern administrative law recognises the Treaty, but still deprives it a substantive role. As Dr Paul McHugh recognised, "for lawyers, the interpretation of the Treaty of Waitangi is only the first step. … They must translate that into legal terms. In other words, the interpretation of the Treaty of Waitangi and the legal response to that (or any) interpretation are two different processes".[249] While the first process received substantial judicial focus, the latter has remained undeveloped. Even as "the Courts now spoke of the Treaty as a foundation document, there was no forgetting the older orthodoxy".[250]

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241 At 388.

242 At 388.

243 At 393.

244 Presumably making reference to the Treaty of Waitangi, being unique across the colonised world.

245 At 395.

246 At 395.

247 At 390–391 per Chapman J, and 397 per Martin CJ.

248 For example, by interpreting the "pre-emption clause" in art II of the Treaty as one granting exclusive rights as acquisition to the Crown, narrowing the sale and purchase of land by Māori to parties other than the Crown invalid, and ultimately arriving at a similar conclusion.

249 McHugh, above n 52, at 2.

250 At 291.

Overtly colonising stories that once captured the judicial ear might have fallen from favour, but their effects have substantially lingered. It is now judicial silence and minimalism, rather than active judicial repetition of the stories, that sees the judicial capture by colonising stories and Westphalian orthodoxies to remain. While the particulars have changed over time, the core colonising themes echo in cognate form.

However, the judicial capture by colonising stories is no longer complete. As this paper now turns to, the effects of those colonising stories have been displaced in some corners of the judicial landscape. While judicial departure has remained fragmented, it can nevertheless be found.

V Departures and Different Stories

Towards the end of the 20th century, countervailing stories were amplified in social and political landscapes. At the same time, the persistent colonising narratives that dominated judicial approaches were disrupted, with scattered pockets of judicial treatment affording the Treaty a more influential role. Taken together, these pockets reflect a trend away from colonising narratives.

To be clear, however, that departure remains nascent and is scattered across Aotearoa's administrative law and found only on the periphery of established doctrine.

A Express Contemplation of the Judicial Role

This paper first canvases judicial treatment where the Treaty influences the express calibration of the judicial role. On their own, the pockets of judicial treatment appear innocuous. Knit together, they reflect an emerging departure from colonising narratives. The Treaty, in these contexts, typically grounds an impulse towards a more expansive judicial role.

(a) Hardie Boys J in *Broadcasting Assets*

Departure from the colonial narrative, and a resulting impulse to expand the judicial role, can be found most clearly in Hardie Boys J's judgment in the *Broadcasting Assets* litigation.[251]

Though ultimately appealed to the Privy Council,[252] Hardie Boys J's judgment in the Court of Appeal reflects a judicial approach putting less stock in colonial stories. Elements of his judgment are difficult to reconcile with orthodox limits of judicial role and reflect an expanded judicial focus grounded in the Treaty.

Early in his judgment, Hardie Boys J acknowledged that "[t]he question before the Court was a legal one and the conclusion is a legal one, as it must be."[253] It was open, and perhaps expected, that his following analysis would be confined to those legal matters; a tenet of the

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251 *Broadcasting Assets (CA)*, above n 105.

252 See: *Broadcasting Assets (PC)*, above n 27.

253 *Broadcasting Assets (CA)*, above n 105, at 587.

judicial role is that "decisions will generally only resolve those points that must be determined",[254] and courts will not decide points "unnecessary" to a dispute.[255] It is generally considered "both unnecessary and undesirable to embark on a consideration of matters other than the narrow issue" before the Court.[256]

Despite this, Hardie Boys J continued, and "add[ed] some comments of a largely non-legal nature."[257] They directly displace colonial narratives of inferiority and relegation, rather, imbuing the circumstances with significance grounded in the importance of te ao Māori and Treaty commitments. That significance was, at its core, non-legal. Despite that, his judgment makes clear it carried legal weight and requires extensive replication. In his view:[258]

> The appeal concerned a matter of very considerable social importance: the language, a cornerstone of identity, of one of the Treaty partners. The issues raised were not simply legal, but political too. As well, constitutional implications arose, not only by reason of the constitutional flavour of Treaty issues, but also because of the duty of the Court to observe constitutional boundaries between its functions and those of the Executive government.
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> It needs neither evidence nor judicial pronouncement to confirm that language lies at the heart of a culture. Indeed, each is fundamental to the other. If one dies so will the other. If a language is not to die, it must be used; not simply recited in solemn rituals by a few devoted souls or reserved in books and manuscripts to be read by scholars who have learned it academically, but spoken and understood by ordinary people in their day-to-day lives. And this they will not do unless the language as value, both intrinsic worth and everyday utility. None of this was disputed in this case.
>
> It was not disputed either that the prime objective of the Treaty was to ensure a proper place in the land for the two peoples on whose behalf it was signed. Nothing could be further from that objective than the obliteration of the culture of one of them or its absorption into that of the other. Thus protection of the Maori language, an essential element of Maori culture, was and is a fundamental Treaty commitment on the part of the Crown. That the commitment was for a long time forgotten is only too well documented. Of late, of course, attitudes have changed. There is an increasing awareness of the commitment and of the obligation to redeem the past and to ensure honour in the future.

Justice Hardie Boys' observations, in light of the narrow legal issue to be determined, are patently obiter. Despite this, their existence, tenor, and content speak to new stories gaining judicial favour. The new stories find value in te ao Māori and force in Treaty relationships in a way colonial narratives did not. Justice Hardie Boys privileges those observations to the point of venturing beyond the expected judicial role in making them and their tenor, too, impresses a gravity found in the situation, anchored in that wider narrative. The focus becomes extra-

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254 Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at 321.

255 *Huata v Prebble* [2004] 3 NZLR 359 (CA) at [42].

256 *Attorney-General v E* [2000] 3 NZLR 257 (CA) at [49].

257 *Broadcasting Assets (CA)*, above n 105, at 587.

258 At 587.

legal, and at the heart of this judicial task, there is more than a point of law to be decided. His engagement with those extra-legal aspects presents an emergent judicial cognisance of new stories, underpinning an expansion of the judicial role.

That Treaty's substantive influence on the judicial role is made explicit through the judgment. He observes "it should be apparent from the foregoing that [his] heart would lead [him] to the same conclusion as the President",[259] who, dissenting, relied heavily on Treaty-based frameworks and standards.[260]

Indeed, both Hardie Boys J and Cooke P relied on the Treaty of Waitangi to ground the significance of language.

For Hardie Boys J, it was material that reo Māori was "a cornerstone of identity, *of one of the Treaty partners*",[261] and that the commitment to protect te reo Māori as taonga "was and is a fundamental Treaty commitment on the part of the Crown."[262] Further still, the direct implications on the ability of the Crown to honour its commitment was salient.[263]

Comparably, Cooke P took the view:[264]

> What is crucial to say at the outset, and to keep steadily in mind in any consideration of this case, is that it is common ground, agreed between Crown and Māori, that the Māori language (Te Reo Māori) is a highly prized property or treasure (taonga) of Māori. By Article the Second of the Treaty the Crown guaranteed undisturbed possession of the language to Māori, and undertook to protect it.

Both judges engaged the exact calculus *Thompson* eschewed. Part of the subject-matter's significance was derived from the constitutional protection and significance grounded in the Treaty. In turn, it drove a desire to intervene, centring the Treaty creating space for it to shape the judicial role.

Despite this impulse, Hardie Boys J conceded, "I cannot escape the conclusion that such circumstances as these are not relevant to the Court's task in the particular circumstances of this case".[265] The decision concerned legislative changes and was one of "policy and philosophy".[266] It was a context "upon which the Court is not entitled to pass a value judgment".[267] As outlined earlier, the inquiry could only concern statutory compliance, going

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259 At 588.

260 At 586.

261 At 587 (emphasis added).

262 At 587.

263 At 588–589.

264 At 578. In his reasoning, Cooke P also made extensive reference to Waitangi Tribunal *The Te Reo Māori Claim* (Wai 11, 1986).

265 *Broadcasting Assets (CA)*, above n 105, at 588.

266 At 588.

267 At 588.

no further.[268] Ultimately, "while one may have misgivings, in the end the Court is entitled to and must rely on the honour of the Crown".[269]

While the Treaty's force was outweighed by orthodox considerations, that final conclusion does not displace the significance of the balancing exercise undertaken. The exercise's very nature—where the Treaty carried weight—is a clear departure from earlier colonising stories. The Treaty grounded an impulse to intervene that *required* balancing out. It was not totally neglected.

For clarity, this paper considers the Treaty ought be influential in formulating the judicial role, befitting its constitutional significance, but it has never sought to demonstrate that the Treaty has become a silver bullet dictating the judicial role. It takes the view that the Treaty should be given (often substantial) weight when determining the judicial role. Its significant constitutional role ought to factor into constitutionally-based discussions. Justice Hardie Boys' judgment — where the Treaty grounded extra-legal commentary and, almost, expansive judicial intervention — reflects an emergent role for the Treaty of that very nature.

Similar judicial treatment is found elsewhere. While not matching Hardy Boys J's candour or force, they reflect a similar departure from stories relegating the Treaty.

(b) *Commercial Radio Assets* Litigation[270]

Various treatment in the *Commercial Radio Assets* litigation reflects this treatment.

Justice McGechan, in an interim High Court judgment early in the *Commercial Radio Assets* litigation,[271] made salient the difference in constitutional foundations on which Aotearoa and the United Kingdom rest.

To distinguish a case placing "considerable emphasis […] upon the legislative character of the subject matter concerned, and the undesirability of the courts intruding into a legislative area",[272] McGechan J observed "there was nothing of a constitutional character in the subject matter involved comparable to Treaty of Waitangi considerations".[273] This, alongside a possible breach of Treaty-based duties, set Aotearoa apart. While the earlier authority was a "powerful reminder" of the non-interference principle,[274] it was distinguished and non-binding.

Aotearoa's unique constitutional context allowed McGechan J to chip away at the enduring dominance of colonising stories. The Treaty provided a salient constitutional base for judicial

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268 At 588.

269 At 589.

270 *Commercial Radio Assets (HC)*, above n 173; and *Commercial Radio Assets (CA)*, above n 105.

271 *Commercial Radio Assets (HC)*, above n 173.

272 *Commercial Radio Assets (HC)*, above n 173, at 11, distinguishing *R v Secretary for State for Home Department ex parte Fire Brigades Union* [1995] 2 All ER 244 (HL).

273 *Commercial Radio Assets (HC)*, above n 173, at 11.

274 At 11.

comparison and distinguishing of authority, and halted, to a small extent, the uncritical application of colonial authority and principle.

Justice Thomas J's dissent on appeal similarly engages extensively with the Treaty. His decision drew from "established" Treaty principles, that "have become part of this country's jurisprudence relating to the Treaty and provide the framework for any case involving an alleged breach by the Crown of its obligations under the Treaty".[275] With reference to Hardie Boys J's articulation reo Māori's importance, Thomas J considered calls for greater protection "had a compelling ring which befits a subject of such fundamental constitutional importance".[276] While that significance did not support the view that "the established legal principles and approaches should be relaxed in favour of Māori any more than they should be departed from to meet the temporal exigencies which may time to time exist",[277] Thomas J continued that "what it does mean is that the Courts need to respond with deliberate and measured care when a matter of importance to Māori and the nation as a whole is at stake".[278]

While not explicit, the calls for "deliberate and measured care" are, in substance, calls for more intense scrutiny. Where that call was based on Treaty relationships, and the significance thus imbued, it reflects a fresh judicial approach to determining their role.

(c) *New Zealand Maori Council v Attorney-General*

Finally, this paper turns to Gendall J's judgment in *New Zealand Maori Council v Attorney-General*.[279] While acknowledging it was "beyond doubt Parliament as sovereign can pass whatever legislation it thinks fit", and that a court "cannot make any declarations or other order which has the effect of inhibiting the legislative powers of Parliament",[280] it chipped away at the absolutism of comity and non-interference.

Notwithstanding the usual comity, Gendall J "[did] not think the Court should shy away from expressing a view on the questions of equitable and ethical duties, especially those which clearly arise out of the Treaty partnership and relationship."[281] While clear that "comment by a judge on the work of a legislature must conform with the convention of courtesy to other limbs of government",[282] and must be done so with appropriate "delicacy",[283] Gendall J remained

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275 *Commercial Radio Assets (CA)*, above n 105, at 169.
276 At 169.
277 At 170.
278 At 170.
279 *New Zealand Maori Council v Attorney-General* HC Wellington CIV-2007-485-0095, 4 May 2007.
280 At [85].
281 At [86]. See also: *Milroy v Attorney-General*, above n 161, at [18].
282 *New Zealand Maori Council v Attorney-General,* above n 279, at [93].
283 At [86]

"prepared to express a view which those who participate in the legislative process may consider, and ignore entirely if they choose."[284]

While deferential, the willingness to comment on legislative action nevertheless reflects a willingness to chip away at comity that ordinarily shrinks the judicial role.

(d) Summary

Each judgment, separately, reflects only small changes facilitated by a departure from old stories—a factor to be balanced, an ability to distinguish precedent, a call for careful consideration, and a willingness to comment where they otherwise might have remained silent—that departure remaining in a nascent state.

Together, however, they reflect emergent trend away from colonial stories, and greater room for the Treaty in judicial consciousness. Whether or not ultimately influential on each occasion, judicial attention is being paid to the Treaty. It stands in direct contrast to the conscious and unconscious relegation, and provides a grounding for the Treaty to take its place in Aotearoa's judicially constructed constitutional landscape.

B Reformulated Doctrine

The judicial departure from earlier stories is also found in the shifting doctrinal boundaries of grounds of review in Treaty-based contexts. The emergent availability of relief on substantive expectations and increasing judicial scrutiny of the weight afforded relevant consideration sees grounds recast to bring greater judicial interventionism. This paper turns to each reformulation in turn.

1 Substantive Legitimate Expectations

Legitimate expectations, generally, provide an avenue for relief where a public authority has engendered a belief, whether expressly or by implication, by actions or articulation, that might reasonable, or "legitimately", be relied upon in the circumstances.[285]

Judicial intervention here aims to prevent "abuses of power" or "unfairness", or "legal uncertainty" that might otherwise result from allowing public actors to disappoint expectations.[286] There is value in certainty. An "individual ought to be able to plan [their] action on the basis [that the expectation will be fulfilled".[287] It grounds institutional trust,[288] and can be traced to "the root of the constitutional principle of the rule of law, which requires regularity,

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284 At [94].

285 *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137 at [125]–[126]. See also: *McLellan v Attorney-General* [2015] NZHC 3218 at [68]; *Gambling Foundation of New Zealand v Attorney-General* [2015] NZHC 1701 at [120]–[121]; and *NZ Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC) at [143].

286 Woolf and others, above n 7, at [12-004]; and Wade and Forsyth, above n 164, at 447.

287 Wade and Forsyth, above n 164, at 447.

288 At 447.

predictability, and certainty in government's dealings with the public".[289] Most generally, "it is in the interests of good administration that a decision-maker should act fairly and should implement its promise".[290]

The doctrine's core is well-established, and is typically understood as an element of procedural fairness.[291] Despite this, its boundaries are unsettled,[292] with an emerging, but by no means settled,[293] view that legitimate expectations might extend to "a substantive benefit or advantage",[294] or a "particular or favourable" decision.[295] While this paper does not engage fully with the nature and extent of this uncertainty, it suffices to note that, if available at all, "relief in the form of a substantive outcome is rarely, if ever, granted".[296]

The reluctance to uphold substantive expectations engages square with justificatory principles grounded in colonial stories. The doctrine requires balancing the "relative virtue and defect of certainty and flexibility",[297] and must recognise that "the liberty of a public body to change its policies is an important constitutional principle".[298] Legitimate expectations have, consequently, become inherently defeasible by "overriding public interest",[299] pursuit of "optimal or preferred outcomes",[300] or a "satisfactory reason".[301] Examining whether a decision-maker disappointing an expectation is justified requires examining whether policy-reasons offered are adequate and brings forth "the fundamental issue of the degree of scrutiny which the courts should employ".[302] Constitutionally, a common question arises: is judicial

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289 Woolf and others, above n 7, at [12-001].

290 *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC), cited in *NZ Association for Migration and Investments Inc v Attorney-General*, above n 285, at [139].

291 Wade and Forsyth, above n 164, at 446.

292 *NZ Association for Migration and Investments Inc v Attorney-General*, above n 285, at [137]; *Te Heu Heu v Attorney-General* [1999] 1 NZLR 98 (HC) at 125; and *Burt v Governor-General* [1992] 3 NZLR 672 (CA) at 679.

293 Joseph, above n 162, at 1039.

294 Woolf and others, above n 7, at [12-012]; and Joseph, above n 162, at 1038.

295 Wade and Forsyth, above n 164, at 453. For possible availability, generally, see: *Comptroller of Customs v Terminals (NZ) Ltd*, above n 285; *Green v Racing Integrity Unit Ltd* [2014] NZCA 133, [2014] NZAR 623 at [40]; *B v Waitemata District Health Board*, above n 33, at [55]; and *Hampton v Canterbury Regional Council (Environment Canterbury)* [2015] NZCA 509, (2015) ELRNZ 825 at [87].

296 *Comptroller of Customs v Terminals (NZ) Ltd*, above n 285, at [155]; and *Green v Racing Integrity Unit Ltd*, above n 295, at [40]; and *Hampton v Canterbury Regional Council (Environment Canterbury),* above n 295, at [87].

297 Woolf and others, above n 7, at [12-017].

298 At [12-014].

299 *NZ Association for Migration and Investments Inc v Attorney-General*, above n 285, at [140] and [157].

300 At [140], [147], and [157].

301 *Broadcasting Assets (PC),* above n 27, at 525; and Joseph, above n 162, at 1031.

302 Woolf and others, above n 7, at [12-017].

assessment of this policy decision appropriate? The answer is presumptively "no", which has seen "a number of common law jurisdictions" avoiding or rejecting substantive expectations.[303]

Despite this, where the Treaty of Waitangi is relevant to a dispute, a judicial willingness to uphold substantive expectations emerges.

At times, that judicial willingness presents itself without acknowledging the contested nature of substantive expectations. Courts have observed that substantive expectations might operate co-extensively with Treaty principles,[304] or that assurances of substantive[305] benefit:[306]

> may not be directly enforceable in law … but this does not mean it is devoid of legal significance. The assurance once given created the expectation, or to use the current parlance the 'legitimate expectation' that the Crown would act in accordance with the assurance and if, for no satisfactory reason, the Crown should fail to comply with it, the failure could give rise to a successful challenge on application for review.

A later court commented on that observation: "in other words, the Privy Council was clearly contemplating, and accepting, a substantive legitimate expectation."[307]

Alternatively, while other judicial support comes in a refusal to dismiss substantive expectations legal availability. In early-stage litigation in *Might River Power*, after acknowledging the "current debate about the place of a legitimate expectation to a substantive outcome in New Zealand jurisprudence", the High Court ultimately took "no view as to that debate".[308] It decided the matter factually rather than legally. While promises within the Treaty could not support a substantive expectation on their own and additional circumstances were necessary, the Court nevertheless stopped short of dismissing the legal availability of substantive expectations.[309]

The strongest judicial support for substantive legitimate expectations comes from Thomas J's dissent in *Commercial Radio Assets*,[310] where he refused to strike out claims of substantive

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303 At [12-014].

304 *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) [*Whale-Watching]* at 561, where the Court observed "the arguments … invoking the doctrine of legitimate expectation [of a substantive benefit] can take them no further than the Treaty principles". In so observing, the Court did not reject the possibility of such a substantive benefit out of hand but left it open for them to exist co-extensively with Treaty obligations.

305 *Broadcasting Assets* (PC), above n 27, where the expectation related to the provision of "broadcasting transmission and production facilities, access to Māori archival material, various payments, and the establishment of a funding agency", as summarised by *Aoraki Water Trust v Meridian Energy* [2005] 2 NZLR 268 (HC) at [40].

306 *Broadcasting Assets* (PC), above n 27, at 525.

307 *Aoraki Water Trust v Meridian Energy*, above n 305, at [40].

308 *New Zealand Māori Council v Attorney-General* [2012] NZHC 3338 [*Might River Power (HC)*] at [320].

309 At [320].

310 *Commercial Radio Assets (CA)*, above n 105.

expectations that the Crown would support te reo Māori's "mainstreaming", continued survival, and rejuvenation.[311] Counsel had asserted an expectation the Crown would "observe the principles of the Treaty in both a substantive and procedural sense",[312] and "the doctrine of legitimate expectations extends to the protection of substantive as well as procedural benefits".[313] Thomas J ultimately held such arguments "cannot be dismissed as unsound" in law.[314] Instead, the case turned on its facts.[315]

Justice Thomas' unwillingness to dismiss substantive legitimate expectations stemmed from the Treaty creating "an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably, and honourably".[316] In addition, he drew on protections offered under arts II and III,[317] recognising that the Treaty is "a document of fundamental constitutional importance guaranteeing to Māori the protection of taonga".[318] The Treaty grounded his attempted reformulation and expansion of legitimate expectations, rendering a previously-unavailable expectation legally arguable.

While the judicial treatment expanding legitimate might lack authoritative precedential value, they reflect pockets of judicial willingness to expand doctrinal boundaries and judicial roles on the basis of the Treaty. The Treaty, in such circumstances, weighs against concerns about judicial intervention or inappropriate fettering of public actors' freedoms. That willingness, regardless of its success, reflects some departure from relegating colonial narratives in judicial consciousness.

2 Weighting and Relevancy

Emergent judicial scrutiny of the weight afforded to relevant considerations similarly reflects space being made in the judicial consciousness.

Axiomatically, decision-makers must turn their minds to relevant considerations and exclude from their mind irrelevant considerations.[319] Additionally, they have significant latitude to consider "permissible" elements that fall between the two extremes.[320]

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311 At 170.

312 At 183.

313 At 184.

314 At 183.

315 At 171.

316 At 169.

317 At 171.

318 At 183.

319 See: *CREEDNZ Inc v Governor-General,* above n 24, at 183; *Secretary for Justice v Simes* [2012] NZCA 459, [2012] NZAR 1033 at [50]; and *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZAR 138 (HC) at [40]. See also: Smith, above n 254, at ch 63; Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [15.32], [15.41] and [15.42]; and Woolf and others, above n 7, at [5-120].

320 *Osborne v Chief Executive of the Ministry of Social Development* [2010] 1 NZLR 550 (HC) at [67].

Just as plainly, the weight afforded to relevant considerations has been protected from judicial intervention: "provided that a matter is genuinely considered … it is for the decision-maker to choose what weight to give to relevancies".[321] Orthodoxly, "weight is always a matter for the decision-maker, unless the weighing of the factors considered is so far out of kilter that the decision is unreasonable"[322] or is "palpably" wrong.[323] This judicial reticence reflects orthodox concerns of the appropriate judicial roles: institutional competency, expertise, polycentricity, and legitimacy. Questions of weight are "value judgments rather than question of law",[324] rendering judicial intervention "prone to intrude on the decision-makers domain" where they are ill-equipped to engage.[325]

On occasion, however, judicial reticence gives way to interventionism. The Treaty has supported judicial scrutiny and directive as to weighting.

Those directives are most evidently within *Whale-Watching*.[326] The Court rejected arguments the decision-maker had absolute discretion as to matters of weighting,[327] offering some guidance on appropriate weighting. "The duty to recognise the special interests that Ngāi Tahu have developed in the use of these coastal waters" was "a *residual factor of weight*".[328] Elsewhere, the Court considered that "due weight" must be given to Treaty principles.[329] Treaty obligations could not be lightly dismissed, nor Māori interests treated as equal to any other potential interest. In *Whale-Watching,* the Treaty entitled Ngāi Tahu to "a reasonable degree of preference".[330]

These directives balanced the competing content of art I, supporting Crown freedom to govern, and art II, guaranteeing Māori tino rangatiratanga over taonga katoa.[331] A "reasonable Treaty partner" would weigh factors informed by their "positive duty to act in good faith, fairly, reasonably, and honourably".[332] While the Court rejected Ngāi Tahu's submissions their views should carry absolute weight or amount to a "veto",[333] their observations nevertheless reflect a more interventionist role.

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321 *New Zealand Fishing Association v Minister of Agriculture and Fisheries*, above n 24, at 551. See also: Taylor, above n 319, at 840; and collated authorities at Smith, above n 254, at ch 69.

322 *LMN v Immigration and Protection Tribunal of New Zealand* [2013] NZHC 2077 at [30].

323 Joseph, above n 162, at 953.

324 *Singh v Legal Aid Review Authority* [1997] NZAR 414 (HC) at 416.

325 Joseph, above n 162, at 954.

326 *Whale-Watching,* above n 304.

327 At 560.

328 At 566.

329 *Radio Frequencies (CA)*, above n 136, at 135 per Cooke P.

330 *Whale-Watching,* above n 304, at 561-562.

331 At 558.

332 At 561.

333 At 560.

Despite *Whale-Watching*, and its subsequent affirmation,[334] other cases have continued to eschew weighting inquiries, relying on polycentricity, expertise, and legitimacy,[335] their presumptively supervisory jurisdiction,[336] or established precedent to justify their non-intervention.[337]

Once more, doctrinal expansion remains tentative. It nevertheless reflects once immovable doctrine boundaries being questioned with reliance on the Treaty of Waitangi.

C Contemporaneous Stories Emerging

The judicial approaches canvassed in this part reflect emergent departures from previously monopolising colonising stories, and a consequential increase in the Treaty's role. It has taken place at the same time as an amplification of stories centring the Treaty in Aotearoa's wider social and political landscapes. However, the ad hoc approach to judicial engagement with the Treaty renders it unclear to what extent those stories have meaningfully found their way into the spaces left by judicial departures.

In the wider social and political landscape, as overt colonising projects began to abate, Aotearoa was "forced by circumstance into a reluctant search for itself",[338] and counternarratives have emerged. They have manifest institutionally, culturally, and politically.

The Waitangi Tribunal provided the institutional foundations for emergent narratives. Justice Williams, extrajudicially, observed that "this phase begins with the enactment of the Treaty of Waitangi Act 1975, and the creation of the Waitangi Tribunal".[339] Its jurisdiction grew in 1985, allowing "retrospective jurisdiction to address Treaty breaches in the 19th century – the real grievances of modern iwi".[340] With that growth, the Tribunal shaped the modern contours of Aotearoa.

The Waitangi Tribunal's introduction is best understood in the context of "significant social change in the country".[341] That change was multifaceted, ranging from the "effect of race consciousness triggered by the American civil rights movement", "the steady dimming of the Empire's light as the United Kingdom shifted focus to surviving as a part of Europe", and "just as importantly, the rise of the Māori demographic and of young urban Māori protest in the

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334 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [69]-[70].

335 *Te Runanga o Raukawa v Treaty of Waitangi Fisheries Commission (HC)*, above n 139, at 10, 21, and 22; and *Te Runanga o Raukawa v Treaty of Waitangi Fisheries Commission (CA)*, above n 139, at 8; and *Thompson v Treaty of Waitangi Fisheries Commission*, above n 28, at [165].

336 *Radio Frequencies (CA)*, above n 136, at 141 per Richardson J and 144 per Hardie Boys J.

337 *Huakina Development Trust v Waikato Valley Authority*, above n 105, at 223.

338 Williams, above n 62, at 11.

339 At 11. See also: Sharp, above n 1, at 316; and Walker, above n 125, at 58.

340 Williams, above n 62, at 11.

341 At 11.

1970s and 1980s".[342] Māori politics took on a new "vibrancy" at this time, with, for example, the Foreshore and Seabed Hikoi following the tradition of the 1975 Land March,[343] and new expressions of Māori political consciousness developing.[344]

Alongside this, legislation increasingly incorporated Treaty considerations.[345]

These shifts mirrored "the emergence of a national and legal constitutional identity".[346] It was developed within and for Aotearoa, and began shifting the constitutional foundations on which Aotearoa's administrative law stood. It was accompanied by greater willingness of senior courts "to give some teeth to the principles of the Treaty of Waitangi",[347] and "explore the gaps in statutory language for a credible Treaty of Waitangi after empire".[348]

Despite this emergence and some judicial reception, the political and constitutional shifts only partially found their way into Aotearoa's judicial consciousness in the realms of administrative law in inchoate, nascent ways.[349] Where colonial stories were displaced, they were not often replaced by clear adherence new stories. Colonising stories were not replaced by a cogent alternative narrative. Rather, a vacuum developed. It has been filled on an ad hoc basis.

Even as arguments are made that the Treaty has "gained especial prominence in [Aotearoa's] administrative jurisprudence"[350], judicial treatment remains hesitant. Any celebration must remain cautious, appropriately reflected in Palmers somewhat reserved analysis. After quoting

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342 At 11.

343 Jones, above n 16, at 13. See also: Walker, above n 125, at 59–61.

344 See, for example: Walker, above n 125, at 58, which discussed *Te Hokio* and *MOOHR* as "underground" publications reflecting a developing and formalising Māori political consciousness; and Mason Durie "Tino Rangatiratanga" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Victoria, 2005) 3 at 3, discussing the establishment of the Māori congress.

345 For full surveys: Palmer, above n 14, at 89-104 and 178-184; and Jacinta Ruru "The Failing Modern Jurisprudence of the Treaty of Waitangi" in Mark Hickford and Carwyn Jones (eds) *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (Routledge, Abingdon, 2019) 111.

346 McHugh, above n 52, at 63.

347 Jones, above n 16, at 16.

348 Williams, above n 62, at 13.

349 The stories might be said to have found judicial favour in the context of judicial reception of tikanga Māori and its influence on the law and in other areas of law. Indeed, the increased judicial reception of tikanga has been gaining consistent momentum in recent years in a wider variety of spheres. See, for examples in Aotearoa's courts: *Ellis v R* [2022] NZSC 114; *Smith v Fonterra Co-Operative Group* [2021] NZCA 552, [2022] 2 NZLR 384 and [2022] NZSC Trans 19; *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; and *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)*, above n 113. However, and saliently to this paper, the reception of tikanga Māori into the law has only rarely found its way into administrative law, and most materially, has not translated into a more forceful recognition of the Treaty or its implications.

350 Philip A Joseph "Constitutional Review Now" (1998) 1 NZ L Rev 85 at 92.

Lord Cooke's effusive description of the Treaty as "simply the most important document in New Zealand's history",[351] Palmer is reticent to celebrate. He observes that the statement "implicitly draws back from making a claim of formal constitutional or legal status of the Treaty".[352] While this paper remains hopeful a new narrative will find judicial favour, the present role of the Treaty in Aotearoa's administrative law is best understood with guarded optimism.

VI Conclusion

The conclusions this paper finally draws are, at times, not revolutionary. Indeed, the core observation comes as little surprise to many readers: as with its wider legal system, Aotearoa's administrative law is profoundly influenced by colonising narratives. These critiques of Aotearoa's wider legal landscape have long been made.[353] This paper has, however, aimed to make indisputable that, despite judicial rediscovery and progress, the colonising narratives first adopted through judicial adherence have persisted through inertia.

Despite their persistence, however, colonising narratives have not maintained exclusive influence. Pockets of judicial departure from those narratives have arisen since the 1970s, reflecting an elision of narratives that relegate the Treaty of Waitangi. But those pockets lack of coherence. They require extra-judicial organisation, rather than presenting a cogent development of new judicial approaches. Further, they carry little precedential value. They have been superseded on appeal, constrained to minority views, weighed out in balancing exercise, or relegated to the fringes of doctrine.

The analysis this paper has undertaken can be summarised simply: while judicial adherence remains structured around a cogent, if varied, colonial narrative, whether intentionally or out of habit, departure has been ad hoc and not yet structured around a persistent counternarrative. While departure has consistently centred the Treaty, it has not found a common driving force.

The comparative cogency of judicial adherence to and departure from colonial narratives provides an understanding that informs the pathway forward.

The lack of a cogent driver of judicial departure from colonial narratives explains its fragmentation and weakness. In contrast, colonial orthodoxy has maintained its force because

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351 Cooke, above n 49, at 1.

352 Palmer, above n 14, at 17.

353 See, for example: Moana Jackon "The Treaty and the Word: Colonization of Māori Philosophy" in Graham Oddie and Roy Perrett (eds) *Justice, Ethics, and New Zealand Society* (Oxford University Press, Auckland, 1992) 1; Ani Mikaere "The Treaty of Waitangi and the Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Victoria, 2005); and Annette Sykes "The Myth of Tikanga in the Pākehā Law" (Nin Thomas Memorial Lecture, Auckland, 5 December 2020).

it carries the weight of a story. Until judicial departure is organised more cogently it will remain relegated to peripheral spaces, unable to forcefully construct a judicial role in administrative law that reflects Aotearoa's constitutional foundations.

The need for a deliberate organising tool to marshal shifts in judicial approach is commonly understood in other spaces of resistance. The process of conscientisation, interrogating the narratives to which one adheres, is a common first step to rebuilding established structures. Theorists commonly posit the need for "cognitive process [to] precede such actions".[354] Unearthing and addressing "embedded colonial thinking" necessarily requires "rethinking and then action".[355] From that conscientisation may stem a process of active judicial reception for new stories.

Shifting the dominant voice need not be a burdensome judicial task. The courts need not be the leaders of new discussions or storytellers moving forward. Indeed, they should not be. Rather, it is a matter of adjusting the voices to which the judiciary becomes attuned. Where colonisation has been likened by Māori writers to a process of "losing your voice",[356] displacing its effects, therefore, requires "a shift in the dominant voice".[357]

There are many voices to be listened to. Stories of Māori constitutionalism and more recent stories centralising the Treaty have long been told. Māori did not go gently into the night with the coming of colonisation, nor were their stories extinguished. Rather, "Māori resistance has … been consistent and continuous", with their stories surviving and predating colonisation.[358]

Stories amplified in more recent times provide a "different and unique" discourse: "there are already stories which express the power of a different truth".[359] The stories tell of shared authority, commitments to cohabitation,[360] interdependence,[361] and pluralist authority.[362] At other times, stories require the relinquishment of power from existing dominant structures. Those stories tell of a constitutionalism grounded in self-determination and tino

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354 Mercier, above n 74, at 54–56. See also: Ngũgĩ wa Thiong'o *Decolonising the Mind: The Politics of Language in Africa Literature* (James Currey, London, 1986); and Pōkā Laenui and Hayden Burgess "Processes of Decolonization" in Marie Ann Batiste (ed) *Reclaiming Indigenous Voice and Vision* (University of British Colombia Press, Vancouver, 2000) 150.

355 Mercier, above n 74, at 42.

356 Mike Ross, above n 2, at 32.

357 Mercier, above n 74, at 58, citing Laenui and Burgess, above n 354.

358 Mike Ross, above n 2, at 38; and Jackson, above n 72, at 147–148.

359 Jackson, above n 72, at 136.

360 Mercier, above n 74, at 40.

361 Jackson, above n 72, at 144.

362 Jones, above n 16, at 42–43.

rangatiratanga,[363] or mana motuhake,[364] where Māori might "live as Māori within the world today".[365] All of the stories ground the potentiality for a new constitutional logic to transform the colonial frameworks that are the "deep institutions of colonisation".[366] The stories will reformulate and grow Aotearoa's administrative law.

While the abundance and diversity range of stories brings with it its own difficulties, there has never been a single constitutional story to be grappled with. The interaction of administrative law and constitutionalism has always been a matter of balancing and listening and privileging different stories, as necessary. What is clear, however, is that the stories are based on a constitutionalism that sees the Treaty of Waitangi at the constitutional centre.

Adhering to these stories will destabilise Aotearoa's administrative law. That instability engenders hesitancy, perhaps even fear. But for Aotearoa's administrative law to take a new life, it requires the room to be adorned with new decorations. The existing contours must be diplaced, and it might not be clear what the new space will resemble. It is, nevertheless, what is needed. The judiciary must move away from those well-thumbed constitutional chapters that bring them comfort. New storytellers have engaged in storytelling based on "imaginative and even brave contemplation".[367] It is time for the judiciary to listen.

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363 Jackson, above n 72, at 147; Durie, above n 344; *Matike Mai,* above n 78, at 29; and Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand *He Puapua* (1 November 2019).

364 Rawinia Higgins "Ko te mana tuatoru, ko te mana motuhake" in Mark Hickford and Carwyn Jones (eds) *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (Routledge, Abingdon, 2019) 129.

365 Mike Ross, above n 2, at 39.

366 Mercier, above n 74, at 64.

367 *Matike Mai,* above n 78, at 22.

Word Count

This paper comprises 14918 words, exactly, excluding table of contents, abstract, footnotes, and bibliography.

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