

ARTICLE

The Myth of Cession: Public Law Textbooks and the Treaty of Waitangi

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The Waitangi Tribunal has confirmed that te Tiriti o Waitangi, as signed and understood in 1840, was not a cession of sovereignty. Although some legal scholars have agreed with this view, mainstream public law scholarship—and Pākehā constitutional discourse more broadly—has not yet caught up. Three textbooks—Joseph’s *Constitutional and Administrative Law*, Palmer and Palmer’s *Bridled Power* and Morris’ *Law Alive*—each portray the treaty as a cession of sovereignty. They do this by overlooking Māori law, history and motivations for signing and by portraying the meaning of the English text as *the* treaty. The myth of cession is used to legitimate the sovereignty presently exercised by the Crown, both in the textbooks and by the Crown itself. Accordingly, the scope of most Pākehā discussions about constitutional change is limited to tinkering with current arrangements rather than adopting or even engaging with Māori calls for the sharing of power that was agreed to in 1840. Because textbooks are considered to be authoritative, they have a role in shaping and legitimising this narrow approach. They should instead present a balanced account of the treaty’s context and meaning in order to help facilitate the possibility of better constitutional relationships in the future.

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I Introduction

The myth that the treaty was a cession of sovereignty is the dominant Pākehā narrative of the founding of New Zealand.¹ In this narrative, Māori are understood to have given up their sovereignty in art 1 in exchange for property rights in art 2 and equality in art 3. The treaty is portrayed as a benign act that has benefitted Māori and as the political basis for the Crown's sovereignty. This myth is evident in three textbooks: Phillip Joseph's *Constitutional and Administrative Law*,² Geoffrey Palmer and Matthew Palmer's *Bridled Power*³ and Grant Morris' *Law Alive*.⁴ Each of these books states or strongly implies that the treaty was a cession of sovereignty. They also claim that the treaty at least partially legitimises the sovereignty presently exercised by the Crown.

On 14 November 2014, the Waitangi Tribunal (the Tribunal) announced the key finding of its Te Paparahi o Te Raki Stage 1 Report:⁵

... the rangatira did not cede their sovereignty in February 1840; that is, they did not cede their authority to make and enforce law over their people and within their territories.

The Tribunal's definition of "sovereignty", which I adopt for the purposes of this article, is as follows:⁶

In our view, 'sovereignty' can be understood in general terms as the power to make and enforce law. ... In describing sovereignty in this manner, we need to be clear that for our purposes 'law' does not refer only to English law made by Parliament and the courts. Rather, we are referring more generally to the system of rules that regulate behaviour in a society.

The Tribunal's finding was nothing new to the generations of Māori who have asserted this claim and to the growing numbers of Pākehā and other tauwiwi (non-Māori) activists and scholars who have supported them. In fact, the Tribunal itself noted that leading Māori and Pākehā scholars "[had] been expressing similar views for a generation"⁷ and that its finding "represents continuity rather than change".⁸

1 The textbook authors use the phrase "the treaty" or "the Treaty" as a general concept either encompassing both texts or not specifying which text is being referred to. As discussed below, this phrasing tends to obscure the fact that the two documents have completely different meanings, and to elevate the meaning of the English text. However, I adopt this terminology because the idea of "the treaty" is significant to my analysis. I use the lower case spelling to clarify that I am referring to this vague and ambiguous concept, not a specific document. When referring to one or other of the texts, I use "te Tiriti" or "the Māori text" on the one hand and "the English text" on the other. Direct quotes retain the terminology used by their authors. Māori words are spelt according to modern spelling, apart from direct quotes.

2 Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at ch 4.

3 Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004) at ch 17.

4 Grant Morris *Law Alive: The New Zealand Legal System in Context* (3rd ed, Oxford University Press, Melbourne, 2015) at ch 3.

5 Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, November 2014) at 526-527.

6 At 9.

7 At 527.

8 At 527.

Prior to the 1970s historians writing about the treaty acknowledged to some extent the differences between the English and Māori texts, but “unquestioningly gave primacy to the English text”.⁹ In 1972 Ruth Ross became the first historian to focus on the Māori text and emphasise the fundamental differences between the Māori and English texts.¹⁰ Her work “exposed the unquestioning assumption of myths about the treaty by an earlier generation of scholars” and left them “with the uncomfortable realisation that a reliance on what was said in the English text alone was no longer intellectually honest”.¹¹ Her conclusion that the Māori text is the relevant document and that it did not cede sovereignty is now well-established orthodoxy among historians.¹²

Since the early 1990s, legal scholars have written about the meaning and effect of the treaty on the basis that it was not a cession of sovereignty¹³—and they continue to do so.¹⁴ However, the view that the treaty was not an instrument of cession has failed to gain widespread acceptance among constitutional and public lawyers and academics to the extent that it has among historians. Instead, the myth that the treaty was a voluntary cession of sovereignty dominates these contexts, just as it continues to underpin Pākehā discourses of constitutionalism and national identity generally.

Rather than attempting to examine all legal academic writing on the constitution—which would be a massive task—this article focuses on three public law textbooks. I have

9 Rachael Bell “Texts and Translations”: Ruth Ross and the Treaty of Waitangi” (2009) 43(1) NZJH 39 at 44.

10 RM Ross “Te Tiriti o Waitangi: Texts and Translations” (1972) 6 NZJH 129.

11 Waitangi Tribunal, above n 5, at 410.

12 For example, see James Belich *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (3rd ed, Auckland University Press, Auckland, 2015); Claudia Orange *The Treaty of Waitangi* (2nd ed, Bridget Williams Books, Wellington, 2011); Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (2nd ed, Penguin Books, Auckland, 2004); Judith Binney “Kawanatanga and Rangatiratanga, 1840–1860” in Judith Binney, Judith Bassett and Erik Olssen (eds) *The People and the Land: Te Tangata me te Whenua – An Illustrated History of New Zealand, 1820–1920* (Allen & Unwin, Wellington, 1990) 77; James Belich *Making Peoples: A History of the New Zealanders From Polynesian Settlement to the End of the Nineteenth Century* (Penguin Books, Auckland, 1996); and Paul Moon *Te Ara ki te Tiriti: The Path to the Treaty of Waitangi* (David Ling Publishing, Auckland, 2002). See also the discussion of historical perspectives in the Tribunal report, above n 5, at ch 8.

13 For example, see ETJ Durie “The Treaty in Maori History” in William Renwick (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 156; Moana Jackson “The Treaty and the Word: The Colonization of Māori Philosophy” in Graham Oddie and Roy W Perrett (eds) *Justice, Ethics, and New Zealand Society* (Oxford University Press, Oxford, 1992) 1; Jane Kelsey *A Question of Honour? Labour and the Treaty 1984–1989* (Allen & Unwin, Wellington, 1990); Nan Seuffert “Colonising Concepts of the Good Citizen, Law’s Deceptions, and the Treaty of Waitangi” (1998) 4 Law Text Culture 69; David V Williams “Te Tiriti o Waitangi – Unique Relationship Between Crown and Tangata Whenua?” in IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives on the Treaty of Waitangi* (Oxford University Press, Oxford, 1989) 64; and Joe Williams “Not Ceded But Redistributed” in William Renwick (ed) *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 190.

14 For example, see Margaret Mutu “Constitutional Intentions: The Treaty of Waitangi Texts” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 13; Ani Mikaere *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011); Carwyn Jones “Tāwhaki and Te Tiriti: A Principled Approach to the Constitutional Future of the Treaty of Waitangi” (2013) 25 NZULR 703; and Jane Kelsey “Te Tiriti is the Constitution” in Heather Came and Amy Zander (eds) *State of the Pākehā Nation: Collected Waitangi Day Speeches and Essays 2006–2015* (eBook ed, Network Waitangi Whangarei, 2015) 34.

chosen to focus on textbooks for two reasons. First, textbooks by their nature usually reflect the mainstream view of the field and go some way to revealing how public law writers engage with the treaty. Secondly, textbooks in any field are important because they play a role in shaping people's perceptions of the subject matter. In my view, this is amplified in the context of constitutional law. Constitutions—especially unwritten ones—are largely constructed by those who write about them. Public law textbooks, therefore, have an influential role in shaping the paradigms and discourses of constitutionalism. If three major textbooks all frame the treaty in a particular way, naturally this has a normative impact on the readers of these texts.

What the textbooks say matters, I argue, because the myth of cession hinders the possibilities for imaginative discussions about future constitutional arrangements. Although many Māori are calling for a Tiriti-based constitution where power is shared, as agreed in 1840, Pākehā discussions of constitutional change generally fail to engage with this perspective. Pākehā instead tend to fit the treaty (meaning the so-called treaty principles)¹⁵ into a framework where the Crown continues to have absolute sovereignty.

In this article, I refer extensively to the *Te Paparahi o te Raki* report.¹⁶ I also refer to Ngāpuhi's account to the Tribunal, as recorded in *Ngāpuhi Speaks*.¹⁷ The Tribunal report is a particularly useful source because it is very comprehensive and draws together a huge body of existing research, as well as the evidence presented to it.¹⁸ Additionally, it is significant because of the legal nature of its findings and the fact that the Tribunal is a Crown institution.

My hope is that the report will add a greater sense of weight to the existing work and spark further engagement with the meaning of the treaty in general constitutional writing. However, my argument is not only that future editions of the textbooks should be responsive to the Tribunal's findings, but also that this work has been around for years and these textbooks have failed to engage with it. That, in my view, is significant, because it reflects a choice that the authors have made.

It is also worth noting that although the majority of historians—and the Tribunal—take the view that the Crown intended for Māori to cede sovereignty and that this is evident in the English text, others have argued that the English text was not a cession of sovereignty either.¹⁹ For the purposes of this article, what matters is not what the British intended or what they thought they were agreeing to, but what they actually agreed to

15 The principles of the treaty are premised on the Crown's absolute sovereignty and involve responsibilities of the Crown to Māori within that paradigm. As such, they do not in any way reflect te Tiriti. I discuss this further towards the end of this article.

16 Waitangi Tribunal, above n 5.

17 Susan Healy, Ingrid Huygens and Takawai Murphy *Ngāpuhi Speaks: He Wakaputanga o te Rangatiratanga o Nu Tirenī and Te Tiriti o Waitangi Independent Report on Ngāpuhi Nui Tonu Claim* (Te Kawariki and Network Waitangi Whangarei, Whangarei, 2012).

18 I am, however, aware of the report's limitations, particularly that it is focused on Ngāpuhi. Other iwi and hapū have their own rich and complex histories, and even within Ngāpuhi there are many different perspectives. It is outside the scope of this article to investigate the understanding of every signatory to te Tiriti. However, it is not a stretch of the imagination to suggest that if Ngāpuhi did not cede their sovereignty, then other iwi and hapū who signed also did not cede sovereignty—neither, of course, did those who refused to sign or who were not given the opportunity to do so.

19 See generally Moon, above n 1212; and Ned Fletcher "A Praiseworthy Device for Amusing and Pacifying Savages? What the Framers Meant By the English Text of the Treaty of Waitangi" (PhD Thesis, University of Auckland, 2014).

with the rangatira who signed the treaty.²⁰ And that is illustrated primarily by the Māori text, the oral agreements and the context at the time of signing.

As a Pākehā writer with limited understanding of both tikanga Māori and te reo Māori, it is inevitable that I cannot absolutely understand or portray Māori histories or Māori perspectives. Yet at the same time, it is important that Pākehā engage with Māori perspectives about te Tiriti. Not only is this the key to understanding the continuing injustices of colonisation, it is necessary in order for Pākehā to work meaningfully with Māori into the future, particularly in relation to constitutional arrangements. It is also the responsibility of Pākehā to critique and challenge dominant Pākehā narratives on te Tiriti. This work should not be left to Māori alone.

The treaty relationship is often assumed to be a binary relationship between Māori and Pākehā (or Māori and the Crown on behalf of Pākehā). This portrayal leaves out tauwiwi who are not Pākehā and reinforces Pākehā dominance among tauwiwi. However, the emphasis on Pākehā discourses in my article is the necessary result of the position of power that Pākehā occupy in this country: Pākehā discourses are entrenched, powerful, and harmful. And it is Māori understandings which are fundamental to challenging that discourse and enabling the possibility of a broader discussion.

The structure of this article is as follows. In Part II, I introduce the textbooks, draw attention to where they say that the treaty was a cession of sovereignty and explain why these textbooks are a necessary and useful subject of critical analysis. In Part III, I turn to the textbooks' treatment (or lack of treatment) of Māori law, Māori history and the intentions of Māori in signing the treaty. I contend that their failure to discuss the Māori context enables the perpetuation of the myth of cession. In Part IV I turn to the textbooks' focus on the English text and its meaning, which again bolsters the narrative that the treaty ceded sovereignty.

Finally, in Part V, I turn to consider the treaty as a basis for the legitimacy of the Crown's sovereignty in New Zealand. The textbooks portray the same view that the Crown itself has: that the treaty is not the legal basis for the Crown's legitimacy, but is—at least in part—the moral or political basis for it. This view relies on the English text and, as such, is disingenuous. Te Tiriti is not a signal of Māori consent to the Crown's sovereignty as it is presently exercised. Rather it is a blueprint for a constitution in which power is shared. Te Tiriti can be the basis for legitimate Pākehā and other tauwiwi constitutional authority, but only if its original intentions are honoured. Māori calls for constitutional transformation on this basis are currently largely ignored by Pākehā writing about constitutional change and this is enabled by continued belief in the myth of cession, as presented in the textbooks and elsewhere.

II The Textbooks and the Myth of Cession

A *Introduction to the public law textbooks*

In this section, I briefly introduce the books I have chosen: *Constitutional and Administrative Law*, *Bridled Power* and *Law Alive*. These textbooks are commonly

20 Ross, above n 10, at 129–130. It is worth noting Fletcher's view that "even though the Maori text is rightly treated as authoritative, its origins in the English draft make that text relevant when considering the meaning of the Treaty in Maori". Fletcher, above n 19, at xiv. Despite his focus on the English text, his intention is not to "elevate the status of the English draft or diminish that of the Maori text." At xiv.

prescribed texts in legal systems and public law courses at New Zealand universities. Their target audience is, however, much wider. Although each book is very different in style and approach generally, their treatment of the treaty is similar in the sense that they portray it as a treaty of cession and fail to engage with Māori understandings of the treaty.

Together, these books provide a snapshot of how the treaty is situated in general discussions of New Zealand public law. Accordingly, my intention in this article is not to criticise the particular authors. I am more interested in the similarities between these texts than their differences and I am interested in what they collectively suggest about the state of Pākehā constitutional discourse. Similarly, the article is not intended to situate each textbook within the historical or political context of its writing, the life of its author(s) or the authors' other works. That said, it is worth noting that each of these authors has written specifically about the treaty elsewhere.²¹

The latest edition of *Constitutional and Administrative Law* was published in 2014. It is certainly the longest and most comprehensive of the three books at 1466 pages. According to its back cover, the textbook "is used extensively in the law schools, is a primary resource for central government and is regularly cited in the judgments of the courts".²² No doubt its comprehensive nature means that it is indeed commonly used as a general reference.

Bridled Power is the oldest current edition of the three texts—the latest edition was published in 2004. *Bridled Power* claims to be "of value to anyone interested in government, as well as to judges, law practitioners, academics, government departments and politicians, and law and political science students".²³ The broad target audience reflects the authors' desire to "offer a stimulus to public debate".²⁴ The book intends to be "practical ... but with a critical and reformist approach",²⁵ which perhaps explains its focus on contemporary issues.²⁶

Law Alive is not strictly a public law textbook. Rather it is an introductory text on the New Zealand legal system as a whole—although roughly half of the topics covered by the book could be classified as public law. It is intended for first year law students²⁷ and the most recent edition was published in 2015. Unlike the other books, one of its stated goals is to provide a contextual account of the legal system.²⁸ This means it has more of an interdisciplinary approach than law textbooks generally do.

21 See generally Philip A Joseph "The Treaty of Waitangi: A Text for the Performance of Nation" (2004) 4 Oxford U Commw LJ 1; Geoffrey Palmer "The Treaty of Waitangi – Where to from here?" (2007) 11 Otago LR 381; Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008); and Grant Morris "James Prendergast and the Treaty of Waitangi: Judicial Attitudes to the Treaty During the Latter Half of the Nineteenth Century" (2004) 35 VUWLR 117. Although for the most part these writings are consistent with the authors' respective textbooks, Matthew Palmer notably writes that "an interpretation of the Treaty of Waitangi that accorded to most rangatira an intention to cede sovereignty is, in my opinion, untenable. The implication of this view is that the Treaty is not a treaty of cession...". At 164.

22 Joseph, above n 2, back cover.

23 Palmer and Palmer, above n 3, back cover.

24 At ix.

25 At ix.

26 As will be discussed later in the article, this textbook engages with the historical context of the treaty far less than the other two.

27 Morris, above n 4, at vii.

28 At vii.

Although each textbook targets a different audience, on their own or in combination they will be read by the general public, law students at various stages of their studies, law practitioners, policy-makers and judges. This wide audience means, in my view, that these textbooks are a worthy and important subject of analysis.

Textbooks are used as a reference by those seeking to understand the subject-matter in general terms and are usually assumed by their readers to be comprehensive and, at least relatively, neutral sources.²⁹ Because textbooks are generally thought of as a statement of the law as it is—and they are consulted for that purpose—they not only reflect the law, but also help to construct it.³⁰

The treatment of the treaty in the three textbooks in question is particularly influential for two reasons. First, I contend that public law textbooks have an especially strong normative role in the context of an unwritten constitutional system. Indeed, by definition an unwritten constitution is constructed by those who write about it. Secondly, these three books each say broadly the same thing about the treaty: that it was or purported to be a cession of sovereignty. This repetition entrenches the myth of cession in readers' minds and shapes the entire paradigm within which New Zealand's constitutional arrangements are understood.

Having explained why I have chosen these textbooks, I turn now to consider how each textbook frames the treaty as a treaty of cession.

B The myth that the treaty was a cession of sovereignty

The three textbooks express the idea that that “the treaty”—meaning the document signed on 6 February 1840 and subsequently—was a cession of sovereignty by Māori to the Crown. Joseph and Morris do this explicitly in several places in their respective chapters. In the textbook by Palmer and Palmer the claim is more implicit.

Joseph argues that although “[t]he Treaty purported to cede to the British Crown territorial sovereignty over New Zealand”³¹ it did not have this effect, because he disagrees that “Maori tribal society possessed ‘statehood’ for cession of sovereignty”.³² He does, however, describe it as a treaty of cession elsewhere. For example, he writes that “the Treaty is a short, sparse document, comprising ... three articles of cession”.³³ He also describes the treaty as “an instrument of cession from colonial times”.³⁴

Palmer and Palmer do not make any such explicit statements. In the first paragraph of their treaty chapter they write that “the Treaty symbolises rights and obligations of Māori and the undertakings that were given to them when the Crown assumed authority”.³⁵ They go on to state that:³⁶

In one sense, New Zealand's right as a nation to make laws, to govern, and to dispense justice can be said to spring from that 1840 compact between the Crown and the Māori.

29 Mary Irene Coombs “Crime in the Stacks, or A Tale of a Text: A Feminist Response to a Criminal Law Textbook” (1988) 38 J Legal Ed 117 at 121.

30 Rosemary Hunter “Review Article Representing Gender in Legal Analysis: A Case/Book Study in Labour Law” (1991) 18 MULR 305 at 308–309.

31 Joseph, above n 2, at 51–52.

32 At 59. See further discussion later in the article.

33 At 46.

34 At 149.

35 Palmer and Palmer, above n 3, at 333.

36 At 333.

It is possible that these quotes could be interpreted to mean that the treaty was not a cession of sovereignty. The words “[in] one sense” and “spring from” are relatively vague. However, even if the sovereignty of the Crown is something that “springs from” the treaty rather than directly results from it, this still suggests that the treaty was a cession of sovereignty. There is no other sense in which it can legitimise the sovereignty presently exercised by the Crown. I return to this point in later in the article.

In *Law Alive* the myth of cession is explicit and pervasive. For example, Morris states that the proclamation dated 14 January 1840, which extended the boundaries of New South Wales to include New Zealand, “preceded the events at Waitangi by several weeks, but in effect was contingent on *Māori ceding sovereignty* through the treaty”.³⁷ In discussing reasons for the treaty signing, Morris writes that “it was necessary for Britain to recognise the [1835] declaration in the treaty and then nullify its provisions through the *cession of sovereignty* in Article 1”.³⁸ Later in the chapter, when discussing native title, Morris writes that “the treaty is a specific document of cession”.³⁹

Morris does acknowledge that sovereignty *might not* have been ceded.⁴⁰

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

This suggestion that the treaty might not have ceded sovereignty reflects a more nuanced approach than the other authors. However, it does not, in my view, change the reader’s overall impression in the context of the other unambiguous statements that the treaty was a cession of sovereignty.

All three of the textbooks portray the idea that the treaty was (or purported to be) a cession of sovereignty. Regardless of the *legal* basis of sovereignty, they portray the treaty as a signal of Māori consent to that sovereignty. The myth that the treaty was a cession of sovereignty is bolstered by each author in two key ways. First, they fail to set out Māori law, history and motivations for signing that would provide the context as to why Māori could not have ceded sovereignty. Secondly, they portray the meaning of the English text as *the* treaty, while downplaying the differences between that text and te Tiriti. This allows them to make claims of constitutional legitimacy that are grounded in the treaty. I turn to these points in the next three Parts of the article.

III Failure to Discuss Māori Law, History and Motivations

As I have discussed, each book states either explicitly or implicitly that the treaty was or purported to be a cession of sovereignty. In most of the remainder of this article, I examine their portrayal of the treaty in more depth. In this Part, I turn to how each author’s discussion of the law, history and motivations leading up to 1840 reinforces the reader’s impression that the treaty was a cession of sovereignty.

The Tribunal was acutely aware of the importance of context, and this is reflected in the report, which discusses events prior to 1840 at length. The Tribunal stated:⁴¹

37 Morris, above n 4, at 32 (emphasis added).

38 At 59 (emphasis added). See discussion later in the article about the Declaration/he Whakaputanga.

39 At 69.

40 At 59.

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

I agree with this sentiment. The meaning of the treaty must be understood in its 1840 context, with reference to the values, legal systems, relationships and political realities of its signatories. The claim that the treaty was a cession of sovereignty is directly linked to the overlooking of Māori law, history and intentions.

Each book fails to adequately convey the context of the treaty from a Māori perspective, but they each fail to in a different way. Joseph explores British law, history and motivations in depth but makes no mention of their Māori counterparts. Palmer and Palmer do not really discuss the context for either side. And while Morris provides some discussion of Māori motivations and Māori law, it is far from adequate.

A *Law*

A basic understanding of the values and operation of tikanga Māori is fundamental to understanding Māori intentions for the treaty in 1840. Tikanga is a system of law, although it is also broader than law because it includes customs and behaviours. The word tikanga comes from tika meaning correct, right or just, and nga which transforms tika into a noun. Accordingly, tikanga means “the system by which correctness, rightness or justice is maintained”.⁴²

Tikanga and British law are driven by fundamentally different values. Tikanga is predicated on personal connectedness through whakapapa and whanaungatanga, while British law is predicated on personal autonomy.⁴³ Like British law, Māori law is based on hundreds of years of experience and has deep historical roots. The foundation of tikanga is whakapapa, through which “all things could be traced back in a logical sequence to the beginning of creation”.⁴⁴ This meant that “all people and all elements of the physical and spiritual worlds were seen as related at a fundamental level”.⁴⁵

Whakapapa begins with Te Korekore, the absolute nothingness or void, which was a realm of energy from which everything emerged. The first world to emerge was Te Pō, the realm of darkness or night. From this, a soft light entered, creating Pō-tahuri-atu, the night that faces day. Within this realm Hawaiki, the home of the atua, or ancestor-gods, was formed. Rangi-nui, god of the heavens, and Papa-tū-ā-nuku, mother of earth, were the first gods. Their children were born into this world, trapped between their parents. When they forced their parents to separate, this created Te Ao Mārama, the world of light or being. Each of the offspring of Papa and Rangi were atua that played particular roles in the creation of the world.⁴⁶

41 Waitangi Tribunal, above n 5, at 498.

42 Joe Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai L Rev 1 at 2–3. See also Waitangi Tribunal, above n 5, at 25

43 At 6. See also Waitangi Tribunal, above n 5, at ch 2.

44 Waitangi Tribunal, above n 5, at 20.

45 At 20.

46 At 20–22.

The North Island of New Zealand, Te Ika-a-Māui, was first discovered by Kupe-ariki, who was a descendant of Māui. He returned to Hawaiki, and passed on his knowledge. His descendants, Nukutawhiti and Ruanui, each voyaged to New Zealand with their people, and settled in the Hokianga. Their descendants spread across the far North of Te Ika-a-Māui, and other waka followed and also settled there. Through descent and intermarriage, these groupings are all related, and they can all trace descent to Nukutawhiti and Ruanui.⁴⁷ While this group is now known as Ngāpuhi, prior to colonisation they referred to themselves by the name of their hapū and not as Ngāpuhi.⁴⁸

The principle of whanaungatanga embodies the idea that all things are related and that the individual and the group were intimately connected. As the Tribunal noted, rangatira (chiefs) “could refer to their tūpuna [ancestors] and their hapū [kin group] as ‘ahau’, which literally meant ‘myself’, but also meant that their hau, their breath of life, was shared”.⁴⁹

Mana derives from whakapapa. Māori Marsden described mana as:⁵⁰

... lawful permission delegated by the gods to their human agents and accompanied by the endowment of spiritual power to act on their behalf and in accordance with their revealed will.

Humans only had a small portion of mana; most of it was retained by the atua. It was passed to Papa and Rangi from Io, and then to their children, all living things and—finally—humans.⁵¹ Events such as storms and earthquakes were expressions of the mana of the atua.⁵²

On a day-to-day basis, law-making power was exercised by hapū: groups of whānau (extended families) who shared a common ancestor. Hapū had rights over land, natural resources (such as fishing beds) and assets (such as whare tūpuna—meeting houses—and waka).⁵³ Hapū were led by rangatira, who coordinated communal activities, mediated disputes, facilitated decision making, allocated land, entered into diplomatic relationships with other hapū and led military efforts.⁵⁴ Rangatira exercised authority in relation to land and people, but that authority (mana) did not belong to them individually. Their mana “was bestowed by virtue of their relationships with people (mana tāngata), land (mana whenua), and tūpuna (mana tūpuna): all of which embodied atua”.⁵⁵

Because mana derived from whakapapa, mana “could not be broken or transferred”.⁵⁶ For this reason, according to Moana Jackson, “mana was absolutely

47 At 26–27.

48 At 28.

49 At 23.

50 Te Ahukaramū Charles Royal (ed) *The Woven Universe : Selected Writings of Rev Māori Marsden* (Estate of Reverend Māori Marsden, Otaki, 2003) at 4–6 as cited in Waitangi Tribunal, above n 5, at 24.

51 Waitangi Tribunal, above n 5, at 24.

52 At 24.

53 At 30.

54 At 30.

55 At 31.

56 At 24.

inalienable”.⁵⁷ Jackson submitted to the Tribunal that “to even contemplate giving away mana would have been legally impossible, politically untenable, and culturally incomprehensible”.⁵⁸ Anne Salmond also pointed out that the mana of the rangatira “came from their ancestors, and was not theirs to cede”.⁵⁹ The Tribunal concluded that both the claimants—and “most scholars since the 1980s”—agreed that ceding mana would have been impossible in Māori law.⁶⁰

The Tribunal stated that “mana, tapu and utu can be seen as fundamental aspects of a system of law and authority that applied long before Europeans arrived”.⁶¹ I agree. Tikanga was as much a system of law as the British legal system, and the context leading to the treaty must also be analysed through that lens.

Law Alive is the only book out of the three to acknowledge the existence of Māori law prior to 1840—though, unfortunately, not in relation to the context and meaning of the treaty. It is mentioned very briefly in the legal history chapter,⁶² which acknowledges that “the English system dominated and effectively excluded the Māori system”⁶³ and argues that from 1840 “Māori customary law, which had operated in New Zealand since the arrival of Polynesian voyagers approximately 700 years before, was swept aside.”⁶⁴

Māori law is again discussed later in the book, in the section on Māori dispute resolution.⁶⁵ Most of that section focuses on contemporary applications of Māori dispute resolution, and the treaty is briefly discussed in that context.⁶⁶

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

57 Moana Jackson “Brief of Evidence” (Wai 1040 Doc D2, Waitangi Tribunal, 2010) at 13 as cited in Waitangi Tribunal, above n 5, at 454.

58 At 13.

59 Anne Salmond “Brief of Evidence” (Wai 1040, Doc A22, Waitangi Tribunal, 2010) at 24–25 as cited in Waitangi Tribunal, above n 5, at 461.

60 Waitangi Tribunal, above n 5, at 514.

61 At 25. I have not discussed tapu and utu here due to space constraints. I have focused on mana and whakapapa because they are fundamental to illustrating why Māori could not cede sovereignty. For a general explanation of tikanga concepts, see the Waitangi Tribunal at 20–36. See also Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003). For discussion of tikanga as a legal system in both the past and the present, see Joe Williams, above n 42.

62 By contrast, this chapter sets out English legal history prior to 1840 in some detail.

63 Morris, above n 4, at 31.

64 At 31. This claim is, of course, not true. Tikanga has always continued to operate despite the State’s refusal to recognise it as a legal system in its own right. For discussions about how tikanga continues to operate in a contemporary context, see generally Mead, above n 61; and Williams, above n 42.

65 Morris, above n 4, at 166–167. Morris writes that Māori had “a complex system of legal concepts and regulations” which “is as much law as the English system.” However, it was “largely ignored by the colonists”. He defines key concepts and briefly discusses the application of some of them in pre-colonial Māori society. He also explains that Māori dispute resolution focuses on the collective rather than the individual.

66 At 168. Morris discusses the possibility of a parallel criminal justice system in light of the over-representation of Māori in prisons. Morris notes that a parallel system “would fulfil the promise of te tino rangatiratanga in Article 2 of the Treaty of Waitangi, but could possibly undermine the idea of ‘one law for all.’” This is the only mention of the relationship between Māori law and the treaty.

Te Tiriti is a valid treaty according to Māori law. As Moana Jackson wrote in 1992:⁶⁷

The Māori version of the Treaty is a reflection of the ancestral precedents and rights which were defined by Māori law. It fulfilled the form of Māori law since it was discussed by the representatives of iwi, and it both recognized and preserved the authority which they had as rangatira to sign on behalf of their people.

Jackson also observed that in discussions about the treaty, the first question is always whether the treaty is valid according to Pākehā law, and that “[t]he fact that it is valid in Māori law does not even merit a footnote.”⁶⁸ This is particularly true of Joseph’s approach.

Joseph discusses extensively whether the treaty was one of cession according to European international law. He dedicates seven pages to the question of whether Māori had the legal capacity to cede sovereignty. He begins by listing the requirements for a treaty of cession.⁶⁹ He then sets out the “orthodox view” that although the treaty purported to be a cession of sovereignty,⁷⁰ Māori did not possess the requisite statehood, meaning that the treaty was not one of cession according to international law.⁷¹ To support this view, Joseph primarily cites works published in the 1950s and 1960s⁷², as well as an “authoritative work”⁷³ by MF Lindley from 1926.⁷⁴

Joseph argues that applying Lindley’s criteria of a “permanent form of government”⁷⁵ Māori did not “exhibit the necessary characteristics to exercise rights of territorial sovereignty”.⁷⁶ Accordingly, he says, New Zealand was legally claimed on the basis of occupation and settlement, not cession.⁷⁷ The “contrary view” that he discusses is that Māori had the capacity to—and *did*—cede sovereignty.⁷⁸ He also states that the validity of the treaty under international law in 1840 “is an exercise in historical curiosity” that “has no bearing on the significance of the instrument as a national symbol”.⁷⁹ However, this discussion is important to highlight because it portrays the treaty as a cession of sovereignty, regardless of its status under European international law of the time. Joseph does not discuss whether the treaty might have been a valid treaty that did *not* cede sovereignty, or how the treaty might be situated within Māori law. The implication is that he considers these questions to be less important or relevant than whether Māori had capacity to cede sovereignty according to European international law.

In *Bridled Power*, there is no discussion of the legal status of the treaty in British or international law, or of Māori law at all. Rather, the chapter is very focused on the contemporary meaning and application of the treaty.

67 Joseph, above n 13, at 7.

68 At 7.

69 Joseph, above n 2, at 59.

70 At 51–52.

71 At 60.

72 At 61–71.

73 At 61.

74 MF Lindley *The Acquisition and Government of Backward Territory in International Law* (Longmans, Green & Co, London, 1926).

75 At 20 as cited in Joseph, above n 2, at 62.

76 Joseph, above n 2, at 62.

77 At 42 and 47.

78 At 62–64.

79 At 59.

The lack of discussion in each book of Māori law and its relation to the treaty is problematic. It is well-established that tikanga Māori was a functioning legal system prior to colonisation and it is one-sided to only discuss the treaty in light of the British legal system but not the Māori one. It was not possible for Māori to cede sovereignty in 1840. This is not for the reason discussed by Joseph, but rather because Māori could not cede mana according to their own legal system.

A basic grasp of tikanga enables an understanding of the legal nature of te Tiriti on Māori terms and is fundamental to a balanced understanding and a constructive dialogue moving forward.

B History

In its report, the Tribunal observed that “[t]hose who have made the assumption that the rangatira ceded sovereignty in February 1840 have largely ignored the Māori understanding.”⁸⁰ The Māori understanding includes the historical context in which the treaty was signed and, in particular, the developing relationship between Ngāpuhi and the Crown. The textbooks do not engage with this history. Although Joseph and Morris both discuss British historical context, neither discusses the Māori context or Māori understandings of the relationships that were developing at the time.

In pre-colonial Māori society, hapū were the primary units of political organisation. They had extensive trading and diplomatic relationships with each other, and these expanded to include Europeans from the late-18th century.

Ngāpuhi’s diplomatic relationship with the British crown began with Tuki and Huru’s stay with Governor King on Norfolk Island in 1793,⁸¹ Te Pahi’s visit to him in Sydney in 1805,⁸² and Maatara’s visit to London in 1807 when he met the royal family.⁸³ In 1820, Hongi Hika and Waikato went to England to work on a Māori language dictionary and to visit the King. The meeting that they had with King George IV was a diplomatic one. They had a friendly discussion, and Hongi and Waikato were presented with gifts. Hongi understood this meeting to be a meeting of equals⁸⁴ and felt that it established a personal diplomatic relationship between himself and the King.⁸⁵

Ngāpuhi had a long tradition of hosting rangatira who represented hapū from throughout the land for the purposes of building alliances. According to Ngāpuhi oral tradition, an assembly or alliance called te Whakaminenga began meeting in 1808 as a forum to bring hapū together to discuss relationships with Europeans. Meetings were hosted by different Ngāpuhi hapū in order to share the burden.⁸⁶ Over time, an increasing number of hapū joined. Te Whakaminenga was a new form of political authority, which operated alongside the authority of iwi and hapū.⁸⁷

The earliest Pākehā to live in New Zealand did so among hapū and strictly under their control. They were expected to abide by the tikanga of the hapū, and were punished for breaking the rules. The missionaries, who first arrived in 1814, were also under the

80 Waitangi Tribunal, above n 5, at 527.

81 At 69–70.

82 At 72–75.

83 At 76.

84 At 98–100.

85 At 106.

86 At 176–177.

87 At 153 and 176–179.

control of their Māori patrons.⁸⁸ For the most part this was a harmonious relationship; however, there were increasing incidents of Pākehā breaching tikanga either because they did not understand it or because they wilfully chose not to follow it. In many cases they were also acting outside their own British law. The British crown did make various attempts to control its subjects in New Zealand, but none of these were successful.⁸⁹

In 1831, frustrated with increasing Pākehā lawlessness and breaking of tikanga, the rangatira of te Whakaminenga wrote a petition to King William IV. They noted the positive trading relationship that they had with Pākehā, but expressed concern about Pākehā troublemakers. They asked King William to become a friend and guardian, and to control the Pākehā.⁹⁰ The response to this letter came with James Busby in 1833, who became the official British Resident.⁹¹ Ngāpuhi understood his role to be about controlling Pākehā lawlessness, as they had requested.⁹²

In 1830, a ship built in New Zealand was seized in Port Jackson (Sydney) because it was not registered. This caused concern to northern rangatira.⁹³ In response, Busby presented three flags to a hui of rangatira.⁹⁴ The flag that was chosen on 20 March 1834 is known as “Te Kara” or “The flag of Te Whakaminenga”.⁹⁵ It was recognised by the British King in December 1834.⁹⁶ It was also recognised in Australia, America, Canada and France.⁹⁷ Patu Hohepa, in his evidence, stated that the recognition of the flag was an important “step in the recognition of Māori mana motuhake or tino rangatiratanga or sovereignty as defined explicitly in Māori terms”.⁹⁸ Busby described the King’s approval as an acknowledgement of “the Sovereignty of the Chiefs of New Zealand in their collective capacity”.⁹⁹

The next important step in the relationship between Ngāpuhi rangatira and the Crown was he Whakaputanga, the English version of which is called the Declaration of Independence.¹⁰⁰ Busby’s intention for the Declaration was to establish a “national congress of rangatira” who would make laws for all Māori, and to then use this congress to increase Britain’s authority and control.¹⁰¹ His other immediate motivation was to mitigate the threat from the French baron, De Thierry, who had claimed sovereignty in the Hokianga.¹⁰² The rangatira, on the other hand, wanted the benefits of European technology, ideas and relationships, while ensuring that the rangatira maintained control and that the newcomers complied with tikanga.¹⁰³

88 At 93–95.

89 At 95–97 and 108–113.

90 At 114–115.

91 At 123–124.

92 Healy, Huygens and Murphy, above n 17, at 71.

93 Waitangi Tribunal, above n 5, at 128–129.

94 At 129.

95 Healy, Huygens and Murphy, above n 17, at 56.

96 Waitangi Tribunal, above n 5, at 133.

97 Healy, Huygens and Murphy, above n 17, at 55.

98 Patu Hohepa “Linguistic Evidence” (Wai 1040 Doc D4, Waitangi Tribunal, 2010) at [82] as cited in Healy, Huygens and Murphy, above n 17, at 56.

99 Waitangi Tribunal, above n 5, at 133.

100 Note that the original document omits the “h” in “Whakaputanga”, because this was how the “wh” sound was written at the time. See Waitangi Tribunal, above n 5, at 11.

101 Waitangi Tribunal, above n 5, at 157 and 499–500.

102 At 159–160 and 499–500.

103 At 157.

Like the treaty itself, the Whakaputanga and the Declaration contain very different terms. In the Whakaputanga, the rangatira of the Whakaminenga declared their “rangatiranga o te matou wenua”, that is, sovereignty or absolute power in their lands. They declared that the kingitanga and mana of their land resided with them, that no-one else could frame laws, and that no governor could be established, unless appointed by the Whakaminenga. They agreed to meet at Waitangi in the autumn of each year to make laws (ture) that would apply to Europeans and to relationships between Māori and Europeans, and they asked the King for protection.¹⁰⁴

The English text expresses Busby’s intention to create a centralised law-making body that would have exclusive capacity to make laws, but this was not agreed to in the Māori text, which only excludes the law-making power of foreigners.¹⁰⁵ The Tribunal found that there was no intention of the rangatira to give up the mana and rangatiratanga they exercised on whanau, hapū and iwi levels. Likewise, there was no intention to create the supreme legislature that Busby envisaged.¹⁰⁶ Indeed, this would have been impossible, as they explained to Busby at the time.¹⁰⁷

Te Whakaminenga was an additional form of authority, which existed alongside—and did not undermine—the authority that already existed.¹⁰⁸ And the Whakaputanga, the Tribunal concluded:¹⁰⁹

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

The Whakaputanga foreshadowed the possibility of the Whakaminenga delegating some of its authority in the future. Accordingly, the Tiriti is intrinsically linked to the Whakaputanga. It builds on rather than replaces it.¹¹⁰ For this reason, it is an important part of the historical narrative that illustrates the intentions of the treaty signatories. The historical context—particularly the developing relationship—is essential to understanding Māori intentions and motivations in signing the Tiriti. However, all three textbooks fail to discuss these narratives.

By contrast, both Joseph and Morris do discuss events leading to 1840 from a British perspective. Joseph discusses British historical context at length in the chapter titled *Establishment of British Rule*.¹¹¹ He describes Britain as a “reluctant colonising power” who “succumbed finally to increasing pressure to acquire New Zealand”.¹¹² The requirement in Normanby’s instructions to acquire the “free intelligent consent of the natives” was “a new and noble beginning in British colonial policy”¹¹³ that “distinguished the history of New Zealand from that of earlier settlement colonies”.¹¹⁴

104 At 171–183 and 500–502.

105 At 182 and 500.

106 At 201 and 499–500.

107 At 501.

108 At 501–502.

109 At 502.

110 Healy, Huygens and Murphy, above n 17, at 148–149 and 188–192; and Waitangi Tribunal, above n 5, at 521.

111 Joseph, above n 2, at 42–46.

112 At 42.

113 Keith Sinclair *A History of New Zealand* (Penguin Books, Auckland, 1980) at 68–69 as cited in Joseph, above n 2, at 42.

114 Joseph, above n 2, at 42.

Joseph goes on to set out the British history in and relating to New Zealand in detail. He begins with Abel Tasman's voyage in 1642 and James Cook's in 1769. He then discusses the 1830s, where he describes Britain's policy of "strict non-intervention" in New Zealand.¹¹⁵ Joseph goes on to mention Britain's legislative attempts at controlling its subjects, Busby's appointment and the increasing pressure on Britain to intervene.¹¹⁶ He sets out Normanby's instructions, the treaty (which he expands on in the next chapter), Hobson's May 1840 proclamations, and the subsequent gazetting of these proclamations in London.¹¹⁷ But, notably, a discussion of Māori perspectives on these events is missing.

Likewise, Morris begins with Britain's reluctance to acquire New Zealand and then describes the factors that caused this attitude to change. However, the section also includes a mention of the Declaration of Independence—a "problem" which needed to be "nullif[ied]" by the treaty¹¹⁸—which makes *Law Alive* the only one of the three texts to even mention the Declaration.

Given how short the chapter is in *Bridled Power*, it is unsurprising that this text does not discuss historical context prior to the treaty at all—British or Māori. The brief section on constitutional history early in the book begins in 1840¹¹⁹ and in the treaty chapter the only reference to history prior to the treaty is "Māori came to Aotearoa before Pakeha."¹²⁰

Māori history makes it clear that hapū were engaging with the British on their own terms and for their own purposes, in ways that strengthened their mana and authority. This history illustrates why it would not have made sense politically for Māori to have signed away their sovereignty, which, as I have discussed, was impossible according to tikanga in any case.

The motivations and intentions that Māori had when they signed the treaty flow on from this historical context and further illustrate that the treaty could not have been one of cession.

C *Motivations and intentions*

Consistent with the failure of the textbooks to discuss Māori law and history is their failure to set out Māori motivations and intentions around the time of signing te Tiriti. In the *Establishment of British Rule* chapter, Joseph describes the increasing pressure on Britain to intervene in New Zealand. The pressure came from, for instance, the increasing European population; unchecked lawlessness and humanitarian concerns; the impending establishment of settlements by the New Zealand Company; and the threat of France annexing New Zealand.¹²¹ In *Bridled Power*, there is no discussion of the motivations for either side. Again, this fits with the contemporary focus of that chapter.

Morris, on the other hand, does address Māori reasons for signing te Tiriti, albeit to a limited and misleading extent. One of the stated objectives of the treaty chapter is that students should be able to "outline the main reasons why the treaty was signed (from both British and Māori perspectives)".¹²² However, under the heading "How and Why was the Treaty Signed?" the focus is almost entirely on British motivations. Like Joseph,

115 At 43.

116 At 43–44. I set out the specific pressures later in the article.

117 At 44–46.

118 At 59.

119 Palmer and Palmer, above n 3, at 6.

120 At 333.

121 Joseph, above n 2, at 44.

122 Morris, above n 4, at 57.

Morris' list of British motivations includes humanitarian concerns, financial motivations, the rivalry with France and the land purchases of the New Zealand Company.¹²³ He also includes the Declaration of Independence as a factor.

Morris' only discussion of Māori motivations is in the context of discussions on 5 February 1840, as follows:¹²⁴

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

Morris also writes that, "[f]rom the Māori perspective, the main purpose was to retain a *degree of* chieftain authority and confirm Māori possession of land and taonga."¹²⁵

Both of these quotes appear primarily to describe motivations to sign a treaty of cession. Accordingly, they are not accurate portrayals of actual Māori intentions. In particular, it is inaccurate to describe Nene's argument as "particularly convincing". The Tribunal noted that his speech is often portrayed as representative, and commented that "[i]t is a mistake to regard his intervention as decisive simply because Hobson (and other Pākehā) described it as such".¹²⁶ It was convenient for Hobson to describe Nene's speech in this way, but "it does not necessarily follow that the position Nene articulated was the understanding of each rangatira when stepping forward to sign".¹²⁷ The speeches of other rangatira, such as Te Kēmara and Taonui, illustrate their understanding that the rangatira would be equal with the Governor and that the governor would govern Pākehā while hapū remained autonomous.¹²⁸

For Māori, the treaty was a strategic alliance which built on the relationship that had been developing since at least 1820.¹²⁹ By 1840, even though there were only about 2000 Pākehā residing in New Zealand, Māori were growing increasingly frustrated with their disrespect for tikanga. The rangatira were troubled by the fact that Pākehā neither submitted to their authority, nor were controlled by a leader of their own.¹³⁰ Accordingly, they decided to enter into an agreement with the Pākehā rangatira—Hobson—so that he could control his own people.¹³¹ As the Tribunal found:¹³²

The treaty ... connects to article 4 of the Whakaputanga, to the petition to King William IV, to Hongi's overtures to King George IV, and indeed to Te Pahi's request in Sydney in 1808 for protection for Māori from British ships' masters.

123 At 58–59.

124 At 60.

125 At 61 (emphasis added).

126 Waitangi Tribunal, above n 5, at 524.

127 At 524.

128 At 524. See the discussion of this later in the article.

129 At 525.

130 Healy, Huygens and Murphy, above n 17, at 164–165.

131 Waitangi Tribunal, above n 5, at 524.

132 At 524.

Māori motivations and intentions make sense in light of tikanga and in light of the relationship developing between Ngāpuhi and the Crown. Failing to discuss Māori intentions—or, in Morris' case, to discuss them adequately—helps to entrench the narrative of cession.

D Conclusion

Law Alive is the only textbook out of the three to engage at all with Māori law and Māori motivations for signing. However, it is unsatisfactory and perhaps even misleading. There is no discussion of what the treaty meant in the context of Māori law at the time and the purported motivations implicitly relate to a treaty of cession. Joseph does not discuss Māori history or law at all. Both Joseph and Morris dedicate a lengthy (relative to the size of each book) discussion to British history' and, in both cases, this stands in stark contrast to the total failure of the textbooks to engage with Māori history.

Unlike the other two, *Bridled Power* does not discuss British law, history or motivations at all. While it cannot be readily criticised as one-sided in this respect, the lack of discussion of Māori context is still significant for it is vital if the reader is to accurately understand the meaning of the treaty.

The failure of all three texts to adequately engage with Māori law, history and motivations for signing te Tiriti reinforces their portrayal of the treaty as a voluntary cession of sovereignty. If the treaty is only understood in light of British intentions and motivations and in light of Eurocentric assumptions, then it has the potential to make sense as a cession of sovereignty.

However, as I have outlined, ceding sovereignty was not legally possible and would not have made sense in the context of the time. By ignoring the Māori context, these textbooks sustain the myth of cession.

IV Emphasis on the English Text

As I have discussed, the narrative that the treaty was a treaty of cession is premised on a lack of engagement with Māori law, history and motivations for signing the treaty. The second theme underpinning the myth of cession is the authors' portrayal of the English text as *the* treaty. They do this, for instance, by failing to set out a translation of the Māori text, downplaying the significance of the textual differences, failing to provide an adequate (or any) discussion of the reasons for mistranslation, failing to mention the oral discussions as part of the agreement, and—in the case of Joseph's and Palmer and Palmer's texts—failing to acknowledge that the Māori text was signed by most rangatira.

A Failure to set out a translation

Each textbook sets out both the English text and te Tiriti in te reo Māori.¹³³ None of them provides an English translation of te Tiriti—only translations of key terms (which I discuss in the next section). This means that readers who do not speak te reo Māori cannot read te Tiriti for themselves and are reliant on each author's interpretations. It also means that the English text is seen as the default and te Tiriti is assessed against it, rather than

133 Joseph, above n 2, at 53–55; Palmer and Palmer, above n 3, at 398–400; and Morris, above n 4, at 62.

the other way around. Further, it means that the overall meaning of the Māori text is not discussed. Instead, the meanings of particular words are emphasised in such a way that downplays the underlying difference.

Reading modern translations of te Tiriti, alongside an understanding of its context, allows an understanding of the document as a whole. Te Tiriti was about Māori retaining sovereignty while allowing a Governor to govern Pākehā. The English text was a cession of sovereignty. This difference is difficult to adequately convey without a full and accurate translation of te Tiriti.

Article 1 of the English text contains a cession of sovereignty. Article 2 is a guarantee of property rights and gives the Crown pre-emption (the exclusive right to buy land). Article 3 gives Māori the rights and privileges of British subjects. The Tribunal found that it was clear from this text that Hobson intended for Māori to cede their sovereignty to the Crown.¹³⁴ This is the orthodox view of the English text.¹³⁵

As to te Tiriti, the Tribunal drew on six modern back-translations,¹³⁶ although it did not set these out in its report. Each translation approaches the task from a slightly different angle. As an example, Manuka Henare's translation is a "historical-semantic" translation, meaning that it attempts to capture the meaning that the text had to the rangatira at the time.¹³⁷ Henare translated te Tiriti (other than the preamble) as follows:¹³⁸

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

The Queen of England will put in place (wakarite) and agrees (wakaae) that the Chiefs, the tribes, and all the People of New Zealand, have full (absolute) authority and power (chieftainship) [tino rangatiratanga] of their lands, their settlements and surrounding environs (kainga), and all their valuables (property) (taonga). But the Chiefs of the Confederation, and all other Chiefs, offer (tuku) to the Queen the exchange (hokonga) of those small pieces of land (wāhi wenua), which the proprietors of the land may wish to make available according to the custom of the exchange of equivalence (ritenga o te utu) agreed upon by them and the agent (kaihoko) who is now appointed by the Queen to be her trading agent (kai hoko).

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

Henare translates the fourth (oral) article as:¹³⁹

134 Waitangi Tribunal, above n 5, at 509.

135 But see Fletcher, above n 19. Fletcher argues that the English text was *also* not intended to be a cession of sovereignty.

136 Waitangi Tribunal, above n 5, at 348.

137 Waitangi Tribunal, above n 5 at 348.

138 Manuka Henare "Brief of Evidence" (Wai 1040 Doc B3, Waitangi Tribunal 2010) at [368] as cited in Healy, Huygens and Murphy, above n 17, at 200–201. Henare's Brief of Evidence is based on his 2003 PhD thesis.

139 At 202.

The Governor says that the many faiths (wakapono) of England, of the Wesleyans (Methodist) and of Rome and also Māori custom, shall be alike protected by him.

The fourth article is part of the agreement. In the Tribunal's view "it [is] correct to regard it as an oral addition to the Crown's treaty undertakings to the rangatira".¹⁴⁰

The Tribunal found that te Tiriti can be broadly understood as follows.¹⁴¹ Kāwanatanga was the power to control the settlers and thereby keep the peace and protect Māori interests. Rangatira would retain their independence and authority as rangatira and would be the Governor's equal. Land transactions would be regulated in some way and the Crown would enforce Māori understandings of previous land transactions, and, therefore, return land that had not been properly acquired. There may have also been protection of New Zealand from foreign powers. The Governor would not have the authority to intervene in internal Māori affairs. However, in situations involving intermingled populations, questions of relative authority "would need to be negotiated on a case-by-case basis, as was typical for rangatira-to-rangatira relationships".¹⁴²

The Māori text makes sense in light of the context discussed in the previous section. Hobson "would be the Pākehā rangatira and a partner in an alliance that had been developing for decades between Bay of Islands and Hokianga rangatira and the Crown".¹⁴³ And, although the Tribunal does not really engage with this point, it is also valid according to—and an expression of—tikanga.¹⁴⁴

B Setting out differences but downplaying them

Although none of the books set out a full translation of te Tiriti, each of them translates key terms and discusses the differences between the English and Māori texts. However, the nature of this discussion in each book has the effect of downplaying the differences rather than emphasising them. Furthermore, the focus on specific words obscures the overall meaning of te Tiriti. The overall meaning is important, because the rangatira focused on concepts rather than specific words.¹⁴⁵

Joseph writes that:¹⁴⁶

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

He states that kāwanatanga meant governorship, which he describes as "the Crown's right to impose law and order".¹⁴⁷ He also notes that rangatiratanga "was a closer approximation to sovereignty than 'kāwanatanga' used in art 1"¹⁴⁸ although he does not explain why. With statements like "[t]he Maori language text was *not an exact translation*

140 Waitangi Tribunal, above n 5, at 518.

141 See generally at 523.

142 At 523.

143 At 519.

144 See Jackson, above n 13, at 7–8. This is discussed further below.

145 Waitangi Tribunal, above n 5, at 518.

146 Joseph, above n 2, at 56.

147 At 56.

148 At 56.

of the original English text approved by Hobson",¹⁴⁹ the differences between the texts are downplayed.

In *Bridled Power*, the discussion of the texts is brief. Palmer and Palmer write that "[t]he first article expresses the cession of 'sovereignty' or 'kawanatanga' (which may be translated as 'governorship') by Māori to the Crown."¹⁵⁰ They do not explain what kāwanatanga may have meant to Māori in 1840. Nor do they explain how governorship may differ from *sovereignty*. They translate rangatiratanga in art 2 as "full chieftainship" while acknowledging that it can also be translated as "sovereignty".¹⁵¹

Palmer and Palmer then turn to the issue of "the balance to be struck between the sovereignty/kawanatanga of the Crown and te tino rangatiratanga/chieftainship of Māori".¹⁵² They state that "[m]ost debates concerning the Treaty's meaning involve the application of this question."¹⁵³ This language suggests that sovereignty and kāwanatanga are analogous concepts and that rangatiratanga can be equated to chieftainship; and this undermines the attempt to distinguish these concepts in the preceding paragraph. The authors then write that:¹⁵⁴

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

This overlooks the fact that the assertion of rangatiratanga against the unfettered sovereignty of the Crown is one key element of Māori struggles for justice in New Zealand. Māori, as well as their tauwiwi supporters, are clear that rangatiratanga cannot be reconciled with the Crown's absolute sovereignty. To suggest that each side of this debate is unsure "whether they disagree" demonstrates a lack of understanding on the part of the authors as to the nature of this debate.

Law Alive does a better job than the other textbooks of outlining the textual differences—although this is still limited to particular words and not the overall meaning. The words kāwanatanga and rangatiratanga are described as being flawed translations, and it is acknowledged that the two texts contradict each other "in key areas".¹⁵⁵ In relation to kāwanatanga, Morris writes that "[m]any experts believe it means a limited form of administrative government."¹⁵⁶ He writes "[t]he *argument runs* that many Māori thought the Governor would have only limited power", which extended only over British citizens and would be subject to the authority of rangatira.¹⁵⁷

He also notes that te tino rangatiratanga "denotes absolute sovereignty" and "probably should have been used in Article 1 to describe Crown sovereignty".¹⁵⁸ As a result of this, "Māori *could well have believed* that they were allowing the Crown a limited form of sovereignty" while a more powerful sovereignty was retained.¹⁵⁹

149 At 55 (emphasis added).

150 Palmer and Palmer, above n 3, at 334.

151 At 334.

152 At 334.

153 At 334.

154 At 334.

155 Morris, above n 4, at 61.

156 At 61.

157 At 61 (emphasis added).

158 At 61.

159 At 61 (emphasis added).

On the page where the translation is set out, particular words in each text are highlighted with accompanying text. In relation to sovereignty and *kāwanatanga*, the text includes “Māori *may have believed* they were allowing the British to govern while retaining sovereignty in Article 2”.¹⁶⁰ In relation to *te tino rangatiratanga*, the text includes, “Māori *may have believed* they were retaining sovereignty”.¹⁶¹

Morris’ use of language such as “could well” and “may have” in relation to Māori understandings is significant. Although Morris sets out these understandings fairly accurately, the language he has chosen creates an impression that there is no clear consensus about whether Māori intended to cede sovereignty in 1840. This is not correct. It is now well-established that the Māori text was not a cession of sovereignty and to suggest that there is a genuine dispute on this point is misleading.

Although there is a range of views as to the precise meanings of *kāwanatanga* and *tino rangatiratanga*, there is also a broad degree of consensus.¹⁶² In the Tribunal, Patu Hohepa explained that *kāwanatanga* meant governorship in the sense that “the governor will govern Pakeha people ... and any lands obtained by or given to the Queen” rather than “governing through a government”.¹⁶³ The Tribunal agreed with this view, concluding that “the rangatira understood *kāwanatanga* primarily as the power to control settlers and thereby keep the peace and protect Māori interests accordingly”.¹⁶⁴ It also found that “few if any rangatira would have envisaged the Governor having authority to intervene in internal Māori affairs”¹⁶⁵ and that the rangatira “did not agree that the Governor should have ultimate authority”.¹⁶⁶

By contrast, *tino rangatiratanga* is a more substantial kind of law-making power. It encompasses sovereignty, but also extends beyond it. According to Mutu “it includes aspects of the English notions of ownership, status, influence, dignity, respect and sovereignty, and has strong spiritual connotations”.¹⁶⁷ The first part of art 2, therefore, is an explicit recognition and strengthening of the sovereign power and authority of Māori. The Tribunal broadly agreed with the claimants’ views on this, concluding that art 2 meant that “rangatira would retain their independence and authority as rangatira, and would be the Governor’s equal”.¹⁶⁸ Issues involving both Māori and Pākehā would be negotiated on a case-by-case basis.¹⁶⁹ It was clear that the signatories understood that Hobson would be a Governor for Pākehā and not for Māori.¹⁷⁰

In sum, the authors of all three textbooks acknowledge the differences between *te Tiriti* and the English text, and engage in some explanation of these differences. However, they also downplay them and fail to grapple with the significance of the differences in terms of the overall meaning of each text. While Morris does this to some extent, his discussion of the overall meaning is undermined by the language he uses in describing Māori intentions—as well as, of course, his statements elsewhere in his textbook that the treaty was a cession of sovereignty.

160 At 62 (emphasis added).

161 At 62 (emphasis added).

162 See the discussion in Waitangi Tribunal, above n 5, at 413–417.

163 Hohepa, above n 98, at 52–53 as cited in Waitangi Tribunal, above n 5, at 454–455.

164 Waitangi Tribunal, above n 5, at 523.

165 At 523.

166 At 524.

167 Mutu, above n 14, at 26 as cited in Waitangi Tribunal, above n 5, at 454.

168 Waitangi Tribunal, above n 5, at 523.

169 At 523.

170 At 524.

C Failure to discuss reasons for mistranslation

The downplaying of the differences between the two texts is exacerbated by each author's discussion of the reasons for the mistranslation. Joseph writes:¹⁷¹

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

The use of the word "some" is misleading because it suggests that contemporary historians who argue that the mistranslation was deliberate are a minority, when, in fact, most contemporary historians take this view.¹⁷²

Joseph writes that "[h]istorians seek convenient explanations" for the fact that Hobson "failed" in his ideal of the treaty uniting Māori and Pākehā.¹⁷³ He quotes Ross's view that the treaty was "hastily and inexpertly drawn up, ambitious and contradictory in content, chaotic in its execution".¹⁷⁴ He also sets out Michael King's view that the treaty was hastily drafted and translated, and that none of the people involved were lawyers.¹⁷⁵ He claims that "[t]hese explanations discount the legal coherence that underpins that Treaty" because "[e]ach of the instrument's articles assimilated existing common law doctrines or principles",¹⁷⁶ which he explains in some detail. He concludes that this "symmetry" between the treaty and common law "belies historians' claims that the treaty was 'contradictory', the work of 'amateurs' and the cause of its contested history".¹⁷⁷ On the contrary, he argues that "[i]ts survival as a national symbol owes much to the dedication of its architects."¹⁷⁸

The problem with this analysis is that the historians he quotes are writing about the differences between the meaning and effect of the English text compared with the Māori text. Ross and King were not at all concerned with the coherence of the English text in and of itself. Rather their statements were made in the context of comparing the differences between the two versions. In my view, that the English text may reflect common law doctrines is entirely unsurprising and unremarkable—and it is also beside the point. Joseph's analysis of how the English text reflects the common law does nothing to explain the differences between that document and te Tiriti, and does nothing to engage with the historians whose views he rejects.

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

Morris suggests, in relation to the textual differences, that it "is not clear from the historical records whether this was a calculated ploy to encourage Māori acquiescence or

171 Joseph, above n 2, at 56 (emphasis added).

172 See Waitangi Tribunal, above n 5, at 413–418 and 513–514.

173 Joseph, above n 2, at 57.

174 Ruth Ross "Te Tiriti o Waitangi, texts and translations" in *The Treaty of Waitangi, its Origins and Significance* (publication no 7, Department of University Extension, Victoria University of Wellington, 1972) at 30 as cited in Joseph, above n 2, at 57. This is an earlier version of the article cited above at n 10, in which Ross expresses the same view.

175 Michael King *The Penguin History of New Zealand* (Penguin Books, Auckland, 2003) at 157 as cited in Joseph, above n 2, at 57.

176 Joseph, above n 2, at 57–58.

177 At 59.

178 At 59.

just poor translating".¹⁷⁹ Again, this is an overstatement of the extent to which historians are divided on this point. He also boldly suggests that "[t]he other possibility is that Māori *did* understand that they were ceding complete sovereignty over New Zealand."¹⁸⁰ This view does not make sense in light of Māori law and context. It also does not address that on its clear face the Māori text was not a cession of sovereignty.

The reason for Williams' translation of sovereignty in art 1 to *kāwanatanga* has been a central feature of debates about the treaty. A few historians have argued that *kāwanatanga* was an appropriate translation, because *kāwanatanga* equated to civil government, which equates to sovereignty.¹⁸¹ Many more historians argue that *mana* would have been a more accurate translation of Hobson's intentions, but this is something that the *rangatira* would never have agreed to.¹⁸² The Ngāpuhi claimants similarly argued that "*mana*, *kīngitanga* or *rangatiratanga* would have been more accurate translations of sovereignty than *kāwanatanga*, and that no chief would have ceded these".¹⁸³ The Tribunal agreed with this view, stating that "a straightforward explanation of sovereignty could not have avoided the use of '*mana*'", because Williams himself had used *mana*, *rangatiratanga* and *kīngitanga* in the *Whakaputanga* to express the highest level of authority and independence, which is "the essence of sovereignty".¹⁸⁴ Further, ceding *mana* or *rangatiratanga* would have been impossible in Māori law.¹⁸⁵

Williams' motivation in using the term *rangatiratanga* in art 2 has also been the subject of intense debate. Historians have written that the mistranslation was a deliberately deceitful re-writing of the treaty in order to persuade Māori to sign—in essence, a creative reworking.¹⁸⁶ Others have suggested that Williams genuinely believed the term to be akin to possession of land and other property, so was not deliberately deceitful in his translation.¹⁸⁷ The Tribunal rejected this last suggestion, because *rangatiratanga* had been used for kingdom in the Bible, and Williams himself had used *rangatiratanga* to denote independence in the *Whakaputanga*.¹⁸⁸ In addition, the term was used by the British shortly after the treaty was signed to express the sovereignty that they themselves had claimed.¹⁸⁹ Therefore, the Tribunal concluded that:¹⁹⁰

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

The Tribunal further found that Williams changed the meaning because he "understood what it would take to convince Māori to sign".¹⁹¹ That is, the mistranslation was deliberate. The authors' failure to engage with this fact reinforces their deliberate downplaying of the differences and strengthens their narrative of cession.

179 Morris, above n 4, at 63.

180 At 63 (emphasis added).

181 Waitangi Tribunal, above n 5, at 513.

182 At 513–514.

183 At 477.

184 At 514.

185 At 514.

186 At 416.

187 At 416.

188 At 514.

189 At 514.

190 At 514 (emphasis added).

191 At 515.

D Failure to discuss oral agreements as part of the treaty

The oral discussions that happened prior to the treaty signing must be considered as part of the agreement. In fact, the oral discussions would have been more important than the written agreement because Māori culture is, and particularly *was*, based on orality. Although the rangatira expressed a range of views, these are broadly consistent with the Māori text—and not consistent with agreeing to a cession of sovereignty. The Tribunal found that when the rangatira signed the treaty, they were agreeing not just to the text “but also to a series of verbal promises, express or implied”.¹⁹²

Morris is the only author to mention the oral discussion in the context of Māori intentions. At the end of the passage quoted above, he writes that “[o]ral argument plays a pivotal role in Māori culture, and this debate proved to be the turning point in the signing process.”¹⁹³ However, Morris does not describe the oral debate as part of the agreement. Palmer and Palmer do not refer to the oral debates, but they do note the fourth article in passing.¹⁹⁴ And Joseph makes no mention of the oral discussions.

The Tribunal found that the recorded speeches of the rangatira focused on whether there would be a Governor and how much power he would have. Some of the rangatira expressed concern that the Governor would be “above” them, which, according to the Crown, meant that they consented to the Governor’s supremacy.¹⁹⁵ The Tribunal rejected this, pointing out that the rangatira were likely doing so to draw out a denial, as was common in Māori oratory.¹⁹⁶ Furthermore, several rangatira said that they must be “equal” with the Governor.¹⁹⁷ For example, Patuone brought “his two index fingers side by side” to demonstrate that “he and Hobson ‘would be perfectly equal, and that each chief would similarly be equal with Mr. Hobson’”.¹⁹⁸ Hobson did not contradict this understanding.¹⁹⁹

Moreover, the speeches of Hobson and Williams were consistent with the Māori text. Hobson’s message to the rangatira was: “[g]ive me the authority to protect you and control the settlers.”²⁰⁰ And his explanations in English suggested that signing the treaty was a technicality, which would not impact on their rights or independence.²⁰¹ Williams’ explanations in Māori focused on the treaty being an act of protection, which would, according to the Tribunal, “preserve their property, rights and privileges” and safeguard them from France.²⁰² The Tribunal found that neither Hobson nor Williams conveyed the concept of ceding sovereignty, or that English law would apply to Māori. In fact, Hobson gave numerous assurances to the rangatira that their authority would be protected.²⁰³

192 At 519.

193 Morris, above n 4, at 60.

194 Palmer and Palmer, above n 3, at 334. The extent of this discussion is: “It is sometimes also suggested that there is an unwritten ‘fourth article’ of the Treaty deriving from an oral exchange amongst some of the signatories and seeking to guarantee freedom of religion, but it is difficult to see how this adds much to the other legal protections today.”

195 Waitangi Tribunal, above n 5, at 518.

196 At 518.

197 At 518.

198 Peter Low “Pompallier and the Treaty: A New Discussion” (1990) 24(2) NZJH 190 at 192 as cited in Waitangi Tribunal, above n 5, at 519.

199 Waitangi Tribunal, above n 5, at 519.

200 At 515.

201 At 515–516.

202 At 516.

203 At 515–517.

In relation to the oral discussions, the Tribunal concluded:²⁰⁴

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

The oral agreement is particularly important because tikanga is premised on orality. Although writing had been introduced and literacy was quickly spreading, Māori culture remained fundamentally oral.²⁰⁵ Viewed through a tikanga lens, the oral agreements must be given as much weight as te Tiriti itself. Accordingly, the Tribunal concluded that the treaty's meaning and effect "came from the Māori text, on the one hand, and the verbal explanations and assurances given by Hobson and the missionaries, on the other".²⁰⁶ The oral discussions and written agreement are consistent with each other and the Tribunal emphasised this in its comment that the similarity of te Tiriti and the oral agreement "undermines the very notion that the two sides talked past each other".²⁰⁷

E Failure to acknowledge that Māori text was signed

Te Tiriti, the Māori text, was signed by 43 rangatira and by Hobson on 6 February and subsequently around the country, bringing the total number of signatories to over 500.²⁰⁸ However, both Joseph's and Palmer and Palmer's textbooks fail to acknowledge it was the Māori text that was actually signed.

The English text was not discussed at Waitangi or at most of the other signings around the country, nor was its content debated.²⁰⁹ There are actually a number of English texts,²¹⁰ but the version which is known as *the* English text²¹¹ was sent to William Maunsell, a missionary, for signings at Waikato Heads and Manukau. Ani Mikaere writes that the reason for this has never been adequately explained, but it was probably an error.²¹² It was signed by 39 rangatira, but it was signed on the basis of oral discussions in Māori that did not convey the meaning of the English text.²¹³

Joseph does not state which text was signed. Palmer and Palmer write that:²¹⁴

Māori and English versions of the Treaty were signed at Waitangi on 6 February 1840 and, over the next several months, in many different places in New Zealand by the Crown and over 200 Māori chiefs.

This is a misleading and inaccurate sentence. The number is incorrect, but, more importantly, it does not convey that the Māori text was signed by the majority of rangatira. Morris is the only author to point out that "[i]t is important to remember that

204 At 524.

205 At 418.

206 At 526.

207 At 526.

208 At 388.

209 At 515–519.

210 Ross, above n 10, at 134.

211 In sch 1 of the Treaty of Waitangi Act 1975, it is set out as The Treaty of Waitangi (The Text in English).

212 Mikaere, above n 14, at 130.

213 At 130–132.

214 Palmer and Palmer, above n 3, at 333.

nearly all the chiefs signed the Māori version”.²¹⁵ This is good. However, the impact of this comment is somewhat overshadowed by his emphasis on the English text elsewhere.

That the Māori text was signed by the majority of rangatira and Hobson is a fundamental historical fact. Palmer and Palmer’s and Joseph’s failure to acknowledge this helps to reinforce their focus on the English text.

F Conclusion

As is evident from the many quotes I have set out so far in this article, all of the authors use the words “the Treaty” (or “the treaty”) to refer to the meaning of the English text. This could imply that the English text was actually agreed to. It could also imply that the texts were substantially similar—that is, both texts were a cession of sovereignty. Either interpretation undermines each author’s attempts to outline the differences between the texts, as well as Morris’ acknowledgement that the Māori text was in fact signed. And either interpretation, of course, supports the myth of cession.

The authors’ failure to set out a translation of the Māori text, their general downplaying of the differences between the texts and their lack of thorough engagement with the reasons for mistranslation also suggest that “the treaty” means the content of the English text and that it was a voluntary cession of sovereignty.

The portrayal of the English text as *the* treaty is a key theme underpinning the myth that the treaty was a cession of sovereignty. The other theme, discussed in the previous Part of this article, is the lack of engagement with Māori law, history and motivations for signing te Tiriti. Together, these two themes underpin, in slightly different ways, each author’s chapter on the treaty. They bolster the explicit or implicit claim that the treaty was a cession of sovereignty. And the myth of cession underpins the claim that the treaty is, at least to some extent, the basis for the legitimacy of the Crown’s absolute sovereignty in New Zealand.

I turn to this in the next Part of the article, where I consider the treaty as a basis for the legitimacy of Crown sovereignty. The narrative that the treaty legitimises the Crown’s sovereignty, in the textbooks and elsewhere, results in Pākehā discussions about future constitutional arrangements being restricted by the assumption that the Crown’s sovereignty is absolute. A historically accurate understanding of te Tiriti, by contrast, can be the basis for meaningful discussions and, ultimately, transformative change.

V The Treaty and the Constitution

A *The treaty as a basis for legitimising current arrangements*

The meaning of te Tiriti in 1840 remains fundamentally important today. As should be evident from the preceding discussion, the absolute sovereignty of the Crown cannot be legitimised by reference to te Tiriti. Yet, in Pākehā constitutional discussions the treaty is expressed as being a foundational document that legitimises the sovereignty—that is, the power to make and enforce laws—presently exercised by the Crown.

In this article, I am not particularly concerned with arguments as to the *legal* basis of the sovereignty that the Crown claims. This is because, as Carwyn Jones explains:²¹⁶

215 Morris, above n 4, at 60.

... when considering the appropriate place of the Treaty in our future constitutional arrangements, the important discussion is the one about legitimacy. The alternative discussion of legality does not speak to genuinely constitutive questions, because, as the political philosopher Andrew Sharp has noted, legality can only be addressed in terms of internal legal rules.

What I am interested in is how the textbooks, like the Crown itself, rely on the treaty as a signal of Māori consent to Crown sovereignty and therefore a basis for its legitimacy.

Prior to the 1970s, the Crown saw no need to ground its legitimacy in the treaty. The *Wi Parata v Bishop of Wellington* case in 1877 had famously declared that the treaty was a nullity, because Māori had no sovereignty to cede.²¹⁷ Paul McHugh writes that what is more surprising than the denial of any residual sovereignty is the assertion that Māori were never sovereign in the first place.²¹⁸ McHugh argues that this was because the validation of the Crown's sovereignty could not, in Chief Justice Prendergast's view, be premised on Māori permission. The case was a "blunt doctrinal and historiographical means by which Crown sovereignty was rendered absolute and unqualifiable".²¹⁹ Essentially, the Crown asserted indivisible sovereignty with no historical origin and with no need for local justification.

From the 1970s "historians acknowledged that the rangatira signed and understood the Māori text of the treaty, and not the English one".²²⁰ The work started by Ruth Ross and continued by Claudia Orange (and many others) had the effect of shifting the historical scholarship to acknowledge Māori perspectives and opened up debates about the nature of the treaty and its contemporary application.²²¹ At the same time, Māori activists were publicly and vocally asserting what their tūpuna had always known: that they never ceded sovereignty. While calls from Māori for the Crown to honour the treaty were of course nothing new, they gained a particular prominence during this period.

This activism and scholarly attention to the treaty led to what Nan Seuffert has described as a "crisis of legitimacy" which led to the government's—and the courts'—"focus on the English version of the Treaty in order to regain legitimacy and re-construct the imposed unity of the nation state".²²² As a result, the narrative has shifted. As McHugh describes it: "instead of supposing the originality of Crown sovereignty, Crown sovereignty [is] now regarded as contractual in origin" and based on the treaty.²²³ The treaty is portrayed as Māori consent to Crown sovereignty on the condition that certain rights are protected. The new narrative is that these rights were breached in the past, but these breaches are being remedied through the treaty settlement process; and the rights are given effect through recognition of the principles of the treaty in various legal contexts.

In their submissions to the Tribunal, Crown counsel argued that the Crown acquired sovereignty through a series of steps, one of which was the treaty. They argued that the cession of sovereignty in the treaty was the Crown's means of fulfilling its self-imposed

216 Jones, above n 14, at 706.

217 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).

218 PG McHugh "Tales of Constitutional Origin and Crown Sovereignty in New Zealand" (2002) 52 UTLJ 69 at 79.

219 At 80.

220 Waitangi Tribunal, above n 5, at 441.

221 At 441.

222 Seuffert, above n 13, at 90.

223 McHugh, above n 218, at 87.

condition of acquiring Māori consent.²²⁴ In other words, the treaty served to legitimate the sovereignty *legally* assumed by a broader process. In a brief response when the report was released, Attorney-General—and Minister for Treaty of Waitangi Negotiations—Chris Finlayson said: “[t]here is no question that the Crown has sovereignty in New Zealand. This report doesn't change that fact.”²²⁵ The Crown's position is inherently contradictory, because the treaty cannot both be irrelevant to its sovereignty while at the same time a basis for the legitimacy of that same sovereignty.

The textbooks, unsurprisingly, reflect the Crown's position. As discussed above, Joseph explicitly rejects the treaty as the legal basis for sovereignty. However, he does rely on the treaty as the basis for the legitimacy of the Crown's sovereignty. In the chapter titled *Establishment of British Rule*, Joseph writes that:²²⁶

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

This is an express claim to constitutional legitimacy. As already noted, the idea of “free consent” illustrates a misconstruction of the treaty and reliance on the English text. Joseph's description of Britain's intentions as “benign” further reinforces this. Elsewhere, Joseph describes the treaty as New Zealand's “founding instrument”²²⁷ and writes that it has “national and symbolic importance”.²²⁸ These statements further bolster the idea that the treaty provides legitimacy to the Crown's sovereignty.

Palmer and Palmer make similar claims. At the beginning of their treaty chapter they write that “the legitimacy of the system of government we have in New Zealand today owes much to the Treaty of Waitangi entered into between the Crown and Māori in 1840”.²²⁹ This is a claim to *at least* partial legitimacy. At the end of the chapter, Palmer and Palmer make a stronger statement: “the Treaty is a key source of the New Zealand Government's moral and political claim to legitimacy in governing the country”.²³⁰ Further, they write that “the Treaty of Waitangi is an integral part of New Zealand's constitutional arrangements”.²³¹

Morris describes the treaty as New Zealand's founding constitutional document on several occasions. He writes that “the influence of our founding constitutional document can be seen in nearly every area of the legal system”.²³² When read alongside his statements that the treaty ceded sovereignty, the treaty is implicitly portrayed as the foundation for the Crown's sovereignty. There is no other sense in which it could be a founding constitutional document that is consistent with the rest of his analysis. Hence,

224 Waitangi Tribunal, above n 5, at 483.

225 Katie Kenny “Maori did not give up sovereignty: Waitangi Tribunal” (14 November 2014) Stuff <www.stuff.co.nz>.

226 Joseph, above n 2, at 48 (emphasis added).

227 At 51.

228 At 53.

229 Palmer and Palmer, above n 3, at 333.

230 At 346.

231 At 346.

232 Morris, above n 4, at 82. See also at 32.

Law Alive also suggests, albeit more subtly than the other books, that the Crown's sovereign legitimacy stems, at least to some degree, from the treaty.

The Crown's evolving construction of its own sovereignty in recent years is, as McHugh argues, a "struggle to inject a modern sense of historical legitimacy into a set of constitutional arrangements built upon a contrary foundation".²³³ This is because the Crown, judiciary, and academic writers increasingly emphasise the foundational nature of the treaty, while at the same time, defining "the treaty" in those same contexts to mean the principles of the treaty.²³⁴ This makes it possible to both claim that the treaty is foundational and to continue to ignore the Māori text, which is, of course, exactly what both the Crown and the textbook authors do.

For this reason, Mikaere writes that rather than "minimising the significance of the Treaty and ignoring Te Tiriti altogether, the Crown now embraces both" while ensuring that its sovereignty "remains undisturbed".²³⁵ Similarly, the textbooks superficially embrace both texts, but fail to grapple with the meaning of the Māori text. Meanwhile, they also assert that the treaty can provide a moral or political legitimacy to the sovereignty presently exercised by the Crown. This assertion can only be premised on the English text and it is based on myth rather than reality.

All three textbooks acknowledge the recent emergence of the current orthodoxy that the treaty is foundational. For example, Joseph writes that the treaty has not "always enjoyed the national reverence it is currently accorded" and nor in the past has it been a focus of debate for Pākehā.²³⁶ Palmer and Palmer note that "[j]udicial attitudes to the Treaty of Waitangi have undergone a remarkable transformation in the last 100 years."²³⁷ And Morris writes that the treaty was "virtually ignored" by the government for 135 years, but "[s]ince the early 1990s, it has reclaimed its position as our most important constitutional document."²³⁸ Additionally, all three books make explicit comparisons between the attitudes expressed in the *Wi Parata*²³⁹ and *New Zealand Maori Council v Attorney-General (Lands)*²⁴⁰ cases to underscore their comments about the treaty now being considered foundational, and to contrast this position with earlier views.²⁴¹

The dichotomy between *Wi Parata* and *Lands* is a means of painting the current legal recognition of the treaty as far more progressive than it actually is. David Williams writes that "[d]istancing modern law from the colonial past, we seem to want to reject 'a simple nullity' as often and as vehemently as possible."²⁴² The *Wi Parata* decision is "convenient", he writes, because it "enables us to lambast the awful nineteenth-century past, and implicitly praise our current more enlightened views".²⁴³

Williams points out that the current orthodoxy that the treaty is only recognisable to the extent that it is incorporated by statute "is not all that far distant from continuing to

233 McHugh, above n 218, at 72.

234 See generally Kelsey, above n 13; and Jackson, above n 13.

235 Mikaere, above n 14, at 138.

236 Joseph, above n 2, at 51.

237 Palmer and Palmer, above n 3, at 346.

238 Morris, above n 4, at 58. See also at 32, 74 and 82.

239 *Wi Parata*, above n 217.

240 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

241 Joseph, above n 2, at 51–53; Palmer and Palmer, above n 3, at 346–347; and Morris, above n 4, at 68.

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

243 At 231.

categorise the Treaty itself as a simple nullity".²⁴⁴ I agree with this view. The principles of the treaty are not the treaty, and, in particular, they are not te Tiriti. They are a means of giving some effect to the treaty while continuing to assert Crown sovereignty.²⁴⁵ As such, they are inadequate as a constitutional expression of the treaty.

Ranginui Walker has argued that "[w]hile the government acknowledged the Treaty as the foundation of nationhood, it did so in a prevailing social climate of historical amnesia."²⁴⁶ As I have discussed, the same is true of the textbook writers. Pākehā orthodoxy, as reflected in the textbooks, claims that the treaty is the foundation of our constitutional arrangements and legitimises the Crown's sovereignty. At the same time it refuses to acknowledge the historical reality that Māori did not cede sovereignty. This matters in an important practical sense because current constructions of constitutional legitimacy are the starting point for how people engage with what constitutional arrangements should look like moving forward.

B *The possibilities for change*

It is clear that the treaty was not a cession of sovereignty. Yet the textbooks (and the Crown) claim that it was, in order to inject a sense of legitimacy into our current constitutional arrangements. This claim to legitimacy is inherently contradictory because it continues to ignore the true meaning of the treaty. The contradiction is present in existing constitutional arrangements and it is also reflected in many of the Pākehā arguments for future constitutional change. Pākehā calls for constitutional change stand in stark contrast to Māori aspirations for constitutional transformation.

The main discourse of constitutional change in New Zealand is strongly premised on the idea that parliamentary sovereignty is a foundational concept that cannot be questioned. The treaty is given effect through its principles in the context of the Crown maintaining sovereignty. However, as Carwyn Jones has argued:²⁴⁷

... it is problematic to enter into a discussion about our constitutional arrangements on the basis of a partnership in which Crown sovereignty sets the framework for determining how a reasonable Treaty partner ought to behave.

The principles are a compromise within the existing constitutional framework that has allowed some degree of recognition and protection of Māori rights. But they are also a reassertion of the English text and the myth of cession. Because they are premised on Crown sovereignty, they are an inappropriate basis for a constitution that seeks to honour the treaty.²⁴⁸

Constitutional transformation is the term used by Moana Jackson to describe the process of creating a constitution grounded in he Whakaputanga and te Tiriti (as opposed to constitutional *change*, which generally involves tinkering with current

244 At 232.

245 Jones, above n 14, at 714.

246 Ranginui Walker "The Treaty of Waitangi in the Postcolonial Era" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) 56 at 57.

247 Jones, above n 14, at 712.

248 At 713.

arrangements).²⁴⁹ This is the premise of Aotearoa Matike Mai, an independent Māori constitutional working group which, in 2016, released a report based on 252 hui over four years.²⁵⁰ Participants were clear that the Westminster system “does not, indeed cannot, adequately give effect to the terms of Te Tiriti” and that the interpretation of the treaty as a cession of sovereignty is “simply a deliberate misreading that [is] not just wrong and unjust but contrary to the facts”.²⁵¹

The report of the working group canvasses the values that would underpin a Tiriti-based constitution as well as models through which this might be realised. It particularly emphasises the context and values underpinning te Tiriti. For example:²⁵²

When Te Tiriti offered kāwanatanga to the Crown it was predicated on the immediate and pressing need for some authority to be exercised over the unruly Pākehā who were arriving here, particularly in the north. But it was also predicated on the belief that just as each Iwi and Hapū was free to exercise its own authority provided it did not impinge upon the territory or rights of others, so Pākehā should be free to do the same. That remarkable offer was the very basis of the hoped-for treaty relationship.

It was also a reflection of tikanga and what may be called the whakapapa ethic. That is, the expectation that people will manage their affairs in a way that is consistent with certain agreed norms that foster the good relationships that are essential in any whakapapa. In a relationship between political entities such as the Crown and Iwi or Hapū, especially one agreed to in a treaty, that ethic is, or should be, the base of a constitutional relationship.

The treaty was not a cession of sovereignty, and to assert that against the unrelenting refusal of the Crown to admit to that fact is important. But moving forward, it is equally necessary to understand what te Tiriti *is*, as well as what it is *not*.

The quote above demonstrates that te Tiriti is an expression of tikanga. Therefore, it is a relationship between sovereign entities where each party to the relationship is responsible for making laws for its own people. As such, te Tiriti is a blueprint for how a genuinely just constitution could be structured. Matike Mai takes that blueprint and suggests indicative models for how power could be shared in a new constitution.

The clash between change and transformation was apparent at a conference called *Building the Constitution* in 2000.²⁵³ Mikaere notes the strong resistance from the Pākehā attendees towards Māori contributions that centered on te Tiriti. She writes that the Māori participants came up with a range of imaginative solutions and that “[b]y comparison, the feature that marked many of the Pākehā contributions to the discussion

249 Moana Jackson “Constitutional Transformation: An Interview with Moana Jackson” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 325 at 327.

250 Aotearoa Matike Mai *He Whakaaro Here Whakaumu Mō Aotearoa* (February 2016) at 18. The hui were held in a wide range of locations, including marae, schools, health and social service clinics, wānanga and universities, disability centres, law offices, trust board offices, gang pads, and private homes. The rangatahi (youth) project held a further 70 wānanga (discussions), in a number of locations including a prison.

251 At 25.

252 At 40.

253 Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Victoria University of Wellington, Wellington, 2000).

was a staggering lack of imagination and a profound resistance to change".²⁵⁴ There was a strong theme of "if it ain't broke don't fix it" which completely overlooked the continued insistence of the Māori attendees that the constitution was in fact broken.²⁵⁵ In my view, many Pākehā advocating for change today are still not adequately grappling with te Tiriti or with Māori aspirations for what our constitution should look like.

Another illustration is the Government's *Constitutional Conversation* project,²⁵⁶ particularly the background paper, *New Zealand's constitution: The conversation so far*. This paper had, as its stated purpose, "to inform and support your [the general public's] conversations with summary information about our existing constitutional arrangements ...".²⁵⁷ The paper does not list the treaty as an "element" of the constitution, but does note that it is "increasingly ... regarded as a founding document of government in New Zealand".²⁵⁸ The paper claims that the treaty "enabled the British to establish a government in New Zealand".²⁵⁹ Later on in the document, in the chapter on Crown-Māori relationships, the treaty's recent history and contemporary role are set out (focussing particularly on the treaty principles, and treaty settlements), but there is no discussion of its context, meaning or effect in 1840.²⁶⁰ The questions posed by the panel for public feedback were what should happen once all historical treaty grievances are settled, and whether the treaty should be "entrenched". The discussion of the latter is entirely focussed on Geoffrey Palmer's 1985 white paper that sought to incorporate the treaty into an entrenched Bill of Rights: a suggestion which was rejected by many Māori.²⁶¹

In her submission to the Constitutional Advisory Panel, Susan Healy questioned the content of the background paper and argued that "knowledge of the country's constitutional history is vital to informed discussion about our constitution".²⁶² I agree with this view. The information provided was inadequate to enable people to engage in informed discussion. Healy called for the Crown to accept the—at the time, yet to be published—findings of Matike Mai as an essential framework for future constitutional arrangements.²⁶³ Despite the narrow questions posed by the Panel, many others similarly submitted that the Whakaputanga and te Tiriti must be the starting point for constitutional arrangements. As a result, in its final report, the Panel recognised that "a majority of Māori" and a "significant number" of other people see the treaty as "a binding agreement to a relationship that brought together two sovereign peoples"—a "vision of shared authority [which] is yet to be realised."²⁶⁴ In its reflections, the Panel noted that it supported the current approach of the treaty within the Westminster-style system, but

254 Mikaere, above n 14, at 88.

255 At 88.

256 See generally Constitutional Advisory Panel <www.ourconstitution.org.nz>.

257 Constitutional Advisory Panel *New Zealand's constitution: The conversation so far* (Ministry of Justice, September 2012) at 4. See generally Constitutional Advisory Panel <www.ourconstitution.org.nz>.

258 At 7. However, in the first chapter, "Our Constitution", under the heading "The foundations of our constitution" the paper lists the rule of law, representative democracy and responsible government, and separation of powers. At 7–8.

259 At 8.

260 At 36–40.

261 At 40.

262 Susan Healy "Constitutional Conversation, Dr Susan Healy Contribution" at 2.

263 At 9.

264 Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation: He Kōtuinga Kōrero mō Te Kaupapa Ture o Aotearoa* (Ministry of Justice, November 2013) at 32.

that “more consideration should be given” to treaty-based options outside that framework, noting the work of Matike Mai in this area.²⁶⁵ It also recommended an education strategy.²⁶⁶ To date, I am not aware of any follow-up work by the Government in relation to these recommendations.

Geoffrey Palmer and Andrew Butler’s recently published *A Constitution for Aotearoa New Zealand* is another example of fitting the treaty into the existing Westminster system, rather than seeking to honour its terms.²⁶⁷ Their draft written constitution includes in the preamble the principle of:²⁶⁸

respect for te Tiriti o Waitangi/the Treaty of Waitangi, which is recognised as the founding document of the nation, and constitutional recognition of the rights, privileges and obligations on and of the State and Māori, and for Māori their interests and customs as the tangata whenua

Section 72 of the draft recognises and affirms the rights and obligations of Māori and the Crown. It provides that effect is to be given to the treaty’s “spirit, intent and principles”. And it confirms that “Te Tiriti o Waitangi/the Treaty of Waitangi” means the treaty in both languages in the Appendix. Section 73 provides for the continuation of the Waitangi Tribunal and s 74 provides for courts and tribunals to request opinions from the Tribunal on tikanga or treaty-related issues.

In the treaty chapter of Palmer and Butler’s book, the treaty as a source of legitimacy is emphasised in similar terms as in *Bridled Power*, and the “remarkable transformation” of attitudes towards the treaty between 1877 and 1990 is set out.²⁶⁹ The closest that the authors get to discussing the meaning of the treaty in 1840 is: “Whatever else the Treaty meant in 1840 it seems clear that both Māori and the Crown intended to enter some sort of power-sharing relationship...”²⁷⁰

The authors note Māori resistance to the inclusion of the proposal to include the treaty in the New Zealand Bill of Rights Act 1990, this due to the potential erosion of its original meaning. They write that:²⁷¹

In order to overcome the fear of the Treaty being amended we have included a provision that prevents any amendment being made to the text of the Treaty itself in an effort to preserve its essence, now and into the future.

This is ironic. Their proposal “will not cause significant changes in the day-to-day application of the treaty in most cases”, they say, because the courts can continue, as they have done, to work out how the treaty applies.²⁷² In other words, their incorporation of the treaty is an incorporation of the treaty principles and a fossilising of the status quo—which is itself an erosion of te Tiriti’s original meaning. Accordingly, their proposal does not give effect to te Tiriti, nor does it even ask whether it should.

265 At 33.

266 At 28.

267 Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016).

268 At 35.

269 At 147–148.

270 At 151.

271 At 153.

272 At 154–156.

Matike Mai is mentioned briefly at the end of Palmer and Butler's chapter. However, while they set out a diluted version of Matike Mai's recommendations,²⁷³ they do not engage with their fundamental premise. This is, in my view, deeply unfortunate.

Jane Kelsey has written that "we as Pākehā need to take our own debate about nation building seriously".²⁷⁴ She argues that colonial attitudes and patronising views towards Māori should not be acceptable "as a basis for nation building in the face of a documented history of colonial dispossession and cultural genocide".²⁷⁵ Similarly, as Mikaere argues, genuine nation building is not possible if Pākehā continue to ignore uncomfortable history. She argues that "Pākehā need to own up to the truth about how they have come to occupy their position of dominance in our country – and to deal with it."²⁷⁶

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

So then, what is the role of public law textbooks in all of this? Tim Howard has pointed out that education "grounded in the real history of Aotearoa" is lacking in both schools and universities.²⁷⁷ Education about this history is necessary so that "younger people will be in more of a position to review how we Pākehā can be better in our relationships with tāngata whenua".²⁷⁸ Legal textbooks are one potential source of this education because they are used as a general reference by many people. They also play a pivotal role in shaping the discourses in which law students—potential future constitutional lawyers—learn about the constitution. Those future constitutional lawyers, as well as the Pākehā public generally, must be able to adequately engage with, and respond to, the types of approaches put forward by Matike Mai.

Textbook authors must, by necessity, make difficult choices as to what content to include and what to omit. It is impossible for textbooks to cover every topic from every perspective and still be readable. However, the difficulty of synthesising large amounts of information does not in itself make the author immune from criticism. Authors make decisions about what material to include, exclude or de-emphasise, guided by their own view of what is important.²⁷⁹ When textbook writers choose to reproduce the dominant approach and ignore critical work, they play a role in continuing to marginalise those who are overlooked, marginalised or oppressed by that paradigm.²⁸⁰ In my view, the textbook authors have chosen to ignore several decades of historical and legal scholarship that focuses on Māori perspectives and on te Tiriti rather than the English text.

273 At 159. Compare with Matike Mai, above n 250, at 113.

274 Jane Kelsey "Māori Political Legitimacy and Nation Building" (paper presented to Nation Building and Māori Development Conference, Hopuhopu, 30 August–1 September 2000) at 14 as cited in Mikaere, above n 14, at 90. See also Kelsey, above n 14.

275 At 14.

276 Mikaere, above n 14, at 91.

277 Tim Howard "A place in the circle" in Heather Came and Amy Zander (eds) *State of the Pākehā Nation: Collected Waitangi Day Speeches and Essays 2006–2015* (eBook ed, Network Waitangi Whangarei, 2015) 152 at 157.

278 At 157.

279 Coombs, above n 29 at 120. See also Hunter, above n 30, at 305.

280 Hunter, above n 30, at 305–306.

Public law textbooks can either portray the treaty in an honest and balanced way—helping to shift the paradigm and open up the possibilities for these conversations—or they can become increasingly unhelpful as a general reference in this area. Their portrayal of the treaty as a treaty of cession is inconsistent with imaginative and morally just constitutional solutions and accordingly they play a part in confining Pākehā discourses about constitution-building to a narrow scope. Ultimately, the authors' choice to promulgate the myth of cession has very real effects because of the deeply normative influence that these textbooks have on their readers.

VI Conclusion

As the Tribunal has confirmed, the treaty was not a cession of sovereignty. It would have been impossible for Māori to cede sovereignty in 1840—both according to tikanga and in light of the practical realities of the time. In the text of te Tiriti, the document that was signed by around 500 rangatira and Hobson, rangatiratanga was expressly retained while making room for a Governor for Pākehā. For this reason, the treaty cannot be the moral or political basis for the undivided sovereignty of the Crown.

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

The textbooks' portrayal of the treaty as a cession of sovereignty is explicit for Joseph and Morris and subtler for Palmer and Palmer. All three books have two themes underpinning this narrative. First, they fail to engage either adequately or at all with Māori law, history, and motivations for signing. Secondly, they portray the English text as *the* treaty by downplaying the differences between the texts (including the reasons for these differences) and by failing to acknowledge that the meaning of the treaty comes from the Māori text, as well as the oral agreements.

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

By shedding light on the myth of cession in this context, I hope to encourage other Pākehā to reject it, and to challenge the textbook authors to revisit their portrayal of the treaty. Te Tiriti *can* and *does* provide for a legitimate place for Pākehā and other tauwiwi in New Zealand—that is exactly what was intended. However, te Tiriti *does not* provide for the absolute sovereignty of the Crown, which was imposed by violence rather than consent. Pākehā need to learn our own history and understand how we have asserted and maintained our position of power. Only then can we engage in meaningful conversations with Māori about how this relationship might work moving forward.