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Towards decolonising constitutionalism: An introduction

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THE YEAR 2016 saw the publication of two important, but fundamentally divergent, works on Aotearoa New Zealand's constitutional arrangements. Sir Geoffrey Palmer and Andrew Butler's *A Constitution for Aotearoa New Zealand* argues for, and drafts, a supreme, written constitution based substantially on Aotearoa New Zealand's existing constitutional orthodoxy, but offering what the authors see as important additional safeguards in the interests of, for example, democracy, accountability, and human rights.¹ This envisaged constitution includes protection of the Treaty of Waitangi's current con-

1 Geoffrey Palmer and Andrew Butler, *A Constitution for Aotearoa New Zealand* (Wellington: Victoria University Press, 2016), 7, 25-27. Note that Palmer and Butler have recently released a follow-up text, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand* (Wellington: Victoria University Press, 2018). This article was written before that book's release and therefore does not engage with it.

stitutional place through entrenchment, essentially extending the logic of developments in the legal recognition of the Treaty since the 1980s.²

In contrast is *He Whakaaro Here Whakaumu Mō Aotearoa*, the 2016 report of Matike Mai Aotearoa, the Independent Working Group on Constitutional Transformation. Matike Mai, chaired by Professor Margaret Mutu and convened by Moana Jackson, formed in 2010 at a meeting of the Iwi Chairs' Forum. It was given broad, but specific, terms of reference, being asked to explore a different kind of constitutionalism based upon He Whakaputanga o te Rangatiratanga o Niu Tirenī of 1835 and Te Tiriti o Waitangi of 1840.³ While Palmer and Butler's vision is one of reforming and strengthening our current Westminster constitutional system, Matike Mai's is one of transformational, creative change, in which there is room for tino rangatiratanga—substantive self-determination—to be realised.

The Matike Mai report acknowledges the difficulty of such an endeavour; our current constitutional arrangements seem 'immoveable and unchallengeable', inevitable because they are all we know.⁴ However, they are historically contingent, and the perception of their immutability is itself a consequence of colonisation, whereby British law and its supporting ideologies were forcibly transposed to Aotearoa, overpowering existing ways of life, law, and constitutional arrangements, which te Tiriti purported to protect.⁵ As the report notes, since 1840, tangata whenua have sought 'a respectful and equal constitutional relationship with the Crown as promised in Te

2 Palmer and Butler, *A Constitution for Aotearoa New Zealand*, 62, 146-159.

3 Matike Mai Aotearoa—The Independent Working Group on Constitutional Transformation, *He Whakaaro Here Whakaumu Mō Aotearoa*, 2016, 12-14.

4 Ibid., 15.

5 See 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), 2014.

Tiriti' and 'have never abandoned the treaty promise'.⁶

Here, after situating this work theoretically, I explore and contextualise these two texts as they represent, respectively, a modern ideal-typical Pākehā position on constitutionalism in Aotearoa New Zealand, and a critical, Māori constitutional discourse from which this orthodoxy can be interrogated. Through this comparison, I argue that Pākehā constitutional orthodoxy continues to talk past Māori constitutional aspirations because it fails to account for its own ideological and ontological biases, representing itself as occupying a space of reality and neutrality, rather than domination. Because this orthodoxy perceives tino-rangatiratanga claims through this lens of self-affirming bias, it perpetually misapprehends and mischaracterises these claims—as either seeking mere property and management rights (these being already constitutionally provided for), or, if something more substantial, as unrealistic, divisive, and extreme.

This miscommunication makes it immensely difficult to have a productive conversation about constitutional justice. My aim here is not to offer solutions about how we can radicalise and decolonise our constitution, but rather to introduce this constitutional debate as an initial step beyond this miscommunication and towards constitutional decolonisation. Exploring these two constitutional positions demonstrates how the issue of constitutionalism goes further than itself: it is not simply about the structure of government, but delves much deeper into the philosophical and ontological contestation at work in 'post'-colonial settler states.

I take for granted that there is room for constitutional improvement in Aotearoa New Zealand; this is the motivation for both of these texts, and for my consideration of them. More broadly, factors such as economic globalisation, increasing wealth

6 Matike Mai, *He Whakaaro Here Whakaumu Mō Aotearoa*, 12.

inequality, shifted and shifting geopolitical relations, increasing multiculturalism, climate change, and technological advancements all create a social and political situation in which it is prudent to reconsider how we think about sovereignty and constitutionalism; our world is now vastly different from that in which our constitutional orthodoxy was conceived. I therefore conclude with a discussion of the potential for law to be a deeply creative institution, arguing that we ought to harness this creativity moving forward constitutionally. However, constitutionalism in Aotearoa New Zealand cannot progress fruitfully or satisfactorily while the two conversations discussed here—represented by Palmer and Butler on the one hand and Matike Mai on the other—happen independently of one another. Given historic and contemporary colonial-power imbalances, the onus is on solipsistic orthodox Pākehā constitutionalism to finally take seriously Māori constitutional aspirations; better nearly 180 years late than never.

Rethinking democracy through postcoloniality

In this work I take up an aspirational praxis of postcoloniality, ‘a critical engagement with the aftermath of colonisation . . . that critiques, and in a political sense, seeks to undermine the structures, ideologies, and institutions that gave colonisation meaning’.⁷ Postcolonialism is not the same as, but is part of the process of, decolonisation.⁸ Because of the ‘ambivalence, contradiction, and hybrid nature of colonisation,’ a postcolonial praxis requires self-awareness and reflexivity, particularly by those

7 Giselle Byrnes, ‘Past the Last Post? Time, Causation, and Treaty Claims History,’ *Law Text Culture* 7 (2003): 253.

8 *Ibid.*, 254.

who materially benefit from colonialism's ongoing effects and are therefore always potentially complicit;⁹ the postcolonial goals of this research are therefore aspirational and tentative.

As part of this praxis, I consciously take up the identity of Pākehā, not just culturally, but politically. Avril Bell explains the dual signification, and therefore ambiguity, of 'Pākehā' as an identity: it refers not only to nationality and ethnicity, an Aotearoa New Zealand-specific whiteness, but also acknowledges a constitutive relationship to Māori, based on the history of the terms 'Māori' and 'Pākehā'.¹⁰ 'Pākehā' specifically denotes otherness in relation to Māori; self-consciously adopting it as an identity recognises the colonial relationship and carries anticolonial commitments. While white New Zealanders often centre themselves as 'normal New Zealanders', 'Pākehā' identity recognises and names white New Zealanders as one group among many. . . . Discursively this goes some way towards undermining white hegemony'.¹¹

Postcolonial reflexivity in Aotearoa New Zealand requires both constant vigilance to the tendency of Pākehā voices, and Pākehā knowledge and ways of knowing, to structure reality, and active engagement with the work of Māori thinkers and mātauranga Māori more broadly. This is an always-unfinished back-and-forth process of epistemic de- and re-construction. It requires epistemic humility: identifying complicity and bias within myself that has been learned through a Pākehā life taking place within Pākehā epistemic hegemony, an ongoing exercise of peeling back layers of learned racism, de-centring my

9 Ibid.

10 Avril Bell, "We're Just New Zealanders": Pakeha Identity Politics,' in *Nga Patai: Racism and Ethnic Relations in Aotearoa/New Zealand*, ed. Paul Spoonley, Cluny Macpherson, and David Pearson (Palmerston North: Dunmore Press, 1996), 153-154; see also Ranginui Walker, *Ka Whawhai Tonu Mātou: Struggle Without End* (Auckland: Penguin, 2004), 94, for a discussion of this linguistic history.

11 Bell, "We're Just New Zealanders", 153.

own perspective and experience and those of other Pākehā. It has required seeking out Māori scholarship at university (and beyond), because it is so under-represented in subjects outside of Māori Studies.¹² It means reading, or rather reading *through*, Pākehā texts to identify their bias and interrogate their claims to authority. Essentially, it requires genuine listening and commitment to change.

Some outspoken Pākehā are vehemently opposed to institutional mechanisms for increased Māori political power, which are perceived as democratically questionable because Māori are a quantitative minority in Aotearoa New Zealand.¹³ This is and will continue to be a serious barrier to the kind of constitutional transformation envisaged by Matike Mai. What is needed, therefore, is an interrogation of the very idea of democracy to unsettle the primacy and apparent immutability of our current system, and therefore recognise an element of universality in the tino-rangatiratanga struggle. As such, one of my aims here is to denaturalise current orthodoxy and its claims to democratic legitimacy. This creates room for a conversation that is more substantively democratic than the ‘quantitative’ democracy we currently have.

Moana Jackson notes that, while many of the tangible, material effects of colonisation—land confiscations, land wars violence, the Parihaka invasion—have slowly been acknowl-

12 I would like to acknowledge Dr Carwyn Jones, whose course on Māori Customary Law at Victoria University of Wellington’s law school was a shining light of critical and creative learning amidst the drudgery of a degree that ordinarily takes Aotearoa New Zealand’s colonial legal system for granted. This course provided the initial tools for thinking through the issues discussed in this article.

13 The most inflammatory of these oppositions can be witnessed in a range of platforms, such as comments sections on online news articles about these issues, campaigns such as those by lobby group Hobson’s Pledge, and, perhaps most disappointingly, legal scholarship. The views expressed in D J. Round ‘Two Futures: A Reverie on Constitutional Review’ (*Otago Law Review* 12, no. 3 (2011): 525-556) are precisely the kinds of arguments I seek to undermine here.

edged as wrongs by many Pākehā, and the New Zealand state in formal apologies, the intangible and subtle effects have not.¹⁴ While explicit colonial violence is rightfully perceived as shameful, the dismissal and suppression of Māori spirituality, ontology, and philosophy, as well as Māori political and legal theory, is barely perceived.¹⁵ However, the tangible and intangible effects of colonisation in this land arise from the same logic: an overarching philosophy underpinning the colonial project, something ‘born of a Christian God, a capitalist ethic, a common law, an imperial domain, and an individuated manifest destiny’, all philosophical tenets at odds with Māori ways of being and doing at the time.¹⁶ This philosophy became hegemonic with the consolidation and entrenchment of the New Zealand colonial legal order and, despite apparent progress in the last few decades, this colonial philosophy persists, ‘now more often covert rather than overt, more often cloaked in the newspeak of bicultural rhetoric or legal pluralism rather than the open bluster of colonisation’.¹⁷

Pratap Bhanu Mehta explains the breadth and depth of imperialism:¹⁸

An imperial order epitomises a *constitution of being*—reaching through all the realms of being from the material to the transcendental. Imperial orders can structure political possibilities, fix the terms of economic exchange, produce hierarchies of knowledge, and redraw the boundaries between the sacred and the profane . . . they

14 Moana Jackson, ‘The Treaty and the Word: The Colonization of Māori Philosophy,’ in *Justice, Ethics & New Zealand Society*, ed. Graham Oddie and Roy Perrett (Auckland: Oxford University Press, 1992), 1.

15 *Ibid.*, 1.

16 *Ibid.*, 1-2.

17 *Ibid.*

18 Pratap Bhanu Mehta, ‘After Colonialism: The Impossibility of Self-Determination,’ in *Colonialism and its Legacies*, ed. Jacob T. Levy and Iris Marion Young (Plymouth UK: Lexington Books, 2011), 147-148 (emphasis mine).

reorder a sense of time and history and produce new forms of subjectivity . . . An empire was more than simply a dominion over territory and people; it was an exercise (literally) in *creating a world and controlling its meaning*.

While I am concerned specifically here with law and constitutionalism, what is at stake is much broader. As Mehta notes, ‘It is important to see Empire as creating a new existential order to be able to see what anti-imperial politics might be about’.¹⁹ Decolonising the constitution is not just about greater political power for tangata whenua for its own sake. Constitutional power is necessary to frame a legal system enabling of a tangata-whenua ontological and existential perspective and way of life, which are currently materially impinged on by a colonial legal system based upon an altogether different set of ontological and philosophical propositions. This is an integral element of what tino rangatiratanga is about.

In Aotearoa New Zealand and elsewhere, across the Left and the Right, a liberal consensus has developed which maintains that parliamentary democracy with capitalist economics is the best possible system for ordering society. The Right manages the status quo; the Left is an ‘adjustment variable,’ coming to power ‘when public opinion has to be readjusted to capitalism,’ and to temper capitalism’s worst excesses without challenging its structure.²⁰ This consensus, of which our constitutional orthodoxy is an essential part, is responsible not only for the distribution of roles and resources in society; more insidiously, it also defines ‘the configuration of the perceptible . . . the allocation of ways of doing, ways of being, and ways of saying . . . it is an order

19 Ibid., 150.

20 Alain Badiou with Fabien Tarby, *Philosophy and the Event*, trans. Louise Burchill (Cambridge: Polity Press, 2010), 3-5.

of the visible and sayable'.²¹ This control over the 'distribution of the sensible' pre-determines what is perceivable as realistic and possible, thereby severely limiting our ability to think politics and constitutionalism creatively.²² Participating in parliamentary democracy is today widely considered to be the extent of political participation for a polity's members. However, participation in this 'democratic' system of profoundly limited options is not political, nor qualitatively democratic. Our options are prescribed by a system forcibly introduced through colonisation and responsible for the loss of Māori legal and political power. It tells us to vote every three years but offers nothing beyond the status quo to vote *for*, and no opportunity to vote on the structure of the system itself. The insidiousness of political and economic consensus limits the possibilities for more *political* politics, for thinking democracy and constitutionalism differently, outside of the distribution of the sensible.

Thus, while constitutional orthodoxy is presented and perceived as natural, neutral, and universal, with its 'rhetoric of impartiality and equality',²³ it is in fact philosophically particular, ontologically restrictive, and participates in enclosing the distribution of the sensible. Recognising this opens space for creatively thinking the possibility of something essentially different. A postcolonial politics that challenges the very foundations of our current order is thus not merely a particular struggle for Indigenous rights benefitting only tangata whenua. In exposing the contingency of our current constitutional order, and thinking something substantially different, a postcolonial praxis draws in

21 Jacques Rancière, *Disagreement: Politics and Philosophy*, trans. Julie Rose (Minneapolis: University of Minnesota Press, 1999), 29; see also Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, 2nd ed. (London: Zed Books, 2012), 40.

22 Rancière, *Disagreement*, 29.

23 Jackson, 'The Treaty and the Word,' 6.

the entire polity to rethink democracy. I return to these themes when discussing the Matike Mai project below. For now, I shift gears, outlining Palmer and Butler’s constitutional vision and contextualising it within New Zealand’s constitutional orthodoxy.

A constitution for Aotearoa New Zealand: Colonial continuation

In this section, I begin by articulating Palmer and Butler’s constitutional vision, showing its general consistency with current orthodoxy. I then relate this orthodoxy to the colonial liberal political theory from which it derives—in particular, the concepts of Hobbesian sovereignty and legal positivism—showing how this is reflected in the Treaty’s changing legal status over time. I argue that the Treaty’s place in Palmer and Butler’s vision presents no serious challenge to Aotearoa New Zealand’s current distribution of the sensible. Rather, it is a manifestation and continuation of colonial discourse which, despite recent ‘progress’, essentially disregards Māori perspectives on the meaning and constitutional significance of te Tiriti, adhering instead to a wholly Pākehā interpretive framework.

Palmer and Butler’s constitutional vision

Aotearoa New Zealand currently has an uncodified constitution, an uncommon situation internationally. This constitution is fragmented, consisting ‘of a hodgepodge of rules, some legally binding, others not. It is formed by a jumble of statutes . . . ; a plethora of obscure conventions, letters, patents and manuals;

and a raft of decisions of the courts'.²⁴ For Palmer and Butler, this creates an accessibility issue, the result being that many New Zealanders do not understand our constitutional arrangements.²⁵ The authors argue that this contributes to a general sense of apathy about constitutional matters and a mistrust of the political system.²⁶ The first aim of their book is to remedy this inaccessibility, to coherently set out, in one place, the rules of the constitution.²⁷ The authors also contend that it is difficult to have a national constitutional conversation because we lack a tangible, clear proposal with which to engage.²⁸ Their proposed constitution is therefore a means of igniting this conversation; it is preliminary, with the intention of revision, once the public has had a chance to engage, within an intended timeframe of one year.²⁹

The proposal 'is not meant as a simple restatement of our constitutional framework as it is now'; it is 'also an aspirational and reformist project'.³⁰ While it is 'at pains to preserve the sound elements of our past and our unique constitutional culture',³¹ it also proposes substantive changes, all deriving from the various stated purposes of the project: accessibility and certainty; civic education; enhancement of the rule of law; democratic accountability and transparency; ensuring protection of citizens' rights; creating a new New Zealand head of state; recording national identity and preserving the useful elements of the current system; and, finally, creating a consti-

24 Palmer and Butler, *A Constitution for Aotearoa New Zealand*, 9-10.

25 *Ibid.*, 10-12.

26 *Ibid.*, 24-25.

27 *Ibid.*, 11.

28 *Ibid.*, 12.

29 *Ibid.*, 8. I note here again that Palmer and Butler's follow-up book, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand*, was released in April 2018, after the writing of this article.

30 Palmer and Butler, *A Constitution for Aotearoa New Zealand*, 12.

31 *Ibid.*, 7.

tution that ‘belongs to the people’.³²

Parts 4-8 of the proposed constitution, regarding the membership and distribution of functions of the government, the parliament and legislature, law-making, and the judiciary, are relatively non-controversial.³³ Although there are some slight procedural changes, these provisions mostly parallel already existing provisions in the Constitution Act 1986, supplemented by codification of rules currently covered by the Cabinet Manual or left up to convention, and provisions from the Judicature Act 1908 and the Supreme Court Act 2003.³⁴ This overall consistency with current practice suggests that these are elements of our current constitutional structures that the authors consider worth preserving and strengthening.

More significant changes in parts 2 and 3 would shift Aotearoa New Zealand from a constitutional monarchy to a republic.³⁵ While we would remain in the Commonwealth (article 8), article 2 replaces the entity ‘the Crown’ with that of ‘the State of Aotearoa New Zealand’. Article 9 provides for the ‘Head of State’, which would no longer be the ‘Sovereign in right of New Zealand’ represented by the governor-general, as per section 2 of the Constitution Act 1986, but a New Zealander appointed by a vote of the House of Representatives. The head of state would be responsible for most of the functions currently performed by the governor-general (article 10). However, these functions would now legally derive from the constitution itself, rather than the royal

32 Ibid., 25-27.

33 Ibid., 39-60.

34 The Senior Courts Act 2016, which took over from these acts, was passed after the book’s publication.

35 Palmer and Butler, *A Constitution for Aotearoa New Zealand*, 35-39.

prerogative,³⁶ which article 13 would abolish. These changes are intended to achieve relative constitutional consistency in terms of function, while legally and symbolically reflecting Aotearoa New Zealand's status as an independent nation with unique national identity.³⁷ The authors do not see these proposals as radical, but inevitable, particularly when Queen Elizabeth dies.³⁸

Part 12 of the proposed constitution incorporates a bill of rights,³⁹ including most of the provisions of the current Bill of Rights Act 1990, and introducing some new rights, including a right to a state education (article 94); a right to property (article 104); environmental rights (article 105); and non-justiciable 'social and economic rights' (article 106).⁴⁰

Particularly relevant to this article is part 11: Te Tiriti o Waitangi/The Treaty of Waitangi.⁴¹ Article 72 recognises and affirms the Treaty rights, duties, and obligations of Māori, and

36 The royal prerogative is a legal source of executive authority vested in a monarch. It derives from the time when monarchs exercised full sovereign power, but has since been progressively whittled away as monarchies were superseded by parliamentary sovereignty. In the case of Aotearoa New Zealand, what is left of this authority is delegated to the governor-general as the Queen's representative. As Palmer and Butler note (95-96), the royal prerogative in Aotearoa New Zealand has 'shadowy and undefined limits,' making the legal situation around it 'unclear and inaccessible.'

37 Palmer and Butler, *A Constitution for Aotearoa New Zealand*, 19.

38 *Ibid.*, 19.

39 *Ibid.*, 63-70.

40 'Non-justiciable' issues are those considered inappropriate for courts to judge on and are therefore outside their purview. Often, non-justiciability derives from the separation of powers. For example, issues of national security are non-justiciable, considered to be the concern of the executive, not the courts. It is interesting that Palmer and Butler would exclude socio-economic rights (which in Article 106 of this proposal include rights to: 'an adequate standard of living'; 'social security'; 'the enjoyment of the highest attainable standard of physical and mental health'; collective action and strikes; satisfactory health and safety conditions at work; and 'the right of workers to earn their living in an occupation freely entered upon') from justiciability. There is a view that court processes are 'not always adequate to the task' of adjudicating on such issues and should not be called upon to do so, but that citizens should still 'be able to draw on [these rights] to make State institutions accountable': *ibid.*, 171.

41 *Ibid.*, 62.

would vest in ‘the State’ those currently vested in the Crown. The Treaty is to be ‘considered as always speaking’ and ‘applied to circumstances as they arise so that effect may be given to its spirit, intent, and principles’. The full text of the Treaty, both the English and Māori versions, is set out in an appendix. Significantly, this would be the first time in New Zealand history that the Treaty would have the general status of law.⁴²

The most significant legal change proposed by Palmer and Butler’s constitution, underlying and giving weight to the rest of its provisions, particularly parts 11 and 12, is that it would have the status of entrenched, higher law, enforceable by the courts. In terms of entrenchment, article 116 provides that the Constitution cannot be amended, unless with the support of a 75 percent majority in the house, or a majority in a national referendum (striking a ‘balance between representative democracy and direct deliberative democracy’), with the exception that the appendix containing the Treaty texts cannot be amended.⁴³ In terms of supremacy, article 1 states: ‘Where there is an inconsistency between any law and any provision of this Constitution, the provision of this Constitution prevails’.⁴⁴ Article 68 gives the courts power to declare that a law inconsistent with the Constitution is invalid; if the Supreme Court confirms this, the inconsistent law will be invalidated, unless parliament passes a ‘validating Act’, with the support of 75 per-

42 Ibid., 147.

43 Ibid., 23, 75. Ordinarily, all that is required to amend or appeal a piece of legislation is a bare majority in the House of Representatives. Entrenchment provisions are relatively uncommon where there is a strong sense of parliamentary supremacy, the idea being that parliament as a democratically elected body should have the unfettered ability to change law as it deems appropriate. The major entrenchment provision in Aotearoa New Zealand currently is s 268 of the Electoral Act, which implements safeguards in relation to, *inter alia*, the term of parliament, the voting age, and the secret ballot.

44 Ibid., 35. This would give the constitution higher status than all other statutes. Currently, all statutes passed by parliament have equal legal status.

cent of the house, determining that the inconsistent law will remain in effect.⁴⁵ This is the balance struck between constitutional safeguards for rights and parliamentary sovereignty of a ‘softer’ kind.⁴⁶ In the authors’ words, ‘Parliament, as an elected body, should have the final word’.⁴⁷

Palmer and Butler’s proposal is a particular vision of what a healthy modern democratic constitution should look like: a reflection of the nation it governs, protection of the rule of law, a clear separation of powers with rigorous checks and balances, protection of rights, and accountability to ‘the people’. They note that 19th-century notions of parliamentary sovereignty, according to which parliament ‘should be able to change any law it likes at speed with a small majority at any time,’ is outdated: ‘parliamentary sovereignty needs to yield to popular sovereignty and participatory democracy’.⁴⁸ While they consider that the ‘political skills’ of Members of Parliament are still ‘essential to the running of a representative democracy’,⁴⁹ ‘ultimately a constitution must stand above the interests of any particular political party or political philosophy. It must belong to all of the people because it is under their will that government is conducted in a democracy. They are the ultimate authority, not Parliament’.⁵⁰

We can question what the authors mean by ‘political philosophy’ here. As discussed earlier, the ideological framework from within which the authors propose this constitution is very clearly derived from the history of colonial philosophy—that is, where the conception of the various organs of the state, and the ideas of the separation of powers, the rule of law, and parliamen-

45 Ibid., 59-60.

46 Ibid., 20.

47 Ibid., 21.

48 Ibid., 16.

49 Ibid., 17.

50 Ibid., 23.

tary sovereignty, come from. Similarly, the authors say that the nature of New Zealand's political economy should be determined through politics, not provided for by a constitution, apparently not recognising the close relationship and mutual reinforcement between institutional arrangements and the economic status quo.⁵¹ Their vision is not 'above' any particular political philosophy, but deeply embedded within one. Because the distribution of the sensible in Aotearoa New Zealand prescribes what is constitutionally possible in these terms of colonial origin, and Palmer and Butler's vision follows the logic of this distribution of the sensible, they can represent their constitution as politically neutral and relatively non-controversial.

Next, I further explore how this is so, identifying two principles of liberal political philosophy—Hobbesian sovereignty and legal positivism—integral to the colonial legal system, and demonstrating how these have influenced the orthodox view of the Treaty's constitutional place.

The Treaty's status in constitutional orthodoxy

The idea that the Treaty of Waitangi was a cession of sovereignty by rangatira to the British Crown is the 'dominant Pākehā narrative of the founding of New Zealand'. In this narrative, Māori are understood to have given up their sovereignty in article 1 in exchange for property rights in article 2 and equality in article 3. The Treaty is portrayed as a benign act that has benefitted Māori and as the political basis for the Crown's sovereignty.⁵²

With this exchange, Westminster parliamentary sovereignty was 'legally' imposed upon these lands, understood within the conceptual frameworks of British law and, more broadly,

51 Ibid., 17.

52 Emily Blincoe, 'The Myth of Cession: *Public Law Textbooks and the Treaty of Waitangi*,' *Public Interest Law Journal of New Zealand* 3 (2016): 127.

colonial liberal philosophy.⁵³ These British legal concepts are important for understanding how the Treaty has been understood in the history of New Zealand constitutional orthodoxy.

Thomas Hobbes's 17th-century theory of sovereignty was very influential, including upon John Austin, whose ideas about sovereignty 'came to dominate British legal thought in the period following the signing of the Treaty'.⁵⁴ For Hobbes, irresolvable disagreement in society is inevitable, a notion tied to a liberal ontology and moral philosophy of individualism and self-interest whereby social relations are inherently conflictual.⁵⁵ For order to obtain, there must be a procedure by which such conflict can be arbitrated, and an ultimate authority responsible for this: Hobbes's sovereign Leviathan.⁵⁶ For this to work, the sovereign's word must be final; therefore the sovereign must be unitary, and its authority must be 'ultimate, unlimited, and absolute'.⁵⁷ There could thus be no legal limit on the sovereign's power, but for practical reasons, to preserve social harmony, there may be political or moral limits.⁵⁸ Legal positivism, according to which, rather circularly, law is valid so long as it is passed in accordance with rules about how law is to be passed, was also a prominent British legal orthodoxy at this time. The conceptual combination of legal positivism and Hobbesian sovereignty, in the institutional context of Westminster rep-

53 Jackson, 'The Treaty and the Word,' 6.

54 Stephen Davies and R E Ewin, 'Sovereigns, Sovereignty, and the Treaty of Waitangi,' in *Justice, Ethics & New Zealand Society*, ed. Graham Oddie and Roy Perrett (Auckland: Oxford University Press, 1992), 54n1.

55 Ian Ward, *Introduction to Critical Legal Theory*, 2nd edition (Oxon: Routledge, 2004), 131. Although, it should be noted that this idea of permanent and ineradicable conflict is shared by many, so-called, 'radical democrats' such as Chantal Mouffe and Jacques Rancière. However, unlike Hobbes, these thinkers argue that the permanence of disagreement and antagonism is the constitutive condition of politics. As such, neutralising disagreement through the word of the sovereign sees politics itself disappear.

56 Davies and Ewin, 'Sovereigns, Sovereignty, and the Treaty of Waitangi,' 42.

57 *Ibid.*, 42-43.

58 *Ibid.*, 43.

representative democracy, means that only law properly passed by parliament is valid, and it cannot be invalidated.

These concepts framed New Zealand's early and ongoing constitutional arrangements. The idea of unitary absolute sovereignty made it inconceivable to English legal minds that the Treaty was an agreement to sovereign power sharing, or dual sovereignty, between the Crown and rangatira; this is not legally possible in terms of Hobbesian sovereignty and so Māori claims to sovereignty have never been recognised by the New Zealand state. Additionally, because treaties are solely within the purview of executive government, and there was no legislative effort to solidify the Treaty's legal status (with a near complete absence of legislative reference to the Treaty prior to 1975),⁵⁹ the Treaty did not have the status of domestic law and, according to legal positivism, could not be enforced in the courts. This severity is classically reflected in the 1877 *Wi Parata* decision, in which Chief Justice Prendergast declared the Treaty a 'simple nullity'.⁶⁰ The essence of this approach 'was that Māori rights existed at the mere sufferance of the Crown,' as per Hobbesian sovereignty and legal positivism.⁶¹

When the Māori resistance movement began to grow in the 1970s—partially due to increasing Māori urbanisation post-war,⁶² and partially in the spirit and context of the growth of

59 Tama W Potaka, 'Legislation and the Legislature,' in *Weeping Waters: The Treaty of Waitangi and Constitutional Change*, ed. Malcolm Mulholland and Veronica Tawhai (Wellington: Huia Publishers, 2010), 85.

60 Paul McHugh, 'Legal Reasoning and the Treaty of Waitangi: Orthodox and Radical Approaches,' in *Justice, Ethics & New Zealand Society*, ed. Graham Oddie and Roy Perrett (Auckland: Oxford University Press, 1992), 93; see also Jane Kelsey, 'Judicialisation of the Treaty of Waitangi: A Subtle Cultural Repositioning,' *Australian Journal of Law and Society* 10 (1994): 132.

61 McHugh, 'Legal Reasoning and the Treaty of Waitangi,' 93.

62 Walker, *Ka Whawhai Tonu Mātou: Struggle Without End*, 209.

the New Left internationally,⁶³ —race relations grew tense, and complete disregard of the Treaty became politically untenable.⁶⁴ In Hobbesian terms, we can see here how, despite having no legal status, the Treaty became a political constraint upon the Crown's exercise of sovereignty.

The unrest led to the creation of the Waitangi Tribunal by the Treaty of Waitangi Act 1975, which had the power to investigate contemporary Treaty breaches, but not historic grievances until amended in 1985. The tribunal has never had a general jurisdiction to make binding recommendations; the Treaty of Waitangi Act did not, therefore, implement serious constitutional change. It was important symbolically and politically, however, catalysing the Treaty-settlements process, increasing legislative references to the Treaty and its 'principles', and creating space for mainstream discussion of the Treaty's status. For example, it was held in the 1987 *Huakina Development Trust* case that it would not be unorthodox for the Treaty to be used as an extrinsic aid to statutory interpretation where appropriate, particularly in the context of administrative law, with Justice Chilwell stating that 'there can be no doubt that the Treaty is part of the fabric of New Zealand society'.⁶⁵

The visibility of the Treaty and increased Māori political power impacted on the Fourth Labour Government's privatisation programme, contributing to the introduction of section 9 in the State-Owned Enterprises Act 1986 which stated: 'Nothing in this Act shall permit the Crown to act in a manner inconsistent with

63 Evan S. Poata-Smith, 'He Pokeke Uenuku i Tu Ai: The Evolution of Contemporary Maori Protest,' in *Nga Patai: Racism and Ethnic Relations in Aotearoa/New Zealand*, ed. Paul Spoonley, Cluny Macpherson, and David Pearson (Palmerston North: Dunmore Press, 1996), 98-102.

64 Kelsey, 'Judicialisation of the Treaty of Waitangi,' 133.

65 High Court, *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210.

the principles of the Treaty of Waitangi'.⁶⁶ There had been concern among Māori that the programme, by transferring land out of state ownership and into private hands, may prejudice Treaty claims.⁶⁷ Claimants sought judicial review of the Crown's proposed asset sales in a landmark case that 'was to become a turning point in Treaty jurisprudence'.⁶⁸ In the 1987 'Lands' case, in what has been called judicial activism, or, less pejoratively, 'creativity', the 'Court of Appeal was unanimous in holding that section 9, as a matter of statutory interpretation, overrode the whole of the Act', and therefore the assets could not legally be transferred without due observation of 'Treaty principles'.⁶⁹ The case also commenced the judicial formulation of the Treaty principles in the language of good faith, partnership, active protection, and, crucially, the relationship between the Treaty terms of *kāwanatanga* and *tino rangatiratanga*, which the court saw as the Crown's sovereign right to govern, and the right of Māori to exercise self-determination.⁷⁰ This Treaty jurisprudence has grown and developed since the 1980s, and is now on relatively firm footing in our constitutional orthodoxy, which can thus be characterised as 'dynamic', rather than static,⁷¹ an ostensibly 'bicultural' legal system.⁷²

This orthodoxy is reflected in Palmer and Butler's proposal. They say that 'the legitimacy of the government we have

66 Linda Te Aho 'Judicial Creativity,' in *Weeping Waters: The Treaty of Waitangi and Constitutional Change*, ed. Malcolm Mulholland and Veronica Tawhai (Wellington: Huia Publishers, 2010), 113-114.

67 Waitangi Tribunal, Interim Report to the *Minister of Māori Affairs on State-Owned Enterprises Bill* (Wai 22), 1986.

68 Te Aho, 'Judicial Creativity,' 114.

69 Court of Appeal, *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641; Te Aho, 'Judicial Creativity,' 114.

70 Court of Appeal, *New Zealand Māori Council v Attorney-General*; see also Kelsey, 'Judicialisation of the Treaty of Waitangi,' 137.

71 McHugh, 'Legal Reasoning and the Treaty of Waitangi'.

72 See Kelsey, 'Judicialisation of the Treaty of Waitangi,' for an extended discussion of the constitutional nuances of the courts' approach to early Treaty jurisprudence.

in New Zealand today owes much to the Treaty,' but because the Treaty still does not have the status of general law, 'its legal effect is inconsistent, incoherent, and uncertain'.⁷³ Therefore the 'prime reason for making the Treaty part of the Constitution is that it is already part of our informal constitutional arrangements, but its legal and constitutional effect is currently contested and uncertain'.⁷⁴ Their constitution would regularise and protect the current status-quo approach to the Treaty's constitutional place, a necessary stability because 'the relationships between Māori and the State are vital to the peace, order, and good government of New Zealand'.⁷⁵ The courts would still have the power to give effect to the Treaty as cases require, and the obligation of the government and parliament to give effect to it would be confirmed and protected.⁷⁶

It is arguable that the Treaty having the status of supreme, entrenched law would increase the constitutional and legal power of tangata whenua by increasing their ability to enforce the Treaty's terms. To an extent this is true—this is a stated intention of the proposal. However, it is clear that it is the 'dynamic' constitutional orthodoxy, and the principles of the Treaty as developed in official Treaty jurisprudence—not te Tiriti as understood in tikanga Māori terms—that are to reign. Although Palmer and Butler acknowledge contestation over the Treaty's interpretation,⁷⁷ and do not explicitly assert that the Treaty was a cession of sovereignty, but rather intended as 'some sort of power-sharing relationship',⁷⁸ their vision is essentially in line with how the Treaty has come to be seen by Pākehā ortho-

73 Palmer and Butler, *A Constitution for Aotearoa New Zealand*, 147.

74 *Ibid.*, 154.

75 *Ibid.*, 156.

76 *Ibid.*, 146.

77 *Ibid.*, 154.

78 *Ibid.*, 151.

doxy: offering some resource and management rights, but always subject to parliamentary sovereignty, which, although softened in Palmer and Butler's constitution, retains ultimate authority.

Palmer notes that 'people are very frightened of' tino rangatiratanga, but that all it means, uncontroversially, is that 'Māori should be able to control and have a say over their own resources'.⁷⁹ This limited orthodox Pākehā view of the meaning of tino rangatiratanga is reflected in Palmer and Butler's constitutional vision, which, still broadly in line with the ideas of Hobbesian sovereignty and legal positivism, has no room for any concept of shared sovereignty, or of tino rangatiratanga as understood according to a tangata whenua perspective as the exercise of a deep and substantive self-determination going well beyond resources. (Notably, Palmer and Butler did not consult with tangata whenua prior to the release of *A Constitution for Aotearoa New Zealand*, although they acknowledge the Matike Mai report.)⁸⁰ As Ani Mikaere notes regarding the development of Treaty jurisprudence, while the harsh Wi Parata perspective on the Treaty has fallen out of favour:⁸¹

It has largely been replaced by a range of views that are, in reality, no less oppressive, despite being conveyed in the soothing language of partnership, mutual respect, or aboriginal rights. While Prendergast's overt racism has for the most part been spurned in favour of greater cultural sensitivity, any concessions that are made to Māori aspirations of tino rangatiratanga . . . are nevertheless envisaged as occurring within the framework of Crown sovereignty. As such they represent the false generosity of the oppressor.

79 Salient, 'Interview with Sir Geoffrey Palmer,' May 19, 2017. <http://salient.org.nz/2017/05/interview-geoffrey-palmer/>.

80 Palmer and Butler, *A Constitution for Aotearoa New Zealand*, 158-159.

81 Quoted in Te Aho, 'Judicial Creativity,' 115.

Next, I seek to further unsettle the perceived neutrality of our constitutional orthodoxy through a discussion of te Tiriti's meaning as understood in accordance with tikanga and mātauranga Māori, and the reflection of this in Matike Mai's project. To finally move towards decolonisation and Treaty justice requires recognising the philosophical biases in the dominant colonial framework. As the Matike Mai report states, it is questionable 'whether a State built upon the taking of another people's lands, lives, and power can ever really be just or Treaty-based if it maintains a constitutional order that was part of the taking'.⁸²

He Whakaaro Here Whakaumu Mō Aotearoa in context: Ontological and sovereign plurality

The terms of reference given to the Matike Mai working group in embarking on their research were 'deliberately broad': 'To develop and implement a model for an inclusive Constitution for Aotearoa based on tikanga and kawa, He Whakaputanga o te Rangatiratanga o Niu Tirenī of 1835, Te Tiriti o Waitangi of 1840, and other Indigenous human rights instruments which enjoy a wide degree of international recognition'.⁸³

The endeavour was not to be framed in terms of our current Westminster constitutional system and its legal theory, but rather within the framework of Māori law, in accordance with which he Whakaputanga and te Tiriti were to be read.⁸⁴ Therefore, the report does not engage closely with the constitutional views maintained by the Crown since 1840, 'and especially its

82 Matike Mai, *He Whakaaro Here Whakaumu Mō Aotearoa*, 29.

83 *Ibid.*, 7.

84 *Ibid.*, 7.

presumption that Iwi and Hapū ceded sovereignty in Te Tiriti’, noting that these views ‘have always been at odds with Māori understandings’.⁸⁵ This project is about Māori talking to Māori, in Māori terms, about a different type of constitutionalism altogether.⁸⁶

Māori philosophy and law

Grasping the full import of Matike Mai’s constitutional vision, and the challenge it presents to the orthodox view, requires at least a basic understanding of Māori law, the philosophical perspective underpinning it, and how he Whakaputanga and te Tiriti were and are seen within this framework. As a Pākehā intellectual, my understanding of this philosophy and law is inherently limited, learnt from books and university study rather than any direct experience—this must be kept in mind when reading this section. I do not purport to be an expert, but have tried to the best of my ability to represent this philosophy as it has been presented by Māori thinkers (the Waitangi Tribunal’s 2014 Wai 1040 report also gives a detailed exposition of these ideas).

Prior to colonisation, tangata whenua had a distinct system of law—tikanga—that still exists despite its violent disruption by colonisation (which includes, of course, the overlaying of tikanga by Pākehā law and sovereignty).⁸⁷ Tikanga, although varying between iwi and hapū of different regions, has reasonably consistent central tenets. Of these, Justice Joe Williams identifies whanaungatanga, or ‘the source of the rights and obligations of kinship’, as the conceptual ‘glue that held, and still holds, the system together; the idea that makes the whole system make

85 Ibid., 8.

86 Ibid., 7-8.

87 I would like to acknowledge the anonymous reviewer who emphasised the need to discuss tikanga in the present tense.

sense—including *legal sense*.⁸⁸ The centrality of whanaungatanga is related to Māori ontology. In te ao Māori, a person's place in the universe is understood 'through the principle of whakapapa—genealogical progression—in which all things [can] be traced back in a logical sequence to the beginning of creation. Through this principle, all people and all elements of the physical and spiritual worlds [are] seen as related at a fundamental level'.⁸⁹

The idea that all things—people past, present, and future; nature; the spiritual—are related through kinship creates a very different philosophical foundation for law than that derived of a Christian cosmology.⁹⁰ The latter separates and hierarchises the spiritual, the human, and the natural: humanity rules over nature, and people are ultimately individually responsible for acting virtuously to be rewarded in the afterlife. This ontological and philosophical difference provides insight into the differences between Māori and English legal systems.⁹¹

Whanaungatanga underlies other central tikanga principles, for example, mana, 'the source of rights and obligations of leadership'; tapu, 'both a social control on behaviour and evidence of the indivisibility of the divine and the profane'; utu, 'the obligation to give and the right (and sometimes obligation) to receive constant reciprocity'; and kaitiakitanga, 'the obligation to care for one's own'.⁹² Whanaungatanga orders the rights and obligations of the Māori legal system. For example, resource rights

88 Joseph Williams, 'Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law,' *Waikato Law Review* 21 (2013): 3-4.

89 Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty*, 20.

90 Shane Malva, 'Indigenous Knowledge, Continental Philosophy, and the Political Real,' paper presented at *Social Movements, Resistance, and Social Change: Beyond Capitalism, Beyond Colonisation*, Massey University Auckland, September 7, 2017; Jackson, 'The Treaty and the Word,' 2.

91 See also Avril Bell, 'Co-existing Indigenous and Settler Worlds: Ontological Styles and Possibilities,' *Journal of New Zealand Studies* NS24 (2017).

92 Williams, 'Lex Aotearoa,' 3-4.

are obtained primarily through descent, and cannot be sustained without an ongoing relationship with the resource, including the obligation to care for it; criminal or tortious behaviour is the responsibility of the perpetrator's wider kin group, and a wrong against the victim's wider kin group.⁹³ Whanaungatanga is also central to political authority and organisation.

Pre-colonisation, 'the fundamental unit of economic and political organisation [in Aotearoa] was the hapū'.⁹⁴ Hapū are 'political and economic groupings based on a combination of common descent and interest,' made up of whānau working together 'in larger kin-based groups under coordinated leadership'.⁹⁵ Hapū, which, in English legal terms, could be characterised as small sovereign units, hold the rights in territorial land, with political leadership being exercised by rangatira.⁹⁶ However, the authority—mana—of rangatira does not vest in them as individuals. Rather, they embody 'the mana of their atua, the ancestor-gods from whom the other members of their hapū also descended'.⁹⁷ Moreover, mana can wax or wane depending on how well rangatira carry out their leadership roles: 'in all of these things, their mana and that of their people and whenua [are] closely aligned. Mana, in other words, [is] bestowed by virtue of their relationships with people . . . land . . . and tūpuna'.⁹⁸ This political organisation and source of authority is central for understanding the import of he Whakaputanga and te Tiriti.

93 Ibid., 4-5.

94 Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty*, 30.

95 Ibid.

96 Ibid.; Matike Mai, *He Whakaaro Here Whakaumu Mō Aotearoa*, 30, 34-35.

97 Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty*, 31.

98 Ibid.; see also Matike Mai, *He Whakaaro Here Whakaumu Mō Aotearoa*, 35

He Whakaputanga and te Tiriti

Settlers had been coming to Aotearoa for some time by the 1830s and 1840s, but the law of the land was that of hapū under the leadership of rangatira.⁹⁹ There was concern among hapū about the lawlessness of Pākehā immigrants, a problem that needed to be dealt with collaboratively. This was the background to He Whakaputanga o te Rangatiratanga o Niu Tirenī 1835, the Declaration of Independence signed by Te Whakaminenga o ngā Hapū, the United Tribes. (Note that this did not include all hapū, but primarily those in the north, where most Pākehā were settling.)¹⁰⁰

He Whakaputanga, partially conceived by rangatira who had met the King of England when there for trade, and drawn up by British Resident James Busby, was ‘a declaration of the rangatiratanga and the mana of the rangatira of te Whakaminenga in respect of all their lands’.¹⁰¹ It ‘declared that the rangatira would not allow any other persons or any other “kāwanatanga” to have law-making powers over their lands’.¹⁰² There were translational issues—‘independence’ in the English text imperfectly translated to ‘rangatiratanga’; ‘sovereignty’ was translated to ‘kingitanga’, an English-derived term—but, regardless, King William IV formally acknowledged the document, which in English *explicitly* stated that rangatira held sovereign power over the independent state of New Zealand.¹⁰³ Meanwhile, the Declaration provided for iwi and hapū to ‘come together in a Whakaminenga or assembly to make joint decisions on matters of common concern’.¹⁰⁴ Matike

99 Margaret Mutu, ‘Constitutional Intentions: The Treaty of Waitangi Texts,’ in *Weeping Waters: The Treaty of Waitangi and Constitutional Change*, ed. Malcolm Mulholland and Veronica Tawhai (Wellington: Huia Publishers, 2010), 16.

100 *Ibid.*, 16-17.

101 *Ibid.*, 17-18.

102 *Ibid.*

103 *Ibid.*

104 Matike Mai, *He Whakaaro Here Whakaumu Mō Aotearoa*, 44.

Mai characterises he Whakaputanga as a ‘constitutional transformation in which Iwi and Hapū would exercise an independent authority while retaining their own independence’,¹⁰⁵ a new federal-like constitutional arrangement, necessary in the new circumstances of Aotearoa.

He Whakaputanga provides crucial context for the Māori understanding of te Tiriti. While the English text of the Treaty was framed and understood in English legal terms as an explicit cession of sovereignty, te Tiriti, very imperfectly translated, did not say as much.¹⁰⁶ In article 1, rangatira allowed the Crown ‘kāwanatanga’, again an English-derived term, conveying an idea of governance, to meet the need for control over British settlers.¹⁰⁷ This contrasts with he Whakaputanga, which disallowed any foreign kāwanatanga. The word in he Whakaputanga that had been used as the translation of sovereignty, kingitanga, was not used. Article 1 of te Tiriti therefore did not convey a cession of sovereignty. Meanwhile, article 2 reserved for rangatira their tino rangatiratanga which, rather than conveying the idea of ‘full exclusive and undisturbed *possession*’ of their material property, as the English text stated,¹⁰⁸ had much more political connotation, more likely referring to ‘paramount and ultimate

105 Ibid.

106 I only briefly discuss the discrepancies between the English and Māori Treaty texts here, assuming this to be relatively well-known, or at least covered sufficiently elsewhere (see, for example, Mutu, ‘Constitutional Intentions,’ and Waitangi Tribunal *He Whakaputanga me te Tiriti / The Declaration and the Treaty*, chapter 10). As Linda Te Aho notes, ‘in any event, the Crown has failed to adhere to either version’: Te Aho, ‘Judicial Creativity,’ 113.

107 Mutu, ‘Constitutional Intentions,’ 24-25.

108 The full language used in the English-language text is ‘full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess.’

authority' over their material and non-material possessions.¹⁰⁹

In discussions of te Tiriti's poor translation, tino rangatiratanga is often translated as sovereignty.¹¹⁰ Some might argue that tino rangatiratanga should have been the phrasing used to convey the cession of sovereignty in article 1, rather than the retaining of property rights in article 2. However, while rangatiratanga, and the corresponding concept mana, does not refer simply to property rights, it is also not an accurate translation of the English concept of sovereignty, because it arises out of an altogether different legal and philosophical framework.¹¹¹ 'Tino rangatiratanga is the exercise of paramount and spiritually sanctioned power and authority', including notions associated with sovereignty, but wider, due to its 'strong spiritual connotations'.¹¹² Had sovereignty been translated as tino rangatiratanga, no rangatira would have agreed to te Tiriti;¹¹³ they *could* not do so according to Māori law.¹¹⁴ Because the authority—mana—of rangatira derived from whakapapa (human, natural, and spiritual), it 'could not be broken or transferred'.¹¹⁵ It derived from the ancestors of the rangatira and was therefore not theirs to cede; it was inalienable.¹¹⁶ What the English text of the Treaty purported

109 The full language used in the Māori text is 'te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa,' which translates literally as 'paramount and ultimate power and authority over their lands, their villages and all their treasured possessions': Mutu, 'Constitutional Intentions,' 25. Not only does this indicate a different level of authority being retained in the Māori text, but also a wider understanding of what that authority was retained over, going beyond simple material possessions.

110 Mutu, 'Constitutional Intentions,' 26.

111 Ibid.

112 Ibid.

113 Ibid., 31.

114 Matike Mai, *He Whakaaro Here Whakaumu Mō Aotearoa*, 35; Blincoe, 'The Myth of Cession,' 135-136.

115 Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty*, 24.

116 Blincoe, 'The Myth of Cession,' 135-136.

to do was ‘unthinkable in terms of tikanga’.¹¹⁷

Rather, te Tiriti was envisaged by rangatira, according to tikanga, as a substantive power-sharing arrangement: the Crown would have authority to control British subjects and thereby protect Māori, while rangatira would retain their law-making and -enforcement authority over their people and land.¹¹⁸ As the Waitangi Tribunal has found:¹¹⁹

The rangatira consented to the Treaty on the basis that they and the [Crown] were to be equals, though they were to have different roles and different spheres of influence. The details of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis.

Because the Crown ‘petulantly’ enforced its own understanding of the Treaty, according to the colonial legal philosophical framework of Hobbesian sovereignty and legal positivism, thereby overpowering and displacing the Māori legal and philosophical framework, this constitutional arrangement envisaged and agreed to by rangatira never came to fruition.¹²⁰ However, this vision was not abandoned, and is reflected in Matike Mai’s vision for constitutional transformation. As their report notes, the Māori communities they engaged with were clear that these constitutional documents are ‘fundamentally relevant because they all express the right for Māori to make decisions for Māori that is the very essence of tino rangatiratanga’.¹²¹

117 Mutu, ‘Constitutional Intentions,’ 31.

118 Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty*, 529.

119 Ibid.

120 Jackson, ‘The Treaty and the Word,’ 6.

121 Matike Mai, *He Whakaaro Here Whakaumu Mō Aotearoa*, 8.

Matike Mai's kaupapa and vision

The Matike Mai report was developed out of extensive consultation with Māori communities over three years; around the country, 252 hui were conducted, in addition to 70 wānanga with rangatahi.¹²² It was important that the project reach a broad cross-section of Māori, wherever they were, and so the discussions were held in a range of locations and environments—marae, kura, tertiary institutions, health and social service clinics, law offices, gang properties, private homes, and a prison.¹²³ The Working Group was aware that constitutional discussion might not be a top priority for the people with whom they were seeking to engage, but that the exercise of constitutional authority touched upon the everyday lives of all people and ‘if they did not know the constitutional rhetoric they would certainly live its effects’. This turned out to be the case, with many people having an ‘almost instinctive grasp on constitutional matters and their effects’.¹²⁴ The hui were recorded and transcribed and, along with written submissions, survey findings, and discussions from smaller focus groups, formed the basis of the report’s proposals.¹²⁵ While ‘there was naturally a wide range of views expressed’, there was nevertheless broad ‘unanimity about the need for some kind of constitutional change’.¹²⁶ There was a ‘firm belief that the Westminster constitutional system as it has been implemented since 1840 does not, indeed cannot, adequately give effect to the terms of Te Tiriti’.¹²⁷

Part 1 of the report discusses the nature of constitutions, outlining the differences between ‘the Western concept and site of power’ and ‘the Māori concept and site of power’, reflecting

122 Ibid., 7.

123 Ibid., 18.

124 Ibid., 15-16.

125 Ibid., 18-19.

126 Ibid., 18.

127 Ibid., 25.

much of what has been discussed above.¹²⁸ Part 2 discusses the ‘constitutional foundations’ represented in tikanga, he Whakaputanga, te Tiriti, and other international Indigenous instruments, again reflecting much of what has been discussed in the preceding parts of this paper, albeit in greater detail and engaging more closely with the Waitangi Tribunal’s 2014 report on te Tiriti and he Whakaputanga.¹²⁹ Much emphasis in the hui was on values, and the need for constitutional values to be clear before a constitutional model is developed.¹³⁰ Part 3 explores the constitutional values that were identified in the hui as important, all sourced in the central principle of whanaungatanga.¹³¹ These values are *tikanga*, in terms of whakapapa values as well as Māori law; *community*, in terms of positive human relationships; *belonging*, of all peoples of this land; *place*, in terms of the protection of the environment; *balance*, between rangatiratanga and kāwanatanga; *conciliation*, in terms of conciliatory and consensual, rather than adversarial and majoritarian, democracy; and *structure*, or the need for a constitution to structurally promote ‘basic democratic ideals of fair representation, openness, and transparency’.¹³² We can see parallels with Palmer and Butler’s vision here, although these values are derived from a different, Māori legal history and philosophy.

Part 4 consolidates the findings of the previous three sections in six ‘indicative constitutional models’ that suggest the range of possibilities ‘available for those who really want a good faith honouring of Te Tiriti’, in which Crown kāwanatanga does not sit above rangatiratanga, but is constitutionally recon-

128 Ibid., 30-38.

129 Ibid., 39-67.

130 Ibid., 23.

131 Ibid., 69.

132 Ibid., 68-93.

ceptualised to sit alongside it.¹³³ These models each draw on the language of different ‘spheres of influence’ in the Waitangi Tribunal’s 2014 report—the kāwanatanga sphere of the Crown in parliament, the rangatiratanga sphere of Māori authority, and a relational sphere for joint deliberation—envisaging the relationships between these spheres in different ways, broadly rather than in detail, but always with equal recognition of the respective authority of kāwanatanga and rangatiratanga that te Tiriti was meant to ensure.¹³⁴

It was not the intention of the Working Group to come up with a definitive draft constitution.¹³⁵ Rather, the report is the result of the first stage of an intentionally long process of engagement and planning, which will include wider engagement with the public and the Crown; the goal for some form of constitutional transformation is 2040, symbolically chosen as the 200-year anniversary of te Tiriti.¹³⁶ The report, therefore, again like Palmer and Butler’s book, is preliminary in nature.

Irreconcilable differences or disingenuous democracy?

Matike Mai notes that a proposal for constitutional change must address questions about the grounds for change, how change would be implemented, and how it would benefit the country.¹³⁷ This is part of their reason for going about this work slowly and methodically. However, they recognise a certain irony in this; given our colonial history, it seems more urgent for the Crown to justify *its* constitutional regime than those promoting a Tiriti-

133 Ibid., 104, 112.

134 Ibid., 104-111.

135 Ibid., 14.

136 Ibid., 11.

137 Ibid., 100.

based constitution.¹³⁸ As Moana Jackson notes, there is a kind of ‘verbal gymnastics’ involved in asserting that a constitutional regime has democratic legitimacy when it was forced on a people non-consensually: ‘the imposition of the Westminster system denied the will of those being dispossessed except on its own terms’.¹³⁹ The limited recognition of the Treaty by the Crown in settlements and management rights, or even in constitutional entrenchment in Palmer and Butler’s vision, might be ‘progressive’ in terms of the colonial legal framework, but ‘it seems counter-productive and somewhat circular to measure whether our current constitutional arrangements give appropriate effect to the Treaty by the yardstick’ of those constitutional arrangements.¹⁴⁰ The continued interpretation and enforcement of an agreement formed between two peoples with two different legal systems, according to only one party’s intellectual tradition with general disregard for the other, is a perversion of the agreement. It is not Treaty justice.

Matike Mai acknowledges that, given the pervasiveness of our current orthodoxy, some Pākehā would dismiss the project as ‘unrealistic’.¹⁴¹ However, ‘what some might see as “unrealistic” discourse’ was rather, in their hui, ‘an expression of a deeply-held understanding about what was promised in Te Tiriti’, ‘a reminder of how consistent Māori have been on such issues and how consistently the Crown has ignored them’.¹⁴² As discussed earlier, what is perceivable as realistic or unrealistic, possible

138 Ibid.; Carwyn Jones, ‘Tāwhaki and Te Tiriti: A Principled Approach to the Constitutional Future of the Treaty of Waitangi,’ *New Zealand Universities Law Review* 25 (2013): 710.

139 Moana Jackson, ‘How about a politics that imagines the impossible?’ *E-Tangata*, September 24 2017, <https://e-tangata.co.nz/news/how-about-a-politics-that-imagines-the-impossible>.

140 Jones, ‘Tāwhaki and Te Tiriti,’ 706.

141 Matike Mai, *He Whakaaro Here Whakaumu Mō Aotearoa*, 16.

142 Ibid., 22.

or impossible, is not innate but constructed, and is a function of power through the distribution of the sensible. Given the long history of Māori dissensus, and political, legal, and constitutional scholarship, the current constitutional orthodoxy's claims to neutrality and immutability, and about possibility and reality, are frankly untenable, disingenuous, and arrogant. The accusation that something is unrealistic is nothing more than an unwillingness to change; our constitutional arrangements are constructed, and they are quite capable of being reconstructed.

We should recall Mehta's words quoted earlier: a colonial order is a constitution of *being*. Law derives from the philosophy of a culture, from its perspectives on ontology, epistemology, cosmology, and ethics. Māori constitutional aspirations are not simply about a greater share of political power, as the orthodox view would have it. They are about self-determination, tino rangatiratanga, the ability of tangata whenua to have control over their own existence and *being*.¹⁴³ The colonial legal system inherently limits this ability, because its rules are based on a different philosophy and ontology—as evidenced here, and also, for example, in Māori efforts to implement change more conducive to tikanga in areas such as resource management, family, and criminal law.¹⁴⁴ That is ultimately the justice at stake in the tino-rangatiratanga struggle. Substantive biculturalism is not possible in a monocultural framework, but it is possible for these different life-worlds to co-exist in a more ontologically neutral space, one where colonial domination is recognised and undermined, and where te ao Māori is seen on its own terms, not through the lens of coloniality. It is time for Pākehā constitutional orthodoxy to

143 See Bell, 'Co-existing Indigenous and Settler Worlds: Ontological Styles and Possibilities'.

144 See Williams, 'Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law.'

recognise its deep biases and tendency for self-affirmation, and instead make a genuine effort to meet tangata whenua in the middle.

Conclusion

In comparing Palmer and Butler's *A Constitution for Aotearoa New Zealand* and Matike Mai's *He Whakaaro Here Whakaumu Mō Aotearoa*, I have sought to displace the claims of colonial orthodox constitutionalism to neutrality, universality, and fairness, showing rather that its cultural biases run so deep that they are often imperceptible. This is how insidious the current distribution of the sensible is. I consider Palmer and Butler to be locked into narrow and uncreative constitutional thinking, which continues to misunderstand Māori constitutional aspirations because it frames these within its own legal-cultural perspective, not on their own terms. Meanwhile, tangata whenua have continued to challenge this distribution of the sensible and seek the constitutional arrangements envisaged by te Tiriti; as Matike Mai points out, the 'failure to honour that promise in word and deed remains the most egregious of all the Crown's breaches of Te Tiriti'.¹⁴⁵ What is characterised by the current distribution of the sensible as unrealistic is not a flight of fancy but a conceptually coherent and thoroughly considered vision that has never been abandoned.

As Moana Jackson notes, what is deemed legally unrealistic has always been a function of power and culture: women having the vote was considered unrealistic, same-sex marriage

145 Matike Mai, *He Whakaaro Here Whakaumu Mō Aotearoa*, 101.

was considered unrealistic.¹⁴⁶ However, while law can and has often been used to preserve the status quo, and is of course supported by enormous state power, as a human construct it is ultimately a creative institution. Even within the colonial common-law system, legal creativity has classically been used in equity and trusts, in corporate law with limited liability and corporate legal personhood, and, more recently and specifically to Aotearoa New Zealand, in the legislation affording legal personhood to Te Urewera and Waikato Te Awa. Legal creativity is how the Treaty received greater constitutional significance in the first place. The suggestion that a Tiriti-based constitution of substantive power-sharing, of some form of dual sovereignty, is unrealistic, before attempts are made to take seriously and think through this proposal, is an evasion in the context of an always adapting and contingent institution.

To critique current orthodoxy through a postcolonial praxis is not to '[throw] the legal baby out with the Treaty bathwater',¹⁴⁷ but rather a belief in the creative potential of law and an earnest endeavour to think about how we can practice democracy differently. Given the omnipresence of colonial ideology, the pervasiveness of the distribution of the sensible, this endeavour will not be easy, and it will take time. But the starting point must be unsettling the orthodoxy's claims to neutrality and universality. This will open the way for more honest dialogue and planning about what values we want reflected in our constitutional arrangements—on Tiriti, not colonial, terms, and recognising the depth of philosophical difference, but also the common ground, between the Tiriti partners.

146 Salient, 'Interview with Moana Jackson,' May 19, 2017. <http://salient.org.nz/2017/05/interview-moana-jackson/>.

147 K Upston-Hooper, 'Slaying the Leviathan: Critical Jurisprudence and the Treaty of Waitangi', *VUWLR* 28 (1998): 696.

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