A Pluralistic Imperialism? Britain's Understanding of Sovereignty at the Signing of the Treaty of Waitangi

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Compared to the Māori text of the Treaty of Waitangi, little attention has been given to what Britain understood by the sovereignty that it obtained in art 1 of the English text. This sovereignty has generally been presumed to denote a paramount, full and undivided authority that gave the Crown ultimate legislative power. Customary Māori authority and law is thus presumed to have been abrogated. However, this article suggests that the Colonial Office understood sovereignty in light of three centuries of British imperial practice in which British sovereignty was largely compatible with persisting indigenous political and legal authority. Although this type of sovereignty had begun to be supplanted by a more rigid and absolute formulation by the mid-19th century, I argue that the Colonial Office adhered to this older, pluralistic model of sovereignty in New Zealand at the time of the signing of the Treaty.

I INTRODUCTION

This article is concerned with the nature of the sovereignty that the British Crown believed it was acquiring in 1840 through the Treaty of Waitangi.[1] The past 40 years has seen an efflorescence of scholarship about how the Māori rangatira who signed the Treaty understood sovereignty — and rightly so, in light of previous academic neglect of this issue. But there has been comparatively little analysis of what the British (both the Government in London and its emissary in New Zealand, William Hobson) understood it to mean. The Waitangi Tribunal recently described this sovereignty as an absolute and undivided "power to make and enforce law".[2] This is what most scholars suggest Britain thought it was acquiring in art 1 of the Treaty.

However, this traditional line of scholarly and judicial thought treats the British conception of sovereignty as monolithic and unproblematic. The

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1 The text of the Treaty can be found in sch 1 of the Treaty of Waitangi Act 1975.

2 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) at 9.

lack of scrutiny applied to this characterisation prompts the question: did the British in fact seek sovereignty in the sense considered by the Tribunal and most scholars? Could the British in 1840 have meant something different by sovereignty than the definition suggested by the Tribunal? This question has been largely unexplored except by Ned Fletcher and Paul Moon, both of whom argue that the British were in fact treating for a more limited form of sovereignty than is generally believed.

This article explores the clash between the orthodox historiographical view and the small but significant contrary historiography. I begin by analysing British understandings of sovereignty at 1840, as articulated through the orthodox Treaty narrative. Specifically, the focus is upon the most recent exposition of this narrative, the Waitangi Tribunal's *He Whakaputanga me Te Tiriti: The Declaration and the Treaty* (*Te Paparahi o Te Raki Report*). To contextualise the development of Britain's policy on New Zealand, I survey the nature of Britain's sovereignty over its various imperial possessions from the 16th to 19th centuries. These often included a degree of legal and political pluralism. Next, the article addresses the emergence, from the end of the 18th century, of the "new" conception of sovereignty as absolute and undivided authority, intolerant of pluralism. Finally, I turn to the central issue: what British officials understood by sovereignty when Britain formally intervened in New Zealand in the late 1830s. I argue that Colonial Office documentation, as well as the Treaty itself, demonstrates a continued adherence to the older, pluralistic model of sovereignty.

II THE ORTHODOX TREATY NARRATIVE

The 1970s saw a marked change in scholarship on the Treaty, characterised primarily by a shift of focus from the English to the Māori text. This shift, generally pinpointed at 1972, generated a large body of academic work seeking to understand what Māori understood by the Treaty's terms in 1840, as well as how the Māori text differed from the English. Historian Ruth Ross' article, *Te Tiriti o Waitangi: Texts and Translations*, was instrumental in establishing this new focus.[3] Her emphasis on the Māori text as the starting point for understanding the Treaty has become "a broadly accepted academic view".[4]

The *Te Paparahi o Te Raki Report* drew heavily upon the historiographical tradition stemming from Ross's work.[5] The Waitangi Tribunal gave primacy to the Māori text of the Treaty when it analysed Māori understandings of the Treaty at 1840. It considered that:[6]

3 RM Ross "Te Tiriti o Waitangi: Texts and Translations" (1972) 6 New Zealand Journal of History 129. The article's transformative importance to Treaty historiography is noted in Rachael Bell "'Texts and Translations': Ruth Ross and the Treaty of Waitangi" (2009) 43 New Zealand Journal of History 39 at 39.

4 Bell, above n 3, at 44.

5 Waitangi Tribunal, above n 2.

6 At 523.

> ... the rangatira understood kāwanatanga primarily as the power to control settlers and thereby keep the peace and protect Māori interests accordingly; that rangatira would retain their independence and authority as rangatira, and would be the Governor's equal; that land transactions would be regulated in some way. ... [F]ew if any rangatira would have envisaged the Governor having authority to intervene in internal Māori affairs – though many would have realised that where the populations intermingled questions of relative authority would need to be negotiated on a case-by-case basis, as was typical for rangatira-to-rangatira relationships.

From this, the Tribunal concluded that Māori had not ceded sovereignty to the Crown.[7] In the Tribunal's eyes, the Māori signatories' understanding of the Treaty's terms — particularly their understanding that the Governor would have equal power to, and a different sphere of influence from, themselves — constituted the meaning and effect of the Treaty at that time.[8] The Tribunal, as well as scholars from Ross onwards, have tended to infer from linguistic discrepancies between the Māori and English texts a degree of deception or obfuscation on the part of the Treaty's framers and translators.[9]

Post-1972 Treaty scholarship has had relatively little to say about what the British intended the Treaty to mean. The general consensus is that the Crown sought full and undivided sovereignty in 1840 even though it may not have contemplated that a few years earlier.[10] Although scholars have vigorously analysed Māori understandings of sovereignty, the same energies have not been applied to understanding British conceptions of sovereignty at 1840.

This holds true for the *Te Paparahi o Te Raki Report*, although that is not to say that the Tribunal was negligent or unbalanced in its inquiry. Rather, the *Report* reflects the Crown's submission to the Tribunal that at 1840 the Crown understood sovereignty based on a definition by Sir William Blackstone.[11] In particular, the Crown adopted Blackstone's definition of sovereign power as "the making of laws".[12] When this concept was applied to the New Zealand situation, the Crown submitted that the paramount and absolute nature of the Queen-in-Parliament's legislative power meant that a dual sovereignty could not have been intended.[13] Thus Māori rangatira

7 At 526–527.

8 At 526–527.

9 See Ross, above n 3, at 141; Claudia Orange *An Illustrated History of the Treaty of Waitangi* (Bridget Williams Books, Wellington, 2004) at 24 and 41; Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (revised ed, Penguin Books, Auckland, 2004) at 92 and 96; and Waitangi Tribunal, above n 2, at 514–515 and 526.

10 See, for example, Orange, 9, at 18–19; and Keith Sinclair *A History of New Zealand* (5th ed, Penguin Books, Auckland, 2000) at 67–69.

11 Waitangi Tribunal, above n 2, at 8. See also David Williams "He Whakaputanga me te Tiriti: the Declaration and the Treaty" (2014) November Maori LR 26.

12 Waitangi Tribunal, above n 2, at 9.

13 Crown Law "Closing Submissions of the Crown" (8 February 2011) at 99–100. These are the submissions made to the Waitangi Tribunal in Wai 1040. They are accessible online in the Waitangi Tribunal's searchable database: see Waitangi Tribunal "Waitangi Tribunal Inquiries" <forms.justice.govt.nz>.

would exercise the rangatiratanga guaranteed to them in art 2 of the Treaty "within the rubric of an overarching national Crown sovereignty".[14] The Tribunal accepted this Blackstonean definition of sovereignty — "the power to make and enforce law" — as its own and then inquired whether rangatira ceded this power to the Crown through the Treaty.[15]

The Crown also conceded that the Treaty texts did not decisively resolve the status of Māori law and custom under British sovereignty.[16] But it argued that:[17]

> ... rangatira understood that their chieftainship over their people and their lands was to continue, but that the new Governor would have an over-arching authority over all people and places within New Zealand to make law for peace and good order, including for the protection of mana Māori.

As to the tino rangatiratanga guaranteed to the rangatira in art 2, the Crown certainly did not view this as an unqualified power. Rather, it suggested it was an exercise of a chiefly authority that allowed the self-management of Māori communities under the aegis of Crown sovereignty.[18] Its exercise was limited to whenua, kāinga and taonga katoa and was subject to British law under art 3, as well as to the Crown's overarching kāwanatanga.[19] According to the Crown in 2011, the Crown in 1840 might have intended to tolerate some form of subordinate chiefly authority but this did not amount to the sort of pluralism in law and governance seen in other British colonies at the time. Britain was to have absolute and undivided sovereignty and its law was to apply to Pākehā and Māori alike.

To evaluate whether this is an accurate characterisation of Britain's intentions in New Zealand, this article now turns to the question of how sovereignty and its relationship with native authority had been understood in Britain's other imperial possessions before 1840.

III CONCEPTIONS OF SOVEREIGNTY IN THE ANGLOPHONE IMPERIAL WORLD UNTIL THE MID-19TH CENTURY

At the outset, it is necessary to note that sovereignty, both as an intellectual and a legal concept in Britain's world of empire, was not fixed before the mid-19th century. It was not merely that its meaning was contested; the very notion that it needed to be authoritatively defined was lacking. Paul McHugh contends that law in "pre-modern" times was not "a corpus of doctrine

14 Crown Law, above n 13, at [282].
15 Waitangi Tribunal, above n 2, at 9.
16 Crown Law, above n 13, at 97.
17 At [479].
18 At 135–136.
19 At 143–145.

located in statute, royal instrumentation, and case-law".[20] The idea that law emanates unambiguously from these formal instruments, expressing the sovereign's "will" is, he says, presentist and anachronistically positivistic.[21] Nor was pre-modern law viewed as a rigidly defined field separate from religion, society and culture. Rather, it was "enmeshed" with these other facets into one "providential order": law was "not an externally imposed set of rules so much as inscribed in the everyday".[22] McHugh argues that this fluid, culturally embedded and customary conception of law accompanied Britain and its settlers in their colonial endeavours, resulting in legal practice developing differently between colonies.[23]

The informal conception of law in the pre-modern period meant that legal principles and powers were debated and contested largely by legal amateurs. This was especially so in colonies where legal professionals were scarce. A vigorous public discourse about law and politics led British settler colonies to contain not one authoritative corpus of law but rather "many legalities".[24] Mark Hickford echoes McHugh's argument, stating that the mid-19th century British empire was, legally speaking, "a messily contingent, occasionally haphazard empire of variations".[25] Thus a concept like sovereignty, with implications for native law and governance, was not rigidly codified but rather fluid and contested throughout the empire.[26]

However, before the positivisation of the law, metropolitan and colonial officials nevertheless shaped and implemented a relatively coherent and consistent notion of sovereignty. A survey of imperial and, to a lesser extent, colonial practice illuminates many of the recurring features of sovereignty practiced around the British empire. Consistent with the then-view that law was derived from customary behaviour rather than legal instruments, imperial practice in the empire's early years provides a better guide than statutes and judicial decisions to how officials conceptualised sovereignty.[27] This part seeks to identify some of these practices, which remained — to varying extents — part of the intellectual and political milieu in which the Treaty was formulated.

Sovereignty's Medieval Origins

British notions of sovereignty at the beginning of the imperial age had their roots in medieval law and practice. In medieval times, sovereignty was not a power asserted over all those within a territory. Rather, it denoted a personal,

20 PG McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, Oxford, 2004) at 23 and 29.

21 At 23 and 29–35.

22 At 30, 34 and 36.

23 At 43.

24 At 33.

25 Mark Hickford *Lords of The Land: Indigenous Property Rights and The Jurisprudence of Empire* (Oxford University Press, Oxford, 2011) at 5. Hickford's book is largely concerned with mid-19th century conceptions of indigenous property rights. However, his depiction of the British empire as one of intense regional variation in legal concepts can be usefully applied to colonial conceptions of sovereignty and native polities.

26 At 35.

27 McHugh, above n 20, at 65.

feudal bond between the monarch and the monarch's subjects.[28] And, as McHugh notes, this bond "required obedience to one's sovereign wherever one ventured. It travelled with the individual beyond the realm".[29]

The jurisdictional, rather than territorial, focus of sovereignty meant that Britain's earliest imperial interactions with other peoples and states were concerned not with controlling foreign populations or territory but with "defining the position of British people in foreign territory".[30] This was often achieved through the promulgation of royal charters. From the late 16th century in the Ottoman Empire, for example, the British Crown granted charters to a company of merchants known as the Levant Company, licensing it to wield legislative power over all English traders in the Levant.[31] This power, while attaching to a particular geographic area, was not a claim to territorial authority; its reach was strictly personal.

India

The Mughal authorities' award of trading privileges to Britain allowed the Crown to grant the first royal charter in India to the East Indian Company in 1600.[32] British traders in India limited themselves to the coastal forts and factory towns where the Company regulated the affairs of British traders and applied English law to British subjects. This personal jurisdiction was firmly within the ambit of the Mughal grants and did not suppose any degree of territorial sovereignty.[33] However, letters patent of 1726 extended the Company's authority to all people, British or otherwise, residing in the "Presidency Towns" of Bombay, Madras and Calcutta (formerly factory towns).[34] This seemed to imply a new territorial authority, a novel step in the subcontinent.

Yet, as McHugh argues, actual British practice from 1726 until the end of the century did not evince British desire to hold such sovereignty.[35] British courts that had applied local laws to Indian residents of the factory towns and their surrounds continued to operate without interruption by the letters patent.[36] Indeed, further letters patent in 1753 "declared the applicability of Muslim and Hindu law to the native inhabitants of the Presidency Towns".[37]

By the early 19th century, a dual system of courts was in place. English law applied to all British subjects and Company servants in the Presidencies, and to all inhabitants of the Presidency Towns. Outside the Presidency Towns, British judges in Company-administered courts applied Muslim criminal law, while both British and Indian judges applied Muslim

28 At 68–69.
29 At 69.
30 At 68.
31 At 74.
32 At 76.
33 At 76.
34 At 77.
35 At 77.
36 At 77.
37 At 77 (footnotes omitted).

and Hindu law in civil matters between people of those denominations.[38] This patchwork of often hybrid jurisdictions illustrates that legal pluralism was seen as compatible with early British rule. Indian authority existed underneath a thin skin of British sovereignty; as McHugh notes, "it seemed as though the two sovereignties were co-existing, the British right supervening but accommodating the native".[39]

North America

Britain's imperial ventures in North America were characterised by a similarly nebulous approach to the issues of territory, sovereignty and jurisdiction. At the same time, there were several important differences because America experienced an influx of British settlers that India did not. Whereas in India the British sought to "govern through indigenous hierarchies in order to extract commodities", North America was marked for larger-scale settlement, thus requiring a different legal approach.[40]

Over time, Britain's North American colonies began to regulate their interactions with their Native American cohabitants. Treaties with tribes from the Northeast to the Great Lakes took the form of the "Covenant Chain", a customary Native American tool for forming alliances between their nations.[41] These agreements were generally viewed as nation-to-nation compacts rather than treaties of submission.[42] Thus, while such agreements "may have extended crown protection over aboriginal nations", from the Native Americans' perspective, "they remained 'independent and sovereign'".[43] Although British and colonial thought on this matter was neither uniform nor entirely coherent, it appears that at least some officials "understood that the Covenant Chain did not establish British sovereignty over Indians".[44]

All in all, it is not clear whether Native American nations were seen as independent nations, tributary dependencies, dependent states subject to Crown sovereignty or something in between. Nevertheless, colonial officials "recognized the viability and continuance of the customary political forms", including the legitimacy of regulating disputes between Native Americans according to native law.[45] In many colonies, colonial law applied to criminal acts committed against Native Americans by settlers; conversely, native jurisdiction was often affirmed where Native Americans offended against

38 Ned Fletcher "A Praiseworthy Device for Amusing and Pacifying Savages? What the Framers Meant by the English Text of the Treaty of Waitangi" (Doctor of Philosophy in Law Thesis, University of Auckland, 2014) at 281–282.

39 McHugh, above n 20, at 81.

40 Lisa Ford *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Harvard University Press, Cambridge (Mass), 2010) at 6.

41 Fletcher, above n 38, at 218–219.

42 PG McHugh *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, Oxford, 2011) at 18.

43 Mark D Walters "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after *Marshall*" (2001) 24 Dalhousie LJ 75 at 82 (footnotes omitted).

44 Fletcher, above n 38, at 221.

45 McHugh, above n 20, at 103–106.

settlers, with the offender's nation collectively liable to pay compensation.[46] But colonial statutes were largely silent on offences committed between Native Americans. According to Walter, this "suggests that native jurisdiction and customs relating to internal native disputes were also implicitly recognized".[47]

The Rest of the Empire

The status of aboriginal law and government in other parts of Britain's burgeoning empire suggested similar conceptions of sovereignty that accommodated varying degrees of legal and political pluralism.

In British Canada, until at least the mid-1820s, colonial and imperial officials "treated [Aboriginal peoples] as allies rather than British subjects despite Britain's assertion of complete territorial sovereignty".[48] Thus, despite the introduction of colonial courts, "[Aboriginal] internal affairs were not the concern of colonial government and law" and native law and custom remained valid and intact outside areas of colonial settlement.[49] In the criminal law, prosecutions of Aboriginal people committing crimes against settlers were rare until the second half of the 19th century; the first criminal prosecution involving both an Aboriginal perpetrator and victim did not occur until 1822.[50] The practice of colonial courts appeared to be that Aboriginal people were only subject to colonial law where they committed offences within areas of colonial settlement under British sovereignty and, possibly, on Aboriginal land close to such areas.[51]

Australia departed from this general trend because, unlike in India and North America, the British never recognised that Aboriginal Australians possessed sovereignty or valid legal systems.[52] However, from the founding of the colony of New South Wales in 1788 until the second quarter of the 19th century, it was generally thought that "Aboriginal Blacks were not amenable to British law, excepting when the aggression was made on a white man".[53] The corollary was, of course, that British and colonial officials believed "British sovereignty did not establish British jurisdiction over territory and everyone in it".[54] And questions continued to be raised as to whether colonial jurisdiction ought to be limited to crimes that were either mala in se or committed within areas of European settlement.[55]

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46 Mark D Walters "Mohegan Indians v Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33 Osgoode Hall LJ 785 at 800–801.
47 At 801.
48 Fletcher, above n 38, at 236.
49 At 228–232 and 236.
50 At 232.
51 Fletcher, above n 38, at 234–235.
52 Ford, above n 40, at 7–8.
53 *R v Murrell and Bummaree* [1836] NSWSupC 35 (SC) as cited in Fletcher, above n 38, at 246.
54 Ford, above n 40, at 31.
55 Fletcher, above n 38, at 248–252.

IV THE TERRITORIAL TURN: THE CHANGE IN CONCEPTIONS OF SOVEREIGNTY IN THE ANGLOPHONE SETTLER-STATES

We have seen that early British notions of sovereignty were largely compatible with legal and governmental pluralism. But the pluralistic order that characterised the imperial world before the 19th century was soon superseded by an order where settler-states wielded an absolute, undivided sovereignty. This marked change was due to a widely acknowledged transition in the Anglophone settler-states' conceptions of sovereignty throughout the late 18th and 19th centuries. No longer were colonial administrations concerned merely with exercising jurisdiction over their own subjects. Nor were they content to leave the precise limits of their sovereignty undefined.

Instead, sovereignty came to be equated with absolute authority in law and governance over a defined territory.[56] This new, absolutist form of sovereignty, which Lisa Ford calls "perfect settler sovereignty", conflated "sovereignty, territory, and jurisdiction".[57] This new notion of sovereignty could not easily accommodate the continuance of indigenous authority and law, which began to be supplanted by that of the coloniser.[58] The trend can be seen partially in the increased assertion of colonial criminal jurisdiction over indigenous peoples described in the preceding part. Indeed, Ford argues that the exercise of criminal jurisdiction over offences between indigenous people was central to the process of asserting this stronger form of sovereignty.[59] It also manifested in Anglophone settler-states' growing intolerance of persisting indigenous authorities and institutions. With the exception of America, where the Supreme Court affirmed residual tribal sovereignty,[60] officials in most states with indigenous populations began to disavow any notion of a "distinct status" for indigenous polities.[61]

The causes of this shift in the boundaries of sovereignty were many and varied. Scholars have tended to group them into two distinct yet necessarily overlapping classes: economic and political drivers, and intellectual and legal developments. Most consider the foremost drivers of this doctrinal shift to be the huge growth of the settler-state in the early to mid-19th century and the concomitant awakening of a sense of national sovereignty in those states. As McHugh argues, the creation of a singular and unified nation necessarily excluded the possibility of plural authorities:[62]

> As its own sense of sovereign identity surged in the settler communities' minds and doctrine ... there also receded any

56 See McHugh, above n 20, at 67. McHugh places this shift as "emerging in the late eighteenth and in place by the mid-nineteenth century".
57 Ford, above n 40, at 2.
58 McHugh, above n 20, at 109.
59 Ford, above n 40, at 208.
60 *Worcester v Georgia* 31 US 515 (1832).
61 McHugh, above n 20, at 150.
62 At 18.

> willingness to regard tribes as distinct polities with a jurisdictional compass of their own.

Furthermore, by the middle of the 19th century, legislative competence had been transferred from London to colonial legislatures. These legislatures pursued aggressively assimilationist policies towards indigenous peoples: much more so than the imperial authorities.[63] Indeed, the British authorities permitted indigenous authority to continue, at least in their non-settler colonies, well after the governments of most settler-states had abandoned such a policy. In mid-19th century India, for example, the Crown continued to recognise the nominal sovereign status of local potentates under its own sovereignty even though it, and the East Indian Company prior to 1857, began to acquire greater territory through annexation.[64] By the end of the 19th century, Britain adhered to a policy of recognising the sovereigns of the Indian princely states as rulers in a sovereign-to-sovereign relationship with the Crown.[65]

But colonial governments continued to dismantle pluralistic colonial polities. This trend was not merely a corollary of economic growth or nascent nationalism. It also had roots in new currents of political thought concerning statehood and sovereignty. During the 19th century, the contours of sovereignty became more clearly and precisely defined as lawyers, theorists and officials "packaged the notion of sovereignty into a doctrinal and positivized form".[66] Particularly influential was the work of John Austin, who drew on the Hobbesian affirmation of absolute sovereign power to argue for an "especially unaccommodating and inflexible" notion of sovereignty.[67] Austin viewed tribal societies as comprising small groups that did not obey an overarching superior and as possessing customary law that was not enforced by the sanctions of the sovereign.[68] While in practice imperial and colonial officials clearly saw greater sophistication in indigenous peoples' systems of governance and law, Austin's views dovetailed with settler polities' growing belief in the necessity of a unitary sovereign and the impossibility of continued indigenous authority.[69]

Of course, these were only some of the factors that contributed — with varying impact — to the gradual shift in colonial understandings of sovereignty. And it certainly was a gradual shift. Despite Ford's assertion that there was a "moment of settler sovereignty",[70] new ideas about sovereignty diffused at different rates through the empire, meeting with

63 At 126–127.
64 At 84.
65 At 84.
66 At 149.
67 At 133–134. See John Austin *The Province of Jurisprudence Determined* (John Murray, London, 1832).
68 See McHugh, above n 20, at 151.
69 At 150–151.
70 Ford, above n 40, at 2.

varying levels of acceptance.[71] As discussed in the previous part, the notion that aboriginal peoples lacked independent law and government was not met with unanimous support.

Ongoing dissent illustrates that the interaction between colonial and indigenous authority was complex. It certainly could not be changed or crystallised by the mere stroke of a pen. However, it is undeniable that by the end of the 19th century "settler-state[s] claimed not only the titular sovereignty but also a very real physical domination over the indigenous peoples".[72] The settler-states were monolithic and absolute in their sovereignty, treating indigenous populations as subjects rather than as special groups permitted some form of self-governance.

The question this article now turns to is whether British officials in 1840 intended New Zealand to come under "perfect settler sovereignty" or whether they still countenanced the existence of a pluralistic legal and governmental order.

V WHAT SORT OF SOVEREIGNTY DID BRITAIN SEEK TO ACQUIRE IN NEW ZEALAND?

Britain's acquisition of sovereignty over New Zealand must be understood in light of the three centuries of imperial practice discussed above. This part analyses what the Colonial Office, the primary institutional force behind the Treaty's creation, meant by the "sovereignty" that Britain would acquire.

This article consider the plans proposed for intervening in New Zealand when it became clear in 1837 that some form of action would be required to bring order to the Māori–Pākehā frontier. These proposals are important in two ways. First, they all to some extent influenced the formation of Colonial Office policy — or at the very least invigorated the deliberation process.[73] Secondly, they exhibit a wide range of views about what sovereignty might entail and whether local customs and institutions could endure once sovereignty was transferred to the Crown. The diversity in these proposals indicates that, at and immediately before 1840, the Blackstonean conception of sovereignty in Britain's empire was far from monolithic or predominant; tolerance of pluralism persisted in official and non-official thinking.

This article then turns to how the Colonial Office thought about the acquisition of sovereignty in New Zealand up until and including 1840. It suggests that throughout the late 1830s, the Colonial Office understood that any acquisition of sovereignty would involve controlling and regulating

71 See Hickford, above n 25, at 4. Hickford describes this uneven diffusion of ideas throughout the empire's networks through differing concepts of native title. See also Stuart Banner *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Harvard University Press, Cambridge (Mass), 2007) at 1–3.

72 McHugh, above n 20, at 119.

73 Peter Adams *Fatal Necessity: British Intervention in New Zealand 1830-1847* (Auckland University Press, Auckland, 1977) at 89 and 102.

British subjects whilst allowing Māori laws and institutions to, by and large, persist. Finally, this article considers how this view was manifested in the text of the Treaty of Waitangi.

Differing Opinions on New Zealand Intervention

James Busby, appointed the first British Resident in New Zealand in 1832, was one of the first proponents of British intervention in New Zealand. Towards the end of the 1830s, his missives back to London and Sydney began to emphasise (and embellish) the lawlessness on the Māori–Pākehā frontier and the incapacity of the Confederation of the United Tribes — a formal body of northern rangatira constituted in 1835 — to govern effectively.[74] Busby suggested a novel model for governing New Zealand:[75]

> ... I submit for the consideration of H.M. Govt whether the Islands of New Zealand might not be received under the protection of H.M. on the same principle as that upon which the Ionian Islands are constituted an Independent State, in all things which pertain to the real advantage of the Inhabitants, in giving them such a share in the Govt of the Country as is consistent with its welfare, but reserving the ultimate authority for that power which affords that protection its weakness requires.

This model was the same as what would later be termed a protectorate.[76] New Zealand, as a nation of the Confederation of the United Tribes, would be a "Nation in its minority", administered in trust by Britain, with rangatira collectively enacting laws determined by the British Government to be advantageous to the country.[77] Busby believed this would replicate the arrangements in some of Britain's Indian possessions,[78] and in the Ionian Islands, which had become a protectorate under Britain pursuant to the Treaty of Paris created at the conclusion of the Napoleonic Wars.[79] Like those examples, this arrangement would allow Britain to assert her imperial power whilst assuming an authority short of full and undivided sovereignty. However, this scheme, like many of Busby's ideas, found little favour in Sydney or London.[80]

Yet the Colonial Office showed considerable interest in another model, one that naval captain William Hobson conceived. Hobson proposed establishing British "trading factories" in particular sites around New Zealand's coast where British settlement was concentrated, such as the Bay

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74 See Fletcher, above n 38, at 486 and 513.

75 Letter from James Busby to Colonial Secretary (NSW) (26 January 1836) as cited in Fletcher, above n 38, at 515.

76 Adams, above n 73, at 89.

77 Letter from James Busby to Colonial Secretary (NSW) (31 October 1835) as cited in Fletcher, above n 38, at 505.

78 Letter from James Busby to Colonial Secretary (NSW) (16 June 1837) as cited in Fletcher, above n 38, at 532.

79 George C Brodrick and JK Fotheringham *The History of England: From Addington's Administration to the Close of William IV's Reign (1801-1837)* (Longmans, Green and Co, London, 1911) at 167.

80 Adams, above n 73, at 108.

of Islands and the Hokianga. This was a similar model to Britain's Indian factories.[81] Such an arrangement would more satisfactorily protect the lives and property of Māori and respectable British subjects alike.[82] Hobson envisaged a treaty under which Māori would recognise these factories, which would not necessarily be coextensive with British landholdings, but in which the land should nevertheless be purchased from its Māori owners.[83] An Act would be necessary to give the New South Wales courts jurisdiction over British subjects in New Zealand and to "authorise the New South Wales Legislative Council to enact laws in respect of the factories and British subjects in New Zealand".[84]

Paul Moon contends that Hobson only envisaged colonial law applying to the European inhabitants of these factories.[85] Fletcher suggests that the planned jurisdiction was personal — applying to British subjects within or "attached to" the factories — rather than territorial.[86] Hobson's plan did not specifically address the issue of sovereignty over the factory areas; Moon believes that any treaty was not to be for the cession of sovereignty but merely to confirm "Maori recognition of the factory system."[87] Adams, on the other hand, seems to think that sovereignty over the factories was intended to be ceded to Britain.[88] Furthermore, Adams suggests that sovereignty over coastal enclaves, as in India, would inevitably lead to the occupation of the interior by conquest.[89]

Contemporaneous with the development of Busby's and Hobson's plans, the debate between two influential London institutions, the New Zealand Association (later the New Zealand Company) and the Church Missionary Society (CMS), was also shaping Colonial Office policy. The New Zealand Association was a private company that sought the systematic colonisation of New Zealand. It intended to do so by purchasing land from Māori, selling it to settlers and then using the profits to fund further immigration.[90] The Association seized upon growing official concerns over the perceived lawlessness of some British subjects and the adverse consequences this was having upon Māori. Leveraging these concerns, the Association sought an Act of Parliament or a royal charter to authorise its scheme. Any treaties with Māori were to obtain both sovereignty and property rights over land that Maori did not require. It was these areas that were to provide the nucleus of British settlement. With regard to law:[91]

81 At 86.
82 See Fletcher, above n 38, at 542 and 686.
83 Sinclair, above n 10, at 58.
84 Fletcher, above n 38, at 687.
85 Paul Moon *Te Ara Kī Te Tiriti: The Path to the Treaty of Waitangi* (David Ling Publishing, Auckland, 2002) at 128–129.
86 Fletcher, above n 38, at 688.
87 Moon, above n 85, at 129.
88 Adams, above n 73, at 86–87.
89 At 86–87.
90 Sinclair, above n 10, at 61.
91 Fletcher, above n 38, at 579 (footnotes omitted).

> Europeans within the settlements would be subject to English law. British subjects who committed crimes in Maori territories would be extradited under treaties for trial in the British settlements.

However, a special criminal code might apply to Māori until they began to appreciate British notions of justice and criminal responsibility.[92]

The Association's plans were vigorously opposed by the CMS on humanitarian grounds. The CMS noted with dismay the proven disastrous effects of colonisation on indigenous populations under other imperial ventures.[93] However, by the end of 1837, the CMS accepted the need for a limited intervention in New Zealand, cognisant of both the Association's plans and the Government's resignation to intervene.

In order to minimise its deleterious effects, the CMS urged that any British intervention "should be limited to that necessary to protect Maori ... from British subjects".[94] CMS suggested that Consular Agents could be appointed with judicial authority over British subjects. Those Agents could, along with the missionaries, help the sovereign and independent chiefs to establish laws and institutions that would, they believed, ameliorate the conflict that troubled New Zealand.[95] Although the Colonial Office did not adopt this scheme either, Fletcher argues that throughout the 1830s, it largely subscribed to the same minimalist approach to intervention as the missionaries did:[96]

> [The Colonial Office] never embraced colonisation (although it was forced to deal with the reality of settlement). It regarded the justification for intervention (the disruption of Maori society by contact with Europeans unconstrained by law) as limiting the scope of intervention. It insisted on Government control of British administration in New Zealand .... It saw it as essential to provide the missionaries with space to achieve the preservation and advancement of Maori through Christianisation. And throughout, it accorded priority to Maori interests and rights, including to the sovereignty of their territories (until ceded), the property in their lands, and the preservation of their society.

The Development of Colonial Office Thinking in New Zealand

All these proposals for intervention in New Zealand helped to shape Colonial Office policy on the subject. It is generally thought that the Colonial Office resigned itself to intervening in New Zealand sometime in 1837 — with attention then turning to what form this involvement would

92 At 581.
93 Adams, above n 73, at 95.
94 Fletcher, above n 38, at 585.
95 At 585 and 598.
96 At 607.

take.[97] Most scholars accept that, for at least some of the late 1830s, the Colonial Office was reluctant to assume full sovereignty. But by 1840, it had done something of an about-turn, jettisoning the pluralistic notion of sovereignty that characterised the early empire.[98] However, such a conclusion is not supported by the official and unofficial documentation of that time. Rather, this part proposes that the Colonial Office adopted a consistent stance; that acquiring sovereignty was overwhelmingly for the control and regulation of settlers, which would not be inconsistent with continuing Māori authority and custom.[99]

In the early and mid-1830s, the Colonial Office did not seek to intervene in New Zealand beyond appointing Busby as Resident. This reluctance was due to a number of factors: concern about the costs associated with formal imperial expansion and the management of colonies; the influence of humanitarian and evangelical arguments that colonialism tended to harm indigenous peoples; and a belief that, as long as trade continued to flow on Britain's imperial fringes, formal intervention was unnecessary.[100]

Towards the end of the decade, however, events transpired that began to convince the Colonial Office to abandon this laissez-faire policy towards New Zealand. In May 1837, the New Zealand Association was formed to effect the systematic colonisation of New Zealand, provoking the debate with the CMS, described above.[101] In June, the Colonial Office received a despatch from Busby in which, alongside an outline of his plans for an Ionian Islands-style protectorate, he depicted an alarming state of affairs in the Bay of Islands; lawless Europeans, tribal warfare and Māori depopulation so extensive that "district after district has become void of its inhabitants".[102] Adams argues that Busby's missives to London, including this one, had a "critical influence on Colonial Office attitudes to New Zealand".[103] Subscribing to the narrative of fatal impact and believing in the corrupting influence of Europeans over indigenous peoples, the Colonial Office began to think it would have to take stronger, more formal action to control disorder in New Zealand.[104]

In spite of the newfound impetus to act, Colonial Office policy — during the 18 months from the end of 1837 — was not entirely cohesive. It also tended to develop sporadically. The Office had initially been dismissive of the New Zealand Association's proposal for a Bill authorising its plans to colonise New Zealand. Colonial Under-Secretary James Stephen wrote that such a proposal would "infallibly issue in the conquest and extermination of

97 James Belich *Making Peoples: A History of the New Zealanders - From Polynesian Settlement to the End of the Nineteenth Century* (Penguin Books, Auckland, 2001), at 180. See also Adams, above n 73, at 103–104; and Orange, above n 9, at 18.

98 See McHugh, above n 20, at 168.

99 See Fletcher, above n 38, at 1031; and Moon, above n 85, at 99.

100 Belich, above n 97, at 182. See also Fletcher, above n 38, at 573.

101 Adams, above n 73, at 94–95.

102 Letter from James Busby's to Colonial Secretary (NSW) (16 June 1837) as cited in Fletcher, above n 38, at 531.

103 Adams, above n 73, at 87.

104 See Orange, above n 9, at 17–18.

the present inhabitants".[105] Lord Glenelg, the Secretary of State for the Colonies, outlined his concern that the Association's plan for systematic colonisation went beyond what was necessary to rein in disorderly settlers and, more importantly, did not contemplate gaining the prior consent of Māori.[106]

This aversion to the scheme seemed to have disappeared by December 1837, when the Colonial Office announced its intention to offer a charter to the Association.[107] This reversal was likely a result of the Colonial Office being apprised of the deteriorating conditions in the Bay of Islands,[108] as well as pressure placed on Lord Glenelg to reach an agreement with the politically powerful Association.[109] Lord Glenelg believed that the situation in New Zealand now required "the establishment of some settled form of government within that territory, and in the neighbourhood of places resorted to by British Settlers".[110] Previous suggestions for appointing Consular Agents with judicial authority over British subjects were now seen as inadequate.[111] However, Lord Glenelg imposed strict conditions on any potential charter: Māori consent would be required; the area of settlement was to be "limited in extent"; the Government would reserve the right to veto appointments within the company and the colony; the Crown would have tight control over land transactions; the company would have to channel a portion of its profits from land sales to amenities to benefit Māori and settlers; and minimum capital in the company would have to be subscribed, and a certain portion paid up, before the company could exercise its authority under the charter.[112] Furthermore, the colony was to be authorised by a royal charter and not by an Act of Parliament, therefore subjecting it to stricter Colonial Office control and providing another restriction on the Association's freedom.[113] These stringent conditions ultimately proved unacceptable for the Association and it rejected the offer of a charter.[114] A further Bill it proposed to legitimate its scheme failed in Parliament and the Association collapsed in 1838.[115]

With the charter now off the table, the Government fitfully explored other options to assert control over British subjects in New Zealand. This consideration unfolded slowly during 1838 and early 1839, partly, Fletcher suggests, due to an ongoing House of Lords Select Committee inquiry into the New Zealand question.[116] The Committee heard from numerous witnesses that New Zealand was better suited to arable farming than pastoralism, was well placed to serve as a hub for the timber and flax trades

105 Letter from James Stephen to Lord Glenelg (16 June 1837) as cited in Fletcher, above n 38, at 577.
106 Lord Glenelg Memorandum (15 December 1837) as cited in Fletcher, above n 38, at 589–591.
107 Adams, above n 73, at 103.
108 At 103 and 106–107.
109 Fletcher, above n 38, at 591–592.
110 Letter from Lord Glenelg to Lord Durham (29 December 1837) as cited in Fletcher, above n 38, at 593.
111 Letter from Lord Glenelg to Lord Durham (29 December 1837) as cited in Fletcher, above n 38, at 593.
112 Fletcher, above n 38, at 593–594; and Adams, above n 73, at 110.
113 See Fletcher, above n 38, at 589. See generally Adams, above n 73, at 105.
114 See Fletcher, above n 38, at 595–596.
115 At 622–623.
116 At 633.

and could support a whaling industry.[117] These opinions were widespread in the New South Wales press,[118] and were repeated in an 1839 publication on New Zealand, which Fletcher believes Hobson would have read before departing from England.[119] Based on the putative lack of land suitable for pastoral farming, Fletcher concludes that, before 1840, the British Government anticipated "only limited British settlement ... confined to coastal enclaves".[120] Accordingly, the British expected Māori and Pākehā to remain largely separate from one another, leaving room for a pluralistic legal and political order to be implemented.[121]

Consistent with these widespread beliefs, in early 1838 the Colonial Office began to support something akin to Hobson's proposal for factories dotted along New Zealand's coast.[122] In May, the Colonial Office suggested that Britain should seek the cession of sovereignty to the factory districts, which would become dependencies of New South Wales.[123] New South Wales could also constitute courts within the factories themselves, where British subjects would be tried for offences committed within New Zealand.[124] Significantly, the plan was not seen to provide for colonisation, illustrating the Colonial Office's departure from contemplating the Association's scheme.[125] Ultimately, the Colonial Office did not enact this plan. But its initial support illustrates that, less than two years before the signing of the Treaty, Britain was in no way committed to assuming full sovereignty over New Zealand. Hobson's plan sought merely to acquire a jurisdictional power, with possibly very limited territorial sovereignty. In this way, it echoed the earlier nature of Britain's imperial possessions far more than it did the later settler-state insistence upon absolute and undivided sovereignty. While the transition between these two conceptions of sovereignty was well under way in the 1830s, the Colonial Office had clearly not abandoned its earlier theory and practice.

The Colonial Office was "somewhat passive" on the New Zealand issue for the remainder of 1838,[126] as it dealt with other imperial problems and awaited an appropriate scheme for New Zealand to materialise.[127] Finally, in December 1838, Lord Glenelg announced his intention to appoint a Consul to New Zealand, a post that would be filled by Hobson.[128] In order to ameliorate the damage caused by the "unauthorized British Colony" and to protect Māori from the depredations of wayward settlers, the Consul:[129]

117 At 611–612, n 208.
118 At 705–706, n 126.
119 At 712.
120 At 216 and 1032.
121 At 216 and 1032.
122 See Adams, above n 73, at 123.
123 At 123.
124 Fletcher, above n 38, at 634.
125 At 634; and Adams, above n 73, at 119.
126 Waitangi Tribunal, above n 2, at 307.
127 See Fletcher, above n 38, at 636.
128 At 636; and Waitangi Tribunal, above n 2, at 307.
129 James Stephen Memorandum (21 January 1839) as cited in Fletcher, above n 38, at 641–643.

> ... should be authorized to acquire from the Chiefs, a Cession of fair terms, of the Sovereignty of such parts of New Zealand as may be best adapted for the proposed Colony.

This plan, in its intention to acquire sovereignty over certain areas of British settlement, seemed to co-opt a large aspect of Hobson's factory scheme.[130] In the new scheme, the Consul would become Governor of the new colony, with the power to establish courts and pass legislation.[131] However, unlike the factory scheme, the Colonial Office's new plan contemplated the establishment of a colony.[132] Stephen, noting that 2,000 British subjects already resided in New Zealand, believed that the only remedy was "a Colony placed under the authority of Law".[133]

In January 1839, Stephen drafted the first set of Instructions for Hobson on behalf of Lord Glenelg. The Instructions reiterated the need for "the formation of a Colony in which lawful authority may be exercised for the protection of the Natives and the benefit of the Settlers themselves".[134] The draft outlined the type and extent of sovereignty that Britain would acquire from such a scheme. Hobson was to treat for the cession "in full sovereignty" of:[135]

> ... some few Districts, especially at the Bay of Islands, and at any other places to which British Shipping usually resorts, or where the Settlements of HM's Subjects have been actually formed.

Stephen disavowed an intention to obtain the cession of "absolute Sovereignty of the whole of [the] New Zealand Islands".[136] So, although this sovereignty was described as "full", it was to be spatially limited. In this respect, it was similar to Hobson's plan for coastal factories. It also appears consistent with a feeling in the Colonial Office that British activity in New Zealand would be largely coastal-based.

The sovereignty acquired was to include a legal jurisdiction, which would need to extend to crimes committed beyond the boundaries of the areas ceded to Britain.[137] It can only be assumed that, since those areas would remain under Māori sovereignty, this extra-territorial jurisdiction was intended to apply only to British subjects. This illustrates that the Colonial Office was more concerned with controlling British subjects and protecting Māori from them, than extending British rule and law over Māori.[138]

Prior to resigning as Secretary of State for the Colonies in February 1839, Lord Glenelg reiterated the Colonial Office's intention to acquire

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130 Adams, above n 73, at 128.
131 Fletcher, above n 38, at 641–642.
132 Adams, above n 73, at 127 and 129.
133 Fletcher, above n 38, at 641.
134 James Stephen *Draft of Hobson's Instructions* (24 January 1839) as cited in Fletcher, above n 38, at 645 (footnotes omitted).
135 Fletcher, above n 38, at 645.
136 At 645.
137 At 647.
138 See Moon, above n 85, at 99–100.

sovereignty over select parts of the country. He disavowed any desire for "an extended system of Colonization" but noted the pressing need for a system of government to control unruly British subjects on the imperial frontier.[139] In his final draft of his Instructions to Hobson he also stressed the need to protect Māori from European violence and vice.[140]

Lord Glenelg's successor, Lord Normanby, adopted Colonial Office policy regarding New Zealand but showed little haste in formalising it.[141] However, news in April 1839 that the New Zealand Land Company, a successor to the New Zealand Association, intended to send a ship in early May to purchase large tracts of land in New Zealand to on-sell to European settlers spurred the Government into action.[142] This development forced the Colonial Office to answer the delicate question of whether Britain should treat for sovereignty over the whole of New Zealand. On the one hand, this would saddle Britain with greater protective responsibilities and higher costs, as well as risk antagonising other foreign powers with interests in New Zealand. On the other hand, not doing so risked further "unauthorized Colonization" occurring in territory that had not been ceded, whether by foreign powers or private companies such as the New Zealand Land Company.[143] The latter concern eventually prevailed, as became clear in Lord Normanby's final Instructions to Hobson.[144]

The Colonial Office issued Hobson with these Instructions on 14 August 1839. As discussed above, scholars have often viewed Lord Normanby's Instructions as expressing a radically different policy toward New Zealand than the Colonial Office had expressed only a few months earlier — particularly in espousing an intention to acquire full and undivided sovereignty over all of New Zealand. But, as Fletcher argues, the Instructions' substance is entirely consistent with the Colonial Office's developing ideas about intervention in New Zealand.[145] Lord Normanby expressed Britain's "extreme reluctance" to intervene but stressed that action was necessary to control (and protect Māori from) those disreputable British subjects in New Zealand who, "unrestrained by any Law, and amenable to no tribunals, were alternately the authors and the victims of every species of Crime and outrage".[146]

Britain's protective — if profoundly paternalistic — intention, and its emphasis on what seems to be a limited jurisdiction, is consonant with much of the Colonial Office's documentation from the previous two years.

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139 Lord Glenelg Minute (12 February 1839) as cited in Fletcher, above n 38, at 651.

140 James Stephen *Draft of Hobson's Instructions* (February 1839) as cited in Fletcher, above n 38, at 651–652.

141 Adams, above n 85, at 135.

142 Fletcher, above n 38, at 660. See generally Moon, above n 85, at 103–105.

143 Memorandum of James Stephen to Henry Labouchere (15 March 1839) as cited in Fletcher, above n 38, at 659.

144 See Adams, above n 73, at 155–156.

145 Fletcher, above n 38, at 551 and, see generally, ch 9.

146 Lord Normanby's Instructions to William Hobson concerning his duty as Lieutenant-Governor of New Zealand (14 August 1839) as cited in W David McIntyre and WJ Gardner (eds) *Speeches and Documents on New Zealand History* (Oxford University Press, London, 1971) 10 at 11–12.

Lord Normanby went on to acknowledge that the independence and sovereignty of New Zealand lay in the rangatira but advised Hobson that:[147]

> Believing ... that [Māori] welfare would ... be best promoted by the surrender to Her Majesty of a right now so precarious and little more than nominal, and persuaded that the benefits of British protection, and of Laws administered by British Judges would far more than compensate for the sacrifice by the Natives of a National independence which they are no longer able to maintain, Her Majesty's [Government] have resolved to authorize [Hobson] to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those Islands which they may be willing to place under Her Majesty's Dominion.

This directive discloses several important features of British policy towards New Zealand, all consistent with the Colonial Office's previous thinking. First, recognition of New Zealand's existing sovereignty and independence was consistent with Britain's stance to that point.[148] Lord Normanby's qualification of this recognition does not necessarily negate it. As Fletcher suggests, the absence of a real national Māori polity seems to "advance a further justification for intervention based on lack of Maori capacity to control irregular British settlement".[149] Britain's assumption of sovereignty would create an overarching power to regulate all British settlement and thus offer a beneficial service to Māori that Britain believed they could not secure by themselves. Paul Moon argues that it was this national authority that Britain sought to acquire and, because Māori did not possess this power to begin with, they were not being asked to cede any authority that they exercised in practice.[150] The corollary of this was that "[t]he mana and sovereignty of each tribe and sub-tribe undoubtedly remained unaffected".[151]

Secondly, Lord Normanby's instruction to treat for sovereign authority over the whole or parts of New Zealand indicates that the Colonial Office now contemplated exercising an authority coextensive with the entire country. However, as discussed above, this was simply a development in Colonial Office thinking that reflected concern about allowing unregulated settlement to occur in Māori territory that had not been ceded. As Fletcher notes, this shift in the spatial extent of British sovereignty in New Zealand did not indicate a shift in the *nature* of the jurisdiction that Britain envisaged it would exercise; the acquisition of territorial sovereignty over Māori-held territories did not reverse the consistent policy of non-interference with Māori society.[152]

147 At 12.
148 See Fletcher, above n 38, at 555.
149 At 555.
150 Moon, above n 85, at 111.
151 At 111–112.
152 Fletcher, above n 38, at 1032.

Finally, Lord Normanby's belief in the "benefits of British protection, and of laws administered by British judges" raises questions about to whom English laws would apply.[153] Nowhere in the Instructions does Lord Normanby expressly state that the English law would apply to Māori.[154] It may be that Lord Normanby expected Māori within British settlements, or in dealings with British subjects, to be subject to English law as was practised in various other colonies at the time. The Instructions give no indication. However, it appears unlikely that Lord Normanby thought English law would apply to dealings between Māori.[155] He advised that:[156]

> ... until [Māori] can be brought within the pale of Civilized life, and trained to the adoption of its habits, these must be carefully defended in the observance of their own customs, so far as they are compatible with the universal maxims of humanity and morals.

As Fletcher suggests, this does not indicate that Britain foresaw itself governing Māori in the near future: "[i]f eventual assimilation was an expectation, it was for the distant future, dependent on Maori acceptance and largely expected to turn on the success of missionary endeavours."[157] As far as law enforcement was concerned, the only intervention in tribal Māori society was in order to end any instances of human sacrifice or cannibalism.[158] That British jurisdiction was to be exercised in these extreme cases does, however, indicate that British sovereignty was paramount in the sense that British jurisdiction could be extended over Māori if the Lieutenant-Governor so chose. Yet conversely, restricting the exercise of jurisdiction to such instances suggests that Britain foresaw Māori essentially dwelling within a separate, albeit subordinate, legal sphere.

Moon argues that Normanby's statement:[159]

> ... props up the division of sovereignty that was planned for the colony. British law would apply immediately to British subjects in New Zealand, whereas Maori would be beyond its scope, provided, in essence, that they nominated to remain outside this realm.

Moon's assertion that Britain intended a divided sovereignty does not square with the evidence. But the intention of a separate legal and political sphere for Māori within the wider colonial polity was nonetheless consistent with British practice throughout its empire. And whether or not the Crown saw the extension of British authority to Māori as a future possibility, it was

153 Lord Normanby's Instructions, above n 146, at 16.
154 Moon, above n 138, at 110.
155 Indeed, Fletcher, above n 38, at 1073, believes that British criminal law would only apply to Māori offenders whose crimes were mala in se and most probably committed in areas of British settlement or in cross-racial cases.
156 Lord Normanby's Instructions, above n 146, at 15.
157 Fletcher, above n 38, at 1031.
158 Lord Normanby's Instructions, above n 146, at 15.
159 Moon, above n 85, at 114.

clearly not a priority in 1840. The vast majority of the Instructions' directives and most of the Colonial Office's documents during the previous two years signified a preoccupation with governing settlers and protecting Māori.[160] Those documents made little, if any, reference to governing Māori.[161] This position was certainly reflective of the paternalistic attitudes that characterised British dealings with indigenous peoples. But, here, that paternalism manifested itself not in a desire to enforce upon native peoples British legal standards (which, it was believed, they would not comprehend), but rather in a desire to protect them and, where possible, to nurture them in the values and practices of "British civilisation".[162]

The Treaty Text Itself

Lord Normanby's Instructions were given effect by the signing of the Treaty of Waitangi on 6 February 1840, as well as in additional signings over the next seven months. If we assume Lord Normanby's Instructions expressed a desire for full and undivided sovereignty over settlers and Māori, or harboured this intention beneath language of humanitarianism and reluctance, with Hobson and Williams deceptively failing to explain this to Māori, then the Treaty was an instrument of that intention. But this article agrees with Fletcher's thesis that, absent any evidence to the contrary, the Treaty honestly expressed the Instructions, which in turn expressed the British Government's consistent policy position on New Zealand.[163]

The texts of the Treaty reflected the Colonial Office's intention to protect Māori by controlling and regulating British settlers in New Zealand, while largely leaving Māori society intact. Hobson, helped by Busby, drafted the English text of the Treaty in the few days between Hobson's arrival in the Bay of Islands on 29 January 1840 and his meeting with Māori at Waitangi on 5 February.[164]

The content of the Instructions is most evident in the Preamble to the Treaty, which is usually ascribed little importance by scholars analysing disparities between the Māori and English texts.[165] The expression of the Queen's anxiety "to protect [Māori's] just Rights and Property and to secure to them the enjoyment of Peace and Good Order" strongly evokes the protective intent running through the Instructions.[166] Likewise, the Crown, in its desire "to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects" indicates that extending British authority was primarily

160 Fletcher, above n 38, at 1031.
161 Fletcher, above n 38, at 1031
162 See Fletcher, above n 38, at 1049, who argues that this was the view of James Stephen, who drafted Normanby's Instructions, and was also the view expressed variously by Glenelg, missionaries and parliamentarians.
163 At 551.
164 Orange, above n 9, at 24.
165 Fletcher, above n 38, at 1024.
166 Treaty of Waitangi Act, sch 1.

designed to protect Māori, as well as settlers, from lawlessness.[167] The Preamble also links the Crown's desire to acquire sovereignty over "the whole or any part of those islands" with its recognition of increasing British emigration to New Zealand. Sovereignty thus had a protective function, rather than an aggressively imperialist one.[168]

The operative articles of the Treaty should be read in light of Britain's intentions as expressed in the Preamble. The rights and powers of sovereignty ceded to Britain did not equate, as many recent histories such as Orange's claim, to the cession of "authority to impose law and order on both Maori and non-Maori".[169] Rather, the Treaty contemplated the extension of British law to settlers. But it is far from clear that it expressed any intention to govern Māori society. In fact, the documentary context of the Treaty strongly suggests that it did not.[170] Fletcher argues that the Colonial Office undeniably hoped that Māori would be "civilised" in the long-term by Britain's presence in New Zealand.[171] However, the Instructions indicate that the Government saw this civilising process as the task of missionaries, rather than something to be achieved by imposing English law on Māori.[172] This is reflected in the Instructions' directive that, until such civilisation had occurred, Māori customs were to be defended, subject to a few exceptions.[173]

The Treaty text neither explicitly affirms nor denies the continuance of Māori tribal authority and customary law after the Crown's acquisition of sovereignty. However, in several cases the language is strongly suggestive of such a continuance — particularly when read in light of this context. The distinction between the statement in the Subscription that the independent chiefs had authority over their "Tribes and Territories", and the statement in art 1 that they ceded only their sovereignty over territories, suggests that rangatira retained customary authority over their tribes.[174] This may reflect a division between overarching governmental power, which was termed sovereignty over territories (concerning law and order, and trade regulation) and internal tribal authority, denoted by sovereignty over tribes. If this were so, it was both honest and accurate to translate kāwanatanga, or government, to describe the sovereignty the British assumed, and rangatiratanga, or independence and chieftainship, to describe the authority rangatira retained.[175] Fletcher also believes that the Preamble's promise to protect Māori's "just Rights" referred to their customs, while art 3's guarantee of "royal protection" in addition to "all the Rights and Privileges of British Subjects" indicates that Māori would have a special status above and beyond that of British subjects.[176] Thus, although Britain may well have intended to

167 Schedule 1. Compare Adams, above n 73, at 166, who argues that the protection of settlers was an "equally important aim" of the British government.
168 See Fletcher, above n 38, at 1057–1058.
169 Orange, above n 9, at 24.
170 Fletcher, above n 38, at 1031.
171 At 1071.
172 At 1071.
173 At 1071.
174 At 1075.
175 At 1040–1043.
176 At 1075.

make Māori subjects of the Crown, it also seems to have intended that their customary existence would be protected within the settler polity.

Perhaps the most compelling evidence that Britain intended a pluralistic conception of sovereignty is found in the records of the oral discussions of the Treaty between British officials and rangatira.[177] Even the Waitangi Tribunal notes that Hobson and the missionaries were "very consistent in their messages" to Māori at these hui, continually stressing the protective function of the Treaty.[178] However, the Tribunal concludes that explanations of the Treaty given by British officials and missionaries to Māori during oral proceedings at Waitangi and Mangungu stressed the Treaty's benefits to Māori while glossing over its limitations upon Māori authority.[179] The Tribunal's analysis of the oral proceedings stems from the premise that the British were seeking to conceal from Māori their true intentions (the acquisition of absolute and undivided sovereignty) and thus deliberately or unintentionally deceived Māori about the consequences of signing the Treaty.

Nevertheless, as we have seen, there is reason to believe that these pronouncements reflected Hobson and Williams' sincere intentions for the Treaty. Their conception of sovereignty, informed by numerous instances of pluralism throughout the Anglo-American world, probably entailed a degree of legal and governmental pluralism under overarching British sovereignty. It is clear that this model had been decisively abandoned in New Zealand by the end of the 19th century. But it is probable that these promises were a genuine representation of British intentions in 1840. Far from deceiving Māori in emphasising the protective intention of the Treaty and the continuance of chiefly authority, British officials were merely expressing the policy that the Colonial Office had developed during the 1830s.

VI CONCLUSION

Over the course of New Zealand's history, and especially in the last four decades, the meaning of the Treaty of Waitangi has been not only a contested academic question, but a controversial political issue as well. Recently, much emphasis has been given to the meaning of the Māori text, as scholars and politicians have problematised the previously straightforward analyses of what the Treaty "as a whole" meant. This new direction of study has been vital and valuable, especially given the long history of academic and public silence about the Māori text. But the reverse side of the question — "what did the British understand the English text of the Treaty to mean?" — has been comparatively little studied. The general assumption that the Crown sought full and undivided sovereignty seems logical in light of imperial and colonial actions from the mid-19th century. The sovereignty the

177 At 1076 and, see generally, ch 12.
178 Waitangi Tribunal, above n 2, at 515.
179 At 515.

Crown exercises today is indisputably full and unitary. Indeed, in submissions to the Waitangi Tribunal, the Crown argued that this was the case from the very beginning.

But this article has sought to show that in 1840 the Crown understood the sovereignty it acquired under the Treaty quite differently. Drawing on the limited amount of recent scholarship pointing to a similar conclusion — particularly the pioneering work of Ned Fletcher — I have argued that the Crown's conception of sovereignty was a paramount political and law-making authority that was nonetheless consistent with the continuation of Māori customary authority and law. This pluralistic notion of sovereignty, which reflected Britain's primary concern with controlling its own subjects rather than indigenous peoples, was manifested in various forms throughout the British empire. It is true that by the mid-19th century this jurisdictional conception of sovereignty was waning, replaced by the idea of absolute and undivided sovereignty, an authority that would apply to British and non-British alike. But this notion of sovereignty took hold at different speeds in different places and was far from entrenched when the Treaty was signed in 1840. Furthermore, this new ideology found earlier and firmer purchase amongst the governments of settler-states than amongst the drivers of colonial policy in Britain.

In this context, the nature of the sovereignty that Britain treated for in New Zealand is not as clear as it once was. The Colonial Office was the primary architect of Britain's policy towards New Zealand. Its statements and actions in the years leading up to 1840 suggest that it contemplated the acquisition of a pluralistic sovereignty over New Zealand. Between 1837 and 1840, its main priority was controlling settlers on the imperial frontier and protecting Māori from the more disreputable British subjects. Its consideration of a range of schemes for intervention in New Zealand falling short of full and undivided sovereignty indicates that it was in no way committed to acquiring absolute authority.

Throughout these years there was little indication that Britain's jurisdiction would extend beyond British subjects. And there was nothing to negate this impression even when the Colonial Office contemplated the geographic expansion of sovereignty to the whole of the country. Māori were to become British subjects, protected by British law, but seemingly still amenable to customary law rather than colonial law in most cases. At the same time, it seemed that the tribal authority of rangatira would persist, although subordinate to paramount British sovereignty. Little of this was explicit in the Treaty itself. But as the Treaty was merely the culmination of Britain's developing policy on New Zealand, it must be read in the context of three years of thinking on the subject. Although the more comprehensive notion of sovereignty began to take root in colonial institutions from the mid-19th century, it does not appear to have been the driving force behind British policy towards New Zealand in 1840.

So where does such a finding leave us? It should be noted that this finding is not at all inconsistent with the line of historiography exemplified

by the *Te Paparahi o Te Raki Report*. The conclusion that Māori did not intend to cede their rangatiratanga, or chieftainship, to Britain is complemented by the conclusion that Britain did not intend to acquire it. Of course, the two findings do not align exactly on how the authority retained by rangatira and gained by the Crown relate to one another: the Waitangi Tribunal found that Māori viewed the power ceded to Britain as supplementary, but not superior, to chiefly rangatiratanga, while I have argued that the British sought a supreme authority that was nevertheless tolerant of a continued tribal authority beneath its mantle. But ultimately these two positions reconcile to an extent that they would not if we attributed to the Crown the view that its sovereignty was supreme and undivided.

I suggest that the conclusion of this article might go a small way towards improving the current relationship of the Crown and Māori. In suggesting that the Crown in 1840 contemplated legal and political pluralism, it starts to negate the charge that the British deceived Māori as to their intentions at the time. Consequently, the "founding moment" of the modern New Zealand state need not be seen as an antagonistic or hostile exchange but as one truly carried out in good faith on both sides. Such an approach would also lend support to initiatives to devolve certain elements of governance back to Māori communities, as was done in the 2014 Te Urewera settlement between the Crown and Ngāi Tūhoe.[180] For such devolution would not merely be a recognition of what Māori understood the Treaty to entail but would also be consistent with the Crown's solemn promises made to Māori in 1840.

180 See Tūhoe Claims Settlement Act 2014.