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CONSTITUTIONAL TRADITIONS IN MĀORI INTERACTIONS WITH THE CROWN

*David V Williams**

Prior to 1863 it cannot be said that the provision of discrete constitutional spaces for Māori was beyond the realms of possibility in the Colony of New Zealand. A focus of this article is on the events of 1863 that saw the death knell of hopes or expectations entertained by many Māori since 1840 for the recognition of some form of divisible sovereignty, or a plurality of power sources in the colony's constitution, and explicit constitutional space for Māori governance entities to retain elements of autonomy governed by Māori laws. A second aspect of the article is that in unearthing New Zealand's constitutional traditions it is important to draw attention to a range of Māori constitutional viewpoints. In particular the article highlights the viewpoints of those Māori – the majority of all iwi/hapū in fact – who for various reasons chose to fight alongside imperial forces and colonial militia, or chose to remain neutral during the decade of wars after 1863. Ngāti Whātua is an example of an iwi that has maintained loyalist constitutional traditions to this day.

I ANNIVERSARIES

In December 2014 the Church Missionary Society (CMS) and others will be celebrating the bicentenary of an important event in New Zealand history. On 22 December 1814, Reverend Samuel Marsden and other CMS missionaries arrived in the Bay of Islands at the invitation of Ruatara – a young Ngāpuhi leader who was one of the first Māori to become closely associated with Europeans in New South Wales and who accompanied the missionary party to these shores.¹ Also in 2014, the Government's "WW100" commemorations will focus attention on the centenary of New Zealanders' involvement in the Great War, now better known as World War I, and its "seismic

* Dr David V Williams is a Professor of Law at the University of Auckland. He acknowledges the valuable criticisms of referees and the detailed attention of the editors in the transformation of this work from a conference paper to a published paper.

1 A Davidson, S Lange, P Lineham and A Puckey (eds) *Te Rongopai 1814: "Takoto Te Pai!" Bicentenary reflections on Christian beginnings and developments in Aotearoa New Zealand* (Anglican Church General Synod Office, Auckland, 2014).

impact on New Zealand society".² No doubt both anniversaries will engage with foundational myths of the nation and the sense of identity (or identities) that are significant for people of the nation now formally known as the Realm of New Zealand.

This article will argue that, in assessing the constitutional ramifications of Crown/Māori interactions, another anniversary is worthy of attention. 2013 was the sesquicentenary of the outbreak of war in the Waikato. Events commemorating the 150th anniversary of the battle at Rangiriri, which commenced on 20 November 1863, were the subject of some modest media coverage and a Ministry of Culture and Heritage press release.³ That battle was preceded by a series of crucial events earlier in 1863 that proved to be of vital importance for the wider context of the future place of Māori in the colony's constitutional arrangements. That is a focus of this article. It is opportune that the government's Constitutional Advisory Panel reported last year on the need for further and deeper conversations on a number of constitutional topics including the status of the Treaty of Waitangi and Māori representation. The Panel recommended that the government:⁴

... invit[e] and suppor[t] the people of Aotearoa New Zealand to continue the conversation about our constitutional arrangements ... [and] develo[p] a national strategy for civics and citizenship education in schools and in the community, including the unique role of the Treaty of Waitangi, te Tiriti o Waitangi, and assign responsibility for the implementation of the strategy.

It is submitted that such conversations about the future will benefit greatly from conversations about constitutional traditions from the past discussed in this special issue featuring contributions to the Unearthing New Zealand's Constitutional Traditions Conference held in August 2013.

II KEY POINTS

There are two main topics that are the focus of this article. First, 1863 was the year that saw the death knell of hopes or expectations entertained by many Māori since 1840 for the recognition of some form of divisible sovereignty, or a plurality of power sources in the colony's constitution, and of explicit constitutional space for Māori governance entities to retain elements of autonomy governed by Māori laws. Prior to 1863, it cannot be said that the provision of discrete constitutional spaces for Māori was beyond the realms of possibility. The Native Exemption Ordinance 1844 and the appointment of rangatira as Native Assessors in the Resident Magistrates Courts and other courts point to plurality possibilities in the early years of the Crown colony. There was statutory

2 "Remembering WW1 – 100 years on" <ww100.govt.nz>.

3 Ministry for Culture and Heritage "150 years since pivotal battle in New Zealand Wars" (19 November 2013) <www.mch.govt.nz>.

4 Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (November 2013) at 8.

authority for Native Districts to be declared under both the 1846 and 1852 constitutions.⁵ It was not foreordained or indeed historically inevitable that policies of racial amalgamation and constitutional monism would be the future for New Zealand. In the mid-nineteenth century there was no particular reason why sovereignty in colonies of the British Empire had to be located in a single indivisible source. Divisible expressions of sovereignty within a single colonial territory were common indeed in European empires. Legal pluralism – entailing different population groups within a colonial territory being governed by different laws on some or all matters – was a feature in most British colonies. Separate Native Districts, reserves or reservations and jurisdictionally discrete princely states within a colonial territory were the norm in the Empire.

As a matter of fact, there were large swathes of the North Island in early colonial New Zealand where the Queen's writ did not run and the 1840 proclamations of British sovereignty were purely nominal. The possibility that Native Districts might be formally set apart as a matter of colonial law, or some other form of official recognition of Māori autonomy recognised, was a topic of considerable discussion in New Zealand, especially in the late 1850s and until about the outbreak of the Waikato war. Mark Hickford puts it this way:⁶

... "native districts" were very much within the lexicon of colonial governance as it imagined fragmentary space throughout the New Zealand archipelago, defining such districts as areas "over which the Native title has not been extinguished".

In the early 1860s, however, Native Districts dropped out of the lexicon of colonial governance. The constitution since then has been firmly framed by the notion of monism – there is just one indivisible sovereign authority in this land. The creation of separate Native Districts by Order-in-Council remained a theoretical possibility because s 71 of the New Zealand Constitution Act 1852 was not actually repealed until well over a century later when the Constitution Act 1986 was passed. From 1863, however, it became apparent that no Native District declarations would ever be made in New Zealand. Nevertheless requests to invoke s 71 were often received from Māori – in particular the King Movement.⁷

The second key focus of the article is that in unearthing New Zealand's constitutional traditions it is important to draw attention to a range of Māori constitutional viewpoints. In particular I wish to emphasise the viewpoints of those Māori – the majority of all iwi/hapū in fact – who for various

5 New Zealand Government Act 1846 (Imp) 9 & 10 Vict c 103, s 10; and New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72, s 71.

6 M Hickford "Looking Back In Anxiety: Reflecting on Colonial New Zealand's Historical-Political Constitution and Law's Histories in the Mid-Nineteenth Century" (2014) 48 New Zealand Journal of History 1 at 11.

7 RA Joseph *The Government of Themselves: Case Law, Policy and Section 71 of the New Zealand Constitution Act 1852* (Te Mātāhauariki Monograph, University of Waikato Printer, Hamilton, New Zealand, 2003). See also Waitangi Tribunal *The Kaipara Report* (Wai 674, 2006) at 347–353.

reasons chose to fight alongside imperial forces and colonial militia, or chose to remain neutral during the wars. Queenite, loyal native, and kupapa constitutional traditions are often largely invisible in historical narratives. They deserve to be better known and understood. In particular, this article highlights the perspectives of the hapū of Ngāti Whātua living in the region from the northern Kaipara to the central Auckland isthmus.

In writing of "constitutional traditions" the focus is not on the formal canons of a Westminster-style constitution. Rather, the concern is with the legal mechanisms and political institutions actually utilised by Māori in the service of political goals that included the maximising of Māori or iwi/hapū self-determination or autonomy. Those goals were advanced both within and outside the parameters of the colonial state's formal constitution.

III NEW ZEALAND CONSTITUTION ACT 1852

Further to the first point on the importance of 1863, it is often suggested that the passage of the New Zealand Constitution Act by the imperial parliament in 1852 was the most significant point of constitutional departure enabling, as it did, the then minority of European colonists to take control of the key elements of state power and excluding all but a tiny number of individual Māori male owners of fee simple property from direct participation in the constitutional arrangements. The Independent Constitutional Review established by the New Zealand Centre for Political Research has advanced a somewhat extreme version of that point of view. Wishing to deny the Treaty of Waitangi any status as *a* founding, or *the* founding document of the New Zealand nation, it describes the 1852 Act as the best contender "for the status of founding document (if we want one)".⁸ That Act, though, did not provide clarity about how or when the transition from a Governor-ruled Crown colony to a parliamentary form of administration responsible to an elected lower house should occur. Given lack of statutory clarity as to the respective powers of the Governor and elected settler representatives, the transition from "representative government" to "responsible government" that took place in 1856 is more frequently identified as the starting point of democratic constitutional arrangements in New Zealand. From 1856 onwards settler ministers became politically responsible to the members of the bicameral General Assembly (rather than to the Governor) for most governmental portfolios. This evolution, and the somewhat untidy and difficult transfer of responsibility for native affairs and the conduct of war from the Governor to elected ministers more than a decade later, is well described by Philip Joseph. It will be evident, though, that I do not share Joseph's orthodoxy that New Zealand's development from a Crown colony to a settler administered colony, a British dominion and thence to an independent member of the Commonwealth was an evolution that "was systematic, timely and uneventful."⁹

8 Elizabeth Rata "Treaty No Longer Symbol of National Unity" *The New Zealand Herald* (online ed, Auckland, 13 December 2012).

9 PA Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 103.

On the contrary, the context of a war engaging large numbers of British imperial troops and then lengthy bush campaigns by colonial militia and kupapa forces during the second governorship of Sir George Grey (1861–1868) and his successor Sir George Bowen (1868–1873) was anything but an uneventful period of history and constitutional change. It was during this period that successive settler ministries finally wrested effective control over all levers of political power in the colony. Their policies sharply pushed Māori to the fringes in political, social, economic and cultural terms. They eliminated iwi/hapū from the constitutional landscape and created just four Māori constituency seats in the House of Representatives (and usually one or two appointees in the Legislative Council) to represent an indigenous population that had comprised more than half of the total population until about 1860 and that was still more than a third of the population in 1868.

IV 1840–1860

Without going into the full details of constitutional developments prior to the outbreak of the Waikato war, it is clear that the Crown Colony government from 1840 until 1854 (when an elected House of Representatives first assembled) was largely unrepresentative of colonists and Māori alike. Yet the views of Māori – the majority of the colony's population throughout that period – and especially of Māori living close to colonial settlements were important factors in the political calculations of the governors and their appointed councils. Some rangatira with privileged access to the governors took political stands that were highly influential in the formulation and revision of colonial governance policies. This is a constitutional tradition that deserves to be unearthed and emphasised. Lyndsay Head has written of a pursuit of modernity by Māori in the early colonial period. Māori, she suggests, invoked a concept of citizenship "via a treaty document to let in colonial administration, provided that government was seen as 'just' in Māori terms";¹⁰ it was the war period in the 1860s that "ended the experiment of Maori-driven citizenship" that had been based on an assumption of equality between Māori and Pākehā.¹¹ Mark Hickford is not convinced that "citizenship" is the best term to use in this context but, whatever metaphor is used, the important point is that there was a "notion of coexistence" prior to the 1860s.¹² I outline below a couple of examples of coexistence strategies when Māori sought to hold the colonial administration to government that was seen as "just" in Māori terms.

Thus representations by Ngāti Whātua and others to the second Governor, Robert FitzRoy, were important reasons for the policy of pre-emption waivers in 1844–1845. Lacking sufficient

10 Lyndsay Head "Land, Authority and the Forgetting of Being in Early Colonial Maori History" (Thesis (PhD), University of Canterbury, 2006) at 200–201 as cited in Hickford "Looking Back In Anxiety", above n 6, at 7, n 49.

11 Head "Land, Authority and the Forgetting of Being", above n 10, at 215 as cited in Hickford "Looking Back In Anxiety", above n 6, at 7, n 50.

12 See Head "Land, Authority and the Forgetting of Being", above n 10, at 200–201 and 215 as cited in Hickford "Looking Back In Anxiety", above n 6, at 6–7.

government funds to purchase lands from Māori for on-sale to settlers, the Governor agreed to Ngāti Whātua suggestions that he waive the Crown's monopoly right to purchase land from Māori as recognised in the English text of the Treaty of Waitangi, art 2, and legislated for in the Land Claims Ordinance 1841, s 2. A Ngāti Whātua understanding of this Māori contribution to Crown policy appears in the Agreed Historical Account of the Deed of Settlement that was given effect to by Parliament in the Ngāti Whātua Ōrākei Claims Settlement Act 2012. The Deed is worth quoting at some length as it provides an important instance of the close involvement of Māori in the evolution of Crown policy in the earliest years of the colony:¹³

2.40 Robert FitzRoy arrived in Auckland at the end of 1843 to become the new Governor of New Zealand. Ngāti Whātua and other local rangatira welcomed him. He received a letter from Te Kawau, Te Tinana and others, stating that they had understood the Treaty to mean that the Queen had the right of first offer to purchase their lands. The chiefs asked to bargain directly with settlers. They also expressed their concerns whether Hobson's promises at Waitangi, which included fair treatment and protection for Māori, would be honoured. FitzRoy responded that if pre-emption was to the disadvantage of Māori then it should be discontinued. In the first months of his governorship there was frequent contact between FitzRoy and Ngāti Whātua over matters related to affairs of the colony. FitzRoy also received requests from settlers to purchase land directly from Māori.

2.41 FitzRoy subsequently decided [on 26 March 1844] to issue a proclamation waiving the Crown's right of pre-emption over certain limited portions of land. ...

2.42 At a hui the same day at Government House in Auckland, FitzRoy outlined his new policy to local rangatira. ...

2.49 Ngāti Whātua assert that the [pre-emption waiver] transactions were akin to the principle of *tuku rangatira* in that chiefs wished to create mutually beneficial relationships with Europeans and enhance their *mana* by making land available for settlement. Ngāti Whātua consider that, consistent with their cultural practice of qualified transactions with other Maori groups, the pre-emption waiver transactions conveyed occupancy and use rights only.

It is of interest to the focus of an article on loyalist Māori constitutional traditions to note at this point an important outcome of that Agreed Historical Account in the 2012 Act. It included the text of the Crown's acknowledgements to Ngāti Whātua Ōrākei as follows:¹⁴

13 Ngāti Whātua Ōrākei and Ngāti Whātua Ōrākei Trustee Limited and The Crown *Deed of Settlement of Historical Claims* (5 November 2011) at 15–17 available at <www.ots.govt.nz>.

14 Ngāti Whātua Ōrākei Claims Settlement Act 2012, s 6.

(10) The Crown acknowledges that Ngāti Whātua Ōrākei endeavoured to establish a relationship with the Crown from 1840 and sought to strengthen this relationship, in part, by transferring lands for settlement purposes. These lands have contributed to the development of New Zealand and Auckland in particular. The Crown also acknowledges that Ngāti Whātua sought to strengthen the relationship by expressing loyalty to the Crown.

(11) The Crown acknowledges that the benefits and protection that Ngāti Whātua Ōrākei expected to flow from its relationship with the Crown were not always realised.

There were other means by which Māori living close to European settlements affected colonial policy. A House of Commons Select Committee in 1844 proposed a resolution that acknowledged:¹⁵

... of a right of property on the part of the Natives of New Zealand, in all wild lands in those Islands, ... was not essential to the true construction of the Treaty of Waitangi, and was an error which has been productive of very injurious consequences.

When news of that proposal reached New Zealand there were a number of vigorous responses from Māori, even though the resolutions were not agreed to by the Tory administration and were not put to a vote in the House. Most notably, the second and third assaults by Hone Heke on the Kororāreka flagstaff in January 1845, and the northern wars that ensued in 1845 and 1846, have been attributed in part as a response to the waste lands doctrine promoted by the New Zealand Company and its supporters. Certainly the Editor of *The New Zealander* in November 1845 thought the doctrine as discussed in the House of Commons in June 1845 was unhelpful:¹⁶

Mr. Buller declaimed for four hours, and quoted VATTEL, as an authority for breach of the Treaty of Waitangi, – in order, we presume, that the New Zealand Company should have an unconditional grant from the Crown, without reference to Native or other titles. But we wish Mr Buller was in New Zealand to convince HONE HEKE or TE WHEREWHERE that because VATTEL laid down certain doctrines and principles, as regards lands belonging to natives who do not, at the time of discovery, cultivate the whole of them – that therefore they must relinquish them! What do the Waikato tribes know of VATTEL? It is beyond measure ridiculous that the English House of Commons should have been occupied three long nights, arguing a question on the mere dry theory of old authorities of the law of nations – while, at the very same time and date, the British troops were being defeated by the aborigines, held by Mr Buller and his friends, in such contempt.

Nevertheless, Earl Grey, who had chaired the 1844 Select Committee and was now a Cabinet member in the new Liberal administration of Lord John Russell, proceeded to incorporate his 1844

15 "Report from the Select Committee on New Zealand, 29 July 1844" in *British Parliamentary Papers: Colonies: New Zealand* (Irish University Press, Shannon, 1968) vol 2 Command 556 3d Resolution at 13.

16 "Editorial" *The New Zealander* (Auckland, 22 November 1845) at 2.

approach to "wild" or "waste" lands into the Royal Instructions of 1846 issued to the third Governor, George Grey (1845–1854), following FitzRoy's recall. Māori property rights in land were to be restricted to presently occupied and cultivated plots, leaving the vast bulk of land in the colony as "waste lands" available for incoming settlers immediately – without the need for the Crown to negotiate extinguishment of native title.¹⁷

Preferring coexistence rather than resort to further war, Te Wherowhero and other Waikato rangatira in 1847 signed a remonstrance to the Queen against the 1846 Instructions. This was the first example of an appeal directly to the monarch herself. Such direct appeals to Queen Victoria and her successors would become a prominent feature in Māori constitutional traditions, especially of the King Movement, in the years to come. At this time, Te Wherowhero – who was later anointed King Pōtatau in 1858 – was living close to the centre of the colonial government (in what is now the Auckland Domain). He took an active part in public affairs in the colonial capital. His 1847 letter, as translated, expressed alarm to Her Majesty the Queen that "your Elders (councillors) think of taking the Maoris land without cause." The "Elder" primarily concerned was Earl Grey. He responded on the Queen's behalf to Te Wherowhero stating that "it never was intended that the Treaty of Waitangi should be violated by dispossessing the tribes which are parties to it, of any portion of the land secured to them by the Treaty without their consent."¹⁸

This exchange of views was undoubtedly a factor in the government's decision to resile from directly imposing the waste lands doctrine in New Zealand. Instead of assuming and asserting that the Crown had the immediate right to dispose of "waste" or "wild" lands without having to negotiate with Māori, the post-1847 policy implemented by Governor Grey and agreed to by Earl Grey involved treating with Māori for all lands sought by the government. This was done by re-affirming the Crown's monopoly right to purchase from Māori and energetically pursuing acquisition of large blocks of land.¹⁹ That policy resulted in the purported extinguishment of native title over virtually all the South Island and large regions in the south of the North Island in just a few years.

17 Earl Grey (Secretary of State for the Colonies) to Grey (Governor of New Zealand) (23 December 1846); and "The Queen's Instructions under the Royal Manual and Signet, 28 December 1846" in *British Parliamentary Papers: Colonies: New Zealand* (Irish University Press, Shannon, 1969) vol 5 at 523–526 and 540–543. (Viscount Howick, eldest son of the 2nd Earl Grey, chaired the 1844 Select Committee. From 1846–1852, by now the 3rd Earl Grey, he was Secretary of State for War and the Colonies).

18 Te Wherowhero and others to the Queen (8 November 1847) in Grey to Earl Grey (13 November 1847) and Earl Grey to Grey (3 May 1848) in *British Parliamentary Papers: Colonies: New Zealand* (Irish University Press, Shannon, 1969) vol 6 Command 1002 at 15–16 and 144.

19 Though not the focus of this paper, I reiterate my view that this version of the Crown pre-emption policy, as expounded by the Supreme Court in *R v Symonds* (1847) NZPCC 387 and applied by the Grey administration, was based on a deliberately narrow reading of the Treaty of Waitangi's English text in order to confine its meaning to United States jurisprudence in line with the New Zealand Company's restrictive views on aboriginal title. The court explicitly disregarded submissions of counsel based on the primary Māori text. See David V Williams *A Simple Nullity?: The Wi Parata Case in New Zealand Law and History*

By the mid-1850s, however, Māori began to offer considerable resistance to engaging in further large-scale land transactions of the sort that Grey and his Native Land Purchase officers had concluded under the 1847 Crown pre-emption policy. TR Gore Browne, the fourth Governor (1855–1861), took office in a new constitutional context following the enactment of the New Zealand Constitution Act 1852.²⁰ He recognised the significance of Māori resistance to further large-scale land purchase transactions on the one hand and settler concerns on the other hand that this resistance was in the nature of a land league – an unlawful combination to stifle the alleged right of individual Māori to dispose of their customary entitlements to land. When Browne agreed in 1856 to the formation of a ministry of elected settlers responsible to the legislature, he nevertheless insisted on retaining gubernatorial control over Native affairs. As Damen Ward observed: "[t]his was part of an older vision of independent gubernatorial authority in relation to Māori, reworked for a new institutional environment."²¹ Browne appointed a Board of Inquiry to inquire into and report to him on Native Matters.²² That 1856 Board heard evidence on issues concerning Māori land tenure from 34 witnesses. What is of importance for this article is that, in addition to hearing evidence from six missionaries, the same number of Crown officials and 13 settlers, the Board received evidence from nine Māori. As Donald Loveridge affirmed, in evidence for the Crown to the Waitangi Tribunal's Hauraki and Turanga inquiries, this process probably constituted the most extensive public inquiry into Māori affairs up until that time and it directly engaged with Māori themselves in deciding on the policy that the Governor should follow. Evidence from the Māori witnesses, and also from Donald McLean (Chief Native Land Purchase Officer), was to the effect, in McLean's own words, that:²³

... there is really no such thing as individual title that is not entangled with the greater interest of the tribe, and often with the claims of other tribes who may have migrated from the localities.

Amongst the Māori witnesses who gave evidence to the Board was Paora Tuhaere, a notable rangatira of Ngāti Whātua Ōrākei who contributed greatly to the public life of the colony, had served as an Assessor and was later appointed to the executive of the Auckland Provincial government.

(Auckland University Press, Auckland, 2011) at 210–223. See also Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011) at 202–215.

20 New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72.

21 Damen Ward "Civil Jurisdiction, Settler Politics, and the Colonial Constitution, circa 1840–1858" (2008) 39 VUWLR 497 at 522, n 108 (citing several of Browne's minutes).

22 "Report of the Board of Inquiry on Native Matters, 9 July 1856" *British Parliamentary Papers: Colonies: New Zealand* (Irish University Press, Shannon, 1969) vol 10 at 509–519.

23 Waitangi Tribunal *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004) vol 2 at 431.

A notable feature of Browne's tenure as Governor following the 1856 Board inquiry was the number of debates in which questions of the divisibility or indivisibility of the colonial state featured. Officials, settlers and Māori all played roles in those debates. Though in the upshot no discrete Native Districts were created it was by no means a foregone conclusion that that would have been the outcome of the debates at the time. Ward has written about the changing allegiances and views of those who participated in debates on the Native Offenders Bills in 1856 and again in 1860 that recognised the de facto absence of Crown control in native districts and would have given extensive powers to the governor to regulate communication and trade by out-settlers in Native Districts.²⁴ The reality on the ground, not just in the hinterland but even in the colonial capital was that:²⁵

... the execution of warrants or writs was often a matter of negotiation, especially in criminal cases. A number of *inter se* homicides in late 1855 and early 1856 led to *hui* (formal meetings) of several hundred Maori to discuss the cases with officials.

Assiduously promoted by CW Richmond as Native Minister, the Native Districts Regulation Act and Native Circuits Court Act were passed in 1858. A Native Territorial Rights Bill was passed but reserved for assent and disallowed by the imperial authorities owing to concerns about inroads into the governor's independent authority over native policy.

The details of these measures are not pertinent to this article. It is important though that as late as 1858 Richmond, a strong voice for settler interests, nevertheless dismissed the views of the 1844 Select Committee and George Grey in favour of the strict application of English law to Māori "as abstract theorising, impractical and 'manifestly absurd'."²⁶ Ward's work is an effective rebuttal to those who assume that lawyers and legal historians make false assumptions about the practical significance of proclamations of British sovereignty. Ward challenged James Belich's statement that Europeans:²⁷

... believed their own maps and their own treaties, and assumed that their writ ran in territory that was actually independent. The false assumption that all New Zealand became British in 1840 is a classic example.

24 D Ward "Territory, Jurisdiction, and Colonial Governance: 'A Bill to Repeal the British Constitution', 1856–60" (2012) 33 *The Journal of Legal History* 313.

25 At 319.

26 Ward "Civil Jurisdiction", above n 21, at 528. See also SD Carpenter "History, Law and Land: The Languages of Native Policy in New Zealand's General Assembly, 1858–62" (Thesis (MA), Massey University, 2008).

27 James Belich "Riders of the Whirlwind: Indigenous Peoples and Settlement Booms in the Nineteenth Century" in Richard Boast and Richard S Hill (eds) *Raupatu: The Confiscation of Maori Land* (Victoria University Press, Wellington, 2010) 33 at 36.

Rather, Ward asked "did settler politicians really talk and behave as if colonial courts had power to enforce their jurisdiction across the whole country?" His answer, for the years prior to the outbreak of war in the 1860s, was that "the practical reality of limited substantive authority was a fundamental part of settler political debate."²⁸ At this time neither Governor Browne, successive settler ministries, and opposition politicians, nor a good number of Māori leaders – especially those aligned to or sympathetic to the King Movement – made false assumptions that British sovereignty and English law prevailed in the entire colony just because New Zealand was coloured pink on European maps.

V 1860

The year 1860 was the beginning of the tipping point from Māori significance to Māori insignificance in the constitutional discourses of the colony. It was also the tipping point in population terms when Māori ceased to be the majority of the people living in the colony.²⁹ Yet it was also the year of the Kohimārama conference, held adjacent to the primary settlement of Ngāti Whātua Ōrakei near to the colonial capital. At the invitation of the Governor some 200 rangatira gathered for four weeks to discuss important political and constitutional issues of the moment.³⁰ Browne opened and closed the conference; Donald McLean, now the Native Secretary, chaired the proceedings.³¹ The government newspaper, *Te Karere Maori*, devoted six issues comprising 298 pages of printed text to reporting on the conference. The cost to the government of holding the conference was immense – at least £4,250 and perhaps as much as £5,171.³² The immediate context of the Kohimārama conference, both for the government and many of the loyalist rangatira in attendance, was the first Taranaki War. War broke out in March 1860 and continued for a year to March 1861, including a significant reverse suffered by government forces at Puketakauere on 27 June 1860 shortly before the conference convened on 10 July 1860. The outbreak of war at Waitara arose in large part from the government's rejection of the 1856 Board's conclusions (and indeed McLean's own views to that Board quoted above) that "there really is no such thing as individual title."³³ When assessing the merits of tribal claims put forward by the rangatira Wiremu Kingi Te

28 Ward "Territory, Jurisdiction, and Colonial Governance", above n 24, at 315.

29 "Māori and European Population Numbers, 1838–1901" (3 September 2013) New Zealand History Online <www.nzhistory.net.nz>.

30 "Minutes of Proceedings of the Kohimarama Conference of Native Chiefs" [1860] I AJHR E9.

31 See Ray Fargher *The Best Man Who Ever Served the Crown? A life of Donald McLean* (Victoria University Press, Wellington, 2007).

32 Lachy Paterson "The Kohimārama Conference of 1860: A Contextual Reading" (2011) 12 *Journal of New Zealand Studies* 29 at 34, 35, 37 and 45, n 53.

33 "Report of the Board of Inquiry on Native Matters, 9 July 1856", above n 22.

Rangitake for Te Ātiawa to prevent a sale of land offered to the Governor in person by an individual, Te Teira Manuka, Browne and McLean decided to accept the offer from Te Teira. This decision and the warfare that followed are often taken to be the watershed events that foreshadowed the total future dominance of the New Zealand polity by settler interests.

In 1860, however, Māori were not yet completely marginalised nor yet rendered constitutionally invisible. On the contrary, from the perspective of many Māori present at Kohimārama, that conference was notable for discussions of the meaning and intent of the Treaty of Waitangi, the mana of the rangatira, and the potentiality for a constitutional arrangement akin to a partnership between Māori and the Crown, or at least an ongoing commitment from the Crown to consult regularly with Māori in pan-tribal national hui. Hence the conference's resolutions both at the time and to the present day, especially within Ngāti Whātua of course, were and are acclaimed as the Covenant of Kohimārama. The Māori use of the term kawenata/covenant invokes a biblical sanctity for the outcome of the conference and aligns it with the various covenant promises between God and humankind found in the Old Testament.³⁴ This aspect of the Kohimārama conference was sympathetically portrayed by Claudia Orange's seminal article first published in 1980.³⁵ In the oral history of Ngāti Whātua, authenticated by the Waitangi Tribunal in its 1987 *Ōrakei Report*, Paora Tuhaere was appointed by the senior rangatira Apihai Te Kāwau to chair the conference alongside McLean.³⁶

I should note that Lachy Paterson doubts this and some other Tribunal findings. He argues that the context of war and the need of the government to shore up support within Māoridom was much more significant in 1860, whilst notions of rangatiratanga and Treaty partnership discourse were much less relevant at Kohimārama than Orange and others since have suggested.³⁷ In my view, though, it is not a retrospective ahistorical re-writing of the past to give emphasis to the importance of viewpoints such as those of Tuhaere that the Covenant of Kohimārama was a fuller ratification of the Treaty of Waitangi. Certainly, given the interest of this article in loyalist constitutional traditions, it is noteworthy that the settler press in Auckland expressed a view on Tuhaere on his death in 1892 that the Waitangi Tribunal concurred with in 1987. The Tribunal approved the *New Zealand Herald* assessment that Tuhaere was "a good friend to the Europeans, loyal to the Crown

34 Of the many examples of covenants in the Old Testament, probably the most apposite was the Noachic covenant – International Bible Society (ed) *Holy Bible: New International Version* (Hodder & Stoughton, UK, 1984) Genesis 9: 11–13. Verse 13 reads: "I have set my rainbow in the clouds, and it will be the sign of the covenant between me and the earth." Māori frequently invoke the rainbow/covenant metaphor and also it resonates, especially for Tainui peoples, with the mythology of the atua Uenuku.

35 C Orange "The Covenant of Kohimarama: A Ratification of the Treaty of Waitangi" (1980) 14 *New Zealand Journal of History* 61.

36 Waitangi Tribunal *Report of the Waitangi Tribunal on the Ōrakei Claim* (Wai 9, 1987) at 57.

37 Paterson, above n 32, at 30–31 and 41.

during the wars, an honest and straight-forward adviser to Governments and a conciliator between races in times of trouble".³⁸

Meanwhile, in 1860 the government's actions at Waitara stirred many missionaries, particularly Bishop Selwyn (supported by former Chief Justice Martin) and Octavius Hadfield, to protest vigorously against the government's stance and express firm support for Kingi's leadership of Te Ātiawa.³⁹ Staunch Māori friends of the Crown such as Renata Kawepo of Ngāti Kahungunu were caustic in the extreme in criticising the government's confrontational tactics against Kingi and Te Ātiawa.⁴⁰ Thus in 1860 the political crisis was over the purported sale of a small block of land. The colonial government found both support and opposition within the settler community and both support and opposition from Queenite Māori as well as military opposition from Te Ātiawa, Ngāti Maniapoto and others.⁴¹ By 1863 the political landscape was very different and the constitutional stakes were very much higher.

VI 1863 – THE TURNING POINT

By 1863 a repetition of the Kohimārama type of national Crown/Māori hui was no longer contemplated in government circles. Indeed the caustic published words of George Grey, early on in his second term as Governor of New Zealand (1861–1868), made the position plain. He explicitly disagreed with his predecessor's offer to Waikato chiefs to reconvene a conference of chiefs "to devise measures for the introduction and law and order, and for the establishment of useful institutions in Native districts." "As a point of policy" he asserted, it would not be wise "to call a number of semi-barbarous Natives together to frame a Constitution for themselves."⁴² It soon became clear that the government had moved from the threat of war in the Waikato to full-scale preparations for such a conflict. By 1863 even those missionaries who had been so outspoken against Browne's policy on Waitara – including Hadfield – fell silent and accepted the inevitability of further war or even, in the case of Bishop Selwyn, decided to provide chaplaincy services to the

38 Waitangi Tribunal *Orakei Claim*, above n 36, at 57.

39 Octavius Hadfield *One of England's Little Wars: A Letter to the Right Hon Duke of New Castle, Secretary of State for the Colonies* (Williams & Norgate, London, 1860). See John Stenhouse "Selwyn Through Settler Eyes" and Grant Phillipson "High and even holy purposes': Selwyn in Treaty History" in Allan Davidson (ed) *A Controversial Churchman: Essays on George Selwyn, Bishop of New Zealand and Lichfield, and Sarah Selwyn* (Bridget Williams Books, Wellington, 2011) 88 and 104.

40 Stenhouse, above n 39, at 89.

41 See Michael Belgrave *Historical Frictions: Māori Claims and Re-invented Histories* (Auckland University Press Auckland, 2005) at 233–244.

42 Grey to Newcastle (Secretary of State for the Colonies) (30 November 1861) in "Native Affairs: Despatches from the Secretary of State and the Governors of New Zealand" [1862] I AJHR E1, s II, no 14 at 34.

imperial troops. Despite the stringent misgivings about government policy that he had expressed in 1860, later on Kawepo was to be one of the leading Queenites who took up arms alongside colonial militia in the east coast wars.

During the colony's first two decades, there had been a number of serious military conflicts involving Crown and Māori and also intra-Māori fighting. The fragility of the Crown's physical hold over substantial parts of the colony had been evident at times during the northern wars, the Wairau affray, the Wellington region "pacification" and the Waitara conflict. By 1863 there was a constitutional and military struggle in which the stakes had been set on a higher plane than disputes about whether particular pieces of land should be sold or not, and fought over or not. The Suppression of Rebellion Act 1863 invoked draconian sanctions against those who failed to swear an oath of allegiance to the Queen's sovereignty or who fought against the British armed forces brought to the colony in large numbers to invade their ancestral lands. The New Zealand Settlements Act 1863 authorised confiscations of whole districts of land where people were deemed to be in "rebellion".

JGA Pocock and others have called the wars in New Zealand the "Land Wars" because of the central role of land in Crown versus Māori disputes and in order to avoid the one-sided connotations of blame implied in an older common term – the Māori Wars. Keith Sorrenson, eschewing a monocausal explanation of the origins of the wars, wrote in 1981:⁴³

The rivalry that developed between the races was more than a naked contest for land, important though this was. It was also a contest for authority, for mana, for authority over the land and the men and women it sustained. Above all, there was the question of whose authority, whose law, was to prevail. Was the Queen's writ to run throughout the land, as the officials and colonists expected ...? Or were the chiefs, even a Maori King, to retain a local autonomy, their mana unimpaired, and their customs recognized in matters that were purely of Maori concern? ... [I]t remained to be seen whether the Queen, her servants in New Zealand, and Parliament itself could make laws that would govern the land and the men it sustained. Europeans had no doubt that she and they could.

It is the case that the approach to the history adopted in the *Oxford History of New Zealand* in which Sorrenson's paper appeared has been the subject of criticism in more recent years. Not least, Giselle

43 MPK Sorrenson "Maori and Pakeha" in WH Oliver and BR Williams (eds) *The Oxford History of New Zealand* (Oxford University Press, Wellington, 1981) 168 at 175–176.

Byrnes, as editor of the subsequent and deliberately named *New Oxford History of New Zealand*, wrote that:⁴⁴

... the structure of this volume reflects the main arguments of the book: that our understandings of New Zealand history are far more complex and more fragmented than the "colony-to-nation" narrative admits.

Nevertheless I think that Sorrenson was generally right to argue that authority and sovereignty were the big issues for New Zealand's politics as 1863 dawned.

By way of qualification, and to avoid the trap implied in another name for these wars – the Anglo-Māori wars – it is suggested that this was not so much a rivalry "between the races" but rather a rivalry between Queenites (both Pākehā and Māori) on the one hand, and on the other hand Kingites, tribal and prophetic movements and the more remote iwi/hapū who claimed and fought to retain constitutional spaces of continued Māori independence and self-government. This was, from the government's point of view, a war (or a series of wars) to assert and if necessary to impose by force the sovereignty of the Queen throughout the colony. The nominal pink colouring on maps was to become substantive and effective. The Queen's writ was to run throughout the land. As it turned out the King Country and Te Urewera would hold out as Māori districts for some years more. For a couple more decades or, in the case of Te Urewera for another half a century, the constitutional traditions of mana motuhake, rangatiratanga and tikanga remained paramount in those districts. For most Māori, and soon enough for all Māori, however, the constitutional landscape had changed dramatically. The 1863–1872 wars settled matters for the rest of the country.

VII SWEAR LOYALTY TO THE QUEEN – OR ELSE ...

A Kingite aphorism from 1857 was "[t]he King on his piece; the Queen on her piece; God over both; and Love binding them to each other."⁴⁵ The acceptability of such pluralism was put to the ultimate test in 1863. On New Year's Day that year there was a meeting at a CMS mission station across the Waikato River from Taupiri mountain. Grey and a party of state officials had sought this meeting with Waikato rangatira. A debate took place (in te reo Māori of course) between Grey and the Kīngitanga leader Wiremu Tamihana. Tamihana for some years had assiduously sought agreement from government and church leaders to permit loyalty both to the British Queen and the Māori King. By 1863 he was anxious in the extreme to avoid the outbreak of war. A report of the

44 Giselle Byrnes "Introduction: Reframing New Zealand History" in *The New Oxford History of New Zealand* (Oxford University Press, Melbourne, 2009) 1 at 18.

45 Paora Te Ahura at Rangiriri (1857) as cited in Waitangi Tribunal *Orakei Claim*, above n 36, at 39.

debates was published and translated by the government in *Te Pihoihoi Mokemoke*. Tamihana urged Grey thus:⁴⁶

O Governor, wait! Don't go until I have been to look, but discontinue the road which you are making there (at Mangatawhiri), stop the work, and let the steamer remain away; let her not enter Waikato, and let you and I cease to provoke each other, but let us work for the good. Keep the days of his year for us to work in, you to make plans for that side and I for this, that is for the King party.

A plurality of loyalty to both the Queen and the King was not an option the government was prepared to tolerate. Grey was not at Taupiri to consent to the wishes of the King or his party.⁴⁷

O Tamihana. Listen! My kindness is not a thing of today, it is of old date. Attend! And I will talk to you. Who gave you mills, horses, ploughs and carts? Who established the school at Rangiohia? I rather think it was I ... Listen! The Victory is mine. What is the use of a man working without an object? Instead of doing that which is right, and which will give him strength to do his work. My work for this island shall not cease, and my kindness [atawhai] shall continue.

Grey's "kindness" did not extend to waiting for a year. None of Tamihana's requests were agreed to. On the contrary there was a huge build-up of army and naval personnel arriving from various parts of the British Empire. One such troop transfer led to the tragic loss on 7 February 1863 of some 189 officers and men (including Commodore Burnett, the senior naval officer of the Australasian squadron) when the steam corvette HMS *Orpheus*, on a fine clear day, struck the bar of the Manukau harbour.⁴⁸ This disaster did not slow the war preparations. Great South Road was pushed further south and this greatly facilitated troop movements and enabled Lieutenant General Cameron's invasion forces to cross the Kīngitanga aukati (border) at Mangatawhiri on 12 July. Steamers did indeed sail up the Waikato, some of them flat-bottomed gunboats specifically designed for the purpose and built in Sydney. They played a significant role in the crucial battle at Rangiriri in November. For the Governor and the government the object of doing "that which is right" included a military invasion of un-ceded Kīngitanga territory in the Waikato. The victory sought was for the supremacy of the Queen's sovereignty and the confiscation of the lands of "rebels". There was to be no consent to the King nor any form of recognition for the King movement.

The impact of the 1863 constitutional confrontation in real people's lives can be illustrated by considering the dilemma – the stark choice between equally undesirable alternatives – faced by Tāmāti Ngāpora of Ngāti Mahuta who was living at Ihumatao, Māngere in 1863. In a number of

46 As translated in Evelyn Stokes *Wiremu Tamihana Tarapipipi Te Waharoa: a Study of his Life and Times* (University of Waikato, Hamilton, 1999) at 187. Tamihana's original words are reproduced at 185.

47 At 187.

48 Gerald Hutching "Wreck of the *Orpheus*" (9 July 2013) Te Ara: The Encyclopedia of New Zealand <www.teara.govt.nz>.

ways Ngāpora may well have been one of those whom Grey had in mind when he wrote, with his usual hyperbole, to the Secretary of State for the Colonies at the end of his first Governorship in 1852 on the success of his amalgamationist native policies:⁴⁹

... the amalgamation of the two races inhabiting these islands, which is rapidly taking place, as evidenced by the considerable Maori population which each European settlement has now attracted to its vicinity, ... already form one harmonious community, connected together by commercial and agricultural pursuits, professing the same faith, resorting to the same courts of justice, joining in the same public sports, ... and thus insensibly forming one people.

Ngāpora lived in the vicinity of Auckland at Ihumatao where he built a stone church. He was a lay reader in the Church of England and an Assessor in the government's Resident Magistrate Court. He was a rangatira who advised the fledgling colonial government on appropriate policies for peace and good order in Māori communities. He was a signatory to Te Wherowhero's letter to the Queen in 1847 on the waste lands issue. Then in 1848 he wrote a letter to Grey on the need for bolstering chiefly authority in the new dispensation. This has been interpreted by some as the yearning of a traditionalist to reinstate slavery within the tikanga followed by Māori. What he wrote was that: "Formerly, if slaves were disobedient, they would be killed. If a slave disobeys now we cannot kill him, lest the laws of the Europeans should be infringed upon." This was interpreted by Jock Brookfield to be a plea from Ngāpora to permit a chief to remain "free to kill his disobedient slaves if he wished to."⁵⁰ In fact, what Ngāpora sought was support from the government for rangatira to advance the new dispensation he had accepted based on ture – law of the government and of Christian teachings.⁵¹ In 1849, he and other Waikato chiefs pledged military assistance if need be to protect Auckland officials and settlers from threatened attack. Thus Ngāpora was most certainly one of those who embraced the positive possibilities for Māori in the new world that was emerging. He engaged frequently with the colonial administration. He believed in coexistence.

Far from being a civilised amalgamated person of "one people" in Grey's dreams, though, Ngāpora was a traditionalist in that he remained deeply committed to his iwi. Though he did not embrace proposals for the Kīngitanga pan-tribal movement from the outset, when Te Wherowhero was anointed King Pōtatau in 1858 and returned from Auckland to the Waikato, Ngāpora remained at Māngere and became the King's representative – ambassador might be a better term – to the Governor in Auckland. When Grey returned to office in 1861, it was Ngāpora who convened a

49 Grey to Earl Grey (7 February 1852) in *British Parliamentary Papers: Colonies: New Zealand* (Irish University Press, Shannon, 1969) vol 9 Command 1779 at 71.

50 FM Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999) at 142–143.

51 David V Williams "Unique Treaty-Based Relationships Remain Elusive" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 366 at 377–378.

meeting between the governor and Kīngitanga leaders. Even as the impending war clouds hovered in 1863 Ngāpora kept the government informed of possible attacks on colonial outposts by belligerent elements within Kīngitanga.⁵²

The constitutional "crunch point" came with the Proclamation issued by the Governor on 9 July 1863 addressed to all Māori living south of Auckland and north of Mangatāwhiri. This unilateral ultimatum required those to whom it was addressed to swear an oath of loyalty to the Queen or to leave the district and face the consequences of disloyalty.⁵³ A further notice required "all friendly disposed Maoris" to "abide within their houses from dusk in the evening until daybreak, let them not move about outside, lest they get into trouble."⁵⁴ Disillusioned, Ngāpora left for the Waikato. He did not participate in the warfare he had forsworn when he was baptised but he remained in exile until his death in 1885 in the Rohepōtae – still also known as the King Country. As did many others, he turned his back on the church of Selwyn and the missionaries who had not stood up for his people. Like Matutaera (Methuselah), the second Māori king, who gave up his Christian name and was re-baptised Tāwhiao (by the Pai Marire prophet Te Ua Haumēne), so Ngāpora ceased to be known as Tāmāti (Thomas) and changed his name to Manuhiri. This was a token of the fact that he had been forced into living as a "stranger" – an exile no longer able to live in his Ngāti Mahuta homeland or in Māngere as both districts had been confiscated by the Crown under the New Zealand Settlements Act 1863.

Similar unpalatable choices were imposed on Māori living in other war zones such as eastern Bay of Plenty and Turanga/Gisborne. The Waitangi Tribunal has recounted how martial law proclamations were issued and how all Māori were required to swear an oath of loyalty to the Queen or be treated as "rebels" and suffer the consequences. The Queen's writ did not run in many Māori districts *de facto* prior to 1863. From 1863 onwards, as imperial and colonial troops entered formerly autonomous Māori districts, there was to be only one sovereign authority in the land both in law and in fact. The Queen's writ was to be enforced emphatically henceforth.⁵⁵

VIII POSTBELLUM MĀORI CONSTITUTIONAL TRADITIONS

After the wars there continued to be a wide range of Māori responses to the claims, pretensions and actual exercises of power by Crown colony governments, settler colonial governments and Dominion governments. I do not doubt that one can properly describe a Māori legal order, as Carwyn Jones does, in the sense that there are underlying fundamental values of tikanga that are

52 Steven Oliver "Ngapora, Tamati" (26 August 2013) Te Ara: the Encyclopedia of New Zealand <www.teara.govt.nz>.

53 "Military and Volunteers: Notice" *Daily Southern Cross* (Auckland, 11 July 1863) at 3.

54 "Notice to the Auckland Natives" *Daily Southern Cross* (Auckland, 11 July 1863) at 3.

55 Waitangi Tribunal *Ngāti Awa Raupatu Report* (Wai 46, 1999) at ch 6; and Waitangi Tribunal *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004) at ch 3.

shared by iwi/hapū.⁵⁶ However, iwi/hapū over the years have adopted a number of constitutional traditions in the ways and means they chose to relate to the Crown. I identify in brief some of those Māori responses and then focus again on the Ngāti Whātua loyalist history.

Despite its retreat to the interior as a result of the wars, the King Movement continued its commitment to the unity of two kingships under one God and to fostering its role as a pan-tribal or at least multi-tribal confederation of iwi/hapū. Constitutional elements of this commitment included taking petitions to the British monarch in London with delegations lead by King Tāwhiao in 1884 and by King Te Rata in 1914. The unwillingness to volunteer, or indeed the outright opposition from Kingites to recruitment for the armed services in the world wars is in part explained by the failure of those missions to the monarch in person and the failure of New Zealand governments to attend to the raupatu grievances.⁵⁷

There were other autonomy responses based on concepts such as mana motuhake that sought to minimise the impact of settler society and norms and to maximise Māori and/or iwi/hapū autonomy and self-determination. Many of these were movements or churches inspired by important and comparatively well-known prophets such as Te Ua Haumēne (Pai Marire), Te Kooti Arikirangi Te Turuki (Hāhi Ringatū), Te Whiti o Rongomai and Tohu Kakahi (Parihaka), Te Rua Kenana Hepitipa (Ngā Iharaia). Less well-known prophets played a significant role in rallying the people of some districts to hope for a better future for Māori such as Te Maiharoa at Arowhenua, Paora Potangaroa in Wairarapa, Te Matenga Tamati at Wairoa, Te Kere Ngatai-e-rua and his grandson Titi Tihi in the upper Whanganui.⁵⁸ The sheer number of Māori prophetic movements, including others not mentioned here, indicate the strong appeal for many Māori of specifically Māori organisations to foster and promote the future wellbeing of Māori people.

On the other hand, there were a number of important constitutional traditions that did not seek a separate or discrete constitutional space for Māori. Many rangatira sought to protect their iwi/hapū interests by cooperating in various ways with the Crown, by lobbying intensively for Māori interests and by fully engaging in parliamentary avenues for the hearing of grievances. The third branch of government – the judiciary – was less of a focus but was not forgotten by Māori. Māori plaintiffs frequently, though generally unsuccessfully, sought remedies for perceived injustices caused by Crown acts or omissions. The leading case to this day on the Treaty of Waitangi's lack of status in

56 Carwyn Jones "A Māori Constitutional Tradition" (2014) 12 NZJPIL 185.

57 Claudia Orange "Te Kīngitanga: The People of the Māori King Movement" in *The Dictionary of New Zealand Biography* (Auckland University Press, Auckland, 1996) vol 3.

58 See Bronwyn Elsmore *Like them that Dream: the Māori and the Old Testament* (Reed Books, Auckland, 2000); H Morrison, L Paterson, B Knowles and M Rae (eds) *Mana Maori and Christianity* (Huia, Wellington, 2012); David Young *Woven By Water: Histories from the Whanganui River* (Huia Publishers, Wellington, 1998) at 123–155; and D Young *Rivers: New Zealand Shared Legacy* (Random House, Auckland, 2013) at 14–34.

domestic New Zealand law was laid down in the unsuccessful appeal of *Te HeuHeu Tūkino VI* – āriki of Ngāti Tūwharetoa – to the Privy Council in 1941.⁵⁹

The use of petitions – thousands of them, especially to the Native Affairs Committee of the House of Representatives – was the most important postbellum mechanism whereby Māori drew the government's attention to grievances or sought consideration of alternative policies. Māmari Stephens notes in a paper also presented at the Unearthing New Zealand's Constitutional Traditions conference that *pitihana* (petition) is one of the most commonly used words in the Māori legal corpus and, by the way, she observes that "*tino rangatiratanga*" features but little until very recent years.⁶⁰ The extensive use of petitions by Māori came to be of the utmost importance in the history of Ngāti Whātua/Crown relationships. Members of Ngāti Whātua over the years took 15 petitions to Parliament, made six appearances before Royal Commissions or committees of inquiry, brought four cases in the Supreme Court (two of which went on appeal to the Court of Appeal), lodged eight cases in the Native Land Court and a further two cases in the Compensation Court.⁶¹

IX WORKING WITH AND WITHIN THE STATE MACHINERY

Loyalty to the Crown as pledged in the Covenant of Kohimarama was demonstrated in the strongest possible way by those Māori who then fought with or alongside Crown forces – especially after imperial troops were withdrawn from the colony in the mid-1860s. Notable warrior rangatira such as Major Rapata Wahawaha and Mokena Kohere of Ngāti Porou, Major Te Keepa Te Rangihīwinui of Muaūpoko, Renata Tama-ki-Hikurangi Kawepo of Ngāti Kahungunu, Tohi Te Ururangi and Te Pokiha Taranui of Te Arawa, to name a few, took this pathway. They were content and indeed proud to be "Queenites". After 1867 a number of Māori were elected members of the House of Representatives and appointed members of the Legislative Council.

One of the features of New Zealand history that distinguishes it from that of otherwise similar British settler societies in British North America and the Australian colonies, is the significant number of Māori who have held high office in the government. As early as 1873 Wiremu Kātene and Wiremu Parata were members of the Executive Council. The team of ministers in most government ministries in the 19th century included at least one rangatira. In a long career, Sir James Carroll of Ngāti Kahungunu went from being a 13 year-old lad fighting against Te Kooti in 1870 to a Member of Parliament – first holding a Māori seat and then for a long period as MP for a

59 *Te Heuheu v Aotea District Maori Land Board* [1941] AC 308.

60 M Stephens "A Loving Excavation: Uncovering Māori Constitutional Thinking" (paper presented to the Unearthing New Zealand's Constitutional Traditions Conference, Wellington, 29–30 August 2013) published as "A Loving Excavation: Uncovering the Constitutional Culture of the Māori Demos" (2013) 25 NZULR 820.

61 M Kawharu "People in our Past: Legacy of Purpose, Place" *New Zealand Herald* (online ed, Auckland, 12 November 2013); and Waitangi Tribunal *Orakei Claim*, above n 36, at chs 5, 6 and 7.

European seat. He was not a token member of the Executive Council merely "representing the native race". Carroll held substantive portfolios as Minister of Native Affairs and Stamp Duties for many years. More than that, he was Acting Prime Minister of the Dominion for several months on two occasions – in 1909, and again in 1911.⁶²

Not as close to the levers of state power as Carroll, there were leaders of movements, such as the Māori and Kōtahitanga Parliaments and the Repudiation movement.⁶³ Paora Tuhaere took a leading role in Māori Parliaments held in 1879, 1880 and 1889 and specifically employed the constitutional language of calling a parliament for Māori in response to the failure of the government to reconvene the Kohimārama gathering of 1860.⁶⁴ Within the national Parliament, tireless MPs such as Hōne Heke Ngapua bombarded the government and the Native Affairs Committee with a constant barrage of letters, petitions and applications for re-hearings of Native Land Court decisions.⁶⁵ Native Land Amendments and Native Land Claims Adjustment Acts, later Māori Purposes Acts, responding at least in part to some petitions were to become a feature of virtually every parliamentary session for more than a century. Lawyers tend to focus on statutes and case law, but a good deal more weight in assessing our constitutional traditions could be given to petitions and their outcomes.

Then there were the members of the Te Aute College Students' Association who matriculated at universities and graduated in law, medicine, anthropology and other disciplines. They formed what became known as the Young Māori Party around the turn of the century. For nearly 30 years they generally managed to ensure that one or other of them held high office regardless of which political party was in government. Āpirana Ngata was a minister in Liberal governments and Maui Pomare served in Reform Party administrations. An indication that the Young Māori Party leaders held views on constitutional issues that point in directions unfamiliar to us now may be gleaned from unearthing and re-examining Ngata's *Te Tiriti o Waitangi: He Whakamarama*. This booklet, published in 1922, was translated into English in 1963. It is frequently cited but it is seldom noted that Ngata sought to *discourage* Māori from persistently harping on about the Treaty of Waitangi and yearning for the separate power and authority of Māori to be enhanced. Though *He*

62 GH Scholefield (ed) *New Zealand Parliamentary Record, 1840–1949* (Government Printer, Wellington, 1950) at 100.

63 Basil Keane "Kotahitanga: Parliamentary Unity Movements 1870–1900" (13 July 2012) Te Ara: The Encyclopedia of New Zealand <www.teara.govt.nz>.

64 Waitangi Tribunal *Orakei Claim*, above n 36, at 57; and Native Department "Report of Proceedings at and Expenditure in Connection with Paora Tuhaere's Parliament at Orakei" [1879] I AJHR G8.

65 Freda Rankin Kawharu "Ngapua, Hone Heke" (4 December 2013) Te Ara: Encyclopedia of New Zealand <www.teara.govt.nz>. See also John A Williams *Politics of the New Zealand Māori: Protest and Cooperation, 1891–1909* (Oxford University Press, Oxford, 1969).

Whakamarama was written in te reo Māori, it was an explanation by Ngata only of the English text of the Treaty:⁶⁶

... the Treaty of Waitangi created Parliament to make laws. The Treaty has given us the Maori Land Court with all its activities. The Treaty confirmed Government purchases of lands which is still being done and it also confirmed past confiscations. The Treaty sanctioned the levying of rates and taxes on Maori lands, it made the one law for the Maori and the Pakeha. If you think these things are wrong and bad then blame our ancestors who gave away their rights in the days when they were powerful.

Given the centrality of the Treaty in contemporary Crown/Māori relations and constitutional discourse, it is of considerable interest that Ngata was so firmly set against Māori reliance on the Treaty when discussing contemporary grievances. Ranginui Walker has fully chronicled the complexity of Ngata's politics and his immense contributions to his people and to the nation.⁶⁷

The Rātana Church emerged in the 1920s and has maintained a strong body of followers to the present. Its origins lie in the prophetic work of Mere Rikiriki and her Holy Ghost Mission in the early 1900s. Her prophetic visions included the choice of her nephew Tahupōtiki Wiremu Rātana to be God's mouthpiece for the Māori people. Rātana began this work from 1918 and his church soon embarked on political campaigns of considerable constitutional significance. In 1924 he took a petition to London, signed by more than 30,000 Māori. This called for the return of confiscated lands, and ratification of the Treaty of Waitangi. Though Rātana was not allowed to speak with King George V and his delegation also tried and failed to present the petition to the League of Nations in Geneva, this petition did help persuade the New Zealand government, in 1926, to set up a commission of inquiry (the Sim Commission) to investigate land confiscations.⁶⁸ That commission upheld many raupatu grievances and its recommendations eventually led to the creation of a number of Māori Trust Boards in the 1940s. Meanwhile, from 1928, Rātana set out to secure the four Māori constituency seats in the House of Representatives. He was, he announced, dividing his body into four koata (quarters), one each for the Eastern, Northern, Southern and Western Māori electorates in Parliament. Between 1932 and 1943 (assisted after 1936 by an alliance with the Labour Party) this goal of electing Rātana MPs for all four Māori seats was achieved.⁶⁹

66 AT Ngata (English translation by MR Jones) *The Treaty of Waitangi, an Explanation; Te Tiriti o Waitangi, he whakamarama* (Māori Purposes Funds Board, Christchurch, 1963) at 15–16.

67 Ranginui Walker *He Tipua: the Life and Times of Sir Āpirana Ngata* (Viking, Auckland, 2001).

68 "Report of the Royal Commission to Inquire into Confiscations of Native Lands and Other Grievances Alleged by Natives" [1928] II AJHR 1928 G7.

69 J McLeod Henderson *Ratana: The Man, the Church, the Political Movement* (2nd ed, AH & AW Reed, Wellington, 1972); Keith Newman *Ratana Revisited: An Unfinished Legacy* (Reed, Auckland, 2006); and Keith Newman *Ratana: the Prophet* (Raupo, Auckland, 2009).

X "NATIVE COLLABORATORS"

When indigenous peoples' agency in the face of land loss is focussed on, it is almost always stories of resistance to colonialism that are highlighted. In his broad-ranging work on the settlement policies of European empires from 1650 to 1900, John Weaver paid attention primarily to the imperial governments and the various factions within settler communities.⁷⁰ He also commented in places on the interactions of indigenous peoples with the settlers and their institutions. He noted the fact that there was a high level of resistance from indigenous peoples to the settlers' great land rushes at their expense. Noting history's complexity in describing the enormity of injustices suffered, he nevertheless refers on several occasions to "native collaborators" and comments on "the value to imperial expansion of native collaborators."⁷¹ It is obvious that not all indigenous peoples acted together in opposing colonialism, but is it fair to divide indigenous peoples' responses into those of resistance heroes, on the one hand, and native collaborators on the other hand? The word "collaborator" is hardly an objective term. Scholars who live in a society built on colonial dispossession and who benefit from the privileges that have accrued to the majority settler communities, are not in a strong position, in my view, to make judgments that implicitly or explicitly condemn the choices made (without the benefit of hindsight) by indigenous leaders to cooperate with the incoming settlers. It is at least plausible that at the time such cooperation might have been thought to be distinctly more beneficial for their people than going to war to resist uninvited incursions.

As indicated above, the injustices suffered by those Māori who allied themselves with the Crown is a focus of this article. In the nineteenth century the government called them "Queenites", "loyal natives", "friendly natives", "Kawanatanga (Government) Māori" or "kupapa Māori". Any of those terms would be preferable to "collaborators". Currently though, kupapa is the most frequently used term on those uncommon occasions that the fact of their existence in New Zealand history is mentioned. It is a word that originally implied neutrality as between the claims of settler ministries intent on acquiring land for settlers and Māori eager to fight against the Pākehā. In modern usage, however, it seems normally to have a negative connotation in describing Māori who "collaborated" (in Weaver's sense) with the Crown forces that invaded Māori districts.

XI INDIGENOUS RESISTANCE ADMIRER

The doyen of academic history of New Zealand James Belich has written a number of magisterial works that have reframed both popular and scholarly conceptions of New Zealand history. In particular, Belich has reinterpreted the narratives of the nineteenth century wars that he

70 John C Weaver *The Great Land Rush and the Making of the Modern World, 1650–1900* (McGill–Queen's University Press, Montreal, 2003).

71 R Louis *Imperialism: The Robinson and Gallagher Controversy* (New Viewpoints, New York, 1976) as cited in Weaver, above n 70, at 19 and 25.

often refers to as the "Anglo-Māori wars". Far from being a crushing conquest of Māori by imperial and colonial military forces, Māori fought with bravery and with such impressive military skill that they were never really defeated. They won some battles and lost some battles. However the Crown's forces came out on top in the end not because Māori were defeated militarily but because their supply lines, their food resources, and the part-time nature of their war commitments could not keep permanently at bay an army of full-time, well-supplied soldiers financed by loans raised in London.⁷²

Many historians have added to the aura of those who staunchly opposed the colonisers, none more so than the brilliant books of Judith Binney on Te Kooti Arikirangi and Te Rua Kenana.⁷³ Michael King's book on Te Puea Herangi of the King Movement is a beautiful account of the life of that movement's famous leader in the first half of the twentieth century. She worked tirelessly to ensure that the history of raupatu confiscations was never forgotten as the Waikato and allied tribes rebuilt themselves for modernity.⁷⁴ Another of Belich's books is an account of the Taranaki warrior Titokowaru – described on the back cover as "one of New Zealand's greatest leaders."⁷⁵ Then there are the much-admired non-violent resistance prophets of Parihaka, Te Whiti-o-Rongomai and Tohu Kakahi. Their determined and resourceful resistance in the 1870s and 1880s to settler occupation of confiscated lands has been praised in books, in plays, and in songs (both in Māori and English) that reverberate to this day – not least at the Parihaka music festivals.⁷⁶

What then about the exploits of famous Māori fighting chiefs who fought against the now admired "rebels"? Major Rapata Wahawaha and Mokena Kohere of Ngati Porou, Major Te Keepa Te Ranghiwinui of Muaupoko, Renata Tama-ki-Hikurangi Kawepo of Ngati Kahungunu, Tohi Te Ururangi and Te Pokiha Taranui of Te Arawa were some of them whom I mentioned above. There

72 James Belich *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland University Press, Auckland, 1986); and James Belich *Making Peoples: A History of the New Zealanders: from Polynesian Settlement to the End of the Nineteenth Century* (Penguin, Auckland, 1996) at 229–246.

73 Judith Binney, Gillian Chaplin and Craig Wallace *Mihaia: The Prophet Rua Kenana and His Community at Maungapohatu* (Oxford University Press, Wellington, 1979); Judith Binney *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki* (Auckland University Press, Auckland, 1995); and Judith Binney *Encircled Lands: Te Urewera, 1820–1921* (Bridget Williams Books, Wellington, 2009).

74 Michael King *Te Puea: a Life* (Reed, Auckland, 2003).

75 James Belich *"I Shall Not Die": Titokowaru's War, New Zealand, 1868–9* (Port Nicholson Press, Wellington, 1989).

76 H Riseborough *Days of Darkness: Taranaki 1878–1884* (Port Nicholson Press, Wellington, 1989); Dick Scott *Ask That Mountain: The Story of Parihaka* (Reed/Southern Cross, Auckland, 2004); Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996); Harry Dansey *Te Raukura: The Feathers of the Albatross: A Play in Two Acts* (Longman Paul, Auckland, 1974) (play first performed in 1972); and Parihaka Festival <www.parihaka.com>.

are now entries about each of them in the *Dictionary of New Zealand Biography*.⁷⁷ Nevertheless one has to go back to a very different sort of writing – colonialist apologia for the wars such as the works of James Cowan – to find published books on their lives and times as fighters in the 19th century wars.⁷⁸ Cowan had an interest in the military skills of these warriors but no interest in why they may have chosen to fight against other Māori.

It is difficult to dissent from Head's observation that in recent times:⁷⁹

Māori who resisted government by the British, to the point of going to war, are admired. Those who did not take up arms, or who fought as government allies, are occasionally demonised but more frequently ignored.

For example, it would be a diligent reader who finds the four-page discussion on Māori "loyalists" during the wars in Belich's *Making Peoples*.⁸⁰ For those who do, Belich acknowledges the varying levels of commitment by such Māori to the purposes of the colonial government and that the first loyalty of kupapa was to their own tribe. He also makes the acute observation that it was in the later stages of the wars, after the withdrawal of imperial troops, that Māori willingness to fight for the government became more evident. It is "hard to see how the later wars could have been won without kupapa help." Moreover, he accepts that "They cannot be seen as quislings or traitors, because they acknowledged no entity higher than their tribal group."⁸¹

Renata Kawepo is an obvious example of an important Māori chief who opposed the Crown at the beginning of the land wars but fought alongside the colonial militia in the latter years of the wars. He, like most Māori, was strongly opposed to the actions of the government at Waitara in 1860. He did not mince his words in attacking Governor Browne over the attacks on Te Ātiawa at Waitara. This, said Kawepo, was an "abominable murder". The Queen should remove this "Governor gun-feeder, powder-feeder, ball-feeder".⁸² Yet from 1868 to 1872, when the prophetic visions of the Pai Marire religion – called the "Hauhau" by settlers – created divisions within his and other tribes, Kawepo stayed faithful to the missionary church. He became a leading kupapa

77 *Dictionary of New Zealand Biography* <www.dnzb.govt.nz>.

78 J Cowan *The New Zealand Wars: a History of the Maori Campaigns and the Pioneering Period* (WAG Skinner, Wellington, 1922 and 1923) vols 1 and 2 available online at <www.nzetc.victoria.ac.nz>.

79 Lyndsay Head "The Pursuit of Modernity in Maori Society" in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past – A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 97 at 97.

80 Belich *Making Peoples*, above n 72, at 243–246.

81 At 243–246.

82 John Stenhouse "Religion and Society" in Giselle Byrnes (ed) *The New Oxford History of New Zealand* (Oxford University Press, Melbourne, 2009) 323 at 325.

fighter in the guerrilla campaign by colonial militia against Te Kooti and his whakarau fighting force. Even whilst Kawepo was away fighting in a government campaign, Crown agents were continuously engaged in a vigorous land purchasing operation to acquire immense tracts of his tribe's land. The payment of a small pension to Kawepo for his loyalty in no way compensated for his bitter disappointment that the 1873 Report of the Hawke's Bay Native Land Alienation Commission completely whitewashed the Crown's land purchasing tactics at the expense of Ngāti Kahungunu.⁸³

In his most recent writings, Belich picks up on the theme of indigenous agency: "[o]ne of the dilemmas of studying indigenous responses to European expansion is the balancing of tragedy and agency."⁸⁴ Even so, it is self-evidently the resistance fighters within indigenous groups – those who took up arms against colonial forces in the Anglo world – that attract Belich's attention, rather than agency of the likes of Renata Kawepo. In Queensland, Tasmania, Argentina and New Zealand indigenous peoples resisted and "rode the whirlwind of European expansion", he wrote, until the sheer numbers of Anglos and other Europeans involved in the explosive settlement booms doomed their valiant resistance efforts.⁸⁵

Yet as Belich himself points out in *Replenishing the Earth*, there were decades (in New Zealand) or even centuries (in North America) of accommodation and mutual benefit as between "collaborating" tribes and settlers.⁸⁶ The more or less successful accommodation of and cooperation with small settler populations by some indigenous polities continued until the nineteenth century. Hazel Petrie has written an excellent monograph on Māori tribal enterprise in early colonial New Zealand.⁸⁷ Then, at particular tipping points of that century, colonial policies and booms of explosive settler immigration suddenly marginalised and dispossessed the indigenous populations.⁸⁸ Dispossession affected not only the resistance tribes, but also the accommodating tribes – especially those closest to settler towns – in a more or less undifferentiated catastrophe for all the indigenous peoples.

83 Angela Ballara "Kawepo, Renata Tama-ki-Hikurangi" (30 October 2012) Dictionary of New Zealand Biography <www.dnzb.govt.nz>; and Report of the Hawke's Bay Native Land Alienation Commission" [1873] III AJHR G7.

84 Belich "Riders of the Whirlwind", above n 27, at 33.

85 At 47.

86 James Belich *Replenishing the Earth: The Settler Revolution and the Rise of the Angloworld, 1783–1939* (Oxford University Press, Oxford, 2009).

87 Hazel Petrie *Chiefs of Industry: Māori Tribal Enterprise in Early Colonial New Zealand* (Auckland University Press, Auckland, 2006).

88 Belich *Replenishing the Earth*, above n 86.

In the era of historical Treaty claims settlements since 1992, it has not been difficult for those who resisted the Crown to assert a right of redress for grievances based on the confiscations of land without compensation. It has been more difficult to negotiate redress for claimants from "loyalist" tribes whose land was lost primarily through the operations of the Native Land Court. Yet the eminent Māori academic, leader of Ngāti Whātua (and descendant of Paora Tuhaere), Sir Hugh Kawharu was surely right when he wrote:⁸⁹

War and confiscation, prominent in histories of New Zealand's race relations, in fact touched few tribes south of the central North Island volcanic plateau and fewer still north of the Auckland isthmus. But it was different in the peace which followed, for with it came the Native Land Court, a veritable engine of destruction for any tribe's tenure of land, anywhere.

In any case, those iwi/hapū who fought with the Crown lost as high or higher a proportion of their lands as those "rebels" against whom they fought. Whanganui, Te Arawa and Ngāti Kahungunu did not generally prosper in the aftermath of the wars. Few iwi/hapū have suffered a greater degree of dispossession and marginalisation than Te Keepa's Muaūpoko iwi. If Ngāti Porou were in some respects better off in terms of lands retained, then the explanation is primarily to be found in their remoteness from the focus of European settlement. Ngāti Tuwharetoa also retained large land holdings though they fought alongside Kīngitanga and Te Heuheu Tūkino IV was with Te Kooti to the end of his guerrilla campaigns. Taupo and Turangi, though, were districts that Pākehā showed very little interest in until modern times (strange though that now seems if one visits Taupo).

In assessing the enormity of historic injustices, if it was an injustice to confiscate the land of "rebels" who fought against the Crown, then surely it was *more* of an injustice for the government also to have pursued land grab policies against other tribes who fought on the Crown's side, or who remained neutral and encouraged their kin not to fight against the Crown. There was never only one "right" way for indigenous peoples to respond to colonialism. Admiration for Māori resisters may result in a failure to acknowledge the wrongs inflicted by government policies on loyalist tribes. Steps are being taken to redress the balance in assessing how loyalist tribes fared and why they related to the Crown in the way they did. An excellent contribution is an account by Vincent O'Malley and David Armstrong of how Te Arawa tribes worked with the Crown and settlers to pursue mutually advantageous relationships while at the same time seeking to maintain their autonomy, culture, and control over their land and resources.⁹⁰ David Armstrong also wrote a

89 IH Kawharu *Māori Land Tenure: Studies of a Changing Institution* (Clarendon Press, Oxford, 1977) at 15.

90 Vincent O'Malley and David Armstrong *The Beating Heart: A Political and Socio-economic History of Te Arawa* (Huia Publishers, Wellington, 2009).

significant historical report for Te Uri o Hau hapū of Ngāti Whātua.⁹¹ I conclude this article with a few further paragraphs on Ngāti Whātua history and constitutional traditions.⁹²

XII A LOYALIST "SPECIAL RELATIONSHIP"

From the outset of the New Zealand colony in 1840, Ngāti Whātua cooperated with the Crown – including issuing an invitation, accepted by the first Governor, to establish the colonial capital in Tāmaki Makaurau (named Auckland by the settlers). Auckland remained the capital from 1842 to 1865. As noted at the outset of this article, Ngāti Whātua thought that the best way to defend their interests and to provide an economic endowment for the future of their people was to initiate and to maintain strong links with the Crown and settlers. Te Uri o Hau, a northern hapū of Ngāti Whātua, has to this day a wooden carved bust of Queen Victoria displayed on their marae atea – the forecourt in front of the tribe's paramount meeting house – Aotearoa at Otamatea. This house was originally located at the site of the Kohimārama conference in Auckland for the Māori Parliament held in 1879, then moved to Aotea (Shelly Beach) in South Kaipara, then moved again across the harbour to Otamatea, north Kaipara. The bust of the Queen was gifted to the tribe at Aotea as a token of the colonial governor's appreciation for their loyalty during perilous times for the colonial state in the 1860s. During the Waitangi Tribunal hearings at Otamatea in 1997 the Queen's bust was moved into the middle of the meeting-house between the Tribunal members and the people, placed on a Union Jack and draped with a korowai cloak. The loyalist constitutional tradition was thus rendered absolutely central to the hearings of this hapū's claims against the Crown. Here was tangible evidence that, at some point in the past, representatives of the Crown had especially honoured Ngāti Whātua's positive accommodations with the colonial government. I am aware of only one other gift of the Queen's bust as a token of appreciation for loyalty – to Te Arawa tribes at Ohinemutu, Rotorua, though that bust is no longer on public display.

Evidence of Te Uri o Hau elders to the Tribunal included the oral history of a special treaty signed on a sheepskin (kirihipi) document between the Governor and Ngāti Whātua around the time of the Kohimārama conference in 1860, or (more likely) the gifting to Ngāti Whātua of the bust of Queen Victoria at Aotea. The continuing significance of the kirihipi treaty constitutional tradition is

91 David Anderson Armstrong "Te Uri o Hau and the Crown: 1860–1960" (research report commissioned by Te Uri o Hau Te Wahapu o Kaipara in association with the Crown Forestry Rental Trust, 1996) Wai 674 [*Kaipara Inquiry*] Doc#A2.

92 It is proper that I declare a long-term series of relationship with Ngāti Whātua. As a political and legal activist I was associated with the Bastion Point/Takaparawhau occupation, the Wai 1 claim of Joe Hawke and two Supreme Court hearings (1976–1978). I drafted the Wai 9 claim that led to the Waitangi Tribunal's *Orakei Report* (1987) and the Orakei Act 1991. I drafted the Wai 388 claim and was a member of the negotiation team (1998–2012) that led eventually to passage of the Ngāti Whātua Ōrakei Claims Settlement Act 2012. With Te Uri o Hau, I worked as an historian, then legal counsel and a member of the negotiation team (1993–2002) leading to Te Uri o Hau Claims Settlement Act 2002.

exemplified by the fact that the name of the wharenui at one of the hapū's most important marae, at Arapaoa, is "Kirihipi".

The Ngāti Whātua hapū of the south Kaipara put at the forefront of their submissions to the Waitangi Tribunal that there was indeed a special relationship in the nature of an alliance between Ngāti Whātua and the Crown. Philippa Wyatt's research report dwelt on this history.⁹³ Donald Loveridge offered in immense detail a different perspective in evidence tendered by the Crown.⁹⁴ Following robust legal submissions, the Tribunal refused to conclude that there should be any difference in law between the Crown's Treaty obligations to "loyal" or "rebel" tribes.⁹⁵

In our view, the idea that the Crown might have had greater obligations to Ngāti Whātua than to other iwi or hapū as a result of its claimed alliance is highly problematic. The Treaty provides the same protections and guarantees to all Māori individuals and groups. Even if a special relationship between the Crown and a particular Māori group could be demonstrated to have existed, such a relationship should have no bearing on the Crown's treaty responsibilities to that group. Nor should the Crown be considered to have greater responsibilities towards Māori groups classified by the Crown as "loyal" than towards those classified as "rebels", or towards those who sold land to the Crown as opposed to those who exercised their Treaty-guaranteed rights not to sell land. Article 3 of the Treaty extended the rights and privileges of British subjects to all Māori.

That may be the correct position in law for the Tribunal to take in interpreting the Treaty of Waitangi Act 1975. It cannot erase the historical fact that the Crown did have different relationships with the various iwi/hapū in the nineteenth century. Nor can that finding dissuade Ngāti Whātua insisting to this day that they are entitled to call on the Crown to honour in some way the special relationship that did indeed exist between Ngāti Whātua and the Crown from 1840 to 1860. As noted above, the historical account, acknowledgements and apology in the Ngāti Whātua Ōrākei Claims Settlement Act 2012 do include significant recognition of the especially close relationship between the local tangata whenua and the Crown at the colonial capital in those years.

Moreover, as a result of Te Uri o Hau negotiations with the Crown the kirihipi treaty constitutional tradition now finds a place in an Act of Parliament. The Office of Treaty Settlements asked the negotiators for Te Uri o Hau to consider the name to be given to the "overlay classification" on land to be retained in Crown ownership because of its national significance, but

93 Philippa Wyatt "Ngati Whatua o Kaipara ki te Tonga and the Crown, 1840–1869" (research report commissioned by the Crown Forestry Rental Trust on behalf of the Claimants, 1998) Wai 674 [*Kaipara Inquiry*] Doc#F4.

94 Donald M Loveridge "Ngati Whatua and the Crown – The First Quarter-Century: An Appraisal of the Wyatt Report" (research report commissioned by the Crown Law Office, 2001) Wai 674 [*Kaipara Inquiry*] Doc#O4.

95 Waitangi Tribunal *The Kaipara Report*, above n 7, at 159.

also overlaid with the recognition that the land is a cultural site or landscape of especial significance to Te Uri o Hau. The term favoured by the Crown was "topuni" as in the Ngai Tahu Claims Settlement Act 1998 – a reference to the dogskin cloak that used to be worn by chiefs of Ngai Tahu. Te Uri o Hau thought "topuni" had very different connotations in their dialect and suggested the word should be "kirihipi". This was agreed to and hence "kirihipi" now appears in the claims settlement legislation.⁹⁶ In my view the inclusion of "kirihipi" in the Act was historically justifiable even if oral testimony concerning the sheepskin treaty could not be verified within the Crown's written archives. It was, and is an undoubted truth in terms of their own constitutional traditions, that Ngāti Whātua did indeed have a special relationship with the Crown.

XIII CONCLUSION

I conclude with the hope that providing some details of the continuing constitutional traditions of a tribe with a long history as a loyal tribe – and willing to own that loyalty openly to this day – will indicate just why it is so important that diverse New Zealand constitutional traditions from the past are indeed unearthed. I am confident that Māori movements and their leaders will continue in the present era to operate in diverse ways in the ongoing evolution of Aotearoa New Zealand constitutional traditions. The legal status of te Tiriti o Waitangi and/or the Treaty of Waitangi, the meaning of "principles of the Treaty" and their place in Crown policy, and even a future entrenched constitution, the recognition or otherwise of te tino rangatiratanga and kaitiakitanga rights and responsibilities, the recognition or otherwise of mana Māori motuhake – these are all constitutional matters that will be debated from a range of positions both by Māori, by government leaders and by citizens. There have been many and various Māori responses to twenty-first century issues such as the foreshore and seabed/coastal marine areas, the "ownership" or "personality" of rivers such as Waikato and Whanganui, the "ownership" or otherwise of a national park such as Te Urewera, and the appropriate mode of recognising proprietary rights of Māori (if any) in freshwater and geothermal resources. The nature and content of these vigorous debates indicate to me that twenty-first century discussions about constitutional traditions are indeed likely to play out with the sort of diversity that one might expect from a knowledge of Māori contributions to the first century of the constitutional histories of Aotearoa New Zealand.

96 Te Uri o Hau Claims Settlement Act 2002, ss 39–56.