Public Interest Law Journal of New Zealand

(2025) 12 PILJNZ 157

ARTICLE

Reclaiming Rangatiratanga: Misrecognition, Māori Sovereignty and the Limits of Crown Reconciliation in Aotearoa New Zealand

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Aotearoa New Zealand remains a colonial state. Its current monist constitutional arrangements maintain the legitimacy of the Crown's sovereignty while disallowing the possibility of an equally legitimate Māori sovereignty. This article argues that the Crown's (mis)recognition of rangatiratanga (Māori sovereignty) legitimises its own sovereignty by reframing Indigenous sovereignty as a difference to be managed within the colonial system. It applies this framework to modern Crown reconciliation efforts, specifically in the establishment and disestablishment of the Māori Health Authority | Te Aka Whai Ora. This article critiques the inadequacy of incremental proposals for constitutional reform, and instead advocates for "agonistic reconciliation"—a theoretical reimagining of the constitutional relationship between Māori and the Crown as one of contestation between sovereign equals. This approach calls for Māori to engage in "recognition from below", asserting their sovereignty independently of the Crown. In challenging colonial authority at a constitutional level, this article contributes to the discourse on decolonisation and amplifies existing calls for constitutional transformation in Aotearoa New Zealand.

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I Hei Tīmatanga

Aotearoa New Zealand stands at a constitutional crossroads. Assertions of rangatiratanga[1] threaten the Crown's political dominance and its hegemonic claim as the sovereign authority in Aotearoa New Zealand.[2] Since the current coalition government aims to impose its revisionist interpretation of the Treaty, which Māori leaders claim will "set us back a generation", genuine constitutional transformation is not just desirable, but necessary.[3] As Patrick Wolfe asserts, recognising colonisation "as a structure rather than an event" clarifies that "its history does not stop".[4] Our colonial past is never behind us, for colonisation merely "transmutes into different modalities, discourses and institutional formations" that prop up the modern state.[5]

This article takes a presentist historical approach to identifying remnants of our colonial past that may limit constitutional transformation.[6] It argues that the Crown's recognition of rangatiratanga undermines Māori aspirations for shifting the constitutional terrain to where Māori and the Crown are equally legitimate sovereign authorities.[7] The current recognition of Māori rangatiratanga serves to reinforce Crown authority and

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1 For simplicity, rangatiratanga at the constitutional level is referred to as "sovereignty", whereas "rangatiratanga" refers to Māori authority at the sub-constitutional level broadly defined as Māori conceptions of self-governance and self-determination. Usage of "sovereignty" alongside "rangatiratanga" aligns with other Māori academics: see Margaret Mutu "Mana Māori motuhake Māori Concepts and Practices of Sovereignty" in Brendan Hokowhitu and others (eds) *The Routledge Handbook of Critical Indigenous Studies* (Routledge, London, 2021) 269; Margaret Wilson "The reconfiguration of New Zealand's constitutional institutions: The transformation of tino rangatiratanga into political reality?" (1997) 5 Wai L Rev 17 at 23; and Roger Maaka and Augie Fleras *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (University of Otago Press, Dunedin, 2005) at 102. For a critique of equating Indigenous claims for self-governance and self-determination with "sovereignty", see Taiaiake Alfred "Sovereignty" in Joanne Barker (ed) *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (University of Nebraska Press, Lincoln (Nebraska), 2005) 33 at 33–45.

2 See Ropata Paora and others "Tino Rangatiratanga and Mana Motuhake Nation: state and self-determination in Aotearoa New Zealand" (2011) 7 AlterNative: An International Journal of Indigenous Peoples 246 at 248; and see also Wilson, above n 1, at 24.

3 Eva Corlett and Jamie Tahana "'Dangerous' and 'retrograde': Māori leaders sound alarm over policy shifts in New Zealand" *The Guardian* (online ed, London, 29 July 2024).

4 Patrick Wolfe "Settler colonialism and the elimination of the native" (2006) 8 Journal of Genocide Research 387 at 402.

5 At 402.

6 Presentism as a methodology is the interpretation of historic events using current understandings. Not without its critiques, in the context of Treaty jurisprudence, presentism remains valuable for diversifying how the Māori-Crown relationship may be understood: see David V Williams "Historians' Context and Lawyers' Presentism debating historiography or agreeing to differ" (2014) 48(2) New Zealand Journal of History 136 at 155–156.

7 In undertaking this critique, the author acknowledges his position as Tauiwi and affirms the assertions of Māori that sovereignty was not ceded with the Treaty of Waitangi. The approach of this article broadly aligns with a kaupapa Māori research methodology, which centres tino rangatiratanga as its objective when engaging in decolonial research and presumes and privileges the legitimacy of Māori realities and their long-term aspirations for autonomy: see Carwyn Jones "Recognising Māori legal traditions in reconciliation Issues of theory and research methodology" in Peter Adds and others (eds) *Reconciliation, Representation and Indigeneity: 'Biculturalism' in Aotearoa* (Universitätsverlag Winter, Heidelberg, 2016) 39 at 41; and Mason Durie "Kaupapa Māori: Indigenising New Zealand" in Te Kawehau Hoskins and Alison Jones (eds) *Critical Conversations in Kaupapa Māori* (Huia Publishers, Wellington, 2017) 13 at 18.

legitimise its sovereignty, reflecting an imperialist tradition that misinterprets Indigenous sovereignty as a "difference" to be managed within colonial systems. As a result, even current reconciliation efforts limit genuine Māori autonomy and the potential for true Māori sovereignty.

Part II outlines the high-level aspirations for constitutional transformation, where the Crown recognises tino rangatiratanga as a legitimate sovereign authority. Part III argues that deeply rooted colonial practices underpin the Crown's relationship with Māori since the Crown's initial establishment of sovereignty, as demonstrated through a critical re-examination of He Whakaputanga o te Rangatiratanga o Nu Tireni 1835 (He Whakaputanga).

It explicates the "misrecognition doctrine", a theoretical framework to expose how the Crown's recognition of rangatiratanga serves to legitimise its own sovereignty. Part IV argues that these colonial practices persist in the Treaty relationship today, as the Crown's measures to reconcile with Māori mute the exercise of rangatiratanga beyond the state. Part V demonstrates that the Crown remains committed to these practices by establishing and disestablishing the Māori Health Authority | Te Aka Whai Ora. Part VI examines the risks that these entrenched practices pose to constitutional transformation, and then argues that incrementalist constitutional reform proposals risk replicating the Crown's colonial practices. Finally, Part VII proposes an agonistic reframing of the Treaty relationship towards a dynamic, open-ended political contestation between the Treaty partners as sovereign equals.

II Imagining Constitutional Transformation

For constitutional transformation that enacts a viable and durable Treaty relationship, each Treaty partner must recognise the legitimacy of each other's sovereign authority. This Part draws from Matike Mai Aotearoa's report, *He Whakaaro Here Whakaumu Mō Aotearoa* (*Matike Mai Report*), to outline the high-level aspirations for constitutional transformation where rangatiratanga is recognised as an equally legitimate sovereign authority.[8]

A *Constitutional transformation and Crown-Māori reconciliation*

The *Matike Mai Report* presents a vision where Māori and the Crown are sovereign equals.[9] Māori constitutional experts developed it through extensive consultation with Māori to create a constitutional framework based on He Whakaputanga and te Tiriti o Waitangi.[10] It has been supported by Māori and non-Māori academics and activists, and was drawn upon by Te Puni Kōkiri | Ministry of Māori Development as instructive on how the

8 Matike Mai Aotearoa *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (25 January 2016) [*Matike Mai Report*]. The legitimacy of relying on the Matike Mai Report is twofold. First, the constitutional framework proposed is based on what was envisioned by Te Tiriti and the power sharing arrangement Māori intended upon with its signing: see at 10 and 28. Secondly, the *Matike Mai Report* drew from extensive pan-Māori consultation, with 252 hui conducted, not limited to merely technical issues and, is likely the most manifest indication of pan-Māori consensus on how they envision a Treaty relationship and the practising of rangatiratanga at a constitutional level: see at 28–29 and 103.

9 At 14.

10 At 7–11 and 14.

New Zealand government could meet its obligations under the United Nations Declaration of the Rights of Indigenous Peoples for enabling Māori self-determination.[11] Such extensive support makes the *Matike Mai Report* an authoritative expression of how Māori envision rangatiratanga to be exercised as a constitutional sovereign authority.

The rangatiratanga envisioned in the *Matike Mai Report* is seen as having a pre-historical basis from prior to te Tiriti o Waitangi.[12] Since Māori are expected to exercise a degree of independence at the constitutional level, the resulting conceptual constitutional models for future governance arrangements involve "three sphere[s]" of authority: the rangatiratanga sphere, the kāwanatanga sphere, and the relational sphere.[13] Within the rangatiratanga sphere, Māori would govern themselves as an "independent authority no longer subject to the power of [the Crown]" with the absolute authority to "define, protect and decide what was in the best interests of [Māori]" according to tikanga.[14] This would curb the Crown's dominating power so that the kāwanatanga sphere would be limited to the Crown governing over tāngata Tiriti (non-Māori New Zealanders) while bound to honour the Treaty relationship.[15] Rangatiratanga would be limited only by instances of Māori-Crown-interdependence in the relational sphere, where Māori and the Crown collaborate on matters of joint interest as equals.[16]

The *Matike Mai Report* also emphasises the need for Crown recognition of the full range of Māori rangatiratanga. This encompasses political authority alongside proprietary and cultural rights.[17] The report expresses that the Treaty "was always meant to be about that balance and the respect and recognition that would be accorded to both rangatiratanga and kāwanatanga".[18] Therefore, how the Crown recognises rangatiratanga is important in achieving constitutional transformation.

Having set out a working vision for constitutional transformation, the next Part outlines a framework for understanding the Crown's misrecognition of rangatiratanga to be applied in the remainder of this article.

III The Misrecognition Doctrine: Setting Out the Theoretical Framework

Imperialist traditions of European sovereignty have lingered in Aotearoa New Zealand's constitutional developments long after it shed its status as a British settler colony. This Part outlines the "misrecognition doctrine"—a theoretical framework that demonstrates how the practices behind the Crown's recognition of rangatiratanga ultimately serve to legitimise its own sovereignty. It adapts legal scholar Antony Anghie's theory on imperial sovereignty, the "sovereignty doctrine", to show how colonial states

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11 *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand* (Te Puni Kōkiri, November 2019) [*He Puapua Report*]; and see Claire Charters and Amelia Kendall "Ko wai tātou? Reflecting on Constitutional Transformation in Aotearoa New Zealand" (2023) 34 PLR 148 at 152.

12 *Matike Mai Report*, above n 8, at 14.

13 At 104–112.

14 At 112.

15 At 112.

16 At 112.

17 See at 12.

18 At 84.

misrecognise and subsequently subsume Indigenous sovereignties.[19] It then applies this doctrine to the signing of He Whakaputanga to illuminate the rooting of such colonial practices at the genesis of the constitutional relationship between rangatiratanga and Crown kāwanatanga.

A *The deeply rooted value of imperialism*

Settler sovereignty of European states has been constructed in relation to the presence and practice of Indigenous sovereignty.[20] Anghie explains how colonising states consolidated their authority in foreign lands.[21] To do this, Anghie draws from the writings of European jurist Francisco de Vitoria, whose works laid the theoretical foundations for imperial state sovereignty and the international legal system.[22] The problem for colonising states was creating a system of law that accounted for relations between societies that were understood as belonging to different cultural orders.[23] At the core of this philosophical conundrum was how to make sense of Indigenous sovereignties, each with its own ideas and practices of propriety and governance, which colonising states encountered during their imperial excursions.[24] What resulted from these encounters was a theory permitting colonising states to enact a powerful set of strategies that excluded Indigenous Peoples from sovereignty.[25] Three themes emerge from Anghie's account of settler sovereignty, which construct the misrecognition doctrine in relation to the Māori-Crown relationship.

First, settler sovereignty was predicated upon its misrecognition of Indigenous sovereignties. By directly comparing Indigenous sovereignty to coloniser practices of sovereignty, colonial states conceptualise Indigenous sovereignty as Indigenous "difference".[26] "Sovereignty", as conceptualised by colonising states, belonged to the "civilised" or "developed", excluding the practices of the "uncivilised" or "developing".[27] The "civilised" served as the universal standard, and the "uncivilised" was measured against it according to the different "social practices and customs of each society" imagined between the Indigenous and the colonising sovereignty.[28] Such practices fashioned what Anghie calls a "dynamic of difference", where a gap between two cultures is identified by the colonising state, "demarcating one as 'universal' and civilized".[29] So while European states were considered amongst one another as equally sovereign, Indigenous societies were seen as "lacking in sovereignty – or else, at best only partially

19 Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2005) at 16. Anghie uses the terms colonialism and imperialism interchangeably, explaining the two concepts are intertwined: at 11. For simplicity, this article refers only to "colonialism" to refer to practices of the settler state.
20 At 6 and 29.
21 At 30.
22 At 13.
23 At 15–16.
24 At 15–16.
25 At 30.
26 At 4–5.
27 At 27–28.
28 At 27–29.
29 At 4.

sovereign".[30] This apparent difference compelled colonising states to control and transform the Indigenous society under the justification of bridging the gap.[31]

Secondly, colonial sovereignty was legitimised and consolidated by deploying state technologies to bridge the difference it established. The colonising states devised bridging "techniques to normalize the aberrant society".[32] These bridging techniques ameliorated the differences between coloniser and Indigenous, the outcome being a neutralisation of the competing Indigenous sovereignty through coercion rather than force. Anghie presents the imposition of the "law of nations" system as an example of such a bridging technique, a legalism constructed by European jurists that imposed natural law rights and obligations on Indigenous Peoples to be upheld according to the colonising state's standards.[33] Ultimately, the colonising state's deployment of "juridical techniques and institutions" that eliminate Indigenous difference serves to bring Indigenous societies "into the realm of sovereignty" of the colonising state.[34] Since the colonising state's bridging techniques act to establish commonality between Indigenous and non-Indigenous peoples, these bridging techniques appear universal and naturalised, giving the appearance of equality between Indigenous sovereignty and settler sovereignty.[35] An example of such, Anghie posits, was the trading system introduced to the Indigenous American population by the Spanish colonisers. The Indigenous Americans appeared to engage in this system as equals, where each party addressed the other's material needs and maintained "the autonomy to decide what is of value to them".[36] The "fairness of the system and the equal status of the [Indigenous Americans]" was further supported by the claims of the Spanish colonisers "that the [Indigenous Americans] are subject to the same limitations imposed on Christian nations themselves".[37] The colonising state and the Indigenous society appear equally bound to the same rights and obligations in their exercise of sovereignty, which masks the colonising state's consolidation of sovereign power over the Indigenous.

Thirdly, these bridging techniques appeared amenable to the accommodation of Indigenous sovereignty, which masked the unilateral sovereign power wielded by the colonising state. Despite an illusion of equality and reciprocity, the common framework laid down by the colonising state justified and legitimised the supreme authority of the settler state to enact "extraordinarily powerful right[s] of intervention".[38] What Anghie suggests is that, having brought the Indigenous society into its realm of governance through its bridging techniques, the colonising state wields a paramount power over the Indigenous people to ensure their conformity within the colonising state.[39] For, as Anghie states, "whatever denotes the Indian to be different – his customs, practices, rituals … justify the disciplinary measures" of the colonising state, aimed at neutralising aberrations to the colonising state's sovereignty.[40] The practice of Indigenous sovereignty is

30 At 5.
31 At 4.
32 At 4.
33 At 28–29.
34 At 30.
35 At 21.
36 At 21.
37 At 21.
38 At 22.
39 At 26–27.
40 At 29.

intolerable, given that sovereignty is held by European powers only, thus warranting the full exercise of state power to neutralise it.

B *He Whakaputanga, Māori sovereignty and colonial protectionism as bridging technique*

By appearances, He Whakaputanga amounted to recognition from the British Crown of rangatiratanga as an independent sovereignty in the land. He Whakaputanga proclaimed the exclusive sovereign power and authority of the rangatira, and the constitution of New Zealand as an independent state under the sovereignty of the assembled rangatira—the "United Tribes of New Zealand".[41] In the Māori text of He Whakaputanga, signed by the rangatira, clear assertions of Māori tino rangatiratanga were made by its numerous references to mana and rangatiratanga.[42] This is bolstered by James Busby's initial statement of intention for He Whakaputanga: as a means for Māori to "declare the Independence of their Country, and assert as a collective body their entire and exclusive right to its Sovereignty" to be respected by nations eying up New Zealand.[43]

However, art 4 qualified the recognition of rangatira authority. That is, the rangatira agreed to the continued protection of the King in their "infant state" against foreign contestations to their authority and independence.[44] The British government would subsequently affirm that the rangatira had the King's support and protection.[45] Busby demonstrated awareness that He Whakaputanga might be misconstrued as an act of recognition by the British Crown of the full sovereignty and authority of Māori, and therefore subsequently clarified that the Crown would not be prevented from claiming sovereignty over New Zealand in the future.[46] While He Whakaputanga seems to clearly affirm Māori rangatiratanga, it also later legitimised the Crown's fragile claim to sovereignty.

Lurking beneath such recognition was a view that Māori forms of tribal governance could not amount to a genuine sovereign claim. Māori practices of governance were rendered aberrant in the eyes of the Colonial Office due to their non-conformity with British governance practices. Soon after He Whakaputanga was drawn up, Busby largely abandoned any pretence of Māori forming a political authority that would produce a national sovereignty.[47] His renewed focus was for rangatira to yield their governance and become subjects of the British Crown, thus providing only for the protection of Māori rights over their land and custom.[48] After an incident of intertribal warfare, Busby came to dismiss Māori forms of governance as incapable of grounding a claim of sovereignty and that Māori would benefit from an enlightened British governance, as:[49]

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41 He Whakaputanga o te Rangatiratanga o Nu Tireni 1835, arts 1 and 2 [He Whakaputanga].

42 Articles 1 and 2.

43 Letter from James Busby (British Resident of New Zealand) to Richard Bourke (Colonial Secretary of New South Wales) (10 October 1835) as cited in Ned Fletcher *The English Text of the Treaty of Waitangi* (Bridget Williams Books, Wellington, 2022) at 157.

44 He Whakaputanga, above n 41, art 4.

45 Letter from Lord Glenelg (Secretary of State for the Colonies) to Richard Bourke (Colonial Secretary of New South Wales) (25 May 1836) as cited in Vincent O'Malley "Introduction" in *He Whakaputanga: The Declaration of Independence, 1835* (Bridget Williams Books, Wellington, 2017) 1.

46 Bain Attwood *Empire and the Making of Native Title: Sovereignty, Property and Indigenous People* (Cambridge University Press, Cambridge, 2020) at 114.

47 At 116.

48 At 115; and Fletcher, above n 43, at 159.

49 Letter from James Busby (British Resident of New Zealand) to Richard Bourke (Colonial Secretary of New South Wales) (18 Jan 1836) as cited in Fletcher, above n 43, at 164.

> … nothing short of Creative power could change the savage of yesterday to the Legislator of today; or bring into operation the functions of an efficient Government among a people whose minds have not yet conceived the ideas of authority and subordination. It is much that they will consent to be led with the confidence of children, to be the passive instruments of enacting laws, and establishing Institutions of which time will gradually evolve the effects.

To the British, the practice of intertribal warfare by the confederacy of rangatira rendered them too "uncivilised" to ground their claim of sovereignty in He Whakaputanga. Public and Māori rights lawyer Mark Hickford argues that in the minds of certain colonial officers, Māori rangatira lacked a certain "constitutional quality", for Māori seemingly lacked "any government whatsoever nor could a meeting of the Chiefs who profess to be the heads of the United Tribes take place at any time without danger of bloodshed".[50] In this "paradox of 'united' chieftains and lurking savagery"[51] lies the demarcation of Māori as "different" rather than sovereign. Busby's belief that Māori are the "savage[s] of yesterday", incapable of efficient government, suggests that underpinning the recognition of rangatiratanga in He Whakaputanga was a view of Māori in terms of Indigenous difference, rather than sovereignty.[52] Lord Normanby echoed similar views leading up to the signing of the Treaty, acknowledging that Māori had asserted sovereignty, but only:[53]

> … as it is possible to make that acknowledgement in favour of a people composed of numerous dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act or even to deliberate in concert.

The Crown's protection, enabled by He Whakaputanga, thus served to bridge this difference. Historian Bain Attwood contends that by asserting Māori sovereign independence, the Crown was able to secure its authority in the land as "protector" of Māori that "shore[d] up what amounted to vague claims in regard to [British] sovereignty".[54] He Whakaputanga was but one instance in the "long chain of protection talk" in line with the historical practices of empires, which rearranged Indigenous authorities into and under the authority of European sovereign orders.[55]

Historian and lawyer Ned Fletcher, however, suggests that under He Whakaputanga, the British presumed to follow a tradition of limited intervention that would only "permit Britain to administer the country in trust and protect Māori property under legislation".[56] But such guarantees by Busby did not negate that Māori political authority would be subsumed by Crown authority. Under a guise of protectionism, Busby had "little doubt" that the rangatira "might be led to enact, and to aid by their influence & power, the enforcement of whatever Laws the British Govt might determine, to be most advantageous to the Country",[57] fulfilling hopes to make Māori "a dependency of the British Crown in all

50 Letter from William Hobson (Captain, Royal Navy) to Richard Bourke (Colonial Secretary of New South Wales) (8 August 1837) as cited in Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford Univeristy Press, Oxford, 2011) at 94.

51 At 94.

52 Letter from James Busby (British Resident of New Zealand) to Richard Bourke (Colonial Secretary of New South Wales) (18 Jan 1836) as cited in Fletcher, above n 43, at 164.

53 Letter from Lord Normanby (Secretary of State for the Colonies) to William Hobson (Consul of New Zealand) (14 August 1839).

54 Attwood, above n 46, at 113–116.

55 At 116.

56 Fletcher, above n 43, at 159.

57 At 159.

but name".[58] The recognition of Māori sovereignty through He Whakaputanga was less about granting Māori substantive rights in their interactions with British authorities and settlers, and more about serving the imperial goal of maintaining order, which would culminate in the Treaty.[59] As Paul McHugh argues, "[s]overeignty was not the substantive interest" of the British but rather "the consciously selected starting predicate from which the appropriate forms of guardianship and facilitation of imperial enterprise ('imperial order') might flow":[60]

> For all its dressing in the modish language of humanitarianism and evangelism, ultimately the recognition of that sovereignty—as with British recognition elsewhere of the sovereignty of non-Christian polities—supplied the frame for action rather than acted as a substantive brake upon the imperial project.

Since the European institutions that would educate Māori into acceptable governance did not materialise,[61] the British sought further interventions by creating the Treaty. He Whakaputanga sought to bridge the differences between Māori and British sovereign orders, paving the way for the Treaty of Waitangi to bring an end "to the constitutional autonomy of tribes" that would consolidate Māori into a new era of colonial governance.[62]

The Colonial Office, while purporting to accommodate Māori rangatiratanga as a sovereign authority in the land through He Whakaputanga, misrecognised Indigenous sovereignty as Indigenous difference. It espoused protectionist rhetoric to bridge such differences, paving the way for the establishment of Crown sovereignty through the Treaty. As will be demonstrated in the next part, the Crown has merely reproduced its colonial practices in new forms in today's era of reconciliation.

IV Reproducing the Misrecognition Doctrine Through Reconciliation

Though the Crown no longer sees Māori as the "savage of yesterday", it redeploys the misrecognition doctrine through efforts to reconcile with Māori under the Treaty. Today, the Treaty has neither formal constitutional status nor legal force in its own right.[63] When the Crown engages with the Treaty, the resulting distribution of power and making

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58 Attwood, above n 46, at 116.

59 But see Fletcher, above n 43, at 487 and 523–529, who argues that the Crown's conception of sovereignty was pluralistic. Fletcher contends that when viewing the actions of the Colonial Office within the wider context of Empire, it imagined for the Crown a paramount political and law-making authority while allowing for Māori customary authority and self-management to continue. However, Fletcher does concede that "colonial government action was to focus on the protection of Māori society" and that assimilation may have been envisioned "dependent on Māori agreement and on the success of missionary endeavours": at 494.

60 Paul McHugh "'A Pretty Gov!': The 'Confederation of United Tribes' and Britain's Quest for Imperial Order in the New Zealand Islands during the 1830s" in Lauren Benton and Richard J Ross (eds) *Legal Pluralism and Empires, 1500-1850* (NYU Press, New York, 2013) 233 at 253–254.

61 See Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, November 2014) at 213.

62 Mason Durie *Ngā Kāhui Pou: Launching Māori Futures* (Huia Publishers, Wellington, 2003) at 100.

63 Reasons for the Crown's position include its belief that the Treaty was an instrument of cession of sovereignty, and that the Treaty is merely an international instrument and therefore lacks legal enforceability: see Christopher Finlayson and James Christmas *He Kupu Taurangi: Treaty Settlements and the Future of Aotearoa New Zealand* (Huia Publishers, Wellington, 2021) at 14; and *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (CA).

of public policy provides some recognition and exercise of rangatiratanga.[64] But, as this Part will argue, Treaty claims remain aberrations to the Crown's claim of ultimate sovereignty. In response, the Crown accommodates rather than outwardly suppresses Māori claims under the Treaty, bridging Māori difference, which orders Māori into the Crown's realm of governance.

A *Māori difference under the Treaty*

Only relatively recently has the Treaty gained prominence in Māori claims to rangatiratanga and the relationship between Māori and the Crown. It was declared a "nullity" in 1877 by the Supreme Court (now High Court); what followed was colonial policies explicitly aimed at assimilating Māori into Crown governance.[65] But as "talk of indigenous autonomy, self-determination or sovereignty gradually became talk of rangatiratanga" with the growth of Māori political consciousness and activism in the 1960s to the 1980s, the Crown responded to Māori claims for the Treaty to be honoured.[66] With Māori rejecting New Zealand's founding myths and demanding recognition of their rangatiratanga, the Crown shifted away from its outright assimilation policies to embrace biculturalism.[67] The Treaty was to be interpreted in a way that accommodates Māori and non-Māori within an officially bicultural, postcolonial nation.[68] So began the reconciliation between Māori and the Crown. However, this enduring interpretation and accommodation of the Treaty merely reproduces a colonial dynamic of difference in a new form.

Today's reconciliation involves state-led processes to address Crown breaches of the Treaty and prevent them in the future. The Crown's engagement with Māori claims under the Treaty has produced a wide range of reconciliation mechanisms—governance practices geared towards addressing Māori inequalities, improving cultural responsiveness and enabling Māori a degree of autonomy in governance.[69] However, through Treaty claims, Māori assertions of rangatiratanga are framed as claims to differential treatment among equal citizens within a liberal pluralistic democracy.[70] Assertions of rangatiratanga through Treaty claims are relegated to claims for recognising difference. This section examines the Crown's efforts to bridge Māori difference through two prominent reconciliation mechanisms: addressing breaches of the Treaty, and

64 Dominic O'Sullivan *Sharing the Sovereign: Indigenous Peoples, Recognition, Treaties and the State* (Palgrave Macmillan, Singapore, 2021) at 126.

65 See *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72 at 78. For an overview of the colonial history between Crown and Māori, see generally Richard S Hill *State Authority, Indigenous Autonomy: Crown-Māori Relations in New Zealand/Aotearoa 1900-1950* (Victoria University Press, Wellington, 2004); and James Belich *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland University Press, Auckland, 2015).

66 Richard S Hill *Māori and the State: Crown–Māori relations in New Zealand/Aotearoa, 1950–2000* (Victoria University Press, Wellington, 2009) at 149 and 175–176; and see also Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 11.

67 Hill, above n 66, at 149.

68 Penelope Edmonds *Settler Colonialism and (Re)conciliation: Frontier Violence, Affective Performances, and Imaginative Refoundings* (Palgrave Macmillan, London, 2016) at 163.

69 Jessica Terruhn "Settler Colonialism and Biculturalism in Aotearoa/New Zealand" in Steven Ratuva (ed) *The Palgrave Handbook of Ethnicity* (Palgrave Macmillan, Singapore, 2020) 867 at 874.

70 Mason Durie *Ngā Tai Matatū: Tides of Māori Endurance* (Oxford University Press, Auckland, 2005) at 205.

devolving governance power to Māori. These mechanisms of reconciliation serve as bridging techniques that ultimately bring Māori into the Crown's governing order.

(1) Addressing Treaty breaches as a bridging technique

The Crown has sought to respond to Treaty claims from Māori against the enduring effects of the Crown's historical colonial policies. The Crown accepts it owes certain obligations to Māori as a "Treaty partner". It has thus adopted principles of the Treaty into select legislation and established the Waitangi Tribunal to investigate Māori claims of Crown inconsistency with the principles.[71] As Veronica Tawhai and Katarina Gray-Sharp argue, the Treaty principles enable Māori to have distinct political status as "Treaty partners", providing "a framework for dialogue that goes beyond the recognition of a right to address needs".[72]

But while the Crown accommodates Māori claims, it does so by positioning Māori as citizens within the state entitled to particular treatment on grounds of equity, rather than as sourced in sovereignty. The paternalistic relationship where the Crown raises the spectre of its honour in committing to address Māori grievances is a part of its imperial statecraft.[73] Since the Crown's modern democracy cannot withstand gaps in living standards between any groups of citizens, the Crown addresses Māori claims by addressing disparities between non-Māori and Māori.[74] By framing Māori grievances as Crown obligations to remedy its own breaches, Māori needs are merely recognised "with increased responsiveness … within the mainstream" entitled to "different or unequal distribution of social goods".[75]

The Crown's responses to such claims fit Māori "within Pākehā economic and social models – *and* the principles of liberal pluralism" rather than providing for self-determination.[76] Similarly, addressing Māori disparities as a Treaty obligation means that the Crown accommodates Māori as an "underprivileged minority" so that recognition for Māori-specific claims may be addressed "on equity rather than constitutional grounds".[77] For example, the Waitangi Tribunal provides a forum for Māori to contest the Crown's decision-making, yet produces narratives amenable to the State's imposition of inclusion. The Waitangi Tribunal offers Māori a means to compel the Crown to acknowledge and amend its past injustices, thereby making provision for the future. However, the internal decolonisation fostered by the Tribunal merely creates a "space for

71 Reasonableness and good faith oblige Māori and the Crown as "partners to act towards each other reasonably and with the utmost good faith": *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 667. Though subsequent case law and Crown policy has expanded the cache of Treaty principles, the principles rendered in *Lands* remain the guiding baseline for the Treaty principles: see Kevin Hille "Introduction" in Kevin Hille, Carwyn Jones and Damen Ward (eds) *Treaty Law: Principles of the Treaty of Waitangi in Law and Practice* (Thomson Reuters, Wellington, 2023) 1 at 15.

72 Haami Piripi "Te Tiriti o Waitangi and the New Zealand Public Sector" in Veronica Tawhai and Katarina Gray-Sharp (eds) *Always Speaking: The Treaty of Waitangi and Public Policy* (Huia Publishers, Wellington, 2011) 206 at 215.

73 Janet McLean "Crown, Empire and Redressing the Historical Wrongs of Colonisation in New Zealand" [2015] 2 NZ L Rev 187 at 211.

74 Durie, above n 62, at 108.

75 Louise Humpage and Augie Fleras "Intersecting Discourses: Closing the Gaps, Social Justice and the Treaty of Waitangi" (2001) 16 Social Policy Journal of New Zealand 37 at 48.

76 At 49–50.

77 Durie, above n 62, at 108.

multiple national ideologies to reside in the same bounded territorial space that is the state".[78]

Historian Miranda Johnson also argues that the Waitangi Tribunal recognises and encourages Māori difference based on an Indigenous cultural identity, one valued "in much broader, *national*, terms" towards constructing Aotearoa New Zealand as a "(post)imperial metropole" in the process of reconciliation.[79] Māori, as claimants of the Crown's commitments, "cannot anticipate sovereign independence from the extant nation-state" and rather "must 'contribute' to their own reparation".[80] So while certain Waitangi Tribunal findings appear to fracture the Crown's construction of a unitary governing order, it nevertheless sets the stage "for co-operation and sites of resolution" between Māori and the Crown that keeps Māori subject to the Crown's governance.[81]

(2) Collaborative governance as a bridging technique

As the end of the Treaty settlement process draws near, Māori have sought greater control over things of importance to them, as guaranteed under the Treaty.[82] In response, the Crown has started granting Māori greater involvement in these matters.[83] As part of its efforts towards reconciliation, the Crown has adopted the dual strategy of devolving its authority in partnership with Māori organisations alongside accommodating Māori cultural practices into state institutions and processes.[84] For instance, one touted benefit for Māori is that co-governance allows Māori to bring a wider range of interests, experiences and perspectives, including their cultural practices and tikanga Māori, to substantive decision-making.[85] By establishing these institutions, the Crown relocates governance to non-state-centric sites of inclusion where Māori are engaged as active participants (and in the case of co-governance, partners) in decision-making.[86]

While this devolution of authority ostensibly enables Māori to share power, it limits the extent to which Māori can exercise autonomy independently from the state. First, while collaborative governance grants Māori greater control over things of importance to them, ultimately, Māori merely supplant state actors for Māori actors within Crown-dictated governance structures.

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78 Sean Killen "The Treaty of Waitangi and the Waitangi Tribunal: Globalization and Decolonization in New Zealand" in Michael R Anderson and Stephanie S Holmsten (eds) *Political and Economic Foundations in Global Studies* (Routledge, New York, 2019) 144 at 151.

79 Miranda Johnson "The Burdens of Belonging: Indigeneity and the Refounding of Aotearoa New Zealand" (2011) 45 New Zealand Journal of History 102 at 111.

80 At 111.

81 Giselle Byrnes *The Waitangi Tribunal and New Zealand History* (Oxford University Press, Oxford, 2004) at 198.

82 See Lyn Provost *Principles for effectively co-governing natural resources* (Office of the Auditor-General, Wellington, 2016) at [3.27]–[3.32].

83 Robert Joseph and Richard Benton (eds) *Waking the Taniwha: Māori Governance in the 21st century* (Thomson Reuters, Wellington, 2021) at xxiii.

84 Katherine Smits "Multiculturalism, Biculturalism, and National Identity in Aotearoa/New Zealand" in Richard T Ashcroft and Mark Bevir (eds) *Multiculturalism in the British Commonwealth: Comparative Perspectives on Theory and Practice* (University of California Press, Berkeley, 2019) 104 at 111.

85 Carwyn Jones "Co-Governance and the Case for Shared Decision Making" (2023) 19(2) Policy Quarterly 3 at 4.

86 Meg Parsons, Karen Fisher and Roa Petra Crease "Co-Management in Theory and Practice: Co-Managing the Waipā River" in *Decolonising Blue Spaces in the Anthropocene: Freshwater management in Aotearoa New Zealand* (Palgrave Macmillan, Switzerland, 2021) 325 at 349.

Political scientist Erik Swyngedouw suggests that dispersing state governance authority inherently implicates the State's "autocratic role" in arranging new forms of governance compatible with its paramount position within a pluralist democratic state.[87] Rather than relinquishing authority, "governance-beyond-the-state" expands the State's realm of governance, which retains the existing asymmetrical power structures between the State and non-state entities.[88] So, even when the Crown pursues power-sharing in co-governance, it views rangatiratanga as a cultural right deriving from an Indigenous identity, refusing to divest full control over key Crown assets to Māori.[89] Here, rangatiratanga merely involves Māori protecting and preserving resources of importance to them, rather than extending to political authority or property rights that rangatiratanga encompasses.[90] So, while the Crown concedes that Māori are entitled to participate in governance, its response is to strengthen Māori roles in management, rather than enabling greater autonomy that is tantamount to recognising the rights of sovereignty.[91]

Secondly, while the Crown may provide a degree of cultural accommodation, its enlightened inclusion does not facilitate greater control or access to resources in a way that furthers Māori autonomy. The procedural inclusion of Māori cultural views in decision-making often lacks substantive power.[92] Nicolas Pirsoul argues that although requirements to account for Māori worldviews are "positive gestures of respect towards Māori", these "have more to do with reconciliation and restoring *mana* to Māori than with self-determination as such".[93] While understandably amenable to Māori desires, such cultural inclusion neutralises resistance and engenders Māori buy-in to the Crown's overarching governance.[94] Providing accommodation for Māori to dictate their own economic, cultural and social affairs *within* the state has meant reconciliation silences overt Māori claims for rangatiratanga *beyond* the state.[95] So while the "language of procedural inclusion and Māori autonomy overlaps", as academics Amanda Lowry and Rachel Simon-Kumar suggest, this merely:[96]

> … furthers Māori autonomy only to the point where control continues to reside within the system … the scope of the inclusive process does not have the capacity to redress wider political claims for Māori autonomy, mana motuhake or rangatiratanga.

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87 Erik Swyngedouw "Governance Innovation and the Citizen: The Janus Face of Governance-beyond-the-State" (2005) 42 Urban Studies 1991 at 1999.

88 At 1999.

89 See Amanda Lowry and Rachel Simon-Kumar "The paradoxes of Māori-state inclusion: the case study of the Ōhiwa Harbour Strategy" (2017) 69 Political Science 195 at 209; Maria Bargh "The Post-Settlement World (So Far) Impacts of Māori" in Nicola R Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) 166 at 168; and see Andrew Erueti "Māori Rights to Freshwater: The Three Conceptual Models of Indigenous Rights" [2016] 24 Wai L Rev 58 at 66.

90 Erueti, above n 89, at 58 and 66.

91 See Jacinta Ruru "Indigenous Restitution in Settling Water Claims: The Developing Cultural and Commercial Redress Opportunities in Aotearoa, New Zealand" (2013) 22(2) PacRim L & Poly J 311 at 342.

92 See Lowry and Simon-Kumar, above n 89, at 209.

93 Nicolas Pirsoul *The Theory of Recognition and Multicultural Policies in Colombia and New Zealand* (Palgrave Macmillan, Cham, 2020) at 214.

94 Smits, above n 84, at 119.

95 Ann Sullivan "The politics of reconciliation in New Zealand" (2016) 68 Political Science 124 at 126.

96 Lowry and Simon-Kumar, above n 89, at 207.

B *Bridging difference, neutralising Māori sovereignty claims*

The amenability of these bridging techniques masks the Crown's unilateral power to accommodate Māori rights and interests. Seeking recognition of their rangatiratanga from the Crown through appeals to the Treaty indentures Māori to the Crown's underlying assumption of sovereignty.[97] Māori subject themselves through claims for provisions of redress and power-sharing to the Crown's treaty discourse.[98] However, the Crown ultimately wields parliamentary sovereignty, so it can rescind its accommodations to Māori when Parliament so desires. So, while Māori benefit from Crown-supplied affirmative action policies or inclusion in governance,[99] the ends served are the consolidation of the Crown's absolute sovereignty.

By presenting itself as committed to the Treaty (that being, more accurately, its principles), the Crown obscures its bridging effects and its unilateral power. The limits that the Crown places on itself are, in effect, illusory. While the Treaty principles have required the Crown to "engage in a dialogue with them [Māori]" in a "partnership", from their inception, the Treaty principles were "constrained by the rule and language of sovereignty the Court was trying to downplay" that established an unequal relationship between kāwanatanga and rangatiratanga.[100] The Treaty principles have been framed to guide Crown conduct, seemingly limiting its unilateral power over Māori as a Treaty partner.

As Dominic O'Sullivan argues, the Treaty principles have contributed to the Treaty's "evolving legal, political and policy significance" but ultimately are a reductionist tactic that "positions the Crown as senior partner with an overriding sovereignty in which Māori do not share and to which rangatiratanga is subservient".[101] Parliament may pursue virtually any legislative objective so long as it gives appropriate priority to Māori interests where Parliament has committed itself to acting consistently with the Treaty principles.[102] Even where the Crown's actions are subject to judicial scrutiny, the courts rarely question Parliament's ultimate jurisdiction over Māori—Parliament merely must not act illegally by failing to consider the Treaty principles when it obliges itself to do so.[103] While simultaneously capable of accommodating Māori through its Treaty commitments, the Crown nevertheless retains and reinforces its paramount sovereign character.

97 See George Fitzgerald and Stephen Young "Agony, Exclusion and Colonial Reproduction: A Critical Examination of the Doctrine of Difference in Aotearoa New Zealand" (2020) 29 NZULR 313 at 334.

98 At 334; and see also Dominic O'Sullivan *Beyond Biculturalism: The Politics of an Indigenous Minority* (Huia Publishers, Wellington, 2007) at 60.

99 Pirsoul, above n 93, at 210.

100 PG McHugh "A history of Crown sovereignty in New Zealand" in Andrew Sharp and PG McHugh (eds) *Histories, Power and Loss: Uses of the Past – A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 189 at 205–206.

101 O'Sullivan, above n 64, at 114.

102 See Mikayla McKenzie Dempsey "Hearing the Māori Voice: The Case for Proper Implementation of Tikanga and Treaty Principles in Natural Justice Analysis" (2021) 27 Auckland U L Rev 55 at 63–64.

103 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [150]–[151]; see Carwyn Jones "Tāwhaki and Te Tiriti: A Principled Approach to the Constitutional Future of the Treaty of Waitangi" (2013) 25 NZULR 703 at 713–715; and see also Moana Jackson "The Treaty and the Word: The colonization of Māori philosophy" in Graham Oddie and Roy Perrett (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992) 1 at 1.

This Part has argued that even in the modern era of reconciliation, the Crown continues to enact the misrecognition doctrine. The next Part will use Te Aka Whai Ora as a case study to demonstrate how the Crown's misrecognition operates in practice.

V Case Study: Te Aka Whai Ora

The establishment of Te Aka Whai Ora was considered a revolutionary step forward in the Māori-Crown relationship. However, a close examination of Te Aka Whai Ora reveals that despite the Crown ostensibly providing for Māori rangatiratanga over their health, the Crown remained the dominant Treaty partner. This Part demonstrates how the misrecognition doctrine underpinned the Crown's exercise of sovereignty in establishing and disestablishing Te Aka Whai Ora.

A *The establishment of the Māori Health Authority and addressing Māori difference*

Māori health is political. It involves decolonial discourses around power and sovereignty and is therefore an important example of a political claim to rangatiratanga rather than a proprietary or solely cultural claim.[104] Further, the *He Puapua Report* and *Matike Mai Report* identified rangatiratanga over Māori health as a necessary feature of constitutional change and a potential site for Māori to exercise independent authority.[105]

Previously in its *Hauora Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (*Hauora Report*), the Waitangi Tribunal found the Crown failed to provide for "tino rangatiratanga and mana motuhake in the design, delivery, resourcing, and control of Māori primary health", meaning the existing primary health care system failed to address Māori health inequities.[106] Several recommendations resulted. First, that the Crown should make policy decisions to fulfil its obligations as a Treaty partner.[107] Secondly, that substantive actions should be taken to realise tino rangatiratanga.[108] These included co-designing solutions with Māori to problems in primary health care and exploring the concept of a standalone Māori primary health authority.[109] While the Tribunal acknowledged that Māori Advisory Groups had a role in the partnership process, it considered that these Groups did not fully reflect the joint obligations of the Treaty principle of partnership.[110] Co-design and co-governance were therefore necessary for "more robust engagement between Treaty partners".[111]

Having accepted these recommendations, the Crown enacted the Pae Ora (Healthy Futures) Act 2022 (the Pae Ora Act). The Pae Ora Act established two new entities: Health New Zealand, the national primary healthcare system responsible for leading and coordinating health service delivery, and Te Aka Whai Ora, an independent statutory Authority tasked with co-commissioning and planning services alongside Health

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104 See Brendan Hokowhitu and others "Mana motuhake, Indigenous biopolitics and health" (2022) 18 AlterNative: An International Journal of Indigenous Peoples 104 at 104–105.

105 *Matike Mai Report*, above n 8, at 121; and *He Puapua Report*, above n 11, at 9, 11 and 46.

106 Waitangi Tribunal *Hauora Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 115–116, 138 and 165.

107 At 165.

108 At xxii and 165.

109 At xxii and 165.

110 At 165.

111 At 165.

New Zealand.[112] The government presented these reforms to New Zealand's health services as a system "reset".[113]

The government itself acknowledged the constitutional significance of establishing Te Aka Whai Ora. In the Bill's third reading, Hon Andrew Little spoke boldly of the Authority's transformative potential and alluded to its constitutional importance in that it would:[114]

> … provide Māori with the opportunity to make decisions that are important to them. That's nothing less than the commitment that was made by the British Crown under Te Tiriti o Waitangi … It will allow Māori to make their decisions to exercise their rangatiratanga on this very important matter of the health of their people.

Noteworthy here is that Mr Little impliedly linked Māori rangatiratanga to the Crown's commitments under the Treaty. While Māori could, and should exercise rangatiratanga, the implication is that it was at the benevolence of the Crown. In this way, the exercise of rangatiratanga by Māori over their own health seems akin to a Crown-conferred advantage, rather than an exercise of free-standing sovereignty. Nevertheless, within Te Aka Whai Ora, there were opportunities for rangatiratanga to be exercised.

B *Rangatiratanga in the operation of Te Aka Whai Ora*

On the surface, the way Te Aka Whai Ora was established gave effect to the recommendations in the *Hauora Report*, providing for rangatiratanga. It enabled Māori to exercise decision-making authority and influence in the design and delivery of their primary health care services.[115] Section 6 of the Pae Ora Act sets down requirements for Ministers to share power with Māori in the operation of the Te Aka Whai Ora "to provide for the Crown's intention to give effect to the principles of te Tiriti o Waitangi (the Treaty of Waitangi)".

On substantive decision-making matters, Te Aka Whai Ora and Health New Zealand were presented as two equal entities that would enable the former to operate independently of the state. First, Te Aka Whai Ora had the power to decide what measures were necessary to achieve the objectives set out in ss 3 and 18 of the Pae Ora Act, which were oriented towards achieving health equity for Māori. Further indications of Te Aka Whai Ora's independence are found in *Te Pae Tata Interim New Zealand Health Plan 2022* report (*Te Pae Tata*), which specifically referenced Māori leadership and mana motuhake, describing the new system as "mana-enhancing".[116] Māori within the health sector would have the autonomy "to lead as Māori" with "Māori in leadership positions making decisions in their own right and in partnership with other key stakeholders".[117] Section 20 provided that Te Aka Whai Ora must engage with and report to Māori in relation to their hauora Māori needs by working with Iwi-Māori Partnership Boards, but also Māori health organisations, rūnanga and Māori trust boards, and other representatives of whanau and

112 Parts 2 and 3.
113 Beehive "New beginning for Health System: Pae Ora (Healthy Futures) Bill passes third reading" (press release, 7 June 2022).
114 (7 June 2022) 760 NZPD (Pae Ora (Healthy Futures) Bill - Third Reading, Hon Andrew Little).
115 See *Hauora Report*, above n 106, at 165.
116 Te Whatu Ora and Te Aka Whai Ora *Te Pae Tata*: *Interim New Zealand Health Plan 2022* (Te Whatu Ora, Wellington, 2022) at 80.
117 At 79.

hapū.[118] Māori presence at these lower levels of the Authority's operation arguably indicates the Crown's acceptance of tino rangatiratanga in public policy, since it facilitated local decision-making that was by and for Māori.[119]

Secondly, Te Aka Whai Ora was to be tikanga-led. Section 22 required that the Authority's board members must be competent in tikanga and mātauranga Māori. Although there are no explicit statutory directives for using tikanga Māori in the decision-making processes of the Authority, the requirement that the board members have competency in tikanga implies that Māori worldviews would be engaged throughout the Authority's operation. This is supported by the progress report undertaken by the Hauora Māori Advisory Committee, which states that the board felt a "deep need and desire" to "ensure all elements of Te Aka Whai Ora are grounded in new, distinctly te ao Māori thinking and framing", including its strategic and operational functions.[120] Te Aka Whai Ora would provide a forum within which tikanga Māori would be used in decision-making, implying a degree of independence for Te Aka Whai Ora. The exercise of rangatiratanga, as Māori expected, was reflected in this provision, which ensured Māori would have adequate decision-making authority and influence in the design and delivery of primary health care services.

C *Critical analysis: the façade of rangatiratanga*

While there were opportunities in the design of Te Aka Whai Ora for Māori to exercise rangatiratanga, ultimately the Crown retained a paramount position in the shared power arrangement. Multiple sections of the Pae Ora Act indicated that Te Aka Whai Ora remained subordinate to Health New Zealand. Section 19 provided that Te Aka Whai Ora jointly develop and implement a New Zealand Health Plan alongside Health New Zealand.[121] Section 32 of the Pae Ora Act provided that the entities must work to resolve disputes between them. If they cannot agree, the matter will be referred to the Minister for Health, who must consult with the Minister for Māori Development or the Minister for Māori-Crown Relations in determining the dispute.[122] Further, ultimate decision-making power remained with the Minister-appointed board.[123]

As stated, Te Aka Whai Ora was empowered to make decisions on matters of importance. However, the Crown was still entitled to exercise an overarching degree of influence in its decision-making. It had the power to intervene when considering the "strength or nature of Māori interests in a matter", and the "interests of other health consumers and the Crown in the matter".[124] So, while Māori could exercise a degree of independence, the Crown retained a clear stake in Māori interests and its self-appointed mandate to interfere in circumstances where the interests between Māori and non-Māori required.

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118 Pae Ora (Healthy Futures) Act 2022, ss 20 and 31.

119 Dominic O'Sullivan "Difference, Deliberation and Reason" in *'We Are All Here to Stay': Citizenship, Sovereignty and the UN Declaration on the Rights of Indigenous Peoples* (ANU Press, Canberra, 2020) at 181.

120 Hauora Māori Advisory Committee *High-level assessment of Te Aka Whai Ora progress against Cabinet expectations, commitments and priorities for the Hauora Māori Advisory Committee* (Ministry of Health, Wellington, August 2023) at 23.

121 Pae Ora (Healthy Futures) Act.

122 Section 32.

123 Sections 21, 29 and 32.

124 Section 7(c)(i)–(ii).

Further, the Crown's obligation under s 6 to "give effect" to the Treaty principles did not grant more autonomy for the exercise of rangatiratanga at a high level. Rather, it bound Māori to engage with the Crown as partners, which did not grant Te Aka Whai Ora greater leadership in the health care system nor enable Te Aka Whai Ora to fulfil its mandate in improving Māori health inequities. Compared to the Crown, Te Aka Whai Ora had "limited authority and autonomy … to have reach across other Crown health and social entities".[125] For example, a survey of *Te Pae Tata* and the progress report does not indicate that Te Aka Whai Ora had independent relationships with other high-level entities such as Pharmac, the Health Quality and Safety Commission or the Mental Health and Wellbeing Commission. Rather, these services would be conducted through Health New Zealand.[126] Ngaire Rae and others note that within the interim plan co-designed by Te Aka Whai Ora and Health New Zealand, there were no references to the Waitangi Tribunal's finding that Māori did not cede their sovereignty.[127] The authors identify that despite the assertions that rangatiratanga would be provided for in the new system, the health system's leadership structure did not enable Māori leadership at all levels "from hapū to independent Māori leadership at a national level from within and outside of the Crown":[128]

> The Plan does not disclose where or how the independent sovereign voices of Māori are represented within this document. Hapū are the Tiriti partners of the Crown, but within the new health structures, hapū are frequently subsumed under iwi-partnership boards, which are themselves a Crown construct.

Structurally, Te Aka Whai Ora remained, in practice, subordinate to the Crown in its high-level power-sharing dynamic. Ultimately, the collaborative efforts between the two health authorities remained "situated within the Crown system".[129] Indeed, the Human Rights Commission would later acknowledge that Te Aka Whai Ora was not rangatiratanga-led, as it reported to and was funded by the Crown.[130] As an example of the Crown's bridging techniques at work, Te Aka Whai Ora was a means for the Crown to legitimise its own power while satisfying Māori demands for genuine policy action for the exercise of rangatiratanga.

But even such accommodation of Māori difference threatened the Crown's claim to paramount sovereignty. Its critics within Parliament asserted that Māori were unfairly privileged, flouting the liberal democratic principles of Aotearoa New Zealand society.[131] Once Te Aka Whai Ora became politically inconvenient, the Crown demonstrated its sovereign authority and sought to reassert its dominance over Māori. The Pae Ora (Disestablishment of Māori Health Authority) Amendment Act 2024 (Amendment Act),

125 Ngaire Rae and others "A Critical Tiriti Analysis of the Pae Ora (Healthy Futures) Bill" (2022) 135 New Zealand Medical Journal 106 at 108.

126 Te Whatu Ora and Te Aka Whai Ora, above n 116; and Hauora Māori Advisory Committee, above n 120.

127 Ngaire Rae and others "A critical Tiriti analysis of Te Pae Tata: the Interim New Zealand Health Plan" (2023) 136 New Zealand Medical Journal 88 at 91; and see also Waitangi Tribunal, above n 61, at 526–527.

128 Rae and others, above n 127, at 89–91.

129 See Rae and others, above n 125, at 89.

130 Human Rights Commission *Co-governance, human rights & te Tiriti o Waitangi: Mana kāwana ngātahi, ngā tika tangata me te Tirit ō Waitangi* (November 2023) at 5.

131 See Bernard Orsman "Act promises 'colourblind' health system, including scrapping prioritised surgical waitlists for Māori" *The New Zealand Herald* (online ed, Auckland, 9 October 2023); and see also the claim that Te Aka Whai Ora was "predicated entirely on race" that "create[d] division" which justified its disestablishment: (27 February 2024) 773 NZPD 1535.

which came into force in June 2024, repealed the Pae Ora Act. Te Aka Whai Ora was disestablished, and its functions were reintegrated into Health New Zealand.[132] Its replacement, Iwi-Māori Partnership Boards, are generally administrative and do not specifically provide for Māori rangatiratanga or the Treaty in their functions.[133] Though the Crown admitted that abolishing Te Aka Whai Ora without consulting Māori breached the Treaty principles, the Crown maintained that it was not obliged to maintain Te Aka Whai Ora.[134] Rather, the Crown was entitled to "choose from a range of Treaty-consistent options" that would similarly meet its Treaty obligations to address Māori health inequities.[135]

While Te Aka Whai Ora initially appeared to provide for Māori autonomy, it was ultimately constrained within a state framework. Its demise reflects a troubling pattern in New Zealand's constitutional history, where the Crown attempts to bridge the differences between Māori and Crown sovereign orders but stops short of recognising Māori as an independent sovereignty. The implications of He Whakaputanga and Te Aka Whai Ora for constitutional transformation will now be discussed.

VI The Stasis of Incrementalist Reforms

Despite the Crown's pretences of committing itself to rangatiratanga, its constitutional imagination is clearly limited to rangatiratanga, which only exists within boundaries set by the Crown. This Part first reflects on He Whakaputanga and Te Aka Whai Ora and what these constitutional moments in the Treaty relationship entail. It then critiques two constitutional reforms—entrenching the Treaty as a supreme constitutional document and strengthening the courts—and argues that neither provokes the necessary mutual recognition between Māori and the Crown for constitutional transformation.

A *Questioning the Crown's recognition: From He Whakaputanga to Te Aka Whai Ora*

If the treatment of He Whakaputanga and Te Aka Whai Ora are any indications, the Crown seems content to maintain its paramountcy in New Zealand's constitutional arrangements while giving the appearance of tacit recognition for Māori aspirations for rangatiratanga. He Whakaputanga was a historical declaration of Māori political and legal authority, and Te Aka Whai Ora represented a potential modern expression of high-level Māori governance. Te Aka Whai Ora, while responding to Māori demands for self-determination over their health, was locked into Crown governance structures that did not afford real autonomy. This mirrors the Colonial Office's treatment of He Whakaputanga. While initially acknowledged, the Crown sought to dictate Māori governance through He Whakaputanga, which ultimately primed Crown governance as the paramount power in the land.

Indigenous scholar Glen Coulthard contends that while modern colonial states may no longer assert their power over Indigenous Peoples through policies that are "explicitly

132 Pae Ora (Disestablishment of Māori Health Authority) Amendment Act 2024, s 6.

133 See Shane Reti *Disestablishment of the Māori Health Authority – Next Steps on Māori health* (Ministry of Health, May 2024) at [3]–[6].

134 Geoffery Melvin *Memorandum of Counsel for the Crown in Response to Application for Urgent Inquiry* (Crown Law, December 2023) at [13].

135 At [13]; and see also John Whaanga and Bernard Te Paa *Briefing Wai 3307 Māori Health Authority Urgent Hearing and Crown Evidence* (Ministry of Health, February 2023) at [14].

oriented around the genocidal exclusion/assimilation double", they nonetheless perpetuate the same power dynamics "through a seemingly more conciliatory set of discourses and institutional practices that emphasize [Indigenous] *recognition* and *accommodation*".[136] Despite this shift in focus, Coulthard argues that "the relationship between Indigenous Peoples and the state has remained *colonial* to its foundation".[137]

In the context of Indigenous-State relationships, recognition is far from benign. Accommodation consolidates—rather than curbs—the form and function of the State. When marginalised groups seek representation from the State, the instinct of the State is to construct these groups in a manner that makes them governable.[138] The consequence of state recognition, therefore, is complicity in the state project that restricts opportunities for fundamental rebalancing of power structures, so that rewards of recognition are:[139]

> … made conditional on their conformity to the norms and expectations that are most conducive to the state's capacity to manage social conflict, to maintain its moral authority to govern, and to secure the conditions of economic growth. While the conditionality of state recognition for minority or subaltern groups does not necessarily erase the benefits of recognition for those groups, recognition may come at the price of the transformation or distortion of their own self-understandings. And most often, it proceeds in forms that set aside any major restructuring of material relationships.

Nicole Roughan similarly identifies an awareness among Māori that recognition by the State may not achieve the emancipatory potential that Māori seek for their legal and political legitimacy.[140] In the context of Indigenous-State legal and political hierarchies, their claims for recognition are often:[141]

> … too small and too deferential to the existing institutions of the state. On this view, recognition should not be sought or claimed, for the very seeking undermines the authority of the claimant. Claims for the state's recognition of Indigenous legalities seem to appeal to and thus fail to disrupt or dispute the state's inner logic of assumed sovereign supremacy.

Rather than fostering genuine constitutional reconciliation, the Crown's recognition legitimises its sovereignty, limiting the extent to which Māori can aspire to exercise an independent form of rangatiratanga.

B *Strengthening the position of the Treaty in our constitutional arrangements*

Former Prime Minister and Attorney-General Rt Hon Sir Geoffrey Palmer and constitutional lawyer Andrew Butler have written the most comprehensive discussion

136 Glen Sean Coulthard *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, Minneapolis, 2014) at 6.

137 At 6.

138 Melissa S Williams "On the Use and Abuse of Recognition in Politics" in Avigail Eisenberg and others (eds) *Recognition Versus Self-Determination: Dilemmas of Emancipatory Politics* (University of British Columbia Press, Vancouver, 2014) 3 at 7.

139 At 7.

140 Nicole Roughan "The role of recognition: persons, institutions and plurality" (2022) 47 Journal of Legal Philosophy 53 at 57–58.

141 At 57 (footnote omitted).

advocating for Treaty recognition within a written constitution.[142] As supreme law, the Treaty would have full legal force, ensuring that Treaty rights cannot be easily displaced, while its authoritative meaning would be interpreted by specialists in a modern context.[143] But rather than legitimise a Māori sovereignty, it merely places an ostensible limit on the Crown's exercise of sovereignty over Māori within its realm of governance. Jessica Terruhn argues that while the Treaty has proved useful to Māori claims for representation in the state, ultimately, it "has been amenable to the settler government because it paved a way to re-legitimizing the presence of settlers and the sovereignty of the settler state".[144] Making provisions for the Treaty by providing Māori limited rights as a citizen minority "protects the sovereignty of the settler state by aiming to subdue indigenous aspirations for sovereignty in favor of subsuming them into the reconciled nation".[145] Rather than providing for rangatiratanga, formal recognition of a differentiated Māori citizenry merely works to pacify a Māori sovereignty. Indeed, Palmer and Butler imply as much, stating that:[146]

> Incorporating the Treaty into a superior law constitution … would not greatly alter current approaches, other than to act as a check on the temptation to reduce Treaty rights for political expediency.

Thus, entrenching the Treaty would likely reinforce the Crown's misrecognition of rangatiratanga as a difference without reducing the coercive effects of its bridging techniques. It would merely preserve the status quo.

C *Empowering the courts*

Similarly, strengthening the courts' judicial review powers to restrain the Crown from acting inconsistently with the Treaty would not suffice. Carwyn Jones has suggested empowering the courts to initiate a constitutional dialogue between the branches of government to compel the recognition of rangatiratanga as a "legal sovereignty" in Aotearoa New Zealand.[147] According to Jones, the courts play a role in shaping the constitution in alignment with societal values. They are well placed to incorporate Māori perspectives into the law through "constitutional korero".[148] Admittedly, the courts are increasingly showing a willingness to initiate this dialogue.[149] Although Jones' notion of a judicially initiated constitutional dialogue is tempting, ultimately, the courts are a part of the state machinery. Even if the Treaty became supreme law, the courts will unlikely initiate a constitutional transformation that would place Māori and the Crown as equal, sovereign

142 Geoffery Palmer and Andrew Butler *Towards Democratic Renewal: Ideas for constitutional change in New Zealand* (Victoria University Press, Wellington, 2018).
143 At 184.
144 Terruhn, above n 69, at 881.
145 At 881.
146 Palmer and Butler, above n 142, at 186.
147 See Jones, above n 103, at 717.
148 At 717.
149 At 715–716; and see, for example, *Kiwi Party Inc v Attorney General* [2020] NZCA 80, [2020] 2 NZLR 224 at [50], where in an unprecedented move the Court of Appeal left open the possibility of issuing declarations of inconsistency with the Treaty as within their judicial function.

authorities. Paul McHugh has noted that the nature of the courts being "embedded inside the public sphere, and mostly as lying well below the public sightline" means that:[150]

> Far from pushing the boundaries of [Treaty] jurisprudence the courts have been cautious and more concerned with ensuring due process. The profile of the jurisprudence has been facilitative, geared mostly around getting the relevant parties in constructive dialogue within the terms of the statutory regime.

Matthew SR Palmer and Dean R Knight argue that Aotearoa New Zealand's generally conservative approach to constitutional developments indicates that:[151]

> … the most likely type of constitutional change in New Zealand will be ongoing pragmatic tinkering within aspects of the broad framework of current arrangements. Incremental reform has been a key aspect of New Zealand's constitutional tradition … Dramatic revolutionary pressures have generally been avoided, even if we have experienced a couple of more fundamental constitutional moments.

Ultimately, "[i]n the current environment, it is difficult to see a popular pathway forward with [the proposals in the *Matike Mai Report*] absent some revolutionary moment."[152] It follows that the courts would unlikely provoke the mutual recognition between the Treaty partners needed for constitutional transformation.

Though providing greater accommodation for the Treaty may initiate greater constitutional discourse between the three branches of (Crown) government, as well as between the rangatiratanga and kāwanatanga spheres, such reforms retain the centrism of Crown legitimacy and the misrecognition of rangatiratanga. Dr Ani Mikaere succinctly articulates the dilemma for Māori aspirations for rangatiratanga at the constitutional level, in that:[153]

> … by the very act of continuing to work within the constraints imposed on us by kāwanatanga, we legitimate a set of constitutional arrangements that are in direct breach of Te Tiriti o Waitangi.

A drastic shift is needed in the Crown's views on its own sovereignty, as well as that of Māori rangatiratanga.

VII From a Conciliatory Reconciliation to an Agonistic Reconciliation

The Māori-Crown relationship requires reframing to displace the Crown's enactment of the misrecognition doctrine and to provide for the mutual recognition necessary for constitutional transformation. This Part advocates for a theoretical reframing of the constitutional relationship between Māori and the Crown from a conciliatory dynamic to

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150 PG McHugh "'Treaty Principles': Constitutional Relations Inside a Conservative Jurisprudence" (2008) 39 VUWLR 39 at 43 and 66; and see also Matthew SR Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Bloomsbury Publishing, London, 2022) at 245–247.

151 At 247.

152 At 245.

153 Joe Williams and Ani Mikaere "Visions for Māori Constitutionalisms" (The Constitutional Kōrero 2022: Transforming New Zealand's Constitution, Auckland, 21 November 2022).

an agonistic dynamic that allows for ongoing political contestation between them as sovereign equals.

A *An agonistic reframing*

Agonistic pluralism rejects the idea of "neutral or rational dialogue" between diverse actors and acknowledges that consensus obscures self-constituting legitimacy through acts of power.[154] In Chantal Mouffe's works on agonostic approaches to politics, conflict is an essential dynamic inherent to politics that allows opposing groups to actively contest their ways of peacefully coexisting.[155] Struggles between political actors are enduring features of a functioning society where healthy "clash[es] of legitimate democratic political positions" can play out.[156] Hickford has contended that an agonistic rethinking of the Treaty's place in our constitutional arrangements would enable "contested and contestable, negotiated and negotiating communities of practice".[157] Rather than close off disagreement that privileges the colonial assumptions of the Crown, our constitutional arrangements would allow for a "place of interdependencies between law and politics" that "beget[s] conversations without end" between Māori and the Crown.[158] Such was imagined in the *Matike Mai Report*, where "[c]ontest and debate were regarded [at the consultation hui that informed the *Matike Mai Report*] as essential to good decision-making."[159] Embracing the inherent tension between the sovereignty of Māori and the Crown could generate opportunities for innovative ways of expressing rangatiratanga without unduly compromising kāwanatanga.[160] An "agonistic reconciliation" pursued by Māori and the Crown, therefore, enables them to engage in a continuous renegotiation of each other's sovereign identities in a way that disrupts the legitimacy of settler sovereignty.

However, the persisting misrecognition of Māori sovereignty, from He Whakaputanga to Te Aka Whai Ora, indicates that the Crown is unlikely to embrace agonistic reconciliation. As a practical strategy for the rangatiratanga sphere, Māori must engage in contestation with the Crown within the state and, more importantly, *beyond* the state. Sarah Maddison argues that engaging in agonistic relations solely within the state disregards how democratic institutions are part of a continuing colonial system that disregards Indigenous sovereignty.[161] Merely allowing for the opening up of political spaces for Indigenous Peoples and settlers to "engage in contests over the hegemonic project of unity and nation-building", ultimately "does not seek to resolve the foundational conflict between Indigenous and settler peoples".[162] Therefore, radical innovation in social and political practices of Indigenous sovereignty is needed to realise reconciliation efforts that "resist[s]

154 Chantal Mouffe "Deliberative Democracy or Agonistic Pluralism?" (1999) 66 Social Research 745 at 749.
155 Chantal Mouffe *On the Political* (Routledge, New York, 2005) at 8–9.
156 At 30.
157 Mark Hickford "Reflecting on the Treaty of Waitangi and its constitutional dimensions: A case for a research agenda" in Mark Hickford and Carwyn Jones (eds) *Indigenous peoples and the State: International Perspectives on the Treaty of Waitangi* (Routledge, Oxfordshire, 2018) 140 at 141.
158 At 144.
159 *Matike Mai Report*, above n 8, at 71.
160 Maaka and Fleras, above n 1, at 99.
161 Sarah Maddison "Agonistic reconciliation: inclusion, decolonisation and the need for radical innovation" (2022) 43 Third World Quarterly 1307 at 1316.
162 At 1316.

the pull back to inclusion" of state recognition of Indigenous sovereignty.[163] This would entail Māori engaging in acts of sovereignty on their own terms, without seeking the condonation of the Crown. Glen Coulthard describes this as "recognition from below", where acts of Indigenous resistance that critically revalue, reconstruct and redeploy culture and tradition may enable a radical self-transformation of the Indigenous actor into agents, not subjects, of recognition.[164] Such processes of "self-constituting power", where Māori reject institutionalised power hierarchies to dictate their own social orders without Crown approval, may initiate an agonistic reconciliation that entails mutual recognition.[165]

B *Agonistic reconciliation, recognition from below and the importance of political dissent*

An agonistic reconciliation may require Māori to reconsider how current practices of rangatiratanga, exercised independently of the Crown at the citizen level, may be scaled up to a constitutional level.[166] Dr Mikaere has similarly suggested an "unflinchingly honest" introspection on the part of Māori of working towards constitutional transformation within the status quo of the state, in that Māori:[167]

> … are within a set of rules designed by and for the coloniser playing their game to secure the least worst outcome currently possible. There's no point deluding ourselves that we are achieving tino rangatiratanga, because we're not. We are merely trying to curtail the reach of a rampant kāwanatanga.

O'Sullivan contends that before a legal revolution can occur, it is necessary to revise the Treaty as speaking of sovereignties in plural.[168] For while "relationships are important":[169]

> … the colonial relationship is complex and always changing. Restraining its exploitative logic requires well developed conceptions of rights to make sense of what healthy relationships might actually look like. If, for example, healthy relationships depend on Māori being able to exercise political authority consistent with the Treaty one does, in fact, need to understand what is meant when people speak of sovereignty, self-determination and rangatiratanga.

What both scholars are ostensibly referring to is how the rangatiratanga sphere may engage in practices of recognition from below. For example, in considering the future of Māori health and how rangatiratanga may be exercised post-Te Aka Whai Ora, Māori could consider how sovereignty was practised through Māori responses to COVID-19. The actions taken by Māori were manifestations of rangatiratanga that could not be disentangled from Indigenous sovereignty, exposing the "wider ambiguity" in what

163 At 1318.

164 Coulthard refers to this as "self-recognition": Glen Coulthard "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6 Contemporary Political Theory 437 at 456.

165 See Williams, above n 138, at 10.

166 See Maria Bargh "Multiple sites of Māori political participation" (2013) 48 Australian Journal of Political Science 445 at 453–454, where she argues that Māori practice political authority in small and diverse ways through "micro-orientated" practices so that rangatiratanga is exercised without needing the Crown's recognition.

167 Williams and Mikaere, above n 153.

168 O'Sullivan, above n 64, at 126.

169 At 125.

constitutes sovereignty in Aotearoa.[170] In the face of Crown inaction over COVID-19 responses, Māori demonstrated innovative and, most importantly, independent expressions of tino rangatiratanga directed at protecting and supporting local communities.[171] Luke Fitzmaurice and Maria Bargh argue that Māori's actions, which sat alongside wider Crown initiatives, were an example of mutual recognition in action, where the Treaty partners "recognis[ed] each other as equals, valuing political diversity and independence … and exercising a degree of self-government that was supported".[172] A successful partnership arose from the Crown—not Māori—adapting to its Treaty partner's exercise of authority.[173] The COVID-19 response was a tangible expression of rangatiratanga exercised successfully, which provides a vision for its viability at the constitutional level.

On the part of the Crown, agonistic reconciliation will require the Crown to carefully consider both Māori's political activism in response to the disestablishment of Te Aka Whai Ora and the implications for Crown sovereignty. In challenging the State's questionable foundation for governing Māori, modern Māori activism contests how the modern state can accommodate such dissent while maintaining its hegemony over Māori.[174] As Ropata Paora and others contend:[175]

> … political activism is crucial in pushing the state further and further to accept positions it previously thought unthinkable as part of the necessity of reforming and adapting its hegemonic position so that it remains legitimate in the eyes of its citizens.

An agonistic approach to reconciliation would not merely see Māori hold the Crown accountable for the disestablishment of Te Aka Whai Ora as a breach of the Treaty principles, as is currently being sought,[176] where the Crown is merely critiqued in "contained, narrowly ritualistic ways".[177] Nor would it suffice for the Crown to reestablish the Authority as it was. Such points signal a reconciliatory endpoint that fails to engage with the fundamental power imbalance underpinning the Crown-Māori relationship in Te Aka Whai Ora. Rather, Māori contestation of the legitimacy of the government's unilateral decisions, both in and beyond engagement with the Crown, would open space for rearranging the constitutional terrain.

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170 Joe Clifford "The sovereign's road: checkpoints and the ambiguity of exception during Aotearoa's lockdown" in Mahnaz Alimardanian and Timothy Heffernan (eds) *The anthropology of ambiguity* (Manchester University Press, Manchester, 2024) 154 at 163–164.

171 See Annie Te One and Carrie Clifford "Tino Rangatiratanga and Well-being: Māori Self Determination in the Face of Covid-19" (2021) 6 Frontiers in Sociology 1 at 3; and Luke Fitzmaurice and Maria Bargh *Stepping Up: COVID-19 Checkpoints and Rangatiratanga* (Huia Publishers, Wellington, 2021) at 39.

172 At 48.

173 At 49.

174 Paora and others, above n 2, at 251.

175 At 256.

176 "Government faces further legal action over Māori Health Authority axing" (18 May 2024) Radio New Zealand <www.rnz.co.nz>.

177 Hickford, above n 157, at 143.

VIII Hei Whakatepe

This article argued that the Crown’s (mis)recognition of rangatiratanga is a fundamental barrier to genuine constitutional transformation. The Crown’s recognition of rangatiratanga merely serves to secure its position as the land’s sole sovereign authority. It exposed how the Crown’s practices of misrecognition are deeply rooted, having been enacted since the Crown’s early engagement with Māori sovereignty to the present era of reconciliation. It explicated a theoretical framework to illuminate these practices. Crown sovereignty is consolidated through reframing assertions of rangatiratanga as claims to difference, whereby accommodation subsumes any potential for an independent Māori sovereignty into the Crown’s expanding governance. Reflecting on these colonial practices shows that incrementalist proposals for constitutional reform are unlikely to ameliorate concerns over the Crown’s misrecognition. And so, it advocates for a fundamental rethinking of the constitutional relationship between Māori and the Crown as an agonistic contestation between sovereign equals, which would require Māori enacting practices of sovereignty independent of the state.

The conclusions drawn here, at times, do not break new ground. That colonial perceptions and practices persist in the Crown’s engagement with rangatiratanga is perhaps self-evident, given the current coalition government’s open hostility towards rangatiratanga.[178] Yet, bringing these colonial remnants to light is only the first step. Without a radical rethink of our constitutional arrangements, we preserve the colonial status quo. True constitutional transformation requires a bold break from the familiar. While revolutionary thinking engenders fear of fracturing our national identity, this fear must be embraced. We must engage in “imaginative and even brave contemplation” and act on it.[179] Our collective constitutional future demands nothing less.

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178 See, for example, the National Party stating openly that it “interpret[s] tino rangatiratanga within Te Tiriti as partnership, not co-governance, and New Zealand should be governed under one system”: National Party “Justice, Treaty and Governance” <www.national.org.nz>.

179 *Matike Mai Report*, above n 8, at 22.