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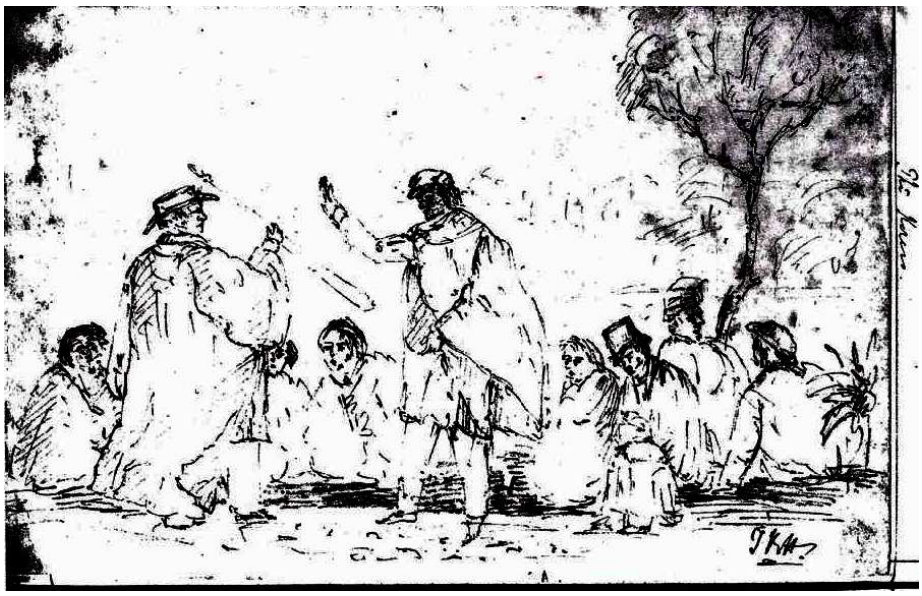
TE WIREMU, TE PUHIPI, HE WAKAPUTANGA ME TE TIRITI
HENRY WILLIAMS, JAMES BUSBY, A DECLARATION AND THE TREATY

A report commissioned by the Waitangi Tribunal



Samuel D Carpenter

November 2009

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Cover page: Drawing by T B Hutton of Hone Heke facing Henry Williams with taiaha, hui at Waimate mission station, 23 September 1844, from Journal of William Cotton, 1844, *St John's College Library, Auckland, New Zealand*

Preface

This report was prepared pursuant to a Waitangi Tribunal research commission dated 28 April 2009. The commission sought a response to four questions:

(a) How did James Busby conceive of He W[h]akaputanga o Te Rangatiratanga/the Declaration of Independence in 1835, particularly with regard to: (i) its international standing; and (ii) the practical effect of Te W[h]akaminenga/ the Confederation of the United Tribes it proclaimed?

(b) Do we know how Henry Williams understood the nature and effect of He W[h]akaputanga/ the Declaration, and, if so, did his Māori text effectively communicate that understanding to the signatories?

(c) What did Busby and Williams mean when they referred to Te Tiriti/the Treaty as 'the Magna Carta of the Māori'?

(d) What does the available documentary evidence reveal about Busby's and Williams's understandings of the nature and effect of Te Tiriti/the Treaty, especially with regard to the relationship between kāwanatanga and rangatiratanga?

The conclusion of this report will address the Tribunal's May 2009 direction regarding the substantive issues of this inquiry, although the emphasis will necessarily remain on Henry Williams and James Busby.

About the Author

Ko Pukekohe te maunga. Ko Waikato te awa. Ko Bombay te waka. Ko Ngā-Hau-e-Whā te marae. Ko Ngāi Te Tiriti te iwi. I grew up in Pukekohe where my Cornish ancestors settled in the 1870s. I think of myself as someone who has a place in New Zealand 'by right of the Treaty' (hence, *Ko Ngāi Te Tiriti te iwi*.) I completed conjoint Bachelor of Arts and Bachelor of Law

degrees in 2001 at the University of Auckland. I was admitted to the bar in 2002 and worked as a lawyer for five years in commercial and property law, and civil litigation. In 2008 I was awarded distinction from Massey University for an MA thesis on New Zealand parliamentary debates of the 1850s and 1860s. This thesis was preceded by a dissertation on the relationship between Henry Williams and Hone Heke. I am also shortly to complete a Diploma in te reo Māori at Tai Tokerau Wānanga (NorthTec).

Acknowledgements

I especially need to thank Barry Rigby. His research at the Turnbull library has meant the inclusion of much material that would not otherwise have been available, especially from the voluminous Colonial Office files. He has also twice reviewed the full report.

Others have read and astutely commented on portions of this report, including Michael Belgrave and Peter Lineham, and my wife, Hana. Jeff Abbott responded with despatch to my requests for articles and inter-loans.

Until a few weeks ago I resided in the Hokianga where the bulk of the report was prepared. Its environs as well as the encouragement of my kaiako and class at the Rawene campus of Tai Tokerau Wānanga have been much appreciated.

He mihi mahana ki a koutou katoa.

Ka tukuna tēnei mihi ki te Kaihanga, te Runga Rawa, te Kaha Rawa. Nāna nei ngā mea katoa i hanga. Tēnei te mihi ki te hunga mate, rātou ngā rangatira kua wheturangitia. Moe mai i raro i te parirau mahana. Ka huri au ki te kanohi ora, kia ora mai tātou katoa.

S D Carpenter
November 2009

Introduction

> …koia ka mea ai matou ki te Kingi kia waiho hei matua ki a matou i to matou Tamarikitanga kei w[h]akakahoretia to matou Rangatiratanga.
>
> He Wakaputanga, 1835 [1]

> Ko te Kuini o Ingarani ka w[h]akarite ka w[h]akaae ki nga Rangatira, ki nga Hapū, ki nga tangata katoa o Nu Tirani, te tino Rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa.
>
> Te Tiriti, 1840 [2]

> We have reason therefore to fear that the French may have designs not yet known upon this Island and would therefore urge most strongly that the British Government should take immediate steps for the protection of this people.
>
> Henry Williams, 1839 [3]

> I should not be at all surprised were [de Theirry] constituted French Consul & then the French Govt would follow it up by supporting his claim to the Land
>
> James Busby, 1839 [4]

> Tell [the pope] this tale; and from the mouth of England/ Add thus much more, - That no Italian priest/ Shall tithe or toll in our dominions:/ But as we under heaven are supreme head/ So, under him, that great supremacy/ Where we do reign, we will alone uphold,/ Without the assistance of a mortal hand…
>
> Shakespeare, 'King John' [5]

Prologue

Henry Williams wrote in January 1839 that missionary 'fears' were 'much increased' by the 'active measures of the French Roman Catholic Bishop [Pompallier] and Priests supported as

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[1] A Declaration of Independence of New Zealand, fourth paragraph: '…[the chiefs] entreat that [the King of England] will continue to be the parent of their infant State, and that he will become its Protector from all attempts upon its independence'.
[2] The Treaty of Waitangi, second article: 'Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand, and to the respective families and individuals thereof, the full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties…'
[3] Williams to Sec, CMS, Paihia, 11 Jan 1839, Auckland Museum Library (AML), MS 91/75, vol 102, p 10.
[4] Busby to Alexander Busby, 13 June 1839, AML, MS 46.
[5] W Shakespeare, 'King John', in *The Complete Works of William Shakespeare* (New York: Avenel Books, 1975), p 377.

they are by the appearance of two French Men of War'. According to Williams the first frigate to appear in the Bay of Islands went to the Chathams to avenge the seizure of a French whaler and the murder of the crew. Williams proposed that a CMS missionary accompany the whaler to act as translator, in the hope that punishment of innocent parties would be avoided. The French commander refused this offer. The second frigate, the *Venus*, arrived from Tahiti where it had exacted a fine because French Catholic missionaries had been refused residence on the island.[6] In June 1839, James Busby commented that he had 'no doubt' of the French having 'an eye to this country', while de Thierry 'expects a French ship of war'.[7] In August, he wrote that Bishop Pompallier had told a 'Christian village' at Waimate of the *Venus* proceedings at Tahiti. Pompallier apparently 'warned them to take care that the same thing did not befall them'. Busby purported to quote the Bishop's statement to Māori that 'the French were the first discoverers of this country and had the best right to it'.[8] In the same letter Busby wrote:

> I was very much struck lately with an article from the 'Journal de Depots' a French [naval] service official paper on the importance of Colonies and Fisheries as the only means of obtaining seamen for a Navy the want of which along in the late war prevented France from being what her Secretarial position entitled her to be, *the Arbitress of Europe* [emphasis added].

Busby and Williams' concerns reflected the realities of geo-politics between Britain and European kingdoms in the early nineteenth century. Busby's reference to the 'late war' was probably a reference to the Napoleonic Wars, which concluded in 1815 after Wellington defeated the French General at Waterloo. French aspirations to be 'arbitress' or arbiter of a new Europe had been real and still lingered in British imaginations 25 years later. The formative years of Williams (born 1792) and Busby (born 1801) were dominated by England's war with France and

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[6] Williams to Sec, CMS, 11 Jan 1839, AML, MS 91/75, vol 102, pp 9-10. Williams thought it significant that the *Venus* was 'of largest class' – 500 men and 1500 tons. Williams supposed that Pompallier and his priests were the ones expelled from Tahiti, but this was not correct. Philip Turner, 'The Politics of Neutrality: The Catholic Mission and the Māori 1838-1870', MA history thesis, University of Auckland, 1986, argues that Pompallier was politically neutral, yet several of his actions suggest otherwise. In 1840 Pompallier called for a French consular and naval presence in the Bay of Islands (pp 22-23). In July 1840 he appealed to one French naval commander to annex the South Island (pp 92-93).

[7] Busby to A Busby, 13 June 1839, AML, MS 46.

[8] Busby to A Busby, 8 August 1839, AML, MS 46.

other powers (1793-1815). Williams served in the Royal Navy in the Napoleonic Wars. When he was retired on half-pay at their close in 1815 he was twenty-three years old.

Yet English antipathy to France had deeper roots than any personal experience of the French Revolutionary and Napoleonic Wars (1793-1815). The words Shakespeare put imaginatively into the mouth of his historical King John (1166-1216) reflected widespread values in post-Reformation England. The English King was 'supreme head' or sovereign under God, 'that great supremacy'. He was no longer accountable to any other earthly or papal authority. He was, rather, defender of his Protestant subjects and their Protestant rights and liberties. The French Wars of 1793-1815 produced a different kind of English reaction to France. Instead of reacting to the supposed despotism of Catholic monarchy, the English reacted conservatively to the excesses of the French Revolution. Nevertheless, English conceptions of monarchy, government and religion were central to both types of anti-France sentiment. During the French wars, the king became a kind of 'pseudo-medieval' symbol of majesty and social order.[9] In the New Zealand context, Evangelical theological antipathy to Catholic doctrines intensified these generic English fears of a French-Catholic state.[10]

Texts and Contexts

This report is focussed on Henry Williams' (Te Wiremu) and James Busby's (Te Puhipi) understandings of He W[h]akaputanga o Te Rangatiratanga/the Declaration of Independence 1835 and te Tiriti o Waitangi/ the Treaty of Waitangi 1840. It adopts a 'texts in context' approach to the material. This could also be called a 'socio-linguistic' approach.[11] He Wakaputanga and te Tiriti are the central texts. Interpretation of Busby's and Williams' commentary about these two texts is a further key to their meaning. These texts and commentary

[9] B Hilton, *A Mad, Bad, and Dangerous People? England 1783-1846* (Oxford: Clarendon Press, 2006), pp 29-30.
[10] See L Colley, *Britons: Forging the Nation 1707-1837* (New Haven and London: Yale University Press, 1992) for the famous thesis that a British Protestant national identity was formed during a century or more of wars with Catholic and then Revolutionary France.
[11] In academic terms, this is a 'New Historicist', 'linguistic-turn', and/or 'Cambridge-School' (Q Skinner and J G A Pocock) approach. These methodologies focus on the meaning of language or 'discourse' in their historical contexts, especially as revealed through literature. It also combines elements of British social and constitutional history, and analysis of colonial and imperial contexts.

are set in the context of New Zealand events and the policy approaches of the London authorities.

The report also contends for the relevance of other texts and contexts. Tony Ballantyne has recently argued that the Treaty should be seen within an Empire narrative, not just viewed as the foundation of a nation. British imperial agents used treaties as a diplomatic tool of imperial expansion. He distinguishes the theory of treaty-making, in which parties meet on a level playing field, with the reality of unequal bargaining positions.[12] These observations are relevant to the Treaty of Waitangi. Māori kōrero at Waitangi on 5-6 February demonstrated concerns about loss of authority and loss of land. Not all of this language can be attributed to the rhetorical nature of Māori oratory or whaikōrero. Some of those rangatira who signed te Tiriti were obviously reluctant to sign, yet felt compelled to. Perhaps Te Wiremu assured some of the Queen's benevolent protection. Many, probably, felt this formal alliance with an imperial monarchy enhanced their mana. Some probably still feared their mana or authority might suffer under the new regime of the Queen's Governor. Nevertheless, a treaty proferred by an imperial super-power in 1840 was not something to be treated lightly. Regardless of whether rangatira accepted it or not, concerns about loss of authority, land, and unjust trade were not going to disappear.

Yet this geo-political or empire context contributes only partially to understanding the terms of the Treaty, along with the Declaration. Other texts and contexts need to be added to picture. There is a need to 'anthropologise' both Māori and Pākehā. That is, the words and actions of Williams and Busby, Nene and Heke, need to be understood within their particular worldviews. These figures need to be seen as operating within their own system of values and perceptions, or their own cultural, social and religious worldviews.[13]

The opening paragraphs of this introduction placed Williams' and Busby's fears of French intervention in the context of British ideas about their own monarchy and constitution. These

[12] T Ballantyne, 'The State, Politics and Power, 1769-1893', in G Byrnes, ed, *The New Oxford History of New Zealand* (Auckland: Oxford University Press, 2009), pp 104-105.
[13] Tony Ballantyne argues that European figures need to be anthroplogised just as Māori figures have been in recent times, see T Ballantyne, 'Christianity, Colonialism and Cross-cultural Communication', in J Stenhouse and G A Wood, eds, *Christianity, Modernity and Culture: New Perspectives on New Zealand History* (Adelaide: ATF Press, 2005), pp 32-33.

homegrown British ideas and assumptions about the meaning and practice of their own society and constitution are important subjects of this report. In particular, te Tiriti cries out to be seen as a constitutional document akin to the English Magna Charta. If Busby and Williams' understandings are to be comprehended, both the Treaty and the Declaration must be seen as British political and legal documents, quite apart from likely Māori understandings. But in British terms, they both formulated the basis of a national government (Congress/ te Wakaminenga in the Declaration, Kāwanatanga/ Governorship/ Government in the Treaty). They both declared rights and liberties. They both contained the potent cultural and constitutional symbol of monarchical protection. Paragraph four of He Wakaputanga (cited above) appealed to the British monarch to protect the independence ('Rangatiratanga') of the new Māori state. Paragraph two of te Tiriti (cited above) formally confirmed this monarchical protection of chiefly authority and property rights ('tino Rangatiratanga o o ratou whenua…'). The relationship between the Queen's Kāwanatanga and Māori Rangatiratanga in te Tiriti should be seen in light of the British constitution, in particular the relationship between a central monarchy and a local landed gentry.

This British 'domestic' interpretation of the Treaty seeks to draw the debate away both from a narrow reading of the mere words of the Treaty, and from broader arguments about whether or not sovereignty was transferred. Michael Belgrave's recent analysis represents a similar attempt to 'free [the Treaty] from hindsight and from the tyranny of textual and legally driven analysis'.[14] By legal analysis he refers to debates in international common law. Belgrave argues that 'the debates that were raging [on 5 February 1840] about the coming of the governor were only partly about sovereignty; they were much more directly about land and religion'.[15] Later nineteenth century or 'classical' international law pictured (European) nation-states as equal contracting parties who exercised an absolute and indivisable territorial jurisdiction (or 'sovereignty') within their borders.[16] According to Belgrave, recent New Zealand commentators have imposed this

[14] M Belgrave, *Historical Frictions: Māori Claims and Reinvented Histories* (Auckland: Auckland University Press, 2005), p 55.
[15] Ibid, p 63.
[16] See D Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', *Quinnipiac Law Review*, vol 17, 1997, pp 99-138 (see esp pp 126-129). By contrast, the Europe of the 1830s was composed of different 'nations' (peoples or ethnicities) subject to more than one 'state' (political society or sovereignty), as Wheaton describes: 'A State is also distinguishable from a Nation, since the former may be composed of different races of men, all subject to the same supreme authority. Thus the Austrian, Prussian, and Ottoman empires, are each

picture on the 1835 Declaration and the Treaty. In 1835, the narrative runs, Māori declared such an absolute territorial independence, 'rangatiratanga', or 'sovereignty'. In the Treaty's article two, Queen Victoria guaranteed to the Māori nation-state or a number of hapū nation-states this same 'sovereignty'. The Queen's government only applied to Pākehā.[17] Yet this picture is both inconsistent with the actual subject matter of the debates at Waitangi and with the inequality between the parties.

Such a narrative is also inconsistent with the nature of international law in 1840. David Kennedy writes that in the early phases of the nineteenth century there were many types of sovereigns and sovereignty 'which overlapped unproblematically', citing as an example British East India Company 'rule' alongside or in conjunction with native potentates.[18] 'Sovereigns came in a variety of shapes and sizes. Their powers and rights differed'.[19] European states recognised the sovereignty of indigenous nations, but this sovereignty differed from that of European states. Moreover, the 'international law' rules or conventions that governed the interaction between European states and other states differed in different parts of the globe.[20] This report will argue that British recognition of Māori 'independence' or 'rangatiratanga' in the 1830s reflected this earlier 'international law'. British humanitarian concerns about Māori welfare and survival as a people constructed and promoted this recognition. It reflected a desire to grant Māori some 'right of nations' constructed from convention, custom, and Christian morality. This 'law of nature', or 'law of nations', differed from a later 'international law'.[21] Hence, the need to understand te

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composed of a variety of nations and people. So, also, the same nation or people may be subject to several States, as is the case with the Poles, subject to the dominion of Austria, Prussia, and Russia, respectively'. The 1815 Vienna Congress made the Polish city of Cracow an 'independent state' protected by these same three sovereign states. See H Wheaton, *Elements of International Law*, R H Dana, ed, (Boston: Little, Brown & Co, 1866 (1836)), (http://books.google.co.nz/books, accessed 4 November 2009), paras 17 & 34, ch 2, part 1.

[17] This is paraphrasing the argument which Belgrave calls 'the modern treaty', seen in the works of Ruth Ross, Ani Mikaere, Jane Kelsey, Moana Jackson, and others, see Belgrave, *Historical Frictions*, pp 52-53. See critique of the 'modern treaty' in chapter four.

[18] D Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', *Quinnipiac Law Review*, vol 17, 1997, p 122.

[19] Ibid, p 123.

[20] Ibid, pp 127-128, citing Baron Montesquieu, who wrote in 1748, 'All nations have a right of nations; and even the Iroquois, who eat their prisoners, have one. They send and receive embassies, they know rights of war and peace: the trouble is that their right of nations is not founded on true principles' (Montesquieu, *The Spirit of the Laws*, bk 1).

[21] Ibid, p 127 (see Montesquieu quote). William Blackstone founded all law on the 'law of nature' and 'revelation' (the Bible), both of which were God's law. The 'law of nations' was simply God's law applied to dealings between nations or peoples, just as individuals were bound by the same law, see W Blackstone, *Commentaries on the Laws of England*, vol 1 (Philadephia: Robert Bell, 1771), (http://books.google.com/books, 17 July 2009), pp 41-43.

Tiriti must be accompanied by stripping it of the baggage of more recent international law and indigenous rights law.[22]

Belgrave's other main concern is with the 'tyranny of textual analysis' that has shackled recent Treaty interpretation since Ruth Ross' influential 1972 article.[23] Ross's suggestion that Williams should have used 'mana' to translate the cession of sovereignty in article one has influenced subsequent Treaty literature. Her empirically-driven focus on the Treaty's texts, brought real research and scholarship to understandings of the Treaty. Yet Lyndsay Head has criticised the 'linguistic essentialism' of Ross' approach.[24] A focus on the Treaty texts is helpful, but language is almost meaningless without context. Lack of contextualization has lead to narrow understandings of 'sovereignty' and 'government' (or 'kāwanatanga') in particular. Hence, this report utilizes a much wider range of sources in order to comprehend more accurately the Treaty's meaning.

Shakespeare and Dr Johnson helped define the meaning of the English language for their times, including for Williams' and Busby's nineteenth century.[25] The passage from Shakespeare's King John (above) articulates the simple English conception of sovereignty from the sixteenth to the nineteenth centuries – 'supreme power'. Yet while the English monarch was thus 'supreme head' of the English unwritten constitution, real independence and power were exercised by Parliament, courts, and local authorities under her sovereign sway. The relationship of 'civil government' to 'sovereignty' to 'independence' (or 'rangatiratanga') within the British domestic context occupies considerable space in this report, because it was the context that formed Williams and Busby's conceptions of these terms. Because modern international law defines

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[22] And see Ballantyne, 'The State, Politics and Power', pp 104-105, who argues that Empire 'realpolitick' was more important than a theoretical 'law of nations'.

[23] R M Ross, 'Te Tiriti o Waitangi: Texts and Translations', *New Zealand Journal of History*, vol 6, no 2, 1972, pp 129-157.

[24] L Head, 'The Pursuit of Modernity in Māori Society: The Conceptual Bases of Citizenship in the Early Colonial Period', in A Sharp and P McHugh, eds, *Histories, Power and Loss* (Wellington: Bridget Williams Books, 2001), pp 103-108. And see Rachael Bell's recent admirable analysis of Ross' article and its context, R Bell, ' "Texts and Translations": Ruth Ross and the Treaty of Waitangi', *New Zealand Journal of History*, vol 43, no 1, 2009, pp 39-58.

[25] This report will employ many definitions from Dr Samuel Johnson's *Dictionary*, first published 1755. The definitions will be taken from the following 1824 edition: S Johnson, *A Dictionary of the English Language: in Which the Words Are Deduced From Their Originals, Explained in Their Different Meanings, and Authorized by the Names of the Writers in Whose Works They are Found*, A Chalmers, ed, abrid from H J Todd edition, (London, 1824), (http://books.google.com/books, 17 July 2009).

'sovereignty' so narrowly, 'government' seems imprecise as a word in translation. Williams however inhabited an early nineteenth century world defined by much broader conceptions of law and government than existed in the world of a later nineteenth century or early twentieth century lawyer.

Other texts help illuminate the meaning of the Declaration and the Treaty. These include the writings and speeches of William Wilberforce, Edmund Burke, George Cornewall Lewis, newspapers and mission periodicals, and the authorised King James Bible. In legal literature, Blackstone's *Commentaries on the Laws of England* is perhaps more important than Vattel's *Law of Nations* in defining British understandings of the law and the law of nations in this period.[26]

Other contexts need to be considered besides the British Empire and Constitution, and the French Revolution and Napoleonic Wars. The Evangelical Revival and the Scottish Enlightenment of the eighteenth century are also significant. The Evangelical Revival or renewal generated the modern missionary movement, in the form of the Baptist Missionary Society (1792), the nondenominational London Missionary Society (1795) and the Evangelical Anglican Church Missionary Society [CMS] (1799), to name only the most well known few.[27] These developments were closely aligned with the rise of a politically influential Anglican Evangelical party, known as the Clapham Sect, or the 'Saints'. Headed by William Wilberforce in the House of Commons, the Saints led the British anti-slavery movement. This mass movement also influenced the Vienna Congress and European state relations at the end of the Napoleonic Wars. Wilberforce himself was part of the formation of the CMS.[28] He also encouraged Samuel Marsden to go to the New South Wales (NSW) penal colony as a chaplain to ameliorate conditions there. The Scottish Enlightenment, in the writings of Adam Smith, William Robertson, David Hume, and Adam Ferguson, influenced a younger generation of Whig

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[26] See William Blackstone, *Commentaries on the Laws of England*, vol 1 (Philadephia: Robert Bell, 1771 (1765-1769)), (http://books.google.com/books, 17 July 2009); and Emmerich de Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, J Chitty, ed, (Philadelphia: T & J W Johnson, 1852 (1758)), (http://books.google.co.nz/books, 11 November 2009).
[27] M R Watts, *The Dissenters*, vol 2: *The Expansion of Evangelical Nonconformity* (Oxford: Clarendon Press, 1995), pp 14-15.
[28] J Pollock, *Wilberforce* (Tring: Lion, 1977), pp 176-177.

statesmen, including Henry Brougham and Lord John Russell.[29] Scottish Enlightenment ideas about the staged development of civilization and civil government ('stadialism') clearly influenced James Busby.[30] This report also considers biographical details that complete the interpretive picture.

Henry Williams

Henry Williams (1792-1867) grew up in a family environment that consisted of his father's business and political interests, a strong naval tradition, and an equally strong Christian tradition. More will be said about the last influence in the body of this report. The Williams family was of Welsh origin. His paternal grandfather was a Dissenting Minister.[31] His father, Thomas Williams (1753-1804), was a mercer or draper. He probably supplied uniforms to the Royal Navy. His father 'was spoken of as a man of very superior abilities, a great and fascinating speaker and an excellent companion'. He was also 'a man of strong opinions and occasional testiness'.[32] Henry's personality was in part a reflection of his father's. Henry's mother was a Marsh, an English family with a Dissenting background. His mother's father, Henry Marsh, was a Captain in the Royal Navy. Three of her brothers (Henry's uncles) were also in the Navy. The Williams family initially lived at Gosport, opposite the harbour from the Navy's Portsmouth base in Hampshire, and officers of rank would often frequent Thomas Williams' clothing retail shop. A close acquaintance was Admiral Sir Joseph Sydney Yorke, brother of the Earl of Hardwick, after whom Thomas named his eldest son, Thomas Sydney.[33]

With these family influences, it is little wonder that the young Henry Williams exhibited a keen desire to also join His Majesty's Service. This was revealed when, as a boy, he constructed,

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[29] Hilton, *A Mad, Bad, and Dangerous People?*, pp 348-349. Many of these Whig statesmen and intellectuals went to Scotish instead of European universities because of the English-French wars.
[30] Although Busby was politically aligned to the Tory party, the broader 'Whig' ideas of British and European history, in large part influenced by the eighteenth century Scots intellectuals, were widely held amongst the British elite. The *Edinburgh Review* was the vehicle for this 'philosophic Whiggism', defined as an 'identification of modern European civilisation with the progress of commercial society' and a belief in the necessity for economic expansion', (Hilton, ibid, p 349, citing B Fontana, 1985).
[31] N T H Williams, 'The Williams Family in the 18th and 19th Centuries', 2003, MS 2007/66, AML, pp 2-3.
[32] Ibid, p 7.
[33] Ibid, p 7.

complete with guns, sails and rigging, a model man-of-war from an encyclopedia.[34] He did not have long to wait to fulfil his ambition. In 1806, at the age of 14, Williams joined the Royal Navy. His father's friend, Sir Joseph Sydney Yorke, arranged for him to join the *Barfleur*, a vessel of eighty-nine guns. A succession of different vessels followed, on most of which he saw active service in the Napoleonic War. Williams was injured in 1810 while serving on the *Galatea*, in an engagement against a French squadron. He was later (1848) awarded a medal for his contribution. The injury, though slight, troubled him for the remainder of his life. He served at the Cape, Madras, Calcutta and Mauritius, travels which must have opened his eyes to the diversity of British imperial interests. Williams passed his examinations for lieutenant in 1812. While serving in the war against the United States, 1812-1815, he was assigned to the *Endymion*. On her he saw his last but most dramatic and life-changing active service. After the *Endymion* captured the USS *President*, this ship, with Williams on board, narrowly escaped shipwreck, an uprising of the American prisoners, and a wild Atlantic crossing. Williams learned that he had been promoted to lieutenant on the *President's* arrival in Portsmouth in March 1815.[35]

His naval experience reinforced in Williams a love of discipline and adventure. But he had also witnessed considerable bloodshed and had narrowly escaped with his life. When his cousin and brother-in-law the Reverend Edward Marsh pointed him to overseas missionary service, Williams was drawn to a dramatic change of career. His biographer and son-in-law Hugh Carleton aptly described Williams' personality and outlook, formed in part from his naval experience:

> Born with an instinct of order, which manifested itself in the smallest details of domestic life, and which was developed, through that noblest school of training – the British navy, into the most punctilious regard for discipline, he troubled himself as little about the inclinations of others as he did about his own, where once "The Service" was concerned. He had entered into a new service [of missionary] – a higher one; but carried into it the impressions graven by the old one. From his own great Commander above he took his

[34] H Carleton, *The Life of Henry Williams*, vol 1 (Auckland: Upton & Co, 1874), p 12; L M Rogers, *Te Wiremu: A Biography of Henry Williams* (Christchurch: Pegasus, 1973), p 31.
[35] Carleton, *Henry Williams*, vol 1, pp 13-14; Rogers, *Te Wiremu*, pp 31-34.

> orders, and in carrying them out he exacted that obedience which he so rigidly compelled himself to pay.[36]

The missionary William Colenso, who was not on the closest terms with Williams, made a similar assessment of Williams' character: 'Mr Williams, though a strict precisian, would be bound by no rules, not even of his own making; he was very imperious and distant, almost of repelling manner, yet very kind hearted'. Colenso added, pertinently: 'However he was eminently fitted for his post at that early time in this then savage land'.[37] The CMS mission, struggling to survive on Williams' arrival in 1823, required the stern and visionary leadership that he provided. His physical and mental courage was tested a number of times, especially on peacemaking expeditions following Ngāpuhi war parties to the south. Williams' biographer, Rogers, tells of an incident that happened while Williams was endeavouring to broker peace between Pomare and Titore in the battle for Kororareka in 1837:

> …Williams was attacked by an angry Māori. The only weapon he had was a long sliding-jointed telescope. His assailant expected a blow on the head, but Williams thrust the telescope against him. The Māori, seeing so short a portion was left in the hand, supposed the remainder had gone through his body, and by the time he discovered what had happened his anger had gone.[38]

Williams sometimes used physical force in situations of self-defence, but his usual mode of engagement was to use words. Initially his peacemaking efforts were ignored, but in 1832, Ngāpuhi fighting against Tauranga Māori complained 'that Te Wiremu's words lay heavy on them, and that their guns would not shoot'. Over time his words became effective and his mana with Ngāpuhi increased. In 1833 Te Waharoa of Waikato entrusted Williams with his patu to deliver to Tareha as a peace token. This incident reflected Williams' standing amongst and beyond Ngāpuhi by this time.[39]

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[36] Carleton, *Henry Williams*, vol 1, p 7.
[37] Cited in Rogers, *Te Wiremu*, p 19.
[38] Rogers, *Te Wiremu*, pp 134-135.
[39] Ibid, p 107.

James Busby

James Busby was of English descent on his father's side and Scottish on his mother's, with both sides sharing an aristocratic pedigree.[40] The family possessed little property, however. Busby's father carried on the profession of a mineral surveyor and mining engineer for much of his early years in Edinburgh. The family's and Busby's ambitions to make a way for themselves is seen in his tenacious lobbying of British officialdom to arrange the family's passage to NSW. In due course his father became engineer of Sydney's water supply. As an engineer, his father could be placed in Wakefield's 'uneasy classes', especially in light of the family's emigration to NSW.

Busby's ambition is also seen in his visionary and entrepreneurial exploration of European wine making prior to the departure for Australia. He introduced the vine into NSW on his arrival and published a well regarded Treatise, followed soon after by a Manual, on viticulture. During this period, in his mid-twenties, he acquired 2000 acres of land for himself and his father and brothers acquired other grants of similar size. In Edinburgh, the Busby's were on the periphery of fashionable, elite society. In Australia, the family as a whole appeared to pursue its ambition of becoming a sort of Tory colonial gentry. Busby's Tory sympathies are quite evident from his later letters to family back in Australia.

While in NSW James also took charge of a farm of 12,000 acres at a male orphan school teaching vine growing, in consideration for which he was to receive one-third of the profits. He succeeded in making a profit, although this was almost stripped from him when an Anglican Church Corporation took over the school. Busby fought tenaciously with officialdom in NSW and secured a cash payout and a temporary appointment to the colony's Land Board. At its termination he again engaged in lobbying the local authorities for a salaried position but was only offered what he considered beneath his station and expected remuneration. Eventually he returned to England, again to state his case with Government officials.

[40] The following account of Busby's background is derived largely from E Ramsden, *Busby of Waitangi: H.M.'s Resident at New Zealand, 1833-40* (Wellington: A H and A W Reed, 1942), pp 23-37; and G Martin, 'James Busby and the Treaty of Waitangi', *British Review of New Zealand Studies*, vol 5, 1992, pp 13-22.

After some time he was appointed to the position of Resident in New Zealand – a position he himself had suggested to the family's patron, Lord Haddington, in February 1832. He had earlier lobbied Governor Darling to appoint him 'Guardian or Protector of Convicts' in NSW, a role that already existed in regard to the West Indian slaves.[41] Ideas of British Government protection for New Zealand pre-dated his New Zealand appointment. In 1831 letter from London to his brother, Busby proposed that he become 'the authorised agent of the British Govt. in treating with the Native Chiefs [of New Zealand] for the Mutual protection of their own people and of the Europeans…'.[42]

Busby was associated with Thomas Fowell Buxton, the parliamentary leader of the antislavery movement from 1818 until 1837, and the Chairman of the House of Commons Aborigines Committee 1836-1837. In a letter of March 1833 to Buxton, Busby revealed himself to be a fervent supporter of the recently replaced Governor Darling. Busby believed that the Colonial Office 'sacrificed an upright and indefatigable servant of the Public to the persevering malice & clamour of wicked men'. Governor Bourke, he added, had 'thrown himself into the Hands' of the anti-Darling clique. In a postscript Busby noted: 'I consider it most unfortunate for myself and…for the Public service that I have been placed under the orders of [Bourke]…' Even before taking up his position, Busby accused Bourke of rendering his appointment 'virtually nugatory'.[43] Hence, a rift with Bourke marked Busby's New Zealand career as British Resident from the very beginning. Busby obviously liked Darling's Tory creditials and disliked Bourke's Whig ones. The NSW press had also charged Governor Darling with favouring the Busby family in NSW.[44] It appears that Busby thought Bourke's sentiments were in the opposite direction. Bourke's apparent ambivalence about Busby's Residency may also have arisen from the circumstances of Busby's appointment in London (without reference to NSW).

Martin argues that Busby's apparent anti-Catholicism, anti-French attitudes when in New Zeland are understandable in view of his upbringing in Calvinist Edinburgh during Britain's wars with Catholic France. These attitudes should also be seen in terms of general British antipathy to

[41] E Ramsden, *Busby of Waitangi*, pp 23-37.
[42] Busby to A Busby, 10 Nov 1831, qMS [347] part 2, Alexander Turnbull Library (ATL), pp 6-7.
[43] Busby to Buxton, 12 Mar 1833, Sydney, qMS [352], ATL, pp 3-5.
[44] Ramsden, *Busby of Waitangi*, pp 30-31.

Revolutionary and Napoleonic France. Martin also points to the fact that the French undermined 40 years of Protestant missionary work in Tahiti in 3 years (1839-42) by the use of gun-boat diplomacy. The *Venus* affair referred to by Busby and Williams (above) was part of this series of events. An Irish priest had also acquired military protection for his presence in Hawaii. So Busby's attitudes to de Thierry and Pompallier, along with his lobbying for British intervention, were understandable. He points to the National Covenant of 1638, signed by a number of Scottish clergy, and which secured their liberties, especially against Catholicism. Martin also suggests Busby may have viewed the Treaty as extinguishing the United Tribes in the same way that the Scottish Parliament was extinquished when it united with the Westminster Parliament in1707. Many Scots had embraced the Union for its commercial and other benefits. Busby's childhood in flourishing Edinburgh, 'the Athens of the North', had no doubt given him a positive view of the Union. His letters certainly reveal a man who was 'British' rather than Scottish in his perceptions.[45]

The pre-New Zealand background reveals a Busby who was personally ambitious and tenacious, entrepreneurial and perhaps even visionary. He was a man who believed in his own worth and possessed definite ideas, some experience, and some knowledge when it came to colonial possibilities in agriculture and the 'invention' of governmental posts. He was also by nature serious, studious and at times pedantic.

Commission Questions

This report was prepared pursuant to a Waitangi Tribunal research commission dated 28 April 2009. The commission sought a response to four questions:

(a) How did James Busby conceive of He W[h]akaputanga o Te Rangatiratanga/the Declaration of Independence in 1835, particularly with regard to: (i) its

[45] G Martin's 'James Busby and the Treaty of Waitangi' is the best contextual account of Busby's early life currently available.

international standing; and (ii) the practical effect of Te W[h]akaminenga/ the Confederation of the United Tribes it proclaimed?

(b) Do we know how Henry Williams understood the nature and effect of He W[h]akaputanga/ the Declaration, and, if so, did his Māori text effectively communicate that understanding to the signatories?

(c) What did Busby and Williams mean when they referred to Te Tiriti/the Treaty as 'the Magna Carta of the Māori'?

(d) What does the available documentary evidence reveal about Busby's and Williams's understandings of the nature and effect of Te Tiriti/the Treaty, especially with regard to the relationship between kāwanatanga and rangatiratanga?

The body of this report consists of four chapters that will deal with each of these questions in turn. The conclusion will address the Tribunal's May 2009 direction regarding the substantive issues of this inquiry, although the emphasis will necessarily remain on Henry Williams' and James Busby's understandings (being the focus of this commission).

Chapter 1: James Busby and the Declaration of Independence

> Thus would the way be prepared for confiding to the [Māori] people the trust of Jurymen, in like manner as to the Chiefs of Congress, that of Legislators, when a generation should arise sufficiently enlightened and virtuous to be capable of these high functions.
>
> James Busby, 1837 [46]

Question (a):

How did James Busby conceive of He W[h]akaputanga o Te Rangatiratanga/the Declaration of Independence in 1835, particularly with regard to: (i) its international standing; and (ii) the practical effect of Te W[h]akaminenga/ the Confederation of the United Tribes it proclaimed?

Busby's path to the Declaration

Less than a week after his arrival (as British Resident) in Peiwhairangi, the Bay of Islands, on 7 May 1833, James Busby had a Confederation of Chiefs clearly in view. In fact, he was 'resolved to bend the whole strength of my mind to effect this object'. In Busby's perception, the New Zealanders (that is, Māori) were an independently-minded people, their society divided into many tribes, each exercising a 'Sovereignty' independent of every other. He was not aware that they had ever had the 'idea of confederating for any national purpose' (although in warfare two or three tribes might combine), their chiefs being reluctant to surrender to the opinion of even a majority of other chiefs and tribes.[47] The nature of native society was thus an obstacle to the formation of a national Government. But this Busby was determined to overcome, though he had been advised – probably by Church Missionary Society (CMS) missionaries – that his efforts would be crowned with success only if a take (reason) were found for provoking collective

[46] Busby to Col Sec, 16 Jun 1837, No 112, p 256.
[47] Busby to Colonial Secretary NSW (Col Sec), 13 May 1833, No 3, pp 31-32, Busby Despatches, qMS [345], Alexander Turnbull Library, Wellington (ATL) (all reference hereafter to Busby's numbered despatches are from this location).

action, and provided also that the chiefs believed themselves to be the originators of such action. The take had already been found: in November 1830, NSW authorities seized a vessel built at Hokianga, the *Sir George Murray*, with leading rangatira Patuone on board. She was an unregistered vessel travelling without an acknowledged national flag. Other New Zealand-built ships were vulnerable when Busby arrived, their owners unwilling to meet the same fate. One such owner had appealed to Busby for assistance in obtaining registration. Busby apparently approved of his plan to apply to local chiefs for a register. Busby intended to certify the status of the said rangatira as 'the acknowledged Chiefs of the District'. But he planned to wait until two-thirds of chiefs at a hui had agreed upon a 'National Flag' together with a 'Petition to the King of England that their flag shall be respected'. He would then have established a precedent for dealing with these northern rangatira in their 'collective capacity' only, and out of which a 'Tribunal' or 'Confederation' of chiefs would have emerged as the basis of 'an established Government' in New Zealand. That 'Conference' or hui did not take place for another ten months, in March 1834.[48]

Busby expressed his notion of orchestrating a pan-tribal collective in a letter to his brother Alexander on 22 June 1833. He wrote enthusiastically of building a '<u>Parliament House</u>!' for rangatira to allow him to instruct them in the art of 'act[ing] in concert' – in a kind of aristocratic democracy. Questions should be decided 'by the will of the Majority'. This was a work in progress as each individual or chief remained 'for himself'. Within a month of his arrival Busby successfully investigated charges of robbery by a European (possibly from a Māori), a success 'very apparent to the Natives'. Busby expressed confidence in 'establish[ing] an influence [among the Natives] which will give me almost entire authority over the Northern part of the Island'. This authority was however to be exercised through the chiefs. In addition to the Parliament House plans, Busby hoped to establish a passport system, whereby chiefs would send out of the country any British subject who did not have the blessing of Busby. He requested the NSW Governor to publish this fact by gazette. He arranged for a 'passport in the Native language to be engraved', believing that by this system nearly all convicts or 'mischievous characters' would be removed from New Zealand within two years. Busby also wished to

[48] Ibid, pp 31-33; C Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams Books, 1987), p 19.

establish a Native Guard – consisting of the sons of chiefs. He requested the Governor to provide funding for uniforms, arms and accoutrements.[49]

Busby, in January 1834, advised NSW that a flag should be submitted to the chiefs for their approval as a National Flag for New Zealand. He had been advised – very likely by Henry Williams or other CMS missionaries – that this flag should include the colour red denoting mana. Otherwise, the chiefs would be 'slighted'.[50] For that reason Busby submitted drawings of three flags prepared by Te Wiremu (Henry Williams). The first flag had been flown from the CMS vessel for some years.[51] The chiefs adopted that design on 20 March 1834, in preference to two others prepared in NSW. The margin of the 'vote' was narrow – the CMS flag winning out by 12 votes to 10 over another option (the third option managing only three votes). Accordingly, the CMS ensign 'was declared to be the National Flag of New Zealand'. It was forthwith raised on the flagstaff prepared for the purpose and saluted with twenty-one guns by HMS *Alligator* (which had brought the flags from Australia).[52] In a letter direct to R W Hay, Undersecretary of State for Colonies, Busby described the adoption of the flag as the first 'National act of the New Zealand chiefs'.[53]

The first real challenge to Busby's position as Resident and the first real challenge – in Busby's eyes – to the effectiveness of this emerging National Confederation came in the form of the attack on the Residency on the night of 30 April 1834. In the affray Busby sustained minor facial injuries from a splinter dislodged by a musket ball. He thought it necessary to despatch a factual

[49] Busby to A Busby, 22 June 1833, MS 46, Auckland Museum Library (AML). See also Busby to Col Sec, 17 June 1833, No 17, pp 50-54, in which he included the English text version of the proposed passport: 'The British Resident of New Zealand prays and requires his friends the Chiefs and all the people of New Zealand to suffer the Bearer [name] being a free subject of H.M. the King of Great Britain and Ireland to pass through or dwell in any part of New Zealand without hindrance or molestation. Given under my hand at…'. The engraved passport was to be in the Māori language (22 June letter to brother) and have 'the Royal Arms of Great Britain at the top' (17 June letter to Col Sec).
[50] Busby to Col Sec, 13 Jan 1834, No 32 pp 72-73. The word 'kura', for the colour red, is a significant word, having a number of meanings related to sacred origins and chiefly status. There are other words for red in te reo Māori as well.
[51] Ibid, p 73.
[52] Busby to Col Sec, 22 Mar 1834, No 38, pp 84-86.
[53] Busby to Hay, 2 April 1834, CO 209/1, p 213a, ATL. Busby had made special arrangements to communicate directly with the Colonial Office in London, thus bypassing NSW Governor Bourke, his immediate superior.

account of this event again to Hay directly.[54] This, he believed, was necessary to oppose any 'exaggerated accounts' that might be published in the English press, or so he told the Colonial Secretary of New South Wales.[55] In a further letter to Hay he stated that the chiefs had done all that could be expected, although the lack of 'national' institutions of 'Law', 'Government', or 'authority', meant their efforts were inevitably limited. They nevertheless had achieved as much as 'persons in a more advanced state of civilization' could have achieved. Busby's statements reflected a Scottish Enlightenment conception of hierarchical grades or levels of civilization (to be further explored later). Busby noted that the chiefs held a hui at Waitangi of their own volition. He was less pleased that there was no collective plan of action, other than leaving searches for the guilty parties to individual chiefs.[56] But, he added to the Colonial Office, considering the missionaries agreed with this course of action, he had little choice in the matter. He was reluctant to let the issue rest, however, and proposed addressing a circular to all the chiefs to the effect that, in order to keep faith with the British Government, they needed to act to apprehend and punish the offender. He also contemplated making a request of Captain Sadler of HMS *Buffalo* to suspend his spar supply contract with leading rangatira Titore until the matter was resolved.[57]

In the months following this April 1834 incident, Busby wavered between proclaiming his faith in the efficacy of collective action by rangatira and the need for his superiors to grant him real legal authority and enforcement power. He normally presented these "options" not so much as alternatives, but rather as two authorities working in combination. The chiefs should provide a basis for government and order, admittedly under Busby's guidance, with Busby's authority exercised over shipping and British settlers. Governor Bourke's failure to respond frustrated him, leading to increased requests for greater jurisdiction (NSW did not respond to his 15 May letter

[54] Busby to Hay, 3 May 1834, No 16, CO 209/1, pp 237-238a. He had already sent a number of despatches direct to London, unbeknownst to the colonial authorities in NSW.
[55] Busby to Col Sec, 15 May 1834, No 41, pp 89-91 (enclosing copy of remarks to the Secretary of State, being letter of 10 May – see reference next note).
[56] Busby to Hay, 10 May 1834, CO 209/1, pp 239-247a.
[57] Busby to Col Sec, 15 May 1834, No 41, pp 90-91. Capt Sadler was commissioned to obtained spars in New Zealand for the Royal Navy. He forwarded to Busby on 16 June 1834 a copy of 'an agreement' with Titore, Tareha and Wairua at Whangaroa, presumably for the supply of spars. See Sadler to Busby, 16 June 1834, Brit Res In-Letters, vol 1, 1832-34, Nat Archives, Wellington, BR 1/1. Busby apparently had in mind an early form of "economic sanction" against Māori: suspension of the Whangaroa contract might have provoked Titore and other rangatira to greater measures to apprehend his attacker. Titore's importance is explained in the next paragraph.

about the attack until after Busby had sent at least three further letters).[58] Then Busby believed that the punishment decided upon by the chiefs for the offender was clearly unsatisfactory, and it was not formally enforced until March 1835 – almost a whole year later. The offender was a local Waitangi chief Rete. He came forward to confess his deed. Titore figured prominently in Busby's account of the investigation and the ultimate decision: this rangatira, regarded by many as the successor to Hongi Hika in the Northern Alliance, said he would himself go to Sydney as a 'Slave for satisfaction' if the culprit did not confess.[59] Titore proposed at a later hui that the rangatira agree upon Henry Williams' suggestion that Rete forfeit his land to the King and that they banish him from the district. Williams also advised Busby not to insist on the death penalty for Rete. Busby wrote to the Colonial Secretary and his brother that he considered execution the appropriate punishment since an attack upon him was an attack upon the King.[60] Te Wiremu may have considered the Māori custom of muru in proposing forfeiture of land as an appropriate penalty.[61] Busby commented upon this custom (without using the Māori word) in explaining to the Colonial Secretary how Māori saw justice. They favoured compensation to the victim, which could be exacted from anyone in the offender's tribe or area. Execution as 'community' retribution was the type of 'abstract justice' Busby advocated, but missionary views overruled him.[62]

Busby grappled with the nature of Māori tikanga and the challenges it posed to a British conception of justice. Busby said that he 'would not, unless in a case of the greatest extremity, feel justified in using [the chiefs'] power to effect any purpose whatever'. '[U]ntil', he wrote, 'the Native Chiefs have acquired some idea of the extents and limits of legal authority their power could not be employed for the purpose of maintaining order without risking greater evils

[58] Busby to Col Sec, 30 Oct 1834, No 47, pp 97-100, pointed out the lack of response to three previous letters. Busby to brother Alexander, 17 Nov 1834, MS 46, AML, clarifies that he had received two letters from NSW, but they did not respond to the Residency attack incident, which made Henry Williams think they had never been received. Busby however stated that this could not be so as private letters sent in the same despatch had reached their destinations. Busby complained of Governor Bourke's 'character' in relation to this absence of response, and suggested that he would lay blame for harmful consequences at the Governor's feet for his failure to act (at p 19).
[59] Busby to Alexander, 17 Nov 1834, MS 46, AML. For Titore's importance, see Capt Sadler to Hay, 12 Jan 1835, CO 209/1, pp 379-380, ATL; and G Phillipson, 'Bay of Islands Māori and the Crown, 1793-1853', report commissioned by the Crown Forestry Rental Trust, 2005, p 229.
[60] Busby to Col Sec, 30 Oct 1834, No 47, pp 97-100; Busby to Alexander, 17 Nov 1834, MS 46, AML.
[61] Busby suggests that muru per se was something to be avoided in this case, see ibid, Busby to Alexander, 17 Nov 1834.
[62] Busby to Col Sec, 28 Nov 1834, No 48, pp 103-104.

than it could remedy'. He worried about chiefs exacting justice for personal gain. A distinction existed in Busby's mind between the personal power and authority of chiefs exercising customary powers of muru, and a British authority based on legal (impersonal) forms and procedures. At the same time, he was confident that his influence with the chiefs would enable the emergence of 'established Government, and impartial laws' without New Zealand becoming 'a direct dependency of the British Crown'; this would in turn secure British settlement and trade. Busby's presentation of the state of affairs in New Zealand, including the difficulties of bringing about law and order, must also be seen as supporting an appeal to his superiors for greater legal jurisdiction. He requested a constabulary of two (European) officers, with 'two young Chiefs' working alongside. In total he requested annual funding of £200 to £300 to retain the services of around twenty Māori as a 'Native Guard' to live with him at Waitangi. In addition he requested £100 annually in 'conciliating the Chiefs' – in particular 'procuring the sons of the most influential of them to be educated under my direction'.[63]

In Busby's letters he wrote that he considered the Rete event as 'the crisis of British affairs' in New Zealand.[64] To his brother he wrote that this was a test case of whether the chiefs would and could act so as to secure peace again and thus preserve 'commercial intercourse', without being able to call on an armed force to 'over-awe' the inhabitants.[65] Busby appealed to Captain Lambert of HMS *Alligator* for naval support. Williams apparently agreed with Busby that the presence of a war ship would add at least symbolic weight (if not actual force) to chiefly and British authority. Williams and his colleagues also believed that the chiefs would enforce the punishment.[66] This motif of naval support for Busby's authority appeared again in March 1835, when Busby called on the captain of HMS *Hyacinth* to remain in the Bay until the chiefs enforced Rete's forfeiture of land (a decision Bourke approved later). At a hui on 14 March, twenty rangatira unanimously support the sentence against Rete. The next issue was, however, how exactly to effect this? Busby wanted as much of a show of force and authority as possible to create an 'effectual and permanent' impression on the Native 'mind'. However, the hui

[63] Busby to Col Sec, 28 Nov 1834, No 48, pp 103-106. The 'Native Guard' concept was mentioned specifically by Busby as early as a letter to Col Sec, 17 June 1833, No 20, pp 58-61: Bourke's original instructions had apparently authorized him 'to claim protection for the persons of myself family and servants either by the establishment of one or other of the Principal chiefs at or near my dwelling; or by placing a native guard over it . . .'.
[64] Busby to Col Sec, 28 Nov 1834, No 48, p 101; Busby to Alexander, 17 Nov 1834, MS 46, AML.
[65] Busby to Alexander, 17 Nov 1834, MS 46, AML.
[66] Busby to Col Sec, 28 Nov 1834, No 48, p 101.

expressed concern that too large a party would look like a taua (war party) and might be provocative, (while some chiefs were concerned at personal 'illwill' against themselves). The hui approved a deputation of four chiefs to enforce the sentence. But this four increased to twelve when, according to Busby, some had overheard him tell Pomare of his intention to make gifts of blankets to those chiefs who accompanied him – as a recognition, it seems, of their time and trouble – this payment was duly performed following the party's return to Waitangi. The forfeiture of land at Puketona (four miles distant from the Residency) was proclaimed with some ceremony and little opposition, Rete's relatives even burning down huts on the land when Busby expressed his desire that this be done – to prevent future reoccupation. Busby then 'took possession of the place as the King of England's farm, and as they [the chiefs, probably] desired me to give it a name, I called it "Ingarani"- the native name for England'. The rangatira of the official party divided a quantity of Rete's potatoes and a field of growing corn amongst themselves. A deed signed by the rangatira confiscated approximately 130 acres and 'vested' it in the King of England.[67]

This, however, was not the end of the Rete affair. Around two months later, Busby complained to the Colonial Secretary that the chiefs had 'not fulfilled their engagement, that they would compel Rete… to quit this District'. After discovering that Rete frequented fishing huts within a quarter of a mile of the Residency, Busby burned them down. Busby had allowed local Māori to continue to use these fishing huts, despite his purchase of the land without reserving fishing places. His precipitate action in destroying these huts – without notice to their habitual users (Rete's 'friends') and without consulting either chiefs or missionaries – provoked disquiet and the threat of retaliation. The missionaries disapproved and may even have encouraged the Māori concerned to seek compensation from Busby. Busby told a relation of Rete's that the chiefs had dishonoured their pledge of expelling Rete from the district. He did not, it seems, receive a very positive Māori response.[68] Bourke's suggestion that Busby place some of his Māori 'supporters . . . upon it as [his] Bailiffs', however, was unrealistic: no Māori would be prepared to put himself in such an invidious position, wrote Busby.[69]

[67] Busby to Col Sec, 16 Mar 1835, No 51, pp108-111.
[68] Busby to Col Sec, 11 May 1835, No 54, pp 118-119.
[69] Busby to Col Sec, 25 Sept 1835, No 66, p 147.

By mid-1835, therefore, Busby's attempts to encourage the growth of collective action by the chiefs to enable law enforcement had mixed results.[70] However, he remained committed to the principle of a chiefly collective, having always spoken of its development over time. A deputation of missionaries and 'respectable settlers' (including Henry Williams and trader James Clendon) in September requested a prohibition on spirits. Busby rebuffed them. In a despatch to NSW he reminded his superiors that he needed 'legal authority' – an increasingly common refrain of Busby's – to work in conjunction with chiefly authority. The requested ban on liquor imports involved the search and perhaps seizure of British vessels and possessions. He distrusted the chiefs in their willingness or capacity to conduct such operations without causing further strife (especially as these operations were British in nature). He also believed that rangatira might get bought-off by a liquor trader. However, if the operations of Māori were supervised by a British official or 'Constable' he thought this system might work.[71] He reiterated his call for a police power in the form of two British constables and two Native chiefs, and naval support. He alluded to a 'treaty' with chiefs for the purchase, for a fixed period, of 'right and title' to all harbour and other monetary impositions on European shipping (especially tonnage duties) to fund prohibition. At the end of this period this regime could be taken over by a Māori government. Alternatively a further 'purchase' of these rights could be made. Such a 'treaty' could extend from the Bay to Hokianga, Whangaroa and Maunganui (with Britain paying £500 each for the Bay and Hokianga harbours for a period of 21 years). Since the purpose of these ventures was the 'preservation of order', and hence the enabling of trade, Busby also believed that the American Government might subscribe to this treaty (enabling exaction of the tonnage duty from American ships). Such a treaty could also exempt British subjects from subjection to Māori power or authority, unless with the co-operation and under the direction of a British authority (in relation to search and seizure operations), but could also stipulate that chiefs lend their active support to the Residency in controlling British subjects under its jurisdiction.[72]

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[70] Busby to Col Sec, 25 Sept 1835, No 66, pp147-148.
[71] Busby to Col Sec, 10 Sept 1835, No 65, pp138-142.
[72] Busby to Col Sec, 11 Sept 1835, No 65/2 (Private & Confid.), pp142-147. By December 1834, Governor Bourke had already virtually written off Busby as ineffective, in his correspondence with London, see Bourke to T Spring Rice, 6 Dec 1834, BPP 1835 (585), p 6, IUP, vol 3, p 14. Bourke attributed this ineffectiveness to several factors: Busby had not earned the respect of the European residents of the Bay of Islands. He had not formed a close working relationship with chiefs, thus he could not call on their aid to restrain violence. Nor had he been granted legal jurisdiction to deport British subjects to NSW for trial. Bourke recommended that Parliament grant these extraterritorial powers and that a naval vessel be stationed in the Bay to aid Busby's authority. Bourke concluded

A month later, on 10 October 1835, Busby wrote to the Colonial Secretary, protesting against the Additional British Resident's (McDonnell's) 'legislation' prohibiting the importation and sale of liquor at a public meeting of chiefs and settlers at Hokianga. Busby claimed McDonnell lacked jurisdiction for such a regulation: McDonnell had no authority from the British Government to enact legislation interfering with British property, and the New Zealand Chiefs 'in their collective capacity' had not sanctioned this liquor law. Busby reiterated his conviction that authority in New Zealand needed to be founded on the chiefly collective, even if this was insufficient to achieve practical governance (certainly in respect of British subjects).[73] From the beginning Busby had objected to McDonnell's appointment. He alleged that McDonnell's trading operations in the Hokianga would cause conflicts of interest to arise in disputes with other traders and perhaps Māori. He also alleged that McDonnell had paid little for his extensive claims to land in New Zealand – certainly not nearly the amount paid by the missionaries and himself.[74] McDonnell, for his part, sought to discredit Busby in numerous letters both to NSW and London over the next few years.[75] Although Governor Bourke was to retrospectively approve McDonnell's liquor law, much to Busby's disgust, he did so mainly because McDonnell convinced him that the Hokianga chiefs would enforce the measure.[76] However, the interpretation of one historian that Busby was motivated to call together the Confederation of Chiefs to declare their independence in order to override the legitimacy of McDonnell's Hokianga liquor law, is inconsistent with of Busby's consistent attempts, from the beginning of

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that if such measures were not adopted, it would be more creditable to the British Government to withdraw Busby completely.

[73] Busby to Col Sec, 10 Oct 1835, No 67, pp148-150.

[74] Busby to Col Sec, 7 Aug 1835, No 61, pp131-135.

[75] See Bourke to Glenelg, 13 Sept 1837, No 90, CO 209/2, pp 60-61a, in which Bourke regretted McDonnell's harsh comments about both Busby and the CMS missionaries. He described McDonnell as 'a person of such sanguine and hasty temperament . . .' (see also Historical Records Australia (HRA) 1/19, p 90). McDonnell accused Busby of having 'compelled me to resign' as Additional Resident. He accused Charles Baker of the CMS of having actively obstructed his peacemaking. He also accused the 'Church Missionary Natives' of being 'far worse than the unenlightened Savages', McDonnell to Col Sec, 24 July 1837, CO 209/2, pp 70-72 (encl in above, Bourke to Glenelg, 13 Sept 1837).

[76] Bourke believed 'that Moetara and his Countrymen should take a most prominent part' in enforcing the law. It 'should be imposed…under the *Native Law by New Zealanders*, and not by the British' (emphasis in original), Col Sec to McDonnell, 24 Oct 1835, CO 209/3, p 461. McDonnell dutifully circulated a (handwritten) notice dated 14 Dec 1835, (CO 209/3, p 476), which stated: 'The Native Law made and passed by the Chiefs of this District…[banning liquor imports] within their jurisdiction having received the sanction and approval of …[Governor] Bourke' will now be enforced by the said Chiefs. McDonnell will not 'interfere with any steps that they may take to accomplish their object after this warning'.

his appointment, to work through a collective of chiefs. Indeed he had always wanted to deal only with a collective.[77]

The concomitant of the argument that McDonnell's actions provoked the Declaration is the argument that Baron de Thierry did not. In fact Ross argues that the Baron was a mere pretext for the Declaration, when the real reason was Busby's jealousy of McDonnell. Yet, it may well be that de Theirry's well known assertion of his authority as 'Sovereign Chief of New Zealand' not only led to the Declaration, the very language of his letters to Busby and missionaries William Williams and King, may have given Busby the specific idea of a declaration of independence. As de Thierry had declared his sovereign independence within all his (purchased) dominions, so Busby was to compose a very similarly worded declaration for the New Zealand chiefs. To Busby, de Thierry wrote:

> I am on my way to New Zealand for the purpose of establishing there a Sovereign Government, and address you [as] His Britannic Majesty's Consular Agent at the Bay of Islands to inform you of my early arrival having already declared my independence to their majesties the Kings of Great Britain and France, and to the President of the United States.[78]

And to the missionaries, he used these words: 'Invited by many Native chiefs, Shungie [Hongi] the foremost. And as a Sovereign Chief by purchase, I have declared the Independence of New Zealand; that is[,] my own Independence as Sovereign Chief...'.[79] In both letters he spoke at some length of establishing a Government for the protection and prosperity of both white traders and settlers and Māori, whereby Māori and New Zealand would be raised to a state of 'Civilization'.

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[77] J O Ross, 'Busby and the Declaration of Independence', *New Zealand Journal of History*, vol 14, no 1, 1980, pp 83-89. Ross says the second article of the Declaration was totally irrelevant, reading it as an attack on McDonnell's law; however legislative authority and government/executive functions were clearly envisaged by Busby much earlier – as seen in the concept of a Native Parliament, and were in any event an elaboration on the concept of an 'Independent State' in para 1 of Declaration. See reasoning below.

[78] De Thierry to Busby, 14 Sept 1835, Tahiti, CO 209/2, p 85.

[79] De Thierry to Rev W Williams & Mr King, 14 Sept 1835, Tahiti, CO 209/2, p 89.

There was nothing inevitable about the Declaration. While it is true that Governor Bourke's instructions to Busby invited him to encourage amongst Māori a 'settled form of government', it focused on the establishment of courts rather than a legislative authority.[80] Words and concepts such as 'Confederation of Chiefs', 'Congress' and 'Parliament House' appear to be Busby's own. Busby commenced his New Zealand duties with a clear conception of a Confederation of Chiefs. He saw this Confederation exercising a collective Sovereignty or Government by means of a national assembly or Parliament. He merged these ideas into the 1835 Declaration. De Thierry provided the impetus and perhaps the immediate inspiration for this.

In his letter to the Colonial Secretary reporting his initiation of the Declaration, Busby explained the specific rationale for the Declaration. He intended it to embrace tribes south of Tai Tokerau. He envisaged a national confederation, to forestall foreign intervention, by incorporating as many regions and tribal sovereignties as possible. Previously Busby was pre-occupied with the Bay and Hokianga, the geographical reach of his Residency. Nevertheless, he had previously alluded to an annual Congress or Confederation in proposing the 'Parliament House' for pan-tribal discussion in 1833. And he had described the 1834 flag as the chiefs' first 'National act' – as a collective expression of individual 'Sovereignties'. Busby saw such a confederate government as a natural outgrowth or reflection of Māori leadership style – a forum of chiefs who had had both inherited and earned their places in it. This followed eighteenth century English statesman Edmund Burke's reasoning, in which constitutional growth was seen as organically evolving, as a reflection of the habits, morality and customs of a people.

Busby justified the Declaration by arguing that the establishment of a national chiefly government would allow the British Government to exercise informal control at limited expense. He argued that acknowledging Māori 'property in Land' and the tribes' 'natural rulers' was consistent with British policy. A military presence would be just sufficient to execute the rangatira-sanctioned British laws. In a sweeping conclusion to his 31 October letter, Busby argued that the Declaration established a British protectorate or 'dependency'. Appealing to Burkean notions of trusteeship, he argued that since Britain was interfering in New Zealand, it needed to confer advantages on Māori by holding in trust their rights and interests. Britain could

[80] Bourke to Busby, 13 April 1833, BPP, 1840 (238), pp 4-6, IUP, vol 3, pp 52-54.

protect Māori and advance its own interests without expensive military or naval intervention. Busby implied that the Declaration went some way to achieving both these goals.[81]

The 'International Standing' of the Declaration

British Empire: a diversity of 'sovereignties'

From the Treaty of Westphalia in 1648, to the Congress of Vienna in 1815, to the Berlin Conference in 1884-5, European empires and states encountered a number of transformations in association, conglomeration, and the nature of internal rule, which in turn affected their respective overseas colonial empires. The Treaty of Westphalia marked the end of the major wars of religion that had dominated Reformation and post-Reformation Europe of the sixteenth and seventeenth centuries. Emerging from these convulsions was the early-modern states system, in which emperors, kings, and princes asserted a territorial authority over their respective lands, kingdoms, and empires, quite apart from the authority over their subject-peoples.

The earlier form of feudal relationship between rulers and ruled was defined by Sir Henry Maine, a later nineteenth century legal historian, as '*tribe*-sovereignty'. Following Westphalia, however, rulers came to assert not just *imperium* – command or authority – over their subjects, but *dominium* also – rights of territorial domination or possession. The King of the English (*Rex Anglorum*) became King of England (*Rex Angliae*), the King of the French (*Rex Francorum*), King of France (*Rex Franciae*), and so on. This transformation in the internal relations of states spilled over into their empires. A century and a half of European empire building later, the Congress of Vienna in 1815 marked the end of the Napoleonic Wars, in which Napoleon had failed in his attempt to build a new unitary European *imperium* or empire. This arguably made other European states wary of their claims and the nature of their rule in other parts of the world.

In 1776, also, Britain's American colonies had declared their independence and defeated Britain's *imperium* (empire) and *dominium* (sovereignty). Emerging from the fall of the 'first

[81] Busby to Col Sec, 31 Oct 35, No 69, pp 152-57; see also Busby to Col Sec, 10 Oct 1835, No 68, pp 150-152. The British imperial practice of 'informal control' or 'indirect rule' is considered below. Edmund Burke's idea of trusteeship is considered in chapter 3.

British empire' in America and the experience of a Napoleonic Europe was the more diverse 'second British empire'. Forms of political trusteeship emerged in Britain's Indian empire following the campaign against and impeachment of Governor Warren Hastings in the 1780s, in which greater Government supervision was exercised over the conduct of the East India Company in its commercial and civil governance of a number of Indian states. Edmund Burke, in a number of key speeches on Indian governance in the 1780s, articulated the 'trusteeship' principle in relation to native states and peoples. After the crises of the American and French Revolutions, Britain's dealings with non-European peoples became characterised by a plurality of different relations in the nineteenth century. Protectorates and dependencies in Asia, Africa and the Pacific contrasted with outright rule of some Indian states. In between these 'soft' and 'hard' versions of empire, Britain shared jurisdiction with Indian princes, exercised 'indirect rule' through native potentates in Africa or India, or made treaties with such native rulers for a defined territorial jurisdiction – as in the coastal settlements and 'factories' of West Africa and India.

British commercial empire, which began with factories in many Indian states, evolved into territorial empire achieved by military force. Yet even in these Indian states in which Britain (or rather the East India Company) exercised a theoretically absolute *imperium* from the 1760s and 70s, British authority worked through existing hierarchies of the landed and ruling elites. Local landlords collected revenue and local legal experts operated in part the civil and criminal justice systems in Bengal. The British Empire, like many other empires before it, consisted of a plurality of different authorities or 'sovereignties', sometimes with sharp territorial boundaries between jurisdictions (as with the factories), but more often working with or through local elites to extract goods and services for (in many cases) a commercial empire, with the least possible expense.[82] Busby's justification of the Declaration of Independence 1835 can be seen in this light: as an

[82] This account relies on A Pagden, 'Fellow Citizens and Imperial Subjects: Conquest and Sovereignty in Europe's Overseas Empires', *History and Theory*, vol 44, 2005, pp 28-46; L Benton, 'Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State', *Comparative Studies in Society and History*, vol 41, no 3, 1999, pp 583-588; and P Burroughs, 'Imperial Institutions and the Government of Empire', in A Porter, ed, *The Oxford History of the British Empire*, vol 3: *The Nineteenth Century* (Oxford and New York: Oxford University Press, 1999), pp 170-197; also P J Marshall, 'The British in Asia: Trade to Dominion, 1700-1765', pp 485-507, and H V Bowen, 'British India, 1765-1813: The Metropolitan Context', pp 530-551, in P J Marshall, ed, *The Oxford History of the British Empire*, vol 2: *The Eighteenth Century* (Oxford and New York: Oxford University Press, 1998); and M C Finn, 'The Authority of the Law', in P Mandler, ed, *Liberty and Authority in Victorian Britain* (Oxford and New York: Oxford University Press, 2006), pp159-178.

argument for 'informal control' or 'indirect rule' exercised through a Congress of Māori elites (rangatira).[83]

British sovereignty or 'paramountcy' might follow annexation, as in New Zealand (1840) and Fiji (1874). It might also be exercised through indigenous rulers, as in the protected Malay states which from 1874 accepted British resident 'advisers'. In such cases Britain declared a 'protectorate', which stopped short of formal annexation and a declaration of sovereignty but which created effective colonial control. Burroughs argues that these later nineteenth century protectorates were more about controlling British subjects than about trade imperatives. These assertions of extra-territorial control inhabited a grey zone 'in the absence of clear British precedents and comprehensive rules of international law'. Concerning Fijian discussions, an official wrote in 1870:

> A protectorate is sometimes proposed. I do not quite know what this means. I suppose it is an intimation to the world – that nobody then must assume sovereignty over these Islands or make war on them – but if they have any grievance against them they must apply to us.

Burroughs says the protectorate was 'an amorphous, elastic concept' developed to avoid the administrative burden of annexation, though this burden was usually avoided only initially.[84]

Within this plural empire definitions of *imperium* ('empire', 'imperial power', or 'command') and *dominium* ('sovereign power', 'right of possession or use', 'territory') were never static.[85] Their form and expression varied from place to place. Not until the Berlin Conference in 1884-5 did a recognisably twentieth century version of nation-state sovereignty begin to emerge. This envisaged a community of equal nation-states with each exercising an absolute authority within

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[83] See Busby to Col Sec, 31 Oct 35, No 69, pp 156-57, discussed above.
[84] Burroughs, 'Imperial Institutions and the Government of Empire', pp 190-91. See also W D McIntyre, *The Imperial Frontier in the Tropics 1865-75: A Study of British Colonial Policy in West Africa, Malaya and the South Pacific in the Age of Gladstone and Disraeli* (London: Macmillan, 1967), pp 359-371.
[85] The definitions of these terms in brackets are from Johnson's *Dictionary* (1824): 'Empire' (*empipe*, Sax): imperial power; supreme dominion (Rowe); the region over which dominion is extended (Temple); command over anything. And 'Dominion' (*domaine*, Fr): sovereign authority; unlimited power (Milton); power; right of possession or use (Locke); territory; region; district (Davies).

its territorial boundaries. This state system did not really solidify until the 1920s, following the First World War. Nation-states were only constrained to the extent they consented to international conventions or treaties, much as individuals are constrained by contracts they enter into. In the late nineteenth century European states entered into treaties with aboriginal rulers to establish 'effective [colonial] occupation'. Europe applied this doctrine only after the Berlin Conference of 1884-5, which coincided with the so-called 'scramble for Africa'. The use of treaties in this way had as much to do, if not more, with the international law standards being applied by the contesting European nations, than it did with recognising aboriginal sovereignty.[86]

The emergence in the late nineteenth-century of the autonomous and independent nation-state was at least partly influenced by positivist definitions of state sovereignty. The whakapapa (genealogy) of this notion can be traced from the all powerful Leviathan of Thomas Hobbes, through Jeremy Bentham, to John Austin's lectures at London University in 1829-30. It is surely no coincidence that Bentham, the great positivist jurist, first used the term 'international law' to describe 'the mutual transactions between sovereigns as such'.[87] A positivist notion of state sovereignty dominated the *Wi Parata* decision of 1877. However, even in 1877, it should be pointed out that the positivist discourse had yet to become legal orthodoxy. Prendergast CJ held that Māori society did not have any recognizable structures of government or institutions of law. On this Busby and many of his contemporaries agreed. Busby believed Māori lacked any effective pan-tribal or national government. But Busby would not have agreed with the positivist legal conclusion to which this premise led Prendergast: that Māori possessed no legal capacity to enter into treaties. To Prendergast, the Treaty of Waitangi was a 'simple nullity', because Māori society was a non-legal entity.[88]

This highly European statist model of positivism did not predominate until some time after 1840. Notions of sovereignty and authority were much looser and more pluralistic during the first half of the nineteenth century. Busby, from the very beginning of his Residency, recognized that

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[86] D Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', *Quinnipiac Law Review*, vol 17, 1997, pp 99-138; P Burroughs, 'Imperial Institutions and the Government of Empire', pp 192-95 (especially); M P K Sorrenson, 'Treaties in British Colonial Policy', in W Renwick, ed, *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Wellington: Victoria University Press, 1991), pp 15-29 (pp 18-19 esp); A Pagden, 'Fellow Citizens and Imperial Subjects', p 39.

[87] According to Armitage, see n 91 above.

[88] *Wi Parata v The Bishop of Wellington & The Attorney General* [1877] SC 72, 77-78.

Māori possessed tribal sovereignty. He acknowledged that rangatira exercised the authority to enter into a treaty relinquishing their rights to harbour dues even prior to their confederation on 28 October 1835.[89] In the Declaration of Independence, these many sovereignties were vested in the collective. Congress would now express the authority or sovereignty of the United Tribes. In negotiating the Treaty of Waitangi, the Crown went beyond Congress and dealt also with individual chiefs further south. This New Zealand example alone contradicts any notion of the dominance of positivist/statist sovereignty in 1840.[90]

International relations meant different things in the 1830s than in the 1890s. The phrase 'international law' was itself not in common use until later in the nineteenth century.[91] Busby used the term 'international' only once or twice. He did so in expressing his wish to deal with the Chiefs of New Zealand in their collective capacity only 'in any transaction which might be considered of an international character'; this was in the context of the Chiefs adopting a National Flag.[92] More often, he used the term national or nation. James Stephen's third draft of Hobson's instructions stated that 'international relations' could not be formed with New Zealand as it possessed no national government or 'civil polity'. Stephen's Evangelical principles and British imperial policy prompted him to recognise the New Zealand tribes as 'one independent Community' with an 'independent National character'. However, Stephen saw full national or

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[89] Busby to Col Sec, 11 Sept 1835, No 65/2 (Private & Confid.), pp143-145.

[90] See also D Kennedy, 'International Law and the Nineteenth Century', p 116: 'In the first half of the nineteenth century, it seemed obvious [to lawyers, politicians and the like] that there were restrictions on sovereignty, and natural to experience sovereigns always already enmeshed in a system of rules.' The judgements in *Regina v Symonds* (1847) NZPCC 387 reveal a much greater concern for Māori property rights or 'dominion' (sovereignty) over the soil, than in *Wi Parata*. See also M Hickford, '"Decidedly the Most Interesting Savages on the Globe": An Approach to the Intellectual History of Māori Property Rights, 1837-53', *History of Political Thought*, vol 27, no 1, 2006, pp 122-67. McHugh writes that the older feudal idea of personal sovereignty lasted until Dicey's formulation of state territorial sovereignty crystallized in the second half of the nineteenth century, although the elements of this view could certainly be found already in Vattel's *Law of Nations* (1758), see P McHugh, 'The Lawyer's Concept of Sovereignty, the Treaty of Waitangi, and a Legal History for New Zealand', in W Renwick, ed, *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Wellington: Victoria University Press, 1991), pp 170-189.

[91] See Kennedy, 'International Law and the Nineteenth Century'. The term 'International Law' was used by Wheaton in 1848 in his *Elements of International Law* published in that year, see S J Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 2000), (http://books.google.co.nz/, 11 June 2009), p 19. According to David Armitage, it was Jeremy Bentham who coined the word 'international' and the phrase 'international law', in 1780, to describe 'the mutual transactions between sovereigns as such', see D Armitage, *The Declaration of Independence: A Global History* (Cambridge, Mass: Harvard University Press, 2007), p 11. However, the word international still did not appear in Johnson's dictionary (1824 edition), which must be taken to represent the words in general use, as opposed to words coined or used by philosophers and jurists.

[92] Busby to Col Sec, 13 May 1833, No 3, p 32.

'international' status as founded on a national civil government, as did Busby and most British officials.[93]

Therefore although the Treaty recognised the 'sovereignty' of Māori rangatira, not all sovereignties were created equal. Johnson's *Dictionary* (first published 1755) demonstrates that 'sovereignty' had a number of expressions or practical outworkings.[94] An 1824 edition of this eminent English book defined sovereignty as 'supremacy; highest place; supreme power; highest degree of excellence' (Shakespeare) from the French *souveraineté*. 'Sovereign' was similarly defined as 'supreme lord' (Shakespeare), and in its adjectival sense as 'supreme in power; having not superior' (Hooker). Beyond these definitions, however, many different forms of rule were defined by the word sovereignty: a 'princedom' was a 'sovereignty', as was a 'chiefdom', a 'potentacy', an 'empery' (or empire), a 'majesty', while 'dominion' was defined as a 'sovereign authority' (interestingly, giving only the French derivation of *domaine* in the definition for 'domain', rather than the original Latin of *dominium*). A 'duchess' was 'a lady who had the sovereignty of a dukedom' (Hume).[95] This is to emphasize the point that sovereignty appeared in many guises in the English language of the eighteenth and nineteenth centuries. The sovereignty of a New Zealand rangatira over his hapū could not be equated with the sovereignty of King William IV or Queen Victoria. Busby's observation of Māori society reflects this inequality of sovereigns:

> From all I have been able to learn it appears that there are in the Northern part of the Island from 25 to 30 Tribes of natives who are in every respect independent of each other and who exercise separately, and each without reference to the rest, all the functions of Sovereignty which their simple state of Society requires.[96]

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[93] CO 209/4, pp 226-227. See discussion of these complexities in chapter 4.
[94] The first real 'modern' English dictionary, first published in 1755.
[95] S Johnson, *A Dictionary of the English Language*.
[96] Busby to Col Sec, 13 May 1833, No 3, p 31. Wheaton said: 'A State is also distinguishable from an unsettled horde of wandering savages not yet formed into a civil society. The legal idea of a State necessarily implies that of the habitual obedience of its members to those persons in whom the superiority is vested, and of a fixed abode, and definite territory belonging to the people by whom it is occupied'. He defined a 'sovereign state' as 'any nation or people, whatever may be the form of its internal constitution, which governs itself independently of foreign powers'. Wheaton defined Indian tribes in relation to the United States as 'semi-sovereign' states, who often retained internal/ tribal sovereignty but could not deal with other foreign states. See Wheaton, *Elements of International Law* (1836), paras 17, 33, and 38, ch 2, part 1. Māori hapū pre-1840 might possibly have been 'states' or 'sovereign states', as

Busby was saying that Māori tribes (or rangatira) exercised only that degree of authority over their people and territorities that reflected their uncivilized or semi-civilized state. And while Edmund Burke compared Indian princes favourably with pre-unification German rulers, he did not dare compare their sovereignty or authority with that of the English monarch:

> If I were to take the whole aggregate of [British] possessions [in India], I should compare it, as the nearest parallel I can find, with the empire of Germany. Our immediate possessions I should compare with the Austrian [Hapsburg] dominions, and they would not suffer in the comparison. The Nabob of Oude might stand for the King of Prussia; the Nabob of Arcot I would compare, as superior in territory, and equal in revenue, to the Elector of Saxony. Cheyt Sing, the Rajah of Benares, might well rank with the Prince of Hesse at least; and the Rajah of Tanjore (though hardly equal in extent of dominion, superior in revenue) to the Elector of Bavaria. The Polygars and the northern Zemindars, and other great chiefs, might well class with the rest of the Princes, Dukes, Counts, Marquisses, and Bishops in the [Holy Roman/ German] empire; all of whom I mention to honour, and surely without disparagement to any or all of those most respectable princes and grandees.[97]

When Burke compared the authority and dominion of different rulers, he implied a scale or hierarchy of rule. Although various forms of rule exercised 'supreme power' ('sovereignty') within their respective spheres or domains, this power was not exercised to the same uniform extent. Nor were all sovereigns equal in power with each other. In addition, rule was exercised in different ways or via different mediums. The power of the British Crown was exercised through the mechanisms of parliament, the courts, and executive instruments (Crown charters, Letters

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defined by Wheaton. Post-Declaration, it is doubtful whether the tribes of Tai Tokerau 'habitually obeyed' the Confederation/ Congress, as this existed only notionally.

[97] E Burke, 'Speech on Fox's East India Bill', 1 December 1783, in F Canavan, ed, *Select Works of Edmund Burke*, vol 4 (Indianapolis: Liberty Fund, 1999), (http://oll.libertyfund.org/, 25 June 2009). Burke also qualified this identification to some extent: 'It is an empire of this extent, of this complicated nature, of this dignity and importance, that I have compared to Germany and the German government; not for an exact resemblance, but as a sort of a middle term, by which India might be approximated to our understandings, and if possible to our feelings; in order to awaken something of sympathy for the unfortunate natives, of which I am afraid we are not perfectly susceptible, whilst we look at this very remote object through a false and cloudy medium.'

Patent, and the like). A New Zealand rangatira ruled in accordance with tikanga or custom law. The sovereignty of a New Zealand rangatira obviously looked considerably different from that of British monarchs.[98] This recalls Kennedy's statement, cited in the Introduction, that nineteenth century sovereigns 'came in a variety of shapes and sizes. Their powers and rights differed'.[99] European states recognised the sovereignty of indigenous nations, but this sovereignty was different to that of European states. Moreover, the 'international law' rules or conventions that governed the interaction between European states and other states were different in different parts of the globe.[100]

Even the definition of sovereignty as 'supreme power' needs carefully explanation in the context of an England or Britain by no means uniform in its religious and socio-political composition: Who was the body or person in the unwritten British constitution who exercised this supreme power? Did 'supreme power' mean that the constitutional sovereign was 'unlimited' in power or merely that he/she/it was the highest power in the constitution, perhaps with divine or natural law limitations? Blackstone's *Commentaries* articulated a standard legal definition of sovereignty as 'a supreme, irresistible, absolute [and] uncontrolled authority' which must exist in every form of government.[101] The sovereignty of the British constitution was lodged in Parliament. Yet Blackstone also explained that Parliament was itself made up of three separate or 'entirely independent' powers, King, Lords, and Commons, who each acted as a check on the others. A century after Blackstone's *Commentaries*, Walter Bagehot, in 1867, gave an almost identical description of the constitution:

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[98] Chapter four will examine these differences further.
[99] Kennedy, 'International Law', p 123.
[100] Ibid, pp 127-128. Although Wheaton's definition of a 'sovereign state' was based on whether a population 'habitually obeyed' a superior person/authority, he was clearly envisaging a European-type constitution as the foundation of sovereign existence: 'Sovereignty is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally. Internal sovereignty is that which is inherent in the people of any State, or vested in its ruler, by its municipal constitution or fundamental laws. This is the object of what has been called internal public law, *droit public interne*, but which may more properly be termed constitutional law. External sovereignty consists in the independence of one political society, in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies. The law by which it is regulated has, therefore, been called external public law, *droit public externe*, but may more properly be termed international law'. See Wheaton, *Elements of International Law* (1836), para 20, ch 2, part 1 (and see citation from Wheaton at n 96).
[101] Blackstone, *Commentaries*, vol 1, pp 48-49.

> A great theory, called the theory of 'Checks and Balances', pervades an immense part of the political literature, and much of it is collected from or supported by English experience. Monarchy [the King or Queen], it is said, has some faults, some bad tendencies, aristocracy [the Lords] others, democracy [the Commons], again, others; but England has shown that a Government can be constructed in which these evil tendencies exactly check, balance, and destroy one another – in which a good whole is constructed not simply in spite of, but by means of, the counteracting defects of the constituent parts.[102]

If Busby and Williams were not familiar with the theory of 'checks and balances', they would have still believed that the British constitution protected rights and liberties. As Blackstone explained, 'each branch [of Parliament] [was] armed with a negative power, sufficient to repel any innovation [or law] which it shall think inexpedient or dangerous'.[103] Moreover, Blackstone also explained that the 'law of nature, being *co-eval* with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding all over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this…'.[104] This moral or theological view of 'sovereignty' being subject to law was probably shared by both Busby and Williams. It corresponds with understandings of the English constitution as based on Magna Charta (examined in chapter three).

British History: from 'independent tribes' to 'civilized nation'

The meaning of 'independence' central to the Declaration or He Wakaputanga can likewise be understood by reference to the British constitution and British history. Busby described Britain as the 'Protector' of a Māori 'Independent State'. Both he and the missionaries believed in an 'independent' state 'dependent' on the British Empire – a contradiction, but completely

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[102] W Bagehot, *The English Constitution*, R H S Crossman, ed, (London: Fontana, 1963), p 60. Bagehot thought this description of the constitution 'erroneous', though it was nevertheless 'influential' (p 59). He thought cabinet exercised far more control than the theory suggested.This book was published shortly before the Second Reform Act 1867 extended the vote to around 58% of adult males in boroughs. Both Blackstone and Bagehot use the terms 'aristocracy', 'monarchy' and 'democracy', forms of government.

[103] Blackstone, *Commentaries*, vol 1, p 51. 'Co-eval' = having same age, existing at same epoch.

[104] Ibid, p 41.

consistent with other British 'protectorate' arrangements. This suggests that Busby and Williams viewed 'international relations' as an interaction of peoples, states, or nations of unequal power, in which a British jurisdiction was carved out, leading often to a layered system of jurisdictions.

Dr Johnson can also assist in understanding a British conception of 'independence'. Reflecting on a trip to the Highlands of Scotland in 1770s, he wrote of this 'Nation just rising from barbarity':

> There was perhaps never any change of national manners so quick, so great, and so general… We came thither too late to see what we expected… a system of antiquated life. The clans retain little now of their original character, their ferocity of temper is softened, their military ardour is extinguished, their dignity of independence is depressed, their contempt of government subdued, and the reverence for their chiefs abated.[105]

Although writing in a very different context and some fifty to sixty years later, Busby's comments on the nature of Māori society stand in the same general tradition as Johnson's. Busby was himself lowland Scots (he grew up in Edinburgh, though one of his parents was English). By the early nineteenth century many Scots wholeheartedly embraced the Union of Parliaments with England of 1707. As Scotland had emerged from clan conflict in the Highlands, so also it had advanced in commerce, education and civilization. This was the context in which Adam Smith of Edinburgh wrote of his four stages of civilizational growth: from the savage hunter-gatherer state, to barbarous herdsmen, to agricultural semi-civilized societies, to prosperous 'polite' commercial and settled societies. This scheme of philosophical history was called 'stadial' history, meaning history divided into stages or periods of development from 'savagery to civilization'.

Busby's comments should be located within this 'Scottish Enlightenment' tradition and, more broadly, a European civic humanist tradition. In these traditions of thought, the freedom and liberty exercised by these confederations of warrior chieftains was praised, but their barbarian

[105] Cited in R Porter, *Enlightenment: Britain and the Creation of the Modern World* (London: Penguin, 2000), p 244.

independence from each other was viewed as a barrier to the development of a settled state of civil society. This somewhat negative accent can be observed in the Johnson quote above. Generally speaking, however, the personal liberty exercised by the German or Saxon ancestors of the English was seen as a good thing, as indicative of their contempt for political slavery and capable of producing constitutional liberty.[106]

Similarly, Busby did not believe that a patchwork of tribal sovereignties could be the future of New Zealand. If New Zealand Māori were to advance in civilization and prosperity they needed to confederate their tribes, combining their many sovereignties to effect a collective sovereignty. Only in so doing could their state of society be truly 'independent' in the sense of having a 'Legal Authority' or government established along British lines. Their tribal independence would become thereby a national (constitutional, governmental) independence and sovereignty. The text of the Declaration itself will now be examined.

The Language of the Declaration (English Text)

Article 1

> *We, the hereditary chiefs and heads of the tribes of the Northern parts of New Zealand, being assembled at Waitangi, in the Bay of Islands on this 28th day of October, 1835, declare the Independence of our country, which is hereby constituted and declared to be an Independent State, under the designation of The United Tribes of New Zealand.*

[106] See S D Carpenter, 'History, Law and Land: The Languages of Native Policy in New Zealand's General Assembly, 1858-62', MA thesis, Massey University, 2008, pp 43-45. A positive affirmation of the polity consisting of independent warrior chiefs or 'citizen-soldiers' actively engaged in government can be seen in the writings of Adam Ferguson, who forged a renewed vision of the classical republican tradition in his *Essay on the History of Civil Society* (1767). Ferguson said, for example: 'The rivalship of separate communities, and the agitations of a free people, are the principles of political life, and the school of men', cited in F Oz-Salzberger, 'Civil Society in the Scottish Enlightenment', in S Kaviraj and S Khilnani, eds, *Civil Society: History and Possibilities* (Cambridge: Cambridge University Press, 2001), p 68. Oz-Salzberger describes Ferguson's understanding of the unity of society and state/government: 'The polity becomes a natural phenomenon: it is as natural for the members of civil society to run their political affairs as it is natural for them, savages and modern Britons alike, to fight, hunt, or play', ibid., p 73.

The first article was intended to effect two things: it declared the independence of the country of New Zealand, and it constituted by means of that declaration an 'Independent State' called or named 'The United Tribes of New Zealand'. This dual formulation – a declaration and constitution in one – suggested that Busby understood independence as founded on 'statehood' or some form of united polity or 'nationality'. The problem, however, was that prior to the Declaration this united polity did not exist. There was no formal institution to articulate the collective will, apart from an embryonic Confederation of Chiefs. A nascent Confederation acted in instances such as the flag and Rete initiatives. If there was no state nationality or government prior to the Declaration, then it is obvious that, in Busby's mind, one had to be created. This 'chicken or egg' scenario was one encountered by the American revolutionaries in making their Declaration of Independence in 1776. One John Dickinson of Pennsylvania articulated this argument in Congress during the debates on the draft Declaration:

> The formation of our government and an agreement upon the terms of our confederation ought to precede the assumption of our station among sovereigns. A sovereignty composed of several distinct bodies of men not subject to established constitutions, and not combined together by confirmed articles of union, is such a sovereignty as has never appeared.[107]

Armitage, in his recent work on the American Declaration and its variants, poses the historic issue in this fashion: 'How could independence be declared, except by a body that was already independent in the sense understood by the law of nations?... A mere declaration alone could not constitute independence; it could only announce what had already been achieved by other means'.[108] The American Declaration was not in fact intended to constitute the new confederated state or nation. At the same time as that Declaration was being drafted, so also were draft articles of confederation (constituting the new state) and a model treaty of commerce and alliance (enabling transactions with other states to be entered into).[109] By contrast, Busby's English text attempted both to constitute and to declare the independence of the new 'Independent State' at

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[107] Clark, *The Language of Liberty 1660-1832*, p 121.
[108] D Armitage, *The Declaration of Independence: A Global History* (Cambridge, Mass: Harvard University Press, 2007), pp 80-81.
[109] Ibid, p 35.

the same time. Busby intended to conflate a 'constitution' and a declaration in the one document. In his most important 1837 despatch, he referred to 'Articles of Confederation' and the 'Declaration of Independence' almost as if they were two separate documents:

> The articles of Confederation having established and declared the basis of a Constitution of Government, it follows, I think, that the rights of a Sovereign power exist in the members of that confederation, however limited the exercise of those rights has hitherto been.[110]

The American example was the most prominent example of a prior declaration that Busby had to draw upon. The 'republican' or 'federal/confederal' wording of the Declaration, together with this later reference to 'Articles of Confederation' (an exact replica of the 1776 American phraseology) immediately suggests the American inspiration. This theme will be returned to shortly.

As for the nature and function of a 'declaration' in the law of nations of this period, it was essentially equivalent to a 'declaration of war' or, indeed, a 'declaration of independence' in twentieth century usage. According to Armitage, 'in contemporary [late eighteenth, early nineteenth century] diplomatic parlance, a declaration meant a formal international announcement by an official body, "either by a general manifesto, published to all the world; or by a note to each particular court, delivered by an ambassador" '[111] There was also the civil court meaning of 'the *declaration*, *narration*, or *count*', defined by Blackstone in 1765 as '[the form] in which the plaintiff sets forth his cause of complaint at length'.[112] Both the 1776 and the 1835 Declarations belonged primarily to the first category – 'general manifesto[s], published to all the world', although the American version contained other elements.[113] As well as despatching a copy of the Declaration to NSW, Busby also despatched copies to the LMS missionaries in

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[110] Busby to Col Sec, 16 Jun1837, No 112, pp 245-263, p 251.
[111] Armitage, *The Declaration of Independence*, p 31, citing Robert Plumer Ward, *An Enquiry Into the Manner in Which the Different Wars in Europe Have Commenced, During the Last Two Centuries: To Which Are Added the Authorities Upon the Nature of a Modern Declaration* (London, 1805).
[112] Ibid, p 31.
[113] Notably the American declaration, in one of its sections, set out grievances or complaints against King George III.

Tahiti (for the obvious purpose of forestalling de Thierry's New Zealand adventure) and the British Consul in Hawai'i.[114]

Article 2

> *All sovereign power and authority within the territories of the United Tribes of New Zealand is hereby declared to reside entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity, who also declare that they will not permit any legislative authority separate from themselves in their collective capacity to exist, nor any function of government to be exercised within the said territories, unless by persons appointed by them, and acting under the authority of laws regularly enacted by them in Congress assembled.*

The second paragraph or article enumerated the powers to be exercised by the independent state of the United Tribes of New Zealand: the generic supreme or 'sovereign' authority, all legislative powers, and all 'function[s] of government'. The exercise of these powers was expressly limited to the 'the said territories' of the Chiefs. This is limited in article one to 'the Northern parts of New Zealand' ('i raro mai o Hauraki'). The Chiefs collective powers could also be delegated by way of legislation. Busby no doubt envisaged himself as one of the chief 'appointees' of the rangatira. All legislation was to be made 'in Congress', the first of two uses of this word.

This second article was not an afterthought or an unnecessary addition designed to oppose McDonnell's spirits prohibition. Busby used the phrase 'function of government' prior to McDonnell taking this action at Hokianga in early October 1835.[115] On 10 September Busby wrote:

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[114] Busby to Col Sec, 31 Oct 35, No 69, pp 155-156. The appointment of such Consuls was a form of international recognition of other nations. The United States accredited James R Clendon to the United Tribes in 1839. James Stephen minuted Busby's letter to Col Office of 19 Sept 1839: 'the United States have still a Consul accredited to the Chiefs, which Consul is recognized in that capacity by the British Resident. We shall certainly not assume the Sovereignty of that Country without a violent remonstrance from the United States', Stephen minute 22 Apr 1840, CO 209/4, p 75a.

[115] See Busby to Col Sec, 10 Oct 1835, No 67, pp 148-150.

> [The Natives] look to the Europeans to effect…[prohibition]; and indeed they are by their ignorance equally incapable of their rights as an *independent people*; and by the absence of all established authority for the exercise of this or any other *function of government* [emphasis added].[116]

Busby's use of the concept of independence in relation to function of government is another indication that he saw true independence (at least in a pan-tribal national sense) as founded on established government, something Māori did not have in September 1835.

Article 3

> *The hereditary chiefs and heads of tribes agree to meet in Congress at Waitangi in the autumn of each year, for the purpose of framing laws for the dispensation of justice, the preservation of peace and good order, and the regulation of trade; and they cordially invite the Southern tribes to lay aside their private animosities and to consult the safety and welfare of our common country, by joining the Confederation of the United Tribes.*

The third paragraph specified how the United Tribes were to conduct the business of government – in Congress at Waitangi in the autumn of each year. Busby defined the purposes as legislating on the subjects of justice (probably criminal justice), the peace of the realm, and commercial regulation. The article also contained an appeal to 'the Southern tribes' to join this new confederate state, so unifying the country.

Johnson's Dictionary (1824 edition) defined confederation simply as a 'league' or 'alliance' (from Sir F Bacon). 'Congress', from the Latin *congressus*, the Dictionary defined as

> a meeting (Dryden); a meeting for settlement of affairs between different nations (Pennant) [for example, the Congress of Vienna, 1815]; a meeting of ceremony (Sir K Digby).[117]

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[116] Busby to Col Sec, 10 Sept 1835, No 65, p 139.
[117] S Johnson, *A Dictionary of the English Language* (London, 1824).

Busby's commentary on the nature and workings of this New Zealand confederation also suggests these basic meanings. This new confederate state of the United Tribes was not intended to dissolve individual hapū and iwi structures, nor the individual authority of rangatira. Nevertheless, it was meant to unify their authority for the purpose of national government and dealings with foreign nations. The 1781 Articles of Confederation formed a unicameral Congress of 'the United States of America'. This Congress exercised both legislative and executive powers until replaced by the new Constitution of the United States in 1789.

It was the 'hereditary chiefs and heads of tribes' who both declared the independence of the new state (article one) and who declared themselves possessed of all 'sovereign power and authority' within that state's territories (article two). This state sovereignty was only possessed by the rangatira collectively (article two); though from the appeal to rangatira in other rohe it was envisaged that others would add their individual sovereignties and their whenua hapū to that of the collective (article three). The state of the United Tribes could grow both in numbers and territory by simple aggregation of new rangatira. Quite what the balance of power, or the differing functions, would be within the United Tribes – that is, between iwi and hapū and the collective power of Congress – was not however specified (though Busby's commentary might assist in constructing this picture – see below). In a similar way, neither was it specified in te Tiriti o Waitangi, the division of responsibility or the differing powers between the British Crown (kāwanatanga) and Chiefs (rangatiratanga).

Article 4

> *They also agree to send a copy of this Declaration to His Majesty, the King of England, to thank him for his acknowledgement of their flag, and in return for the friendship and protection they have shown, are prepared to show, to such of his subjects as have settled in their country, or resorted to its shores for the purposes of trade, they entreat that he will continue to be the parent of their infant State, and that he will become its Protector from all attempts upon its independence.*

Paragraph four consisted of diplomatic overtures to the English monarch, thanking him for acknowledging the New Zealand flag and asking for his parental protection of their independent 'infant State'. This article contained Busby's conception of New Zealand – British relations already referred to, namely independence founded on protection or dependence. This idea contained at least two strands of thought. One was the feudal notion whereby the monarch was akin to a protecting parent for the realm, to whom subjects owed obedience. Clark argues that allegiance of subject to (a Protestant) monarch was the British conception of nationality until well into the nineteenth century: the state was conceived as essentially a personal or familial relationship rather than a collection of individuals of a particular ethnicity, language or culture owing allegiance to an abstract government or state (a definition more relevant to revolutionary regimes like America and France and later nineteenth-century ethnic nationalism).[118] The idea of familial dependence on, indeed allegiance to, the British Crown – especially a Crown backed by a powerful apparatus of empire – was an idea even the American revolutionaries struggled to overcome. Thomas Jefferson himself said, as late as August 1775, that he 'would rather be in dependence on Great Britain, properly limited, than on any nation upon earth, or than on no nation'.[119]

The other strand of thought present in the Declaration's fourth article – implied by Busby's use of the term 'infant State' – can be attributed to the influence of Scottish stadial theory, which saw societies emerging from savagery and barbarism to civilization in a series of 'stages'.[120] In the eighteenth and nineteenth centuries the state of aboriginal peoples was likened to the 'childhood' or 'infancy' of more advanced nations: Māori were, on this view, like a mirror reflecting the early progressions of British civilization. Different prescriptions followed the ascription of barbarism. For James Mill, followed to a large extent by his son John Stuart Mill, the barbarous state of India was a reason why it needed 'despotic' government – that is directive, non-participatory rule – to raise it to a more educated and civilized state. Some of the Mills'

[118] Clark, *The Language of Liberty 1660-1832*, pp 50-53. Clark says: 'Providential destiny as demonstrated from scripture and history, not ethnicity, was the earliest matrix of English national identity' (p 52).
[119] Ibid, p 121.
[120] See text at n 106.

contemporaries agreed neither with this description of nor this prescription for Indian society – the 'orientalists' saw Indian society as considerably advanced in languages and the arts.[121]

Adam Smith's 'four stages' version of stadial history did not represent the entire field of late eighteenth and early nineteenth century historical thought. In more orthodox and evangelical Christian versions of civilization, societies could progress or regress. This was seen primarily in moral and relational terms, and only secondarily in economic or material terms. The real test was man's relationship with God – supposedly 'polite' civilized societies such as England could display barbarous features.[122] Nevertheless a generic 'civilizational perspective' did predominate in British and European Enlightenment culture of the eighteenth and nineteenth centuries. Peter Mandler characterizes this paradigm as one in which 'the ladder of civilization, rather than the branching tree of peoples and nations, remained the dominant metaphor'.[123] The Evangelicals shared in this generic Enlightenment culture, believing their faith both reasonable and rational. Nonetheless it is true to say that their emphasis differed from the more materialistic and 'philosophical' versions of civilization. Mandler describes the Evangelical view in this fashion:

> The civilisational perspective was thus not tutelary – it gave much scope to individual conscience and action – and required only a minimum of exclusive political institutions (particularly churches, to disseminate a proper understanding of revelation) for its smooth functioning … adding to older Scottish requirements for 'commerce' and 'manners' a narrower Protestant idea of 'character', the civilisational perspective remained potentially universal, available to all peoples.[124]

Busby grew up in an Edinburgh moulded by secularists Smith and Hume as well as the orthodox Calvinist Church. His statements on Māori culture reflect this combination of perspectives. Busby approved the missions' work amongst Māori as a civilizing influence, coming into conflict with them only in political matters. It is quite clear that he also saw his 'civil' or

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[121] Carpenter, 'History, Law and Land', pp 6-9, 30, 34-35.
[122] S Dingle, 'Gospel Power for Civilization: The CMS Missionary Perspective on Māori Culture 1830-1860', PhD history thesis, University of Adelaide, 2009 (chs 1, 4 & 5 especially).
[123] P Mandler, ' "Race" and "Nation" in Mid-Victorian Thought' in S Collini, R Whatmore and B Young, eds, *History, Religion, and Culture: British Intellectual History 1750-1950* (Cambridge: Cambridge University Press, 2000), p 233.
[124] Ibid, p 227. And see discussion in Dingle, 'Gospel Power for Civilization', pp 91-92.

governmental influence as integral to their future progress. His address to Māori on his arrival in Paihia in 1833 expressed a natural mingling of these two views. It is worth quoting at length as it reflects a very British Protestant conception of national identity and providential purpose (one with which the missionaries would have supported wholeheartedly). This should also be seen in the context of Bourke's 13 April 1833 instructions requiring Busby to cooperate with the missionaries. In his address, Busby first placed his appointment within the providential meta-narrative:

> It is the custom of HIS MAJESTY, THE KING OF GREAT BRITAIN, to send one or more of His servants to reside as His Representatives in all those countries of Europe and America, with which He is on terms of friendship; and in sending one of His servants to reside among the Chiefs of New Zealand, they ought to be sensible not only of the advantages which will result to the people of New Zealand, by extending their commercial intercourse with the people of England, but of the honour THE KING of a great and powerful nation like Great Britain, has done their country, in adopting it into the number of those countries with which He is in friendship and alliance.

Later, he continued this providential meta-narrative with an account of Christianity's critical role in civilizing the barbarous society of his European ancestors: as it had had this effect on his tūpuna, so it would have the same effect on Māori. He said:

> At one time Great Britain differed very little from what New Zealand is now. The people had no large houses, nor good clothing, nor good food. They painted their bodies, and clothed themselves with the skins of wild beasts. Every Chief went to war with his neighbor, and the people perished in the wars of their Chiefs, even as the people of New Zealand do now. But after God had sent HIS SON into the world to teach mankind that all the tribes of the earth are brethren, and that they ought not to hate and destroy, but to love and do good to one another; and when the people of England learned HIS words of wisdom, they ceased to go to war with each other, and all the tribes became one people.

> They peaceful inhabitants of the country began to build large houses, because there was no enemy to pull them down. They cultivated their land and had abundance of bread, because no hostile tribe entered into their fields to destroy the fruits of their labors. They increased they numbers of their cattle because no one came to drive them away. They also became industrious and rich, and had all good things they desired.
>
> Do you, then, O Chiefs and Tribes of New Zealand, desire to become like the people of England? Listen *first* to the word of GOD, which HE has put it[sic] into the hearts of HIS servants, THE MISSIONARIES, to come here to teach you. Learn that it is the will of GOD that you should all love each other as brethren, and when wars shall cease among you, then shall your country florish. Instead of the roots of the fern, you shall eat bread, because the land shall be tilled without fear, and its fruits shall be eaten in peace. When there is abundance of bread, men shall labor to preserve flax, and timber, and provisions for the ships that come to trade; and the ships which come to trade, shall bring clothing and all other things which you desire. Thus shall you become rich. *For there are no riches without labor, and men will not labor unless there is peace, that they may enjoy the fruits of their labor* [emphasis added].[125]

The emphasis on Christianity first, or conversion first, would surely have satisfied those like Te Wiremu who had brought this change to the CMS missions' policy in New Zealand – from the emphasis of Marsden's earlier policy of teaching the 'arts of civilization' first.[126] Apart from the centrality of teaching and translating the Word of God (the Bible) Busby's emphasis on peacemaking was another significant missionary endeavour amongst Māori. The infant Māori state or nation, in the view of Busby and the missionaries, was founded on Māori acceptance of the Gospel of Peace along with the fostering care of a Protestant British monarch. The placing of Māori within this providential (British) meta-narrative in Busby's 1833 speech – a picture

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[125] Rt Hon Lord Viscount Goderich, and J Busby, *Letter of the Right Honorable Lord Viscount Goderich, and Address of James Busby, Esq. British Resident, to the Chiefs of New Zealand. Ko te Pukapuka o te Tino Rangatira o Waikauta Koreriha, me te Korero o te Puhipi, ki nga Rangatira o Nu Tirani* (Sydney: Anne Howe, 1833), DU 418, AML.

[126] Elizabeth Elbourne writes that the Evangelical renewal (or revival) marked a move away from eighteenth century critiques of civilization (or civility) and distinctions between races and social groups to a nineteenth century emphasis on individual conversion, see E Elbourne, 'Religion in the British Empire', in S Stockwell, ed, *The British Empire: Themes and Perspectives* (Massachusetts: Blackwell, 2008), pp 131-156.

painted in broad scriptural and historical brush-strokes – befitted the nature of an introductory address. Busby's more specific civil or governmental policies were soon to follow (the flag, and ultimately the Declaration and Confederation). Nevertheless, the idea of the 'infant State', articulated in paragraph four of the Declaration, should be understood in light of this British meta-narrative – as much as it should be understood in light of any specific policy of Busby's or the British Empire.

The parent-infant metaphor and language recurs a number of times in Busby's post-Declaration despatches. The clearest articulation of it occurs in his 16 June 1837 'protectorate' despatch in which he advocated much greater British Government involvement.[127] The providential motif was also present. Busby argued that:

> it seems not more consistent with the arrangement of the Divine Providence, that an infant people which by its intercourse with a powerful state, is subject to all the injury and injustice which weakens[sic, 'weakness'] and ignorance must suffer[,] being thrown into a competition of interests with knowledge and power[,] should as naturally fall under, and be not less entitled to the protection of the powerful state, than the weakness of infancy and childhood is entitled to the protection of those who were the Instruments of bringing it into an existence, which requires such protection.[128]

In this passage Busby cast Britain as both the parent and instigator of the Māori 'infant State' of the Declaration. In a fascinating concluding comment, Busby further suggested that the 'infant' had to some degree requested the language of 'parenthood' in the Declaration: '[The chiefs] prayed that His Majesty "would continue to be their parent, and that he would become their protector" – *The sentiment and the language were their own* [emphasis added]'.[129] It is quite possible that this final sentence was self-serving – that it formed part of Busby's attempt to acquire greater British control: if the idea of British protection could be attributed to Māori desires then how could the British parent refuse?

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[127] The specifics of Busby's extensive recommendations are set out in a section below.
[128] Busby to Col Sec, 16 Jun 1837, No 112, p 263.
[129] Busby to Col Sec, 16 Jun 1837, No 112, p 263.

There is no doubt that protectorate language was a prominent code for British control of the time. However, Busby's comment should not be dismissed as mere rhetoric. Familial and hereditary relationships (whanaungatanga and whakapapa) also structured Māori society; hence the language of 'to matou Matua' (our Father) in the Lord's Prayer might naturally have resonated with Māori whakaaro and tikanga. The language of 'matua' or parent with reference to missionaries and Busby himself was certainly quite prevalent in the debates on te Tiriti (as recorded by Colenso). These considerations lend a certain substance to Busby's claim that the appeal to His Majesty as 'matua' and protector derived from the kōrero of Chiefs. Whether this reference supports an argument that the Declaration was as much a Māori creation as a European one is going several steps further: this would imply that the English text and Māori texts were at most drafts prior to presentation to chiefs on 28 October 1835.[130] Another possibility is that Busby text and Williams' translation (prepared pre-28 October) was simply mimicking Māori modes of address, with which the missionaries in particular were long familiar.

The Reception of the Declaration in NSW and England

Busby's despatch of a Declaration copy direct to R W Hay, Undersecretary of State for Colonies, was eventually received and minuted by Hay as follows:

> [A]cknowledge receipt and authorize Mr B to assure the Chiefs that H.M. will not fail to avail Himself of every opportunity shewing his good will and of affording them such support and protection as may be consistent with due regard to the just rights of others and to the interests of H.M. Subjects.[131]

[130] As argued by M A Henare, *The Changing Images of Nineteenth Century Māori Society – From Tribes to Nation*, PhD Māori studies thesis, Victoria University of Wellington, 2003, pp 187-201; see discussion below at n 217.
[131] Hay minute 28 May 1836 on Busby to Hay, 3 Nov 1835, No 4, pp 264-264a, CO 209/1, ATL. Busby's despatch was also marked 'Copied for Aborigines Comm. Apr/37', that is the House of Lords Select Committee on New Zealand, which sat April and May 1838.

These words found their way (in modified form) into Secretary of State Lord Glenelg's 25 May 1836 despatch to NSW Governor Bourke (drafted by Hay),[132] which read:

> With reference to the desire which the Chiefs have expressed on this occasion to maintain a good understanding with His Majesty's Subjects, it will be proper that they should be assured in His Majesty's name that He will not fail to avail Himself of every opportunity of shewing His good will and of affording to those Chiefs such support and protection as may be consistent with a due regard to the just rights of others and to the interests of H.M. Subjects.[133]

The Glenelg (Hay) despatch also noted that Busby's 2 November 1835 despatch had been received and that it had enclosed:

> a Copy of a declaration made by the Chiefs of the Northern parts of New Zealand, setting forth the independence of their Country, and declaring the union of their respective Tribes into one State under the designation of the Tribes of New Zealand.[134]
>
> I perceive that the Chiefs at the same time came to the resolution to send a copy of this declaration to His Majesty; to thanks him for his acknowledgement of the Flag; and to entreat that, in return for the Friendship and protection which they have shewn and are prepared to shew to such British Subjects as have settled in their Country or resorted to its Shores for the purposes of Trade, His Majesty will continue to be the Parent of their Infant State, and its Protector from all attempts on its independence.[135]

Although this despatch noted the substance of the Declaration, it did not extend official British endorsement of the Declaration as constituting an independent New Zealand state. The emphasis

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[132] Glenelg to Bourke, [25] May 1836, No 5 [RW Hay draft] 'Forwarded to Mr Gairdner 24 May; Mr Stephen 24 May, Sir Geo.Grey 25 May, Lord Glenelg, 25 May', pp 268-270a, CO 209/1, ATL. See this same despatch at HRA 1/18, p 427.
[133] Ibid, p 270-270a.
[134] Ibid, p 268a
[135] Ibid, p 269-269a

was rather on the relationship of support and protection which Britain could offer the New Zealanders. Even that might be qualified by 'a due regard to the just rights of others and to the interests of H.M. Subjects'.

For his part, Governor Bourke accepted the Declaration but rejected article two with respect to the legislative powers of the Congress. This was serious, as Busby envisaged the primary function of the Confederation as legislative. Bourke reported to Glenelg that Busby had alerted him of de Theirry's declared intention to establish himself as independent sovereign of New Zealand.[136] Bourke approved the Declaration except for the part of article two which said that the chiefs would not allow any other legislative authority to be established.[137] Bourke attributed this portion of article two to the proceedings of MacDonnell and the Rev. William White in procuring the ban on the import of spirits in Hokianga. Bourke noted that he published this ban in the NSW Government Gazette. He added that Busby opposed a similar measure in the Bay of Islands.[138]

Glenelg, as a sound Evangelical concerned for both spiritual and material welfare, concurred with Bourke (as did the New Zealand missionaries) in relation to the prohibition issue:

> …I cannot but record by entire concurrence in your opinion that, however upright may have been [Busby's] motives, he judged unwisely and acted with great indiscretion in placing himself in opposition to your measures for preventing and discouraging the introduction of Ardent Spirits amongst the Natives of New Zealand.

On the other hand, Glenelg also approved of the Declaration in terms of its effect in forestalling other foreign powers who would (much like Ardent Spirits) cause harm to Māori:

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[136] Bourke to Glenelg, 10 March 1836, HRA 1/18, pp 352-355.
[137] Ibid, p 353.
[138] Ibid, pp 354-355. Bourke and his Council approved the Declaration, even though Busby did not have specific authority for it. But they objected to article two, which they thought was inserted to override McDonnell's Hokianga law prohibiting liquor imports. And they cautioned Busby to seek NSW's sanction for any future measures of importance before submitting them to rangatira for adoption. McLeay to Busby, 12 Feb 1836, No 36/5, NSW Colonial Secretary, Outward Ltrs 1831-1836 [NSW 4/3523] NSW State Archives, Micro Z2710, NA, pp 513-517.

> Every motive of humanity and of National policy combine in favour of Mr Busby's efforts to defeat the attempt of the person calling himself Baron de Thierry, to establish a Sovereignty over the New Zealanders. The success of such a scheme would not only have introduced a new and dangerous power in the neighbourhood of our Australian Colonies, but could scarcely have failed to bring about, at no remote period, the depopulation of New Zealand, or at least the extinction of the Aborigines.

Glenelg also noted that he had not done anything about legislation to protect Māori but was still hoping to do something.[139]

Conclusion: did the Declaration have 'international standing'?

Busby clearly intended the Declaration to have an international effect – to forestall de Thierry. Yet the Crown never formally assented to, or gazetted, the Declaration.[140] Moreover, Busby and most officials thought that full nationality status or 'sovereignty' depended on a viable national government. James Stephen's third draft of Hobson's instructions stated that 'international relations' could not be formed with New Zealand as it possessed no national government or 'civil polity'.[141] Normanby's final instructions to Hobson qualified New Zealand as a 'sovereign and independent state' on identical grounds.[142]

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[139] Glenelg to Bourke, 26 August 1836, HRA 1/18, p 506. Adams notes that a Colonial Office bill to grant Busby judicial power under the NSW Government failed to pass the Commons on the basis that New Zealand was a foreign country for which Britain could not legislate. British subjects could not, legally, even be apprehended in New Zealand, see P Adams, *Fatal Necessity: British Intervention in New Zealand, 1830-1847* (Auckland: Auckland University Press and Oxford University Press, 1977), pp 65-66. According to Tapp, Glenelg withdrew Howick's South Seas Bill from Parliament in mid 1836, see E J Tapp, *Early New Zealand: A Dependency of New South Wales 1788-1841* (Melbourne: Melbourne University Press, 1958), p 104.

[140] The Declaration would not have been 'gazetted' since the Crown was not a party to it. The first 'official' publication of the Declaration would appear to be in the evidence of Coates and Beecham before the House of Lords Select Committee 1838, see BPP 1837-38 (680), pp 245-246, IUP vol 1. Therefore, the second question posed by the Tribunal for this inquiry wrongly assumes that the Crown 'signed' the Declaration (see Conclusion).

[141] CO 209/4, pp 226-227. See discussion of these complexities in chapter 4. The NSW Governor and Council regarded the Declaration as 'an approach towards a regular form of Government in New Zealand', see McLeay to Busby, 12 Feb 1836, No 36/5, NSW Colonial Secretary, Outward Ltrs 1831-1836 [NSW 4/3523] NSW State Archives, Micro Z2710, NA, pp 513-517.

[142] '…so far at least 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 deliberate in concert', cited in Palmer, *Treaty of Waitangi*, p 49, and quoted by Gipps in his address to the NSW Legislative Council on 9 July 1840. CO 209/6, p 280a.

The practical effect of the Confederation of the United Tribes

British observations of the Confederation, 1836-1840

Captain William Hobson, after attempting to resolve the Northern Alliance-Pomare conflict in 1837 (see below for a fuller account of these events), noted the very limited achievements or organization of the Confederation:

> At present, notwithstanding their formal declaration of independence, they have not in fact 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 the danger of bloodshed.[143]

Disunited tribes remained vulnerable to manipulation by 'turbulent individuals', said Hobson.[144] It was in this despatch that he proposed the 'factory system' for New Zealand, modelled on his Indian experience (considered below).

Hobson reported his view some two and a half years later to Bourke's successor, Governor Gipps, that:

> it is true a formal declaration of Independence has been made by the New Zealand Chiefs; but that in fact the New Zealanders but little understood the nature of that proceeding, and that they never fulfilled its obligation. No confederation had ever been formed to enact Laws nor for any other useful purpose, it was an experiment wh[ich] had failed…[145]

This was notwithstanding that Hobson had carried to Sydney in July 1837 four British subjects charged with theft from a British settler in New Zealand (Capt Wright), along with a 'warrant'

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[143] Hobson to Bourke, 8 Aug 1837; encl in Bourke to Glenelg, 9 Sept 1837, No 86, CO 209/2, NA, p 34-34a [Also, BPP, 1837-38 (122), pp 3-5, IUP vol 3, pp 22-24].
[144] Ibid, p 35-35a.
[145] Despatch of 16 Jan 1840, cited by Loveridge, 'The "Declaration of the Independence of New Zealand" of 1835', p 21.

for their arrest signed by three rangatira of a five member Committee appointed by the Congress (this was procured by Busby).[146]

In 1836 Bourke's Executive Council pointed out to Busby that the Declaration was geographically limited to the tribal areas of those rangatira who had signed it (something he was well aware of),[147] but in July 1840 Governor Gipps lowered the estimation of the document even further:

> it was, in fact, a manoeuvre played off by him against the Baron de Thierry, and it was not even pretended that the natives could understand the meaning of it; still less could they assemble yearly in congress and pass laws, as Mr. Busby, in his declaration, had made them say they would do .... His declaration of independence (for it was his) was indeed, I think, a silly as well as an unauthorized act .... it was, in fact, as I have said before, a paper pellet fired off at the Baron de Thierry.[148]

The context of these 1840 statements by both Hobson and Gipps requires careful analysis as they were made five years later and in the context of debates on British pre-Treaty land claims. It is not true to say that the Declaration was unauthorised, although it may well have involved Busby's creative interpretation of his instructions regarding the encouragement of a 'settled form of government' amongst Māori.

Busby would have resented Gipp's demeaning of the Declaration and the Confederation. In 1837 Busby had considerable plans for the Confederation, albeit within a formalized British protectorate. Nevertheless, Busby wrote in June 1837:

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[146] Despatch of 3 Jul 1837 to Col Sec, cited by Loveridge, 'The "Declaration of the Independence of New Zealand" of 1835', p 20.
[147] See Loveridge, 'The "Declaration of the Independence of New Zealand" of 1835', pp 17-18. This can be read as an attempt by the Council to exclude McDonnell's liquor law from the operation of article two of the Declaration.
[148] Ibid, p 22.

> Thus would the way be prepared for confiding to the [Māori] people the trust of Jurymen, in like manner as to the Chiefs of Congress, that of Legislators, when a generation should arise sufficiently enlightened and virtuous to be capable of these high functions.[149]

This quote was Busby's 'plan of Government' for New Zealand.[150] However, this portion of the plan had to be gradually worked towards, and to this end New Zealand needed Britain to provide military support for a civil establishment, founded on the Confederation, but advised and indeed directed by British officials experienced in the art of government. The Congress of Chiefs, as the annual assembly of the Confederation, was always intended to be a legislative body – a parliament. But experience since October 1835 had proved the validity of Busby's earlier thinking that a confederation of rangatira alone, even with his advice, would be incapable of establishing effective executive government. Two key events, and many subsidiary ones, affected Busby's thinking, although his view in general terms always remained consistent. The first event was the dramatic altercation between Te Hikutu and a hapū from Whananaki at a Waitangi hui in January 1836. The second was the flair up between the Northern and Southern Alliances of Ngāpuhi, between Titore and Pomare and their associated hapū, at Peiwhairangi.

Busby's New Zealand context, 1836-37

The ink was hardly dry on the Declaration of Independence before Busby was asked to mediate in a dispute between Waikato's Te Hikutu from Te Puna and Noa's hapū from Whananaki. The background was this: Two European traders, Bond and Day, had entered into an arrangement with Waikato for the sale of a kauri forest at Whananaki. However, the whakapapa links of Waikato to that whenua (at least in Busby's account) seemed doubtful. Henry Williams became involved and the Whananaki hapū conveyed the said land in trust to the missionaries. Williams then communicated with Day, a British settler, that he would have to obtain the consent of both the missionary trustees and the local hapū owners before any purchase could be effected. Waikato then requested Busby's mediation. Waikato brought 35-40 men to the 12 January hui, while Noa brought around 150 men, women and children. After some verbal fire-works, one of

[149] Busby to Col Sec, 16 Jun 1837, No 112, p 256.
[150] Busby to Col Sec, 16 Jun 1837, No 112, pp 245-263.

Waikato's party pushed an older kaumatua from Whananaki. Noa's party reacted. Te Hikutu then leapt up, recovered their muskets lying concealed nearby, and proceeded to fire upon the Whananaki people. Two died. Others were injured. Soon the large Whananaki group was crowding into the Residency for protection. 'The floors were covered with blood' reported Busby, and in a later despatch appealed to a sense moral outrage in his superiors by referring to blood on the floor of his wife's bedchamber.[151] In the aftermath, Busby avoided calling a hui of the Confederation as he feared it might provoke an even greater conflict.[152] Although he believed the Confederation would sanction a punishment of the Te Hikutu offenders, he preferred the actual punishment to be carried out by a British military force.[153] In the meantime he delayed, waiting for the 'determination of the [British] King whether justice should be done by his Government or by the Government of this Country alone [that is, the Confederation]'.[154]

The second event involved Pomare's apparent attempt to retake Kororareka from the Titore-led Northern Alliance. After the Alliance forced Pomare out of Kororareka in 1830, he had removed about five miles away to Otuihu at the southern end of the Peiwhairangi anchorage. The loss of Kororareka obviously hindered his trading interests and prestige. According to Busby the fighting involved around one thousand warriors (200 on Pomare's side and around 800 on the

[151] Busby to Col Sec, 18 Jan 1836, No 84, pp 175-185.
[152] Busby to Col Sec, 26 Jan 1836, No 85, p 187.
[153] Busby to Col Sec, 18 Jan 1836, No 84, pp 183-185.
[154] Ibid, p 180. Still waiting for an answer from NSW on 20 February, he wrote: 'The Congress of Chiefs might be prevailed upon to pass sentence upon [the offenders]; but I believe it would be impossible to procure native executioners', Busby to Col Sec, 20 Feb 1836, No 86, p 196. The Governor finally responded by despatch dated 23 March but its suggestion of a Rete-type punishment of land forfeiture and banishment was rejected by both Busby and the missionaries as unrealistic and 'would occasion a general war' in Tai Tokerau if there was not any 'British Force' to supervise or carry out the punishment. Busby also disagreed with the Governor's view that there was no insult to the British Resident. He now considered that his office was 'in abeyance' as he could do nothing to resolve the situation, and he requested permission to proceed to England to lobby for greater British intervention (this was not the last time when his request to plead the case of NZ in London was denied), Busby to Col Sec, 18 May 1836, No 95, pp 210-217. The Governor's 23 March 1836 despatch (a response formulated by the Governor in Council) gave as reasons for not interfering with a British military force: 'Because there appears no sufficient motive for an armed interference, amounting in fact to an invasion of an independent state on the part of the British Government.... Such affrays between Savages are of common occurrence and the New Zealanders being but little removed from the Savage State, the attack . . . cannot with propriety be considered as an intended insult to the British Nation requiring immediate reparation and chastisement for the vindication of National honor'; and 'Because supposing it was expedient in Policy to strike with terror the New Zealanders by the expedition of a Foreign Military force in their Country . . . it would be an act wholly unjustifiable to take the lives of those People under colour of British Law to which they owe no obedience, in retribution of [?] an offence committed by one New Zealander against another', see McLeay to Busby, 23 Mar 1836, No 36/6, NSW 4/3523, pp 530-536.

other). There were some deaths, including of leading rangatira Titore, but otherwise the death toll was not initially significant and British property was, with one or two exceptions, spared.[155] Widely different accounts exist concerning resolution of the conflict. Busby wrote that missionary and Hobson's attempts at mediation failed.[156] McDonnell claimed that he along with Hokianga chiefs resolved the conflict.[157] Yet according to missionary accounts, Williams and colleagues were integral to its resolution.[158]

Besides these immediate concerns in mid-1837, the spectre of de Thierry still hung in the air. Busby had talked further about the possibility of such European adventurers making use of the unstable geopolitics of Tai Tokerau to obtain a territorial dominion. He suspected they might even purchase from rangatira the rights to shipping dues in the Bay, as he had earlier proposed to NSW.[159] The tensions within Ngāpuhi had also figured after the Te Hikutu-Whananaki incident at Waitangi, Titore and other Northern Alliance rangatira supposedly lending their support to Waikato, and Pomare and others potentially aligning himself with Whananaki.[160] These movements did not immediately provoke conflict but may have simmered until the Kororareka turmoil broke out.

Busby was also encountering problems with a somewhat reckless McDonnell. In Hokianga, the Additional British Resident was passing laws and taking the law into his own hands. On one occasion he literally took up arms to protect the supposed rights of European land purchasers, in a run-in with Waka Nene who claimed the land had not been sold and that he therefore had rights to sell the trees. McDonnell was also involved in a turf war with the Wesleyan missionary, the

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[155] Busby to Col Sec, 4 May 1837, No 111, pp 242-245; Busby to Col Sec, 16 Jun 1837, No 112, pp 245-263. Leading rangatira Pi also died in the conflict, see Rogers, *Te Wiremu*, p 135.
[156] Busby to Col Sec, 16 Jun 1837, No 112, p 247.
[157] McDonnell provided an 18pp wide-ranging account of the conflict between the Titore-led Northern Alliance, and the Pomare-led Ngati Manu. He also believed that both Busby and the CMS Missionaries had failed to intervene effectively. He accompanied WMS Missionaries Nathaniel Turner and John Whitely, together with Hokianga rangatira 'Tuckiore' on a peacemaking mission to the Bay. This he said was much more effective in bringing hostilities to a close. McDonnell to Col Sec, 24 July 1837, CO 209/2, pp 68-68a, encl in Bourke to Glenelg, 13 Sept 1837, No 90. In most cases, however, McDonnell was not a reliable witness.
[158] Rogers, *Te Wiremu*, pp 133-135.
[159] Busby to Col Sec, 12 March 1836, No 89, pp 197-200.
[160] Busby to Col Sec, 26 Jan 1836, No 85, pp185-191. Busby's account is somewhat vague, as he indicates Pomare paid Waikato a 'friendly visit', even though Pomare was on the opposite side of the Bay of Islands division (perhaps because he was, like Waikato, not 'under the influence of' the missionaries).

Rev William White.[161] All these little and larger fires were breaking out in 1836 and 1837, causing Busby to call even louder for the interposition of British authority *de jure* backed by real not imaginary force.

Māori 'juries' and the 'school' of Congress

Given this background it is not difficult to comprehend Busby's conviction (if it was a strong belief in 1834-35 it was certainly a conviction by 1836) that British 'Legal Authority' and military power was needed to bring about a more durable framework for law and order. Nor is it difficult to understand his conception that Māori structures of government and law based on British models (including especially criminal justice) would be brought about only over time; as he said (in the quote above): 'Thus would the way be prepared for confiding to the [Māori] people the trust of Jurymen, in like manner as to the Chiefs of Congress, that of Legislators, when a generation should arise sufficiently enlightened and virtuous to be capable of these high functions'.

The immediate context for these comments was Busby's recommendation that Māori juries be not judges in the case but rather 'witnesses to the Country' of the accused having had a fair trial. Jurymen would be 'compurgators' with the accused, he said.[162] A 'compurgator' was a witness who swore to the innocence or good character of an accused person.[163] This recommendation, said Busby, was in accordance with 'the original Constitution of Juries in England', as evidenced by the research of Sir Francis Palgrave (a prominent English legal historian).[164] This reference to old English jury models may seem irrelevant today, but to Busby's mind, and in conformity with his evident stadial conceptions of the rise of civilization, this reference made complete sense. Institutions of law and government must reflect the characteristics of the people and their state of civilization if they were to prove durable. In other words, all institutions must be adapted to the

[161] Busby to Col Sec, 30 Jan 1837, No 107, pp 228-235.
[162] Busby to Col Sec, 16 Jun 1837, No 112, p 256.
[163] As defined by the Concise Oxford, 9th ed, (1995), which notes it as an historical legal term.
[164] Busby to Col Sec, 16 Jun 1837, No 112, p 256. The text Busby was referring to was most probably *The Rise and Progress of the English Commonwealth: Anglo-Saxon Period* (London: John Murray, 1832), (http://books.google.co.nz/books, accessed 12 November 2009). I could only locate vol 2 of this, which referred to this Saxon jury system at pp 176-178.

people's circumstances. If Māori were not currently able to exercise legal judgement in a British criminal justice sense – because they knew not its forms and rationale – then they needed to be educated into it over time by sitting as 'witnesses' on juries. In like manner Busby saw the Congress of rangatira as 'a School in which the Chiefs would be instructed in the duties required of them'.[165] The learning would take time and it would be "on the job" learning. This conception of civilization requiring exemplary education for its emergence was derived clearly from stadial or Scottish Enlightenment concepts. Although Busby also shared in the Evangelical missionary idenfication of conversion as integral to civilization, the civilization of Māori also required coaching or tuition in British legal forms.[166]

Busby believed that the 'infant Māori state' had to be tutored to emerge gradually as 'enlightened'. Only then could its juries adjudicate on matters of fact, guilt or innocence. This was, according to Busby, the education, knowledge or 'enlightenment' problem. The other problem, mentioned in Busby's jury reference, was the required cultivation of 'virtue'. In Busby's view, rangatira needed to transition from Māori conceptions of justice (muru or group compensation) to British conceptions (individual punishment on behalf of the community or state). Busby's use of the word 'virtue' perhaps fundamentally indicated the need for moral and character growth (as he conceived it), rather than mere shifts in theoretical understanding. In his 16 June 1837 'plan of Government' this reasoning also appeared in the passage immediately before he described the Congress as a 'school'. He said:

> In theory and ostensibly the Government would be that of the Confederate Chiefs, but in reality it must necessarily be that of the Representative of the British Government. The Chiefs would meet annually or oftener and nominally enact Laws proposed to them, but in truth the present race of Chiefs could not be entrusted with a discretion in the adoption or rejection of any measure that might be submitted to them, moral principle, if it exist among them at all, being too weak to withstand the temptation of the slightest personal consideration.[167]

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[165] Ibid, p 252.
[166] This is a view somewhat different in emphasis from the Evangelical missionary view of civilization, which saw conversion as primary, see n 124, although the boundaries between such views are indistinct.
[167] Busby to Col Sec, 16 Jun 1837, No 112, p 252.

This proved the need for Congress to be a 'School', in which both British legal forms and a British morality supposedly adverse to personal aggrandisement and nepotism would be inculcated with time. This passage echoes Busby's comments prior to 1835 about the inadvisability of Confederation rangatira enforcing a liquor prohibition regime (with search and seizure functions) for fear they would be 'paid off' by traders who would then be able to avoid the law.[168] And with reference to the Rete affair, Busby was concerned that rangatira enforcing a forfeiture of land would consider themselves justified in plundering property personally (ironically, rangatira did receive some personal payment, both from Rete's property and from Busby).[169]

From 'savagery' to 'civilization'

The above quotation was moderate compared with the fierceness of Busby's expression following the Te Hikutu attack on Whananaki, the language of 'savage' being more prominent than at any other time:

> … I am indeed persuaded that 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. But while in this state of transition from barbarism to order, the well disposed portion of the natives, give up to the cause of religion and civilization, the defences of the Savage, is it consistent with humanity that they should be exposed without protection to the violence of that party of their own Countrymen, whom the dread of vengeance will alone restrain? – or with justice that the subjects of a civilized state should be suffered to excite that violence by

[168] Busby to Col Sec, 11 Sept 1835, No 65, p 141.
[169] Busby to Col Sec, 28 Nov 1834, No 48, p 104; Busby to Col Sec, 16 Mar 1835, No 51, p 110.

> every motive which can tempt the cupidity of the Savage, aided by every false and wicked suggestion which can stimulate his passions to outrage.[170]

The nature of this passage, its reasoning and its language has already been explained with reference to both stadial and Christian conceptions of civilization. It is clear from this passage that Busby saw 'Savage' as a descriptor for both a moral state as well as a governmental state (or rather, the lack of both a developed morality and ideas of government). Again there is the metaphor of children being coached in the ways of life, whereby they 'transition' to a more mature 'state' of existence. 'Religion and civilization' are both the means of this transition and descriptors of its end goal. This leads us to the core issue, as Busby saw it: if 'religion and civilization' had begun to effect this change in the 'well disposed' natives, such that they gave up their usual modes of utu and muru, trusting to the missionaries and Busby to intervene on their behalf, then where would that leave those not so influenced? Waikato's party had brought guns for their defence (and quite certainly for means of attack), while Noa's party had brought women and children and almost no weapons. In the absence of a military force and the 'dread of vengeance' to restrain groups like Waikato's party, the meek would be at the mercy of the strong. Meanwhile self-interested Europeans, like Bond and Day, would seek personal profit by encouraging Māori to sell disputed property and by provoking them to violence in defence of these contested rights. These were Busby's views of the Whananaki case and the general state of New Zealand in 1836-37.

Little wonder then that, while continuing to speak of the role of the Confederation and the Congress as a Māori Legislature for New Zealand, he believed it could not succeed in establishing order. British Legal Authority and military force was required. It was required also to defend the national honour. Waikato's attack was an affront to the British Residency, and thereby to the King himself. Busby believed the only realistic approach to bringing the Te Hikutu offenders to justice was to call on military power. But without Bourke's support, this never

[170] Busby to Col Sec, 18 Jan 1836, No 84, p 184. The idea of 'habitual obedience' or 'subordination' to a higher authority was a key element of the existence of a sovereign state, see Wheaton's definitions at n 96.

happened.[171] A British 'Protectorate' and even the cession of 'Government' was now the language on Busby's lips. A week after the Te Hikutu-Whananaki despatch, Busby argued:

> In their late declaration of Independence, the Chiefs prayed that their Country might be taken under the protection of the British Government. They are perfectly convinced of their incapacity to govern themselves, or to cope unaided with the novel circumstances to which they are constantly exposed by the encroachments of their civilized visitors. They have as yet confidence in the British Government, and if protected in the enjoyment of their Landed property, and their personal rights[,] they would I am sure gladly become the subjects of the King of England; and yield up the Government of their Country to those who are more fitted to conduct it; and not only feel, but acknowledge the blessings which they would derive from equal Government and impartial Laws. But it is not necessary to require from them even this sacrifice; and I submit for the consideration of H.M. Government – whether the Islands of New Zealand might not be received under the protection of H.M. on the same principle as that upon which the Ionian Islands are constituted an Independent State, in all things which pertain to the real advantage of the Inhabitants, in giving them such a share in the Government of the Country as is consistent with its welfare; but reserving the ultimate authority for that power which affords that protection its weakness requires.[172]

Busby had already indicated the protectorate idea in his 1835 despatch annexing the Declaration, and it was to find even greater articulation in his 16 June 1837 'plan of Government'.[173] He again referred to recent British practice:

> [The plan of Government] is founded upon the principle of a protecting State administering in chief the affairs of another state in trust for its inhabitants, as sanctioned

[171] Busby to Col Sec, 18 Jan 1836, No 84, pp 182-185.
[172] Busby to Col Sec, 26 Jan 1836, No 85, p 190.
[173] Busby to Col Sec, 31 Oct 35, No 69, p 157.

> by the Treaty of Paris in the case of Great Britain and the Ionian Islands, and as applied, I believe, in several instances on the border of our Indian possessions.[174]

Busby's somewhat sanguine assessment of Māori character, and his limited requests for a constabulary and native guard in 1834, stand in contrast to his more extensive calls for British intervention in 1836-37. He spoke reservedly in November 1834 of Rete's midnight attack as 'revealing a [negative] new trait in the character of the New Zealanders', amongst their more well known positive traits.[175] Then he described Māori as 'on the very threshold of civilization'. He added: 'it is only necessary to acquire their confidence, in order to lead them to whatever changes in their social condition may best afford them the blessings of established Government, and impartial laws'. These types of hopeful comments, as compared with his later pessimistic ones, may well reflect differences of degree, not of kind. Their stadial nature, in which Māori accommodation to civilized legal forms 'will no doubt be a work of time', and in which Christian instruction was foundational for civilization, was Busby's mode of discourse in this

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[174] Busby to Col Sec, 16 Jun 1837, No 112, p 251. Busby described accurately the nature of the Ionion Protectorate. Wheaton summarised its elements: 'By the convention concluded at Paris [the Treaty of Paris of the Vienna Congress] on the 5th of November, 1815, between Austria, Great Britain, Prussia, and Russia, it is declared (Art. 1,) that the islands of Corfu, Cephalonia, Zante, St. Maura, Ithaca, Cerigo, and Paxo, with their dependencies, shall form a single, free, and independent State; under the denomination of the United States of the Ionian Islands. The second article provides that this State shall be placed under the immediate and exclusive protection of His Majesty the King of the United Kingdom of Great Britain and Ireland, his heirs and successors. By the third article it is provided that the United States of the Ionian Islands shall regulate, with the approbation of the protecting power, their interior organization: and to give all parts of this organization the consistency and necessary action, His Britannic Majesty will devote particular attention to the legislation and general administration of those States. He will appoint a Lord High Commissioner who shall be invested with the necessary authority for this purpose. The fourth article declares, that, in order to carry into effect without delay these stipulations, the Lord High Commissioner shall regulate the forms of convoking a legislative assembly, of which he shall direct the operations, in order to frame a new constitutional charter for the State, to be ratified by His Britannic Majesty. The fifth article stipulates, that, in order to secure to the inhabitants of the United States of the Ionian Islands the advantages resulting from the high protection under which they are placed, as well as for the exercise of the rights incident to this protection, His Britannic Majesty shall have the right of occupying and garrisoning the fortresses and places of the said States. Their military forces shall be under the orders of the commander of the troops of His Britannic Majesty. The sixth article provides that a special convention with the government of the United States of the Ionian Islands shall regulate, according to their revenues, the object relating to the maintenance of the fortresses and the payment of the British garrisons, and their numbers in the time of peace. The same convention shall also ascertain the relations which are to subsist between this armed force and the Ionian government. The seventh article declares that the merchant flag of the Ionian Islands shall bear, together with the colors and arms it bore previous to 1807, those which His Britannic Majesty may grant as a sign of the protection under which the United Ionian States are placed; and to give more weight to this protection, all the Ionian ports are declared, as to honorary and military rights, to be under the British jurisdiction, commercial agents only, or consuls charged only with the care of commercial relations, shall be accredited to the United States of the Ionian Islands; and they shall be subject to the same regulations to which consuls and commercial agents are subject in other independent States', see Wheaton, *Elements of International Law* (1836), para 35, ch 2, part 1.

[175] Busby to Col Sec, 28 Nov 1834, No 48, p 102.

earlier period as much as the later period.[176] Still, in 1834 he was telling British settlers that 'they must be satisfied to rest the security of their lives and properties altogether upon their success in conciliating the natives, and securing their protection'.[177] In the Declaration, paragraph four, 'protection' did not flow all one way. In this Busby acknowledged Māori for protecting British subjects in New Zealand. The Te Hikutu-Whananaki affair and the Titore-Pomare conflict saw Busby's fears for New Zealand's future take concrete form in his June 1837 'plan of Government' and the sending of his wife and family back to the comparative safety of Sydney in March 1836 after the Te Hikutu affair.[178]

The Protectorate Proposal, 1837

Turning, finally, to the specifics of Busby's 'plan of Government' of June 1837, this significantly extended previous recommendations and specifically enlarged on Busby's conception of a British protectorate.[179] Busby argued that the Declaration of Independence or 'articles of Confederation…established and declared the basis of a Constitution of Government' and therefore that 'the rights of a Sovereign power' existed in the rangatira of the Confederation – 'however limited the exercise of those rights has hitherto been'.[180] It followed that the Confederation rangatira were 'competent to become parties to a Treaty with a Foreign Government, and to avail themselves of Foreign assistance in reducing their Country to order'.[181] Busby continued, elaborating on the notion of a protectorate state established by treaty:

> The appearance of a Department of British Troops, in fulfilment of a Treaty with the Confederation of Chiefs would not be a taking possession of the Country, but a means of strengthening the hands of its native Government.[182]

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[176] Ibid, p 105.
[177] Busby to Col Sec, 15 May 1834, No 41, p 90.
[178] Busby to Col Sec, 12 March 1836, No 89, p 199.
[179] Busby to Col Sec, 16 Jun 1837, No 112, pp 245-263.
[180] Ibid, p 251.
[181] Ibid, pp251-52.
[182] Ibid, p 252. See Wheaton's summary of the Ionion Protectorate above, at n 174, which refers to Britain's right to garrison its forces on the Ionian islands.

In return for this 'subsidiary force', British settlers would only be subject to laws passed by or consented to by the British Government and if the enforcement of such laws was 'under the direction and control' of British officers (this was consistent with Busby's earlier idea concerning a treaty for the purchase of harbour dues and a spirits' prohibition regime). Revenues, presumably from shipping and tonnage duties, would in the first instance be applied to the maintenance of the military presence specified in the treaty, and to pay the salaries of the officials of the protecting power's 'Civil Government'. Legislation applying in New Zealand would, in most if not all cases, be legislation enacted by the Congress, applicable both to Māori and British (applicable to the latter on the basis of official consent). Legislation would not usually be a matter of Congress' deliberation and discretion, but would be a process of simply approving laws and regulations submitted to it by the chief British official or 'Resident' (a word Busby continues to use in this context). However, Congress rangatira would be responsible for promulgating and enforcing the laws in their own rohe or districts as 'Conservators of the Peace', and would receive a 'small salary' for this function. The distinction of this employment would be capped off by the conferring of medal on each rangatira, containing his name.[183]

Māori authority (even if only instrumental) did not end with the Congress. Congress would select a few leading rangatira to act with the Resident as a native Council or executive authority. The code of laws was to conform to Māori circumstances (as well as to 'natural' justice).[184] Busby also recommended establishing a native police force to apprehend criminals. This would solve the problem of individual chiefs having a conflict of interest, if they were related to the criminal. This independent native police would be backed by the British military force. According to Busby: 'The vengeance of the Laws might not in many cases overtake the guilty party, but the act of a single individual would at once, and for ever cease to be the occasion of a Civil war'. This recalled one of the key issues that provoked his British protectorate idea in the first place.[185]

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[183] Ibid, pp 252, 253, 255. It is quite clear that Busby's conception of the Confederation was largely a legislative one, as expressed in the Congress, see Busby to Col Sec, 12 March 1836, No 89, p 199, where he talks of obtaining further signatories to the Declaration or Confederation, thus making it 'impossible for any person to establish a political power in any part of the Island upon a Legislative basis'.
[184] Ibid, pp 253-54.
[185] Ibid, p 254.

These means of establishing social and political control, or law and order, over the Māori populace could be augmented by establishing a network of Schools and by a periodical newspaper that might further instruct the natives 'in the relative duties of the people and their rulers, which are familiar to all ranks of the population, under established Governments'.[186]

A court system would involve Justices of the Peace and assessors (missionaries and settlers) and native juries of 'witnesses'.[187] In addition Busby recommended an advisory Council for the Resident consisting of missionaries and settlers. Busby gave his reason for such a Council, in recognition of the realpolitik of the New Zealand situation, as:

> Unless a defined and specific share in the Government of the country be allotted to the Missionaries, the British Government has no right to expect that that influential body will give a hearty support to its Representative. In points on which their own opinion is different from his, and these will constantly arise [he is speaking from experience], they will persuade themselves that it is their duty to secede [withdraw formally] from him; and should they, in the character which they have assumed to themselves, of Guardians to the Natives conceive it to be their duty to use their influence in opposition to his measures, they will occasion him no little embarrassment, even when vested with the full powers of a Government.[188]

There were other recommendations, including the appointment of an independent commission 'not connected…with this Country' to investigate 'the titles of British subjects to land which they claim to have purchased from the natives', and to ascertain and fix these titles 'upon equitable principles'.[189] Busby also appeared to suggest an alternative way of governing the country: that a charter of Government be granted to a colony of British subjects, the foundation of this colony being those already established there.[190] Perhaps Wakefieldian notions of modern chartered or systematic colonization had already reached him. South Australia had been established on that basis in 1836-37. Or perhaps he was thinking of the old American colonies.

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[186] Ibid, p 253.
[187] Ibid, pp 255-56. As described above.
[188] Ibid, p 257.
[189] Ibid, p 260.
[190] Ibid, p 262.

His land interests were no doubt in the background here. Whatever was the case, this government by charter rather than government from Westminster through a Governor or Resident seems somewhat inconsistent with the bulk of his recommendations. As he had previously argued, 'humanity and justice' dictated interference to protect an 'infant nation' by way of a protectorate arrangement; this would also satisfy the (moral and legal) 'scruples' of other 'Foreign Powers' and forestall people like de Thierry.[191] In the last paragraph of the 16 June 1837 despatch he appeared to revert to this leading plan, referring to the Declaration and speaking of an 'infant people' established under the protection of the King of England.[192]

[191] Busby to Col Sec, 18 May 1836, No 95, p 216; Busby to Col Sec, 16 Jun 1837, No 112, p 261.
[192] Busby to Col Sec, 16 Jun 1837, No 112, p 263.

Chapter 2: Te Wiremu and He Wakaputanga

> Ki te mea ra ka wakarangatiratia koutou e te Tamaiti, he tino rangatira ano koutou.
>
> Te Kawenata Hou, 1837 [193]

> … that most respectable portion of the English public, which holds liberty dear as life itself, and hears with detestation every expression which savours of the tyrant or the slave.
>
> Rev David Bogue, 1812 [194]

Question (b):

Do we know how Henry Williams understood the nature and effect of He W[h]akaputanga/ the Declaration, and, if so, did his Māori text effectively communicate that understanding to the signatories?

This question seeks illumination of Henry Williams' understanding of He Wakaputanga. How did Williams understand other declarations and their role internationally? What about his understanding of the concepts of confederation and nationality in He Wakaputanga? How did Evangelical theology affect views of indigenous independence and sovereignty?

In his Māori translation of He Wakaputanga, did Williams' communicate his distinctive understanding to the signatories? What does the text itself reveal of Williams' understanding of the nature and function of He Wakaputanga and te Wakaminenga (the Confederation)? Williams' critical involvement with te haki (the 1834 flag) and with the Rete affair is important, as are the

[193] John 8: 36, the New Testament: 'If the son therefore shall make you free, ye shall be free indeed. (KJV))'. Māori translation from, W Williams, J Shepherd and W G Puckey, trans, *Ko te Kawenata Hou o To Tatou Ariki te Kai Wakaora a Ihu Karaiti* (British and Foreign Bible Society: Ranana/London, 1841), (http://books.google.com/books , 27 July 2009). This is the 1841 printing of the original 1837 edition.
[194] D Bogue and J Bennett, *History of Dissenters, from the Revolution in 1688, to the Year 1808*, vol 4 (London: 1812), (http://books.google.com/books, 2 June 2009), pp 152-153.

hui and kōrerorero attached to these events. All these events influenced the development of He Wakaputanga and Williams' understanding of it.

The particular New Zealand context, theological understandings of independence and nationality, and Williams' own beliefs or hopes concerning New Zealand's future as a Māori place, were more important than any awareness of the law of nations. It is hardly likely, for instance, that Williams would have read Vattel.

Henry Williams in the Records, c 1833-35: A Short Review

On his arrival in Peiwhairangi, Busby relied upon the CMS missionaries, particularly Henry Williams, to organise a hui at the Paihia Mission on 17 May 1833. After Busby read the King's letter in English, Te Wiremu read a translation in Māori. Busby then addressed the hui in English with William Williams translating. William Williams probably translated both letter and address as later printed in Sydney.[195] Of the 22 or so rangatira present, 10 to 15 responded. The missionaries insisted that custom dictated the laying on of a hakari for the 500 to 600 Māori present. They evidently told Busby that he would have to find 'presents' for more than the 22 or so rangatira present.[196] He concluded his report to NSW praising 'the exertions of the missionaries [in their attempt] to render the conference imposing in the eyes of the natives – and to impress their minds with the importance of this event to the future welfare of their Country'.[197]

The *Missionary Register* (a CMS monthly publication which began 1813) recorded this 'inauguration of the British Consul' as 'an event promising, under the Divine Blessing, materially to promote the protection of the Natives from the outrages to which they have heretofore been exposed from British Subjects; and their internal peace; and their consequent advancement in civilization and social comfort'. The bulk of the CMS report consisted of a

[195] This is recorded in Busby to Col Sec, 25 May 1833, No 5, pp 39-40.
[196] Busby's account is somewhat confusing: he refers to 22 Chiefs being present, but also talks about the missionaries' consulting about who to present the gifts to, on to the basis of rank or avoiding giving offence – 40 chiefs in total received the gifts of one blanket and five-six pounds of tobacco each.
[197] Busby to Col Sec, 17 May 1833, No 5, pp 34-38.

simple reproduction of Henry Williams' journal for 17 May, and an excerpt from Busby's address. In his journal entry, Te Wiremu recorded the nature of the hakari and its preparation:

> At three [pm], the Natives were served with their repast of beef, potatoes, and stir-about. As our [Māori mission] Boys have had some experience in this important duty, at our Annual Meetings, our Visitors [Busby and the naval officers] were a good deal surprised at the order and expedition with which this assemblage of New Zealand rank was supplied, as the feast consisted of about 800 dishes constructed of a plant similar to the flag. All passed off very agreeably.[198]

The mission provided the kai for the hakari, and it was obviously prepared by the young men of the settlement with great skill and the use of local materials.[199] Williams' reference to 'this assemblage of New Zealand rank', that is, the ranking chiefs, is noteworthy; he also used the terms 'principal men' and the 'Chiefs and Nobles of this land' to refer to the rangatira. This appears to reflect an identification of the rangatira with the rangatira or nobility of England. Williams' diary account emphasizes the ceremonial aspects of the occasion. His careful description of the haka and challenge from the welcoming Māori group stands in contrast to Busby's less observant despatch. This reflects his ceremonial awareness, both from his experience in Aotearoa and also, perhaps, from his naval background.[200]

Te Wiremu repeatedly exhibited his cultural awareness in early dealings with Busby. In June 1833, when Busby arbitrated in favour of a Mair land claim against a conflicting Poyner claim, he delivered his decision in the presence of Henry Williams, and provided Mair with 'the English translation of his Title deed'. This last comment might suggest that there was an original Māori version of the Māori title deed.[201] Also in June, Henry Williams estimated an annual expenditure

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[198] The *Missionary Register*, Dec 1834, vol 22 (London, 1834), p 552. (Busby and the official party from HMS *Imogene* were hosted separately in the Williams' residence.)
[199] See Busby to Col Sec, 1 June 1833, No 13, pp 47-48, in which Busby requests reimbursement for the fresh beef provided by the missionaries for the hakari, and justifies this provision and expenditure as 'absolutely necessary, in order to avoid producing an unfavourable impression on the minds of the natives on such an occasion'.
[200] The *Missionary Register*, Dec 1834, vol 22, p 552.
[201] Busby to Col Sec, 1 June 1833, No 12, pp 45-46. At the same time Busby advised Mair 'privately against the conclusion that the British Government was in any way pledged to support him by force . . .' in the possession of his land.

of £3 10s for the recruiting of a Native Guard, to assist Busby in his submission to NSW (the Guard to comprise the sons of 20 or so 'influential Chiefs').[202] And Te Wiremu probably advised Busby that the colour red (kura) needed to be included in any flag proposed to rangatira. Te Wiremu drew up the three alternative designs, one of these being the CMS ensign that was eventually chosen as the flag of the New Zealand rangatira.[203] The *Missionary Register* spoke in glowing terms of New Zealand's new 'National Colours': it would stimulate commercial enterprise and civilization and combined with the 'moral and religious improvement' of Māori, the country enjoyed 'every prospect' of becoming 'eventually' the 'Great Britain of the Southern Hemisphere'.[204]

Te Wiremu played a prominent role in the immediate aftermath of Rete's attack on the Residency. In fact, on the night of the attack, Henry and Marianne Williams were among the first to respond, travelling quickly from Paihia to Waitangi. Marianne attended Agnes Busby who had a few days prior given birth to the Busby's first child. Soon after their arrival, an armed party from the European shipping arrived but Henry persuaded them that there was no further ground for concern and they returned.[205] Te Wiremu may have advised Busby that he thought the offender a European, as Busby notes assurances to this effect.[206] Later, Williams guided negotiations with rangatira and Busby on the appropriate punishment of Rete, and advised Busby against insisting on the death penalty.[207] The missionaries also assured Busby that he should rely on the rangatira carrying out this punishment.[208]

Busby did not always accept Williams' advice. In September, Busby refused to support a local delegation headed by Henry Williams calling for a ban on liquor imports into the Bay of Islands. He believed that without the legal means to enforce such a ban, it would surely be evaded with

[202] Busby to Col Sec, 17 June 1833, No 20, pp 58-61 (the Guard to comprise the sons of 20 or so 'influential Chiefs').
[203] Busby to Col Sec, 13 Jan 1834, No 32, pp 72-73. Busby to Col Sec, 22 Mar 1834, No 38, pp 84-86.
[204] The *Missionary Register*, Dec 1834, vol 22, p 553.
[205] Busby to Alexander, 17 May 1834, MS 46, AML.
[206] Busby to Alexander, 17 Nov 1834, MS 46, AML.
[207] See nn 59 and 60.
[208] See n 66.

impunity.[209] A month later Busby opposed McDonnell's attempt to enforce a liquor ban at Hokianga. When Henry Williams renewed that request in the Bay, Busby again refused.[210]

The marked contrast between Busby and Williams' personalities later led to something of a breakdown in their relationship.[211] Williams was a man of action, quick to become engaged in 'te mura o te ahi' (the flame of battle), even when engaged in peace-making. He was of a predominantly practical rather than a theoretical cast of mind, despite philosophical engagement, as with his later description of the Treaty as a Magna Charta. Busby's despatches, by contrast, reveal a greater tendency to engage in consideration of constitutional issues. Busby's objections to a spirits' prohibition regulation were variously that: there was no legal authority to pass it and no appropriate means to enforce it; a treaty was required with rangatira to purchase the rights to take harbour dues to fund such a regime; and/or that the Confederation needed to be party to such a treaty or sanction as a collective any such regulation.[212] Williams, on the other hand, probably shared with Lord Glenelg an Evangelical reaction to the effects of 'ardent spirits' and its associated trading practices on Māori.[213]

Henry Williams was present at the kōrerorero at Waitangi on 28 October 1835. He seems most likely – based on past practice and his leadership of the CMS – to have taken the leading role in explaining He Wakaputanga to the assembled rangatira. Aside from the missionary witnesses to the Declaration (G Clark and Williams), he is the only missionary whom Busby mentions by name in his 31 October despatch. Williams advised Busby at the 28 October hui that the 35 'Chiefs and leading men' present were 'a fair representation of the population of the Country, from the North Cape, Southwards to the River Thames'.[214]

As for the English and Māori texts of He Wakaputanga, Busby evidently drafted the English text and then passed it to Williams and his colleagues for translation. He wrote:

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[209] Busby to Col Sec, 10 Sept 1835, No 65, pp138-142; and see discussion at n 71.
[210] Busby to Col Sec, 10 Oct 1835, No 67, pp148-150; and see discussion at n 73.
[211] See Busby to Alexander, 20 Dec 1837, MS 46, AML.
[212] See discussion at n 71.
[213] See quote from Glenelg at n 139.
[214] Busby to Col Sec, 31 Oct 35, No 69, pp 152-153.

> The Declaration of Independence, was transmitted to the Revd. Henry Williams to be translated, with a request that he and his colleagues would offer any suggestions for its improvement which might occur to them, but no suggestion was offered, nor had I any reason to doubt that the declaration was entirely approved by all the Missionaries who had an opportunity of examining it.[215]

While Te Wiremu probably played a leading role in translating from English to Māori, he probably received assistance from other missionaries.[216] Manuka Henare suggests that Busby and Williams prepared an initial Māori draft to be read out to the assembled rangatira at Waitangi on 28 October. After debate and discussion Henare believes a revised draft was read out and then marked with moko or signatures. Henare also suggests that the kaituhituhi or Māori scribe listed on the signed He Wakaputanga, Eruera Pare, assisted Williams and Busby with the original Māori draft or some aspects of translation.[217] Busby's account however suggested that this scribe, the 'son of a chief', merely wrote out the final He Wakaputanga copy; he did not indicate any role in drafting or translation.[218]

The exact sequence of texts is unclear. Busby's certification of the English text commonly available today describes this as a missionary 'translation' of the 'Declaration of the Chiefs'.[219] This implies that missionaries translated the final signed Māori text into English. This supports Henare's account that there never was an original English text. Loveridge, however, argues convincingly that this 'translation' was very likely based on, perhaps identical to, Busby's

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[215]Busby to Col Sec NSW, 16 Mar 1836, No 91, CO 209/2, p 213, (and cited by Loveridge, 'Declaration', p 12).
[216] Soon after his arrival in New Zealand, in 1823, Henry Williams organized regular meetings of his missionary colleagues to formalize their learning of te reo Māori. Translating the Anglican liturgy and the Bible soon became a means to learning and later the focus of these groups. Although he did not take a leading role in the translation of the 1837 New Testament, unlike his brother William, William Yate and William Puckey, Henry did take an active part in these language-translation groups especially in the earlier years. See L M Rogers, *Te Wiremu: A Biography of Henry Williams* (Christchurch: Pegasus, 1973), pp 56, 63n, 69, 78, 82, 102, 122n.
[217] Henare, *From Tribes to Nation*. Henare's account is unclear: he suggests that Eruera Pare 'assisted' Williams and Busby as a 'scribe', which does not imply translation, only copying (p 187); he later suggests that Pare helped in the translation of an English text into Māori (p197). This last point is also confusing, as Henare also states that the English text we have is a 'missionary translation' of the final Māori text – what the missionaries thought Māori were doing (pp193, 197); and see next paragraph.
[218] Cited in Loveridge, 'Declaration' , p 12, citing report in Sydney Morning Herald of 6 July 1840, concerning proceedings in NSW Legislative Council of 30 June 1840.
[219] Orange, Treaty, pp 255-256, being a transcription of the English text from *Facsimiles of the Declaration of Independence and the Treaty of Waitangi* (Wellington: 1976) being itself a copy from H H Turton (1877).

original English draft referred to above.[220] Henare's view that the initial Māori text could well have been altered as a consequence of the kōrerorero of rangatira has a ring of truth to it.

As a sequel to the signing of the Declaration, Henry Williams recommended to Busby the erection of a 'weather-boarded' House of Assembly at Waitangi to accommodate chiefs and encourage them to attend regular meetings there. On 28 October Busby had loaned each chief 'a Blanket and expressed my regret that I had no accommodation to offer him'. He indicated that 18 months previously (in early 1834) he acquired the framing timber and flooring for such a building, but had to use it for 'another purpose'. The NSW Legislative Council and Governor Bourke ensured that Busby's Residency was often under-funded.[221] There is little reason to doubt that the materials intended for the House of Assembly was used for a legitimate purpose (perhaps for storing supplies, or even building his own house). Yet it remains something of a mystery why Busby failed to make funding requests for such a building.

This may be explained by the uncertain situation created by the Te Hikutu-Whananaki affair in January 1836. At that stage, and for one or two years following, the safety of his family and the failure of Busby's superiors to provide him with tangible support preoccupied Busby. Certainly, the failure to arrange the construction of this House of Assembly or Parliament can not be attributed to Williams or the missionary body, who would not have considered this their duty. The fact that Williams raised the point though indicates that he envisaged a Māori Parliament in a similar way to Busby.

Ngā Whakaaro o te Wakaputanga – the Language of the Declaration (Māori text)

Article 1

> *Ko matou, ko nga Tino Rangatira o nga iwi o Nu Tireni i raro mai o Hauraki kua oti nei te huihui i Waitangi i Tokerau i te ra 28 o Oketopa 1835, ka wakaputa i te*

[220] Loveridge, 'Declaration' , p 13.
[221] Busby to Col Sec, 3 Nov 1835, No 70, pp 158-159.

Rangatiratanga o to matou wenua a ka meatia ka wakaputaia e matou he Wenua Rangatira, kia huaina, Ko te Wakaminenga o nga Hapū o Nu Tireni.

In the analysis (above) of the English text of He Wakaputanga, the first article was intended to effect two things: it declared the independence of the country of New Zealand, and it constituted by means of that declaration an 'Independent State' called or named 'The United Tribes of New Zealand'.

In the Māori text, the declaration took the form of 'ka wakaputa i te Rangatiratanga o to matou wenua', literally 'cause to come forth the Chieftainship of our land', though wakaputa could also mean 'declare' or 'announce'. The 'Independent State', rendered in Māori 'he Wenua Rangatira', meant 'a Chief(ly) Land' or 'a Free Country', which was caused or made ('ka meatia') and declared ('ka wakaputaia') by the rangatira, to be named ('kia huaina') 'the Assembly of the Tribes of New Zealand' ('Ko te Wakaminenga o nga Hapū o Nu Tireni').

The questions this chapter seeks to answer are: What was Te Wiremu's understanding of the Declaration; and did the Māori text convey that understanding to the rangatira signatories? When he came to translate Busby's English text, did Williams understand other declarations of independence elsewhere? What would the English concept of an 'Independent State' have meant to him?

Henry Williams and most of his fellow missionaries probably lacked a detailed understanding of the American Declaration of Independence (1776). Yet the American Revolution was still within living memory in the 1830s and continued to inform the British imagination. Its memory was especially relevant to England's Dissenting churches, those outside the established Church of England. Although Williams and his CMS colleagues were Anglicans, their low-church Evangelical convictions meant their religious beliefs were more allied to the Dissenting or Nonconformist tradition. They believed in the centrality of the Bible, the Cross of Christ, conversion, and social activism or humanitarianism.[222] Williams came from a Non-Conformist

[222] See summary of these four characteristics of Evangelicalism in Dingle, 'Gospel Power for Civilization', pp 16-19.

background. His grandfather was the Dissenting Minister at Gosport Congregational Chapel on the southern coast of England (opposite Portsmouth) for some twenty years (1750-1770). His father and the family continued to attend the Gosport Chapel until the family moved to the Midland city of Nottingham in 1794, but continued to have connections with the church until he was formally accepted into the membership of the Castle Gate Chapel, a Dissenting congregation in Nottingham, in 1802. The Reverend David Bogue's inspiring tenure at Gosport for a staggering 47 years (1777-1825) is perhaps a reason why Williams' father was reluctant to finally leave Gosport. Bogue was a founding member of the London Missionary Society in 1795 and his theologically-informed and reasoned writings (and presumably sermons) along with his missionary zeal must have been reasons for his success.[223] Quite probably the Williams family had Bogue's writings on its shelves.[224] In a four volume work entitled *History of Dissenters*, Bogue and his fellow author articulated the sympathy of English Dissenters with their American 'brethren' over the American Revolution:

> The principles of liberty appeared to the [English] dissenters to be endangered in this unnatural contest [between Britain and her American colonies]. The haughty tone of the British ministry, and the unqualified submission which, in the day of their success, they demanded from the Americans as the condition of reconciliation and favour, gave rise to the strongest suspicion that it was their design to forge chains for the vanquished colonies, and to hold in their own hands the despot's lash. It had been well if they had used milder language, and uttered sentiments more consonant to the feelings of that most respectable portion of the English public, which holds liberty dear as life itself, and hears with detestation every expression which savours of the tyrant or the slave.[225]

Bogue explained the attachment of the English Dissenters to the Americans as a 'religious union', as 'many of the colonists, in almost every state, maintained the same doctrines of faith, and the same system of church government as themselves'.[226]

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[223] N T H Williams, 'The Williams Family in the 18th and 19th Centuries', 2003, p 35.
[224] The Rev D Bogue is recorded as staying with the Williams family and speaking at the Castle Gate Chapel in Nottingham in 1801, a service attended by the Williams family (see ibid, p 33).
[225] D Bogue and J Bennett, *History of Dissenters, from the Revolution in 1688, to the Year 1808*, vol 4 (London: 1812), (http://books.google.com/books, 2 June 2009), pp 152-153.
[226] Ibid, p 153.

The English, the Dissenters especially, felt keenly the separation of the confederated American states from the British nation and empire, but as Bogue writes, many English Dissenters saw in it the creation of a free polity in which religious liberty was assured.[227] This was no new doctrine. The English, the ranks of Dissent included, believed their constitution free, even though it was a church establishment. It was free precisely because it was based on a reformed Protestant faith (both Anglican and non-Anglican) and defended by a Protestant King. Bogue may well have been on the more radical side of Orthodox (Calvinist) Dissent, but his basic view, of English liberties being essentially negative liberties – that is, freedom from tyranny and slavery – was shared by the bulk of the British nation. Dissenters also understood this liberty as the right to exercise private judgment ('conscience') in matters of religious doctrine and forms of church government. Written in the aftermath of the abolition of slavery in 1807, Bogue's language also contains echoes of anti-slavery language ('the despot's lash'). The contrast between political (and religious) slavery and political liberty was, however, a long-standing English tradition.

This English Protestant language of liberty echoed within the English and Māori texts of the Declaration of Independence 1835. An 'Independent State' or 'he Wenua Rangatira' was one in which religious and civil liberty reigned. If Williams and his CMS colleagues were not aware of the finer details of the American Declaration, they would have had some comprehension of both its related religious and civil implications. Although the American colonies had asserted their liberty by separating themselves from British imperial control, Williams would certainly have believed the British Empire should support Māori rangatiratanga in 1835. The 1835 British Empire was more humanitarian and more Christian even than its 1776 counterpart. In this context, also, any French attempts to control New Zealand were a dim prospect.

The missionaries, in general terms, looked forward to a New Zealand in which all its inhabitants were 'rangatira', that is, liberated from all forms of slavery – spiritual, material, and political, although not without hierarchy – 'nga Tino Rangatira' or the 'hereditary chiefs' of the

[227] Bogue and Bennett, *History of Dissenters*, pp 153-155. Even loyal British Americans of the 'maritime colonies' New Brunswick, Nova Scotia, and others, saw the American Revolution in this way in the 1830s-40s, see G Marquis, 'In Defence of Liberty: 17th Century England and 19th Century Maritime Political Culture', *University of New Brunswick Law Journal*, vol 42, 1993, p 82.

Declaration's first article. They saw hierarchy as consistent with freedom. British (Burkean) conservatism saw hierarchy as essential to liberty. The religious or spiritual connotations of 'he Wenua Rangatira' ('an Independent State') and 'Rangatiratanga' ('Independence') predominate in the Māori text of He Wakaputanga. Two or three passages from the Bible will help explain this connection between the material and the spiritual.[228] In the Book of John, chapter 8, versus 31-32, the 1837 Māori translation of the New Testament (Te Kawenata Hou) read:

> Me i reira ka mea atu a Ihu ki nga Hurai i wakapono ki a ia, ['']Ki te mau tonu koutou ki taku kupu, he tino akonga ano koutou naku; A e matau koutou ki te pono, ma te pono koutou e wakarangatiratia['']. (Hoani 8:31-32)
> (Then Jesus said to those Jews which believed on him, ['']If ye continue in my word, then are ye my disciples indeed; And ye shall know the truth, and the truth shall make you free['']. (KJV))

To this statement, the Jews responded that they were the descendents of Abraham and had never been anybody's slaves ('He wanau matou no Aperahama, kahore ano matou i wakaponongatia ki tetahi *tangata*' v 33a); what then, they said, did Jesus mean by saying 'Ye shall be made free'? ('e wakarangatiratia koutou' v 33b). Jesus explained that everyone who sinned was a slave of sin, but that:

> Ki te mea ra ka wakarangatiratia koutou e te Tamaiti, he tino rangatira ano koutou (v 36).[229]
> (If the son therefore shall make you free, ye shall be free indeed. (KJV))

In this teaching, Jesus was using a human relationship – that of master and slave to illustrate the truth that if a person followed him then he would be a member of God's household and would not be a slave of anybody or anything, in particular sin. The missionary translators (William Williams, James Shepherd and W G Puckey) used social relationships existing in Māori society

[228] Further analysis of the uses of rangatiratanga in the Bible and Evangelical views of the nature of government will take place in chapter four, with reference to the Treaty translation.
[229] W Williams, J Shepherd and W G Puckey, trans, *Ko te Kawenata Hou o To Tatou Ariki te Kai Wakaora a Ihu Karaiti* (British and Foreign Bible Society: Ranana/London, 1841), (http://books.google.com/books , 27 July 2009). This is the 1841 printing of the original 1838 Paihia edition.

– rangatira and pononga(slave or servant) in particular – in a similar way. Two aspects of this usage are noteworthy. First was the way they turned rangatira from a noun into a (passive) verb: rangatira became wakarangatiratia. They used the social status of rangatira to convey the spiritual state of being free from (or independent of) sin. Second, they transformed this spiritual connotation back into a social one in the startling conclusion that 'you (all) shall be true rangatira' – in the phrase 'he tino rangatira ano koutou'. This is indicates the missionaries' general view that, with the conversion of chiefs and people, New Zealand's (Māori) inhabitants would all become 'rangatira', liberated from all forms of slavery, social and spiritual.[230]

Another New Testament passage illuminates the missionaries' understanding of Christian faith and human freedom. The book of Galatians inspired the Reformation. It convinced Martin Luther that only faith in Christ could save him, that he could not by saved by conformity to any human standard or law.[231] For Evangelicals, justification by faith was the central doctrine.[232] Galatians chapter 5, verse one, in the 1837 New Testament, read:

> E tu ra koutou i te rangatiratanga kua wakarangatiratia nei tatou e te Karaiti, a kei puritia ano hoki koutou e te herenga o te ponongatanga.[233]
> (Stand fast therefore in the liberty wherewith Christ hath made us free, and be not entangled again with the yoke of bondage. (KJV))

Just as with the passage from John above, freedom or liberty in Christ ('rangatiratanga') contrasts with slavery ('ponongatanga'), even if it is slavery to human laws and traditions. 'Rangatiratanga' denotes a state of true human and spiritual freedom. In Te Kawenata Hou it

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[230] As Dingle argues, faith in Christ and the atoning power of the Cross, together with the Word of God (the Bible), was viewed by the CMS missionaries as 'the means of civilization', as the foundation of all transformation, which was firstly moral and spiritual and then material, social, and political, see Dingle, 'Gospel Power for Civilization', ch 5.

[231] Galatians is often referred to as 'Luther's book' for this reason. A key verse was 2:16: 'Knowing that a man is not justified by the works of the law, but by the faith of Jesus Christ, even we have believed in Jesus Christ, that we might be justified by the faith of Christ, and not by the works of the law: for by the works of the law shall no flesh be justified.' (KJV)

[232] B Hilton, *A Mad, Bad, and Dangerous People? England 1783-1846* (Oxford: Clarendon Press, 2006), pp 179,182,183. Justification by Faith was the central doctrine – a 'festish' – for evangelical Clapham Anglicans, says Hilton. Anselm and Calvin were sources for the conception of sin as a 'debt' that had to be 'redeemed' by Christ's atoning work.

[233] W Williams, J Shepherd and W G Puckey, trans, *Ko te Kawenata Hou.*

often represents ‘the kingdom of Heaven’ (‘te rangatiratanga o te rangi’) or ‘the kingdom of God’ (‘te rangatiratanga o te Atua’). Although in this sense, the word rangatiratanga meant the rule or reign of God, it also referred to a state in which all human beings were rangatira – free from sin, free to be children of God. This was partially realized in this life, only fully realised in heaven or in the next world. In a later translation of the New Testament, Romans 8: 21 described this end state in this manner: ‘Tera te mea hanga e whakaateatia mai i ta te pirau whakataurekarekatanga, whakarangatiratia ake ki roto ki te kororia o nga tamariki a te Atua’.[234] (‘Because the creature [or creation] itself also shall be delivered from the bondage of corruption into the glorious liberty of the children of God’ (KJV)). The use of the root word ‘taurekareka’ for ‘bondage’ in this 1868 translation is stronger than the word ‘pononga’ used in the 1837 translation passages cited above, but the use of ‘whakarangatiratia’ for liberty or liberated is consistent with the 1837 translation.

These biblical uses of ‘rangatira’ and its variants depart from concepts of the law of nations or an ‘independence’ or ‘freedom’ seen in merely secular terms. Rather, a British Protestant language of liberty that was inherently theological in tone can be seen as latent within both texts of He Wakaputanga. This liberty was fundamentally a ‘spiritual’ one, conceived as a relationship with the Creator restored through the atoning work of Jesus Christ on the Cross. In being regenerated by the atoning work of the Cross, by the action of the Word of God and the Spirit of God, individuals and communities would be enabled to lead healthy, moral, and productive lives. The ‘fruit’ of this process would be civilization, that is, social well being, peace, and material prosperity.[235]

The other dimension to this spiritual liberty was freedom from the dominion of Satan. Thomas Fowell Buxton, prominent Evangelical and successor to William Wilberforce in leading the anti-slavery campaign in the Commons, wrote concerning his preparation of the Aborigines Committee Report in 1837: ‘The next few months are very important, as in them the Aborigines

[234] *Ko te Paipera Tapu, ara, ko te Kawenata Tawhito me te Kawenata Hou* (British and Foreign Bible Society: Ranana/London, 1868), (http://books.google.com/books, 1 August 2009).
[235] D Coates, *The Principles, Objects, and Plan of the New-Zealand Association Examined, in a Letter to the Right Hon. Lord Glenelg, Secretary of State for the Colonies* (London: Hatchards, 1837), p 41. Coates argued that the New Zealand mission should be left alone and colonization prevented for fifty years to enable the diffusion of ‘the blessings of Christianity, and its inseparable fruits – civilization, and social well being’.

Report will be settled. Most earnestly I pray that it may stop the oppressor, and open the door for the admission of multitudes of heathens to the fold of Christ.'[236] The 'oppressor' could be construed as a reference to the pernicious effects of European colonization on aboriginal peoples, but also, behind this, to the dominion of Satan, who worked through men and their systems or institutions. This extract from Buxton's private papers shows that he envisaged his work in primarily theological terms. In considering the relationship between missions and British Empire, Rowan Strong writes that:

> for the Evangelicals of the nineteenth-century New Zealand mission, as much as the Anglicans of the eighteenth century, the world of the British Empire – indeed, the globe generally – was divided ontologically and theologically into Truth and Error, God and Satan, Light and Darkness. So the imperialism of these missionaries was primarily theological, rather than political or economic. Their concern in the colonies of the British Empire was to replace Satanic darkness, and his evil errors with the true light of the gospel of Christ of the one and only God.[237]

This 'Satanic darkness' could be represented as much by the activity of immoral Europeans as it could native superstitions and customs. Coates', Stephen's, and Glenelg's references to the 'evil' inflicted on Māori in their accounts of the 'state of New Zealand' during 1837-1839, can be understood in this light.

Beyond concepts of spiritual and civil liberty, Evangelicals conceived the 'nation' itself in theological terms. Buxton's son (the editor of his *Memoirs*) wrote that he 'was anxious to render [the Aborigines] report a sort of manual for the future treatment of aboriginal nations in connection with our colonies'.[238] The Report spoke of the 'national independence' of the 'South-Sea Islands', that is, the islands of New Zealand and the Pacific. The frailty of these 'foreign states', which lacked civil governments or courts to punish (British) offenders or regular armed forces to ward off foreign powers, was problematic. The desire to respect their national

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[236] C Buxton, ed, *Memoirs of Sir Thomas Fowell Buxton, Bart*, fifth edition, (London: John Murray, 1866), (http://books.google.com/books, 4 August 2009), p 425.
[237] R Strong, *Anglicanism and the British Empire c.1700-1850* (Oxford: Oxford University Press, 2007), p 263.
[238] Buxton, ed, *Memoirs of Sir Thomas Fowell Buxton*, p 425.

independence and yet the need to control British subjects was doubly problematic, indicated the Aborigines Report.[239] Dandeson Coates, lay secretary of the CMS, glossed the Report's conclusions by saying that any scheme of Government interference in New Zealand was to be 'grounded in the recognition and maintenance of Native sovereignty', (which was true except the Report had not used the phrase 'Native sovereignty').[240]

Issues of extra-territoriality aside, the fact that the Report did not ascribe 'national independence' and 'foreign state' status to these island nations based on the existence of declarations of independence or the presence of civil government or civilization, was noteworthy. Yet if their independence was not founded in some constituted authority or a declaration of such, then on what was it founded? The answer must be found in the Evangelical provenance of the Report and the theological perspective of its key players. A long tradition of Biblical interpretation saw the nation as a moral person: God both made and dealt with nations.[241] William Wilberforce, in his 1807 work justifying the abolition of the slave trade, made a portion of Acts 17:26 appear on the title page: 'God hath made of one blood all nations of men, for to dwell on all the face of the earth'.[242] Clark confirms that at this period national identity was still seen by many in terms of a providential or God-ordained history (along with traditions of liberty) and not in terms of an ethnic, language or culture-based nationalism.[243] On this view, the Māori nation of the 1830s was independent and free because it had been ordained by the Creator as an independent nation; the fact that it was characterised by people ethnically Polynesian or who shared a common language was a secondary consideration. Moreover, in the view of Buxton, Coates, Williams and their Evangelical contemporaries, it was independent and free quite apart from any declaration of independence.[244]

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[239] *Report of the Parliamentary Select Committee on Aboriginal Tribes, (British Settlements), Reprinted, with Comments, by the 'Aborigines Protection Society'* (London: Ball and Chambers, 1837), (http://books.google.com/books, 4 August 2009), pp 128-130, (hereafter 'Aborigines Report').
[240] Coates, *The Principles, Objects, and Plan of the New-Zealand Association Examined*, p 32.
[241] Clark, *The Language of Liberty 1660-1832*, p 55.
[242] W Wilberforce, *A Letter on the Abolition of the Slave Trade; Addressed to the Freeholders and Other Inhabitants of Yorkshire* (London: T Cadell and W Davies, 1807), (http://books.google.com/books, 27 July 2009).
[243] Clark, *The Language of Liberty 1660-1832*, pp 52-55.
[244] And it was truly free because this 'nation' or 'people' embraced Christianity and the freedom of Christ, both spiritual and social, (as in the above analysis of texts from Te Kawenata Hou). Busby wrote to Buxton on 12 March 1833 from Sydney. He was fervently opposed to the replacement of NSW Governor Darling by Bourke, see Busby Ltrs qMS [352] ATL, pp 3-5.

Other contemporary sources, besides Evangelical ones, demonstrate that the nation was not conceived in ethnic nation-state terms. Johnson's *Dictionary* (1824) defined 'nation' simply as 'a people distinguished from another people'. The *Dictionary* defined 'national' as 'publick, general, not private, not particular', and 'nationality' very simply as 'national character'.[245] The 1837 Te Kawenata Hou rendered the Acts 26 passage quoted by Wilberforce (above) as: 'A ka oti i a ia te hanga ki te toto tahi nga iwi katoa o nga tangata hei noho i te mata katoa o te wenua'. The Māori term 'iwi' paralleled well the English word 'nation'. The application of the word 'nation' to North American tribes is a pertinent comparison. These definitions contrast with the *Concise Oxford* (1995) which defined 'nation' in the terms moderns have come to think of it as 'a community of people of mainly common descent, history, language, etc., forming a state or inhabiting a territory'. The last phrase gives this definition its particularly nation-statist flavour. However, if we are looking for this later nineteenth century nation-state centred conception of the 1835 Declaration, we will struggle to find it. Rather, the missionary translators of the Declaration understood nations and people-groups to have divine origins. Their own nation not only had divine origins but had been long influenced by Christianity, and in the Providence of God it had become a leading Protestant nation amongst the nations of the world. Such 'nationalist' sentiments were balanced by the Evangelical conviction that all peoples of the world were equal before God in terms of salvation. This conception of universal humanity was probably more important in Evangelical thought than primitive nationalism or patriotism.

In light of this discussion, the words used in article one of He Wakaputanga, in particular 'he Wenua Rangatira' and 'Rangatiratanga', expressed as best they could Te Wiremu's conception of 'an Independent State' and 'Independence'. Whether they conveyed to Māori the various conceptions analysed above is a further question for consideration. The fact that 'rangatira' was a status and title embedded in Māori usage and practice suggests that its uses in He Wakaputanga would have conveyed the ideas of social or 'civil' freedom and liberty, to rangatira. The contrast between 'he Wenua Rangatira' and its hypothetical opposites, 'he Wenua Pononga' or 'he Wenua Taurekareka' would doubtless have lingered in their thoughts. Ngāpuhi still had slaves or was in the process of releasing them in 1835. The discourse of taurekareka(tanga) or slavery to Queen Victoria assumed some prominence in1840 and the years following, and had to be

[245] Johnson, *A Dictionary of the English Language*.

combated by missionaries who did not believe such talk. The spiritual connotations of these contrasting states of rangatirataga and ponongatanga/taurekarekatanga would perhaps also have been understood by those rangatira influenced by missionary teaching.

Article 2

> *Ko te Kingitanga ko te mana i te wenua o te wakaminenga o Nu Tireni ka meatia nei kei nga Tino Rangatira anake i to matou huihuinga, a ka mea hoki e kore e tukua e matou te wakarite ture ki te tahi hunga ke atu, me te tahi Kawanatanga hoki kia meatia i te wenua o te wakaminenga o Nu Tireni, ko nga tangata anake e meatia nei e matou e wakarite ana ki te ritenga o o matou ture e meatia nei matou i to matou huihuinga.*

The second article of Busby's English text enumerated the powers to be exercised by the independent state of the United Tribes of New Zealand. The generic supreme or 'sovereign' authority came first, followed by all legislative powers, and lastly, all executive powers or 'function[s] of government'. The exercise of these powers was expressly limited to the territories of the said United Tribes. These powers could also be delegated by way of legislation (Busby being a likely 'delegate'). All legislation was to be made 'in Congress', the first of two uses of this word.

Te Wiremu's choice of 'Kingitanga' ('Kingship') for 'sovereign power and authority' was obvious: the King was the English sovereign. Some Māori understood the nature of 'Kingship', 'Kingitanga' or 'sovereign power' from visits to England where they saw the opulent possessions and palaces of the monarch. Many more visited NSW and saw the powers exercised by the King's governors there. 'Mana' for 'sovereign power and authority' was also a natural choice. Its various meanings span 'authority, control', 'influence, prestige, power', and the adjectival forms of these words, 'effectual, binding, authoritative', and 'having influence or power'.[246] Mana was however not the Māori equivalent of Kingitanga. A king was someone who

[246] H W Williams, *Dictionary of the Māori Language*, seventh edition (Wellington: G P Publications, 1971), p 172 (for mana).

exercised supreme authority; mana was the authority itself. If an equivalent had been sought by the translator, 'Rangatiratanga' was the obvious choice, but it was not used, perhaps for the reason that it had already been used in article one for 'Independence'.

Another reason for not using 'Rangatiratanga' was that, arguably, Māori rangatira did not exercise a 'supreme power and authority' over their hapū in the same way that the British monarch was conceived to hold such a power (even if it was a symbolic supremacy).[247] Arguably, also, there was no Māori word that denoted or connoted a 'supreme' power, 'mana' representing any kind of authority or power (although conjunctions could be found in 'mana nui' and 'tino nui'). 'Ariki', meaning the first born of a leading family, hence a chief or priest,[248] was a possible candidate for a 'sovereign' or 'supreme lord',[249] but to use 'Arikitanga' might not have been a judicious choice as it might have demeaned or excluded rangatira who could not regard themselves as ariki. Whatever the reason, Te Wiremu chose to conjoin the English derived proper noun 'Kingitanga' (itself a missionary conjuction of 'Kingi' and 'tanga') with the Māori noun 'mana' to convey the phrase 'sovereign power and authority'. It is submitted this conjunction would have conveyed the English sense appropriately to rangatira.

Like the English text, the Māori text confined the exercise of this authority geographically to 'te wenua o te wakaminenga o Nu Tireni' (the lands of the assembly of New Zealand) and to the hereditary chiefs and heads of tribes in their collective capacity, rendered 'kei nga Tino Rangatira anake i to matou huihuinga' (at/in the True Chiefs only of our gathering/meeting).

The proposed legislative power of te Wakaminenga was expressed in the Māori text by 'te wakarite ture', literally, 'the arranging/preparation (of the) law', or simply 'the law making'. 'Ture' was a missionary word introduced from Tahiti where the missionaries used it to denote

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[247] This is notwithstanding the fact that a 'Chiefdom' was defined as a 'sovereignty' in Johnson's *Dictionary* (1824). 'Chief' was defined as: a military commander (Milton); 'chieftain' as: a leader; a commander (Spenser), the head of a clan (Davies); and 'chieftainship' as: headship (Smollett). Chapter four on the Treaty translation argues that Māori chieftainship was a different kind of sovereignty from English monarchy. It was akin to a military commander's authority, not a governmental institutional authority like that of Her Majesty the Queen.
[248] Williams, *Dictionary of the Māori Language*, p 15.
[249] Johnson, *A Dictionary of the English Language* (1824).

the Torah, that is, God's law, or the Mosaic Law of the Old Testament.[250] The use of this missionary-derived word in Biblical translation and in He Wakaputanga would have conveyed to rangatira a notion of law or custom different from Māori tikanga. The notion that this law was to be 'enacted' by them ('e meatia nei e matou') in their collective capacity ('i to matou huihuinga') was also a foreign notion. Māori tikanga was not so much made as inherited by each generation. That law should be made by the Wakaminenga in their huihuinga only was contrary to the existing model where each rangatira and hapū conducted their own affairs in accordance with tikanga.[251] A supra-tribal authority was being created. How much rangatira understood these introduced notions in October 1835 is difficult to say.

Another Māori word for custom, 'ritenga', was used in article two. The phrase in which it was used meant something like 'the custom of our laws' ('te ritenga o o matou ture'). This attempted to convey the English reference to persons appointed by the Wakaminenga 'acting under the authority of laws regularly enacted by them'. 'Ritenga' translated 'authority' in this sentence. This reflects a missionary attempt to weld together Māori and English notions of law or custom, conveying to rangatira that the procedures of the Congress would reflect both sources. It might also express some of the whakaaro articulated by rangatira at the 28 October 2009 kōrerorero in an effort to incorporate Māori modes and custom.

The exercise of any 'function of government' was also reserved to chiefs in the English text (along with the legislative power). As with Kingitanga and ture, an English word was used. Kāwana was used in Te Kawenata Hou for the Roman Governors. Williams used 'Kawana' conjoined with 'tanga' to make 'Kawanatanga' – 'Governorship' or 'Government', in the Māori text. This borrowing indicates a missionary view that the notion of a national government was a British one and had no Māori equivalent. Māori had some conception of 'governors' from NSW

[250] Williams, *Dictionary of the Māori Language*, p 459. The Torah also referred to the first five books of the Bible containing the law, also known as the Pentateuch.
[251] Henare, *From Tribes to Nation*, p 191, makes a similar point: 'In the 1830s, tikanga and ritenga (custom law) applied to hapu only, namely, to those people who belonged to particular kinship groups. In this context, no single rangatira or tohunga could assert, except through the ringa kaha [strong arm] principle, an overarching set of tikanga or ritenga that applied across tribal boundaries. However, should a new level of rangatira and tohunga authority be established and accepted on a wide basis then perhaps a transformation in cultural terms might be possible. The Biblical notion of new laws, ngā ture, began to gain some credibility'.

and perhaps other places, so this word should have likewise conveyed more foreign notions of government, not their own notions.[252]

The notion of a Congress however was not translated with a borrowed word. Nor was this notion reified into a proper noun or title, as with the 'Wakaminenga' or state of the United Tribes. In article two Congress was simply translated as 'our gathering' ('i to matou huihuinga'). In article three, another Māori term was used – 'runanga', meaning 'assembly' or 'council'. This suggests that the notion of a Congress was a reasonably generic one for the missionaries, and that the Māori notion of runanga sufficiently represented its meaning.[253] The function of this Congress or runanga was however new. As Henare puts it: 'The idea that Māori would pass legislative law and that it was to apply to all Māori represented a radical development in Māori custom law and practice'.[254]

Article 3

> *Ko matou ko nga tino Rangatira ka mea nei kia huihui ki te runanga ki Waitangi a te Ngahuru i tenei tau i tenei tau ki te wakarite ture kia tika ai te wakawakanga, kia mau pu te rongo[,] kia mutu te he[,] kia tika te hokohoko, a ka mea hoki ki nga tauiwi o runga, kia wakarerea te wawai, kia mahara ai ki te wakaoranga o to matou wenua, a kia uru ratou ki te wakaminenga o Nu Tireni.*

The third paragraph in the English text specified how the United Tribes were to conduct the business of government. They were to meet in Congress at Waitangi in the autumn of each year to legislate on the subjects of justice, the peace of the realm, and commercial regulation. This article also contained an appeal to 'the Southern tribes' to join this new confederate state, so unifying the country.

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[252] Chapter four on the Treaty translation discusses further the uses of Governor in the Māori New Testament.
[253] Congress was a fairly generic or non-specific concept, although in America it had taken on institutional form: see the discussion at n 117.
[254] Henare, *From Tribes to Nation*, p 191.

The Māori text of this article expressed in simple Māori idioms the meaning of the English text. A few phrases are of note. 'Runanga' for 'Congress' has already been mentioned. The English phrase 'for the purpose of framing laws for the dispensation of justice' was rendered 'ki te wakarite ture kia tika ai te wakawakanga'. This phrase appears to say, idiomatically, 'for the arranging of laws to make straight the ridges/furrows'. The word 'wakawaka' refers to a bed or furrow in a plantation. The word 'justice' was partially expressed by the word 'tika', meaning correct or straight.

Te Wiremu's use of 'tauiwi', meaning 'strange tribe' or 'foreign race', for the tribes south of Hauraki, was an interesting choice.[255] It indicates that he expected difficulties in developing friendship or political alliance between Ngāpuhi, Ngāti Whatua, Waikato, Ngāti Porou, and the others. In view of Hongi's southern raids and the inter-iwi warfare in which he had mediated at Hauraki and Tauranga, it is not surprising that Te Wiremu considered these southern iwi as 'tauiwi' in the eyes of Ngāpuhi. If there had been specific objection to this term at the October 1835 kōrerorero, it would probably have been discarded. Although there were whakapapa ties between Ngāpuhi and southern iwi, including notable examples of alliances formed through intermarriage, these relationships were still strained during the 1830s.[256] The concept of a formal confederation, embracing a number of rohe and iwi of Aotearoa, was not a concept embedded in Māori thought or practice. The nature of Ngāpuhi itself was Ngāpuhi-kowhao-rau ('Ngāpuhi-of-a-hundred-chiefs').

Key southern rangatira signed He Wakaputanga between 1835 and 1839, including Te Wherowhero of Waikato and Te Hapuku of Ngāti Kahungunu. The advantages of confederation may have been attractive, but so was the appeal of an alliance (if informal) with te Kingi o Ingarangi. The Māori text exhorted these southern rangatira to 'discard' or 'forsake' ('kia wakarerea') their 'fight(s)' ('wawai') with Ngāpuhi and join ('kia uru') te Wakaminenga, the Independent State or Assembly of New Zealand.

[255] Williams, *Dictionary of the Māori Language*, p 398.
[256] Henare, pp 194-195, gives a prominent instance of intermarriage between Waikato and Ngāpuhi (Rewa), and of an alliance between Te Hapuku and Pomare, Kawiti and Te Haara.

Article 4

> *Ka mea matou kia tuhituhia he pukapuka ki te ritenga o tenei o to matou wakaputanga nei ki te Kingi o Ingarani hei kawe atu i to matou aroha nana hoki i wakaae ki te Kara mo matou. A no te mea ka atawai matou, ka tiaki i nga Pākehā e noho nei i uta, e rere mai ana ki te hokohoko, koia ka mea ai matou ki te Kingi kia waiho hei matua ki a matou i to matou Tamarikitanga kei wakakahoretia to matou Rangatiratanga.*

Paragraph four in the English text consisted of diplomatic overtures to the English monarch, thanking him for acknowledging the New Zealand flag and asking for his parental protection of their independent 'infant State'. This paragraph expressed Busby's conception of New Zealand-British relations already referred to, namely independence founded on British protection or dependence.

The Māori text of this fourth paragraph appears to appropriately encapsulate the English text and convey its meaning. 'Pukapuka', meaning book or letter, was a missionary-introduced word. The signatories say they will 'write' a book/letter to the King in the likeness 'of this our declaration' (that is, send a copy of it to him). Their thanks for his acknowledgement of the flag is expressed as 'aroha' for his agreement to the 'Kara'. The King's 'subjects' is rendered 'Pākehā'. He is asked to remain ('kia waiho') to be a parent or father ('hei matua') to them in their Infancy or Childhood ('Tamarikitanga') – 'lest our Independence be destroyed/made of no account' ('kei wakakahoretia to matou Rangatiratanga').

The language of parent-infant and protector has already been explored in the analysis of Busby's English text. It was suggested there that it derived from feudal conceptions of the relationship between monarch and subject, and from Scottish notions of civilization where uncivilized societies were regarded in their 'infancy'. The importance of Christian teaching and conversion to this British expectation of ever-increasing peace and prosperity was also considered (as reflected in Busby's opening address to Māori). Busby also suggested that this appeal to the King as 'matua' to protect 'Tamarikitanga' was a Māori 'sentiment' and Māori 'language'. This

statement has some validity.[257] For the missionaries, theological understandings of God as a father, as expressed in the Lord's Prayer, would have been paramount over feudal and certainly over the civilizational conceptions of this clause. Christian rangatira would doubtless have had these Christian analogies in mind also.

[257] See discussion at n 129.

Chapter 3: The Treaty as 'Magna Charta'

> My view of the the Treaty of Waitangi is, as it ever was, that it was the Magna Charta of the aborigines of New Zealand
>
> Henry Williams, 1847 [258]

> [The Declaration is] the Magna Charta of New Zealand Independence
>
> James Busby, 1835 [259]

Question (c):

What did Busby and Williams mean when they referred to Te Tiriti/the Treaty as 'the Magna Carta of the Māori'?

On at least two occasions, Henry Williams called te Tiriti o Waitangi a 'Magna Charta' for Māori, while James Busby called He Wakaputanga 'the Magna Charta of New Zealand Independence'. What did they mean by this? To answer this question it is necessary to understand what Magna Charta (or 'Great Charter') represented in British political discourse of the early nineteenth century.[260] This chapter provides a brief summary of the historic Magna Charta and its context. A sketch of Magna Charta discourse in the seventeenth to nineteenth centuries follows. The final section locates Henry Williams and James Busby's use of Magna Charta within that historical discourse. Williams demands more attention than Busby, as it was Williams' role in explaning te Tiriti's meaning to Māori that was significant in shaping Māori understanding.

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[258] Williams to Bishop Selwyn, 12 July 1847, MS 91/75, AML, vol 100, p 53.
[259] Busby to Alexander Busby, 10 Dec 1835, MS 46, AML.
[260] I will adopt this spelling of Magna Charta in my text, as this was the spelling used by Williams and Busby and their contemporaries, rather than the modern 'Magna Carta'. From the Latin word 'charta' is derived the English word 'charter', defined by the Concise Oxford Dictionary, 9th edition (1995): 'a written grant of rights, by the sovereign or legislature, esp. the creation of a borough, company, university, etc.'. This meaning is quite close to the historic meaning of the Magna Charta (or 'Great Charter').

The Magna Charta is critical in comprehending Williams' understanding of the importance of the Treaty. This is because Magna Charta was a pervasive cultural symbol of British law and justice, rights and liberties. A leading modern historian of Magna Charta has defended the political and constitutional potential of the thirteenth century Magna Charta(s) against those writers who have derided its 'myth'. According to the 'myth' view, much more has been made of this thirteenth century feudal document than was justified by its original context. However James Holt writes that:

> The history of Magna Carta is the history not only of a document but also of an argument. The history of the document is a history of repeated re-interpretation. But the history of the argument is a history of a continuous element of political thinking…. Approached as political theory it sought to establish the rights of subjects against authority and maintained the principle that authority was subject to law. If the matter is left in broad terms of sovereign authority on the one hand and the subject's rights on the other, this was the legal issue at stake in the fight against John, against Charles I and in the resistance of the American colonies to George III.[261]

Famous twentieth century jurist Lord Denning described Magna Charta similarly as 'the greatest constitutional document of all times – the foundation of the freedom of the individual against the arbitrary authority of the despot'.[262] Part of the purpose of this chapter is to show how the Magna Charta 'myth' pervaded British culture and was used as a weapon in political debate. Even the monarchically inclined Dr Samuel Johnson felt compelled to include a definition for Magna Charta in his *Dictionary*. His definition cited the authority of Addison, editor of probably the most influential English periodical journal (the *Spectator*) of the eighteenth century English Enlightenment:

> Magna Charta [Lat]: the great charter of liberties granted to the people of England in the ninth year of Henry the Third, and confirmed by Edward the First (Addison).

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[261] J C Holt, *Magna Carta*, second edition, (Cambridge: Cambridge University Press, 1992), pp 18-19, see also pp 6, 9.

[262] Cited in A Pallister, *Magna Carta: The Heritage of Liberty* (Oxford: Clarendon Press, 1971), p 1.

This definition referred to Henry III's 1225 confirmation of the original 1215 Magna Charta granted by King John. This illustrates that Magna Charta enjoyed an ongoing political life from its inception. 'Charter' language pervaded English politics. Johnson's *Dictionary* defined charter (from the Latin, charta) as: 'A written evidence. Any writing bestowing privileges or rights' (Shakespeare).[263] The nineteenth century radical 'Chartist' movement in England proves the relevance of this language.

The relevance of Magna Charta to nineteenth century New Zealand political discourse is demonstrated by the number of times it is cited in the New Zealand press. In the period 1 January 1839 to 1 January 1849, around 24 different articles mentioned Magna Charta or 'great charter'. Many of these articles concerned significant settler and Māori interests.[264] Auckland paper, the *Daily Southern Cross*, a paper sympathetic to Māori during the 1840s, recorded Governor FitzRoy's statement to the Legislative Council in April 1845. The Governor assured members that Māori at Orakei were 'all disposed to abide by the Treaty of Waitangi, the Magna Charta of New Zealand'.[265] The *New Zealand Colonist*, a Wellington paper established to oppose the pro-New Zealand Company *New Zealand Gazette*, defended George Clark's efforts to protect the Māori of Te Aro pa from Colonel Wakefield in 1842. It argued that a letter written by Protector Clark contained 'nothing more than a simple statement of an undeniable principle of English law, at least as old as Magna Charta' that no person should be 'driven from his property'.[266]

Settlers also argued from British constitutional precedent. The *Nelson Examiner* of 22 March 1845 argued for settlers' rights to operate any business they chose without obtaining a license, because this was protected by Magna Charta, the Bill of Rights and even the Coronation Oath itself. The article relied in part on the Bill of Rights (1689), which, it stated, was 'incorporated in the statute law of the realm', and which declared 'that excessive fines should not be imposed, nor cruel and unusual punishment inflicted'.[267]

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[263] See Johnson's *Dictionary* (1824 ed).
[264] The majority were settler concerns. The following references to New Zealand newspapers are taken from www.paperspast.natlib.govt.nz. A search of 'Magna Charta' on this site between the above dates delivered 21 results, a search of 'Magna Carta' one result, and a search of 'great charter' four results. In total 26 results, though a few searches identified the same article.
[265] *Daily Southern Cross*, 5 April 1845, vol 2, no 103, p 3.
[266] *New Zealand Colonist*, 16 Sept 1842, vol 1, no 14, p 2.
[267] *Nelson Examiner*, 22 March 1845, vol 4, no 159, p 12.

FitzRoy, in his 1846 New Zealand *Remarks*, called the Treaty a 'Magna Charta', as did sub-protector George Clarke jnr in his memoirs.[268] The Wesleyan Mission Society in 1848 described the Treaty as 'the pledge of [Māori] loyalty, and the Charter of their rights'.[269]

These examples demonstrate the continuing relevant of Magna Charta and its successor documents to colonial political discourse in the Treaty period.

A Brief History of the Great Charter, 1215

To understand the historical echoes of 1215 during the nineteenth century requires a brief description of its origins. King John, a successor of William the Conqueror, exacted on England a burdensome level of taxes and fines and avoided the finer points of criminal justice procedure.[270] Since the Norman Conquest of 1066 the Norman barons, granted estates by William I,[271] gradually came to identify more with England than with Normandy, the land of their ancestors.[272] In 1213 the northern nobility refused to follow the King to fight in France, and John lost Normandy to the French. He also lost his battle with Pope Innocent III over the appointment of a new Archbishop of Canterbury and surrendered England's independence when it became a fief of the Church of Rome. This national humiliation and multiple grievances over misgovernment combined to create a 'confederacy' of church, nobility and people against a tyrant king. The barons in arms demanded that the King confirm the rights and liberties of the people by written charter sealed by him. When the time for doing so expired they marched on London and their articles (formulated in part by Archbishop Stephen Langton) were subsequently embodied in the 'Great Charter' at Runnymede. The traditional date for King John's acceptance of the Charter is 15 June 1215.[273]

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[268] R FitzRoy, *Remarks on New Zealand* (London: W and H White, 1846), p 10; G Clarke (jnr), *Notes on Early Life in New Zealand* (Hobart: J Walch & Sons, 1903), p 36.
[269] *Correspondence between the Wesleyan Missionary Committee and the Rt Hon Earl Grey* (London: P Thoms, 1848), cited in R Evans, *The Truth About the Treaty* (Kerikeri: Lal Bagh Press, 2004), p 118.
[270] T P Taswell-Langmead, *English Constitutional History: From the Teutonic Conquest to the Present Time*, T F T Plucknett, ed, tenth edition (London: Sweet and Maxwell, 1946), p 77. See also Holt, *Magna Carta*, chs 8 and 9 for a detailed discussion of the Charter's key clauses and the various contributions to its drafting.
[271] Taswell-Langmead, *English Constitutional History*, p 35.
[272] Ibid, p 76.
[273] Ibid, pp 76-80.

The Great Charter consisted of 63 articles and was largely concerned with practical issues of government and the relationship between the King and his feudal subjects. It commenced with a declaration that the church should be free with all rights and liberties secured, and confirmed the freedom to elect prelates which had already been granted by separate charter.[274] It dealt with a range of feudal obligations: wardships, the marriage of heirs, widows' dowries, and the rights of barons to the custody of abbeys which they had founded.[275] The administration of law and justice was the subject of a number of articles. These clauses covered issues from fixing the location of the king's court (so that plaintiffs did not have to follow the king around the kingdom), to civil suits by a woman being limited to the death of her husband (as women could hire a champion to fight for them in a 'trial by battle', hence suits or 'appeals' by women were disliked).[276] Clauses 12 and 14 of Magna Charta concerned specific dues or taxes from feudal tenants, rather than taxes in general. However, these clauses were later held to represent the constitutional principle that the Crown had no right of general taxation except with the consent of the national council (or Parliament).[277]

Clauses 39 and 40 also had future constitutional significance. These clauses contained the principles of no imprisonment without trial (*habeas corpus*), trial by jury, and security of property and personal liberties generally:

> 39. No free man (*nullus liber homo*) shall be taken or imprisoned or disseised [deprived of his property] or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.
> 40. To no one will we sell, to no one will we deny or delay right or justice.[278]

[274] Ibid, p 80.
[275] Ibid, pp 81-83. A good example of the feudal nature of the Magna Charta is c 29: 'No knight shall be compelled to pay for castle-guard, if he be willing to perform the service in person, or (on reasonable excuse) by a proper deputy; and whilst on service in the army, he shall be free from the duty of castle-guard'.
[276] Ibid, pp 83-89.
[277] Ibid, pp 89-90.
[278] Holt, *Magna Carta*, p 461; Taswell-Langmead, *English Constitutional History*, pp 89-93 has a slightly different translation. The writ of *habeas corpus* (Latin 'you must have the body') was developed later. It required a detained person to be brought before a judge or into court to investigate the lawfulness of his or her detention.

Other clauses secured to London, and all other cities, boroughs, towns, and ports their 'ancient liberties and free customs'. Uniformity of weights and measures was prescribed. Foreign merchants were granted free movement in and out of and within England, except in time of war.[279] Constables and royal bailiffs had to pay if they took any man's corn or other chattels. The king, his sheriffs, or bailiffs were prohibited from taking any horses or carriages of freemen or any timber for castles or other uses, without the consent of the owner.[280]

Clause 61 provided that the king's castles and possessions could be seized until such time as a grievance against him was redressed. The clause set up a 'Council' of twenty five barons. Like a court, the Council would adjudicate on disputes with the king concerning the seizure of property or the imposition of fines. The Council was to operate by majority decision, an innovation pointing to the future. Some older commentators have seen in this clause a general right of rebellion. The clause really conferred a legal power to distrain the Crown's property. This nevertheless represented a real check on its own powers.[281]

The Charter stated that it was both a 'confirmation' and a 'grant' of rights by the King.[282] Holt writes: 'Sometimes Magna Carta stated law. Sometimes it stated what its supporters [the barons] hoped would become law. Sometimes it stated what they pretended was law'.[283] Nevertheless, Magna Charta was interpreted by many commentators in successive centuries as merely confirming ancient English rights and liberties. The Magna Charta itself was confirmed dozens of times by successive monarchs.[284]

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[279] Taswell-Langmead, *English Constitutional History*, pp 93-94.
[280] Ibid, pp 94-95.
[281] Holt, *Magna Carta*, pp 343-344; Taswell-Langmead, *English Constitutional History*, pp 97-98.
[282] Holt, *Magna Carta*, pp 449-450; Taswell-Langmead, *English Constitutional History*, p 74.
[283] Holt, *Magna Carta*, p 300.
[284] It was alone confirmed 37 times between the first year of Henry III's reign (1216) and the second year of Henry VI 's reign (1421), Taswell-Langmead, *English Constitutional History*, p 108.

Magna Charta in 17th to 19th Century Discourse

The Principle of Trusteeship

In his speech to the Commons supporting Charles James Fox's India bill in 1783, Edmund Burke articulated what came to be regarded as the principle of trusteeship in the British Empire.[285] He argued that:

> all political power which is set over men, and…all privilege claimed or exercised in exclusion of them, being wholly artificial, and for so much, a derogation from the natural equality of mankind at large, ought to be some way or other exercised ultimately for their benefit.

According to Burke, political power and commercial monopoly were not natural rights – they were 'artificial' ones – and as such conferred obligations on those who exercised these powers to do so in the interests of those subject to them. Hence, the privileges exercised by the East India Company in India, which were originally derived from Crown charter, were 'in the strictest sense a *trust*': 'and it is of the very essence of every trust to be rendered *accountable;* and even totally to *cease,* when it substantially varies from the purposes for which alone it could have a lawful existence'. Parliament had both the right and the duty, therefore, to supervise the exercise of the Company's powers, and if they were abused, dissolve this delegated trust. Parliament was the ultimate trustee of Indian interests. This was the principle of trusteeship.

Fox's bill proposed a commission to control the political governance of India. If Indian governance was appropriately supervised the rights of the Indian people would be protected. Burke contrasted the charter of the East India Company with the 'great charter' (or Magna Charta), which truly established the 'rights of *men,* that is to say, the natural rights of mankind'. Such great charters were 'express covenants' which 'defined and secured' these natural rights 'against chicane, against power, and [against] authority'. Not only were these documents protections against arbitrary power, but 'this formal recognition, by the sovereign power, of an

[285] Burke, 'Speech on Fox's East India Bill', in Canavan, ed, *Select Works of Edmund Burke*.

original right in the subject, can never be subverted, but by rooting up the holding radical principles of government, and even of society itself'. Hence, government and society would crumble if these rights were not upheld. Magna Charta was 'a charter to restrain power, and to destroy monopoly'. The Company's charter, in contrast, was 'a charter to establish monopoly, and to create power'.

The Magna Charta thus acted (theoretically at least) to limit or restrain the power of the Crown. This was not the end of Burke's history lesson to the Commons. There were other documents of constitutional significance that protected the subject's natural rights. Fox's bill and its associated bills, said Burke, were 'intended to form the *Magna Charta* of Hindostan':

> Whatever the treaty of Westphalia [1648] is to the liberty of the princes and free cities of the [Holy Roman] empire, and to the three religions there professed—Whatever the great charter [Magna Charta, 1215] the statute of tallage [1297], the petition of right [1628], and the declaration of right [1688], are to Great Britain, these bills are to the people of India.[286]

The Treaty of Westphalia ended the Thirty Years' War in the Holy Roman Empire and legally established the three religions of Calvinism, Catholicism, and Lutheranism. This reference demonstrates that Burke's thinking was not insular and that he conceived of civil liberties in terms of polities with varying denominational identities. In the 'statue of tallage' the English king renounced for himself and his heirs the right to levy any general tax (tallage) without the consent of the estates of his whole kingdom.[287] In the Petition of Right 1628, Parliament complained of a series of breaches of law and asserted the subject's right not to be subjected to arbitrary imprisonment and taxation without parliamentary consent. The petition also prohibited the use of martial law and the billeting of soldiers on private citizens against their will. Charles I was forced to assent, insisting that the petition merely confirmed established liberties rather than creating new ones. The Declaration of Right(s) accompanied the English crown offered to William and Mary in 1689. It pledged the monarchs to observe laws passed by Parliament (in

[286] Burke may have assumed a kind of direct rule in India that did not exist until after the Indian Mutiny (1857-58). Prior to this the British Parliament only supervised East India Company governance of India, via the Board of Control.
[287] Only in later centuries was this document called a 'statute'.

effect making Parliament the supreme legislator) and prohibited Catholicism in the monarchy. The Declaration was incorporated within the Bill of Rights 1689, which ratified the Revolution settlement with William and Mary, making them joint monarchs (as William III and Mary II) of England.[288]

The Language of Liberty

Burke's thumbnail sketch of English constitutional history also comprised the key building blocks of the seventeenth to nineteenth centuries' 'language of liberty'. In this discourse, the Magna Charta was the foundation stone. The 1628 Petition called it 'The Great Charter of the Liberties of England'.[289] Together, the Magna Carta, the Petition of Right and the Bill of Rights were regarded as the fundamental covenants between Crown and nation. In the words of one notable they were 'the Bible of the English Constitution'.[290] Prominent in this chain of constitutional compacts were the principles of Parliamentary consent to taxation, freedom from arbitrary imprisonment, and the security of person and property generally from arbitrary government.

Sir Edward Coke, an articulate defender of the common law against the royal prerogative, argued in the Commons that 'Magna Carta is such a fellow that he will have no sovereign'. He made this statement in response to the House of Lord's attempt to attach a clause to the Petition of Right referring to the 'sovereign power' of Charles I.[291] The House of Commons firmly rejected this amendment as nullifying the effect of the Petition. Coke relied on the rights confirmed in Magna Charta and other 'statutes':

> I know that [the royal] prerogative is part of the law, but sovereign power is no parliamentary word. In my opinion it weakens Magna Carta, and all our statutes; for they

[288] Burke, 'Speech on Fox's East India Bill', in F Canavan, ed, *Select Works of Edmund Burke* (notes); C Haigh, ed, *The Cambridge Historical Encyclopedia of Great Britain and Ireland* (London: Cambridge University Press, 1985), pp 200, 205.
[289] Taswell-Langmead, *English Constitutional History*, pp 415-416.
[290] Ibid, p 74 (Lord Chatham, William Pitt the elder).
[291] The Lord's amendment stated: 'We present this our humble petition to your Majesty with the care not only of preserving our own liberties, but with due regard to leave entire that sovereign power wherewith your Majesty is trusted for the protection, safety, and happiness of the people', ibid, p 413.

> are absolute, without any saving of sovereign power; and shall we now add it, we shall weaken the foundation of law, and then the building must needs fall.

In Coke's view, the law, embodied in Magna Charta, not the King, was sovereign. The King was subject to law. In making or proposing laws he was limited by this 'absolute' law. John Pym argued similarly that the 'laws of England' must prevail. He argued further that: 'I know how to add "sovereign" to his [the king's] person, but not to his power'. Pym thus made a distinction between the king as symbolically sovereign and the 'power of the law' as the fundamental legal sovereign. Alford likewise claimed that the amending clause would be granting a new 'regal' power rather than giving to the king 'that [which] the law gives him, and no more'.[292]

For Coke, 'Magna Carta' was fundamental law. For Burke, it enshrined the 'natural rights of mankind'. The expressions differed but the effect was the same: Magna Charta acted to restrain arbitrary power.[293] Two Whig historians, James Mackintosh and Henry Hallam, contemporaries of Burke, both supported his elevation of the Great Charter in the early nineteenth century. Mackintosh said that clauses 39 and 40 'clearly contained the habeas corpus and the trial by jury, the most effectual securities against oppression which the wisdom of man has hitherto been able to devise'. Hallam asserted that these were 'the essential clauses', being those that 'protect the personal liberty and property of all freemen, by giving security from arbitrary imprisonment and arbitrary spoliation'.[294] In another place Hallam characterised the Charter as the 'keystone of English liberty'.[295] In his India speech of 1783, Burke was used 'the *Magna Charta* of Hindostan' as a code phrase to incorporate the protection of Indians' fundamental rights and liberties, as well as their local customs. An appropriately structured Indian bill would thus protect Indians in the same way as England's series of constitutional compacts had protected the Englishman's rights, liberties and local customs.[296]

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[292] Ibid, p 413.
[293] It might be truer to say that it declared fundamental law, much as Burke conceived it as declaring natural rights. Both formulations have the sense of relying on absolutes derived from natural or divine law. Coke's exact words were: 'It was declaratory of the principle grounds of the fundamental laws of England'. Ibid, p 104.
[294] Ibid, pp 90-91 (Mackintosh, *History of England*, vol 1, (1831), pp 219-220; Hallam, *Middle Ages*, vol 2, (1818), p 327).
[295] Ibid, p 104.
[296] Burke refers to 'the due observance of the natural and local [Indian] law', Burke, 'Speech on Fox's East India Bill', in F Canavan, ed, *Select Works of Edmund Burke*.

'Magna Charta' symbolism in the late eighteenth and early nineteenth centuries influenced not just Whig statesmen and historians. Hannah More, the leading 'publicist' of the Evangelical Anglican or Clapham era (the 1790s to the 1830s), referred to Magna Charta as the English 'palladium', the 'basis of our political security'.[297]

More's reference to Magna Charta illustrates its prevalence as a general British cultural symbol.[298] This is borne out by the use of Magna Charta in popular discourse surrounding the Queen Caroline affair of 1820-21. Many of the 'middling and lower classes', as Wilberforce referred to them,[299] supported Caroline in her efforts to be crowned Queen against the opposition of her husband, the new King George IV, and Lord Liverpool's Tory government. The popular agitation, involving labourers, artisans and thousands of women, defended the Queen's constitutional rights against an oppressive and corrupt elite. 'Caroline became Britannia – the embodiment of the nation. Her lost rights became the people's lost rights'.[300] In a pro-Caroline pamphlet entitled *The Queen and Magna Carta; Or, the Thing that John signed*, William Hone visually represented Magna Carta as surrounded by the laws of England, the revolutionary Cap of Liberty, a lion with a crown and a dog with a collar labelled 'John Bull'. Some rhyming verse accompanied this image, which the verse referred to as 'THE STANDARD, the RALLYING SIGN, round which every BRITON of HONOR will join'. These 'Britons' were to unite against the 'RATS AND THE LEECHES' (that is, the elite) who, if they were not expelled from the land, would 'Destroy MAGNA CARTA, and then in its place Allow us like slaves to exist in disgrace'.[301]

Although this tract had radical or revolutionary elements (including the French Revolutionary 'Cap of Liberty') it expressed a more widespread popular belief in a constitution that despised

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[297] H More, *The Works of Hannah More*, vol 10 (London: Henry G Bohn, 1853), (http://books.google.com/books, 14 August 2009), p 30. Hilton, *A Mad, Bad, and Dangerous People?*, p 178, characterizes More as leading 'publicist'.
[298] More was using Magna Charta as a metaphor: just as Magna Charta was the original of all other English laws so the Gospels were the foundation to which Paul's Epistles pointed, ibid, p 30.
[299] R I Wilberforce and S Wilberforce, eds, *The Correspondence of William Wilberforce*, vol 2 (London: John Murray, 1840), (http://books.google.com/books, 14 August 2009), pp 442-443.
[300] R McWilliam, *Popular Politics in Nineteenth-Century England* (London and New York: Routledge, 1998), p 8.
[301] Ibid, pp 10-11.

despotism and embraced liberty.[302] Magna Charta was a key symbol of this constitutional inheritance.

For constitutional reasons quite different from those of William Hone, William Wilberforce supported Queen Caroline. He wrote to the Anglican Rev Dean Pearson, in February 1821, that the Queen was prayed for in all the Dissenting and Methodist Chapels throughout the kingdom. He advised Pearson that he had supported a motion in the Commons to include the Queen by name in the Church's liturgy. Not to do so would risk alienating the 'more religious and sober of the middling and lower classes of this country' from the Church of England, and add fuel to the radical fires of the not-so-respectable. Wilberforce's comments suggest that he saw the monarchy as a unifying cultural symbol and as an Anglican Evangelical he believed the alliance of Crown and Church preserved social order and peace. His letter to Pearson communicated his 'deep conviction of the inestimable benefits which we owe to the monarchical branch of our constitution'.[303]

Wilberforce's reference to 'the monarchical branch' indicates a belief in a limited monarchy, and hence a Whig view of the 'balanced constitution' with authority shared between King, Lords, and Commons. As an Evangelical, however, Wilberforce and his Clapham colleagues attempted to remain independent of any one political allegiance. Wilberforce was critical of the development of party spirit or the 'system of party' in Parliamentary politics.[304] His first duty was to God, secondly to the nation, and only finally to political alliances (though he was personally loathe to go against his friends, Prime Minister William Pitt included). Clapham Evangelicals used less constitutional language than Whig members of Parliament.[305] Yet they still employed this language. Thomas Fowell Buxton's motion for the 'gradual' abolition of slavery in 1823 was framed: 'the state of slavery is repugnant to the principles of the British

[302] Ibid, p 11.
[303] Wilberforce and Wilberforce, eds, *The Correspondence of William Wilberforce*, pp 442-445.
[304] Wilberforce and Wilberforce, eds, *The Correspondence of William Wilberforce*, p 444.
[305] See A D Kriegel, 'A Convergence of Ethics: Saints and Whigs in British Antislavery', *Journal of British Studies*, vol 26, no 4, 1987, pp 423-450.

Constitution and of the Christian religion'.[306] Ideas of interlinked spiritual and civil liberty permeate this wording.[307]

The Whig lawyer, Henry Brougham, who had famously defended Queen Caroline at her trial for adultery, argued for abolition of slavery in 1830 in these terms:

> There is a law above all the enactments of human codes – the same throughout the world, the same in all times... it is the law written by the finger of God on the heart of man; and by that law, unchangeable and eternal, while men despise fraud, and loathe rapine, and abhor blood, they shall reject with indignation the wild and guilty fantasy that man can hold property in man. In vain you appeal to treaties, to covenants between nations. The convenants of the Almighty, whether the old covenant or the new, denounce such unholy pretensions.'[308]

With these Biblical appeals and analogies the Evangelical abolitionists would no doubt have concurred. The conception of human laws and human lawmakers, whether parliaments, kings, or oligarchies, being subject to fundamental law (or God's law) are ideas echoed in Coke's, Burke's and Hone's descriptions of Magna Charta. And if Magna Charta represented the freedom of Englishmen from political and religious slavery, there was no better constitutional analogy for the liberation of slaves than that charter and the charters that followed it. Thus, as Burke had argued for an Indian Magna Charta, the Whig Samuel Romilly argued that abolition would be a 'Magna Carta for Africa'.[309]

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[306] McGilchrist, J, *The Life and Career of Henry, Lord Brougham, With Extracts From His Speeches, and Notices of His Contemporaries* (London: Cassell, Petter, and Galpin, 1868), (http://books.google.com/books, 12 August 2009), p 129.
[307] For which, see the discussion in chapter two.
[308] McGilchrist, J, *The Life and Career of Henry, Lord Brougham*, p 136.
[309] A D Kriegel, 'A Convergence of Ethics: Saints and Whigs in British Antislavery', *Journal of British Studies*, vol 26, no 4, 1987, p 447.

A Protestant Constitution or an Anglican Constitution?

Magna Charta, and the British Constitution, was understood by all ranks of British society as a common religious, national and legal inheritance: it defined itself against the threat of 'popery' or European Roman Catholicism. It identified Britons as freedom-loving people who were, at the same time, loyal to monarchy. Moreover it protected their persons and property.[310]

Within this broad consensus, understandings of the Constitution and Magna Charta were anything but homogenous.[311] The Anglican establishment, by the later eighteenth century, understood the 1689 Glorious Revolution as establishing the sovereignty of Parliament.[312] English Dissenters had a different understanding of 1689. Dissenter Rev Richard Price, in his famous 'Discourse on the Love of Our Country' (1789), defined the three principles of the Revolution as: 'first, the right to liberty of conscience in religious matters; secondly, the right to resist power when abused; and thirdly, the right to choose our own governors, to cashier [dismiss] them for misconduct, and to frame a government for ourselves'.[313] These principles were in opposition to 'the odious doctrines of passive obedience, non resistance, and the divine right of kings'.[314] The doctrines of non-resistance and passive obedience meant that those who disagreed with the law should passively accept its penalties.

Despite these different views, the force of Magna Charta expressed itself even in establishment explanations of the Constitution. William Blackstone wrote of the absolute authority of the English Parliament, yet wrote as if Parliament could not meddle with the rights and liberties of Englishmen. He called Magna Charta 'the great charter of liberties'. He appeared to endorse the prevalent view that it 'contained very few new grants [of rights]'. He even appeared to endorse Sir Edward Coke's view that it 'was for the most part declaratory of the principal grounds of the fundamental laws of England'.[315] He defined the three primary rights as 'the right of personal

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[310] See L Colley, *Britons* for the famous thesis of a unifying British Protestantism defined against a Catholic France.
[311] See T Claydon, and I McBride, eds, *Protestantism and National Identity: Britain and Ireland, c. 1650–c. 1850* (Cambridge: Cambridge University Press, 1998) for the divisions within a broad British Protestant identity.
[312] Clarke, *The Language of Liberty 1660-1832*, p 83.
[313] R Price, *A Discourse on the Love of Our Country, Delivered on Nov 4, 1789* (London: T Cadell, 1790), (http://books.google.com/books, 8 August 2009), p 34.
[314] Ibid, p 35.
[315] Blackstone, *Commentaries*, vol 1, pp 127-128.

security, the right of personal liberty, and the right of private property'.[316] Blackstone stated that the English Constitution was unlike 'modern' European constitutions, which 'vest an arbitrary and despotic power… in the prince'. English laws (including the Charter) preserved English political and civil liberties. The 'spirit of liberty' was 'deeply implanted in our constitution, and rooted even in our very soil'.[317]

Henry Williams and Magna Charta

Williams' theology and politics

In English debates concerning the authority of government and the subject's rights Magna Charta played a conspicuous role. These tensions within the British Constitution are important for appreciating Williams and Busby's references to te Tiriti and He Wakaputanga. British commentators in post-1840 New Zealand, including missionaries, often spoke in the language of obedience to the Crown or rebellion against it. At the same time, Williams and others enlisted Magna Charta in their appeals for Māori interests and the honour of the Crown under the Treaty. Before examining the New Zealand context, some further British context is necessary to appreciate Williams' (and Busby's) worldview.

Edmund Burke's defence of Church and State in his *Reflexions on the Revolution in France* (1790) also included an assertion of Magna Charta's importance:

> From Magna Charta to the Declaration of Rights it has been the uniform policy of our constitution to claim and assert our liberties as an *entailed inheritance* derived to us from our forefathers, and to be transmitted to our posterity.[318]

[316] Ibid, p 129. Anne Pallister notes that 'these are the three legal rights which seventeenth-century politicians and writers constantly claimed as fundamental'. She also equates them with John Locke's 'life, liberty and estate', see Pallister, *Magna Carta*, p 58 (n 2).
[317] Blackstone, *Commentaries*, vol 1, p 127.
[318] Cited in Pallister, *Magna Carta*, p 82.

Burke thus defended the English constitution as an inheritance bequeathed by the ancestors: a taonga tuku iho. This conservative strategy allowed liberty to coexist with law and traditional authority. In the face of this conservative English reaction to the French Revolution, Henry Williams' father was one who felt the necessity of supporting the traditional order. Henry Williams' uncle John Marsh recorded in his December 1792 diary:

> There being at this time a great spirit of Republicanism & Levelling prevalent all over the Kingdom, kept up by the corresponding Society & their Emissaries, there were great apprehensions of Riots & Tumults in London, on which account the Tower was fortified & the Guard at the Bank doubled etc. Ships were also put in commission & the Militia in the Eastern Counties order'd to be embodied, on which account Friends to good Order & Government also now met in several places, to form associations for supporting the Constitution, a meeting of which kind was on this day (the 10h.) held at the Town Hall, Chichester, where some Resolutions against Sedition etc. were drawn up & signed. There being also a Meeting of the same kind about this time held at Portsmouth, Mr [Thomas] Williams [Henry's father], who had been rather imprudent in uttering his democratic Sentiments, & fearing he had gone too far & might be reckon'd a mark'd man, put himself in as conspicuous a part of the Hall as he co'd & warmly supported the Resolutions, joining in the cry of God save the King etc. with great vociferation, as he inform'd us the next day, when he came over to spend a day or two with us.[319]

Thomas William's democratic sentiments as a Dissenter probably concerned repeal of the Test and Corporation Acts. These Acts excluded those Dissenters and Catholics who did not subscribe to Church of England articles of faith from election to Parliament and local municipalities, access to Oxford and Cambridge, and other civil restrictions (not repealed until 1828-29). Chapter two referred to Henry Williams' upbringing in a culture of English Nonconformism. His grandfather, Rev Thomas Williams, was a Congregationalist minister with Calvinist theological training, while his father continued to attend the Congregational Chapel at Gosport and then a Dissenting chapel at Nottingham (after the family moved there in 1794). His father, having business and church connections with other Dissenters was admitted as a burgess or voter in the

[319] John Marsh, Journal, cited in N T H Williams, 'The Williams Family in the 18th and 19th Centuries', 2003, p 22.

Corporation of Nottingham and was involved generally in Nottingham's Dissenting politics and municipal affairs. His mother's father, Wright Coldham, was a Sheriff of Nottingham in 1798 and 1807, and Mayor in 1809, while his mother's uncle, George Coldham, was the Town Clerk from 1792 to 1815 and a prominent solicitor. The Nottingham scene of the early 1800s was particularly engaging intellectually and politically, with notables such as the Reverend George Walker of the Presbyterian Chapel, a friend of Dissenters Richard Price and Joseph Priestly and known to Adam Smith.[320]

The implications of this Dissenting background, with its theological leanings towards the Puritans or Calvinists of Cromwell's England, places Williams in a tradition of religious and political thought with two closely related streams. The first was an appeal to 'the rights and liberties of Englishmen', declared in and secured by the common law, principally by Magna Carta and the Bill of Rights 1689. The second was a particular Calvinist theology, according to which all human authority was appointed by God and was subject to his law.[321] These two streams converged in many cases. Rev David Bogue's *History of Dissenters* is a case in point. A Calvinist in theology and minister of the Gosport Chapel (1777-1825), he discussed in his *History* the 'principles of liberty' which English Dissenters held dear.[322] Gregory Marquis writes that 'England's first great revolution, the Reformation, was viewed in Protestant thinking as an essential stage between the Magna Charta and the Glorious Revolution'; and that, by the mid-nineteenth century, 'the link between Calvinist Protestantism and the spread of liberty…was deeply engrained in Protestant culture'.[323] The Calvinist and English liberties streams of thought illuminate the meaning of Henry Williams' own appeal to the Treaty as a 'Magna Charta' for Māori. Another feature of Williams' Congregational heritage was an emphasis on local church autonomy or independence from other churches or church hierarchies. The congregation itself governed the church, rather than governance by elders (Presbyterianism) or bishops (Anglicanism) – hence the name of 'Congregational' given to these churches.

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[320] N T H Williams, 'The Williams Family in the 18th and 19th Centuries', 2003.
[321] J C D Clark, *The Language of Liberty 1660-1832*, pp 94-98; and M R Watts, *The Dissenters*, vol 2: *The Expansion of Evangelical Nonconformity* (Oxford: Clarendon Press, 1995), pp 347-350.
[322] See discussion at n 225.
[323] G Marquis, 'In Defence of Liberty', pp 78-79. Marquis' context is the 'maritime colonies' of New Brunswick, Nova Scotia, and Prince Edward Island, but the same could be said of Evangelical Anglicans and Dissenters in the colonies generally (and in Britain).

The Dissenting theology and the Dissenting politics of Nottingham in which his close family were involved no doubt influenced Henry Williams' worldview. He and wife Marianne (with a similar background) seemed comfortable hosting dignitaries at Paihia, from naval captains to Bishops to Governors. This was the world in which they had grown up. But if he was familiar with power he was not afraid to withstand it. In the 1840s he resisted both Governor George Grey and Bishop Selwyn, a stand which eventually led to his unjustified dismissal from the CMS.[324]

At the same time, deference to traditional authority was a hallmark of 'respectable' propertied British society. This conservative (Burkean) tendency became more prominent in response to the French Revolution. Williams' more middling class, propertied background and his later admittance into the ranks of Anglican clergy would have reinforced respect for government authority in general. However, these factors need not obscure from view the Dissenting or Calvinist understandings of government that also formed part of his family heritage.[325]

Te Tiriti as a Magna Charta

The significance of Magna Charta to Henry Williams is seen in his explanation of events which occurred in September 1844. In this month he had 400 copies of the Māori version of the Treaty printed at the Paihia mission press in order to refute kōrero to the effect that Māori were made slaves of Queen Victoria by the Treaty. Williams sought to refute these claims. He recounted the September 1844 events:

> On my return from Tauranga on the 16th Sept/44 I found the tribes around under considerable excitement without exception. The Treaty of Waitangi having been declared the origin of all the existing mischief by which the chiefs had given up their Rank, Rights, and Privileges as chiefs, with their Lands and all their possessions. To meet this growing evil, I had four hundred copies of the Waitangi Treaty struck off and distributed,

[324] This was primarily over his and fellow missionaries' land purchases from Māori, an immense subject on its own. The CMS later offered to reinstate him once they realized the allegations by Grey (supported in part by Bishop Selwyn) were unfounded. Williams also took a lead in using trust deeds to endeavour to protect Māori from European land purchasers.

[325] His conception of English government and monarchy is more fully explored in chapter four on te Tiriti.

> and for many days was engaged in explaining the same, shewing to the Chiefs that this Treaty was indeed their 'Magna Charta' whereby their Lands[,] Rights and Privileges were secured to them. By these means and by these alone were the fears of Waka [Nene] and all the other chiefs allayed. They admitted that the Treaty was good.[326]

It is quite clear from this that Magna Charta for Henry Williams stood for the protection of two distinct types of right: the first was rights of property; the second was the 'rank' or authority of the rangatira and its associated privileges.

These two elements appeared also in Williams' explanation to Bishop Selwyn, in 1847, of his interpretation of the Treaty to Māori. In this letter to the Bishop he rendered part of the Treaty's preamble as: '[That the Queen] was desirous to protect them in their rights as chiefs, and rights of property'.[327] Similarly, Williams rendered the article two guarantee of 'te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa' as 'their full rights as chiefs', together with 'their rights of possession of their lands, and all their other property of every kind and degree'. This explanation appeared to make chiefly rights something more than just possession of lands and property.[328] In this1847 letter Williams also stated: 'My view of the the Treaty of Waitangi is, as it ever was, that it was the Magna Charta of the aborigines of New Zealand'.[329]

It is apparent that Williams and the missionary body in general saw te Tiriti as preserving chiefly authority and that this would continue in respect of local or hapū related issues of property and perhaps customary law generally (except where contrary to Christian morality). This conception of the Treaty's protection of a Māori rangatiratanga follows the historic Magna Charta, which preserved the rights of local nobility. In the feudal structure of English society, aristocracy or local gentry exercised some measure of local control as 'lords of the manor' over a complex hierarchy of property rights. Similarly, Williams envisaged te Tiriti as a relationship between a

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[326] 'Statement by Henry Williams re 400 Copies of Treaty', 16 Sept 1844, vol G, p 104, MS 91/75, AML. A copy of te Tiriti in Williams papers (MS 92/3, C K Williams, folder 5) is probably one of the 1844 prints.
[327] Williams to Bishop Selwyn, 12 July 1847, vol 100, p 53, MS 91/75, AML.
[328] Ibid, p 54.
[329] Ibid, p 53.

central kāwanatanga and a local rangatiratanga. To Williams, the Treaty protected both taonga (property) and rangatiratanga (chieftainship, chiefly independence or liberty).[330]

Williams, in his 1847 letter to Selwyn, conceptualized the Treaty as a compact between the rangatira and 'her Majesty the Queen', rather than an abstract Crown. He used 'The Queen' or 'her Majesty' (or these titles combined) at least 23 times in this letter, and the Treaty text rendition only accounts for 10 of these appearances. Her Majesty was head of the executive branch of government, and the Treaty was an executive act of state, so Williams correctly emphasized the Crown in his Treaty explanation. He identified the Crown with Her Majesty, and he conveyed this clear understanding to Māori at the 5 February kōrerorero: the Treaty was 'an act of love' from Victoria to the rangatira.[331] Williams' 1847 letter equated te Tiriti with 'the word' of Her Majesty, a word that 'was sacred, and could not be violated'.[332] In another part of the letter, Williams said, 'I have always maintained to the aborigines that her Majesty's word was sacred and inviolable'.[333] In a similar way, Magna Charta was a personal covenant between the monarch and all English 'freemen'. Williams' emphasis on the personal relationship of Queen with rangatira follows in the footsteps of Magna Charta: the Queen herself was promising to protect Māori rights by the Treaty.

This characterisation of te Tiriti also reflects Anglican theology of church government and civil polity in which the Monarch was head of both state and church. In this sense her word was 'sacred'. To Bishop Selwyn, Williams wrote in 1845 that the Treaty was 'a sacred compact' between 'the British Government and the Chiefs of New Zealand', as he expressed it on this occasion, adding that, 'it was impossible that the Queen or Governor could admit of any deceit towards [the Chiefs]'.[334] This supports the view that his references to the Treaty as the Māori

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[330] Chapter four explores in more detail missionaries' understanding of the Kawanatanga-Rangatiratanga relationship. McHugh notes relevantly that the British, generally speaking, described their political and civil liberties in terms of a property right – something inherited and passed down through the generations – a 'birthright'. This property-based conception is evident in the language and form of the English text of the Treaty, which assumes the appearance of a conveyancing deed. See P McHugh, 'The Lawyer's Concept of Sovereignty', pp 171-172.
[331] Williams, 'Early Recollections', [nd], cited in Carleton, *The Life of Henry Williams*, vol 2, p 12.
[332] Williams to Bishop Selwyn, 12 July 1847, p 55.
[333] Ibid, p 57.
[334] Williams to Selwyn, 20 Feb 1845, CMS/CN/0 101, reel 65, ATL (Williams copies this letter in Williams to FitzRoy, 20 Feb 1845). To Selwyn Williams wrote that he had just read 'that triumphant document the New Zealand Journal for August 3/44. I was certainly overwhelmed with shame and confusion considering that we were betrayed

Magna Charta reflected the intertwining of the sacred (church) and the secular (government) in Williams' worldview.

It was not until 1847-48 that Williams' belief in the integrity of Her Majesty's Government – not Her Majesty personally – really began to break down. In his July 1847 letter to Selwyn, Williams wrote: 'Earl Grey's ['waste-lands'] despatch to his Excellency the Governor, which may be regarded as the warrant of extermination, I have seen, and am truly grieved to find that the Queen of Great Britain should be so dishonoured'.[335] In response to this same 'waste-lands' dispatch, Williams wrote to the CMS: 'I am grieved beyond the power of expression at the attempted violation of the Treaty, and must never again plead the honour and integrity of Her Majesty's Government. This appears to be lost or never to have been possessed'.[336]

Busby's use of Magna Charta needs little explanation. He referred to the Declaration as 'the Magna Charta of New Zealand Independence'.[337] This resembles Burke's reference to the India bill being a Magna Charta for the Indians, or Samuel Romilly's reference to the 1807 abolition of slavery as a Magna Charta for Africa. David Bogue also referred to the Toleration Act 1689 as the Magna Charta of the Dissenters.[338] In these uses, the title 'Magna Charta' became code for the protection of personal liberties and property rights generally, and local customs or laws in particular. The 1215 Magna Charta was very much about the protection of local feudal custom, including the customs and laws of particular towns and localities.

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and ruined and our cause in New Zealand lost'. This was probably the House of Commons Select Committee Report 1844, which referred to the Crown's right to the 'waste-lands' of New Zealand. In his letter to FitzRoy, Williams thanked him for sending a document that had 'allayed' their 'fears' because of 'the assurance that the Treaty remained inviolate'. Williams was keenly aware that on the faith of the Treaty depended their reputation and hence the Christian faith amongst Māori.

[335] Williams to Selwyn, 12 July 1847, vol 100, MS 91/75, AML, p 51.

[336] Williams to Secretaries, CMS, 15 July 1847, CMS/CN/0 101, reel 65, ATL. See also Report of Northern District Committee CMS to CMS London, 1 July 1847, (signed by H Williams as Chairman), which stated: 'The Revocation of the Treaty of Waitangi and the mere idea of the British Government taking possession of any portion of the Land belonging to the Aborigines will have a most serious and alarming effect'.

[337] Busby to Alexander Busby, 10 Dec 1835, MS 46, AML.

[338] D Bogue, and J Bennett, *History of Dissenters, from the Revolution in 1688, to the Year 1808*, vol 1 (London: 1808), (http://books.google.com/books, 18 August 2009), pp 186-198. At p 202: 'for religious liberty [liberty of conscience, assembly etc], which is one of the unalienable rights of human nature, springs out of the very essence of Christianity'. The Toleration Act allowed freedom of assembly and worship to Dissenting congregations, though not access to public office.

Busby's description of the Declaration as a Magna Charta was equivalent to saying that it protected Māori rights or independence. It was none other than a Great Charter declaring New Zealand independence, which, as Busby noted, included an appeal to the King to protect this infant state. Just as Williams characterized the Treaty as constituting a personal compact between Queen Victoria and rangatira, Busby saw the Declaration as making King William IV a protector of an infant state. British protection made 'the Magna Charta of New Zealand Independence' effective. The other element which this Magna Charta constituted was the United Tribes or te Wakaminenga, which according to Busby, was 'the only safe foundation upon which British Interests in this Country can be established or upon which the fabric of National laws and Institutions can be raised'.[339] For Busby, the Declaration was a Magna Charta because it conjoined a benevolent British monarch with a Māori aristocratic assembly, much as Magna Charta had stabilized an England based on a compact between King and nobility. This conception captured the various elements of his thinking about Māori society and its similarities with an older British society.[340]

[339] Busby to Alexander Busby, 10 Dec 1835, MS 46, AML.
[340] Considered in chapter one. See, for example, Busby's discussion concerning using an early English jury model for Māori, see discussion at n 164 and surrounding text. Trial by jury was of course a key liberty protected by Magna Charta.

Chapter 4: Kāwanatanga-Rangatiratanga

> In the midst of profound silence I read the Treaty to all assembled. I told all to listen with care, explaining clause by clause to the Chiefs, giving them caution not to be in a hurry, but telling them that we, the missionaries, fully approved of the Treaty; that it was an act of love towards them on the part of the Queen, who desired to secure to them their property, rights and privileges.[341]
>
> Henry Williams

Question (d):

What does the available documentary evidence reveal about Busby's and Williams's understandings of the nature and effect of Te Tiriti/the Treaty, especially with regard to the relationship between kāwanatanga and rangatiratanga?

The first section of this chapter will highlight aspects of different plans that were proposed for New Zealand in the three years prior to the conclusion of the Treaty at Waitangi. This is not intended to be an exhaustive discussion. Instead, it will summarise aspects of these plans that concerned the relationship between kāwanatanga and rangatiratanga.

This background will demonstrate the diversity of constitutional proposals. It will also locate in context the understandings of Henry Williams and James Busby on the relationship between the first and second articles of te Tiriti. Te Wiremu and his contemporaries did not perceive a tension between British sovereignty and Māori chieftainship, yet most of the recent discussions on these articles have assumed a tension. This retrospective view is partly the result of post-1840 history, in which the Crown (or settler authorities) marginalized rangatiratanga.[342] Recent commentators have also imposed later nineteenth century understandings of sovereignty on 1840 discussions, which has lead to the view that te Tiriti was inadequately translated by Williams. These and other issues will be considered later in this chapter.

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[341] Williams, 'Early Recollections', [nd], cited in Carleton, *The Life of Henry Williams*, vol 2, p 12.
[342] The most obvious marginalization occurred after 1860, once the settler General Assembly took over responsibility for Native affairs.

Pathways to te Tiriti, c 1837-1840

Busby's Protectorate and Hobson's Factories

Chapter one concluded with Busby's protectorate plan for New Zealand.[343] This plan envisaged a formal protectorate, established by treaty with te Wakaminenga (the Confederation). It involved a British official proposing laws for the adoption of the rangatira Congress, a Māori police force supported by British military muscle, an embryonic Māori jury system, rangatira as head officials of the central government in their rohe (district), and multiple subsidiary features (including schools and newspapers).[344]

Governor Bourke dismissed Busby's scheme. He supported Captain William Hobson's 'factory' proposal, formulated after Hobson's visit to New Zealand on HMS *Rattlesnake*.[345] Hobson articulated his remedy for New Zealand's alleged lawlessness in a despatch to Bourke of 8 August 1837.[346] His ideas originated in his naval experience in India. Hobson recommended the establishment of 'Factories' at the Bay of Islands, Hokianga, Cloudy Bay 'and in other places as the occupation of British Subjects proceeds; [to ensure that] a sufficient restraint could be constitutionally imposed on the unctuous Whites without exciting the jealousy of the New Zealander or any other Power'.[347] Hobson was aware of how other nations might view Britain's intervention. He proposed that:

> Sections of land be purchased within the influence of British Jurisdiction as dependencies of [NSW]…
>
> The Heads of Factories should be Magistrates, and the Chief Factor should, in addition be accredited to the United Chiefs of New Zealand as a political agent

[343] As outlined in his despatch No 112 of 16 June 1837.
[344] See above.
[345] See chapter one.
[346] Hobson to Bourke, 8 Aug 1837, encl in Bourke to Glenelg, 9 Sept 1837, No 86, CO 209/2, ATL, pp 30-37a.
[347] Ibid, p 35a.

> and consul. All communication with the British Government should take place through the Chief Factor…
>
> All British Subjects should be required to register themselves and their landed property at the Factories…
>
> Two or More of the most respectable British Residents nearest each Station should hold Commissions of the Peace to assist the Factors.
>
> Prisons should be constructed within the factories, and legally proclaimed in [NSW]…
>
> A Treaty should be concluded with the New Zealand Chiefs for the recognition of the British Factories and the protection of British Subjects and property.[348]

Registration fees, harbour dues and import duties could finance the Factories. Settler support would follow protection of their property. An Act of Parliament could extend the jurisdiction of NSW. Such Factories may 'be the means of introducing amongst the Natives a System of Civil Government . . .' It will also ensure that British subjects 'become powerful by concentration'.[349]

Governor Bourke accepted the thrust of Hobson's Factory proposal.[350] He contrasted it with Busby's 16 June 1837 protectorate proposal:

> Mr Busby recommends that Great Britain should undertake the *protection* of New Zealand, and for this purpose should maintain British troops on the Islands. But, though this undertaking should be commenced with the greatest good faith and purest intentions, it would be open to misinterpretation; and, in a remote country where it is hardly to be expected the law would be very effectively administered, it might be eventually perverted by British subjects to selfish purposes.

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[348] Ibid, p 36-36a.
[349] Ibid, p 37a.
[350] Bourke to Glenelg, 9 Sept 1837, No 85, CO 209/2, pp 24-28a (see also HRA 1/19, pp 84-6). Bourke was evidently looking to replace Busby at this time, but it did not happen, p 26.

Bourke thought Busby's protectorate proposal was 'not without virtue', but was not easily reconciled with Hobson's observations. Bourke believed that a protectorate would require greater military support than Factories.[351]

Both proposals contained similar elements: a 'Chief Factor' or 'Resident'; courts of justice; and shipping and import duties to fund the government administration. Both schemes were to be established on the basis of treaties with Māori. Both were concerned with the development of civil government among Māori. Their core conceptions, though, differed markedly. Hobson's factories were an attempt to limit British jurisdiction geographically, while Busby envisaged a country-wide protectorate jurisdiction. In keeping with its comprehensive reach, Busby's plan also contained many more ways to incorporate Māori within the new regime. It was designed to instruct Māori in the arts of civil government, by the use of the central Congress, rangatira appointees in the localities, and embryonic Māori 'juries'.

The expansive scope of Busby's scheme made it less palatable to NSW and London in 1837-38. It was comprehensive and reasonably detailed, but its application left questions unanswered. The use of a military force Busby believed was necessary to maintain a pan-hapū order. However Bourke, justifiably, believed this might provoke Māori opposition. There was also the matter of finding and financing such a force. Bourke believed the military commitment would be greater for the protectorate than for the factories.

For his part, Busby believed Hobson's scheme was manifestly 'impracticable'. Hobson, he argued, had visited New Zealand for less than four weeks, when he had been there for four years.[352] Although not without its defects, his protectorate at least recognised that law and order

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[351] Ibid, p 27.

[352] Busby to Gipps, 30 Nov 1838, CO 209/2, pp 24-28a. Governor Gipps succeeded Bourke in NSW. In this despatch Busby defended himself against Bourke's criticism of his official conduct in Parliamentary Papers dated 2 Sept 1835 and 7 Feb 1838 that had only just arrived in New Zealand. The former referred to the 1834 Harriet incident in Taranaki, which was unfair since Busby was not involved (see Bourke to T Spring Rice, 6 Dec 1834, *BPP* 1835 (585), p 6, IUP, vol 3, p 14). Busby cited Bourke's failure to take up his protectorate proposal as evidence that Bourke did not treat him with the confidence and respect he deserved. See also Busby to Col Sec, 8 Mar 1839, No 141, pp 297-298, in which stated 'that further injury [to New Zealand] was likely to result from the entertaining of unpractical[sic] projects, such as that suggested by Captain Hobson'.

was as much the result of Māori activity as British.[353] It also purported to found a new civil government on Māori rangatiratanga (Congress), however much this rangatiratanga might be subject to the direction of a British Officer. Hobson's Indian experience must have taught him the difficulty of confining British authority to the geographical area of the factories. Once established, it would inevitably expand beyond these jurisdictional limits, especially as territory was purchased outside the nominal factory area.[354] Britain also had to consider the rights of foreign nationals in unceded areas. It became evident, on further reflection, that it would be difficult to 'ring-fence' British jurisdiction geographically within Aotearoa.[355]

The New Zealand Association and the Mission Societies

The Mission Societies still wished to prevent the large scale European settlement of New Zealand, with British authority extending only as far as absolutely necessary. They wished to create a civilized Christian New Zealand, without competition from settlers. Dandeson Coates, Lay Secretary of the CMS London, wrote to Glenelg in early 1838 arguing that the New Zealand Association 1837 plans would ruin New Zealand.[356] Busby's 16 June 1837 protectorate report had confirmed this, he argued. New Zealand was a special case, requiring 'some departure from the strict letter of the law of nations'. He saw British authority as a necessary guarantor of 'native sovereignty and independence'. Coates recommended a 'Court of Judicature' be established in New Zealand, available to both Europeans and Māori.[357] Cession of a 'small portion' of land might be necessary on which to erect court buildings. This cession should be 'absolutely exclusive of colonization'. Coates opposed all species of colonization, including the Association's proposals for private (though Government-authorised) colonization.[358] Colonization, to Coates, meant British settlers moving to New Zealand with a British colonial administration (whether or not it was exercised by a chartered company).

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[353] The 1831 letter from rangatira to William IV had sought protection against both British subjects and 'neighbouring tribes', cited in Stephen memo, 16 Nov 1839, CO 209/5, p 51.
[354] See P J Marshall, 'The British in Asia: Trade to Dominion, 1700-1765', p 506.
[355] Hobson, in early 1839, acknowledged the imperfections of his factory system, see below.
[356] Coates to Glenelg, 3 Jan 1838, (Private), CO 209/3, pp 127-129a.
[357] Ibid, p 128.
[358] Ibid, p 129.

Coates supported Busby's native police force, under the jurisdiction of Māori rangatira.[359] He thought that the way Busby dealt with the theft of Captain Wright's property was a good example of this. Busby had obtained from a Committee of the Congress a warrant for the arrest and deportment to NSW of the Europeans charged with the crime.[360] However Coates believed Busby's picture of the threatened extermination of Māori was 'exceedingly overcharged'. Other parts of Busby's proposal he criticised as too complicated and intrusive.[361]

Rev John Beecham, Secretary of the Wesleyan Missionary Society, also lobbied Glenelg to prevent colonization. If colonization became necessary then it must be directly Government controlled.[362] In a 67 page tract presented to Glenelg he critiqued the New Zealand Association plans.[363] Despite protestations to the contrary, Beecham argued, the plans depended upon buying Māori land cheaply, or for 'little more than a nominal consideration'.[364] While the Association would appoint a Protector of Aborigines, it would claim unoccupied Māori land as wasteland (as in South Australia). The question then became: 'what can the Protector do?'[365] Beecham concluded that Association unwillingness to pay 'more than nominal' consideration for Māori land, its 'Quixotic' means of civilising Māori (for example, by introducing feudal recognition of chiefly powers), and the hollow promise of protection, all made its Plan unworthy of the Government's support.[366]

In his major November 1837 tract to Glenelg, Coates objected to the Association's plans on somewhat different grounds from Beecham. Of all metropolitan defenders of Māori interests, Coates took the lead in advocating Māori 'sovereignty' and 'independence'. In this 1837 pamphlet, he pointedly critiqued the idea of the Association obtaining 'cessions' of 'sovereignty' and 'unoccupied lands' from Māori.[367] He stated: 'It is a fact, fully established by the intercourse of the Missionaries with the Natives, that extreme jealousy is entertained by them of being

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[359] Ibid, p 129. See text at n 185 above.
[360] See Busby to Col Sec, 3 Jul 1837, No 113, pp 263-265.
[361] Coates to Glenelg, 3 Jan 1838, p 129.
[362] Beecham to Glenelg, 26 Jan 1838, CO 209/3, pp 205-206.
[363] J Beecham, 'Colonization: being remarks on Colonization in General with an examination of the proposals of the [New Zealand] Association . . . [Jan]1838', CO 209/3, pp 209-242.
[364] Ibid, pp 223a-224a.
[365] Ibid, pp 235-235a.
[366] Ibid, pp 240a-241.
[367] Coates, *The Principles, Objects, and Plan of the New-Zealand Association Examined*, p 13.

deprived of their independence and sovereignty, by their intercourse with White People'.[368] A necessary precondition of such a plan of acquiring territory and sovereignty would require conveying the practical consequences of these cessions clearly to the Natives, said Coates. He doubted that Māori could understand this, such was their 'state of barbarism'. He argued that treaties in English or which attempted to convey English concepts in the Native language, because of its 'rudeness and poverty', would be difficult for the Natives to comprehend.[369] The Aborigines Committee Report (1837) made similar recommendations against treaties with native peoples. The fact that Europeans dictated the terms of colonial treaties meant Aborigines were in no position to negotiate terms as willing and witting parties.[370]

Coates critiqued the powers requested by the Association by reference to the expansion of the British Empire in India. Coates argued that the Association wanted the power to acquire 'cessions of territory' until they had bought up or conquered the whole of New Zealand, just as the East India Company had conquered 'Hindostan' (India).[371]

Colonization, whether by charter or by direct Crown action, would surely lead to conflict and disaster, argued Coates. Māori would inevitably resist colonization: 'Of great physical and intellectual powers – fierce, uncontrolled, and ungovernable – proud of his rights and independence, and prompt to avenge the infringement or supposed infringement of either'.[372] Coates understood that any attempt to limit the scope of colonization would encounter difficulties.

The issue of territorial scope was one of two key issues upon which Glenelg's offer of a Government charter to the New Zealand Association floundered. One of the charter's proposed

[368] Ibid, pp 16-17.
[369] Ibid, p 17.
[370] The full quote from the Aborigines Report, p 121, read: 'As a general rule, however, it is inexpedient that treaties should be frequently entered into between the local governments and the tribes in their vicinity. Compacts between parties negotiating on terms of such entire disparity are rather the preparatives and the apology for disputes than securities for peace: as often as the resentment or the cupidity of the more powerful body may be excited, a ready pretext for complaint will be found in the ambiguity of the language in which their agreements must be drawn up, and in the superior sagacity which the Europeans will exercise in framing, in interpreting, and in evading them. The safety and welfare of an uncivilized race require that their relations with their more cultivated neighbours should be diminished rather than multiplied'.
[371] Coates, *The Principles, Objects, and Plan of the New-Zealand Association Examined*, p 18.
[372] Ibid, pp 19-20.

conditions was the limitation of colonization's geographical extent. The Association rejected this. It wanted the authority to acquire any and all New Zealand territory. The requirement for a capital fund to be obtained upfront from Association members was also rejected. The charter offer was withdrawn when the Colonial Office accepted an Association proposal to bring a bill before parliament.[373]

The Government, however, opposed the Association's bill, and Parliament rejected it.[374] In the Government's view, the bill did not provide against injustice to both Māori and settler.[375] The bill empowered Commissioners (including Lord Durham, Lord Petre, W B Baring, W Molesworth, and S Hinds) to enter into treaties with Māori for the cession of both 'sovereign rights' and lands. Such treaties were to be conditional on 'the free will and full consent' of the native sellers. Protectors of aborigines were to be appointed and all treaties were to be made in their presence. Native reserves were to be created within British settlements to enable Māori to share in the advantages of civilized life.[376] The inclusion of these elements, clothed in the language of consent, protection, and civilization, was not enough to convince Glenelg and the Government. This phraseology does demonstrate, however, the dominance of civilizational language and humanitarian sentiment in official circles.[377] By the mid 1840s, when New Zealand Company influence had increased and humanitarian Evangelical influence had waned, this rhetoric changed. Company supporters referred then to the Treaty as 'a device to amuse savages'. In the 1830s it would not have been possible to dismiss treaties with Māori in this way. Busby, Hobson, Stephen, and Glenelg all considered treaties a legitimate way of obtaining Māori

[373] Adams, *Fatal Necessity*, p 113. Glenelg's offer of a Crown charter is contained in Glenelg to Durham, 29 Dec 1837 [printed], CO 209/2, pp 410-410a. The rejection was communicated immediately in Durham to Glenelg, 30 Dec 1837, CO 209/2, pp 434-439. Hobson's factory proposal arrived in London in February 1838, hence the geographical limitation was derived by Glenelg from elsewhere, see Adams, *Fatal Necessity*, p 123.
[374] By 92 votes to 32, see M S R Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington: Victoria University Press, 2008), p 46.
[375] Adams, *Fatal Necessity*, p 120.
[376] [NZAssn] 'Bill for the Provisional Govt of British Settlements in the Islands of New Zealand', 1 June 1838 [printed], CO 209/3, pp 549-561a.
[377] This language and sentiment was so dominant that the New Zealand Association Committee felt compelled to resolve, undoubtedly as a sop to Parliamentary and official concerns: 'That notwithstanding the temporary failure of their application to Parliament this Assn are determined to persevere in their efforts for assuring to the Inhabitants of New Zealand the blessings of Christianity and Civilization and to this Country the advantages of a well regulated system of Colonization', GS Evans (Sec, NZAssn) to Glenelg, 31 Aug 1838, CO 209/3, p 294.

agreement or consent to British intervention. Ironically, the House of Commons Aborigines Committee did not.[378]

Other Proposals for British Intervention

The character of that intervention remained the focus of debate in 1838 and 1839. A number of other proposals were submitted to the Colonial Office in 1838-9, besides those of Busby, Hobson, the New Zealand Association, and the mission societies. Colonel Robert Torrens, for example, one of the key South Australian Commissioners (and a member of the 1826 New Zealand Company), lobbied the Colonial Office in late 1838 with a proposal to establish a 'regular Government' in New Zealand. This plan utilized the Confederation and Congress rather than cessions of territory and sovereignty from rangatira.[379]

New Zealand Association interests tried another tack: utilising 'The New Zealand Company of 1826 (to whom the Govt of the day promised a charter of incorporation)'.[380] On its face, this earlier company involved a different set of names, but the appearance of George Lyall and Lord Durham, both proposed Commissioners in the failed 1838 Association bill, marked this out as a related body. Robert Torrens was also a member of the 1826 company. Torrens' 1838 proposal also wished to establish a 'regular form of government' in New Zealand. Confusingly, this proposal reintroduced cessions of territory from native chiefs. There was also no mention of the Confederation or Congress as forming part of this government.[381] James Stephen, sensing these inconsistencies, suggested to Glenelg that the various parties involved in these proposals needed to formulate 'some one scheme' for the Government's consideration.[382]

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[378] Perhaps it could be argued that Stephen and Glenelg, at least, ultimately conceded the necessity of a treaty with Māori as the only just way to effect annexation.
[379] Col Robert Torrens to Stephen, nd (rec'd 7 Nov 1838), CO 209/3, pp 297-312. This plan utilized the Confederation and Congress rather than cessions of territory and sovereignty from rangatira. Torrens was father of the man who devised the 'Torrens System' of land titles in New Zealand and throughout the British Empire.
[380] George Lyall to CO, 14 Dec 1838, CO 209/3, pp 313-316.
[381] Lyall to Sir George Grey, 28 Dec 1838, CO 209/3, pp 317-321a. Torrens later denied any allegiance to the NZ Company, see Torrens to Normanby, 29 May 1839, CO 209/5, pp 371-374.
[382] Ibid, p 321a (Stephen minute).

G Fife Angas, another South Australia 'Founder',[383] weighed into the New Zealand question. He was alarmed at information that the French were considering appointing de Thierry French Consul in New Zealand. Angus suggested that the Government adopt a Factory system to thwart suspected French designs. He recommended that 'a contract could be entered into with the Chiefs through the agency of a special officer appointed . . . to incorporate their native country with[in] the British Empire…'[384] This appeared to be a further variation on Hobson's and Torrens' proposals.

Baron de Thierry continued to appear in communications of the period 1837-40. Referring probably to the Angas correspondence, Stephen wrote to the Foreign Office that Glenelg had been reliably informed that the French Govt were 'about to nominate [de Thierry] as their Consul [in New Zealand]'. Glenelg was 'fully aware', continued Stephen, 'of the difficulty of interfering with a Foreign Govt in the selection of its own Agent', but still considered it proper for the Foreign Office to remonstrate with France against the appointment of someone 'who has been so constant in his attempts to assume undue authority'.[385] In a despatch of October 1837 Bourke informed Busby that he had declined to enter into correspondence with de Thierry. Busby replied that de Thierry had claimed a retinue of 60-70 'mechanics and labourers', but arrived in Hokianga with only four people. Hokianga Māori had confined him to two small pieces of land.[386] Bourke's successor, Governor Gipps, adopted the same policy of declining to engage with de Thierry.[387] Busby followed suit. He ignored de Thierry's half-yearly report from Hokianga in mid-1838. This prompted de Thierry to write direct to Gipps. De Thierry believed the frequent references to him in the Lords New Zealand Committee evidence misconstrued his position on sovereignty. He would never assert his own sovereignty in conflict with either Britain, or in opposition to 'the New Zealanders themselves'. If Britain established a colony, he believed he should be permitted 'to act the part of a Parent to the Aborigines of this Country . .

[383] And father of painter, G French Angas.
[384] G Fife Angas to Glenelg, 20 Dec 1838, CO 209/3, pp 348-349. Stephen minuted the file to Sir George Grey: 'This is another application for a New Zealand Charter. The Writer is a Gentleman of very high character and has for some time past been well known at this office. Will you take the trouble to dictate the terms of the answer to him[?]', p 349a.
[385] Stephen to Backhouse, 29 Dec 1838, (draft), CO 209/3, pp 117-119a.
[386] Busby to Col Sec, 16 Jan 1838, No 120, pp 268-269.
[387] H W Parker (Gov's Private Sec) to de Thierry, 16 Apr 1839, CO 209/4, p 18.

.'.[388] The 'Decree' accompanying his letter to Gipps, dated 7 March 1839, announced his intention to act as a Protector, to ensure that Māori retained sufficient land in trust for their subsistence.[389] De Thierry was an important figure before he arrived in New Zealand. After that, as Busby's reports illustrate, he probably deserved the ridicule heaped on him.

Government Views, 1839

Hobson's version of limited British intervention dominated British official thinking from 1838 until late 1839. At the end of December 1838, the British Government offered Hobson the position of Consul in New Zealand.[390] Prior to accepting this position on 14 February 1839 he corresponded with the Colonial Office concerning its responsibilities.[391] Based on official correspondence provided to him (probably mainly a selection of Bourke and Busby despatches) he stated: 'I am now more than ever impressed with the absolute necessity for her Majesty's Govt adopting speedily some measures for the protection both of the Aborigines, and of the British subjects' in New Zealand. He endorsed Angas's suggestion "that the Chiefs might be induced to incorporate their Native Country with[in] the British Empire", as 'consummation' of a Factory system.[392] Hobson stated that his 1837 Factory proposal was 'the only measure short of the actual assumption of Sovereignty by Great Britain calculated to afford protection'.[393] He acknowledged its several imperfections: first, it still left New Zealand vulnerable to intervention of foreign powers; secondly, foreign nationals could create difficulties between British subjects and Māori; and thirdly, British subjects would continue to hold 'vast tracts of land…without recognized titles…creating confusion and strife'.[394] Hobson sought to remedy these imperfections. He recommended that the Superintendent (or Chief Factor of the 1837 proposal) should 'form alliances with friendly tribes, or to act in opposition to those which may be hostile'. The Superintendent should also have jurisdiction over British subjects throughout New

[388] De Thierry to Gipps, 6 Mar 1839, CO 209/4, pp 14-15.
[389] De Thierry 'Decree', 7 Mar 1839, CO 209/4, pp 16-17b. The de Thierry letter to Gipps of 6 Mar 1839 and the 'Decree' of 7 Mar 1839 were forwarded to London, in Gipps to Glenelg, 20 Apr 1839, No 73, CO 209/4, pp 12-18.
[390] Palmer, *Treaty of Waitangi*, p 47.
[391] Hobson to Glenelg, 21 Jan 1839, CO 209/4, pp 87-93 .
[392] Ibid, p 87 (the Angus reference is to G F Angas to Glenelg, 20 Dec 1838, above at n 384).
[393] Ibid, p 88.
[394] Ibid, p 93.

Zealand.[395] Hobson wanted Parliamentary authority to raise a militia of British subjects, and to have a mixed (Māori-Pākehā) police force. A naval vessel should also be at his disposal.[396]

This was a significantly beefed-up version of the 1837 Factory proposal. In effect, it introduced the police and military force recommendations of Busby's protectorate proposal. Reading between the lines, these forces would have "roving commissions" over the entire country, especially in respect of British subjects, even if outside the ceded factory territories. Unlike Busby's proposal, Hobson now wanted authorization to ally with friendly tribes against unfriendly ones. This was not unlike how the East India Company had operated in India. These recommendations would not have found favour in 1837. In 1839 they indicated an escalation in the scale of the proposed intervention. Hobson even suggested that the factory system could lead to complete British paramountcy. Britain should not be deterred, he exhorted, from extending 'to that highly gifted land the blessings of civilization and liberty, and the protection of English Law, by assuming the Sovereignty of the whole Country, and by transplanting to its Shores, the Nucleus of a moral and industrious population'.[397]

Hobson's phraseology was designed to win official support. It drew on common assumptions concerning the superiority of British civilization, in which civil government protected 'liberty' and encouraged commerce. Viewed in this light British sovereignty could only be a good thing. But if Hobson was also suggesting large scale British settlement,[398] Glenelg was not listening. In February Glenelg's minute to Cabinet suggested he was still attempting a CMS Coatesian version of Government intervention:[399]

> The plan which I propose is not one for the encouragement of an extended system of Colonization, but for the establishment of a regular form of Govt, urgently demanded by existing circumstances.

[395] Ibid, pp 89a-90.
[396] Ibid, pp 90a-91.
[397] Ibid, p 93.
[398] He speaks of the 'the tide of Emigration which had already begun to flow' in 1837, ibid, p 92a.
[399] Glenelg Minute, 12 Feb 1839, CO 209/4, pp 191-201a.

> For this purpose it is proposed to obtain by negotiation and Cession from the Chiefs, the Sovereignty for the Queen of certain defined portion or portions of Land . . . where the British are already settled.[400]

Draft instructions of the Colonial Office to Hobson under Glenelg's leadership revealed this bias against large scale colonization and for limited and defined cessions of territorial sovereignty (or factories). An initial draft recommended that a Crown agent should negotiate with Chiefs a cession of Sovereignty 'on fair terms' for such part of New Zealand 'best adapted for the proposed Colony'. A Crown agent should become 'Governor of the Colony when so acquired'. The Crown should ensure 'the protection of the Aborigines by every method which can be devised for that end'. The Crown was to assume direct control of the colony, in contrast to South Australia where too much power was left to local Commissioners. Parliament should legislate to ensure colonial Courts had jurisdiction throughout New Zealand, that is, in the unceded, as well as in the ceded, areas. Within this Crown colony government a charter of incorporation was to be granted to the New Zealand Company (being a remodelled New Zealand Association). The Company would raise loans for public purposes on the security of local revenues, establish banks, dispose of, or on-sell, public lands and apply the proceeds to fund further emigration.[401]

A second set of draft instructions anticipated Normanby's final instructions, which suggested a qualified sovereignty only in Māori rangatira and hapū. The sovereignty of Māori in such an uncivilized society could not support 'a lawful dominion in that full and absolute sense . . . of the more civilized parts of the World', again reflecting stadial conceptions that required settled cultivation and use. Yet, this draft continued, rangatira must still consent to the extension of British sovereignty, 'and a title to that dominion can be legitimately acquired . . . [only by] voluntary cession of it by the Chiefs in whom it is at present vested'. The limitation of British sovereignty, in Glenelg's minute, to 'certain defined portion or portions of Land' was expressed in this second draft to be a matter of practicality or expediency. However, the draft did clearly instruct Hobson to ascertain which were the predominantly British areas, and then acquire the 'local Sovereignty' by cession from the relevant rangatira. In addition, Hobson was to exercise

[400] Ibid, p 191a. Glenelg did not mention the Confederation/ te Wakaminenga in his Minute.
[401] [First] Draft instructions, 21 Jan 1839, CO 209/4, pp 193a-201a.

extraterritorial jurisdiction in unceded areas in his capacity as British Consul. Hence, in the ceded areas he would be Governor (or Lieutenant-Governor) and in the unceded he would remain Consul, reflecting the quasi-diplomatic character of this title. He would however be a "foreign" representative with military and civil power close at hand.[402]

A longer draft referred to the disavowal of annexation made by the 1837 Aborigines Report.[403] However, principles of 'humanity and justice appear now to require a direct intervention in the internal affairs of New Zealand'.[404] Busby had also argued that 'humanity and justice' dictated the need for interference by way of protectorate.[405] The author of the draft instructions (probably Stephen) implicitly acknowledged departure from the 1837 Report. This was explicitly acknowledged in Normanby's final instructions.[406] The 'independent National character' of Māori hapū was limited by the absence of any 'union' between them or 'Civil polity' which collectively governed them. 'With men in such a state of Society no international relations can be formed', the draft went on. Yet, it was 'right that their title to be regarded as one independent Community should be observed'. Britain 'disclaim[ed] any pretension to regard their lands as vacant Territory'.[407] This passage made explicit the stadial conception that the possession of national civil government was the foundation of true 'international' status. Busby expressed this same view, as did the Normanby instructions.[408] However, it seems that more on grounds of moral principle, with humanitarians and Evangelicals watching on, Britain was prepared to acknowledge the legal standing of the Māori community for the purpose of entering into an 'international' treaty.

The humanitarian and Evangelical lobby advocated the acknowledgement of Māori nationality, independence and sovereignty. Busby too had been attempting to construct this nationality from its component parts – hapū and iwi. Coates and the Aborigines Report, composed largely by the Evangelical Buxton, advocated the most unequivocal recognition of Māori sovereignty. As

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[402] [Second] Draft instructions, 24 Jan 1839, CO 209/4, pp 203-220a. This may have been the draft attached to Glenelg's 12 Feb 1839 Minute.
[403] [Third] Draft instructs, nd, CO 209/4, pp 221-242a.
[404] Ibid, p 222.
[405] See text at n 191.
[406] Palmer, *Treaty of Waitangi*, p 49.
[407] [Third] Draft instructs, pp 226-227.
[408] See below paragraphs for relevant citations of Normanby instructions.

expressed in chapter two, Evangelicals saw the acknowledgement of Māori sovereignty, or independence, as a scriptural and moral imperative. God had made people-groups and man must therefore respect their independence. This national independence was not based on the existence of a civil polity or institutions of government, or even on a formal declaration of independence. Rather, it existed in the God-given nature of things.[409] And it was the Evangelical Glenelg who had acknowledged the Declaration, although he seems to have been more concerned about it protecting Māori from foreign spoliation. This practical concern for Māori welfare was as much the concern of Evangelicals in England and New Zealand as was any acknowledgement of nationality.[410]

The conceptions of Māori independence in the Aborigines Report and the Normanby instructions differed. The 1837 Report founded independence in scriptural and moral imperatives, whereas the Normanby instructions and earlier drafts of these founded it in stadial conceptions of cultivation and the existence of civil government. The Aborigines Report did acknowledge that the lack of governing institutions, including a military force and courts capable of controlling crime, made New Zealand independence weak. But these practical limitations were not expressed to limit national independence as a question of 'political rights'.[411] In fact, the Normanby instructions paraphrased the Report as acknowledging in Māori a 'title to the soil and to the sovereignty of New Zealand' that was 'indisputable' and which had been 'solemnly recognized by the British Government'.[412] However, just as the earlier draft instructions (just outlined) had done, Normanby later qualified the acknowledgment of New Zealand 'as a sovereign and independent state' on stadial grounds:

> so far at least 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 deliberate in concert.[413]

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[409] See above.
[410] See above. Glenelg never unequivocally acknowledged Māori independence or sovereignty as such. He may well have felt constrained by his official position from doing so.
[411] Aborigines Report, p 128.
[412] Palmer, *Treaty of Waitangi*, p 49.
[413] Ibid, p 49. This is quoted by Gipps in his address to the NSW Legislative Council on 9 July 1840. CO 209/6, p 280a.

As the earlier draft had expressed it, the Māori community had no 'Civil polity' to unite it. Hence the surrender of their 'national independence', shaky at best, would be a little sacrifice.[414] Having previously admitted Māori rights, the Queen could only acquire any New Zealand dominion or sovereignty with Māori consent.[415] This seems a concession to moral principle, to uphold the faith of the Crown's previous acknowledgement, rather than a full admission of a fundamental political or legal right, for which the stadial basis was absent. By contrast, Coates and his colleagues admitted no such civilizational (stadial) barriers. Coates even argued explicitly that 'the New Zealanders, though uncivilized, are, strictly speaking, an Independent State, and [should] be dealt with accordingly'.[416] Whether or not Māori possessed civilization did not determine whether they possessed rights, including the right not to be subject to a sovereignty or government not of their own choosing. The basis of rights was, fundamentally, not the condition or state of their society, but the fact that they were as much creatures of God as were the English. This vision of a universal humanity was the substance of Evangelical concern for Māori and indigenous peoples generally.

The Aborigines Report reluctantly conceded the necessity of a narrowly defined British intervention:

> Your Committee deprecate any further interference with the internal affairs of the South Sea Islands [New Zealand and Pacific], except as they would authorize the consular agents to frame, and the King in council to establish, all such special rules as may be necessary for maintaining peace and order amongst British subjects resident in or resorting to the island.[417]

The Report recommended the appointment of Consuls with jurisdiction to try British subjects 'on the spot' or, in serious cases, transport them for full trial at the nearest fully constituted court.[418]

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[414] Ibid, p 50.
[415] Ibid, p 49.
[416] Coates, *The Principles, Objects, and Plan of the New-Zealand Association Examined*, pp 28-29. Coates also admitted the difficulty that Māori did not comprehend the principles of 'inter-national law' or 'the obligations which that law imposes on Independent States, in their intercourse with each other', but this did not diminish the reality that New Zealand was still an Independent State.
[417] Aborigines Report, p 130.
[418] Ibid, 129.

The Consul's jurisdiction was not expressed as requiring any cession of territorial sovereignty.[419] By contrast, Normanby instructed Hobson 'to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any parts of those islands which they may be willing to place under Her Majesty's dominion'.[420]

Normanby's instructions were the first to clearly outline a plan of total territorial sovereignty. The last (or third) set of the Glenelg instructions had explicitly stated that a cession of the entire country 'would be a needless encroachment upon the rights of the Aborigines', and would risk complications with foreign powers (an interesting inversion of the thinking that saw issues with confined factory-based sovereignty). Instead, Hobson should acquire only areas occupied by British settlers, or where 'they assert a proprietary right . . .'[421] This draft also stated that the British Government would not encourage Emigration. Its current policy was to regulate existing settlement, and to protect Māori from its adverse effects.[422]

James Stephen, who was Permanent Undersecretary at the Colonial Office from 1836 to 1847, was perhaps the key policy maker for New Zealand. He was also an Evangelical, son of James Stephen, the close accomplice of William Wilberforce in the fight to abolish the slave trade. Stephen the son was mentored by Wilberforce. He also served on the CMS Committee for nine years (until 1822).[423] Some of Stephen's policy advice during his tenure as Colonial Undersecretary should be highlighted. After Glenelg resigned in February 1839, Stephen summarised the Government position: 'I hold the two Cardinal points to be kept in view in establishing a regular Colony in New Zealand are, first, the protection of the aborigines, and, secondly, the introduction among the Colonists of the principles of self Government…'. However, colonial self-government was not immediately to be granted as it might jeopardise Māori interests. The colony was to be established, under a Consul, in particular districts ceded in Sovereignty to the British Crown. Acquiring control of limited districts created difficulties in unceded areas, said Stephen. For the unceded areas he recommended 'the middle course of

[419] Ibid, p 130.
[420] Palmer, *Treaty of Waitangi*, p 50.
[421] [Third] Draft instructs, pp 230a-231a.
[422] Ibid, pp 241-242a. This would seem inconsistent with the earlier (first?) draft which proposed the NZ Company as the agent of planned immigration and land purchase and sale, although with other limitations on its powers.
[423] A G L Shaw, 'Sir James Stephen (1789-1859)', from http://www.oxforddnb.com (accessed October 2009).

obtaining from the Chiefs an agreement to place [such areas] under British protection'. This last point tacitly recognised the relevance of Busby's protectorate. Significantly, also, Stephen believed that the Colonial Office should give the New Zealand Association or Company a 'short and Conclusive' rejection of their request for Government support. The Government cannot support a Bill 'for the enlargement of Her Majesty's Dominions' introduced by anyone 'except the Ministers of the Crown'.[424] This referred to a draft bill transmitted with a letter from Hutt of the New Zealand Company a few days before.[425]

On 30 April 1839, Stephen minuted that Normanby could not condone the New Zealand Company proceeding. In a meeting with Hutt the day before, Normanby had been advised that a Company vessel, under Colonel Wakefield, was shortly to depart for New Zealand to establish a colony. A letter from Hutt the same day (29 April) was presumptuous enough to request British naval assistance and letters of introduction to the Australian Governors. Stephen maintained this meeting and letter was the first time Normanby had heard of these plans. Stephen's minute advised Normanby 'to obtain cession in Sovereignty [to] The British Crown of those parts of New Zealand which are or shall be occupied by HM's Subjects'. Parliament, he urged, should declare all lands purchased by the Company subject to Crown repurchase, and Normanby should decline all the requested assistance. The essence of this advice was communicated to Hutt by return. It included the statement that 'the parties concerned should be distinctly apprised, that H.M. Govt cannot recognize the authority of the [Company] Agents'.[426]

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[424] Stephen to Labouchere, 15 Mar 1839, CO 209/4, pp 326-331. He also summarised Glenelg's statement to Durham on 5 Feb 1838: 'a Colony should be formed on the model of the Old New England Constitutions, that is, on a Body Corporate with a joint stock . . . To this were added, various elaborate provisions for the defence of the Natives'.

[425] Hutt to Normanby, 12 Mar 1839, CO 209/4, pp 531-531a.

[426] Hutt to Normanby, 29 Apr 1839, Stephen minute, 30 April, CO to Hutt, 1 May 1839 (draft), CO 209/4, pp 532-549. The Colonial Office resistance to New Company plans continued throughout 1839. Stephen was at the forefront of this resistance. In October he wrote that he was convinced that the Company was trying to cover-up an 'Establishment by their own authority of a Conventional System of Govt in [New Zealand] '. In subsequent correspondence 'the Coy themselves virtually admit to have been [guilty of] an illegal usurpation of Royal Authority, Lord Durham being the leader in that measure ', Stephen to Vernon Smith, 24 Oct 1839, CO 209/4, pp 577-580. Although Durham was granted an interview, against Stephen's wishes, this was on condition that it be 'distinctly understood that I [Normanby] do not by doing so recognize in any manner the Assn . . . [nor] sanction the object for which this assn has been constituted', CO to Durham, 28 May 1839, (draft), CO 209/4, pp 562-562a.

Hobson accepted the Consulship of New Zealand on 14 February 1839.[427] The Crown issued Letters Patent on 15 June 1839, which extended the boundaries of NSW to include 'any territory which is or may be acquired in sovereignty by Her Majesty, Her Heirs or successors' in New Zealand. On 30 July Hobson was made Lieutenant-Governor 'in and over that part of Our Territory which is or may be acquired in Sovereignty in New Zealand'. On 13 August Hobson's appointment as Consul was confirmed and he departed England on 25 August 1839.[428]

One final piece of policy advice from Stephen is noteworthy. In a letter of 28 July 1839 to Vernon Smith, Stephen critiqued American case law on aboriginal nations, in particular *Johnson v M'Intosh* (1823). He considered British law in Canada more 'humane' than the Marshall jurisprudence. In Canada, land was first purchased from aborigines by the Crown. In America, Indians occupied the land 'on sufferance' as European states claimed title by right of discovery and conquest. He also distinguished Māori society from Indian society, stating the New Zealanders were agriculturalists rather than herdsmen. They had 'a settled form of Government' and had 'divided and appropriated the whole Territory amongst them'. In any event, Britain disavowed sovereignty in New Zealand. For these reasons, United States aboriginal law was not good British law.[429] Stephen's placement of Māori high on the civilizational scale was no doubt designed to appeal to stadial definitions of sovereignty and independence – though it did not qualify them for full international status. Yet Stephen's core assumption was incorporated in Normanby's final instructions, issued on 14 August 1839: since Māori exercised a tribal sovereignty (or government), they had legal standing to enter into a Treaty which granted sovereignty (or government) to the Crown.[430]

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[427] Palmer, *Treaty of Waitangi*, p 47.
[428] Ibid, p 48.
[429] Stephen to Vernon Smith, 28 Jul 1839, CO 209/4, pp 343-344.
[430] In a minute on Hobson's reports of 3-6 Feb 1840, Stephen wrote: '[Hobson's reports] . . . prove, if proof were wanting, how much wiser was the course taken of negotiating for a Cession of Sovereignty, than would have been the case of relying on the proceedings of Captain Cook, or the language of Vattel in opposition to our own Statute Book', Stephen to Vernon Smith, 9 Jul 1840, CO 209/6, p33a. Stephen, here, appears to be rejecting any British right to the sovereignty of New Zealand on the grounds of discovery ('Cpt Cook'), or on the basis of limited use and occupation of Māori , leaving Britain free to claim the unused portions ('Vattel'). New Zealand Company interests argued both of these positions.

Busby's View of the Confederation, 1839

In defending his official conduct and accomplishments to Glenelg, in February 1839,[431] Busby commented on te Wakaminenga. Busby rejected Bourke's charges that he had failed to win the confidence of the Chiefs or to accomplish any of the objects of Bourke's 13 April 1833 instructions. These instructions specified that conciliating the Chiefs was Busby's "most important duty". Busby claimed that he had 'entirely succeeded' in this object.[432] He paid particular attention to the accomplishment of the Confederation:

> The basis of a settled form of Govt has also been established by the Confederation of Chiefs on principles Sufficiently Comprehensive to embrace all the Tribes in the Islands. And though no overt acts of Govt or Legislation has[sic] proceeded from this union . . . it has not been without a beneficial effect of a negative character.

The Confederation still had the potential, argued Busby, to politically and governmentally unify the country. However, its purpose had been stymied by lack of resources:

> While, had Sir R Bourke complied with my urgent request [12 Mar 1836 des, No 89] to be enabled to visit and obtain the adhesion of other Tribes, it would have proved a but[buttress?] to the interference of any foreign power or the establishment of any other authority [18 Jun 1836 des, No 97] than what should emanate from itself [the Confederation] throughout the Islands.

He reiterated the key problem that had beset an effective Confederation government; the lack of authority, both from within the Confederation and from outside it. He explained that

> … in attempting to obtain the cooperation of the Chiefs in execution of any of the functions of a Govt, or to establish amongst them any system of Jurisprudence,

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[431] Busby to Glenelg, 25 Feb 1839, CO 209/4, pp 47-66.
[432] Ibid, pp 49a-50.

> there was no foundation on which I could proceed. The Native Chiefs possessed no authority, and they could not, therefore, impart to me what they did not possess. No one Tribe had acquired such a preponderating influence as to overawe the rest; nor could any Chief secure the assistance…to enable him to enforce the obedience either of his own Tribe, or of others beyond them…[433]

A Wakaminenga or Confederation force which was resisted would be bound to fail. Moreover, in New Zealand, 'all exertion of power is violence, and the only law that of the strong arm . . . [Māori] have not, in fact, acquired the ideas of authority and subordination'. Busby, consequently, had to exercise the greatest 'caution in bringing a [Confederation] power into action, which I had not the means to control'. He could have proclaimed a Code of Laws, but he could not enforce it.[434] Bourke, also, never provided him with police power, so he had no ability to bring wrongdoers to justice.[435]

Busby completed his appraisal of the Confederation's failure with some metaphysical or scriptural reflections:

> I was 'not able to make that straight which God made crooked'. Divine Providence has denied to this Country the blessings of Social Institutions, and the protection of established laws. The New Zealander is still the son of Ishmael, the 'wild man whose hand is against every man and every man's hand against him'; and he is likely so to continue till the race shall become extinct, unless some Civilized State should take them not only nationally, but individually, under its protection.
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> This My Lord is a truth which is now undisputed by the Missionaries and by all others [well enough informed to comment reliably on New Zealand].[436]

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[433] Ibid, p 50.
[434] Ibid, p 51.
[435] Ibid, p 59a.
[436] Ibid, pp 51a-52. Busby makes the same statement to Glenelg in despatch of 22 Feb 1839, pp 310-323.

Despite their influence, the missionaries 'will not restrain the wicked. Till human nature is changed the majority [of Māori]…will require the strong arm of the law…to make them respect the rights of their neighbours'.[437]

The Confederation's authority had not been entirely ineffective. In addition to the warrant Busby obtained from a Confederation committee for the arrest of Europeans (for the theft of Captain Wright's property), Busby appeared to utilize Confederation authority to execute a Hokianga 'slave'. The crime was murder of a European, Henry Biddle. Busby reported to NSW that Māori executed the 'slave' 'after as fair a trial as circumstances would admit of…on my application in the name of the Queen'. The executioner 'appointed by the Chiefs' shot him after a day-long public trial attended by both Māori and Pākehā. Busby instructed what appeared to be the all-Pākehā jury that a two-thirds majority would be sufficient to convict. An 8-9 year old boy was an accessory, but since he was not a 'slave', any attempt to try him 'would have roused the whole tribe to arms…'[438] The NSW Attorney General later protested Busby's failure to act in a manner that would make it clear that the sentence was an impartial one, unrelated to slavery. Busby rejected the inference that he allowed the execution of a man because he was a slave, not because he was a murderer. He declared that 'the safety of my Countrymen demanded the example which was made…' The new Governor, Sir George Gipps, needed 'to be aware that there exists neither law nor Government in any form in New Zealand… Justice is however essentially independent of Law… and that it was administered, perhaps for the first time in New Zealand… is a triumph of order which persons unacquainted with New Zealand, can ill appreciate…' Busby expostulated that the example set 'will do more to teach the New Zealanders the advantages arising from the regular administration of justice and to prepare them for its establishment, than a whole volume of Instructions and exhortations upon the subject'.[439] Busby's defensive assertion that 'justice' was different from 'law' was at least consistent with his view that there were no effective legal institutions in New Zealand. His resort to a jury and a Confederation executioner nonetheless showed Māori what 'civilized' justice looked like.

[437] Ibid, pp 52a-53.
[438] Busby to Col Sec, 28 May 1838, No 127, pp 280-282.
[439] Busby to Col Sec, 8 Nov 1838, No 135, pp 290-293.

The CMS in New Zealand

Having considered a number of pre-1840 proposals for British intervention in New Zealand, it remains to consider the views on this subject of Henry Williams and the CMS in New Zealand.

In late 1837, Sydney defence lawyers subpoena'd Henry Williams, Baker and Davis in the Captain Wright theft case. According to one account, Williams' evidence in Sydney helped to convict the accused, James Doyle.[440] Doyle was executed there in December 1837. Coates used this example to highlight deficiencies in the existing enforcement of the law.[441] Doyle and other Europeans were assisting Pomare in the fight with the Northern Alliance when they attacked and plundered Wright's property. The Sydney trial interrupted Williams' mission work for around three months.[442] These circumstances no doubt influenced Williams' view that greater British involvement in New Zealand was necessary.

Yet Williams was more concerned about large scale British colonization than a few rogue British subjects in the New Zealand. Within a month of his return from Sydney, Williams wrote to Coates expressing alarm at the New Zealand Association plans.[443] He presented the two options as British Government protection or the 'slavery' or 'extirpation' of Māori. He elaborated on these two themes:

> The European Settlers are making rapid advances and are beginning to hold out threats. Should any encouragement be given to the Association, thousands would immediately come and over-run the whole country and the natives must give way. The only protection I can propose is that the English Government should take charge of the Country as the Guardians of New Zealand and that the Chiefs should be incorporated into a general assembly under the guidance of certain Officers with an English Governor at their head,

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[440] Rogers, *Te Wiremu*, p 136.
[441] Coates to Glenelg, 23 July 1838, CO 209/3, p 166. According to Coates, a 'Native Chief of the District under the influence of Mr Busby' apprehended the offender.
[442] Rogers, *Te Wiremu*, p 136.
[443] Williams to Coates, 11 Jan 1838, (rec'd 24 Aug 1838), CMS/CN/0 101, reel 65. See same letter in H Carleton, *The Life of Henry Williams*, vol 1 (Auckland: Upton & Co, 1874), pp 231-232.

> and protected by a Military Force, which would be the only means of giving weight to any laws which might be established, and preserve that order and peace so much desired. The natives have many years since proposed that this should have been done and have repeated their desire from time to time.

Williams' proposal reflected the broad outlines of Busby's protectorate proposal. Congress, or an 'assembly' of rangatira, would act as a legislature under the direction of a British Resident or Governor. A military force would ensure that these laws were carried out.

George Clarke's 1 March 1838 letter, on behalf of the CMS Northern District Committee in New Zealand expanded on the concerns raised in Williams' letter.[444] Having considered the New Zealand Associations' tract the Committee recommended

> That the whole country be recd under the protection and guardian care of the British Government for a certain number of years – with a resident Governor & other officers with a Military Force, to support their authority and ensure obedience to all laws which may be enacted.
>
> That the Principle Chiefs of Tribes being regarded as members of Congress under the guidance of the Governor and Counsel [Executive Council?] who collectively shall enact all laws & by whose authority all offenders shall be punished.

This account clearly saw the 1835 Wakaminenga as the foundation of the proposed government. Like Williams' account, Clarke's appeared to grant Congress a little more influence in law making than under Busby's 1837 protectorate, in which rangatira would have (initially at least) almost no discretion in rejecting or adopting laws proposed by the Resident or Governor. Clarke's next paragraph combined the stadial language of civilizational growth with the missionary language of moral transformation:

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[444] Clarke (Corr Sec Northern Ctee) to Coates, 1 Mar 1838, encl in Williams to Coates, 4 June 1838, CMS/CN/0 101, reel 65. See same letter in Carleton, *The Life of Henry Williams*, vol 2, p 232.

> This mode of proceeding we consider the most salutary as a commencement and most likely to redeem this people from that degraded and immoral state in which they are. Their ideas will gradually expand & their condition daily improve. They will form a mutual support to each other a protection to those who do well & dread to evil doers and gradually rise in the scale of Nations. Foreigners will be then more circumspect in their conduct seeing that crime can be punished here as in other countries.

The Committee referred to 'numberless applications' by rangatira for a 'controlling power' to 'enforce order'. 'An attempt has been made to organise the Chiefs into a Parliament but nothing has yet been accomplished for want of power to enforce the laws they might make'. The 'New Zealanders', in their 'infant state', must be afforded 'relief and protection' in the formation of 'their Government'. Although a 'Free People' (a clear reference to the Declaration) governing may 'work their ruin' if it was not regulated by 'wisdom and care'.

A Committee letter of November 1838, also penned by Clarke, confirmed that their March 1838 letter (above) and their involvement in the 1837 [sic, 1836] settler petition 'ha[d] for their object the maintenance of the Sovereign rights of the New Zealanders [by] imploring Her Majesty's Government to extend its fostering care and become the guardians of this interesting people'.[445] Their March letter had mentioned this petition, which, the letter stated, had prayed 'the King and Parliament' for protection 'against the lawless band of Europeans residing on shore in this land'.[446] The October 1836 petition called for protection of the shipping and property interests of British subjects. It also appealed for intervention against 'the threatened usurpation of power over New Zealand by Baron Charles de Thierry'.[447] Williams and his colleagues generated the petition, although far more settlers and traders signed.[448] Williams wrote to his brother in law in England attaching a copy of the petition: 'It is high time that something be done to check the progress of iniquity committed by a lawless band daringly advancing in wickedness and outrage, under the assurance that "there is no law in New Zealand" '.[449]

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[445] Clarke to Coates, 16 Nov 1838, CMS/CN/0 101, reel 65.
[446] Clarke (Corr Sec Northern Ctee) to Coates, 1 Mar 1838.
[447] CO 209/2, pp 321-324a.
[448] There were 213 signees in total, including 24 CMS missionaries and teachers, and 5 WMS missionaries. See also Busby to Glenelg, 20 Apr 1837, CO 209/2, pp 318-319a.
[449] Williams to Marsh, 28 Feb 1837, cited in Rogers, *Te Wiremu*, p 131.

Summary of Schemes of British Intervention, c 1837-1840

British proposals for New Zealand altered dramatically between the Aborigines Report of early 1837 to Normanby's instructions of late 1839. Between the Report's recommendations of limited intervention, involving roving British criminal tribunals, to the Secretary of State's instructions to seek sovereignty over potentially the whole country, there were a range of different views. Busby's protectorate proposal wanted total British control, but still utilized the Confederation as a nominal national legislature. Hobson in 1837 proposed that British sovereignty should be confined to particular territories or 'factories' where British subjects were settled. In 1839 he suggested that total British sovereignty might be advantageous or necessary. Some of the Stephen-Glenelg draft instructions to Hobson suggested limited territorial sovereignty with protectorate arrangements in the unceded areas. Busby in 1837 wanted military and naval backing for a Māori Congress. Only in 1839 did Hobson admit the necessity of full military and naval support.

In 1839 Coates still wanted limited government intervention in the form of courts (perhaps by extending NSW authority), and condemned large scale colonization by settlers. Glenelg shared similar views. Meanwhile the New Zealand Association wanted a Crown charter which authorized the acquisition of full territorial rights to New Zealand (obtained by treaties with Māori chiefs). When this tack failed, the Association unsuccessfully sought Parliamentary approval. New Zealand Company vessels ultimately departed without official sanction in May 1839.

All of these schemes acknowledged, at least outwardly, the capacity of Māori to enter into treaties concerning land, factories, harbour dues, protectorates, or sovereignty spanning the entire country. This policy of deference to Māori independence was due both to humanitarian influence and imperial strategy. The first upheld Māori rights. The second saw treaties as a means to achieve British ends.

All parties employed similar language in their proposals: Māori would benefit by British protection or sovereignty or colonization, sometimes all three. The similarity of language masked more fundamental differences. Missionaries on the ground in New Zealand saw British intervention as a practical necessity, to protect Māori independence and property, and British property, from lawless Europeans and a French Catholic threat. Busby also sought protection for an embryonic Māori government, though the total effect of his proposals was to make Māori rangatira more subservient to British authority than perhaps the missionary proposals envisaged. New Zealand Association and Company interests envisaged a settler New Zealand in which Māori would be civilized by contact with their more advanced fellows. Similar language was employed to advance proposals with contrasting assumptions and goals.

Officials in London were at different times swayed by different interests. These different interests and conceptions converged in February 1840. The Treaty of Waitangi used certain words – sovereignty, rangatiratanga, protection, rights and privileges – but not all participants had the same understanding of these words or the same expectation of how the new relationship would work in practice. Although cloaked in similar language, policy advice and proposals differed wildly in the period 1836-1840. The language of te Tiriti (Māori and English texts) likewise clothed a range of views concerning the relationship between British Government and Māori Rangatiratanga. The next section explores how Williams and Busby understood this relationship.

Te Wiremu and te Tiriti o Waitangi

The focus of this section is on how Williams understood the nature and effect of te Tiriti. Appreciating how he conceived the relationship between the Crown's kāwanatanga and the chiefs' rangatiratanga under the Treaty will illuminate its meaning for him. Appreciating his conceptions of this core Treaty relationship will in turn illuminate why he chose certain words in his translation or interpretation of the English text into Māori. This section also casts a critical eye over Ruth Ross' influential argument that Williams' translation was inadequate, in particular that he should have used the word mana to convey the idea that sovereignty was to be ceded. At

the outset it is important to note how Williams' Evangelical Anglican understandings of law, government and church, shaped his understanding of te Tiriti.

The relationship of Rangatiratanga with Kāwanatanga

In the conception of Williams and his missionary colleagues, how would the Queen's or Governor's kāwanatanga interact with the chiefs' rangatiratanga, both in theory and practice? Williams' understanding has already been indicated in the discussion of Magna Charta in the previous chapter. It would have been impossible in 1840 to predict all the outworkings of this relationship. Alan Ward agrees that in February 1840 the relationship between kāwanatanga and rangatiratanga 'would have been considered [an issue] too remote and theoretical for practical discussion'.[450] To Williams, kāwanatanga was a national form of governance with enough civil muscle, and military muscle if necessary, to maintain internal 'peace and good order' and prevent foreign interference or invasion. It was primarily a civil authority for the regulation of property rights and the suppression and punishment of offences against the peace. Rangatiratanga on the other hand was traditional chiefly authority exercised in respect of hapū affairs, including land transactions. Rangatira would maintain order within the hapū and whanau according to Māori (and increasingly Christian) tikanga and laws.

Kāwanatanga: Pākehā and Māori?

The basic function of Kawantanga can be seen in the texts of the Treaty itself. The English text opened with the declaration of Her Majesty Victoria's 'Royal Favor' in respect of 'the Natives Chiefs and Tribes of New Zealand' (in the Māori text, 'i tana mahara ataw[h]ai ki nga Rangatira me Nga Hapū o Nu Tirani'). The Queen was 'anxious to protect their just Rights and Property', and 'secure to them the enjoyment of Peace and Good Order' (translated by Williams, 'i tana hiahia hoki kia tohungia [to preserve] ki a ratou o ratou rangatiratanga, me to ratou w[h]enua, a

[450] A Ward, *An Unsettled History: Treaty Claims in New Zealand Today* (Wellington: Bridget Williams Books, 1999), p 18.

kia mau tonu hoki te Rongo ki a ratou me te ata noho hoki'). The words following these statements clarified that she was also concerned about numbers of her own subjects coming into the country (in the Māori, 'he tokomaha ke nga tangata o tona iwi kua noho ki tenei whenua, a e haere mai nei').

For these reasons she had sent Hobson to 'treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole of any part of those islands', the objective being 'to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the Native population and to Her subjects' (preamble). Williams rendered these passages in a way that could not avoid the conclusion that Kāwanatanga was to apply to both Māori and Pākehā:

> Kia w[h]akaaetia e nga Rangatira Māori te Kawanatanga o te Kuini, ki nga wahi katoa o te w[h]enua nei me nga motu… (That the Government of the Queen may be agreed/recognised by the Chiefs over or concerning all the places of this land and the islands.[451])
>
> …kia w[h]akaritea te Kawanatanga, kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana. (…to arrange/establish the Government, to put a stop to the evil that is affecting the Maori people and the Pakeha people living without law.)

Other phrases in te Tiriti support this conclusion that all were to be encompassed by the Government's authority. Hobson was appointed to be a Governor for all the places of New Zealand, which Williams rendered 'hei Kawana mo nga wahi katoa o Nu Tirani'; at least, all those places that were ceded to the Queen (preamble). That cession (in article one), by the rangatira of the United Tribes (or Confederation) and all the other rangatira that had not joined te Wakaminenga was expressed: 'ka tuku rawa atu ki te Kuini of Ingarani ake tonu atu te Kawanatanga katoa o o ratou w[h]enua' (give up completely to the Queen of England forever the

[451] Words in brackets that appear like this, after citations of the Māori text and without inverted commas, indicate a translation/interpretation by the writer of this report.

entire Government of their lands). In other words, all who signed the Treaty were bringing their hapū territories and hapū within the authority of the Kāwanatanga. James Busby's circular, inviting rangatira to the 5 February 1840 hui, spoke of the arrival of Hobson, 'tetahi Rangatira ano…no te Kuini o Ingarani' (a Chief…from the Queen of England), who had come 'hei Kawana hoki mo tatou' (to be a Governor for all of us).[452] The personal pronoun 'tatou' clearly referred to both Europeans and Māori.

The third article is also important in understanding British conceptions of the Treaty's all-embracing nature. This article extended the Queen's Royal protection and the 'Rights and Privileges' of British subjects to 'the Natives of New Zealand'. This was expressed in the Māori text: 'Ka tiakina e te Kuini o Ingarani nga tangata Māori katoa o Nu Tirani. Ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani'. Just as Māori had granted her ('ka tuku') the government of the land, so she was granting them ('ka tukua') her protection and all the customs or laws ('nga tikanga katoa') exactly the same as those belonging to the people of England. The feudal nature of this relationship – protection in return for allegiance – was very much in the nature of the Magna Charta or the Bill of Rights.[453]

Kāwanatanga, then, was to apply to all hapū and rangatira who acknowledged the Queen's government over their territories. Williams recalled what he had told the rangatira at Waitangi:

> We gave them [the chiefs] but one version [of the Treaty], explaining clause by clause, showing the advantage to them of being taken under the fostering care of the British Government, by which they would become one [Christian] people with the English, in the suppression of wars, and of every lawless act; under one Sovereign, and one Law, human and divine.[454]

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[452] Busby circular to rangatira, 'No te 30 o nga ra o Hanuere, 1840' [30 Jan 1840], MS 46, AML.
[453] Part 6 of the Bill of Rights 1689 stated: 'That all and singular the rights and liberties asserted and claimed in the said declaration [of Rights or Bill of Rights] are the true auntient [ancient] and indubitable rights and liberties of the people of this kingdome and soe shall be esteemed allowed adjudged…to be[,] and that all and every the particulars aforesaid shall be strictly holden and observed, as they are expressed in the said declaration; and all the officers and ministers whatsoever shall serve their Majestyes and their successors according to the same in all times to come', see Taswell-Langmead, *English Constitutional History*, p 506.
[454] Williams, 'Early Recollections', [nd], cited in Carleton, *The Life of Henry Williams*, vol 2, p 14.

Williams thus unequivocally stated both the extent and nature of Kāwanatanga. It would protect all, it would suppress lawlessness, and the law which it upheld would be derived from God's law. An Anglican vision of civil polity seems implicit here. Church and State, God's law and human law, Māori and Pākehā would be one. In Richard Hooker's classic conception of English Reformation polity, all members of the English 'commonwealth' (state or kingdom) were also members of the Church of England, and the Sovereign was the head of both.[455] This influential definition illuminates Williams' statements. There was one Sovereign and one Law, which was a perfect unity of human codes and God's law. Williams probably thought the English Sovereign symbolically represented 'one Law', or that s/he exercised government in accordance with that 'one Law'. This 'one Law' might also have been called the English Constitution, including the Magna Charta.

The connection between divine and human law, between Church and State, can clearly be seen in extracts from the Bill of Rights 1689:

> Whereas the late King James II, by the assistance of diverse evil councellors, judges, and ministers…did endeavour to subvert and extirpate the Protestant religion, and the laws and liberties of this kingdom….
>
> in order to such an establishment as that their religion lawes and liberties might not againe be in danger of being subverted….
>
> Having therefore an intire confidence that his said Highnesse the Prince of Orange [William III]…will still preserve them from the violation of their rights which they have here asserted and from all other attempts upon their religion rights and liberties…[456]

[455] 'We hold, that...there is not any man of the Church of England but the same man is also a member of the commonwealth, nor any member of the commonwealth which is not also a member of the Church of England...', R Hooker, *The Works of Richard Hooker, Containing the Eight Books of the Laws of Ecclesiastical Polity, and Several Other Treatises*, Izaak Walton, ed, vol 2, (Oxford: Thomas Tegg, 1843), (http://books.google.com/books, 1 September 2009), p 386 (bk 8, *Laws of Ecclesiastical Polity*).
[456] Taswell-Langmead, *English Constitutional History*, pp 503, 504, 505.

Williams had told rangatira at Treaty signings that by consenting to te Tiriti they would be united with their Pākehā brethren under a unitary state that would be ruled in accordance with a law that was ultimately sourced from God's law. This perhaps is also the best way in which to understand the statement which Williams encouraged Hobson to announce as rangatira signed te Tiriti: 'he iwi tahi tatou' (we are all one people).[457]

The Function and Structure of Civil Government

Williams and the CMS's basic conception of the function of Kāwanatanga under te Tiriti was in essence that of the Māori government suggested in their November 1838 letter: 'They [Māori] will form a mutual support to each other[,] a protection to those who do well & dread to evil doers and gradually rise in the scale of Nations.' These words were derived from Romans 13, an important New Testament chapter on civil government. In the 1837 Kawenata Hou, verse four of this chapter reads as follows:

> Ko ia hoki te minita o te Atua mou mo te pai. Tena ki te mea koe i te kino, kia mataku ra; ekore hoki ia e maumau hapai i te hoari: ko ia hoki te minita o te Atua, he kai rapu utu mo te riri ki a ia e mahi kino ana.
> (For he [the civil magistrate/ruler] is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minster of God, a revenger to execute wrath upon him that doeth evil. (KJV))

The central teaching contained here was that God had appointed the civil magistrate; s/he was none other than his minister or servant. (Such passages made it easy for Anglicans to see the King/Queen as the Chief civil magistrate.) The connection between God's law, or the moral law, and the law to be enforced by 'te minita' was close. The same chapter from Romans (verse nine) referred to several of the ten commandments (thou shalt not commit adultery,...kill,...steal,...bear false witness) which were also summed up by 'Thou shalt love thy neighbour as thyself'.

[457] It was almost certainly Williams who coached Hobson to say this. See W Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Wellington: George Didsbury, 1890).

The same chapter (Romans 13) exhorted subjection or obedience to these 'higher powers', for to resist the authority which they wielded was to resist God. The 1837 translation of this passage suggests that not only Kāwanatanga but also Rangatiratanga under the Treaty's article two should be understood as one of these 'powers'. The translation read:

> Kia rongo nga wairua katoa ki nga rangatiratanga nunui. No te Atua anake hoki nga rangatiratanga: ko nga rangatiratanga nei hoki kua oti te w[h]akamea e te Atua.
> (Let every soul[wairua] be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. (KJV))

'Higher powers' were here translated by 'nga rangatiratanga nunui', which could be interpreted back into Māori as 'the great chieftainships'. The plural noun indicates any number of powers, and perhaps a hierarchy of powers. Within the English constitution, the monarch, together with the Lords and Commons, was seen as the highest power. But underneath them there were many other powers exercised at the local level, including the powers of local corporations, magistrates and landlords. Pat Thane describes the British state in the later eighteenth century (equally relevant to the early nineteenth) in this fashion:

> This strong central state was associated with an unusual range of 'free institutions', official and voluntary, enabling local communities to achieve a high degree of self-government within the broad framework of the law and their representatives to influence the activities of central government. Parliament could and did act as a check upon the actions of crown, ministers (normally resident in the House of Lords) and civil service. Chartered municipalities [local councils] had considerable independence in the conduct of their local affairs including, often (their exact powers varied with the terms of their charters), extensive judicial powers, both civil and criminal.[458]

[458] P Thane, 'Government and Society in England and Wales, 1750-1914', in F M L Thompson, ed, *The Cambridge Social History of Britain 1750-1950*, vol 3 (Cambridge: Cambridge University Press, 1990), pp 5-6.

Until the 1830s, and even beyond that decade, policing and poor relief (welfare) were provided by local municipalities or parishes, and education was the almost exclusive sphere of Anglican and Dissenting churches. Unpaid justices of the peace had extensive local powers, including the arrest and punishment of offenders for drunkenness, vagrancy, profanity, poaching, and so on.[459] Busby's 1837 plan to appoint rangatira as local 'Conservators of the Peace' might have reflected such a model.[460] In addition, central government land taxes were 'paid by landowners who passed them on to tenant farmers, labourers, artisans and other tenants in rents and other charges'.[461] This demonstrates the property hierarchy of English society.

It is therefore not difficult to see how the missionaries and officials could have conceived rangatira as 'higher powers' within their respective hapū. The Queen as the supreme power did not deprive other legitimate authorities of their own powers, within their sphere of influence. Verse seven of Romans 13 implied that a number of legitimate authorities comprised the government of a kingdom:

> Ho atu ki *nga tangata* katoa nga mea tika: he takoha ki *a ia e tika nei* te takoha; he utu ki *a ia e tika nei* te utu; he wehi ki *a ia e tika nei* te wehi; he honore ki *a ia e tika nei* te honore.
> (Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honour to whom honour.(KJV))

The use of 'nga mea tika' ('dues') and 'e tika nei' ('is due') would probably have suggested to a Māori reader, custom law or tikanga. It can be argued that this Biblical passage, along with the hierarchical nature of British society and constitution, can be correlated to the words used in te Tiriti's article two. That this article was intended to protect land and property rights there can be no doubt. The English text plainly conveyed that. That it protected chiefly authority or rangatiratanga per se is another matter. The interpretation given to the Romans 13 translation above certainly indicates that 'chieftainship' was within the hierarchical assumptions of Williams. David Cannadine argues that the British saw other races in terms of social or class

[459] Ibid, pp 6, 13, 16-17.
[460] See text at n 183.
[461] Thane, 'Government and Society in England and Wales', p 4.

hierarchy, comparing them with their own domestic society, rather than distinguishing themselves from other societies on racial grounds. Hence, Māori and other societies were defined primarily by reference to British norms of social hierarchy.[462] Stadial views of civilization support this view: Māori needed only to move from chiefly barbarism to civilized government, that is, from the past form to the present form of British society. Cannadine further argues that a Burkean vision of 'faith', 'family', 'property', and 'monarchy', was exported to the empire.[463] Anglican missionaries would certainly appear to fit well within this mould. Cannadine's interpretation supports the idea that indigenous elites would be an important part of the social order, even if Britain exercised the sovereign power.

Rangatiratanga: property rights *and* hapū authority?

In 1840 most Europeans accepted that Māori land tenure was communal and that the rangatira of hapū would have to be consulted to effect a valid transfer of possessory rights. Missionaries and others transacted land with the relevant rangatira. Only rangatira with links to that whenua as representatives of hapū and whanau could participate in such transactions. Since rangatira claimed the most significant use-rights to land and fisheries within the hapū rohe, Europeans viewed them as akin to English landlords. To Henry Williams the link between property and rank or status was obvious in English society. To him it was no less obvious in Māori society.[464] Thus Williams stated in September 1844 that he believed the Treaty protected the 'Lands[,] Rights and Privileges' of chiefs, or their 'Rank, Rights, and Privileges'. 'Lands' appears an alternative for 'Rank', and visa versa.

Chiefly rights, however, were not limited to land. In his review of the 1840 Commons' Report on New Zealand, Williams rebutted E G Wakefield's evidence that 'there was nothing [in Māori society] like what is called law amongst civilized nations'. Williams' commented: 'It is impossible there could be as amongst civilized nations, as they were in a savage state – yet they

[462] D Cannadine, *Ornamentalism. How the British Saw Their Empire* (London: Allen Lane, 2001). His argument is intended to counter Edward Said's famous *Orientalism* thesis, in which the British defined themselves by contrast with coloured races and societies. Cannadine instead argues that the British looked for similarities between their own society and other societies, with lesser regard for whether they were 'coloured' or not.
[463] Ibid, p 122.
[464] And political liberties were also conceived as property-rights, see n 330.

were not without law whereby their proceedings were regulated'.[465] Hence, while Williams accepted that Māori did not have a 'civilized' law, they did have law to regulate their society. Chiefly authority, he implied, reflected what we today might describe as customary law.

Furthermore, Williams stated that the 'Principal Chiefs' who made the cession of sovereignty were 'Sovereign Chiefs' who exercised 'Sovereign authority', and that 'the limits also of their jurisdiction [were] clearly defined being the territory possessed by the Tribe'.[466] These statements challenged Wakefield's evidence that 'the cession is extremely vague as to boundaries' and that the Confederation of Chiefs purporting to make the cession 'in point of fact, never possessed any sovereign authority'. Wakefield declared: 'It [their sovereign authority] was a mockery, and the mockery has been carried on now. These natives have been assembled and have gone through the form of a treaty, without being able to define the boundaries of their jurisdiction, since they never had any jurisdiction'.[467] Williams' counter to Wakefield's mocking of the Treaty was his affirmation that the chiefs did have authority on behalf of hapū to enter into the Treaty and cede to the Queen the sovereignty (civil government) within the hapū's territories. This was consistent with Williams' belief that article one was about rangatira accepting a new authority – Kāwanatanga or Civil Government.

Williams believed that rangatira exercised chieftainship in hapū affairs. This hapū-based sovereignty was nevertheless not equal to the national sovereign authority of the Queen. Yet Henry Williams believed that this hapū-based authority would continue after the Treaty.

Chapter three argued that Magna Charta for Henry Williams stood for the protection of both property rights and the 'rank' or authority of rangatira. Williams' rendition of article two in his 1847 letter to Bishop Selwyn suggests this:

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[465] Williams to Coates, 21 Oct 1841, CMS/CN/0 101, pp 2-3.
[466] Ibid, p 2. This is quite a brief response of a few lines. Its exact import, as argued in the text above, requires careful interpretation.
[467] 'Report from the Select Committee on New Zealand; Together with the Minutes of Evidence Taken Before Them, and An Appendix, and Index' (House of Commons, 3 August 1840), in BPP 1840 (582), p 38, IUP, vol 1.

> The Queen of England confirms and guarantees to the chiefs and tribes, and to each individual native, their full rights as chiefs, their rights of possession of their lands, and all their other property of every kind and degree.

Williams separated 'rights as chiefs' from 'rights of possession of their lands', whereas a 'literal' translation of article two might have read 'the full/true chieftainship of their lands, their villages, and all their properties/treasured possessions'. The Māori text of te Tiriti does not literally appear to separate out chieftainship itself from chieftainship in relation to property.[468] Williams countered Bishop Pompallier's 1845 letter to Hone Heke which suggested that Māori had surrendered their sovereignty to England by the Treaty – 'their rights as chiefs'. Williams disagreed as Māori rights *were* protected.[469] Williams implied that rangatira had retained chiefly authority and only surrendered ultimate sovereign authority.

In 1860, Williams' colleague and former Chief-Protector of Aborigines, George Clarke, was in no doubt that

> the rights of Chieftainship over the tribes and lands were fully recognized and protected by the Treaty of Waitangi. The expressive language used and fully understood by both parties to the Treaty was this – that 'the *shadow* of the land was to be the Queen's (meaning the Queen's sovereignty) 'and the *substance* to remain to the native Chiefs;' – their lands and the 'tino rangatiratanga' (chief chieftainship) over their own tribes.[470]

In this pamphlet Clarke was contending for the rights of chiefs to consent to (or refuse) the sale of hapū lands to an outside party, in the context of the Waitara dispute at Taranaki. However, his comments show that these rights of chieftainship were not intended by the Treaty to be limited to just land alienation to outside parties. He gave instances of other rangatira or 'tribal' rights:

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[468] See text at n 330.
[469] Pompallier to Heke, 31 January 1845, and Williams' notes on this letter, MS 91/75, AML. See S Carpenter, 'A Question of Mana: the Relationship between Henry Williams and Hone Heke', Research Exercise, PGDipArts history, Massey University, 2004.
[470] G Clarke, *Pamphlet in Answer to Mr James Busby's on The Taranaki Question and the Treaty of Waitangi by Sir William Martin (Late Chief Justice of New Zealand)*, reprint (Auckland: A F McDonnell, 1923), p 11. This appears to be quoting Nopera Panakareao's well known statement (which a year later he reversed).

> The Hakaris (Maori feasts, where tribal affairs were discussed and grievances settled), the Tapus, and many other Maori practices all bear testimony to Tribal rights.[471]

Clarke was in effect referring to Māori tikanga as evidence of rangatiratanga in general. There was, he was arguing, some institutional basis for tribal or chiefly authority: the institution of tapu, the holding of wanaanga, and other tikanga. This rangatiratanga was the right of rangatira to conduct hapū affairs. It was not confined to land use and alienation.

The Treaty, Clarke argued, protected this rangatiratanga. Clark claimed that he was consulted on the Treaty (probably he meant the drafting of the translation).[472] He was unequivocal in affirming that:

> when the subjects contained in the Treaty were under consideration, the subject of Tribal rights and *the full power of the Chiefs over their own tribes and lands* was fully explained to the natives, and fully understood by the Europeans present. I further state, that from the feelings manifested at the time, as expressed in the speeches made, and also in the negociatory conversations and explanations which took place during the transaction it was evident that not one Chief would have signed that Treaty had not Tribal rights been fully recognised and protected. So tenaciously did the natives cling to these rights from the first. [emphasis added] [473]

This account of the Treaty discussions and its explanation supports the missionary view that rangatira retained authority in respect of both hapū land and hapū tikanga after te Tiriti.

Somewhat ironically, Clarke was arguing against Busby's view that Wiremu Kingi had no basis, under the Treaty, to refuse to consent to the Crown purchase of Waitara. Busby evidently believed that before the Treaty chiefs exercised the ringa kaha (strong arm) over land sales, but that this was not based by any Māori 'law' or institution. Hence, any rights which Māori had 'were created by the Treaty'. This was consistent with his 1830s view that rangatira lacked an

[471] Ibid, p 9.
[472] Ibid, p 2.
[473] Ibid, p 11.

institutional/legal basis for their authority, apart from within what he was developing with the Confederation and Congress. Clarke, on the other hand, argued that rangatira exercised authority, according to Māori customs or usages (tikanga). Henry Williams wrote to England in 1862 concerning the Waitara dispute:

> It would appear that the Government cannot make the *amende honorable*[474] in admitting their error, and taking a fresh start [that is, by returning Waitara to Wiremu Kingi], by which the Māories would see that there is much protection for their rights and interests. But now there is much confusion, and general distrust and threats passing from one to the other. The Government ought long since to have learned that "honesty is the best policy;" to do justly, and to love mercy, and to walk humbly with their God'.[475]

Williams probably supported the tribal and chiefly rights of Wiremu Kingi against the lesser interest of Te Teira; the same stance as Clarke and Octavius Hadfield adopted. In contrast to Busby, Williams, Clarke and Hadfield believed that rangatira did exercise real authority both pre- and post-Treaty.

An incident a few years after the Treaty provides further support for Williams' view of the continuance of Māori tikanga, in particular where it assisted the cause of peace and order. In this incident, the police had attempted to apprehend a European at a Māori settlement in Kawakawa – at night and without warning.[476] Williams wrote: 'In the scuffle, the finger of Hori Kingi's sister [a high-born Māori woman] was cut, drawing blood, which, though never [ever?] so little, is by *Maori law* a serious aggravation of offence [emphasis added].' He continued: 'The natives in the pa, so soon as they heard of the affair, were very indignant, denouncing the transaction as a *kohuru*, coming without notice and in the night'.[477] Māori sent a taua to the magistrate at

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[474] The Concise Oxford, 9th ed, 1995, defines '*amende honorable*': a public or open apology, often with some form of reparation (French = 'honourable reparation').
[475] Williams to E G Marsh, 10 Nov1862, in Carleton, *Henry Williams*, vol 2, p 346.
[476] This incident is found in Williams' 'Early Recollections'/ 'Reminiscences', Carleton, vol 2, pp 82-85, and see also Carleton, vol 2, 'Plain Facts', Appendix C, p xxiii. It is also recounted in Carpenter, 'A Question of Mana', pp 23-24.
[477] Even in war Māori were known to not fight at night, not to engage in surprise attacks and even to let in water and food to a besieged pa to enable the fighting to continue on an even basis, see William Pember Reeves, *The Long White Cloud, Ao tea roa*, revised edition (Christchurch: Golden Press, 1975), p 57.

Kororareka ‘for redress’. When the magistrate ignored their plea the taua took (or muru’d) eight horses from Captain Wright as compensation. In the end the magistrate was forced to ask Williams for advice. Williams recalled that:

> I said that as there had been undoubtedly an assault on the part of the police, the more quietly it was settled the better. I mentioned the circumstance which had occurred at Pakaraka [the Williams’ farm], in the killing of a pig, for which a colt worth 10 pounds had been given, the European being in the wrong. The magistrate was perplexed and displeased, but there was no alternative, and a colt was given to the worth of 10 pounds, though with bad grace.[478]

In the end it appears Williams negotiated the return of the horses taken by Māori in return for the colt, which was given for the cut finger.

In other contexts Williams demonstrated his belief that the mana of rangatira should be respected. On one occasion a carpenter named Collins employed by Williams assaulted Hone Heke. Williams remarked that, because the authorities did not investigate the incident, charge Collins, or express any ‘sympathy’ towards Heke, he thought this was one of many incidents that played on Heke’s mind and lead to his distrust of British authority.[479] Williams also recorded his concern about rangatira being verbally insulted by Europeans, including the charge of being made taurekareka (slaves).[480] He had discovered, over many years, what a verbal insult meant to a chief.[481]

Chapter two argued that missionary translators understood the independent state (‘he w[h]enua rangatira’) declared by He Wakaputanga in a number of ways. They acknowledged a Māori

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[478] The pig story I have seen independently recounted by Henry Williams jnr in (private) Williams family papers.
[479] Williams, ‘Recollections’, Carleton, vol 2, pp 30-31. And which led to Kororareka and the Northern War. See the discussion of this in Carpenter, ‘A Question of Mana’, p 33.
[480] Carleton, vol 2, p 31.
[481] See Williams to Fitzroy, 20 March 1845, MS 91/75, AIM, where Williams gave FitzRoy his report of the battle of Kororareka and mentioned the insulting language used by the Hazard’s crew and Lieutenant Philpotts that Williams was a traitor and the threat to ‘seize’ him and ‘cut him to pieces’: ‘to a New Zealander [Māori] ear [these threats were] peculiarly disgusting’. Williams said he was raising this issue because of the effects of such language on the Public Service and interests of Great Britain, which ‘must suffer materially’ and lead to much distrust and bloodshed.

nation or people that already existed in a spiritual and theological sense because God had created it. Declaring the 'independence' or 'rangatiratanga' of Māori was also a declaration of hope that they would truly become free or liberated. By this Williams meant Māori could be liberated from Satan and oppressive customs, and from lawless human beings. Missionaries hoped a Māori nation would emerge founded on spiritual liberty (knowing Christ) and civil liberty (established by the laws of a national wanaanga or Congress). This nationhood the missionaries understood primarily in religious and moral rather than nation-state terms. The use of rangatiratanga for the kingdom of God ('te rangatiratanga o te Atua') and Kingdom of Heaven ('te rangatiratanga o te rangi') in the New Testament reinforced this sense of sanctified nationhood. As the hopes of the Confederation dwindled, and colonization approached, missionaries looked more to British Government intervention to preserve Māori chieftainship.

The rangatiratanga declared in He Wakaputanga was the same chiefly and tribal authority protected by article two of te Tiriti. The missionaries probably relinquished hopes of a national Māori Congress supported by British authority after 1840. With the coming of the Kāwanatanga of the Queen, and her Kāwana and associated administration, they probably supposed that a Māori assembly was no longer relevant. Yet institutionalised Māori autonomy should not be dismissed outright. Williams' and the Northern Committee's recommendations to Coates in 1838 involved a British Governor or Government administration advising a Māori assembly (and a military force to ensure peace). How did these suggestions differ materially from what te Tiriti had brought about? By the Treaty a Governor was installed in those hapū territories ceded by rangatira, and by his declaration of sovereignty in May 1840 the entire country was declared within Her Majesty's dominions. While in 1840 the chiefs gave the government to the Queen, missionaries hoped that the chiefs' powers in relation to their hapū could be incorporated within Kāwanatanga to make its rule over the entire country effective. George Clarke articulated such a view in 1844:

> In order to restore confidence [in te Kāwanatanga], speedy redress in cases of native wrong should be adopted; *a deference to native customs paid*, together with kind treatment, would be much towards its restoration. The Europeans would feel less distrust could they be assured that the young men could not be allowed, but in some way

> punished, when they take the law into their own hands. In order to accomplish this, I would submit that something should be done to *raise the influence of the chiefs*; nothing has been attempted at present; a regular correspondence should be kept up with the chiefs of every district, and that they should at all times be rewarded for their services in keeping the peace; also they should be given to understand that both the peace and prosperity of the country depends very much upon *the exercise of their own powers in connexion with that of the Government* [emphasis added].[482]

The last sentence clearly indicates a missionary (and, in this case, official) view that rangatira continued to exercise powers distinct from those of Kāwanatanga. Clarke was recommending that rangatiratanga or independence in hapū localities should not only be recognised by the central administration, but that it should be supported and strengthened by the central power. In addition, Kāwanatanga should respect Māori tikanga. The peace of the country depended on this course of action. In Clarke's recommendations, the idea of chiefly authority seems at least as strong as the idea of incorporation within Kāwanatanga. Clark's proposals and language also support the relevance of the Romans 13 reference to a number of 'powers' (nga rangatiratanga) making up the governance of a country and its exhortation to pay respect to those different powers (see above). While the pre-Treaty concept of a national assembly of rangatira has disappeared from Clarke's (and missionary) recommendations, the concept of British authority supporting Māori authority, and law and order generally, has not. This was consistent with colonial practice in other parts of the Empire, such as the princely states in India and the great council of chiefs in Fiji.

It was also consistent with the practice of the Roman Empire, as George Cornewall Lewis described in his influential 1841 work, the *Government of Dependencies*.[483] Lewis discussed the legal framework of the Roman provinces. This combined, first, the terms (or *formula*) on which the province was originally annexed to Rome. Second, Acts of the supreme Roman legislature. Third, edicts of the provincial governors or praetors. Lastly, the native laws and institutions of

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[482] Clarke to Col Sec, 19 Oct 1844, BPP 1845 (369), pp 35-36, IUP vol 4, p 416. Some of Clarke's perspectives on this were incorporated into the Native Exemption Ordinance of 1844, see http://www.nzhistory.net.nz/people/robert-fitzroy.

[483] G C Lewis, *An Essay on the Government of Dependencies* (London: John Murray, 1841), (http://books.google.com/books).

the country as they existed prior to Roman rule. The provinces usually retained all their own laws – especially respecting mattes of property, contracts, marriage and the like – that were not inconsistent with Roman law. Public order and the criminal law was by contrast under the immediate control of the imperial power. Lewis stated that the 'libertas' (liberty, 'rangatiratanga'?) of a Roman dependency consisted mainly in its being allowed to retain its own civil laws, and to administer them by native judges.[484] Lewis assumed an existing (native) legal system akin to Rome. In Roman colonies, by contrast with provinces, incoming Roman settlers expelled the native inhabitants.[485] Discussing English colonies, Lewis wrote that British subjects took with them as much of the common law as was applicable to their circumstances.[486] The case was different if Britain acquired a dependency by cession or conquest which was not colonized by British subjects. Again Lewis assumed cases of conquest or cession between Western nations such as the Dutch and French, 'which already possess[ed] a legal system of their own'. Like Roman provinces, the private law of contracts and property remained unaltered until amended by positive enactment.[487] Britain's qualified recognition of the 1835 Declaration in effect acknowledged the existence of a separate legal code. New Zealand post-1840 can be viewed as a hybrid of a Roman province and a Roman (or British) colony. British officials and governors faced the challenge of adjusting the interests and laws of two different populations.

C W Richmond, in an 1858 New Zealand General Assembly speech, pertinently analysed the three different policy approaches concerning Māori governance since the inception of British rule. Secretary of State Lord Stanley and Protector George Clarke advocated recognizing Native custom. George Grey's early paper on Australia recommended the immediate application of British law to the aborigines, as did the 1844 Commons Select Committee. Richmond favoured a third approach, which Grey later advocated, which was 'to insinuate or induce the acceptance of British law'. Richmond condemned the Stanley-Clarke view on the basis that 'barbarous laws perpetuate barbarism'. He discounted the second on the basis that it was 'neither humane nor practicable', involving as it would the 'subjugation of the aborigines'.[488] The Stanley-Clarke

[484] Ibid, pp 117-123.
[485] Ibid, pp 172-176.
[486] Ibid, pp 190-197, citing Blackstone and others.
[487] Ibid, pp 201-206.
[488] C W Richmond, 18 May 1858, NZPD 1856-58, pp 443-445. Richmond cites Clarke's letter of 29 July 1844 to illustrate this view: 'I see no alternative but that of legalizing those Native customs and usages which are not in

view was that expressed by section 71 of the 1852 New Zealand Constitution Act, which allowed for the creation of separate Native districts in which customary law would apply. This section was never fully utilized by Governors Gore-Browne, Grey, or the New Zealand Assembly.[489] It nevertheless reflects the missionary-humanitarian view of Māori policy that Māori should be allowed local self-government or rangatiratanga. In many ways this was advocating nothing more than the concept of local self-government still prevalent in the British constitution in 1840. Colonial self-government was of course the aspiration of the settler population and was finally granted in the 1850s by the Crown.

In summary, Māori rangatiratanga was declared in He Wakaputanga. It was protected under te Tiriti. Chiefs still exercised their powers independently of the Government post-1840 but there was a need to support their powers. A Māori national body or 'state' was arguably the central idea of the English text of the Declaration. But in missionary views the integrity of the Māori people (or nation) would still be ensured if rangatira powers and tikanga were acknowledged at the local level.

The Translation of Sovereignty: Kāwanatanga?

This section argues that Williams equated civil government with sovereignty. Therefore, the transliteration of government or governorship, 'kāwanatanga', was to Williams' an appropriate way of rendering the meaning of sovereignty in te Tiriti's article one.

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themselves repugnant to humanity, by an enactment of the Legislature. Native Courts should, then, be organized throughout the land, to adjudicate in cases where Natives only are concerned, and to administer justice according to Native usages; against whose decisions, in cases purely Native, no appeal could lie', ibid, p 443.

[489] However, F D Fenton, Resident Magistrate in the Waikato, advocated Māori village self-government in March 1857 to Governor Gore Browne. Fenton appeared to advocate the use of s71 Constitution Act 1852, see AJHR 1860, E–No 1c, pp 1-13. And Gore Browne proposed a law code adapted to Māori circumstances for 'native districts', in his memorandum to ministers of 28 April 1857, see AJHR 1858, E–No 5, pp 7-8. These considerations support McHugh's argument that Crown functionaries at 1840 would not have seen Crown sovereignty as negating Maori customary law or property rights. Hobson had served in the East Indies and had seen Indian custom and property existing under or alongside the operations of British government or sovereignty. Legal pluralism was the norm within the British Empire. See McHugh, 'The Lawyer's Concept of Sovereignty', pp 182-183.

The identification of the two – sovereignty and government – in Williams' mind can be seen from his July 1847 letter to Bishop Selwyn, in which he detailed how he had explained the Treaty to Māori.[490] Bishop Selwyn had requested this explanation because of the furore over the 'waste-lands' despatch from Earl Grey to Governor Grey. Selwyn's letter opened with the statement that this 'waste-lands' despatch:

> …distinctly denies the right of the New-Zealanders to their unoccupied lands, in entire violation, as I conceive, of the Treaty of Waitangi. As you were commissioned by Captain Hobson to interpret and explain the treaty to the natives, both in the North and the South, and were expressly directed by him in his official letter, not to allow any one to sign till he fully understood it, I hereby request you to inform me in writing *what you* explained to the natives, and *how they* understood it.[491]

In the preamble of his actual translation (the Māori text of te Tiriti), Williams chose to render both 'Sovereign authority' and 'Civil Government' as 'Kawanatanga'. In the first article, 'all the rights and powers of Sovereignty' was likewise rendered as 'te Kawanatanga katoa'. In his 1847 letter to Bishop Selwyn these three phrases were rendered 'Government', 'settled government' and 'the Government', respectively. He did not attempt to gloss his Māori text as a 'literal' translation of the English text by rendering kāwanatanga back into English as sovereignty. It does not appear that Selwyn ever noted any inadequacy or inaccuracy in Williams' translation/explanation. There was some criticism at the Waitangi discussions that Williams was not translating appropriately, but never any indication that the issue concerned the translation of sovereignty. These considerations are one indication that Williams, Selwyn and their contemporaries, essentially equated British sovereignty with British government/kāwanatanga. They suggest that to Williams sovereignty meant the exercise of government.

Other statements in his letter to Selwyn demonstrate that he believed he had adequately conveyed the intention of the English text:

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[490] Williams to Selwyn, 12 July 1847, vol 100, MS 91/75, AML, pp 51-56.
[491] Ibid, p 48.

> The Instruction of Captain Hobson was, 'not to allow any one to sign the treaty till he fully understood it;' to which instruction I did most strictly attend. I explained the treaty clause by clause at the signing of the same, and again to all the natives in this part of the Island previously to the destruction of Kororareka, on March 11, 1845; I maintained the faith of the treaty and the integrity of the British Government, and that the word of her Majesty was sacred, and could not be violated.
>
> That the natives to whom I explained the treaty understood the nature of the same, there can be no doubt; for by this explanation alone I was enabled to give considerable check to the proceedings of the natives in arms, and to suppress the irritation excited by unprincipled Europeans as to the intention of her Majesty's Government, who had spread the report that the country was seized in her Majesty's name. By this explanation many tribes remained neutral, and others acted with the troops as allies of the British military force.

This passage shows that Williams thought he had explained the nature of the Treaty and that the Treaty did *not* mean that 'the country was seized in her Majesty's name'. The word 'seized' in this context suggests that the Queen was taking possession of the country by military occupation. The fact that the Crown deployed only about 80 troops, a handful of mounted police and whatever naval forces were available in early 1840 did not amount to military occupation. Williams emphatically denied that the cession of sovereignty to the Crown authorized military possession of the whenua of Aotearoa. He clearly believed that sovereignty had been ceded or acknowledged by Māori.[492] But he clearly did not believe that sovereign status made the Crown owner of all the unoccupied or waste-lands of the country. He probably had little understanding of the concept of the Crown's underlying or 'radical' title – a feudal legal fiction.

[492] Williams to Coates, 3 Oct 1840, CMS/CN/0 101, reel 65. In defence of his colleagues, he cited how essential they were 'when the Sovereignty of these Islands has been ceded to Her Majesty by the Chiefs . . .' A task that took 3 months could have taken 3 years. Williams does not however use the word sovereignty very much at all in his correspondence concerning the Treaty.

Johnson's *Dictionary* of the English language supports the view that the notion of sovereignty was at least implied by the notion of government. The word 'Government' or *gouvernement,* from the French, was defined

> Form of community with respect to the disposition of the supreme authority (Temple); an established state of legal authority (Milton); administration of publick affairs (Walker)

The phrase 'supreme authority' in this definition is equivalent to the Dictionary's definition of 'sovereignty' as 'supremacy' or 'supreme power'. Hence, government was the form or arrangement of sovereignty in a community. The definitions of the terms 'to govern' and 'governor' employed the meaning of sovereignty with even greater clarity:

> '*To* Govern' (*gouverner*, Fr): to rule as a chief magistrate (Spenser); to regulate, to influence, to direct (Davenant)
>
> 'Governour' (*gouverneur*, Fr): one who has the supreme direction (Hooker); one who is invested with supreme authority in a state (Psalm 22); one who rules any place with delegated and temporary authority (Shakespeare)

The last definition of governor, derived from Shakespeare, refers to a lesser form of authority. However the first two definitions clearly invoke the concept of sovereignty. In the New Testament, kāwana and kāwanatanga were used to refer to the title and authority of the Roman governors. In Te Kawenata Hou, kāwanatanga is used to translate a Roman province (Acts 23:24). The Roman governors exercised a delegated authority from the Roman Emperor. It is misleading however to infer from this that kāwanatanga was a lesser form of authority, as within the province of Judaea, for example, Pontius Pilate was the 'chief magistrate' and had 'the supreme direction' (to use Johnson's definitions) of the civil government. He was ruling as a representative of the Empire which claimed an absolute jurisdiction within the lands of Judaea (though with jurisdiction over religious and moral matters exercised by the Jewish Council of priests and elders). Williams evidently understood the authority and function of Governor Hobson in much the same way. Within those territories ceded by rangatira, Hobson would

exercise the Queen's sovereign authority. It is spurious to suggest that 'Kawanatanga' in te Tiriti denoted anything less than the controlling civil power of the land.[493]

That Williams believed government was both an adequate and meaningful translation of sovereignty is supported by other contemporary sources. Busby himself equated the terms when he said of the chiefs' authority:

> What acts approaching to sovereignty or Government have been exercised by the Chiefs in their Individual capacity as relates to their own people, and in their collective capacity as relates to their negotiations with the British Government…[494]

The great legal authority Blackstone defined sovereignty in terms of civil government, and vice versa:

> Municipal law is 'a rule of civil conduct prescribed *by the supreme power in a state*' [emphasis in original]. For legislature…is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very edifice of law, that it be made by the supreme power. *Sovereignty and legislature are indeed convertible terms; one cannot subsist [exist] without the other* [emphasis added].[495]

'Sovereignty', said Blackstone, is equivalent to the legislative power. Legislation, he said, is the essence of government. Hence, if you exercise civil government in a state you will be sovereign.

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[493] Kawana also has a quite precise application to a civil ruler. It is not used for 'governor' of a feast (John 2:8), Jesus as the 'Governor' or Ruler of the people of Israel (Matthew 2:6), or for the 'governor' of a ship (James 3:4). There is no way rangatira familiar with the New Testament could confuse the word kawana and kawanatanga with any other authority. Buick notes the fascinating event which took place on Sunday 9 February 1840, when Williams led a service at the Paihia church, attended by Captain Hobson, the officers of the Herald, and other members of the 'Civil staff'. Williams, it seems, preached a sermon on 'the duties and opportunities of Governments'. This sermon has not survived, or has not been found. In addition to the sermon, according to Buick, 'intercession was made to the Giver of all Good that He might bestow His fostering care upon the nation new born, and now standing with trembling feet upon the threshold of an expectant life'. See Buick, *Treaty of Waitangi*, p 163.

[494] Busby to Col Sec, 16 Jun1837, No 112, p 251. In 1836 Busby wrote of rangatira 'yield[ing] up the Government of their Country' to the British Government/ Crown, see Busby to Col Sec, 26 Jan 1836, No 85, p 190 (see full citation at n 172).

[495] Blackstone, *Commentaries*, vol 1, p 46.

And if you are sovereign you will be the law maker or governor.[496] Williams, perhaps, did not read Blackstone's *Commentaries* or Johnson's *Dictionary*. Nonetheless, these authorities illustrate the way in which the notions of sovereignty and government were commonly understood. Their authoritative definitions are in accordance with how both Williams and Busby used the terms.

For Busby, the rangatira of hapū exercised a local and limited government or sovereignty. It was of necessity limited because it relied on personal power and influence, not on institutions of government. Johnson's *Dictionary* understood chieftainship in a similar way. A 'Chiefdom' was a 'sovereignty' (Spenser), but this 'sovereignty' should be understood in context of related definitions. 'Chief' was defined as 'a military commander' (Milton). A 'Chieftain' was 'a leader; a commander' (Spenser), and 'the head of a clan' (Davies). And 'Chieftainship' was simply 'headship' (Smollett). Hence, the sovereignty exercised by Māori rangatira was not the same as the sovereignty exercised by the Queen of England. The one was personal government; the other was national institutional government.

The Declaration, in Busby's view, founded a Māori national government and with it a national sovereignty, 'however limited the exercise of those [sovereign] rights has hitherto been'.[497] Busby believed that this national sovereignty, vested in the Confederation, empowered it to treat with the British Crown.[498] As used by Busby, the term sovereignty appears to have been most often used in the 1830s as a technical term: as a principle of national or international recognition. The Normanby instructions and New Zealand Company opinion tended to base nation or sovereignty status on the possession of civil government (based on stadial theory). This demonstrates forcibly that many contemporaries identified sovereignty status with the possession of civil government.

As discussed above, Coates, Buxton and the Evangelicals generally did not make the same identification. They were willing to acknowledge Māori sovereignty and independence without any theoretical qualifications. Nevertheless, they believed that without civil government Māori

[496] Ibid, p 49.
[497] See text at n 180.
[498] See above.

independence, and indeed Māori rangatiratanga, was frail. Hence the missionaries asked for British government intervention 'to save a Nation struggling to maintain her independence'.[499] The kind of government they called for was one that, of necessity, could exercise a supreme colonial control within New Zealand, although it would also incorporate Māori authority in important ways.

The predominant view of the 1830s, therefore, was that all true civil governments were, by definition, sovereign governments. The existence of representative institutions and courts signalled the presence of a sovereign authority according to the law of nations (or 'international relations'). Even the English text of the Treaty reflected this view. Article one brought about a cession or surrender of 'all the rights and powers of Sovereignty' which the Confederation and individual rangatira exercised or possessed, or were 'supposed' to exercise or possess. The qualification is important because it reflected the view that Māori sovereignty, rule or government existed on unstable ground, not having a proper institutional basis. Hence, the very purpose of obtaining the sovereignty was to empower Victoria to establish 'a settled form of Civil Government' or 'the necessary Laws and Institutions' (preamble). Obtaining sovereignty was the necessary (legal, moral, humanitarian) precondition to establishing the government. Viewed in this light, kāwanatanga should be understood as the most appropriate word to describe the substance of the cession of sovereignty in article one.

The Translation of Sovereignty: Mana?

Ruth Ross, in her well known New Zealand Journal of History article (1972),[500] suggested that Williams should have 'associated *mana* with *kawanatanga* in the translation of sovereignty', for then 'no New Zealander would have been in any doubt about what the chiefs were ceding to the Queen'.[501] Some recent historians repeat this argument.[502] Many non-historians have adopted it,

[499] Clarke to Coates, 16 Nov 1838, CMS/CN/0 101.
[500] R M Ross, 'Te Tiriti o Waitangi: Texts and Translations', *New Zealand Journal of History*, vol 6, no 2, 1972, pp 129-157.
[501] Ibid, p 141.
[502] P Moon and S Fenton, 'Bound into a Fateful Union: Henry Williams' Translation of the Treaty of Waitangi into Māori in February 1840', *Journal of the Polynesian Society*, vol 111, no 1 (2002), pp 51-63, although see counter-

to the extent that it has arguably become the central doctrine of a modern Treaty orthodoxy. Michael Belgrave has recently traced the rise of this 'modern treaty' from Ruth Ross's article: 'This is a treaty of two texts with major differences between them, creating doubt whether sovereignty was transferred in 1840 and emphasising the tribal nature of the guarantees under Article Two'.[503] He cites a heath sector publication as an example of this 'modern treaty':

> In Article One of Te Tiriti, the Rangatira were granting 'kawanatanga' to the Crown. Rangatira believed this term to be less than sovereignty. It was a missionary transliteration of the word 'governorship'. The missionaries used the story from the Bible to explain that Pontius Pilate was a governor and had limited powers under Ceasar, who retained sovereignty. The Rangatira were agreeing to kawanatanga (governorship) by the Crown, not mana (sovereignty).[504]

Rachael Bell has critically assessed the 1970s historical context of Ross's article. Although Ross adopted a strict empirical methodology, which focused on the treaty texts, her 'hypercritical' treatment of Busby and Williams' weakened her analysis. Her secular environment made her liable 'to distrust and dismiss' the contribution of both to the Treaty.[505] The following section addresses the problematic nature of the 'modern treaty' that has flowed from Ross's article.

As argued in the previous section, kāwanatanga was in substance what Māori were granting to Queen Victoria. They were granting her the authority to establish the kāwanatanga that they did not in reality exercise. The need for 'peace and good order' and the protection of Māori 'just Rights and Property' (preamble, English text) in the face of European land purchase and

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argument by J Laurie, 'Translating the Treaty of Waitangi', *Journal of the Polynesian Society*, vol 111, no 3 (2002), pp 255-258.

[503] M Belgrave, *Historical Frictions: Māori Claims and Reinvented Histories* (Auckland: Auckland University Press, 2005), p 45. Belgrave shows how Ross's analysis was employed by Māori writers, who articulated the modern 'Māori sovereignty' position based on the concept of two distinct Treaty texts and modern concepts of sovereignty in international law. Belgrave critiques this non-contextual basis for the modern treaty: 'Its supporters reclaim the text in te reo, but not its context in tikanga – the Māori values and world-view which must have informed their understanding of the Treaty remain opaque'. Belgrave's analysis attempts to free the treaty' 'from hindsight and from the tyranny of textual and legally driven analysis'. See *Historical Frictions*, pp 46-55 for the 'modern treaty' and ch 2 for Belgrave's entire analysis.

[504] Ibid, p 45.

[505] R Bell, ' "Texts and Translations": Ruth Ross and the Treaty of Waitangi', *New Zealand Journal of History*, vol 43, no 2, 2009, pp 52-53.

lawlessness was the problem that lead to the Treaty in the first place, certainly from a missionary perspective. Although article one of the English version used the term ‘cede’, meaning to ‘give up one’s rights to [sovereignty]’, the reality was more accurately expressed by the preamble which referred to Hobson treating for ‘the recognition of Her Majesty’s Sovereign authority’. Williams rendered this: ‘Kia w[h]akaaetia e nga Rangatira Māori te Kawanatanga o te Kuini’ (That the Chiefs may agree to/acknowledge the Government of the Queen). The sense of this was Māori agreeing to accept a new authority in the land rather than giving up an authority that they themselves already exercised.

Viewed in this light, the Treaty did not represent a loss of Māori authority. Rather, it was providing them with the protection of a chiefly authority and civil government that they had previously not possessed. In a theoretical sense (the sense used by Coates of the CMS) they may have been losing their sovereignty or independence. In substance, however, British power and institutions could protect their rights and property in a way not otherwise possible. Ross’s argument rests on the assumption that British sovereignty meant the loss of Māori authority or prestige (‘mana’). Williams, however, believed or hoped that the Treaty would protect Māori chieftainship just as the English Magna Charta protected the landed rights and local customary privileges of British gentry and freeholders. In other words, Williams envisaged the Treaty protecting the substance of their mana as chiefs of hapū. As the decades passed, this comtemplated future did not eventuate. Yet this does not change the fact of missionary expectations in 1840. Hindsight is an unreliable guide in interpreting the meaning of te Tiriti in February 1840.

In Williams’ eyes, the Crown promised to protect ‘o ratou rangatiratanga, me to ratou w[h]enua’ (their chieftainship and their lands (preamble)), or ‘te tino Rangatiratanga o o ratou w[h]enua o ratou kainga me o ratou taonga katoa’ (the true/full Chieftainship of their lands, of their villages and all their valued properties (article two) at the level of local hapū and whanau. Alan Ward supports this interpretation:

> The missionaries and officials did not use the term mana to translate ‘sovereignty’. It has been suggested that this amounted to a deliberate deceit, but this is too harsh a

> judgement. With reason the British did not believe that Māori had a well-developed concept of *national* sovereignty. Hence the use of the term kawanatanga to denote the new thing the British were claiming. They were quite prepared to recognise tino rangatiratanga – the mana of rangatira – at the local level.[506]

Ward's interpretation inverts Ross' assumption that the Treaty meant loss of Māori rights and authority. But there is another sense in which 'mana' was inappropriate as a word to express sovereignty. The essence of mana, in its original Māori context, was the possession of authority and personal influence, both inherited from tūpuna and enhanced by personal endeavour (through feats in battle, for example). The meanings of mana that tie it intrinsically to chiefly whakapapa and personal ihi or power, mean that it is something that could never be given up. Understanding this, Te Wiremu would not have used mana as an equivalent for sovereignty.

The argument that mana was used, along with Kingitanga, in He Wakaputanga to express the phrase 'all sovereign power and authority' is perhaps the strongest contextual argument for why it should have been used in te Tiriti. Ross argued this and many have followed her. This view starts to look shaky, however, if the above considerations are allowed to have their due weight. The different contexts and purposes of He Wakaputanga and Te Tiriti must also be kept in mind. Mana was an appropriate term in 1835, in a document that was intended to incorporate a new Māori nation on British or European lines. The Māori concept of mana conjoined with the European concept Kingitanga appropriately conveyed to rangatira the notion that the 'sovereign power and authority' ('ko te Kingitanga ko te mana') they were declaring over their collective lands was a new conception and phenomenon. Their mana was exerted in 1835 to declare a new confederate nation. In 1840, their mana was exerted in choosing to come under the protection of the Queen of England. This would not necessarily deprive them of their mana; it might well enhance it. At least, this was the missionary view. It may well also have been the view of the

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[506] A Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press and Oxford University Press, 1973), p 44. Ward continued: 'The misleading aspect of this lay in their not discussing fully how kawantanga would impinge upon rangatiratanga, though this was certainly discussed to some extent in relation to the prohibition of warfare and violent retribution'. This relationship will be discussed below. Ward seems to have qualified his view that this lack of discussion was 'misleading' in his *An Unsettled History: Treaty Claims in New Zealand Today* (Wellington: Bridget Williams Books, 1999), as it was not possible to comprehend in 1840 how this relationship would work in detail, see text at n 450 below.

rangatira. An alliance with a great imperial ariki would preserve the country from foreign aggression and would establish internal order. The Queen's Kāwana Captain Hobson could protect their rangatiratanga.[507]

Ross's use of Declaration terminology has superficial merit. It appears to be a simple case of taking a word used in one document (mana = sovereignty) and using it in a second document to mean the same thing (cede sovereignty = cede mana). But the above contextual considerations prove that simple word transference is not a good understanding of the way translation must work in practice. The fact is that sovereignty was an English word. There was no direct Māori equivalent. A Māori sovereignty declared in part by the significant word mana in 1835 was not going to work to mean the giving up of that mana in 1840. To Williams this was not intended in 1840. Mana was something that rangatira could declare themselves possessed of in He Wakaputanga: they already had it. It was not something that could be surrendered ('ka tuku rawa atu') to another rangatira in te Tiriti, regardless of how powerful she was. In practice, translation must proceed by capturing the spirit or sense of the source language. This is more akin to the 'simultaneous interpretation' used by the Waitangi Tribunal (and by the United Nations) in its hearings. Williams admitted the translation difficulties:

> In this translation it was necessary to avoid all expressions of the English for which there was no expressive term in the Māori, preserving entire the spirit and tenor of the treaty.[508]

Williams believed that with words like sovereignty, for which there was no Māori equivalent, the best approach was to avoid translating these and instead use an introduced word or transliteration that Māori understood via other means. Kāwanatanga was very likely one of those transliterations. In a sense Māori already had their 'picture' of the type of authority that would be exercised by the Queen through her Kāwana. It was provided in the New Testament by the Roman Governors and by the Australian Governors from first hand experience of some chiefs. Anne Salmond talks about how Governor Philip King's return of Huru and Tuki from Norfolk

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[507] Belgrave, *Historical Frictions*, p 59, states it simply: 'As a translator, Williams in 1835 was describing the kind of sovereignty that Māori were declaring for themselves. Five years later, 'mana' or 'rangatiratanga' were not appropriate in translating a sovereignty that was transferrable'.
[508] Oranga, *Treaty*, pp 39-40.

Island in 1793 led to 'a close relationship between Northland Māori and Kaawana Kingi…'[509] This shows that the concept of a Governor and his authority had been familiar to Ngāpuhi for some time before 1840. Michael Belgrave provides a further contextual interpretation of Williams' choice of kāwanatanga for sovereignty:

> …the one idea that was repeated again and again in the treaty debates was that of a governor. No Maori was recorded as discussing the meanings of the three articles with Hobson or any other bearer of the treaty for signing. However, Maori repeatedly debated whether they wanted a governor and, if they did, what powers the governor would have and what the consequences would be. These were down-to-earth, realistic discussions, the kind of discussions that Henry Williams would have considered a practical debate about sovereignty.[510]

To have told the chiefs that the Kāwana possessed mana and would exercise it within New Zealand was superfluous – this was plain for all to see. As Orange has written, 'rangatiratanga and kawanatanga each has its own mana'.[511] Rangatira debating at Waitangi clearly understood that the Kāwana came to exercise authority (or mana). The real question they were concerned about was whether they would be equal with him or beneath him in power and status. If they accepted Kāwanatanga, what would that mean for their own authority?[512]

Ruth Ross was probably correct in stating: 'It is difficult not to conclude that the omission of *mana* from the text for the Treaty of Waitangi was no accidental oversight'. It is reasonable to argue that if he had considered it, he would have discounted it as an option, for one or more of the above considerations. It was probably not accidental. It may well have been deliberate. Either

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[509] A Salmond, *Between Worlds* (Auckland: Viking/ Penguin Books, 1997), p 232.
[510] Belgrave, *Historical Frictions*, p 60.
[511] Orange, *Treaty*, p 42.
[512] According to Colenso, Te Kemara, Rewa, Kawiti, Hakiro, and Tareha queried the relative authority of Governor and chiefs, see Colenso, *Treaty of Waitangi* (1890). All but Tareha signed. Does this mean the others were satisfied they would be equal with the Governor? It seems not, because Te Kemara and Rewa appeared to sign only reluctantly on 6 Feb, and Kawiti signed much later. Perhaps they considered a British Governor the best choice in the circumstances. Alternatively, perhaps they felt that to leave their marks off the parchment would reduce their standing/mana in the eyes of the British authorities.

way, the omission of ‘mana’ from te Tiriti does not demonstrate any inaccuracy in its translation (or interpretation), nor does it reveal any deceit on Williams’ part, as Moon and Fenton allege.[513]

Two other points can be made about the Declaration as a translation context for the Treaty. Few, if any, have argued that Kingitanga could have been used to convey the cession of sovereignty. Having declared themselves also possessed of Kingitanga in 1835, could they not have surrendered this to the Queen (on Ross’s argument)? First, it did not make sense for ‘Kingitanga’ to be surrendered to a Queen, who presumably exercised ‘Kuinitanga’: the gender specificity of the terms does not work. The real reason, though, is the same as for mana: Kingitanga, to the extent it can be seen as equivalent to rangatiratanga or mana, was being preserved by the Treaty in the missionary mind. There was also talk of establishing a Kingitanga in 1839. Use of that term would therefore risk confusion.[514]

The other, more significant, observation about the Declaration-Treaty relationship is the fact that the Declaration used ‘Kawanatanga’ to translate ‘any function of government’ in paragraph two. The chiefs declared that they would not permit any ‘legislative authority’ (‘te wakarite ture’) nor ‘function of government’ to be exercised apart from their collective authority. It would appear to be this same ‘Kawanatanga’ which in the Treaty is ceded to the Queen: the phrase ‘ka tuku rawa atu ki te Kuini of Ingarani ake tonu atu te Kawanatanga katoa o o ratou w[h]enua’ (give up completely to the Queen of England forever the entire Government of their lands). Busby’s suggestion that ‘te Wakaminenga’ (the United Tribes, or the Assembly of the) be used instead of ‘huihuinga’ (which probably referred to the Congress of the Declaration) which the Williams had originally drafted, suggests that Busby was alive to the relationship of Declaration to Treaty and the powers that they had declared and were now ceding. Their discussion suggests Williams would also have recognised the connection with kāwanatanga. In both te Tiriti and the Declaration, kāwanatanga could have equally embraced ‘any legislative authority’ and ‘function of government’, both legislative and executive powers being part of civil government. Hence, the rangatira of the Confederation were clearly granting to the Kāwana the right to exercise the

[513] See Moon and Fenton, ‘Fateful Union’.
[514] A Waimate chief proposed establishing a New Zealand King and offered Busby the position, which Busby refused. See Busby to A Busby, 29 July 1839, Busby Ltrs [347], ATL, pp 110-112; R Davis to Busby, 29 June 1839, Busby to Davis, 11 July 1839, Busby Ltrs [352], ATL, p 36.

national powers of governance that they had declared themselves possessed of in the Declaration. In a sense, the Treaty could be viewed as a formal delegation of those powers; a delegation the Declaration had allowed for (in the same paragraph two).

The 1985 Manukau Tribunal rejected the idea that Te Wiremu deliberately deceived rangatira with his choice of words. They accepted his use of 'kawanatanga':

> In his Declaration of the Independence of New Zealand (Te Wakaputanga o te Rangatiratanga o Niu Tireni) Busby [sic, Williams] used 'mana' to describe 'all sovereign power and authority'. Some commentators consider that 'mana' best describes 'sovereignty' and imply that a careful avoidance of 'mana' in the Treaty is obvious and was misleading, the missionaries knowing that no Maori could cede his mana. We think the missionaries' choice of words was fair and apt. In English terms the personal standing of the Queen (her mana) is divorced from the Crown's authority. To capture that sense, and to ensure that in ceding *the right to make laws* the Māori retained his mana without denying that of the Queen, 'Kawanatanga' was an appropriate choice of words. It also underlines the spirit of the Treaty of Waitangi apparent in both the English and Māori texts [emphasis added].[515]

The Manukau Tribunal's definition of Kāwanatanga as 'the right to make laws' was consistent with Williams' understanding of both government and sovereignty. It also recalls Blackstone's authoritative legal definition of 'sovereignty' as equivalent to 'legislature'.[516]

[515] Cited in Belgrave, *Historical Frictions*, p 82.
[516] See text at n 495.

Conclusion

The research brief for this report was confined to James Busby's and Henry Williams' conceptions of the Declaration of Independence and the Treaty of Waitangi. In the course of researching and writing this report, other surrounding documentation and contexts have been considered, especially Colonial Office files. This research and report informs the conclusion below, which will address several of the substantive issues identified by the Tribunal's direction of 29 May 2009. It will also form the basis of a summary of evidence for hearing presentation purposes.

The seven issues defined by the Tribunal are:

He Wakaputanga/ The Declaration

1. How did Māori understand He Wakaputanga/ The Declaration? And, therefore, what was the nature of the relationship and the mutual commitments they were assenting to in signing He Wakaputanga/ The Declaration?

2. How did the Crown understand He Wakaputanga/ The Declaration? And, therefore, what was the nature of the relationship and the mutual commitments it was assenting to in signing He Wakaputanga/ The Declaration?

3. What then was the effect of He Wakaputanga/ The Declaration at 1835?

Relationship between He Wakaputanga/ The Declaration and Te Tiriti/ The Treaty

4. What, if any, was the relationship between He Wakaputanga/ The Declaration and Te Tiriti/ The Treaty?

Te Tiriti/ The Treaty

5. How did Māori understand Te Tiriti/ The Treaty? And, therefore, what was the nature of the relationship and the mutual commitments they were assenting to in signing Te Tiriti/ The Treaty?

6. How did the Crown understand Te Tiriti/ The Treaty? And, therefore, what was the nature of the relationship and the mutual commitments it was assenting to in signing Te Tiriti/ The Treaty?

7. What then was the effect of Te Tiriti/ The Treaty at 1840?

Preliminary Issue: the Place of Missionaries in He Wakaputanga and Te Tiriti

The Tribunals' questions divide the interpretive task between Māori and Crown views. This binary division does not easily apply to the position of Henry Williams and his colleagues.

Considered from the perspective of 'the Crown', missionaries were not part of the Crown in a formal, institutional sense. They were not its paid employees or servants. Nevertheless, they did act informally as interpreters or translators for Government officials in 1835 and 1840. In addition, the missionaries were themselves British subjects. They believed certain things about Her Majesty's Government and their own constitution. They possessed a loyalty to their own country and doubted the goodwill of other foreign powers when it came to the interests of Māori and the mission. Hence, the missionaries were personally interested in the growth of an alliance between the New Zealanders and British authority, and encouraged Māori to see Britain in a positive light. Although they were not officially part of the Crown, they believed in the Crown's integrity and supported its protective mission in New Zealand.

In a legal sense, because the Crown authorised missionaries to explain the documents to Māori in 1835 and 1840, they can be considered Crown 'agents'. Yet despite this, and despite their

identity as 'British subjects', they were first and foremost missionaries. Their mission in New Zealand concerned the spiritual and material interests of the Māori populace. In bringing 'te Rongopai' – the Goodnews, or the Gospel of Peace – to Māori, missionaries became part of a Māori world in varying degrees. They acquired Māori language and adopted Māori modes of address (as is revealed by Henry Williams adopting the 'rere', with taiaha in hand, at Waimate in 1845).[517] Over time they obtained understandings of Māori tikanga and worldview. Williams' position as translator/ interpreter in 1835 and 1840 reinforced the missionaries as an 'in-between' people. They bridged the divide between the British and Māori worlds. Their missional role to Māori was dependent on them retaining the trust of Māori, in particular rangatira. Missionaries knew in 1840 that their mission depended on the Crown keeping faith with the Treaty. These considerations suggest that Te Wiremu and colleagues would not have jeopardised their mission purpose by 'duping' Māori to accept a Treaty that was not in their best interests. The translation of the Treaty was not a 'fraud'. If it had been, Williams would have been sentencing the New Zealand mission to the death penalty. Ultimately the Crown's dishonouring of the Treaty significantly tarnished missionary Christianity in New Zealand, in Māori eyes.[518]

To summarise this point, the Māori texts of He Wakaputanga and Te Tiriti must be understood, from Williams' perspective, as speaking to the Māori world and Māori concerns, at least as much as to British concerns. The Māori texts were missionary-Māori documents, rather than Crown documents. As such, they incorporated Williams' perception of what the English texts meant, in language that he considered Māori would best be able to understand.

This conclusion will not address directly the Tribunal's issues one and five relating to 'Māori understandings' of He Wakaputanga and Te Tiriti, as this falls outside the research brief for this

[517] See image on front page of this report. See also Lady (Mary) Martin, *Our Māoris* (London: Society for Promoting Christian Knowledge, 1884), p 37.
[518] Many historians of British Empire are now dealing with the relationship between missions and imperialism. A few representative examples are S Thorne, 'Religion and Empire at Home', ch 7, in C Hall and S O Rose, eds, *At Home with the Empire: Metropolitan Culture and the Imperial World* (Cambridge, UK and New York: Cambridge University Press, 2006); and A Porter, *Religion versus Empire? British Protestant Missionaries and Overseas Expansion, 1700-1914* (Manchester and New York: Manchester University Press, 2004); A Porter, ' "Cultural Imperialism" and Protestant Missionary Enterprise, 1780-1914', *Journal of Imperial and Commonwealth History*, vol 25, no 3, 1997, pp 367-391. R Strong, *Anglicanism and the British Empire c.1700-1850* (Oxford: Oxford University Press, 2007), ch 1, provides a good summary of this literature.

report. Hence, it does not set out to investigate directly the views of rangatira in 1835 and 1840. With a few exceptions, present-day Ngāpuhi or Māori views of documents were not consulted. However, Ngāpuhi views are implied by the texts of the documents themselves, missionary commentary on them, and from the surrounding context. Hence, Ngāpuhi understandings, or missionary views of Ngāpuhi understandings, are suggested both in the body of the report and its conclusions.[519]

There may well be grounds for arguing that aspects of the Declaration and Treaty arrangements were "lost in translation" somewhere in between Busby's or the Crown's English texts and Māori understandings. But those who allege a "lost in translation" argument, must first seek to ascertain what it was that Williams thought he was doing. It cannot simply be assumed that a particular interpretation of the English texts (in particular a Crown interpretation) was Williams' own understanding. This is, once again, to create a binary division between 'Crown' and 'Māori' views whereas, perhaps, Williams' view was not identical to that of either 'side'. Finally, this conclusion/summary of evidence somewhat reluctantly deals with Williams' views under the heading of 'the Crown'.

Issue 2: Crown Understandings of the Declaration

'How did the Crown understand He Wakaputanga/ The Declaration? And, therefore, what was the nature of the relationship and the mutual commitments it was assenting to in signing He Wakaputanga/ The Declaration?'

[519] For example, when George Clarke appears to cite Nopera Panakareao's well known statement that the shadow of the land went to the Queen and substance remained with the chiefs. This, says Clarke, was the missionary view of the Treaty as well. See text at n 470.

The Text and Context of He Wakaputanga

This sub-section interprets the words of He Wakaputanga in their missionary-Māori context. It therefore describes a missionary view of what He Wakaputanga meant and/or what missionaries considered rangatira understood about this document or event. It does not purport to describe what Ngāpuhi or particular rangatira actually understood. The investigation of such views independently of the missionary/Busby records was not within the scope of this report's research.

The written record indicates that James Busby largely authored the English text we now have. According to his own account, Busby gave this text to the CMS missionaries for translation.[520] Henry Williams' leadership of the CMS and his role of interpretation at the hui on 28 October 1835 indicates that he took a leading role, also, in translating (or interpreting) Busby's English draft. This is not to deny that the Declaration/ he Wakaputanga also expressed Māori concerns in a Māori way.

Article 1

> *Ko matou, ko nga Tino Rangatira o nga iwi o Nu Tireni i raro mai o Hauraki kua oti nei te huihui i Waitangi i Tokerau i te ra 28 o Oketopa 1835, ka wakaputa i te Rangatiratanga o to matou wenua a ka meatia ka wakaputaia e matou he Wenua Rangatira, kia huaina, Ko te Wakaminenga o nga Hapu o Nu Tireni.*

Paragraph one of the English text of the Declaration of Independence did two things. First, it declared the independence of the country of New Zealand. Second, it constituted by means of that declaration an 'Independent State', called or named 'The United Tribes of New Zealand'.

In the Māori text, the declaration took the form, 'ka wakaputa i te Rangatiratanga o to matou wenua', literally 'cause to come forth the Chieftainship of our land', though wakaputa could also mean 'declare' or 'announce'. The 'Independent State' was rendered in Māori 'he Wenua Rangatira', which could mean 'a Chief(ly) Land' or 'a Free Country'. This was caused or made

[520] Busby to Col Sec NSW, 16 Mar 1836, No 91, CO 209/2, p 213.

(‘ka meatia’) and declared (‘ka wakaputaia’) by the rangatira, and named (‘kia huaina’) ‘the Assembly of the Tribes of New Zealand’ (or ‘Ko te Wakaminenga o nga Hapu o Nu Tireni’).

Chapter two of this report suggested that since ‘rangatira’ was a status and title embedded in Māori usage and practice, its uses in He Wakaputanga would have conveyed the ideas of social or ‘civil’ freedom and liberty, to rangatira. The contrast between ‘he Wenua Rangatira’ and its hypothetical opposites, ‘he Wenua Pononga’ or ‘he Wenua Taurekareka’ (a Servant/ Slave Land), may very possibly have lingered in Ngāpuhi thoughts. Ngāpuhi still had slaves or was in the process of releasing them in 1835. The discourse of taurekareka(tanga) or slavery to Queen Victoria assumed some prominence in 1840 and the years following. Missionaries combated this kōrero because they did not believe it had any basis.

The spiritual connotations of these contrasting states of rangatiratanga and ponongatanga/ taurekarekatanga would perhaps also have been understood by those rangatira influenced by missionary teaching. A central missionary message was contained in John chapter 8 of the 1837 Māori translation of the New Testament (Te Kawenata Hou). This was the message that all who accepted Ihu Karaiti (Jesus Christ) would be free from sin: that is, they would all be ‘rangatira’. Hoani (John) 8:31-32, 36 stated:

> Me i reira ka mea atu a Ihu ki nga Hurai i wakapono ki a ia, [‘]Ki te mau tonu koutou ki taku kupu, he tino akonga ano koutou naku; A e matau koutou ki te pono, ma te pono koutou e wakarangatiratia[’]…. Ki te mea ra ka wakarangatiratia koutou e te Tamaiti, he tino rangatira ano koutou.
> (Then Jesus said to those Jews which believed on him, [‘]If ye continue in my word, then are ye my disciples indeed; And ye shall know the truth, and the truth shall make you free[‘]…. If the son therefore shall make you free, ye shall be free indeed. (KJV))

Hence, Williams used the social status of rangatira to convey the idea of spiritual freedom from sin. Just as rangatira in Māori society were free from (or independent of) external control, all who accepted Christ would be truly free of sin’s controlling power (‘he tino rangatira ano

koutou'). The spiritual meaning also contained some startling social implications: it suggested that even pononga (slaves or servants) could become rangatira.

Whether or not rangatira had embraced missionary influence, Williams' use of 'Rangatiratanga' for 'Independence' and 'he W[h]enua Rangatira' for 'Independent State' neatly conveyed the English meanings of 'Independence' as 'freedom', 'exemption from reliance or control', or 'state over which none has power'.[521]

Article 2

> *Ko te Kingitanga ko te mana i te wenua o te wakaminenga o Nu Tireni ka meatia nei kei nga Tino Rangatira anake i to matou huihuinga, a ka mea hoki e kore e tukua e matou te wakarite ture ki te tahi hunga ke atu, me te tahi Kawanatanga hoki kia meatia i te wenua o te wakaminenga o Nu Tireni, ko nga tangata anake e meatia nei e matou e wakarite ana ki te ritenga o o matou ture e meatia nei matou i to matou huihuinga.*

Williams' conjoining of Kingitanga and mana to denote 'sovereign power and authority' (in the English text) reflected the fact that Māori terms alone were inadequate to translate a new concept of national sovereignty. His use of 'huihuinga' (article 2) and 'runanga' (article 3) for Congress appropriately indigenized a European concept. Congress was intended as the practical outworking of te Wakaminenga, or the Confederation. Manuka Henare states: 'The idea that Māori would pass legislative law and that it was to apply to all Māori represented a radical development in Māori custom law and practice'.[522]

Rangatira or Congress reserved to themselves the new legislative powers ('te w[h]akarite ture') and functions of civil government ('Kawanatanga'). Both Kāwanatanga and 'ture' (the Torah or Old Testament law) were missionary-introduced words. Together they conveyed a combination of civil/ secular law and Christian morality. Most CMS missionaries would have viewed 'state'

[521] These definitions from Johnson's *Dictionary* (1824 edition).
[522] Henare, *From Tribes to Nation*, p 191.

and ‘church’ within a single frame, though there were also important differences between them. Such views paralleled Māori holistic views of society and customary law. The identification of Christianity with civil government (kāwanatanga) was a significant factor in te Tiriti, which according to article one, granted (‘ceded’) this government to the Crown.

Article 3

> *Ko matou ko nga tino Rangatira ka mea nei kia huihui ki te runanga ki Waitangi a te Ngahuru i tenei tau i tenei tau ki te wakarite ture kia tika ai te wakawakanga, kia mau pu te rongo[,] kia mutu te he[,] kia tika te hokohoko, a ka mea hoki ki nga tauiwi o runga, kia wakarerea te wawai, kia mahara ai ki te wakaoranga o to matou wenua, a kia uru ratou ki te wakaminenga o Nu Tireni.*

In article three, te Wakaminenga declared what it would do with this new ‘national’ government: make laws to dispense justice (‘kia tika ai te wakawakanga’), preserve peace (‘kia mau pu te rongo’), end wrongs (‘kia mutu te he’), and regulate trade (‘kia tika te hokohoko’).

Key southern rangatira signed He Wakaputanga between 1835 and 1839, including Te Wherowhero of Waikato and Te Hapuku of Ngāti Kahungunu. The advantages of confederation may have been attractive, but so presumably was the appeal of an alliance (if informal) with te Kingi o Ingarangi. The Māori text exhorted these southern rangatira to ‘discard’ or ‘forsake’ (‘kia w[h]akarerea’) their ‘fight(s)’ (‘w[h]awai’) with Ngāpuhi and join (‘kia uru’) te Wakaminenga, the Independent State or Assembly of New Zealand.

Article 4

> *Ka mea matou kia tuhituhia he pukapuka ki te ritenga o tenei o to matou wakaputanga nei ki te Kingi o Ingarani hei kawe atu i to matou aroha nana hoki i wakaae ki te Kara mo matou. A no te mea ka atawai matou, ka tiaki i nga Pākehā e noho nei i uta, e rere mai ana ki te hokohoko, koia ka mea ai matou ki te Kingi kia waiho hei matua ki a matou i to matou Tamarikitanga kei wakakahoretia to matou Rangatiratanga.*

In article four, rangatira sought the King of England's protection for their infant state, literally, 'our childhood' ('to matou Tamarikitanga'). This language of alliance and protection echoed the chief's 1831 petition, which had appealed for King William IV 'to become our friend and guardian of these Islands' in particular from 'the tribe of [Capt] Marion [du Fresne]'.[523] Henry Williams' journal entry suggests that this earlier petition was at least partially initiated by rangatira: 'Several chiefs came to speak respecting the letter to the King to become protector of this island'.[524]

The chiefs' appeal to the King to be 'matua' expressed a Māori idiom of parent-child, matua-tamaariki. Busby suggested as much about this fourth paragraph.[525] Some rangatira at Waitangi also referred to the missionaries and Busby as 'fathers'.[526] Christian rangatira also understood the Christian God as 'father', as seen in the Lord's Prayer ('E to matou Matua…').

Henry Williams and He Wakaputanga

Henry Williams had no easy task translating the concepts of Busby's draft Declaration into the Māori text of He Wakaputanga. For Williams, the concepts of independence (rangatiratanga) and independent state (he wenua rangatira) had a number of connotations. First, these terms implied notions of religious and civil liberty, or freedom from dictation by government in matters of faith or worship. Williams would have considered these freedoms in jeopardy if the French Government had established itself in the country. Second, there was the connotation of spiritual and social liberty, or independence from individual and social sin, which was only possible through Māori believing in Christ. Third, Williams understood that all peoples had divine origins. This meant that their integrity as a people or nation had to be respected.

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[523] T L Buick, *The Treaty of Waitangi: How New Zealand Became a British Colony*, third edition, (New Plymouth: Thomas Avery, 1936), p 11.
[524] Rogers, *Te Wiremu*, p 90, citing Williams' journal, 28 Sept 1831, CN/O 94.
[525] See above text at n 129.
[526] See W Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Wellington: George Didsbury, 1890).

Williams' understanding of a 'Congress' may have been partially formed from his familiarity with the Congress movement in Europe, which began with the Congress of Vienna in 1814-1815. The Congress marked the end of the Napoleonic Wars. It also marked the end of Williams' navy career.[527] The Vienna Congress produced the second Treaty of Paris in November 1815, which allotted France the colonies it had possessed in 1790.[528] (Busby referred to this same Treaty of Paris in his 1837 protectorate scheme proposals.[529])

The Vienna Congress also denounced the slave trade. The CMS *Missionary Register* of June 1816 noted an important article appended to the Treaty of Paris. This article apparently confirmed the French and Allied Powers' prohibition 'in their respective dominions' of the slave trade – 'a commerce so odious, and so strongly condemned by the laws of religion and of nature', the Treaty declared.[530] This wording proves the relevance of concepts of divine and natural law to the law of nations of this period. Following the first Treaty of Paris (May 1814) the *Missionary Register* was ecstatic in its praise of Britain. Britian had rendered services to 'European Independence' and maintained the 'independence' of other European states against the Napoleonic threat.[531]

Williams' exit from active naval service at the tail end of the Vienna Congress and the anti-slavery concerns expressed in Evangelical publications like the *Missionary Register* (which Williams read), suggest Williams' familiarity with European state relations of this period. The Vienna Congress established a system of congresses to adjudicate future problems. 'The Congress of Vienna was a prime example of balance of power diplomacy', says the *Oxford*

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[527] In August 1815 he was discharged on half-pay, see Rogers, *Te Wiremu*, p 34.
[528] J Cannon, ed, *The Oxford Companion to British History* (Oxford: Oxford University Press, 1997), p 957. It also produced the first Treaty of Paris in May 1814 following Napoleon's abdication in April 1814. This first Treaty restored the Bourbon monarchy, returned most of France's colonies, and allowed her the boundaries of 1792. Post-Waterloo, the second Treaty of Paris was more severe, giving France the 1790 boundaries.
[529] See text at n 174.
[530] *Missionary Register*, vol 4, (1816), pp 218, 220-221.
[531] *Missionary Register*, vol 2, (1814), pp 243-244. The same report stated, in similar triumphal language, the nature of Britain's 'sacred obligations' to 'protect, to instruct, and to redeem' the 'savages' of the world (p 243). The British mission societies were disappointed at the first Treaty of Paris, which allowed the French slave trade to continue for five years and restored African Forts and Factories to her. An address was moved in the House of Lords for abolition of the trade, stating that it was contrary to 'the Law of Nations', *Missionary Register*, vol 2, (1814), pp 246, 253.

Companion to British History.[532] Williams would have appreciated the relevance of 'balance of power diplomacy' applied to a divided Ngāpuhi and a divided New Zealand. In this context, a Congress, huihuinga, or runanga, that brought together Ngāpuhi and other iwi for the purpose of pan-iwi government would have been no mean achievement. Such Māori congresses were not repeated in the period 1836-1839, the period between He Wakaputanga and te Tiriti.

James Busby and British Official Understandings of the Declaration

Busby's English text of the Declaration of Independence constituted a new Māori 'Independent State', and declared its independence at the same time. This differed from the American Declaration of Independence (1776) that was prepared at the same time as separate 'Articles of Confederation' setting out the terms on which the American states would unite.[533] In 1837 Busby revealed his thinking that the Declaration was both a 'constitution' and a declaration:

> The articles of Confederation [that is, the Declaration] having established and declared the basis of a Constitution of Government, it follows, I think, that the rights of a Sovereign power exist in the members of that confederation, however limited the exercise of those rights has hitherto been.[534]

Therefore, Busby clearly believed that the Declaration of Independence 1835 had international status. Yet the Declaration should not be understood in terms of present day international law. The Independent State of the United Tribes was not the same thing as a modern day nation-state, nor a European state of Busby's period. Busby justified the Declaration as establishing a British 'protectorate', albeit an informal one. Busby hoped the rangatira Congress, whose 'laws' would be guided by himself, would be backed by a British military force, albeit a limited one. Busby's 1837 statement revealed that he thought the exercise of Māori sovereignty or government had

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[532] Cannon, ed, *Oxford Companion to British History*, p 957.
[533] The US Congress passed the Articles of Confederation 15 November 1777. They were not ratified until 1 March 1781. See C C Tansill, ed, *Documents Illustrative of the Formation of the Union of the American States* (Government Printing Office, 1927), (http://avalon.law.yale.edu/18th_century/artconf.asp, 9 November 2009).
[534] Busby to Col Sec, 16 Jun1837, No 112, pp 245-263, p 251.

been limited. His 1837 protectorate proposals clearly implied a limitation of both the Confederation's 'internal' and 'external' sovereignty. Not only would British power deal with other foreign nations in respect of New Zealand (removing 'external sovereignty'), but Māori government would be guided by British expertise and supported by British military force (limiting 'internal sovereignty').[535] He complained in 1839 that, 'in attempting to obtain the cooperation of the Chiefs in execution of any of the functions of a Govt, or to establish amongst them any system of Jurisprudence, there was no foundation on which I could proceed'.[536] This was despite the existence of the Declaration.

The nature and effect of the Declaration must take into account its background and its context. First, Busby identified Māori society with the tribal (Anglo-Saxon) society of ancient Britain.[537] Second, Busby believed that a Māori nationality could only be forged by uniting this factional or tribal society. Third, Busby assumed that the establishment of a national framework of governance could only be achieved on English or British models. This necessarily required British supervision, advice and military backing for the authority of a tribal collective. British jurisdiction or protection was inevitably the practical means by which a chiefly confederation might be established and preserved. Fourth, in view of this, a collective Māori sovereignty was a British construct. To the extent that a Māori national sovereignty could be established for Busby it was predicated on the establishment of some form of British authority with Māori consent.

For Busby, independence or 'statehood' required the exercise of government and law. Hence, Māori statehood would emerge gradually as Congress and its institutions developed. During this development phase the 'infant' Māori state would have to depend on Britain for support. The Declaration of Independence was, therefore, as much a declaration of *dependence*. This is not to deny the legitimacy of the tribal sovereignties that Busby identified from the very beginning of his tenure as British Resident. Indeed the Declaration's use of the words 'Congress' and

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[535] Wheaton used these two terms ('internal' and 'external' sovereignty) in explaining the nature of the Ionian Protectorate, which Busby used as a model for his own proposal. See H Wheaton, *Elements of International Law*, R H Dana, ed, (Boston: Little, Brown & Co, 1866 (1836)), (http://books.google.co.nz/books, accessed 4 November 2009), para 35, ch 2, part 1.
[536] See n 433 above.
[537] See Busby's speech to chiefs on his arrival, at n 125 above. Pat Moloney's research confirms 'a common comparison of Māori to the Anglo-Saxons of Britain', see P Moloney, 'Savagery and Civilization. Early Victorian Notions', *New Zealand Journal of History*, vol 35, no 2, 2001, p 158.

'Confederation' might have meant that Māori rangatira would retain their original *local* powers in relation to hapu. But if Māori were to stand on the world stage, then their independence had to be founded on a national or pan-tribal collective.

In Britain, Secretary of State Lord Glenelg acknowledged receipt of the Declaration and its contents. There was, however, no unequivocal statement that Britain acknowledged the Declaration as constituting an independent New Zealand state. The emphasis was rather on the relationship of support and protection which Britain could offer Māori. And even that might be qualified by 'a due regard to the just rights of others and to the interests of H.M. Subjects'.[538]

To reiterate these points another way. Busby and most officials thought that full nationality or 'sovereignty' status depended on a viable national government. James Stephen's third draft of Hobson's instructions stated that 'international relations' could not be formed with New Zealand as it possessed no national government or 'civil polity'.[539] Normanby's final instructions to Hobson qualified New Zealand as a 'sovereign and independent state' on identical grounds.[540]

In summary, the first question of this Tribunal Commission asked about the Declaration's 'international standing'. Busby clearly intended the Declaration to have an international effect – to forestall de Thierry. Yet it did not establish a sovereign state dependent entirely on itself. The NSW Governor and Council regarded the Declaration as 'an approach towards a regular form of Government in New Zealand'.[541] Furthermore, the Crown never formally assented to, or gazetted, the Declaration.[542] Indeed, the second question posed by the Tribunal for this inquiry wrongly assumes that the Crown 'signed' the Declaration.

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[538] Glenelg to Bourke, [25] May 1836, No 5, CO 209/1, pp 268-270a.
[539] CO 209/4, pp 226-227. See discussion of these complexities in chapter 4.
[540] '…so far at least 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 deliberate in concert', cited in Palmer, *Treaty of Waitangi*, p 49, and quoted by Gipps in his address to the NSW Legislative Council on 9 July 1840. CO 209/6, p 280a.
[541] McLeay to Busby, 12 Feb 1836, No 36/5, NSW Colonial Secretary, Outward Ltrs 1831-1836 [NSW 4/3523] NSW State Archives, Micro Z2710, NA, pp 513-517.
[542] The Declaration would not have been 'gazetted' since the Crown was not a party to it. The first 'official' publication of the Declaration would appear to be in the evidence of Coates and Beecham before the House of Lords Select Committee 1838, see BPP 1837-38 (680), pp 245-246, IUP vol 1.

Issue 3: The effect of He Wakaputanga/ The Declaration 1835

'What then was the effect of He Wakaputanga/ The Declaration at 1835?'

Williams' View

At one level, Henry Williams probably considered that He Wakaputanga affirmed the mana or authority that rangatira already exercised as chiefs of hapū. At another level, given the French/ de Thierry threat, Williams would have seen sense in rangatira collaborating for mutual support and strength against foreign incursion and for internal order. From the written record, it is difficult to say to what extent the idea of national civil governance was understood and expressed the definite intentions of rangatira. Certainly there were no further Confederation hui or runanga at Waitangi until 5-6 February 1840 (and that could not be viewed as the yearly legislative hui envisaged by the Declaration).

Williams probably saw the fourth article as of equal importance than any of the others. It is possible that he had in mind the history of interchange between rangatira and England; that he thought the Declaration reinforced the alliance with Britain which began with Hongi and Waikato's hui with King George IV in 1820. Williams and his CMS colleagues (perhaps with scribe Pare's assistance) certainly expressed the fourth article in idiomatic Māori – in the language of parent and child. They possibly saw this article as bringing Britain's protection closer.

Missionaries conceived the British monarch as a protecting parent. His/her protection reflected God's greater parental protection. Only by being dependent on God could individuals and states be truly free or independent of sin. Similarly, Māori dependence on a British parent would ensure their rangatiratanga in a world being divided between rival European states.

Te Wiremu probably believed that the idea of a Māori Congress was a rational idea. Like Busby, he probably believed that its viability would depend on the support of British authority. His

advice to Busby about constructing a House of Assembly for the Confederation to meet demonstrated that he was thinking about the practicalities of a Māori government. His advice about te kara (the 1834 flag) and his involvement in preparations for the powhiri and hakari on Busby's arrival, show that he walked in a Māori world in which symbol, ceremony, and hospitality were significant values.

Busby and Official Views

In 1836, the neutral ground of Busby's Residency was stained with the blood of a Whananaki hapū after Te Hikutu's surprise attack. Pākehā traders were implicated in the property dispute which led to this affray. In 1837, Busby witnessed the battle for Kororareka resume between Pomare and Titore and their allies. Other issues relating to land and trade arose between settlers and Māori.

These issues convinced Busby that te Wakaminenga would only have limited practical effect without the support of British governing institutions and a military force. Yet the British or NSW Governments never granted Busby the legal authority or practical means to enforce any law or prohibition that the Confederation might make.

From a twenty-first century standpoint it is easy to dismiss Busby's talk of Māori tutelage in British ways as imperial paternalism, or as a pretext for acquiring British control of the country. However Busby's exact motivations are less important than his actual proposals and what they say about his worldview. His proposals were paternalistic. Yet this merely reflects his understanding of the appropriate relationship between a civilized British empire and a Māori tribal society that was in the early stages of becoming civilized. In this context 'civilization' meant almost entirely one thing – 'Civil Government'. That is what Busby believed the British could offer Māori, in addition to the equally important process of Christian conversion.

Busby's 1837 protectorate proposals for the tutelage of Congress (or te Wakaminenga) by British authority should be placed within the overarching master narrative of civilization that structured his worldview. Busby believed that societies could, over time, scale the ladder of civilization.

English society, and Scots society in quite recent history, had experienced such advances. Equally, so could Māori society. Busby believed that in time Māori could become both 'Jurymen' and 'Legislators'. Quite what the relationship would be, at that point, between te Wakaminenga and British authority is not clear from his protectorate proposals.

Captain William Hobson noted the very limited achievements or organization of the Confederation in 1837:

> At present, notwithstanding their formal declaration of independence, they have not in fact 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 the danger of bloodshed.[543]

Disunited tribes remained vulnerable to manipulation by 'turbulent individuals', said Hobson.[544] It was in this despatch that he proposed the 'factory system' for New Zealand, modelled on his Indian experience.

While Hobson acknowledged the formal existence of the Declaration, doubting only its practical or governmental effect, Bourke's successor, Governor Gipps, dismissed the Declaration as 'a silly as well as an unauthorized act.... it was…a paper pellet fired off at the Baron de Thierry'.[545]

Gipps' comments could themselves be dismissed: they were made five years after the Declaration in a debate about pre-Treaty European land claims. Although the Declaration was itself unauthorised, it was arguably within the scope of Bourke's instructions which exhorted Busby to encourage among Māori 'a settled form of government' and law.[546] Bourke and his Council approved the Declaration, even though Busby did not have specific authority for it. But they objected to article two, which they thought was inserted to override McDonnell's Hokianga law prohibiting liquor imports. And they cautioned Busby to seek NSW's sanction for any future

[543] Hobson to Bourke, 8 Aug 1837; encl in Bourke to Glenelg, 9 Sept 1837, No 86, CO 209/2, ATL, p 34-34a.
[544] Ibid, p 35-35a.
[545] Gipps' Speech to NSW Legislative Council, 9 July 1840, CO 209/5, pp 281-281a.
[546] Bourke to Busby, 13 April 1833, BPP (1840), p 6.

measures of importance before submitting them to rangatira for adoption.[547] For his part, Secretary of State Glenelg approved Busby's efforts 'to defeat the attempt of the person calling himself Baron de Thierry, to establish a Sovereignty over the New Zealanders'.[548]

The Confederation acted on at least two occasions between 1835 and 1840. A Committee of the Congress issued a warrant in 1837 for the arrest and deportment to NSW of the Europeans charged with the crime of theft from Captain Wright. Busby probably prepared this warrant for their endorsement.[549] In 1838 Busby obtained the authority of Confederation chiefs to execute a Hokianga 'slave' for the murder of a European.[550]

Issue 4: The relationship between He Wakaputanga and Te Tiriti

'What, if any, was the relationship between He Wakaputanga/ The Declaration and Te Tiriti/ The Treaty?'

The close relationship between He Wakaputanga and te Tiriti requires careful interpretation. In particular, the uses which He Wakaputanga makes of the words rangatiratanga and mana must be understood in light of all other important word choices, including kāwanatanga. Te Tiriti also makes use of rangatiratanga and kāwanatanga. Each document must also be understood in light of its unique purpose and context. He Wakaputanga was about creating a new Māori state. Te Tiriti was about bringing that Māori state, or rather a collection of states or hapū, under the protective governance of Britain.

'Rangatiratanga'

[547] McLeay to Busby, 12 Feb 1836, No 36/5, NSW Colonial Secretary, Outward Ltrs 1831-1836 [NSW 4/3523] NSW State Archives, Micro Z2710, NA, pp 513-517.
[548] Glenelg to Bourke, 26 August 1836, HRA 1/18, p 506.
[549] Busby to Col Sec, 3 Jul 1837, No 113, pp 263-265.
[550] Busby to Col Sec, 28 May 1838, No 127, pp 280-282.

The Declaration's article one declared the independence (rangatiratanga) of the independent state (whenua rangatira) of New Zealand. Te Tiriti appeared to protect this same rangatiratanga in article two.

What did the independent state of New Zealand mean to Busby and Williams and their British associates? This report suggests that Williams saw He Wakaputanga as confirming the rights and independence which the Māori 'nation' already possessed by virtue of being a people created by God. 'Nation' should be understood in the early-modern sense given by Johnson's *Dictionary* as 'a people distinguished from another people'. This Māori nation pre-dated He Wakaputanga. Therefore, He Wakaputanga declared an independence that already existed. It also pointed to a British form of national governance, in the form of a Congress or legislature.

Busby, with his stadial views of civilization, identified the existence of an independent state more with this collective national governance – Congress or te Wakaminenga. Most British officials similarly identified the two. Hence, when it was clear that a Māori pan-tribal government had not developed much beyond the Declaration by 1839, Normanby's instructions qualified the acknowledgment of New Zealand 'as a sovereign and independent state':

> so far at least 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 deliberate in concert.[551]

Yet British officialdom did not believe that a Māori state properly existed at 1840. And Williams and company, for their part, saw its 'independence' in terms of a sanctified Māori chieftainship (or rangatiratanga), at least as much as in governmental terms. This means that the rangatiratanga protected by Kuini Wikitoria in article two of te Tiriti did not amount to that of a European kingdom or state. There was in fact no 'Kingitanga' established by 1840: there was no King, neither was there an operational British-style legislature.

[551] Palmer, *Treaty of Waitangi*, p 49. This is quoted by Gipps in his address to the NSW Legislative Council on 9 July 1840. CO 209/6, p 280a.

‘Kingitanga’, ‘Mana’, ‘Kawanatanga’, and ‘Tamarikitanga’

Article two of He Wakaputanga specficied the location of the United Tribe’s ‘sovereign power and authority’ (ko te Kingitanga ko te mana’) in their Congress (‘huihuinga’ or ‘runanga’). In other words, it was Congress that was to exercise or represent the sovereignty of te Wakaminenga. Article two expanded on this thought, declaring that only Congress was to make laws (‘te wakarite ture’) and/or exercise government (‘Kawanatanga’). Hence, the Declaration established the inextricable connection, in British thinking, between national sovereignty and national government or kāwanatanga: Congress held the sovereignty because it enacted the laws.

It is possible to say that rangatira probably had a limited understanding of the meaning of rule by legislation, especially as the Congress was never effective in that capacity. The governor’s authority in NSW would have showed itself more in terms of military and police powers – the coercive end of civil government or kāwanatanga, rather than the law making or parliamentary end. On the other hand, Christian rangatira may have had some conception of the new Christian ‘ture’ (law) from the scriptures (the Ten Commandments, for example). And ‘ture’ was of course used in He Wakaputanga for law-making (‘te wakarite ture’).

The text of He Wakaputanga tied a British form of governance, by way of national assembly or Congress, very much to this law (ture) and its associated kawanatanga. Hence, Williams and Busby probably considered that at least some rangatira would have made the connection between the chiefs’ claim of governmental powers in 1835 and the coming of Hobson to be a governor for Pākehā and Māori (‘hei Kawana hoki mo tatou’), in the words of Busby’s invitation to the 5th February hui.[552] In the Treaty’s article one, rangatira granted to the Queen this right of government over the land.

Williams’ explanation at Waitangi reinforced the idea that te Kāwanatanga would govern all by means of one law:

[552] Busby circular to rangatira, ‘No te 30 o nga ra o Hanuere, 1840’ [30 Jan 1840], MS 46, AML.

> We gave them [the chiefs] but one version [of the Treaty], explaining clause by clause, showing the advantage to them of being taken under the fostering care of the British Government, by which they would become one [Christian] people with the English, in the suppression of wars, and of every lawless act; under one Sovereign, and one Law, human and divine.[553]

Rangatira influenced by Christian teaching presumably would not have escaped the implication that the law brought by Hobson would reflect scriptural principles or 'ture'. Hobson's 'he iwi tahi tatou' (we are all one people) on 6 February 1840 would surely have brought home to some rangatira the Biblical concept of a new sanctified nation, of Māori and Pakeha, under British protection.

Article three of the Declaration stated the subject-matter of the laws to be made by Congress: 'justice' (which probably meant the criminal law), the peace of the realm, and commercial regulation. These ideas were expressed idiomatically in the Māori text. Together with the foreign threat, these were the key concerns of Busby, the missionaries, and rangatira, in 1835. Arguably, missionaries thought that these 'national' governmental functions were handed over to Hobson in 1840 (by the cession of kawanatanga).

The Declaration's article four requested the King's protection. The Treaty of Waitangi formalized this request by express convenant (in particular, articles two and three). This protection implied some form of natural or social hierarchy, as expressed by the metaphor of the King as parent ('matua) and Māori as child ('tamariki/tanga').

Issue 6: Crown understandings of Te Tiriti/ The Treaty

'How did the Crown understand Te Tiriti/ The Treaty? And, therefore, what was the nature of the relationship and the mutual commitments it was assenting to in signing Te Tiriti/ The Treaty?'

[553] Williams, 'Early Recollections', [nd], cited in Carleton, *The Life of Henry Williams*, vol 2, p 14. Williams' account is somewhat unclear, whether it was the 5 February hui when he reassured chiefs in this fashion, or whether it was after the hui in private discussions with some rangatira.

The focus of this section will be on the meaning of Williams' translation.

Article 1: 'Sovereignty' and 'Government'

In the early nineteenth century, 'sovereignty' was defined as 'supreme power' or 'highest place'. A 'sovereign' was a 'supreme lord', who was subject to no other authority.[554] These definitions suggest that the English Monarch was the highest power in the kingdom, though not an absolute power. The idea of absolute, unlimited, or despotic power was associated in British thought with European Catholic kingdoms, not with the British constitution. In England, the sovereign ruled in accordance with law and liberties. William Blackstone gave a theoretical legal definition of sovereignty as 'a supreme, irresistible, absolute [and] uncontrolled authority'. Yet Blackstone also stated that English laws (stemming from Magna Charta) preserved English rights of personal security, personal liberty and private property. The 'spirit of liberty', Blackstone said, was 'deeply implanted in our constitution, and rooted even in our very soil'.[555]

Blackstone expressed a common English view of constitutional monarchy rather than absolute monarchy. Williams, Busby, and their compatriots no doubt shared this view. Williams applied this domestic constitutional perception to the Treaty, when he said: 'My view of the Treaty of Waitangi is, as it ever was, that it was the Magna Charta of the aborigines of New Zealand'.[556] In the common-place political thinking of Williams' day, Magna Charta, or the Great Charter, had protected the lives, liberties and property of Englishmen from 1215 to the present.

Ruth Ross, in her 1972 article, suggested that Williams should have 'associated *mana* with *kawanatanga* in the translation of sovereignty', for then 'no New Zealander would have been in

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[554] S Johnson, *A Dictionary of the English Language: in Which the Words Are Deduced From Their Originals, Explained in Their Different Meanings, and Authorized by the Names of the Writers in Whose Works They are Found*, A Chalmers, ed, abrid from H J Todd edition, (London, 1824), (http://books.google.com/books, 17 July 2009). Johnson apparently derived these definitions of sovereignty largely from William Shakespeare, as well as Richard Hooker.
[555] Blackstone, *Commentaries*, vol 1, pp 127-129.
[556] Williams to Bishop Selwyn, 12 July 1847, vol 100, p 53, MS 91/75, AML, p 53.

any doubt about what the chiefs were ceding to the Queen'.[557] Ross and many commentators since have assumed that the sovereignty being ceded was akin to Blackstone's 'supreme, irresistible, absolute [and] uncontrolled authority'. Yet this ignores the common understandings of most Englishmen about their constitution that even the great legal authority of Blackstone included in his account. Williams emphatically did *not* believe that Māori were granting to Queen Victoria a sovereignty that was unconstrained by law and liberty. Likewise, he believed in a sovereignty that protected chiefly mana (authority) and rangatiratanga (chiefly privileges) in relation to hapu affairs. Seen through the eyes of constitutional monarchy, therefore, the cession of sovereignty did not imply the loss of chiefly rights.

So what was 'sovereignty' to Williams, if it was not unlimited political power, or the absorption of all authorities (or mana) into the person of the Queen or the Governor? *In essence, it was civil, constitutional, government.* 'Government', especially government by legislation, was the English version of 'sovereignty'. Johnson's *Dictionary* defined 'government' as 'form of community with respect to the disposition of [administration of] the supreme authority'. Hence, sovereignty was administered by institutions of government.

William Blackstone identified government with legislative rule. And he wrote that 'Sovereignty and legislature are indeed convertible terms; one cannot subsist [exist] without the other'.[558] In the British constitution, according to strict legal definition, Parliament (or the Crown-in-Parliament) made laws and was therefore sovereign. Williams' discussions of the Treaty, on the other hand, showed that he saw the Crown or Her Majesty at the pinnacle of the constitution. Whatever the exact location of the sovereign power within the British state, it is clear that Williams associated the Queen's 'sovereignty' with her 'government'. In his important letter to Bishop Selwyn of July 1847 Williams made no attempt to gloss his Māori translation of 'kawanatanga' as 'sovereignty' for the Bishop's benefit. He simply translated back the Māori text as 'government'. Māori had given up 'government', not 'sovereignty', to Queen Victoria. Yet, if there was any difference in Williams' mind between the two terms, he did not show it.

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[557] R M Ross, 'Te Tiriti o Waitangi: Texts and Translations', *New Zealand Journal of History*, vol 6, no 2, 1972, p 141.
[558] Blackstone, *Commentaries*, vol 1, p 46.

Rather, on the balance of evidence, Williams thought ‘sovereignty’ and ‘government’ were identical terms.

This interpretation is consistent with the actual subject-matter of Waitangi discussions. As Michael Belgrave argues:

> …the one idea that was repeated again and again in the treaty debates was that of a governor. No Māori was recorded as discussing the meanings of the three articles with Hobson or any other bearer of the treaty for signing. However, Māori repeatedly debated whether they wanted a governor and, if they did, what powers the governor would have and what the consequences would be. These were down-to-earth, realistic discussions, the kind of discussions that Henry Williams would have considered a practical debate about sovereignty.[559]

Supporting this interpretation also, ‘sovereignty’ was at the core of early nineteenth century definitions of ‘governor’ and ‘govern’. Dr Samuel Johnson defined the phrase ‘*To* Govern’ as ‘to rule as a chief magistrate’, and ‘to regulate, to influence, to direct’. A ‘governor’ was ‘one who has the supreme direction [sovereignty]’, or ‘one who is invested with supreme authority [sovereignty] in a state’. ‘Governor’ was further defined as: ‘one who rules any place with delegated and temporary authority’. The idea that a governor was someone who exercised at least a local or provincial sovereignty was stronger in these definitions than the idea of delegated power from Emperor or King. The Biblical Roman governors and the Australian governors all exercised the same sovereign control or the ultimate governing power within their respective provinces or colonies. There is therefore no need to read into the meaning of ‘kawanatanga’ a lesser power than that of territorial sovereignty. Territorial sovereignty is exactly what governors exercised. Williams, Busby, and British officials, it is suggested, all understood things this way.[560]

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[559] Belgrave, *Historical Frictions*, p 60.

[560] Belgrave also suggests that ‘Busby, with his much more esoteric language of rights, might have preferred a different term [than kawanatanga], but Williams was not Busby’, ibid, p 60. This is a reasonable suggestion based on the differences in Busby and Williams’ character and worldviews, yet there is no direct evidence of this. The interpretation advanced above suggests rather than kawanatanga or civil government was both a functional and theoretically-correct word to translate sovereignty.

Hence, Williams' use of kawanatanga to translate sovereignty was both functional and theoretically-correct. It was functional because it was focused on Hobson's exercise of practical powers of civil government.[561] It was theoretically-correct because the highest form of sovereignty to be exercised over a territory or people was a law-making and law-enforcing power.[562] The tino rangatira, Queen Victoria, had sent her rangatira, Hobson, to be kawana for all those places of New Zealand that were given to her ('hei Kawana mo nga wahi katoa o Nu Tirani, e tukua aianei a mua atu ki te Kuini'), in the words of the preamble. The rangatira of the Confederation and the other rangatira then, in article two, gave up fully to Queen Victoria for ever the entire Government of their lands ('ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu te Kawanatanga katoa o o ratou w[h]enua').

Andrew Sharp has suggested, summarising others' views, that Williams should have used 'mana', 'rangatiratanga', or 'kingitanga' to convey to Māori 'the abstract and magical conception of British legal sovereignty'.[563] However, Williams possessed an 'abstract and magical conception' of the Queen's personal sovereignty, not some view of unlimited, impersonal legal power. Besides, missionaries had already taught Māori to exalt the idea of the Crown's Majesty. Rangatira did not need to be told that Kuini Wikitoria possessed mana. Nor did they need to be told that her rangatira Hobson possessed mana. The real issue was the type of sovereignty to be exercised by Hobson, which was captured by the word kāwanatanga.

Lastly, Ross pointed out that although Williams used mana with kingitanga in He Wakaputanga to mean 'all sovereign power and authority', he did not employ mana for sovereignty in te Tiriti.[564] Yet the contexts and purposes of each document were different. Ross's use of Declaration terminology has superficial appeal because it appears to be a simple case of taking a word used in one document (mana = sovereignty) and using it in a second document to mean the same thing (cede sovereignty = cede mana). However simple word transference is not a good

[561] In 1837 Busby wrote about Māori giving up 'the Government of their Country' to the Crown. 'Government' was here equivalent to 'Sovereignty', see text at n 172.
[562] Blackstone said that 'legislature…is the greatest act of superiority that can be exercised by one being over another', *Commentaries*, vol 1, p 46.
[563] Sharp, *Justice and the Māori*, p 18.
[564] Ross, *Te Tiriti*, p 141.

understanding of the way translation must work in practice. The fact is that sovereignty was an English word. There was no direct Māori equivalent. A Māori sovereignty declared in part by the significant word mana in 1835 was not going to work to mean the giving up of that mana in 1840. To Williams this was not intended in 1840.

Williams needed to interpret sense and spirit rather than attempt the impossible of direct word-for-word translation. Even then, he admitted these translation difficulties:

> In this translation it was necessary to avoid all expressions of the English for which there was no expressive term in the Māori, preserving entire the spirit and tenor of the treaty.[565]

Williams expressed his considered opinion that words without a Māori equivalent required him to avoid direct translation. Instead, he used an introduced word or transliteration that Māori understood via other means. Kāwanatanga was very likely one of those transliterations. In a sense Māori already had their 'picture' of the type of authority that would be exercised by the Queen through her Kāwana. It was provided in the New Testament by the Roman governors and by the Australian governors from first hand experience of some chiefs.

Article 2: The Crown Guarantees 'te tino Rangatiratanga'

In article two of te Tiriti, the Crown guaranteed to rangatira, to hapū, and to all Māori people, their true or full chieftainship of their lands, villages, and all their other treasured possessions ('te tino Rangatiratanga o o ratou whenua, o ratou kainga, me o ratou taonga katoa'). This report has argued that Te Wiremu (Henry Williams) understood this Crown guarantee as protecting chiefly authority in relation to tribal property and affairs. Williams argued with chiefs in 1844 that the Treaty protected their 'Rank, Rights, and Privileges'. These words should be understood as a guarantee of tribal property, with the chief as hapū representative having the right of transacting land with parties outside the tribe.

[565] Williams, 'Early Recollections', [nd], cited in Carleton, *The Life of Henry Williams*, vol 2, p 12.

Yet these words also strongly suggest that rangatira retained the exercise of authority and discretion in relation to tikanga. The word 'privilege' implies a negative right of immunity from Crown interference in hapū affairs. This can be compared with the connotation of 'independence' or 'freedom' which Williams gave to the word 'rangatiratanga' in the Declaration of Independence. The three words 'Rank, Rights, and Privileges' also suggest positive powers or rights of self-determination (or 'prerogative'). Williams use of 'rank' in 1844 and in 1833 at Busby's welcome, suggests a degree of aristocratic independence. In simple terms, this word implied that rangatira enjoyed and should continue to enjoy a degree of dignity and eminence. They were not to be levelled down to become simply British subjects. In his 1847 letter to Selwyn, Williams clearly emphasized the 'rights of chiefs', as distinct from Māori rights generally. In this sense, the Treaty as a Māori Magna Charta confirmed the rights, privileges, and even liberties, of a Māori nobility. A Māori hierarchy of sorts was confirmed. At the same time, like Magna Charta, this status was now held under the Crown.[566]

Article two in the English text was also capable of yielding a confirmation of rangatira status. The Crown guaranteed the rights of 'Chiefs', 'Tribes', 'families', and 'individuals' to their 'Lands and Estates… which they may collectively or individually possess'. Tribal rights, implying in particular chiefly rights, were acknowledged. The word 'estate' can mean both possession and rank.[567]

Article 3: 'the Rights and Privileges of British subjects'

Whereas Williams saw article two as confirming rangatira status, his translation of article three appeared to confirm to Māori British rights and privileges generally. This was in accordance with the English text which did not distinguish chiefs, tribes, and individuals. It simply referred

[566] This discussion is in part constructed from definitions in Johnson's *Dictionary*, as follows: 'Privilege': peculiar advantage (Milton); immunity, right not universal (Shakespeare). '*To* Privilege': to invest with rights or immunities, to grant a privilege (Dryden); to exempt from censure or dander (Sidney); to exempt from paying tax or impost (Hale). 'Immunity': discharge from any obligation (Hooker); privilege, exemption from onerous duties (Sidney); freedom (Brown). 'Right': various defns, including, property, interest (Dryden); power, prerogative (Tillotson); immunity, privilege (Shakespeare). 'Rank': several definitions including, range of subordination (Wilkins); class, order (Atterbury); degree of dignity, eminence, or excellence (Dryden); dignity, high place, as in 'he is a man of rank'.

[567] See Johnson's *Dictionary*.

to ‘Natives’, which Williams rendered ‘nga tangata Māori’. Rights and privileges, Williams interpreted as ‘tikanga’. Williams conceived British subjects generally as ‘freemen’. A ‘freeman’, in the words of Johnson’s Dictionary, was ‘one not a slave, not a vassal (Locke)’, or ‘one partaking of rights, privileges, or immunities (Dryden)’.

David Brion Davis in his 2006 book *Inhuman Bondage*, refers to Britain as a rather surprising core of the international anti-slavery movement. He ponders the words of ‘Rule Britannia’: Britons never, never, never, shall be slaves. It captures something that perhaps explains why Britian, not France, and certainly not the US, kicked off the mass emancipation of the 1830s.[568]

Issue 7: the Effect of Te Tiriti/ The Treaty

‘What then was the effect of Te Tiriti/ The Treaty at 1840?’

From a missionary point of view, te Tiriti established the Crown’s protection of chieftainship (rangatiratanga) over tribal lands and tribal tikanga (to extent these were not inconsistent with Christian morality). It granted to Queen Victoria the rights of civil government over all rohe or territories ceded (e tukua). In Williams’ eyes, this civil government probably included the power to try and convict criminals (both Māori and Pākehā), mediate in inter-tribal disputes, regulate trade, and keep the peace generally. These were in essence the powers of kāwanatanga which the Confederation nominally exercised under the Declaration.

From a Crown point of view, it would be fair to say that officials envisaged a wider range of prerogatives or rights coming under the umbrella of Kāwanatanga than did rangatira (and missionaries). Heke and others disputed the Crown’s assumed right to harbour dues in Peiwhairangi. The Crown right of pre-emption in the English text was not clearly an exclusive right of purchase in the Māori text. It is arguable Williams understood this as a right of ‘first-purchase’ rather than exclusive purchase, though the Crown would still investigate and confirm land transactions with Māori. Neither Māori nor missionaries anticipated the Crown’s claim in

[568] D B Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (Oxford: Oxford University Press, 2006).

the mid-1840s to waste lands. This watershed Treaty issue is beyond the scope of this report. The Crown's assumption of criminal justice powers was tested with Maketu's case in the early 1840s. This, too, is beyond the scope of this report and beyond the scope of the Tribunal's issues.

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