The Editor,  
*Journal of the Polynesian Society*  

Madam Editor,  

In what follows I comment, not exhaustively, on some of the serious flaws in Dr Richard Dawson’s review (*JPS* 2002:391-93) of my book *Waitangi and Indigenous Rights* (Brookfield 1999).  

The reviewer remarks, somewhat dismissively, that the book is “laden with definitions and distinctions”. There are many, certainly, and clearly he has little patience with them and with the legal and moral analyses of which they are part. One distinction he ignores is that between legality and legitimacy, much discussed and developed in the book and indeed implicit in the title. (His bare mentions of legitimacy at the outset of the review do not make the distinction.) To put the matter briefly, legal and constitutional systems established by revolution, whether by internal rebellion or by conquest or colonisation, may for moral or other reasons lack legitimacy. Readers of the review, otherwise unacquainted with the book, would never know that this and the factors that tend to legitimation (particularly in Aotearoa New Zealand) are a major theme of the book. The omission vitiates much of Dawson’s review.  

I do not hold the opinion, and the book does not suggest, that a legal decision is just “a matter of logic and correct answers”. I “perpetuate” no such “myth”. If I were the formalist the reviewer makes me out to be, I would not write (relying on the work of scholars in the field) about the customary Maori legal and constitutional orders of pre-colonisation times (Brookfield 1999:86-90), in which questions of formal legal validity could scarcely arise.  

In discussing the concept of the rule of law, supported in the book but “arguably a myth” according to him, the reviewer may lead unwaried readers to infer, wrongly, that I support the simplistic cry of “one law for all New Zealanders”, frequently uttered by some politicians, who certainly would not favour the constitutional changes to empower Maori, discussed in the book (pp.169-77).  

The reviewer’s astonishingly dogmatic pronouncement that the concept of the separation of powers “has long been recognised as a fiction” is far from accurate and carries untrue implications. If, in relation to the courts, the reviewer means only that normally they will uphold the particular constitutional order of which they are part, that is a point fully explained in the book. But the separation and independence they enjoy within that order, if and so far as the rule of law prevails there, is not fictional and is worth maintaining and strengthening, as is the case with the rule of law generally. After all, the surviving Moriori, the indigenous “Other” of the Chatham Islands, were better off under the imperfect rule of law brought...
belatedly by the Crown, than they were in slavery under the Maori conquerors of 1835 (Brookfield 1999:158-62, Brookfield 2002).

In my criticisms (Brookfield 1999:85) of Dr David William’s account of constitutional origins, I do not suggest “arbitrary, personal biases” on his part, let alone do so in order to “escape[e] fundamental issues about the rhetorical character of law”. Williams (1990:10) wrote that probably “few lawyers and even fewer citizens would be disposed to argue for the legitimacy of the modern nation state of New Zealand” on the purportedly Kelsenian analysis (going back to the events of 1688-89 in England) he had described. As Williams clearly concurred with his fellow New Zealanders, I described his discarding of the analysis, lightly enough, as “patriotic”, without the ill intent imputed to me by this most suspicious reviewer. In any case I discussed the issues raised by Williams many years ago in a critique of his (and Jane Kelsey’s) work (Brookfield 1990). In the absence of a reply, there was no pressing need to return to those issues in the book.

I hope the reviewer will revise his opinion that “Brookfield’s work [is] at best a type of academic puzzle solving” (what is it at worst, one wonders), in light of the use made of it by the Fiji Court of Appeal in Republic of Fiji v Prasad (2001:760, 762 and 768). Referring approvingly to the book, the Court quoted the definition of “revolution” (Brookfield 1999:13) and accepted the legality/legitimacy distinction. The book is having some effect outside the “academic puzzles” scorned by the reviewer.

Oddly, he misunderstands the technical nature of “persuasive authority” in judicial reasoning. (He could usefully consider, for example, Walker 1980:953.) This vitiates his patronising discussion of my views on the matter in relation to Wi Parata v Bishop of Wellington (1877) and the notorious rejection of the doctrine of aboriginal title in that case. He writes, irrelevantly, that my finding the line of judicial authority recognising that doctrine to be “‘persuasive’ does not make it universally persuasive”.

But the point is that there was some reasoning by earlier judges (in cases such as Worcester v Georgia (1832)), in favour of the doctrine, which the Wi Parata judges could have found “persuasive” and chosen to follow and build on. It was within their power (“authority” in the reviewer’s term) to do that. Dawson himself, apparently unknowingly, has given elsewhere a good, hypothetical example of how persuasive authority works. He wrote (2001:80), in justified criticism of Chief Justice Prendergast’s judgment in Wi Parata, that “[a] judge who had some degree of sensitivity to or regard for Maori interests could have decided in favour of Wi Parata using the Worcester case as authority”. I agree.

I agree too (as the book makes plain, despite the reviewer’s contrary assertion) that the setting up of the colonial courts and their functioning were part of the “political process” by which the Crown seized power beyond that ceded under the Treaty of Waitangi. Here the process of legitimation, ignored by the reviewer, plays an important part, if an admittedly controversial one.

The idea of Maori “meaningfully participat[ing]” in the “working out of what constitutes Māori property and autonomy” is not beyond my “legal imagination” (anchored though that is in what is practically and morally justified in the settlement of Waitangi matters). It must have escaped the reviewer’s notice—much has—that
the new constitutional arrangements I suggest (Brookfield 1999:169-77) would require separate Maori concurrence (p.175). There is no reason why Maori participation in the process should not be “meaningful”.

The reviewer’s final remark, on the use of the “discourse” of legal formalism “to legitimate the disempowerment and dispossession of tribes”, is pointless unless taken to suggest, wrongly, that the book treats formal legal validity of seizures of land in the raupatu as concluding questions of their legitimacy. Yet again the reviewer inexcusably ignores the legality/legitimacy distinction made repeatedly in the book and, indeed, in this context (Brookfield 1999:130-33).

In view of Dawson’s previous criticism (2001:157-60) of earlier writings of mine—which I am in course of answering (Brookfield 2003)—the present review was unlikely to be favourable. Obviously there is no complaint about that. But had Dawson paid better attention to the book and entertained even the minimal sympathy necessary for him to understand what it was mostly about, the review might have been far more informative, fairer and more nuanced. As it is, this tendentious piece may well be effective, as apparently sophisticated propaganda, in the ideological (Gramscian) “war of position” now being waged by some scholars and commentators (Brookfield 1999:165-66). Its merit lies there if anywhere.

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REFERENCES


Wi Parata v Bishop of Wellington (1877) 3 N.Z. Jurist Reports (New Series) 72.


*Worcester v Georgia* 6 Peters 515 (1832) (U.S. Supreme Court).
To the Editor,
Journal of the Polynesian Society

Tena koe, Judith

I note John Laurie’s comment on translating the Treaty of Waitangi (Laurie 2002) and his assertion that my translation of Ko te kingitanga ko te mana i te whenua as ‘Kingitangi is the ultimate power, authority and control of the land’ should be ‘Kingitangi and the ultimate power, authority and control of the land’ (ibid. :257). He asserts that two ko initiated phrases in Māori should be interpreted as the beginning of a list.

My paper (Mutu 2002), from which he quoted, is not concerned with how Europeans understood the Māori that was written, but rather how Māori would have understood what was read out to them when Williams read He Whakaputanga o te Rangatiratanga o nga hapu o Nu Tireni (his Māori version of the Declaration of Independence) to them. As such I am more concerned with how Māori, as native speakers of their own language, understand the sentence above, than how non-Māori may choose to gloss it. The translation I have given accurately reflects the meaning attributed to that sentence by native speakers of Māori.

Sentences of the above form are basic sentence forms in Māori. They are used specifically to introduce new information, which is precisely what Williams was doing in introducing the word kingitanga, which is borrowed from English. John Laurie may find the standard undergraduate beginners’ text on Māori grammar (Bruce Biggs’s Let’s Learn Māori, especially its two sections describing the use of the particle ko) helpful in developing an understanding of this sentence structure. Of further help to him would be Winifred Bauer’s Reference Grammar of Māori, which has a section on new topics and describes these types of sentences in more technical terms.

On the one hand, linguists, including Biggs, Bauer and me, are concerned with language as it is spoken and understood by native speakers. Laurie, on the other hand, seems more concerned with how the English thought Māori should understand what they were being told. In other words, he is advocating that the recorded interpretations of the Māori language, society and culture as written down by recently arrived foreigners is preferable to native speaking Māori understandings of their own language, culture, history and traditions. That includes turning a blind eye to mistranslations of official documents, a practice that was not uncommon in the 19th century (Mutu 1992) and which Fenton and Moon address in their article. So while John Laurie advocates that Māori knowingly and willingly gave up their sovereignty because English observers said they did, the linguistic evidence contained in both He Whakaputanga o te Rangatiratanga o nga hapu o Nu Tireni and Te Tiriti o Waitangi (the Māori language version the Treaty of Waitangi) indicates very clearly that they did not and that their mana and rangatiratanga, that is, their “old powers”, remained intact.

Margaret Mutu
The University of Auckland
Reply to Margaret Mutu:

The Māori of this section of the Declaration of Independence appears to have been translated almost word for word from English. The English version has the phrase, “All sovereign power and authority”. The translation is “Ko te kingitanga ko te mana”. The next phrase is “within the territories” which has been translated as “i te whenua”. Then comes “of the United Tribes of New Zealand” which becomes “o te w(h)akaminenga o Nu Tirenī”.

The oral delivery, including pauses and emphases, would have been such as to convey this meaning. Supplementary explanations would have tended to reinforce the construction put on the sentence by the translator.

The enumeration of items in constructions of this kind is common in Māori.

— “A ko te witi, ko te oti, ko te pare, ka ngakia e te Māori e te Pakeha…” [Te Wānanga: Pukapuka 4, Nama 24: 235 ]
— “Ko te whakapono, ko te ture, nau enei taonga i atua [sic] manaaki” [Te Toa Takitini: Nama 53: p.337]

Mutu argues that Māori listeners would have understood the sentence in a different sense. She suggests that the first part of the sentence consists of two definite nominal phrases “ko te kingitanga” and “ko te mana i te whenua o te w(h)akaminenga o Nu Tirenī” and that it is an example of a narrative beginning with one or more scene-setting statements, with new topic marking and an equational meaning—“the kingitanga (is) the mana of the land of the Confederation of New Zealand (and) is said here…”. This could also be expressed in English in the form “the kingitanga (the mana of the land of the Confederation of New Zealand) is said here….”

I agree this is a possible reading. I believe the wording, as read today, remains inherently ambiguous.

Which of the two constructions is put on the sentence will be influenced by the hearer’s understanding of the terms, kingitanga and mana. If these two entities are perceived to be equivalent, an equational meaning will be assumed. If they are
perceived as different an additive meaning will be deduced. In 1835 the equivalence of *kingitanga* and *mana* would not have been immediate.

There appear to be many examples in written Māori of definition-type nominal sentences where second phrase is not marked with “ko”. If the translator of the Declaration had wished to emphasise the meaning suggested by Mutu and avoid any possibility of ambiguity he might have used two sentences and followed the pattern of the following examples in his first sentence.

— “*a ko te Kawanatanga te tinana o te Kuini, o te Kingi i Niu Tireni nei, a ko te Kawanatanga hoki o tatou matua inaianei ake nei*” (Te Pipiwharauroa: Nama 163:6)
— “*I te mea ko te kawanatanga te mana o nga Ture o te motu nei, e kore ia e pai kia whakakino i tona turanga, homai ana etahi Ture hei whakapororaru i te ngakau o te Maori*” (The Jubilee: Te Tiupiri: Pukapuka 1, Nama 18:6).
— “*a ko te Kawanatanga te kai tiaki, a ma ana Kooti komihana e whakamana nga hoko, nga Riihi, ka mana ai*” (Te Puke ki Hikurangi: Pukapuka 1, Nama 10:6).
— “*ko te Kawanatanga te kai-whakahaere, te kaiwhakatutuki o nga ture e hangaia ana e te Paremata*” (Te Toa Takitini: Nama 28:12).
— “*ko te Nupepa te kai whakaatu i nga hau pai i nga hau kino*”… (Te Puke ki Hikurangi: Pukapuka 6, Nama 2:3).

Finally, in the context of my arguments about the translator of the Declaration, if his Māori listeners misunderstood what he was trying to say, this reflects on his competence in Māori not on his belief that he needed the word *kingitanga* as well as the word *mana* to translate “all sovereign power and authority”.

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