



PROJECT MUSE®

The English Text of the Treaty of Waitangi by Ned Fletcher
(review)

Samuel Carpenter

New Zealand Journal of History, Volume 57, Number 1, April 2023, pp.
93-94 (Article)

Published by University of Auckland



➔ For additional information about this article

<https://muse.jhu.edu/article/895864>

Reviews (Books)

The English Text of the Treaty of Waitangi. By Ned Fletcher. Bridget Williams Books, Wellington, 2022. 736pp. NZ price: \$69.99. ISBN: 9781990046537.

NED FLETCHER'S BOOK is one of the most significant works of scholarship on the Treaty of Waitangi ever published. Its importance lies in its central arguments, its degree of engagement with empire historiography and the expansive scope of its narrative and analysis.

The book's main contributions to New Zealand Treaty historiography may best be comprehended via its principal arguments, of which the most important is that British sovereignty acquired in 1840 was *not* inconsistent with ongoing tribal government and custom. Fletcher argues (in the first six chapters) that the history of British imperial engagements with foreign states and indigenous peoples, including the history of treaty-making, shows that British authority was usually content to work with or through pre-existing leaderships and laws. Treaties often included guarantees of tribal property rights, customs and even, on occasion, the right to go to war. The nature of imperial engagements was as diverse as the contexts encountered: this was an empire of plurality, not uniformity of governing arrangements and laws. British authority often impacted indigenous systems the most through introduced modes of English legal procedure. The criminal law was often at the frontier of engagements between white settler and indigenous communities. Fletcher's analysis draws on much of the latest historiography of empire, and generally carries weight.

By placing these chapters up front, Fletcher relocates the Treaty of Waitangi firmly in the history of empires. In so doing, he counteracts various conventions in the New Zealand literature — including that the Treaty of Waitangi was exceptional or unique — while also effectively advancing his argument that British sovereignty or government could co-exist with Māori self-government. Whether the broader imperial narrative fully supports the claim that such accommodation reflected policy preference rather than *realpolitik* must probably remain to be argued with reference to the immediate forces, personalities and contexts in play. This is what Fletcher does for the case of New Zealand in the remainder of the book.

Fletcher's second principal argument is that the primary purpose of British intervention in New Zealand 'was to establish government over British settlers, for the protection of Māori' (p.17). This conclusion is reached through painstaking analysis of the Colonial Office and parliamentary papers, and through philological reconstruction of the English Treaty draft. This argument places Fletcher in an older tradition of Treaty historiography (Keith Sinclair, A.H. McLintock and Trevor Williams), which emphasized the humanitarian moment and motivations behind the Treaty. It was to be followed by the scholarship of Ian Wards (1968), Peter Adams (1977) and others, who considered that by the time of Normanby's instructions to Hobson in 1839, or perhaps Russell's to Hobson in December 1840, the needs and interests of British settlement and British capital (via the New Zealand Company's involvement) were to be equal to, if not prioritized above, the needs and interests of Māori. Fletcher demonstrates that, at least until *circa* 1846, instructions to New Zealand governors consistently emphasized that the terms of the Treaty should be 'scrupulously fulfilled'. He also suggests that officials did not in 1840 envisage British settlement in the numbers that eventuated by the 1850s. Fletcher thus emphasizes the Colonial Office view of the case.

However, as other recent scholarship — Mark Hickford (2011) and Bain Attwood (2020) — underlines, British policy towards indigenes was always contested and ‘made’ in particular contexts. Fletcher’s argument about British humanitarian intent in the Treaty during 1840 does not fail; but such ‘original intent’ as James Stephen, James Busby and William Hobson possessed was often actively opposed by ‘systematic colonizers’ and colonial capitalists. Concepts of sovereignty and property were fluid, and colonial situations more so. British territorial *imperium* (sovereignty) would also necessarily intervene in cases of inter-tribal warfare, inhumane custom and serious crimes — as the instructions intimated — involving the probable exercise of coercive power (even if deployed to ‘protect’).

Fletcher’s third argument is that British policy in New Zealand, and in empire generally, was to recognize indigenous property rights to their fullest possible extent. Here the book makes an important contribution by its laudably perspicuous analysis of the American case law of the Marshall Supreme Court of the 1820s–1830s, and by its plausible reconstruction of how this case law came to infiltrate the pamphlet debates in Australia and London. Only later was this case law picked up by New Zealand courts, beginning with *Regina v Symonds* (1847). If Fletcher has repositioned the Treaty within a history of the British Empire, then he has also relocated it within a Tasman world, and not just in the tortuous triangle of official instructions and correspondence between New Zealand, New South Wales and London, but also in the engagement of the New South Wales colonial presses and legislature in New Zealand issues. These debates became most forceful and the issues most acute around 1840, when every respectable New South Wales lawyer and scurrilous speculator in the New Zealand (Māori) land market had a view on imperial land policy and Hobson’s instructions. Fletcher proves that the American case law — ostensibly limiting Indians to occupation rights only — did *not* represent the Colonial Office position, nor British practice, and was itself internally inconsistent; yet that did not stop some colonial protagonists from selectively appropriating some of its arguments.

Fletcher’s greatest contribution to Treaty historiography may well be this reconstruction of political languages (*cf.* J.G.A. Pocock) that preceded, surrounded and, ultimately, re-made the Treaty (and sovereignty) itself. His is a grand history of British imperial administration and its contested discourses, rather than a history of case law or colonial politics. The conclusion of the book — that the Māori- and English-language texts can be reconciled — may, however, have the most significance for the Treaty literature. While Fletcher has not reconstructed Māori views, he has ably summarized many of the key speeches that came through the European record; the gist of these was that under British government, Māori chiefly or tribal rights would be protected, along with rights of property. Thus, the *kāwanatanga* of Article 1 and *rangatiratanga* of Article 2 reconcile (or ‘appear to’) consistently with Fletcher’s argument from the imperial record. Justice Sir Joe Williams suggests in the book’s foreword that Fletcher’s impressive philological argumentation from mostly English-language records is yet to be matched by a genuine reconstruction of the Māori Treaty text. This commentary strikes an odd note given recent Waitangi Tribunal evidence and findings; it now itself becomes part of the ongoing discourse over the Treaty’s meaning.

SAMUEL CARPENTER

Laidlaw College, St John’s Theological College