

TE TIRITI O WAITANGI & INTER-NATIONAL TREATY MAKING #1: MANA & THE UN-CEDED RIGHT TO MAKE TREATIES BETWEEN NATIONS¹

As part of Ngā Toki Whakarururanga’s mandate to bring a te Tiriti o Waitangi lens to the international trade and investment space, we have commissioned a series of working papers on the constitutional power to make international treaties. The full paper *Mana and Constitutional Transformation of Treaty Making* can be accessed at ngatoki.nz/kaupapa/rangatiratanga-and-constitutional/

Who has the power to make inter-national treaties is a fundamental constitutional question. As Dr Moana Jackson explained in his clear, calm and meticulous way to the Waitangi Tribunal in numerous inquiries, rangatira never gave up their inherent treaty-making power to the Crown in Te Tiriti o Waitangi or in any other way. It was, and remains, an inherent and inalienable element of their mana. Recognising that mana motuhake and tino rangatiratanga include creating and maintaining relationships with other states is essential to honouring Te Tiriti o Waitangi me He Whakaputanga o te Rangatiratanga o Nu Tireni.

Yet, the Crown claims the Executive (in practice, Cabinet) has a “royal prerogative” power to negotiate international treaties that do not even need the consent of its Parliament. Today’s international treaties are far reaching. They cover subjects as diverse as Indigenous Peoples’ rights, climate change, workers’ rights, refugees and nuclear disarmament as well as commercial interests in trade, foreign investment, intellectual property rights and taxation. All have impacts within Aotearoa, and on Māori responsibilities and rights and Crown obligations under Te Tiriti. But Māori are denied a seat at the decision-making table.

This paper draws together Dr Moana Jackson’s evidence from various Waitangi tribunals to inform the process of constitutional transformation in this critical sphere of state activity. Much of his evidence is quoted verbatim, so that he is always speaking.

¹ www.ngatoki.nz, August 2025

The Papa or Foundations of Māori Treaty Making

Dr Jackson's evidence in the Wai 2522 Claim on the Trans-Pacific Partnership Agreement (TPPA)² set out ten *papa* or foundations for the continued exercise of rangatiratanga in the international domain and to deconstruct the Crown's rationale for the assumption of exclusive powers of international treaty making:

1. The tikanga-based concept of power that Iwi and Hapū have defined as mana, and which they have exercised as a unique, absolute and independent constitutional authority;
2. The key constituent parts of mana, including, in particular, the right to treat. This right is enjoyed by all polities as a necessary component of political and constitutional authority and was clearly exercised by Iwi and Hapū for centuries prior to 1840;
3. The use of treaties in tikanga (Māori law) and diplomacy as a means of cementing relationships, making peace, securing trade, negotiating borders, and protecting the nature and exercise of mana itself;
4. The notion of treaty making as an inherent and inalienable consequence of any independent political and constitutional authority, including mana;
5. The contrasting Pākehā concept of power known as sovereignty, and the concomitant constituent authority it carries to treat with other sovereign polities as defined in Pākehā politics and law;
6. The development in English and international law of what may be called the notion of "petty sovereignties" that colonising States used to rationalise treating with, and subsequently dispossessing, Indigenous Peoples who were regarded as culturally, racially and politically inferior;
7. The related development of a distinct colonising jurisprudence to rationalise and "legalise" all aspects of the dispossession of Indigenous Peoples, including the links between the colonising right to treat with "petty sovereignties", in order to secure a purported cession of Indigenous authority and the subsequent claim of a colonising right to unilaterally treat with others;
8. The refinement of that law and its underlying ideologies in New Zealand and the continuing and damaging effects they have had on Māori;
9. The meaning and parameters of kāwanatanga in Te Tiriti as understood from Iwi histories and the Tribunal's formulation in the Paparahi o Te Raki hearing where it is described as a discrete "sphere of influence" which the Crown has consistently and wrongly assumed to include a unilateral Crown authority to treat with others; and

² Brief of Evidence of Moana Jackson to the Waitangi Tribunal Inquiry into the Trans-Pacific Partnership Agreement (Wai 2522), Urgency hearing, 26 February 2016. Available at: <https://ngatoki.nz/wp-content/uploads/2024/04/Moana-J-Wai-2522.pdf>

10. The continued misuse of that purported authority in the particular negotiations for the TPPA, and especially the drafting of the “Treaty Exception” provision, which constitutes a specific breach of Te Tiriti.

Tikanga, mana and the right to treat

Inter-national relations and diplomacy, and cementing relationships through formal agreements, has always been and remains integral to the independent constitutional and political authority of Iwi and Hapū, sourced in mana and exercised in accordance with tikanga:

In all societies the ability and the right to conduct negotiations and enter into relationships with other polities has always been among the foundational realities of diplomatic and political authority. If co-operation and co-existence with others is seen as the reason for inter-nation or international relations then the right to enter into treaties is part of the power that societies have always accepted as fundamental to both their independence and their necessary interdependence with others.

Iwi and Hapū have been no different. However the particular cultural imperatives of the right to treat within Māori society were inevitably defined by the wider relationship between tikanga as “The first law of this land,” and mana as the collective political and constitutional authority that vested in Iwi and Hapū.

Tikanga was relationship and values-based and sought to regulate how people should relate to each other and the wider world. It was bound by the ethics of what ought to be in a relationship as well as the values that measured the tapu and mana of individuals and the collective. It set the prescriptive guidelines for what is legal (tika) behaviour and what is not.

Just as our people lived within the relationships of their whakapapa as a daily matter of political and social life so we lived within tikanga as the first law. In that context we in fact lived with the law rather than under it, and the law existed to protect who and what we were while recognising the importance of the most intimate relationships within our own polity as well as with those of other Iwi and Hapū.

Self-governing polities as treaty makers

Inter-national relationships and agreements are, by definition, informed by the constitutional notions, and political processes and practices, that govern the polity, including Hapū and Iwi:

The jurisprudence, institutions and practices of law, and thus of treating, were uniquely developed by each Hapū and Iwi, but they also shared a common philosophical and value base. As a result our tīpuna lived in an ordered and organised society that was both independent and interdependent. We were never a law-less nor an isolationist people.

And just as all societies learn they cannot live in a law-less state, so our people also learned that law and social order cannot be maintained in a power vacuum. We therefore developed political and constitutional ideas and practices to govern ourselves within the distinct polities of Iwi and Hapū.

In this context government is the process or system that people choose to regulate their affairs and a constitution may be understood as the code upon which government will proceed, akin to the kawa of the marae which outlines the way the marae will be governed.

A natural corollary of government is citizenship which is simply membership within a self-governing polity. The membership of the polity always carries reciprocal citizenship obligations and rights and in our history it is clear that each Iwi and Hapū defined them within tikanga and the relationships of whakapapa.

In doing so we developed all of the components of an independent constitutionalism, including the right and capacity to treat and to create or enhance relationships through the act of treaty-making. That constitutionalism was a unique cultural creation, just as it is in every polity.

Concepts of power and sites of power

The constitutional authority to treat is an abstraction that needs to be operationalised by determining who, how and where that power is to be exercised. In explaining the components of the right to treat, Dr Jackson observes that each component

*... is, however, based on what may be called a “**concept of power**” and a corresponding “**site of power**”.*

*A **concept of power** is the idea of political and constitutional power. It is the philosophical base that a people develop about what government should be, as well as the values upon which the will of the people should be manifest.*

Throughout our history that concept of power was known generically as mana, although it is described in some Iwi and Hapū as mana motuhake, mana taketake, or mana torangapu. More latterly it was called rangatiratanga or tino rangatiratanga.

*A **site of power** is the governing institution through which the concept of power is given effect. It is the institutional place where governing and constitutional decisions are made.*

In Aotearoa prior to 1840 that site of power resided within the collective of rangatira or ariki who were acknowledged by each Iwi and Hapū as having the skills and ability and mandate to govern. In some rohe it was also on occasion vested in properly constituted huihuinga or whakaminenga involving a collective of Iwi and Hapū. Through such institutions the concept of power was given effect and the exercise of power was mandated through the sanction of law.

The tenure of ariki and rangatira was always subject to how well they preserved and defended the wellbeing of the people and the whenua, and how well they ensured their protection. John Rangihau once described the authority and status of rangatira as being “people bestowed” and for that reason it was ultimately exercised for and by them.

The concept and site of power that were encapsulated in the term “mana” reflected the collective aspirations shared across Iwi and Hapū. Although there were often practical differences between Iwi and Hapū in the actual manner of its exercise it always implied an absolute independence that Dame Mira Szazy once defined as “the self-determination” implicit in “the very essence of being, of law, of the eternal right to be, to live, to exist, to occupy the land.”

Specifics of power

Having identified the sites of power, Dr Jackson’s next step was to articulate the scope and specific components of that power.

*Like all concepts of power, mana or tino rangatiratanga is made up of a number of different but inseparable constituent parts that may be called the **specifics of power**. These included:*

- 1. **The power to define** – that is, the power to define the rights, interests and place of both the collective and of individuals as mokopuna and as citizens;*
- 2. **The power to protect** – that is, power to be kaitiaki, to manaaki and maintain the peace, and to protect everything and everyone within the polity through an ultimate authority to wage war when necessary;*
- 3. **The power to decide** – that is, the power to make decisions about everything affecting the wellbeing of the people;*
- 4. **The power to reconcile** – that is, the power to restore, enhance and advance whakapapa relationships in peace and most especially after conflict through processes such as hohou rongo.*
- 5. **The power to develop** – that is, the power to change in ways that are consistent with tikanga and conducive to the advancement of the people; and*
- 6. **The power to treat** - that is the power to negotiate and commit to formal collective agreements with other polities.*

The mana to make treaties was, and is, inalienable

As confirmed in *Te Paparahi o Te Raki*,³ *Te Urewera*⁴ and *Te Rohe Potae*,⁵ the mana of rangatira and the exercise of rangatiratanga, on behalf of Hapū and Iwi, has never been given away. Nor, says Dr Jackson, could it be:⁶

This expansive reach necessarily presupposed that mana was an absolute political and constitutional power. It was absolute because it was absolutely the prerogative of Iwi and Hapū, but it was also absolute in the sense that it was commensurate with independence. It was of course always bound by tikanga but it was a totalising authority that could not be tampered with by that of another polity.

Mana was in fact absolutely inalienable. It was a taonga handed down from the tīpuna to be exercised by the living for the benefit of the mokopuna, and no matter how powerful rangatira might presume to be, they never possessed the authority nor had the right to give it away or subordinate it to some other entity. The fact that there is no word in Te Reo Maori for 'cede' is not a linguistic shortcoming but an indication that to even contemplate giving away mana would have been legally impossible, politically untenable, and culturally incomprehensible.

And just as mana as a totalising authority could never be ceded, so its constituent parts were inalienable. Thus the right to declare war was as jealously guarded as the right to hold the land and would never be ceded or delegated to another polity to exercise on one's behalf. It would have been impossible for example for Ngāti Kahungunu to delegate its authority to maintain peace or declare war to say Ngai Tahu.

Similarly the right to treat was also fundamentally inalienable and would never, could never, be ceded or delegated to another polity to exercise on one's behalf. It would have been impossible for example for Ngāti Manawa to delegate its authority to treat and make agreements with others to say Ngāti Mutunga.

At a more personal level the citizenship rights of a mokopuna were also inalienable and unable to be subordinated to that of another polity. It would have been impossible for example for Tuhoe to ever accept that its mokopuna could be made "subject" to say Ngāti Porou or have their rights and obligations subordinated in an agreement to which their polity had not been a party.

³ Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Report on Stage 1 of the Te Paparahi o te Raki inquiry (Wai 1040), 2014.

⁴ Waitangi Tribunal, *Te Urewera*, (Wai 894), 2009.

⁵ Waitangi Tribunal, *Te Mana Whatu Ahuru. Report on Te Rohe Potae Claims*, (Wai 898), Parts I and II, 2018

⁶ Brief of Evidence of Moana Jackson, (Wai 2522), 26 February 2016

No cession of sovereignty, no cession of treaty-making authority

The Waitangi Tribunal in the Stage One Report of the Paparahi o te Raki claim, *He Whakaputanga me Te Tiriti*, recognised that the rangatira who signed Te Tiriti did not cede their sovereignty. That was reiterated in the Stage Two report of the te Raki inquiry. Other Hapū and Iwi did not sign Te Tiriti. Some entered into their own agreements with the Crown, including Ngāi Tuhoe and Te Arawa, which reflected the treaty making authority of those rangatira and they have their own history of breach based on the same usurpation of their mana and rangatiratanga by the Crown.

Across Aotearoa, there is therefore no basis for asserting that Hapū and Iwi in any way conceded to the Crown their authority in international relations and to make treaties. In Dr Jackson's words, the signatories to Te Tiriti:

... did not cede their authority to make and enforce law over their people or their territories. Rather they agreed to share power and authority with the Governor. They agreed to a relationship: one in which they and Hobson were to be equal – equal while having different roles and different spheres of influence. In essence, rangatira retained their authority over their hapu and territories, while Hobson was given authority to control Pākehā.

Because mana could not be ceded in tikanga or Māori legal terms it is in fact axiomatic that the authority and responsibility of Iwi and Hapū to treat could also not be ceded. It is similarly axiomatic that the authority to treat could not be delegated or subordinated in a treaty to that of another polity. If it was impossible and indeed culturally incomprehensible for one Iwi to permit another to treat on its behalf it is at best illogical to assume that Iwi would allow the Crown to do so. At worst such an assumption is a breach of Te Tiriti.

A composite paper on

Mana and Constitutional Transformation of Treaty Making

and working papers on “*Te Tiriti o Waitangi and Inter-national Treaty Making*”

#2 *Legal Imperialism and the “Doctrine of Discovery”*

#3 *What the Waitangi Tribunal has said to date*

#4 *The Crown's “Principles of Constitutionalism”*

#5 *The Secret Review of International Treaty Making*

can be accessed at

www.ngatoki/kaupapa/rangatiratanga-and-constitutional/