

# NGĀ TOKI WHAKARURURANGA

## TE TIRITI O WAITANGI & INTER-NATIONAL TREATY MAKING #2: LEGAL IMPERIALISM & THE “DOCTRINE OF DISCOVERY”<sup>1</sup>

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/](http://ngatoki.nz/kaupapa/rangatiratanga-and-constitutional/)

Iwi and Hapū have always had, and retain, their mana Motuhake, including the right to conduct inter-national relations and treat with other nations, as independent sovereign nations within their own rohe. Some of them also exercised this right collectively to the extent they joined together in He Whakaputanga o te Rangatiratanga o Nu Tireni me Te Tiriti o Waitangi - both of which, by their very existence, affirm that sovereign statehood and capacity to treat internationally with another state power (see Working Paper #1).

Despite the affirmation of this authority in He Whakaputanga me Te Tiriti, the Crown asserts an exclusive power to make international treaties on behalf of the State of New Zealand that it sources in the royal prerogative of the Queen or King of England/New Zealand.

The Crown’s assumption of that authority, and its denial of mana motuhake and exercise of rangatiratanga in the international domain, rests on several enduring colonial fictions. The ideology of *legal imperialism* denies the legitimacy of tikanga and rangatiratanga as essential elements of mana, and seeks to justify the exclusive application of English common law, including the Crown’s prerogative of international treaty making, as a pillar of the constitution.

The authority to impose that ideology on Aotearoa is derived from an even more potent fiction - the “*doctrine of discovery*” - that entitled Europeans, as a superior civilisation, to seize “discovered lands” and impose their own constitutional systems and law on all “others”.

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<sup>1</sup> [www.ngatoki.nz](http://www.ngatoki.nz), August 2025

This paper deconstructs both those concepts and how they frame the contest over constitutional authority, including the power of treaty making, in Aotearoa.

## **Tikanga as constitutional law**

In a commentary written in 1990 following consultation with Iwi on the Draft United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Moana Jackson explained how the guaranteed retention of tikanga and tikanga Māori was integral to tino rangatiratanga and to the protection of one Hapū or Iwi as a collective against threats from other polities:

*The rights which Maori possess as indigenous peoples are found in the tenets of Maori law and were exercised as personal, whanau, hapu and Iwi prerogatives. However the rights which issued to individuals did so only because they were part of a wider group. ... In exercising the rights of Rangatira in relation to Iwi members, the leaders acted within a framework of rules derived from the precedents and sources of ancestral law and mana. In protecting the welfare of the Iwi and its members against other Iwi, they asserted their rights of Iwi Rangatiratanga handed down through the same weave of divine and ancestral precedent. The “legal” rights of the individual, and the constitutional or political rights of the collective, were essentially inseparable.*

The system of law – tikanga – was sourced in those fundamental values and precedents. Pou Whakatupu Mātauranga Ani Mikaere of Ngati Raukawa ki te Tonga explains how,

*while there may be a degree of overlap between Western definitions of what constitutes a system of law and the content of tikanga, most authorities acknowledge that tikanga is in fact a broader term. ... Justice Durie has identified a series of ‘conceptual regulators of tikanga’, which he sees as ‘providing the fundamental principles or values of Maori law’. They include such values as whanaungatanga, mana, manaakitanga, aroha, mana tupuna, wairua, and utu.<sup>2</sup>*

Yet the promise under Te Tiriti to maintain rangatiratanga and tikanga was untenable for the Crown because the legitimacy, indeed the very existence, of tikanga was not perceivable by the agents of (English) common law:

*Colonisation demanded, and still requires, that Maori no longer source their right to do anything in the rules of their own law. Rather they have to have their rights defined by Pakeha; they have to seek permission from an alien word to do those things which their philosophy had permitted for centuries.<sup>3</sup>*

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<sup>2</sup> Ani Mikaere, ‘The Treaty of Waitangi and Recognition of Tikanga Maori’, 331

<sup>3</sup> Moana Jackson, ‘The Treaty and the Word’, 6 quoted in Ani Mikaere, ‘The Treaty of Waitangi and Recognition of Tikanga Maori’, in Michael Belgrave et al. eds, *Waitangi Revisited. Perspectives on the Treaty of Waitangi*, Oxford, 2004, 342 fn87

Consequently, tikanga Māori was redefined as ‘custom’, a lesser, malleable and temporary set of rules, decision-making procedures and administrative mechanisms that could be manipulated to serve the objectives of colonisation.

### **Sovereignty: the Crown’s concept and site of power**

Dr Jackson analysed the contrasting claims to constitutional authority under imperial Europe and the Westminster system using his typology of both **concepts** of power and **sites** of power:

*Polities in Europe also developed their own culturally distinct concept of power which they called “sovereignty”. It naturally reflected their histories and culture, and after the consolidation of (Catholic and then Protestant) Christianity it reflected in particular the centralised hierarchy of the Church and its monist beliefs in a single all-powerful god.*

*The Westminster constitutional system developed in the particular cultural circumstances of England. Its hierarchical structure headed by a Crown or sovereign is a cultural product that grew out of the historical tensions between the monarchs and those deemed to be below or in opposition to them.*

*It is a distinct artefact that over the centuries has sought to accommodate the long-disputed interests of the nobility, the Church and the “lower classes” while preserving the notion of individual property rights. Its concept of power became known as sovereignty which was exercised in a site of power known as Parliament.<sup>4</sup>*

So, the ideological rationale for the Crown’s assertion of sovereignty was not unique to the English. It drew on **concepts** of power that were developed in Europe over several centuries.

*Although the concept of sovereignty is generally understood as an English or Westminster construct it was of course first defined in France by the political philosopher Jean Bodin in 1569. His definition is still apposite today and still marks the distinctive cultural ethos that is inherent in the Crown notion of political and constitutional authority.*

*Bodin’s view of sovereignty was essentially based in a belief that it marked a hierarchy of progress from societies of apolitical barbarism (such as those of the recently “discovered” Indigenous Peoples in the Americas) to those countries in Europe with a “civilised” constitutional order. It presumed that proper political power could only exist once “man ... purged himself of troubling passions” and moved up “the great chain of being ... and its hierarchical order”.*

*Once a peoples became “civilised” they attained the reason to develop a concept of power vesting in a sovereign, “a single ruler on whom the effectiveness of all the rest*

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<sup>4</sup> Brief of Evidence of Moana Jackson to the Waitangi Tribunal Inquiry into the Trans-Pacific Partnership Agreement (Wai 2522), Urgency hearing, 26 February 2016, at paras [46] – [48]. Available at: <https://ngatoki.nz/wp-content/uploads/2024/04/Moana-J-Wai-2522.pdf>

*depends”. Sovereignty was thus the “most high ... and perpetual power over the citizens” and it was that power “which informs all the members and ... to which after immortal God we owe all things”. It was a hierarchical ideal of constitutionalism that could only be held by civilised peoples.<sup>5</sup>*

For them, the **site** of that power was located in a single sovereign:

*The site of that power throughout Europe was the monarch or alternatively the “monarch in Parliament” which had absolute authority and dominion over the land and its peoples. It was that culturally-defined and “civilised” notion of constitutional authority or “dominion over” which the Crown of course brought to Aotearoa after 1840.*

*It was therefore an inalienable and absolute authority which was exercised within a site of power that was most often based upon a single sovereign – a King, Queen, or Emperor whose power was ordained by god. Over time that site of power was modified in England in particular within a constitutional monarchy framework as “The King (or Queen) in Parliament”. However the inalienability and the singularity of its absolute power remained its most essential component.<sup>6</sup>*

What Dr Jackson calls the “**specifics** of power” under Crown sovereignty were both domestic and international.

*Under that system the various constituent parts of sovereignty were also inalienable including the authority to treat and the obligation to maintain the peace and the right to declare war when necessary. Treaty-making was an honourable expression of the sovereign’s will and like the act of mahi tūhono it was an authority that could never be ceded or delegated to another polity to exercise on the sovereign’s behalf since only the sovereign was ordained by god to make treaties just as he or she was ordained by god to declare war.*

## **Legal Imperialism**

Different concepts of power and sites of power possessed and exercised by different nations could peacefully co-exist, if each recognised the other and sought to develop a means for reciprocal recognition and mutual respect. As Dr Jackson explained, that was the tikanga-based means by which Iwi and Hapū co-existed or resolved their disputes, although not always peacefully. However, the ideology of Empire, including its legal form of jurisprudence, could not envisage or permit such mutual respect and co-existence.

### ***Law as a concept of power***

Imperialist ideology justified repression and even extermination of Indigenous Peoples.

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<sup>5</sup> Brief of Evidence of Moana Jackson, (Wai 2522) at paras [49] – [51]

<sup>6</sup> Brief of Evidence of Moana Jackson, (Wai 2522) at paras [52] – [54]

*When Christopher Columbus stumbled into the Caribbean in 1492 he unleashed a frenzy of European colonisation in the Americas that eventually led to the world-wide dispossession of millions of Indigenous Peoples. It also led to the creation of a colonising jurisprudence in which the purported reason of the law in countries from England to Spain became the unreasoned rationalisation for the violent and unjust taking of the lives, lands, and power of innocent peoples. Colonisation spawned a new and pernicious legalism that was eventually brought to Aotearoa.*

*Its foundation was a deliberately developed and rationalised presumption that Indigenous Peoples by their very nature were an inferior “other” who could be legitimately dispossessed because of their inferiority. Among its many deliberately engineered falsehoods was the claim that Indigenous People had neither a “real” law nor a “real” capacity to “properly” govern themselves which led in turn to a number of doctrines which attempted to justify everything from the actual taking of indigenous lands to a definition of “aboriginal rights” that were necessarily subordinate to the rights of the colonisers. They have neither reason nor justice but are rather a kind of verbal gymnastics based on little more than a will to dispossess and ultimately a certain racist illogicality.<sup>7</sup>*

In his seminal commentary on colonisation and imperialism, *Orientalism*, Egyptian historian Edward Said describes the Western concept of the Oriental as the creation of “a sovereign Western consciousness out of whose unchallenged centrality an Oriental world emerged.”<sup>8</sup> The “Other” is viewed within this “intellectual and imaginative territory” of the West and its dominant social, economic, cultural, political and legal structure. That internal consistency makes perfect sense from the Western perspective, while it imposes an alien and oppressive conceptual framework on the Other.

A paradigm case is the “intellectual territory” of law that was imposed in British colonies. As expressed by Sir William Blackstone, English law was the birthright of Englishmen.<sup>9</sup> Wherever they went in the Empire, they expected to be governed by English law and English courts. The mere accident that they inhabited one colony rather than another, or lived at Home, was irrelevant. This, in turn, was the law by which all Others in the colony would be judged.

The colonial project, wherever it was pursued, required a state apparatus, including a legal system, through which to achieve its economic, political and ideological objectives. The institutional form, ideology and doctrinal tools of that legal system broadly replicated those operating in the metropole, but were adapted for local conditions.

English law defined what was natural, civilised and universal. Its absence was equated with anarchy or untamed nature. Resistance, seen as deviant behaviour, could legitimately be

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<sup>7</sup> Brief of Evidence of Moana Jackson (Wai 2522) at paras [55] – [56]

<sup>8</sup> Edward Said, *Orientalism*, London, Penguin, 1978, p.8.

<sup>9</sup> William Blackstone, *Commentaries on the Laws of England*, Book 1, Oxford: Clarendon Press, 1765, 104-5

disciplined by the colonial power, even if it broke some of the tenets of liberalism, like freedom, equality or protection of property. Notable liberal as John Stuart Mill argued in his essay *On Liberty* that: “Despotism is a legitimate mode of government in dealing with barbarians provided the end be their improvement”.<sup>10</sup>

When comparing the experiences of colonial law in Tanganyika (now Tanzania) and Aotearoa New Zealand, Dr David Williams observed how

*when one studies colonial legal systems of the British Empire one is confronted with unambiguous evidence that state power was exercised as an instrument of monocultural imposition and legal domination.*<sup>11</sup>

### ***Legal Imperialism in Aotearoa***

That mind-set was epitomised in a booklet explaining the laws of England to Māori that was compiled for Governor Gore-Browne in 1858 by Francis Dart Fenton, who later drafted the Native Lands Act 1865 and became chief judge of the Native Land Court,:

*The people of England were not so fortunate in days of old as are the people of New Zealand now. When they began to frame for themselves laws, in generations long past, they had no example to direct them. They had to open for themselves a road through the thick bush; sometimes right, sometimes wrong; try it here, and find it wrong; try it there; try it on the right hand, if wrong, try it on the left hand; where should the right road be found? ...*

*In the present day, the Maori is more fortunate. A path has been cleared and opened through the forest, it lies before him; he has but to walk in it. A wise and generous people, the English, have settled in his land; and this people are willing to teach him and to guide him in the well-made road which themselves have traveled for so many generations; that is, in the path of the perfected law – in the path by which themselves have attained to all the good things which they now possess; wisdom, prosperity, quietness, peace, wealth, power, glory and all other good things which the pakeha possesses. Let there now be no doubt nor hesitation, but be patient and earnest and follow the direction of those who have been appointed to shew you the right and finished path.*<sup>12</sup>

The same supremacism found judicial expression from Prendergast CJ in *Wi Parata v Bishop of Wellington*, where Māori were deemed to have no law because they did not maintain institutional structures and practices that replicated those of the English common law:

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<sup>10</sup> J.S. Mill ‘On Liberty’, in *Utilitarianism, On Liberty, Essays on Bentham*, London: Fontana, 1962, 136.

<sup>11</sup> David Williams, ‘The Recognition of “Native Custom”’, 20

<sup>12</sup> Francis D. Fenton, *The Laws Compiled and Translated into the Maori Language by Director of His Excellency Colonel Thomas Gore-Browne, C.B. Governor of New Zealand*, Auckland, 1858

*On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. ... The Crown was compelled to assume in relation to the Maori tribes, and in relation to native land titles, these rights and duties which, jure gentium, vest in and devolve upon the first civilized occupier of a territory of thinly peopled by barbarians without any form of law or civil government.*<sup>13</sup>

This supremacism is not just a relic of colonial history. Legal imperialism was equally evident in 1979 when Blackwood SM rejected the cultural defence of He Taua, a group of young Māori and Pacific activists who faced charges of riot and assault for stopping engineering students from denigrating the haka as part of their capping day stunts:

*However offended these defendants may have felt, that does not entitle them to take the law into their own hands which is exactly what they chose to do. They chose to operate a kind of lynch-law, a concept unacceptable to our land and, I believe, unacceptable in any civilised society. We are one people, of differing religious beliefs, cultural heritages and racial backgrounds. We are governed by one law. Every civilised society has rules by which it lives and it makes those rules to that the society may survive; without those rules the law of the jungle would operate.*

*Commonly in these courts we refer to it as the rule of law and it is the duty of the court to uphold the rule of law. Expressed simply the rule of law is that every citizen of this country is equal before the law, but is equally subject to that law. There cannot be one set of laws, for example, for one ethnic group and another set of laws for others. If the rule of law is not upheld, we have anarchy. If we have anarchy then civilised society will perish.*<sup>14</sup>

## **The Doctrine of Discovery**

The concept of legal imperialism itself relied on a related concept of power: the “**doctrine of the right of discovery**”. The doctrine’s racist ideology and genocidal impacts have been extensively documented internationally, and within Aotearoa in Dr Moana Jackson’s evidence to several Waitangi Tribunal inquiries, his and Tinā Ngata’s work on the Doctrine of Discovery,<sup>15</sup> the report for the tangata whenua caucus of the National Action Plan Against Racism for Te Kāhui Tika Tangata/The Human Rights Commission and the accompany draft Cabinet paper on renouncing the doctrine, which never made it to Cabinet.

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<sup>13</sup> *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 at 77

<sup>14</sup> *Police v Dalton and others*, unreported, Magistrates Court, Auckland, June 1979, per Blackwood SM.

<sup>15</sup> Tina Ngāta, *Kia Mau: Resisting Colonial Fictions*, Rebel Press, 2019. Available at <https://tinangata.com/wp-content/uploads/2020/06/kia-mau-resisting-colonial-fictions.pdf>

## ***Papal Bulls: a concept of power***

Both Moana Jackson and Tina Ngata have intensively researched and deconstructed the Crown's conceptualisation of its own right to sovereignty and its consequential treaty-making authority, which they trace back to that doctrine. According to Dr Jackson this

*presumed that the mere “discovery” of indigenous lands by someone from Europe validly transferred title in said land to the “discoverer”. The doctrine was of course limited in its application to indigenous “others” and no European jurist ever suggested for example that an English explorer could have a valid claim to France simply by asserting that he had “discovered” it.<sup>16</sup>*

*Maranga-Mai!*, the report prepared by the Tangata Whenua Caucus for the National Action Plan Against Racism<sup>17</sup> for Te Kāhui Tika Tangata/ The Human Rights Commission, led by Tina Ngata, provides a concise history of the doctrine, sourcing it from the

*edicts of Papal Bulls delivered by Catholic Popes from the mid-1400s onwards. The Dum Diversas (1452) encouraged the conversion of new peoples to Christianity, while also justifying, if necessary, their enslavement, subjugation, or destruction as “enemies of Christ”. This doctrine birthed virulent colonial racism which, combined with white supremacy, matured into the colonists’ manifest duty.*

*The Romanus Pontifex (1455) legalised the taking of lands from Indigenous peoples in new worlds without their knowledge or consent. Alongside other Papal Bulls, this emerged as the Doctrine of Discovery that articulated a violent European Christian entitlement to seize “discovered lands”. This led to the destruction of Indigenous economies and “the genocide and deaths of millions of men, women and children”.<sup>18</sup>*

The report explained how the “doctrine of discovery” was integral to British claims to annex Aotearoa:

*Aotearoa New Zealand was first colonised by the British Crown under an international legal principle known as the Doctrine of Discovery. This fifteenth century Papal Bull asserted that non-Christian, Indigenous peoples inhabiting ‘discovered lands’ were enemies of God, less human than Europeans and therefore their land could be taken from them. This was key to the authority by which the British Crown first gained its sovereign and property rights in Aotearoa. ...*

*In Aotearoa, the Doctrine of Discovery “underpinned the European belief in their right to set up government sculpting societal reasoning of European superiority over*

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<sup>16</sup> Brief of Evidence of Moana Jackson (Wai 2522), at [59]

<sup>17</sup> Tangata Whenua Caucus of the National Anti-Racism Taskforce, *Maranga-Mai!*, Te Kāhui Tika Tangata/ The Human Rights Commission, November 2022. Available at [https://tikatangata.org.nz/cms/assets/Documents/Reports-and-Inquiry/Tangata-Whenua-reports/Maranga-Mai\\_Full-Report\\_PDF.pdf](https://tikatangata.org.nz/cms/assets/Documents/Reports-and-Inquiry/Tangata-Whenua-reports/Maranga-Mai_Full-Report_PDF.pdf)

<sup>18</sup> *Maranga Mai*, p.30. References omitted

*all who are non-white and non-Christian alongside a supreme European entitlement to all non-white, non-Christian lands and resources.*"<sup>19</sup> ...

In similar vein, Dr Jackson observed how

*... such arrogant presumptuousness marked all of colonising law which the Lumbee jurist Robert Williams has described as the "discourses of conquest" devised solely to give some "vener of legitimacy" to an essentially illegitimate dispossession. By the 18th century such ideas were fundamental to Britain's own colonising jurisprudence and were inevitably brought to New Zealand. Thus for example James Cook's Secret Admiralty Orders in 1769 included an instruction to claim whatever lands he encountered by right of discovery, which he subsequently did at Whitianga and Motuara Island in what is now Queen Charlotte Sound.*

*Later in 1840, even while the Treaty of Waitangi was still being signed, Hobson issued proclamations taking the land in the north by right of discovery<sup>20</sup> while one of his functionaries did the same in the South Island. The discovery proclamations were part of the colonising legal theatre which purportedly gave the Crown its "vener of legitimacy" in this land.*

*The proclamations in fact became an accepted part of the "jurisdictional steps" which the legal academic Paul McHugh has claimed were necessary for the Crown to "annex" our land. Annexation is really just a euphemism for colonisation yet it is somehow accepted that "discovery" along with the Treaty gave to the Crown the overarching authority to govern, and thus to unilaterally treat.<sup>21</sup>*

### ***The Doctrine of Discovery and the right to treat***

The Crown's assertion of sovereignty over Aotearoa included an assumed exclusive prerogative for it to engage in inter-national relations and to treat with other states. The premises of the "doctrine of discovery" meant that Māori had no capacity or status to treat beyond the treaty-making action that purportedly gave away their mana to the Crown.

*The idea that "discovery" could transfer land and power is of course related to the foundational belief referred to above that because Indigenous Peoples were of lesser worth they had lesser rights and capacity – they were only what Lord Normanby's Instructions to Governor Hobson referred to as "petty tribes" with no real understanding of sovereignty or its concomitants such as a right to properly govern themselves.*

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<sup>19</sup> *Maranga Mai*, p.30. References omitted

<sup>20</sup> Dr Jackson explains that Hobson's false claim to a cession of sovereignty through the Treaty of Waitangi, as affirmed in the Waitangi Tribunal's report on Te Paparahi o Te Raki inquiry, reduces it to a claim by discover over both the North Island and the South Island.

<sup>21</sup> Brief of Evidence of Moana Jackson, (Wai 2522) at paras [60] – [62]

*It also necessarily implied a “petty” capacity to treat that only involved the ability to give away or cede “real” sovereignty to the Crown. In effect the petty polities of Iwi and Hapū were only capable of treating in order to give away that capability to the coloniser.*

*In spite of the prevailing humanitarian ethos of the time, and in spite of the fact that we were sometimes labelled as “noble savages” our people were still deemed to be the inherently savage and lesser “other” who could and should be colonised. It was therefore accepted that the Crown should take the absolute right to rule while subjecting Iwi and Hapū to a lesser status.*

*Indeed the earliest descriptions of Māori society used all of the ideology of the “other,” from the very idea of “petty tribes” to the negative and inaccurate depictions of a “warrior race”. Most particularly they depicted our people as somehow lesser in both our capacity and right to govern ourselves.<sup>22</sup>*

Acting Governor Willoughby Shortland dismissed suggestions from his own Attorney-General William Swainson in 1842 that parts of the country where consent to the Treaty of Waitangi was not acquired (under the English text), saying “*British sovereignty was deemed to have been established throughout the whole country in 1840, by formal act of state, and whether they had signed the Treaty or not the Maori were all British subjects*”.<sup>23</sup>

### ***Doctrine of Discovery in its contemporary form***

Those assumptions continue to underpin the Crown’s claim to a prerogative right to conduct foreign affairs, including to make treaties. Dr Jackson insists that this centuries old doctrine

*... is not just some historical artefact that has now been jettisoned in more enlightened times but instead remains the base of Pākehā law and the base for the whole Treaty jurisprudence which rests upon the assumption that Iwi and Hapū ceded sovereignty to the Crown in the Treaty.*

*The long-term social, legal, and political consequences of that dreadful mythology are outside the scope of this brief but there is no doubt they have influenced the historical narrative about the sort of society that Māori had and consequently the sort of people we were. They certainly reduced our reality from the complex society that it was to a caricature of either violent or compliant natives who ignored our own history and law and willingly ceded authority to the Crown.*

*Most importantly in terms of this claim they have impacted negatively upon the perceptions held about our rights and authority. They have in effect silenced any appreciation of the clear philosophies developed by Iwi and Hapū about the*

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<sup>22</sup> Brief of Evidence of Moana Jackson, (Wai 2522) at paras [63] – [66]

<sup>23</sup> Alan Ward, *A Show of Justice. Racial ‘Amalgamation’ in Nineteenth Century New Zealand*, Auckland University Press, 1995, p.62.

*complexities of mana and especially the capacity and need to treat as a constituent part of its effective exercise.*

Dr Jackson observed how this underpins the

*treaty discourse which continues to assert that because of the purported cession and other “jurisdictional steps” taken by the Crown we became British citizens under Article Three of the Treaty and thus forfeited any right to treat because we were henceforth merely its subjects.*

*Such an assertion was of course fundamental to the Westminster system as well as the whole discourse of colonising law. However it was absolutely contrary to the legal and political ideals of Iwi and Hapū as well as Te Tiriti o Waitangi.<sup>24</sup>*

### ***International moves to repudiate the Doctrine of Discovery***

Treating the “doctrine of discovery” as a historical relic conceals its ongoing influence, as Maranga Mai explains:

*The doctrine is still recognised under international law insofar as it has never been repudiated. In this way, it continues to underpin the position of the New Zealand government and its legislation.<sup>25</sup>*

Indigenous Peoples have fought long and hard internationally to secure its repudiation. Paragraph four to the Preamble of *The UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*, to which the Aotearoa New Zealand is a Party, affirms that:

*all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.*

In 2012 the United Nations Permanent Forum on Indigenous Issues held a special session on the doctrine of discovery with expert speakers,<sup>26</sup> including Dr Jackson.<sup>27</sup> The session recommended that:

- (i) States repudiate racist doctrines, such as the doctrine of discovery, that are based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences; and

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<sup>24</sup> Brief of Evidence of Moana Jackson, (Wai 2522) at paras [57], [67] – [70]

<sup>25</sup> *Maranga Mai*, p.31.

<sup>26</sup> United Nations Department of Economic and Social Affairs, “Impact of the ‘Doctrine of Discovery’ on Indigenous Peoples”, 1 June 2012. Available at: <https://www.un.org/en/development/desa/newsletter/desanews/dialogue/2012/06/3801.html>

<sup>27</sup> The UN Permanent Forum on Indigenous Issues, Panel Discussion on Doctrine of Discovery, Presentation of Moana Jackson, 7-18 May 2012, <https://www.converge.org.nz/pma/mj070512.pdf>

- (ii) The Permanent Forum encourages the conduct of processes of reconciliation between States and indigenous peoples.<sup>28</sup>

The following year the Permanent Forum strongly recommended the implementation of the recommendations of the Special Rapporteur on Indigenous Peoples that

*the “doctrine of discovery” be denounced and that its use and application be discontinued.*<sup>29</sup>

In 2023 the Vatican finally rejected the racist Doctrine of Discovery based on its Papal Bulls (Catholic laws) that were issued during the fifteenth century.<sup>30</sup> But, as Tina Ngata points out, the Pope still did not own the Catholic church’s responsibility for the doctrine and for the violence, dispossessions and genocides it was used to justify, or seek to provide redress.

### **Draft briefing to Cabinet to renounce the doctrine**

A briefing paper for Cabinet ministers on “the doctrine of discovery, its application in Aotearoa and its relevance to the implementation” of the UNDRIP was drafted as part of the Marangai Mai process and discussed with the Solicitor-General, but it was never presented to ministers or Cabinet. The paper advised that:

*Numerous government agencies are currently developing strategies for addressing institutionalised racism. The doctrine of discovery is understood by race theorists as both the progenitor of colonialism and modern racism. Understanding the role of the doctrine of discovery in the shaping and embedding of racism in modern institutions will enhance both the understanding of racism in general and the colonial racism which provides the underpinnings for how racism has manifested in Aotearoa.*

The briefing traced the historical application of the doctrine of discovery in Aotearoa from James Cook in the 18<sup>th</sup> century, Governor Hobson’s proclamations in May 1840 and the case of *Wi Parata* in 1877 through to the present day. It challenged the Crown’s claim to contemporary exceptionalism in its speech at the United Nations on the UNDRIP, which sought to distance New Zealand from the doctrine by sourcing its sovereignty in “the Treaty of Waitangi”. The Waitangi Tribunal’s finding in Stage One of Wai 1040 *He Whakaputanga me Te Tiriti* that there was no cession of sovereignty was simply ignored.

Specifically in relation to foreign policy, the draft paper described

*the New Zealand government’s assumption to represent the interests of Aotearoa stands as the primary expression of the doctrine of discovery in relation to foreign policy.*

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<sup>28</sup> “Te Whakaakoranga Tūhura: ētahi tauira Waiwai: The Doctrine of Discovery: some basic facts”, September – Mahuru 2023, Te Kāhui Tika Tangata/ Human Rights Commission, Available at: <https://tikatangata.org.nz/cms/assets/Documents/General/Indigenous-resources/The-Doctrine-of-Discovery-Some-Basic-Facts-Te-Kahui-Tika-Tangata.pdf>

<sup>29</sup> Closing session, Permanent Forum on Indigenous Issues Reaffirms Unswerving Desire to Preserve Identity, Secure Fully Fledged Plan on Global Stage, 31 May 2013, Available at: <https://press.un.org/en/2013/hr5142.doc.htm>

<sup>30</sup> “Vatican’s rejection of racist doctrine is a start”, Te Kāhui Tika Tangata/ Human Rights Commission, 2 April 2023, Available at <https://tikatangata.org.nz/news/vaticans-rejection-of-racist-doctrine-is-a-start>

*Further, there are specific functions carried out through New Zealand’s multilateral agreements that function to support both the domestic and international dominance of European imperialism, in addition to relying upon the doctrine of discovery principles and entitlements in order to develop and expand New Zealand imperialism throughout the Pacific region [and] it set the foundations for global economic infrastructure, which included the economic domination of the global north over the global south. ...*

*Further, in understanding the global extractive economy as a contemporary derivation of the doctrine of discovery, there are numerous instances of the extraction from Indigenous territories and exploitation of Indigenous persons which occurs through multilateral trade agreements.*

The briefing recommended that the Crown recognise that the Waitangi Tribunal findings that Māori did not cede sovereignty means that the current constitutional framework is an expression of the “doctrine of discovery”. It called on the Crown to officially renounce the racist doctrine, and in doing so commit to constitutional transformation.

The draft paper was discussed with, but did not make it past, the Solicitor General and his staff. The politics of the late 2010s, with the backlash against He PuaPua, the 2019 roadmap for Aotearoa New Zealand to implement the UNDRIP, and Three Waters, meant no Cabinet minister was about to defend it.

In September 2021 the Crown rejected another opportunity to renounce the “doctrine of discovery”. The Department of Conservation (DOC) was the state party representative for the New Zealand Government at the World Conservation Conference of the International Union for the Conservation of Nature (IUCN), one of two environmental organisations with observer status at the United Nations, in Marseille, France from 3-11 September 2021.

The Conference adopted Motion 048 – Renunciation of the Doctrine of Discovery to Rediscover Care for Mother Earth at the IUCN World Conservation Congress.<sup>31</sup> DOC abstained, saying it was supportive in principle, but needed to have consulted Māori and across government, which was not possible due to Covid. However, it was represented by an official from New Zealand’s Embassy in Paris who, according to DOC, “*was able to vote on our behalf in support of motions that clearly aligned with existing government policy*”.<sup>32</sup>

## **Iwi Chairs quit over history curriculum**

The anti-Māori backlash that intensified under the National/NZ First/ACT government elected in 2023 ended moves to include the doctrine of discovery in the new history curriculum.

The 2012 United Nations Permanent Forum on Indigenous Issues had recommended that States include a discussion on the doctrine of discovery, and related aspects, in education curricula.

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<sup>31</sup> 048 – Renunciation of the Doctrine of Discovery to Rediscover the Care for Mother Earth, Version sent to plenary, 22 September 2021. Available at <https://www.iucncongress2020.org/motion/048>

<sup>32</sup> Response from Department of Conservation to an Official Information Act request by Dr Aroha Mead, 1 November 2021.

The draft paper for Cabinet as part of the *Matike Mai* process emphasised the importance of delivering on this recommendation in the proposed new history curriculum for schools:

*The government has committed to teaching Aotearoa New Zealand's histories in all schools and kura from 2022 onwards and is currently undergoing a review process. The doctrine of discovery is a vital aspect of our history that contextualises our own domestic colonial experience within a broader global phenomena of imperial expansion. This remains sorely misunderstood and under-taught, in spite of a 2012 United Nations recommendation that all member states incorporate the doctrine of discovery in their national curricula.*

When the Coalition Government called for colonial history, including the doctrine of discovery, to be dropped from the National Action Plan Against Racism, the National Iwi Chairs delegates walked out.<sup>33</sup>

So, the Doctrine of Discovery remains alive in Aotearoa, with no indication that the Crown is prepared to renounce its application or to debate its legacy.

## **Constitutional Transformation Requires Decolonisation**

In sum, legal imperialism denies tikanga in its authentic, non-assimilated form, as a specific means for the exercise of mana motuhake, so the unrepudiated Doctrine of Discovery continues to underpin the fiction of Crown sovereignty in Aotearoa. Constitutional transformation, including in international treaty making, cannot be achieved without confronting and redressing these legacies of colonisation.

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<sup>33</sup> Tina Ngāta, "Why we walked away", *E-Tangata*, 7 April 2024. <https://e-tangata.co.nz/comment-and-analysis/tina-ngata-why-we-walked-away/>