IN THE WAITANGI TRIBUNAL

WAI 898
WAI 440

IN THE MATTER OF	the Treaty of Waitangi Act 1975
AND	
IN THE MATTER OF	claims in Te Rohe Potae
AND	
IN THE MATTER	of a claim filed by the descendants of and rightful successors to the chiefs and people specified in the claim and collectively brought before the Tribunal through Ngati Paretekawa and Ngati Paia Hapu of Ngati Maniapoto and Ngati Raukawa Iwi (**Wai 440**)

Brief of Evidence of MOANA JACKSON

Dated the 12th day of November 2012

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Introduction

1. My name is Moana Jackson, I am Ngati Kahungunu and Ngati Porou.

2. I graduated from Victoria University with an LLB and undertook postgraduate research with the Justice Department of the Navajo Nation in Arizona. Whilst there, I had the privilege of working with and was exposed to the writings of many indigenous scholars on the rights and authority of their nations. I was struck particularly by the consistent affirmation that their ancestors never gave away the sovereignty or independence of their nations.

3. Since that time I have tried to further my understanding of indigenous rights and the parallels that exist with the efforts of our people to advocate our rangatiratanga. This has necessarily included questions to do with the injustice that we and other Indigenous Peoples have had to endure through the process of colonisation and the particular place of He Whakaputanga and Te Tiriti o Waitangi in the history of Iwi and Hapu.

4. In 1988, I was able to specifically compare the situation of Maori and other Indigenous Peoples as part of the first Maori delegation to the United Nations Working Group drafting the Declaration on the Rights of Indigenous Peoples. In 1990 I was elected chairperson of the Indigenous Peoples caucus of that Working Group and in that capacity I was also able to undertake research on indigenous rights in the Pacific Islands, North and South America, the Philippines and Southern Africa.

5. In 1988, I co-founded with now Judge Caren Fox, Nga Kaiwhakamarama i Nga Ture, the first Maori Law Centre. Our work included drafting the original Flora and Fauna Claim (Wai 262) and early litigation in fisheries and broadcasting. We also took part in international conferences on indigenous constitutionalism and human rights. Since 1999 I have tried to continue that work in my own capacity.

6. In 1993 I was appointed as a judge to the independent International Peoples Tribunal in Hawaii, and in 1995 I was appointed to a similar tribunal in Canada. The Tribunals were established following the Russell Tribunal which heard

claims of Indigenous Peoples in North and South America in 1972. They consisted of international jurists and were not bound by the so-called domestic law of the colonisers but rather by international and indigenous law.

7. More recently I have studied the history and consequences of colonising law in England, Spain and Portugal, among other places. In England I spent time in the archives of the Colonial Office, the Privy Council and the Church Missionary Society. In Spain I researched the debates held in Valladolid in 1550 which set the baseline for the colonial law relating to Indigenous Peoples. In Portugal I studied the records dealing with the submissions to and eventual promulgation of the 1493 Inter Caetera Papal Bull which outlined some of the other baselines enabling European states to erect their imperium in indigenous territories.

8. At the same time I have been privileged to work with and learn from many Iwi and Hapu. From them, as well as my own Iwi, I have gained some insights into the history and more importantly the tikanga and philosophy which have always underpinned the ideals and practice of Maori political and constitutional authority.

9. It is that work and history which informs this Brief. In presenting it I am mindful and respectful of the evidence already given to this Tribunal by the rangatira of Te Rohe Potae. They are the proper experts on the law and history of their people and I acknowledge the power and sincerity of their evidence. In this Brief I merely seek to contextualise the meaning and significance of Te Ohaki Tapu within a broader analysis of Maori law, politics and constitutionality.

10. In dealing with Te Ohaki Tapu in that way it is necessary to bear in mind four different contexts:

    (a) The first is that Te Ohaki Tapu or compact was developed, discussed and agreed to by the rangatira of Te Rohe Potae operating within a context that is Iwi and Hapu specific in terms of law, politics and history. It is a text in the context of Iwi and Hapu reality.

    (b) The second is that the compact was understood by rangatira operating within a context that was changing in practical and institutional terms but

unchanging in terms of the philosophical underpinnings of Iwi and Hapu law and politics. It is a text in the context of the immutable political and constitutional authority of the Iwi and Hapu of Te Rohe Potae.

(c) The third is that the compact was discussed and understood by the Crown operating within a general context that was shaped and determined by the historic ideologies and presumptions of dispossession. The understanding the Crown brought and still brings to the compact constitutes a text in the centuries-long context of colonisation.

(d) The fourth is that the compact was discussed and understood by the Crown in the quite specific context of the colonising claims to supreme sovereignty that it asserted in the Treaty of Waitangi and the Proclamations of Discovery in 1840. The understanding the Crown brought to the compact constitutes a text in the deliberate subordination of the political and constitutional authority of Iwi and Hapu.

11. The Brief itself has four Parts:

(a) The first Part considers and analyses the ideologies and philosophies of authority within which those Iwi and Hapu who are parties to the compact operated and understood the world. While it does so as a matter of historical record outlined in the rangatira evidence already presented to the Tribunal it also establishes and re-positions Iwi and Hapu authority within a broader framework that acknowledges its legitimacy in both theoretical and tikanga terms. Where appropriate it makes comparisons with the law and constitutionality of other Indigenous Peoples in order to reinforce the inherent if culturally unique suppositions of authority that Iwi and Hapu brought to the development and understanding of Te Ohaki Tapu.

(b) The second Part of the Brief considers particular ways that Iwi and Hapu chose to express and give effect to their legal, political and constitutional ideologies over time, including in particular the power to treat. It does so to establish how the complex cultural history that

shaped the extent and limits of Iwi and Hapu authority inevitably determined how the rangatira of Iwi and Hapu approached both Te Tiriti o Waitangi and Te Ohaki Tapu. It acknowledges in particular that while Iwi and Hapu may have drawn upon that history and those ideologies in different practical ways prior to and after 1840 they nevertheless shared a common and deeply entrenched philosophy about law and power which necessarily links Te Tiriti and the compact as sacred agreements.

(c) The Third Part looks specifically at Te Tiriti and Te Ohaki Tapu as interrelated expressions of mana and the concomitant right to treat and make binding commitments with other polities.

These first Three Parts are outlined in some detail because the Iwi and Hapu history of Te Rohe Potae requires it. However the detail is also necessary to counter the essentialist racism of colonising history which presumed that non-European peoples either did not have "real" law or government or only possessed a notion of political authority and independence which could easily be subsumed under the allegedly superior and "real" sovereignty of a colonising State.

(d) The Fourth Part of the Brief specifically analyses that colonising history because it is crucial to any understanding of the Crown's attitude to, and interpretation of both Te Tiriti and Te Ohaki Tapu. In particular Part Four considers the development in Europe of a political, legal and social consensus about a right to dispossess Indigenous Peoples and its subsequent expression in British practice as a so-called authority to "erect an imperium" and thus rationalise its jurisdiction over indigenous nations. It does so to illustrate the context which justified colonisation as a process and thus the Crown's dispossession of all Iwi and Hapu and in particular its determination to belittle and dismiss the authority and rights claimed in Te Ohaki Tapu.

These matters are also addressed in some detail because they background the policies and purported justifications advanced by the Crown in relation to both Te Tiriti and Te Ohaki Tapu and provide some

insight into why it continues to "hesitate to categorise the agreement (with Te Rohe Potae) in terms of a scared compact". Indeed it is submitted in this Brief that such a response is based ultimately on its own presumptions about the lesser capacity of Indigenous Peoples and the superior legitimacy of its colonising power rather than any proper consideration of the efficacy of Te Ohaki Tapu let alone the law and constitutional ethos that guided the actions of the people of Te Rohe Potae.

12. Each part proceeds from my considered view that Te Ohaki Tapu is a carefully considered and legitimate example of treating that is consistent with the law and diplomatic/constitutional processes of the Iwi and Hapu of Te Rohe Potae.

13. It also proceeds from my considered view that the Crown responses to, and consequent breaches of Te Ohaki Tapu themselves flow from its determination to erect its imperium in another indigenous land. In effect they are little more than an attempted legitimising of its own presumed right to dispossess and are therefore neither ethical nor logical. They are certainly not legitimate according to the law of Iwi and Hapu.

14. Indeed because the very idea of erecting an imperium was in effect a justification for the overthrow of existing indigenous polities and presumed a voluntary giving away or ceding of authority by those polities, it is contrary to everything that underlay the political, constitutional and legal reality of all Indigenous Peoples. It is thus also contrary to everything expected and understood by the people of Te Rohe Potae.

Part One – Law and Concepts of Power

15. History shows that every society realises very early on that it cannot survive in a lawless state. All societies therefore establish ways of ensuring social cohesion by developing a philosophy or jurisprudence of law and a discrete legal system to give effect to it. Both are shaped by the land, history and values of the people - the idea and ideals of law are unique cultural creations.

16. Indigenous Nations have unique philosophies of law and legal systems. Two

examples may serve to illustrate this point while also repudiating the colonisers' view that only they were possessed of real law. They also illustrate some commonalities in the law of Iwi and Hapu.

17. Professor John Borrows has described the law of his Anishinabe nation as a jural system that is derived from five main sources and values. These are:

    (a) The sacred, that is law is derived from norms and precedents outlined in the poetry of creation and other stories of the cosmogony;

    (b) The land, that is law is derived from the land of its origins and the normative lessons found in the interrelationship between all beings and phenomena in the universe;

    (c) The deterministic precedents, that is law is derived from decisions made in the past;

    (d) The positivistic lessons, that is law is derived from culturally specific ideas about ethics and how people ought to behave; and

    (e) The customs, that is law is derived from the settled practices of the people mediated by their inherent right and capacity to change those practices in an appropriate way over time.[1]

18. The Kombumerri/Munaljahal people in Australia have what they call a 'full law' which the Kombumerri academic Christine Morris described as linking humans to all realities, spiritual and non-spiritual, as opposed to a 'half law' that only concentrates on tangible things. Concepts of balance and obligation originated in the dream-time when relationships were formed and over time they became the founding philosophy of the 'full' law.[2]

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[1] John Borrows, 'Recognising and Reaffirming Different Legal Traditions in Canada' (Paper presented at the Nga Pae o te Māramatanga 4th International Indigenous Conference/Mātauranga Taketake Traditional Knowledge, Auckland, New Zealand, 6-9 June 2010) (see http://www.traditionalknowledge2010.ac.nz/speakers/john-borrows).

[2] Christine Morris, 'Indigenous Law is a Full Law', Ngā Kaiwhakamārama I Ngā Ture, August 1988 (Paper presented at the Māori and Criminal Justice – He Whaipaanga Hou Ten Years On 1988-1998 Conference, Wellington, New Zealand, 15-17 July 1998).

19. Iwi and Hapu also developed a law that grew out of the stories and the culture that developed here. Ani Mikaere of Ngāti Raukawa has called the resulting tikanga the 'first law'[3] of this land and while it was specific and unique to Maori it does share certain commonalities with the examples referred to above. It developed from philosophies to do with the sacred and the interrelatedness of whakapapa as well as from precedents and custom. It recognised the need for sanctions but stressed ethics and sought reconciliation rather than punishment. In every sense it was a 'full' law that recognised the relationships between people and every part of the universe, both seen and unseen, physical and spiritual.

20. The normative guidelines it contained formed part of a values-laden jurisprudence upon which decisions were made to settle disputes, regulate trade, ensure peace after war and reconcile all of the competing interests in human existence. Justice Edward Durie has stressed the importance of those values and has noted that law depended upon 'whether there were values to which the community generally subscribed. Whether those values were regularly upheld is not the point but whether they had regular influence. Maori operated not by finite rules alone…but by reference to principles, goals and values'.[4] Law set the 'ought to be' of conduct and recognised the fact of human fallibility.

21. Perhaps the clearest example of the efficacy of law is seen in the ceremonies that were performed when a baby was born. The rites of birth associated with naming and blessing were not just a cultural celebration but a legal affirmation of the rights or entitlements that would vest in the child as he or she grew into adulthood. They established the child's turangawaewae and the interests or title that went with his or her whakapapa.

22. Tikanga itself was thus relational as well as values-based. It was bound by the ethics of what ought to be in a relationship as well as the values that measured

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[3] Ani Mikaere, 'The Treaty of Waitangi and Recognition of Tikanga Maori', in Michael Belgrave, Merata Kawharu and David Williams, eds, *Waitangi Revisited: Perspectives of the Treaty of Waitangi*, 2nd ed., Oxford University Press, Auckland, New Zealand, 2005, p. 334.

the tapu and mana of individuals and the collective. It set prescriptive and proscriptive guidelines for what was legal or illegal (tika or non-tika) behaviour, and because it was so whakapapa-based people lived with the law rather than under it. The idea that someone might be above it was simply a cultural contradiction in terms. Tohara Mohi of Ngati Kahungunu aptly said that law was 'the essence of all order and life' and it helped ensure an ordered existence and a benchmark against which all relationships, known or potential, could be measured.[5]

23. The jurisprudence, institutions and practices of law which rangatira have already alluded to in Te Rohe Potae were therefore constructs that they uniquely developed in their land. They shared with other Iwi and Hapu a common philosophical and values base but they also had specific variations that were often as subtle but as real as the differences in dialect. In a very real sense they establish that which should not need to be stated – that the tīpuna lived in an ordered and organised society. The tīpuna were never a law-less people.

24. In the same way that societies learn that they cannot exist in a lawless state they also learn that social order cannot be maintained in a power vacuum. They therefore simultaneously develop political and constitutional ideas and practices to govern themselves.

25. Constitutionalism and government are often regarded as complex ideas but they are really very simple. Government is the process that people choose to regulate their affairs and a constitution may be understood as the code they use to describe how government will function. An essential part of that process is the creation of what may be described as concepts and sites of power.

26. 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. A site

[4] Edward Durie, 'Custom Law' (Unpublished Paper, January 1994, distributed by Chief Judge's Chambers, Māori Land Court, 14 February, 1994).

of power is the governing institution through which the concept of power is given effect.

27. In its broadest sense a concept of power is a particular society's reflection of the universal desire humans have to determine their own destiny and to do so through their own uniquely constructed polities and institutions.

28. Indigenous nations have defined their own concepts and sites of power with the same acuity and confidence as they defined the notions of their law. Again some examples may illustrate their unique philosophies and practices.

29. In Hawaii the Kanaka Maoli defines their concept of power as 'mana' which is the absolute independent authority to 'malama aina' or care for the land and thus the people who belong to it. Professor Kekuni Blaisdell has likened 'mana' to the idea of 'ea' or the force that 'can move heaven and earth'. The site of power was the institution of 'A'liki' which consisted of hereditary leaders or those chosen for their special skills by the elders or 'kupuna'.[6]

30. Other indigenous concepts of power also link the idea of political/constitutional authority to a relationship with the land. Thus the Havasupai Nation define it as "sumaaga" or the power people derive from the spirit of the land while the Akan nation have a concept of power "asomdwai" that denotes the absolute political authority commensurate with maintaining peace and tranquillity with the land.

31. The Mohawk scholar Professor Taiaiake Alfred has situated the Mohawk concept of power within the Kaswentha which stresses the need to foster relationships within a 'cohesive universe' predicated on the relationship between the collective and the 'conscious co-ordination of individual powers of self determination'.[7] In the 15th century the Mohawk exercised that authority and treated with the Onandaga, the Seneca, the Oneida and the Cayuga Nations to form the Haudenosaunee Confederation. In the Confederation (which still exists

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[5] Tohara Mohi, transcript of presentation on 'Law and Custom', Ngāti Kahungunu wānanga, 8 September, 1985.
[6] Kekuni Blaisdell, oral statement to the International People's Tribunal, Hawaii, 1993, Tribunal Proceedings, Vol. One, p. 125.
[7] Taiaiake Alfred, *Peace, Power and Righteousness: An Indigenous Manifesto*, Oxford University Press, Ontario, Canada, 1999, p. 26.

today) each Nation kept its own authority but joined together in a different site of power to make decisions of common interest. The current Faith Keeper of the Onandaga, Professor Oren Lyons, has stated that the concept of each Nation's power remains the honouring of the relationships between humans, the Mother Earth, the Father Sky, and 'our elder brother the sun, our grandmother the moon and our grandfather the trees'.[8]

32. The concept of power which was developed in this land reflected a similar focus on collective aspirations and on the relationships implicit in the notion of whakapapa. The generic name given to the concept was mana, although it was specifically rendered in some Iwi and Hapu as mana motuhake, mana taketake or mana to rangapu. Rangatira evidence to this Tribunal shows clearly that the term used throughout Te Rohe Potae was mana motuhake or the specific Ngati Maniapoto designation mana whatu ahuru.

33. The whakapapa which ultimately links all Iwi and Hapu together meant that mana as a political power could only be legitimised in concert with mana whenua, mana moana, and mana atua. If law was designed to meet all the possibilities of human existence, mana emerged to meet all the relationships our people might have with each other, with strangers or manuhiri, with the world, and indeed the universe.

34. After 1840 the term tino rangatiratanga was also used to represent the concept of power. Dame Mira Szazy once defined it 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'.[9]

35. The concept of mana as a political and constitutional power thus denotes an absolute authority. It was absolute because it was absolutely the prerogative of Iwi and Hapu, but it was also absolute in the sense that it was commensurate with independence and an exercise of authority that could not be tampered with

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[8] Oren Lyons, commencement address to the graduates of the College of Natural Resources, University of California, 22 May 2005 (see http://nature.berkeley.edu/blogs/news/2005/05/fall_2005_commencement_address.php).
[9] Miraka Szazy, oral submission on behalf of Te Aupouri and Ngati Kuri (Wai 22: Muriwhenua Fishing Claim), first hearing, Te Reo Mihi Marae, Te Hapua, 8 - 11 December 1986.

by another polity. It included a number of different components that may be called the specifics of power such as:

(a) The power to define – that is the power to define the rights, interests and place of individuals and collectives;

(b) The power to protect – that is the power to protect, manaaki and be the kaitiaki for everything and everyone within the polity;

(c) The power to decide – that is the power to make decisions about everything affecting the wellbeing of the people; and

(d) 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.

(e) The power to treat – that is the power to negotiate and establish (or re-establish) relationships through treaties, compacts or covenants with other polities possessed of mana or some similar authority.

36. Such powers were the inevitable correlates of political and constitutional independence. However a crucial part of its cultural uniqueness lay in the fact that as well as being an unequivocal expression of independent authority it also necessarily recognised the interdependence inherent in whakapapa. Indeed Iwi and Hapu politics has always been about seeking, reaffirming or repairing interrelationships while preserving the independence which allowed that to happen. Te Ohaki Tapu is clearly a product of that reality.

37. The site of power was the institution of ariki and rangatira who were responsible for exercising mana. They could be chosen because of hereditary or specifically identified skills, although their tenure was always subject to what would now be called 'performance measures,' that is how well they preserved and defended the well-being of the people, protected their land, and nurtured the relationships implicit in whakapapa. John Rangihau once succinctly and accurately described the authority and status of rangatira as being 'people bestowed'. [10]

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[10] John Rangihau, transcript of presentation on Law and Custom, Ngāti Kahungunu wānanga, 8 September, 1985.

38. Together the concept and sites of power were situated in the discrete polities of Iwi and Hapu. Indeed in the hundreds of years prior to 1840 the common land mass that made up the islands of Te Ika a Maui and Te Waka a Maui was occupied by a number of distinct polities that exercised their own mana and lived according to their tikanga secure in the uniqueness they had developed over centuries. Just as the common land mass of Europe was occupied by a number of distinct polities exercising their authority and living according to their law so Iwi and Hapu did the same. They were recognised and constitutionally regulated polities.

39. The constitution of each polity may be described by drawing an analogy with the kawa of the marae which outlines the way the marae will be governed and the codes upon which it and the conduct of the people (both hosts and manuhiri) will be determined. Thus the constitution of each Iwi and Hapu was simply the kawa writ large across the 'marae' of its whole territory. In many rohe effective governance on a day to day level actually resided in the Hapu, and as the word 'hapu' itself means to be pregnant or swelling with life it was the site of power where life affirming (and life threatening) decisions were most regularly made.

40. Within this reality three constitutional prescriptions and proscriptions underpinned mana and determined how it could be exercised within any particular site of power:

    (a) Firstly, the power was bound by law and could only be exercised in ways consistent with tikanga.

    (b) Secondly the power was held by and for the people, that is it was a taonga handed down from the tīpuna to be exercised by the living for the benefit of the mokopuna.

    (c) Thirdly the power necessarily entailed an obligation to promote and protect the wellbeing of the people through the constant mediation of relationships.

41. One ramification of those prescriptions was that mana was absolutely inalienable. No matter how powerful rangatira might presume to be, they never

possessed the authority nor had the right to give away or subordinate the mana of the collective because to do so would have been to give away the whakapapa and the responsibilities bequeathed by the tipuna. 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 and constitutionally untenable, and culturally incomprehensible.

42. Another consequence was that like law the exercise of mana as a concept of power was clearly relational and values-based. It was bound by the ethics of what ought to be in a relationship, whether negotiated or otherwise, and it melded the practicalities of politics with the need to enhance the people's well-being by limiting or advancing the parameters of a relationship as circumstances demanded.

43. In general terms then mana as a concept of power was a culturally and tikanga-specific understanding of political authority. It grew from this land and the history, knowledge and experience which the people took from it. It was a concept of independence and if it was rarely articulated as such it was only because independence was known and lived as the norm by a people who were neither dependent upon nor beholden to any other. In a very real sense mana represents a vibrant reality that should also not need to be stated – that the tīpuna lived in a politically and constitutionally structured society. The tīpuna were a power-full people.

44. In Europe too, the unique history and cultural/religious ideologies of its people led to the development of a particular concept of power called sovereignty. Its first recorded theorist was Jean Bodin who defined sovereignty in 1579 as being the "most high…and perpetual power over the citizens and subjects in a commonweal". It was "the greatest power to command" that was vested in "a sovereign prince (who) is…indispensable to maintain civilised order…it is his power which informs all the members and…to which after immortal God we owe all things'.[11]

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[11] *Jean Bodin* "Six livres de la republique" English trans R. Knolles (1606) and M.J. Tooley (1955) 23.

45. Over time Bodin's definition of sovereignty was refined in other European countries. In Britain theorists from Thomas Hobbes to John Austin defined sovereignty to suit the particular realities of the political system that had developed through the often tense relationship between their hereditary monarchs and the nobility. Those very English definitions nevertheless preserved the idea of a hierarchical power vested in an absolute monarch who had the authority to govern with the same ascendancy as God 'not as creator and gracious but as omnipotent'.

46. Sovereignty was thus a concept of power defined in Europe by Europeans. It was both shaped by and gave expression to European ideas of hierarchy, individuated authority, and of course the teachings of Christianity. Like the law and legal systems of Europe it is a culturally specific creation.

47. However the discourses of colonisation framed the specificity of sovereignty within the racism of a "chain of being" running from the primitive savage "tribes" of Indigenous Peoples to the superior civilised "States" of Europe. In this depiction the former were pre-literate and pre-political and thus lacked the prerequisites for what Europe regarded as civilised and legitimate polities, including a lack of constitutional government and an incapacity to treat. In that discourse sovereignty was the only "real" concept of power.

48. Thus Bodin depicted sovereignty as a power that arose once 'man…purged himself of troubling passions' and moved up 'the great chain of being…and its hierarchical order. By such a progression (he) reaches the concept of the one infinite God' and with it the reason to develop a concept of power vesting in 'a single ruler on whom the effectiveness of all the rest depends'. Hobbes similarly saw sovereignty as a universal concept of power that societies only attained when they progressed out of a so-called state of nature, a primitive place where life was based around warfare or 'the known disposition thereto (and) the concord whereof dependeth on natural lust."[12] In that condition people had "no government at all (and) the life of man (was) solitary, poore, nasty, brutish and short'.

[12] Thomas Hobbes "Leviathan (1651)" Pelican Classics ed C.B. MacPherson, 1979, ch 13, p62.

49. It is within that discourse that the Colonial Office Instructions to William Hobson were drafted in 1839. They clearly reflect the presumption that whatever constitutional authority might be possessed by Iwi and Hapu it was necessarily of an inferior nature, a point made specifically by Lord Normanby –"I have already acknowledged 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".

50. That statement is of course both fundamentally flawed and inaccurate. It is flawed because with typical colonising arrogance it fails to consider the possibility that there may be differently constructed but equally legitimate concepts of power other than sovereignty and instead assumes that those who do not possess a European-type political structure based on sovereignty have only a kind of limited or not really "real" authority. It is inaccurate because Iwi and Hapu were clearly organised polities and any differences and commonalities among Iwi and Hapu arose from the normal flux of political interaction not some inbred incompetence.

51. Mana clearly was (and is) a legitimate concept of power which for centuries was exercised effectively and unquestioningly by Iwi and Hapu. In that context it is my respectful view that the question asked by the Crown "Were Maori of Te Rohe Potae a sovereign people prior to the arrival of Europeans?" is the wrong question because sovereignty was not a concept of power developed in this land. A more apposite question would be "Were the people of Te Rohe Potae independent polities exercising the absolute and inalienable authority of mana to treat and otherwise determine their own destiny?" and the answer would be "Of course they were".

Part Two: Treaty Making and the Mana To Make Political Compacts –

52. It is obvious that any independent polity possesses the capacity to treat and that Iwi and Hapu within Te Rohe Potae freely exercised that capacity prior to 1883. The relational nature of mana as a concept of power meant that treating was

not only expected as a means of maintaining balance by sustaining or mending relationships but was a diplomatic practice used to ensure and enhance mana itself. Making treaties did not suddenly fall out of the sky over this land in 1840.

53. The notion of treating or making agreements with other polity is an ancient human activity and the word “treaty” has a dual derivation in the Latin tractatus meaning “a discussion or negotiation” and tractare or tractate meaning “to engage with” another party. Every Iwi and Hapu has a long history of similarly engaging with each other or negotiating to regulate their affairs, settle conflicts, and address other political matters. Iwi and Hapu made treaties because that is what polities do.

54. Most particularly the capacity to treat arose inevitably from the interdependence that was a necessary correlate of mana. The old people in Ngāti Kahungunu refer to our history of treaty-making as the ‘mahi tūhono’ or the work that draws people together which seems a nice way of describing what a treaty should do, rather like Robert Williams’ description of treaty-making among native American Nations as a ‘rite of making relatives’ through ‘diplomatic conversations’.[13]

55. Every Iwi and Hapū has stories of such mahi and each one exemplifies the many different ways in which the development of inter-polity agreements occurred. They illustrate for example how the agreements were often reached after sometimes years of discussion because a conclusion only ever followed the korero (whai-korero) and the potential for the agreement to be binding and honoured only followed the thought (whai-whakaaro) that the other party could be trusted. They also indicate how the very process of mahi tuhono necessarily involved a degree of political realism and flexibility without compromising either the mana of the parties or the importance of the relationship that was being considered.

56. Some compacts or treaties were very practical arrangements that for example allowed an inland Iwi or Hapū to get seasonal access to coastal food supplies in

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[13] Robert A. Williams Jr., “Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800” Oxford Press,1997, p43.

exchange for the other party having a reciprocal opportunity to do the same at some time in their territory. Others were negotiated as military alliances while some were tatau pounamu or hohou rongo that were arranged at the end of a conflict to restore peace by literally 'removing the anger' and thus mending the relationships involved.

57. The inter-polity (indeed the inter-nation) character of treaties naturally meant that they were always extremely political exercises but they were also imbued with the special sacredness that came from the committing of rangatira to a particular course of action and the honouring of relationships. There was a certain tapu too in the recognition that in a treaty the honour as well as the pride and independence of the collective was at stake which meant that treaties could only be negotiated by those rangatira or ariki whom Monita Delamere described as "diplomats well-schooled in whakapapa and tikanga as well as the give and take of politics".[14]

58. Those who negotiated them therefore had to have the legal standing to do so, and the agreement they made had to be consistent with the prescriptions and proscriptions inherent in the tika exercise of mana. Indeed treating was not a task for the unskilled or politically naive but for those who were mandated by the people and were recognised as having the ability to weigh up all the risks or benefits that any agreement might produce. Mahi tūhono was mahi mana and it was never undertaken without a shrewd calculation of the potential risks and benefits and a careful consideration of the prevailing circumstances.

59. In the whole political and constitutional tradition that underpinned the rite of 'making relatives' Iwi and Hapu talked treaty talk and accepted the obligations that were heard and spoken about. It was the words placed upon the atea that acknowledged the mana of the participants and gave mana to the guarantees that were agreed to – 'Ko te kupu te mana, ko te mana te kupu'.

60. Mana also ensured that agreements were only ever concluded if there was a

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[14] The Monita Delamere quote is from the transcript of a hui held at Waipatu Marae on Feb 10, 1990 as part of a wananga we were having during 1990.

clear tikanga to govern the relationship. An obligation to treat in good faith was essential to that tikanga because mana required it and history would judge those who made decisions for the mokopuna. But if good faith was the usually unspoken expectation it could also be shown in a tangible way with the transfer of gifts or koha either prior to or during the treaty-making. Sometimes the koha was actually included in the terms of the agreement as occurred for example when Ngati Hawea granted a use right to riverbank land to Ngati Poporo as part of an access agreement concluded in the early 1800's.

61. Treating as an exercise of mana is the philosophical base from which any understanding of Te Ohaki Tapu derives in Maori terms. The act of treating through the stating of bottom line positions and much korero tempered by an astute awareness of the situation on the ground is the complementary political base within which its particular terms need to be understood.

62. And it is those jural, constitutional and indeed moral baselines from which it is also possible to measure whether the British Crown's behaviour, motives and subsequent assertions in regard to Te Ohaki Tapu are sustainable, tika, and just.

63. A consideration of those baselines may in my view be assisted by drawing links between the political, constitutional and cultural ethos which guided the rangatira involved in Te Tiriti o Waitangi and Te Ohaki Tapu. Although they were concluded in quite different situations the Iwi and Hapu perceptions of power and relationships were the same.

Part Three – Te Tiriti and Te Ohaki Tapu within the Context of Maori Law and Power

64. The certainties of tikanga and mana were beset by a new set of challenges with the arrival of Pākehā. Other evidence before this Tribunal has clearly illustrated the nature and extent of those challenges for the Iwi and Hapu of Te Rohe Potae. Yet the evidence also clearly shows that the increasing numbers of strangers did not alter the fundamental legal and political perceptions which Iwi and Hapu brought to the new and rapidly changing situation.

65. In a most basic cultural sense the strangers were manuhiri whom Iwi and Hapu were obligated to welcome according to tikanga. They represented new relationships as well as the possibility of benefits and threats to the established order. Their presence therefore needed to be carefully measured according to where and how they might best be accommodated and what entitlements or rights (if any) they might be granted. They were in a sense entering the marae atea of Iwi and Hapu who clearly had the legal competence and political power to determine the terms of engagement. Like any iwi arriving in the rohe of another, they were expected to abide by the kawa and jurisdiction of the hosts.

66. That simple reality, sourced in culture as well as law and power, did not change in the period immediately prior to 1840. It has long been argued by the British Crown and many historians that disease and the so-called ‘musket wars’ had reduced Iwi and Hapu to almost helpless and hapless victims begging for the protection and salvation of a greater power. While the consequences of encounter should not be underestimated it is simply contrary to Iwi and Hapu realities to presume that new experiences and even worrying new trends in any way forced them to retreat from or believe in a sudden diminishing of the authority implicit in history and whakapapa

67. The almost received wisdom that Iwi and Hapu were somehow vulnerable also flies in the face of demographics. Even by 1840 the colonisers were still just a distinct if sometimes unruly little population in the midst of independent polities, it is simply not a human reality, let alone a Maori one, that the presence of a tiny minority would bring about a surrender of long held and deeply cherished concepts of power.

68. It is contrary too to the facts of population spread because in many Iwi the degree of contact was fleeting and almost non-existent and therefore hardly likely to induce a feeling of political or cultural disempowerment. In most places, like the territory that would become Te Rohe Potae, the newcomers were merely passing curiosities or strange visitors viewed as a sometimes irksome if potential source of mutual benefit.

69. As a result an initiative such as Te Tiriti o Waitangi would be acceded to by Iwi

and Hapu only if it was deemed to be consistent with the political and legal traditions that had been nurtured for so long. As rangatira have illustrated that was certainly the case in Te Rohe Potae. Logic and common sense, let alone simple realities, made such a conclusion inevitable. Indeed Te Tiriti was necessarily derivative of Maori law and of mana because it could only have been discussed and understood by rangatira in that context.

70. Indeed in 1840 all Iwi and Hapu continued to know and exercise their mana as culturally unique and independent polities, and while many were desirous of formalising some relationship with the new arrivals by treating with the British Crown they were clear on the legal as well as the political criteria which that relationship had to meet if it was to be legitimate. An agreement would only ever be contemplated if it clearly ensured the maintenance of both mana and tikanga.

71. That was the Maori reality and there are two important considerations in situating Te Tiriti within that reality –

    (a) Firstly the language of that reality was naturally te reo Maori. In 1840 most rangatira were still monolingual and the korero about whether to treat with the Crown and what the terms of that treating should be were conducted in the reo. In most places where signings were held it was only the words in Te Tiriti that were discussed and signed. Even when moko were appended to the words in English, as they were at Manukau, the discussion was in te reo and the text was orally translated.

    (b) Secondly it is important to bear in mind that for rangatira the issue was not a question of whether they understood sovereignty (the continuing preoccupation of Pakeha historians and jurists) but whether they understood mana. Because sovereignty was a foreign concept of power and because all of the understandings reached by the rangatira were concluded in Te Reo rather than a foreign language the key interpretive lens was obviously mana with all of its implications and absoluteness, including the absolute impossibility that any thought might be given to ceding that mana.

72. The evidence of all of the korero in the reo before and at the time of the signing clearly indicates that rangatira were mindful of their responsibility to preserve and even enhance the mana they were entrusted with. In 1840 they too could only act according to law and commit the people to a relationship that was tika in terms of their constitutional traditions.

73. That truth points to an obvious Maori meaning to Te Tiriti that may be illustrated with another analogy. For just as part of the responsibility of mana was to recognise relationships with others and to expect that they would reciprocate by ensuring that their people did not impinge upon one's own harmony and well-being so rangatira actively sought a relationship with the British Crown through Te Tiriti and granted it a limited power, kawanatanga, to ensure its people did not impinge upon the mana of Iwi and Hapu. Perhaps the recorded comment of Rewi in 1879 about the particular importance of the aukati at that time also best sums up the Tiriti perception – "Ko tau tikanga kei a koe; ko taku kei au".

74. Maori linguists have consistently explained the nuances of the reo in Te Tiriti but the legal and political realities of Iwi and Hapu give those nuances a specific meaning. If mana was not ceded then Te Tiriti was a Maori reaffirmation of the ideals contained in the practice and philosophy of mana as a concept of power and a tikanga-based expectation that the British Crown would meet its obligations by helping to keep order among Pakeha while acknowledging the kawa and mana of the existing polities.

75. In a very real sense that expectation situates Te Tiriti in a legal, political and constitutional framework that was (and is) absolutely consistent with Maori law, politics, and indeed the very 'essence of being'. Logic and common sense, let alone simple realities, would again seem to make such a conclusion inevitable.

76. Although the Iwi and Hapu rangatira who signed Te Tiriti did not have the usual expected time to discuss its terms (there was comparatively little time to "follow the korero" to a conclusion) there was a clear understanding in the reo that mana would be retained and the Crown would be granted a delegated power to look after its own people. The words in Te Tiriti clearly "followed the thought" to the proper exercise of mana and the rangatira expected that the Crown would

act honourably in return.

77. The question now posed by the Crown "Did Rohe Potae Maori cede sovereignty to the Crown through Te Tiriti" is therefore also the wrong question. The more apposite question is did they cede mana and the answer is obviously that they could not and did not.

78. Of course in the years between 1840 and the formulation of Te Ohaki Tapu the Crown did not act honourably. Instead it dishonourably began to pursue its self-defined right to dispossess with the tragic and almost casually violent results that rangatira have clearly outlined to the Tribunal. The Iwi and Hapu had to resist as best they could to preserve the land, the cultural integrity and ultimately the mana bequeathed to them. As Indigenous Peoples did throughout the world they mounted a defiant and proud defence of home, and often that defence required a necessary adaptation to the new circumstances.

79. However adaptation is never the same as acquiescence. Indeed no matter how much disruption was occurring by the 1880's it was only a few decades in the making. It was a mere blip in Maori time, and a people who have spent centuries developing a vibrant and resilient culture do not jettison it merely because circumstances change. The undoubted stress caused by disrespectful and abusive colonisers and the appalling violence and injustice was never sufficient for a proud people to do anything but seek compliance with and respect for their own authority. If it also encouraged them to use their wit and imagination to contemplate new initiatives that was only another way of asserting mana in their own land.

80. Thus when pressure mounted to "open up" Te Rohe Potae the steps taken to preserve and defend it were not acts of subservience but a determined effort to retain and assert mana. One of those steps, the formalization of ancient relationships that brought the Iwi and Hapu together in Te Rohe Potae was an alliance that may in fact be likened to the creation of the Haudenosaunee Confederation in that each Iwi and Hapu retained its own mana while agreeing to work interdependently on matters of common interest.

81. Mana was similarly asserted when those Iwi and Hapu effectively offered to

treat with the Crown as a diplomatic way of negotiating through the new situation. The petition, indeed the act of writing itself, were simply new technologies to preserve an ancient right and authority, and its terms reflected the tikanga that words would be binding because in them lay the mana.

82. As their predecessors had done when contemplating whether or not to sign Te Tiriti in 1840 the rangatira saw themselves as representing the Iwi and Hapu as distinct, independent polities and the Crown as just another polity. Treating was a government to government process and forty years later circumstances had not changed that perception. Te Ohaki Tapu was therefore never seen as a plea from a subordinate to a superior Crown but a compact entered into with another polity that was assumed to be honourable and worthy of diplomatic engagement. Te Ohaki Tapu was a way of seeking an accommodation with the "new relatives" and the very act of formalizing that relationship made it a sacred compact. As evidence has shown, it was a "ki tapu".[15]

83. Te Ohaki Tapu is thus an adaptive mechanism based on ancient and inalienable perceptions embedded in tikanga and expressed through the exercise of mana as an ongoing concept of power. It was an attempt not just to deal with the immediate threat posed by the injustices the Crown was perpetrating but a restatement that its mana remained intact in spite of all that the Crown was trying to do. Indeed the understanding referred to in the rangatira evidence that the grant of land for the railway was a koha is indicative that fundamental protocols commensurate with mana were still intact, as is the firmly held belief that the terms of the compact may be likened to a constitution.

84. In that context the statement by the Crown that "the legislation, judicial processes and government institutions and mechanisms…introduced by the Crown did not undermine the sovereign authority of Rohe Potae Maori since the sovereign authority they formerly had no longer resided with them" is in my respectful view an unworthy and illogical misrepresentation of Iwi and Hapu reality. Stating something does not make it so and the Crown's view is simply a gross representation of the long-maintained Maori understanding of Te Tiriti o

[15] Refer to the evidence of Charles Roa dated October 2012 (Wai 898, #H9).

Waitangi and the subsequent authority asserted in Te Ohaki Tapu.

85. Like the further statement made by the Crown “that It hesitates…to categorise the agreement in terms of a sacred agreement” and instead defines it as a mere “understanding that enabled a government surveyor to enter the area” it is both a diminution of its status in the law of Te Rohe Potae and a continuing misrepresentation of that law and the people who sought to uphold it.

86. In a broader contextual sense it is also a perpetuation of the discourses that were first developed as Europe invented a jurisprudence of oppression after Christopher Columbus first stumbled upon the Indigenous peoples of the Carribbean in 1492.

Part Four: Colonisation and British Crown Discourses That Frame Te Ohaki Tapu

87. The British Crown discourses on Te Ohaki Tapu (and Te Tiriti) are situated in what Paul McHugh has acknowledged as the legal history of ‘erecting a British imperium in territory occupied by non-Christian and tribal people.[16] However that history is part of a broader context in which arguments in politics, religion, philosophy, science and economics were used to rationalise the brutal colonisation of Indigenous Peoples after 1492.

88. The legal history then is not merely some reasoned debate about points of jurisprudence or even esoteric arguments about whether ‘the legal formats of its imperialism were a variegated pattern of jurisdictionalism’. Rather it is the deliberate construction of a legal artifice to justify taking away the lands, lives, resources and power of innocent peoples who had done Europeans no harm nor posed any threat to them. It was the transformation of a European will to dispossess Indigenous Peoples into a putative right which is directly relevant to any consideration of the Crown’s attitude towards Te Ohaki Tapu.

89. In Europe’s long history of fratricidal wars States had assumed that they had a so-called prerogative to ‘acquire and erect rights of government – some form of

[16] Paul McHugh, ‘Brief of Evidence’, Crown Commissioned Evidence for Wai 1040, 16 April 2010, p. 7.

sovereign authority (an imperium) in territory beyond the realm'. After 1492 they refined this prerogative by classifying Indigenous Peoples as an 'other' that was inferior because it was un-Christian, uncivilised, and un-White.[17] – a kind of legal incorporation of the chain of being.

90. The 'refashioned legalism'[18] that resulted, and its application in 'territory occupied by non-Christian (and tribal) peoples,' was essentially a race-based discourse. It positioned Indigenous Peoples as objects who could and should be dispossessed and then articulated a series of doctrines to rationalise how that might be done by privileging the rights and authority of those belonging to what one jurist called the 'charmed circle' of European States.[19]

91. In theory and practice it thus performed what Robert A. Williams has described as an 'immunization function' to give a veneer of legitimacy to dispossession and a semblance of "value to what might otherwise be regarded as an underlying baseless substance".[20] The Chief of the James Bay Cree, Dr Ted Moses has more bluntly defined it as an attempt to answer the troubling question 'How can a thief go about establishing legal and legitimate possession of his stolen spoils? This in reality is the difficulty…no matter what the constitutional laws, jurisprudence or other legal trapping(s) a State might assume…this fact stares us in the face'.[21]

92. There are many texts in that jurisprudence from the claim that Australia could be 'annexed' because it was a terra nullius or vacant land to the presumption that certain territories could be declared as 'waste land' if they were not being farmed in a proper civilised manner and then vested 'without injustice' in the colonisers. They also included the outrageously silly like the Requerimiento

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[17] Ibid., p. 5.
[18] Ibid., p. 17.
[19] Robert Jennings and Arthur Watts, eds, *Oppenheim's International Law*, *Volume 1, Peace*, 9th ed., Longman, London, 1996, p. 33.
[20] Robert A Williams Jr, *The American Indian in Western Legal Thought: The Discourses Of Conquest*, Oxford University Press, New York, 1990, p. 8.
[21] Ted Moses, 'Renewal of the Nation', speech presented at the Plenary session of the Australian Reconciliation Convention, Melbourne, Australia, 27 May 1997, adapted to print as Ted Moses, 'Renewal of the Nation', in Gudmundur Alfredsson and Maria Stavropoulou, eds, *Justice Pending: Indigenous Peoples and Other Good Causes: Essays in Honour of Erica-Irene A. Daes*, Kluwer Law International, The Hague, 2002, p. 60.

which was a statement informing Indigenous Peoples that their lands had become the property of a colonising State and warning them that if they opposed it a 'just war' could be declared against them in which the colonisers could 'take you and your wives and children and make slaves of them (and) do to you all the harm and damage that we can'.[22]

93. The rationalisations used by the British Crown in relation to Te Tiriti and subsequently Te Ohaki Tapu derive inevitably from that same jurisprudence. For 'annexation' was just the 19th century euphemism for their right to dispossess, and the justifications advanced for it are part of its often logic-defying history. Indeed they can only be understood in that context. They may now be seen in the apparent reason of law or as unchallengeable cultural certainties but they were a means to a colonising end.

94. Three of those justifications will be considered in turn to illustrate both the 'immunising' or myth-making function they performed and to contextualise whether they would have any credence in the extant law of Iwi and Hapu. They are:

    (a) The notion of discovery and the associated presumptions about how the British Crown could 'exert sovereign authority over all the inhabitants of the New Zealand islands' through a "series of jurisdictional steps".

    (b) The notion that the imperium had to be exercised 'beneficently.'[23]

    (c) The notion that any Iwi and Hapu authority exercised after 1840 was necessarily subordinate to Crown sovereignty because Iwi and Hapu had ceded their previous "sovereignty" in Te Tiriti.

95. The Notion Of Discovery:

    (a) When William Hobson issued a Proclamation on 21 May 1840 declaring sovereignty over the North Island by cession and the South Island by

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[22] Charles Gibson, ed, *The Spanish Tradition in America*, Harper and Row, New York, 1968, pp. 59-60.
[23] McHugh, p. 17.

discovery he was acting on precedents that were set in the earliest days of the dispossession of Indigenous Peoples. Indeed Columbus had first claimed the Americas by a right of discovery which was based on the canon law edict that any discovery of a heathen land by a Christian State automatically made it the sovereign property of the discoverer.[24]

(b) Various arguments then ensued about the extent of the claim which were settled when Spain and Portugal sought a declaration from the Vatican. In a declaration known as the Inter Caetera Bull issued in 1493 Pope Alexander VI reaffirmed the right of discovery and 'donated' Africa and Brazil to Portugal and everything else to Spain by 'drawing a line…from the Arctic to the Antarctic pole'.[25]

(c) Further arguments ensued about the rituals needed to accompany the claim such as raising flags, as well as debates about what rights the discovered peoples might have in the new jurisdiction they were apparently under and what occupation was necessary to consolidate the discovery. Those precedents were followed by James Cook in 1769 when he claimed everything he could see from Mercury Bay 'in the name of and for the use of His Majesty'.[26]

(d) What was never discussed in all the legal debate was the legitimacy of the right itself – it was simply accepted as a legal fact. What was also never acknowledged was the application of any indigenous jurisdiction that might be in place or whether in fact it would recognise that the mere waving of a flag on one of its beaches was a surrender of its authority to complete strangers.

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[24] For a commentary and reproductions of a number of canon edicts, see Frances Gardiner Davenport, ed, *European Treaties Bearing on the History of the United States and Its Dependencies to 1648*, Vol. One, Carnegie Institution of Washington, Washington DC, 1917, pp. 71-78 (see http://www.questia.com/PM.qst?a=o&d=23628818).

[25] For a reproduction of the text of Bull Inter Caetera (Alexander VI, 4 May 1493) see Frances Gardiner Davenport, ed, *European Treaties Bearing on the History of the United States and Its Dependencies to 1648*, Vol. One, Carnegie Institution of Washington, Washington DC, 1917, pp. 71-78 (see http://www.questia.com/PM.qst?a=o&d=23628818).

[26] A W Reed, ed, *Captain Cook in New Zealand: extracts from the journals of Captain James Cook giving a full account in his own words of his adventures and discoveries in New Zealand*, A H and A W Reed, Wellington, 1951, p.66.

(e) Instead the doctrine became a given assuming that indigenous lands could be taken, even when it was clear that others were already there and even though it would have been illegitimate (and probably a cause for war) if for example Hobson had raised a flag on the beach at Calais and declared British sovereignty over France. In its 19th century manifestation it was an essentially racist assertion of the will to dispossess, and its proclamation by Hobson was no different. Its subsequent use by the Crown as part of a "series of jurisdictional steps" in the acquisition of sovereignty does not diminish that racist intent or its fundamental illegitimacy in Maori law. It remains a mere assumption reassuring the Crown that its authority would apply simply because it said it would.

96. The Notion of A Beneficent Imperium:

(a) The claim that the imperium had to be applied 'beneficently' also has its most detailed clarification in the first period of Europe's dispossession of the 'New World'. In the decades immediately after Columbus' discovery Spain embarked on a genocidal destruction of Indigenous Peoples which was so widespread the King of Spain called a debate of jurists in the city of Valladolid in 1550 to discuss how discoveries could be made to accord with justice and reason.

(b) The two main protagonists in the debate were canon lawyers Juan de Sepulveda and Bartolome de Las Casas. The former reaffirmed the right of discovery and alleged that once it was exercised the discoverer had unfettered power and the Indigenous Peoples essentially had no rights since as non-Christians they were 'as inferior to the Spaniards as children are to adults'. Las Casas also reaffirmed the right of discovery but argued that Indigenous Peoples needed to be 'cultivated' in God's garden 'with love and gentleness and kindness' because they were like an 'uncultivated soil that may be made to yield sound and healthful fruits'.[27]

[27] Lewis Hanke, *All Mankind is One: A Study of the Disputation Between Bartolome de Las Casas and Juan Gines Sepulveda in 1550 on the Intellectual and Religious Capacity of the American Indians*, Northern Illinois University Press, DeKalb, 1974, pp. 57-59.

(c) No-one 'won' the debate but the views of Las Casas became influential in a refinement of the right to dispossess which placed an obligation on the colonisers to treat those they were dispossessing with honour and 'the utmost good faith'. By the late 18th century it was the motivating ethos of a 'Humanitarian Movement' that was especially influential in Britain. It essentially argued that colonisation should proceed with the 'due observance of justice' and that the colonisers should accept the obligation to 'protect' those they were dispossessing like 'a father towards a child; as a being induced with great knowledge…towards a frail and wayward creature which had been committed to his care'.[28]

(d) When the British Crown asserted that it could not offer Iwi and Hapu 'effectual protection' against 'settlers amenable to no law' it was thus drawing on the precedents of a dispossession founded on the 'love and gentleness' advocated three hundred years earlier. It was a beneficence which could only be manifest if the Queen was 'acknowledged as the sovereign of their country' and was not the kind of power to protect implicit in mana where the integrity of the individual and collective was guaranteed. Rather it was one in which the British Crown would assume the role of what John Stuart Mill called 'the dominant partner'.[29]

(e) The very doctrine of a benevolent protection thus contains some internal inconsistencies, hypocrisies even. The first is the notion that the bad faith and dishonourable process of one people colonising another could ever be one of good faith and honour. Dispossession is dispossession whether it is carried out at the point of a gun or with a benevolent promise. The second is that it is premised on all of the racist dualities about the inferiority of Indigenous Peoples and the consequent assumption that they lacked the capacity to look after themselves.

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[28] Montague Hawtrey, 'Exceptional Laws In Favour Of The Natives Of New Zealand', Appendix A in Edward Jerningham Wakefield and John Ward, *The British Colonization of New Zealand; Being An Account Of The Principles, Objects, And Plans Of The New Zealand Association; Together With Particulars Concerning The Position, Extent, Soil And Climate, Natural Productions, And Native Inhabitants Of New Zealand*, John W Parker, West Strand, London, 1837, p. 403.
[29] John Stuart Mill, *Representative Government,* 1861, Chapter 18 (see http://ebooks.adelaide.edu.au/m/mill/john_stuart/m645r/).

(f) Its particular relevance to Te Ohaki Tapu is that it enabled the British Crown (and nearly all subsequent Pakeha historians and jurists) to assert that any recognition of the independence underpinning Te Ohaki was somehow limited and contingent upon the greater authority and benevolence assumed by the Crown in the Treaty.

97. The Notion Of Consent:

(a) In the discourses about the erection of an imperium one precondition was always that Indigenous Peoples had to have the capacity to consent to the cession of 'rights of jurisdiction, including sovereignty'. Getting consent was in fact both a legal requirement and a reiteration of the British Crown's beneficence in only being willing to do what Indigenous Peoples agreed to.[30]

(b) The idea of consent was originally devised as what may be called an 'ease of entry' requirement since entering an indigenous land with consent was usually less problematic than say an invasion. It was then reinforced in theories about the development of civilised polities from the state of nature primitivism described by Thomas Hobbes where there was 'no common power, no law…no culture' to the polities in Europe where John Locke argued that reason led to a 'social contract' in which government was only possible with the consent of the people.

(c) By the late 1830's the British Crown was thus convinced that although Iwi and Hapu were 'incompetent to act, or even deliberate in concert' their limited sovereignty was nevertheless sufficient to satisfy the prerequisite of consent 'before annexation could occur'. Thus while Article One of the Treaty (as distinct from Article One in Te Tiriti) stated that the chiefs ceded 'absolutely, and without reservation, all the rights and powers of sovereignty,' it was only after several months of treating 'with the Native chiefs for their adherence to the Treaty' that the British Crown felt a process had been completed 'by which Māori agreement to British

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[30] Ibid., p. 57.

sovereignty over New Zealand was obtained'. When that was done it formally established the imperium and reinforced the British Crown's belief in its beneficence because it had 'refused to erect any imperium without Māori consent'.

(d) In constitutional terms the notion of consent was therefore crucial to the British Crown because it gave legitimacy to the imperium by assuming it could govern with the consent of Iwi and Hapu. It was also crucial because it meant that the colony could be designated as a settled colony which had particular implications in terms of 'carrying' the birthright of English law and thus reinforcing the presumption that the 'new found country is to be governed by the laws of England'.

(e) Yet the very notion of consenting to give away one's site and concept of power was another race-based assumption that was never made in the polities of Europe. Indeed it flew in the face of all political realities because there is no evidence of any polity in peace time ever voluntarily ceding its authority to another, especially if it was a majority population with overwhelming military strength. Humans do not behave in that way but in the dualities that underpinned colonising law it was simply accepted that child-like primitives would willingly succumb to a more civilised being.

98. There is a certain suspension of logic in the entire jurisprudence of colonising law and the discourses used in the erection of an imperium. They require an equally illogical suspension of disbelief if one is to accept their legitimacy but like Roland Barthes' conceptualisation of myths they have been well learned and have established an ability to 'turn reality inside out'.[31]

99. Yet those presumptive beliefs have shaped the Crown's approach to Te Ohaki Tapu as evident in its current view espoused by Paul McHugh that whatever our people may have constitutionally created in the 19th century or earlier only has some limited meaning as evidence of an older Maori 'juridical capacity' that was nevertheless 'regarded…as spent' because of circumstance and the

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[31] Roland Barthes, *Mythologies: Selected and translated from the French by Annette Lavers,* Jonathan Cape Ltd, London, 1972, p. 142.

"jurisdictional steps" which enabled the British Crown to acquire sovereignty. At best perhaps Te Ohaki Tapu is evidence of an ostensible good faith where "in furtherance of its policy of reconciliation and to establish a sound relationship for the future the Crown entered into various discussions with Kingitanga and Rohe Potae leaders".

100. The persistence of that view of Te Ohaki Tapu as some almost incidental arrangement indicative of Crown honour can be traced back beyond the colonial officials engaged in the discussions to the doctrines of discovery and consent and a beneficent imperium which ultimately shaped how they perceived the capacity and indeed the authority of the people of Te Rohe Potae. That approach is at best simplistic and illogical, at worst it maintains an unacknowledged but persistent colonising dialectic.

101. The history of every Iwi and Hapu shows that such presumptions have neither credence nor legitimacy in Maori law. For it is clear from the evidence in this hearing that prior to 1840 the people of Te Rohe Potae protected and exercised an independent political power according to law. It is also clear that they continued to do so through the 1880's in spite of the terrible things that were being done to them both individually and collectively. Indeed the constitutional importance of actually establishing Te Rohe Potae lay in the reiteration of mana as a concept of power and the creation of a new site of power where independent polities could act in an interdependent way.

102. Like Te Tiriti Te Ohaki Tapu was an attempt to do what tikanga required in terms of formalising a potential relationship while reaffirming the mana that rangatira were bound to uphold. As so many rangatira have indicated it was not, could not, in Iwi and Hapu law be a submission to Crown authority or a diminution of mana. Rather it was a noble attempt to ensure compliance and co-operation within the dictates of tikanga and Te Tiriti. The fact that the Crown chose to diminish its significance and flagrantly breach the understandings within it does not diminish either its legitimacy or the context within which it was conceived.

103. The depiction of Te Ohaki as essentially the product of another "discussion"

demeans its significance and reduces it to a text constrained in the myths of colonising legal history where erecting the imperium is presented as a reasoned and considered attempt to abide by 'the law' in order to 'exercise a lawful authority in those islands'. Yet such a presumption is divorced from the illogic and fanciful presumptions that are at the core of colonising law and ignore the fact that colonisation in itself required the diminishment of a law and authority that were already in place.

104. The Crown view also minimises or sanitises the violence and inherent injustice of colonisation in an apparently dispassionate consideration of the 'mounting legalism in imperial matters, visible in a variety of sites as a variegated pattern, loosely knitted and barely connected, if at all, rather than a coherent and singular doctrinal phenomenon'. However what is undeniably coherent is that the claimed erection of an ostensibly objective imperium was the prelude to the very subjective suffering and disempowerment of Iwi and Hapu.

105. It is that reality which this Brief has tried to address while reframing the actions and ideals of the people of Te Rohe Potae within the more honest and reaffirming history of their own law and authority. If Te Ohaki Tapu can be viewed in that way it may provide the key to finally settling the grievances that the people have had to bear for too long.

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Moana Jackson