

# OFFICIAL

**Wai1040, #D2**

**IN THE WAITANGI TRIBUNAL**

**WAI 1040**

**IN THE MATTER OF**

the Treaty of Waitangi Act 1975

**AND**

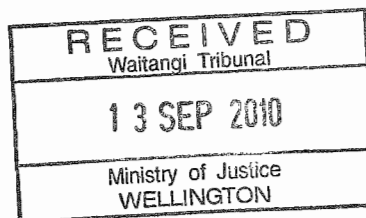
claims in Te Paparahi o Te Raki  
Inquiry

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**Brief of Evidence of MOANA JACKSON**

Dated the 13th day of September 2010

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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. 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 Pou Korero of this rohe. They are the proper experts on the law and history of their people and I acknowledge the power and sincerity of their evidence.
9. In dealing specifically with He Whakaputanga and Te Tiriti it is necessary (and I hope not unduly obvious) to bear in mind two different contexts:
  - a) The first is that both He Whakaputanga and Te Tiriti were discussed, understood, and signed by rangatira operating within a context that is Iwi and Hapu specific in terms of law, politics and history. They are texts in the context of Iwi and Hapu reality.
  - b) The second is that both He Whakaputanga and the Treaty were discussed and understood by the British Crown operating within a context that was specifically shaped and determined by the ideologies and presumptions of dispossession. They are texts in the context of colonisation.

10. The Brief itself has four Parts:

- a) The first establishes a framework within which the legal, political and constitutional responses of Iwi and Hapu might be considered. While it does so as a matter of historical record already outlined by Pou Korero it also does so to counter the essentialist racism of the colonial history which presumed that non-European peoples did not have 'real' law or government. Where appropriate it also makes comparisons with the law and power constructs of other Indigenous Peoples.
- b) The second Part of the Brief situates Iwi and Hapu thought and practice in relation to He Whakaputanga and Te Tiriti within that framework. It does so to illustrate the absolute and inevitable compatibility between them and a long established political, legal and cultural history. It acknowledges in particular that while Iwi and Hapu shared a common and deeply entrenched philosophy about law and power, the way that they exercised them in relation to the colonisers in the decades prior to 1840 often varied from rohe to rohe. For example in places such as the north where most of the colonisers were concentrated the responses were often practically different to those of say Tuhoe where there were very few of them.
- c) The third Part contextualises the history of thought and practice which lay behind the colonisers' decisions in relation to He Whakaputanga and Te Tiriti and relates it to its claims to 'erect an imperium' or acquire sovereignty. It considers how a social and legal consensus about dispossessing Indigenous Peoples developed after Christopher Columbus' landfall in the Americas in 1492, and how that was then transformed into a supposed right to dispossess that has since become entrenched as a political and social truth.

- d) The fourth Part briefly measures the presumptions of erecting an imperium against the dictates of Iwi and Hapu law and outlines the continuing importance of He Whakaputanga in relation to Te Tiriti and indeed the future aspirations of Māori for a long delayed justice.
11. Each part proceeds from my considered view that the erecting of an imperium in indigenous lands is in effect little more than the attempted legitimising of Europe's own presumed right to dispossess Indigenous Peoples and is neither ethical nor logical. It is certainly not legitimate according to the law of Iwi and Hapu.
12. 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 Indigenous Peoples.

### **Part One – Law and Concepts of Power**

13. 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.
14. 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.
15. 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.<sup>1</sup>

16. 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.<sup>2</sup>

17. 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

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

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

tikanga the 'first law'<sup>3</sup> 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.

18. 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'.<sup>4</sup> Law set the 'ought to be' of conduct and recognised the fact of human fallibility.
19. 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.

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<sup>3</sup> 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*, 2<sup>nd</sup> ed., Oxford University Press, Auckland, New Zealand, 2005, p. 334.

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

20. 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 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 Ngāti 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.<sup>5</sup>
21. The jurisprudence, institutions and practices of law which Pou korero have already alluded to in Te Paparahi o Te Raki 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 tipuna lived in an ordered and organised society. The tipuna were never a law-less people.
22. In the same way that societies learn that they cannot exist in a lawless state they also learn that law and social order cannot be maintained in a power vacuum. They therefore simultaneously develop political and constitutional ideas and practices to govern themselves. They create what may be described as concepts and sites of power.
23. 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 manifest. A site of

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<sup>5</sup> Tohara Mohi, transcript of presentation on 'Law and Custom', Ngāti Kahungunu wānanga, 8 September, 1985.



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

24. Like law, the concept and site of power within a particular society are also cultural creations. Indeed the universal desire to be free and independent has led to numerous culturally distinctive ideas about constitutionalism and government but they are really simple ideals. Government is the process that people choose to regulate their affairs (the practical nexus between a concept and site of power) and a constitution may be understood as the code upon which government will proceed. An analogy may be drawn by likening a constitution to 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.
25. 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.
26. The Mohawk scholar Professor Taiake Alfred has described the Mohawk concept of power as the ideal of decision-making sourced within a 'cohesive universe' predicated on the relationship between the collective and the 'conscious co-ordination of individual powers of self determination'. The site of power was the leadership institution of 'Clan Mothers' and 'Clan Fathers,' as well as those holding special positions such as 'Faith Keepers'.<sup>6</sup>
27. In the 15<sup>th</sup> century the Mohawk treated with the Onandaga, the Seneca, the Oneida and the Cayuga Nations to form the Haudenosaunee Confederation. In the Confederation (which still exists 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

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<sup>6</sup> Taiaiake Alfred, *Peace, Power and Righteousness: An Indigenous Manifesto*, Oxford University Press, Ontario, Canada, 1999, p. 26.

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'.<sup>7</sup>

28. 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'.<sup>8</sup>
29. The concept of power which was developed in this land reflected the collective aspirations that were shared across Iwi and Hapu. 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. After 1840 it was also called tino rangatiratanga. It implied an independence that Dame Mira Szazy once defined as 'the self determination' implicit in 'the very essence of being, of law, of the eternal right to be, to live, to exist, to occupy the land'.<sup>9</sup>
30. The whakapapa which ultimately links all Iwi and Hapu together provides the papa upon which mana is based because any mana which humans might exercise 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 others, with the world and indeed the universe.

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<sup>7</sup> 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](http://nature.berkeley.edu/blogs/news/2005/05/fall_2005_commencement_address.php)).

<sup>8</sup> Kekuni Blaisdell, oral statement to the International People's Tribunal, Hawaii, 1993, Tribunal Proceedings, Vol. One, p. 125.

<sup>9</sup> 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.

31. 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 by that of another polity. It included a number of different components that may be called the specifics of power such as:
- a) Power to define – that is the power to define the rights, interests and place of individuals and collectives;
  - b) Power to protect – that is the power to protect, manaaki and be the kaitiaki for everything and everyone within the polity;
  - c) Power to decide – that is the power to make decisions about everything affecting the wellbeing of the people; and
  - d) Power to develop – that is the power to change in ways that are consistent with tikanga and conducive to the advancement of the people.
32. But if Iwi and Hapu were independent they were also necessarily interdependent through the whakapapa which linked every mokopuna. Independence did not mean isolation from one's whanaunga and the extended relationships that made one unique.
33. The site of power resided in the institutions of ariki and rangatira operating within particular Iwi and Hapu, and sometimes through huihuinga or whakaminenga involving a collective of Iwi and Hapu. It was through those institutions that the concept of power was given effect and the exercise of power was given the sanction of law. But the existence of mana whenua meant that this human site of power was also located in the land (mana i te whenua) and related to the mana moana and mana atua just as the concept of power was.

34. Ariki and rangatira could be hereditary or selected for their particular skills but 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'.<sup>10</sup>
35. 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 Iwi and Hapu polities. Each polity exercised its own mana and lived according to its tikanga secure in the uniqueness it 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.
36. The constitution of each polity 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.
37. Within this reality two fundamental prescriptions and proscriptions underpinned mana as a concept of power 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 and thus the maintenance of relationships and responsibilities.

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<sup>10</sup> John Rangihau, transcript of presentation on Law and Custom, Ngāti Kahungunu wānanga, 8 September, 1985.

- b) Secondly the power was held by and for the people, that is it was a taonga handed down from the tipuna to be exercised by the living for the benefit of the mokopuna.
38. The 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 untenable, and culturally incomprehensible.
39. 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.
40. In the context of Iwi and Hapu realities law and political power were like the maihi and amo of a whare tipuna – they held the house of the people together. The inter-relationship between tikanga as law and mana as a concept of power was intimate and indeed inevitable in both a philosophical and practical sense. Law set the parameters of acceptable political behaviour because the exercise of mana was only legitimate if it was tika and pursued according to the law, The law in turn gained its efficacy from the power and certainty of mana, whether it was the mana of a rangatira ensuring compliance through consensus decision making or the mana atua ensuring compliance through the seemingly inexplicable precedents and power of tapu.
41. They are both texts in the context of Iwi and Hapu reality and they are the base from which any understanding of He Whakaputanga and Te Tiriti derives in Maori terms. They are also the jural and constitutional base from which it is

possible to measure whether the British Crown's behaviour, motives and subsequent claims to legal validity are sustainable, tika, and just.

**Part Two – He Whakaputanga and Te Tiriti within the Context of Maori Law and Power**

42. The certainties of tikanga and mana were beset by a new set of challenges with the arrival of the first Pakeha. Other evidence before this Tribunal has clearly illustrated the nature and extent of those challenges, especially those which confronted the Iwi and Hapu of Te Paparahi o Te Raki. 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. They continued to engage with and perceive the newcomers according to a view of the world determined by tikanga and the absolute certainty of mana as a concept of power.
43. 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.
44. That simple reality, sourced in culture as well as law and power, did not change even during the 1820s and 1830s. 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 the initiatives undertaken at the time were in any way a retreat from or a diminishing of the authority implicit in history and whakapapa.

45. No matter how much disruption was occurring by the 1830'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 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 and retaining control in their own land.
46. 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. 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.
47. As a result an initiative such as He Whakaputanga would be acceded to only if it was deemed to be consistent with the political and legal traditions that had been nurtured for so long. As Pou korero have illustrated that was certainly the case in Te Paparahi o Te Raki. Logic and common sense, let alone simple realities, made such a conclusion inevitable.
48. Thus the already regular practice of whakaminenga was readily transferable into a document like He Whakaputanga and the idea of finding new ways of giving expression to Iwi and Hapu authority that it encapsulated was absolutely consistent with the powers to define, decide and develop that were inherent in mana. Indeed He Whakaputanga may appropriately be seen as simply another

expression of the power to protect the uniqueness of the people while its specific request to the King of England to recognise Te Whakaminenga in its 'tamarikitanga' was an astute and independent assessment of the need for alliance in the new venture.

49. He Whakaputanga is in fact a novel and bravely imaginative articulation of an old concept of power. What is most strikingly new is that it situates the concept of power in a constitutionally different site of power where mana could be exercised in a co-operative and collective way that nevertheless still acknowledged the specific mana of the constituent members, rather like the ideals adopted in the Haudenosaunee Confederation. More importantly it reflected the kawa of the marae because just as manuhiri agree to respect the kawa of the host people while retaining their own authority, so Te Whakaminenga became a new 'marae' where polities could exercise an interdependent authority while preserving their own independence.
50. In that context the question is not so much who actually drafted it or even the biographies of James Busby and Henry Williams (the preoccupation of most Pakeha historians and jurists) but rather whether it was tika or legal, whether it was consistent with the reality of Iwi and Hapu politics, and whether in theory and practice it reaffirmed their mana and integrity. Clearly it did.
51. As such He Whakaputanga was a legal and constitutional precedent for Te Tiriti o Waitangi. Indeed Te Tiriti was also necessarily derivative of Maori law and of mana. It could only have been discussed and understood by rangatira in the same historical and political context.
52. For while Iwi and Hapu were always ready to treat and establish new relationships, that readiness depended upon the maintenance of both mana and tikanga. And the idea of a treaty of course did not suddenly drop out of the sky in 1840. The word 'treaty' comes from the Latin 'tractare' meaning to 'engage with' another party and every Iwi and Hapu has a long history of engaging with each other or 'treating' to regulate their affairs, settle conflicts,



and address other political matters. Iwi and Hapu made treaties because that is what polities do.

53. The negotiation of tatau pounamu is one example of Iwi and Hapu regularly treating with each other, as are the instances where for example coastal Hapu allowed access by inland Hapu to gather kaimoana in return for reciprocal access to the resources of the forest etc.
54. The key context for such agreements was that their legitimacy and meaning were dependent upon the realities of tikanga as law and mana as a concept of power. 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.
55. In that context the two most relevant facts in 1840 were:
  - a) That all Iwi and Hapu continued to know and exercise their mana as culturally unique and independent polities, and those who had acceded to He Whakaputanga had just recently reaffirmed that reality, some only a few months before the 6<sup>th</sup> of February.
  - b) That Iwi and Hapu were desirous of formalising some relationship by treating with the British Crown but were clear on the legal as well as the political criteria which that relationship had to meet if it was to be legitimate.
56. The important question in situating Te Tiriti in the Maori reality is not whether rangatira understood sovereignty (another preoccupation of Pakeha historians and jurists) but whether they understood mana. Sovereignty after all 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.

57. 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.
58. The constant statements by Pou Korero that the words in Te Tiriti do not envisage or permit a cession of mana or even a recognition of some sort of overarching British Crown authority therefore reaffirm a fundamental Maori truth. They simply could not consent to something that was not only contrary to law but also the very base upon which Iwi and Hapu society was built.
59. 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.
60. Maori linguistics have explained the nuances of the words 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 He Whakaputanga 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.
61. In a very real sense that expectation draws He Whakaputanga and Te Tiriti together into 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.

**Part Three: Colonisation and British Crown Discourses Relating To He  
Whakaputanga and Te Tiriti**

62. The British Crown discourses on He Whakaputanga 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.’<sup>11</sup> 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.
63. 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.
64. 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 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.<sup>12</sup>

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<sup>11</sup> Paul McHugh, ‘Brief of Evidence’, Crown Commissioned Evidence for Wai 1040, 16 April 2010, p. 7.

<sup>12</sup> *Ibid.*, p. 5.

65. The 'refashioned legalism'<sup>13</sup> 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.<sup>14</sup>
66. In theory and practice it thus became a jurisprudence of oppression that the Lumbee Indian scholar 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".<sup>15</sup> 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'.<sup>16</sup>
67. 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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<sup>13</sup> Ibid., p. 17.

<sup>14</sup> Robert Jennings and Arthur Watts, eds, *Oppenheim's International Law, Volume 1, Peace*, 9<sup>th</sup> ed., Longman, London, 1996, p. 33.

<sup>15</sup> Robert A Williams Jr, *The American Indian in Western Legal Thought: The Discourses Of Conquest*, Oxford University Press, New York, 1990, p. 8.

<sup>16</sup> 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'.<sup>17</sup>

68. The rationalisations used by the British Crown in relation to He Whakaputanga and Te Tiriti, as well as its moves to 'annex' Iwi and Hapu derive inevitably from that same jurisprudence. For 'annexation' was just the 19<sup>th</sup> 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.

69. Four 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. The four 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'.
- b) The notion that the imperium had to be exercised 'beneficently'.<sup>18</sup>
- c) The presumption that there was an 'absence of any other legal system that might appropriately apply to British subjects' and the

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<sup>17</sup> Charles Gibson, ed, *The Spanish Tradition in America*, Harper and Row, New York, 1968, pp. 59-60.

<sup>18</sup> McHugh, p. 17.

associated perceptions about the limitations of indigenous legal and political capacity.<sup>19</sup>

- d) The notion of consent and the associated belief that the Treaty was 'a valid instrument of cession' and that 'the basis of Crown sovereignty lay in Maori consent'.<sup>20</sup>

#### 70. 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 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.<sup>21</sup>
- 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'.<sup>22</sup>

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<sup>19</sup> Ibid., p. 91.

<sup>20</sup> Ibid., p. 73.

<sup>21</sup> 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>).

<sup>22</sup> 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*

- 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'.<sup>23</sup>
  
- 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.
  
- 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 19<sup>th</sup> century manifestation it was an essentially racist assertion of the will to dispossess, and its proclamation by Hobson gave the British Crown the reassurance that its authority would apply simply because it said it would.

#### 71. The Notion of A Beneficent Imperium:

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*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>).

<sup>23</sup> 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.

- 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'.<sup>24</sup>
  
- 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 18<sup>th</sup> 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

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<sup>24</sup> 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.



child; as a being induced with great knowledge...towards a frail and wayward creature which had been committed to his care'.<sup>25</sup>

- 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'.<sup>26</sup>
- 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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<sup>25</sup> 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.

<sup>26</sup> John Stuart Mill, *Representative Government*, 1861, Chapter 18 (see [http://ebooks.adelaide.edu.au/m/mill/john\\_stuart/m645r/](http://ebooks.adelaide.edu.au/m/mill/john_stuart/m645r/)).

- f) Its particular relevance to He Whakaputanga is that it enabled the British Crown (and nearly all subsequent Pakeha historians and jurists) to assert that the reference in the Declaration to the King as 'matua' implied some sort of request to British authority for an overarching (father to child) protection which then contextualised any recognition of the independence of Te Whakaminenga as somehow limited and contingent upon the greater authority to be later assumed in the Treaty.

72. The Assumed Absence of An 'Appropriate Legal System':

- a) The assumption that Iwi and Hapu lacked an 'appropriate' legal system that might apply to the colonisers is most obviously sourced in the same dualities. Indeed a key part of erecting any imperium was the perceived need and right that the colonisers assumed to bring their own culturally 'superior' law to the land of lawless savages. It arose from the pseudo-science of chains of being theory in which 'real' law only existed in the form developed by the so-called civilised States of Europe. Other uncivilised societies were deemed to be governed 'not by law but by caprice' and had neither the capacity nor right to impose their jurisdiction on their 'superiors'.
- b) When the British Crown therefore argued for annexation of Iwi and Hapu on the grounds of bringing law and order it was acting upon a race-based presumption posing as protective concern that is evident in the differential application of its usual diplomatic conventions. For example when English citizens travelled to France they agreed to abide by the jurisdiction of French law but when they travelled to 'primitive' places they 'carried' their law with them as part of their birthright because there was no 'real' jurisdiction to recognise. As they consolidated their power they

then assumed that it should become the 'birthright' of everyone else as well.

- c) In immediate practical terms the presumption was the first step in the suppression of Iwi and Hapu law except for its occasional resuscitation as a 'customary interest' subject to definition or extinguishment as part of the British Crown's beneficence. In strictly constitutional terms it was linked to the claim in Lord Normanby's instructions to William Hobson that Iwi and Hapu only had the sort of limited sovereignty possessed by 'petty tribes who possess few political relations to each other' which in turn became instrumental in the arguments that the British Crown then advanced to reject He Whakaputanga as 'an unworkable constitutional device' that needed to be superseded by a Treaty establishing 'rights of sovereignty and the introduction of English law'.<sup>27</sup>

### 73. 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.<sup>28</sup>
- 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

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<sup>27</sup> McHugh, p. 95.

<sup>28</sup> *Ibid.*, p. 57.

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 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.

74. 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'.<sup>29</sup>

#### **Part Four – Iwi and Hapu Law And The Legitimacy of Erecting The Imperium**

75. It is clear from the evidence in this hearing, and from the histories of other Iwi and Hapu, that prior to 1840 the tipuna exercised independent political power according to law.
76. That law and power shaped the understandings of rangatira who agreed to declare their independence to the world when it seemed to be under question. The constitutional importance of He Whakaputanga therefore 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.
77. Rangatira who did not accede to He Whakaputanga, for whatever reason, were nevertheless also actors in a continuing exercise of power. The ideals and tikanga of mana that drove He Whakaputanga were also those which drove any

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<sup>29</sup> Roland Barthes, *Mythologies: Selected and translated from the French by Annette Lavers*, Jonathan Cape Ltd, London, 1972, p. 142.

collective huihuinga or whakaminenga held by Iwi and Hapu in their decision-making capacity.

78. In that context the request for recognition by the sovereign in England was simply a diplomatic initiative between authorities whom rangatira clearly recognised as comparable. In that context also, the belief held by many Pakeha that rangatira were somehow only gullible participants in a Busby initiative is a misreading of their political astuteness and responsibilities. In Iwi and Hapu terms it simply institutionalised those responsibilities in a new way.
79. The ideals, and the law and power that shaped He Whakaputanga similarly shaped the understandings of rangatira who signed Te Tiriti. Like all other examples of treating in Iwi and Hapu history it depended upon a recognition of the capacity of parties to treat and an understanding that its mana lay in the words that were spoken and the honour that was promised.
80. In that context its constitutional importance for Iwi and Hapu was that it 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 Pou Korero have indicated it was not, could not, in Iwi and Hapu law be a cession of any form.
81. The fact that He Whakaputanga was not able to sustain all of its functions and that the possibilities for a new relationship in Te Tiriti were not honoured by the British Crown does not diminish either their legitimacy or the context within which they were conceived.
82. The British Crown of course has a different view of He Whakaputanga and Te Tiriti. He Whakaputanga has meaning as some indication of Maori 'juridical capacity' that was nevertheless 'regarded by British officials as spent' by 1840. Te Tiriti has meaning as one of 'a series of jurisdictional steps, that culminated in Hobson's May 1840 Proclamations,' which enabled the British Crown to acquire sovereignty. Whether described as solemn covenant or its version of a

founding document it was a necessary part of erecting its imperium and was necessarily in conflict with Iwi and Hapu law.

83. To the British Crown they are both part of legal history. Yet in that history the saga of erecting the imperium is divorced from the colonising illogic and fanciful presumptions that were at its core. It is presented instead as a reasoned and considered attempt to abide by 'the law' in order to 'exercise a lawful authority in those islands' through 'the voluntary cession of it by the Chiefs in whom it is at present vested'. The fact that colonisation in itself required the diminishment of a law and authority already in place, is only admitted in the verbal gymnastics of racist dualities.
84. In that process the violence and inherent injustice of colonisation is minimalised 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'. What is undeniably coherent however is that the claimed erection of an ostensibly objective imperium was the prelude to the very subjective suffering and disempowerment of Iwi and Hapu.
85. It is that reality which this Brief has tried to address and which He Whakaputanga and Te Tiriti if properly construed can still fully and finally settle.