



Te Kāhui Tika Tangata
Human Rights Commission



Te Whakaakoranga Tūhura: ētahi
tauirā waiwai

The Doctrine of Discovery:
some basic facts

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Introduction - Kupu whakataki

The Doctrine of Discovery is both a legal doctrine and an ideology that has its origins in Catholic Papal canonical law in the 15th and early 16th centuries. From its inception, and as it evolved over the centuries, it underpinned European colonial claims to sovereignty over Indigenous peoples and their territories, including the British Crown's claim to New Zealand.

Today, the Doctrine of Discovery has been exposed as racist, genocidal in impact, unjust and illegitimate. Indigenous peoples have joined forces to call for the Catholic Church and states to repudiate the Doctrine of Discovery in all its manifestations, and to address the harm caused in its name.

The law - Te ture

Various papal bulls (legal decrees from the Pope) of the 15th and early 16th centuries authorised Catholic states to claim sovereignty over Indigenous peoples and their territories, especially where Indigenous peoples did not express allegiance to the Church. It also provided the discovering state with the better claim over the discovered territories, relative to other European states.

Over centuries, the Doctrine of Discovery was incorporated into European law (including British common law) and international law, and it subtly changed in content. Its global reach expanded. Under 19th century common law, territories governed by 'uncivilised Indigenous peoples', as determined by European powers, were assumed to be legally empty (terra nullius) and therefore discoverable.² In such

cases, Indigenous peoples did not count as human as a matter of law.

States' claims to Indigenous peoples' territories based on the Doctrine of Discovery were upheld by colonial courts. The 1823 US Supreme Court decision in *Johnson vs McIntosh* is one of the most famous examples.³ In that case, the Court upheld the United States' rights over the Piankeshaw People's lands, based on the State's claim to discovery.⁴

In Aotearoa, Hobson expressly declared Crown sovereignty over te Wai Pounamu|the South Island on the basis of the Doctrine of Discovery in 1840.⁵ Then, in the 1877 *Wi Parata* case, Chief Justice Prendergast described te Tiriti o Waitangi (te Tiriti) as a "simple nullity", signed by "primitive barbarians".⁶ He declared that "[n]o body politic existed capable of making cession of sovereignty, nor could the thing itself exist". Under this interpretation, the Crown's claim to sovereignty was based on the Doctrine of Discovery.

While academic and constitutional analysis of the Crown's claim to sovereignty can be described as contradictory,⁷ some constitutional lawyers also suggest that Doctrine of Discovery is the basis for Crown's claims over Aotearoa.⁸

Historical analysis shows that the Crown's claim to sovereignty over the South Island under the Doctrine of Discovery, and the Chief Justice's finding in *Wi Parata*, is based on legal myth that is implausible as a matter of fact. Māori and their tribal authority were officially recognised by the Crown in te Tiriti and He Whakaputanga.⁹ Moreover, in the 2003, Chief Justice Elias described *Wi Parata* as "discredited authority".¹⁰

The Doctrine of Discovery as ideology - Te Whakaakoranga Tūhura hei whakaaro

The ideology associated with the Doctrine of Discovery extends far beyond the formal confines of the legal doctrine outlined above. Over time, it came to be understood more generally as the political, social, cultural and economic concept that European colonisation of Indigenous peoples and territories is morally justified because Indigenous peoples are inferior to Europeans.¹¹ Today, this assumption is more commonly described as white supremacy.

Doctrines based on white supremacy are described in the UN Declaration on the Rights of Indigenous Peoples as “racist, scientifically false, legally invalid, morally condemnable and socially unjust”.¹² Legal historians and constitutional lawyers from all around the globe have traced the evolution and impact of the Doctrine of Discovery as a colonial tool in politically legitimising colonisation,¹³ and its genocidal consequences.¹⁴

The impact of the Doctrine of Discovery is reflected in every part of the structure of the New Zealand state, in its assumption of the right to govern and impose state law over the peoples and territories of New Zealand. As such its impact is all-encompassing but immeasurable.

Indigenous peoples reject the Doctrine of Discovery - Ka parahako ngā iwi taketake ki te Whakaakoranga Tūhura

Indigenous peoples have resisted the Doctrine of Discovery as both a legal doctrine and as a

political, social, cultural and economic ideology.¹⁵ In response, the Catholic Church repudiated the Doctrine,¹⁶ although questions remain about the extent to which this provides adequate redress to Indigenous peoples.

Colonial governments are also being called upon to formally repudiate the Doctrine of Discovery. As Native American jurist Professor Robert Miller noted: “discovery is a dangerous fiction that if not tackled will continue to undermine attempts to create a better, reconciled Crown-Indigenous future.”¹⁷ Similarly, a 2010 UN study concluded,¹⁸

History cannot be erased. Its course, however, can be changed to ensure the present and future well-being, dignity and survival of indigenous peoples. [...] There must be a full and honest account of the past, in order to ensure that colonial doctrines do not continue to be perpetuated. A clear shift of paradigm is critical from colonial doctrines to a principled human rights framework, consistent with the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights law.

The United Nations Permanent Forum for Indigenous Issues formally recommended that all member states repudiate the Doctrine of Discovery in 2012.¹⁹ To date, no member states have reported back on that recommendation. New Zealand is yet to repudiate the Doctrine of Discovery despite repeated requests to do so by many, including the National Iwi Chairs Forum.

Endnotes - Kupu āpiti

- ¹ The Commission often works in partnership with the National Iwi Chairs Forum (NICF) under its Tuhonotanga Agreement 2023. This Factsheet has been prepared in collaboration with the NICF and its factsheet on the Doctrine of Discovery (August 2023). The Commission also published *Maranga Mai: The Dynamics and Impacts of Colonisation, Racism and White Supremacy Upon Tangata Whenua in Aotearoa*, which also addresses the Doctrine of Discovery.
- ² *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992).
- ³ *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. 8 Wheat. 543 (1823).
- ⁴ *Ibid.*
- ⁵ Sovereignty proclamation for New Zealand by William Hobson, on behalf of Her Majesty Queen Victoria. Alexander Turnbull Library, Wellington, New Zealand. <https://natlib.govt.nz/records/23237257>.
- ⁶ *Wi Parata v The Bishop of Wellington* SC Wellington [1877] NZJurRp 183; (1877) 33 NZ Jur (NS) 72 (SC); 1 NZLRLC 14 (17 October 1877).
- ⁷ Palmer, Matthew S.R. (2008). *The Treaty of Waitangi in New Zealand's Law and Constitution*. Wellington: Victoria University Press. Paul G. McHugh. (1991). *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi*. Auckland: Oxford University Press. Joseph, P. A. (2021). *Joseph on Constitutional and Administrative Law*. New Zealand: Thomson Reuters New Zealand Limited.
- ⁸ Joseph, P. A. (2021). *Joseph on Constitutional and Administrative Law*. New Zealand: Thomson Reuters New Zealand Limited.
- ⁹ As an aside, given Māori did not cede sovereignty under article 2 of te Tiriti o Waitangi in te reo Māori text (which is the more legally authoritative text under British and international law) the legality of the Crown's claim to sovereignty today remains questionable. Waitangi Tribunal (2014) *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, Wai 1040. New Zealand: Waitangi Tribunal.
- ¹⁰ *Attorney General v Ngāti Apa* [2003] NZLR 643 at 651.
- ¹¹ As the Canadian Assembly of First Nations has stated, "Discovery was used as a legal and moral justification for colonial dispossession of sovereign Indigenous Nations [...]": <https://www.afn.ca/wp-content/uploads/2018/02/18-01-22-Dismantling-the-Doctrine-of-Discovery-EN.pdf>.
- ¹² United Nations Declaration on the Rights of Indigenous Peoples, preambular paragraph 4. Similarly, the Doctrine of Discovery has been described by the UN as the driver of all Indigenous dispossession (UN Permanent Forum on Indigenous Issues, (2012), *Report on the 11th Session*, E/C.19/2012/13; UN Permanent Forum on Indigenous Issues, (2014), *Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress*, E/C.19/2014/3).
- ¹³ Including: Miller, R. J., Ruru, J., Behrendt, L., & Lindberg, T. (2010). *Discovering Indigenous lands: The Doctrine of Discovery in the English colonies*. Oxford: Oxford University Press.
- ¹⁴ Jackson, M., Panel Discussion Presentation, United Nations Permanent Forum on Indigenous, Issues Eleventh Session, New York 7-18 May 2012. Accessed 4 August 2023 at: www.converge.org.nz/pma/mj070512.pdf.
- ¹⁵ "E/C.19/2014/3 Study on the impacts of the Doctrine of Discovery on Indigenous peoples, including mechanisms, processes and instruments of redress by Edward John" (2014) https://digitallibrary.un.org/record/767270/files/E_C.19_2014_3-EN.pdf.
- ¹⁶ Holy See Press Office, Joint Statement of the Dicasteries for Culture and Education and for Promoting Integral Human Development on the "Doctrine of Discovery", 30.03.2023. Accessed 4 August 2023 at: <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2023/03/30/230330b.html>.
- ¹⁷ Miller, R. J., Ruru, J., Behrendt, L., & Lindberg, T. (2010). *Discovering indigenous lands: The doctrine of discovery in the English colonies*. Oxford: Oxford University Press. At p 23.
- ¹⁸ UN Permanent Forum on Indigenous Issues, (2014), *Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress*, E/C.19/2014/3. At para 38.
- ¹⁹ UN Permanent Forum on Indigenous Issues, (2012), *Report on the 11th Session*, E/C.19/2012/13. At para 4.