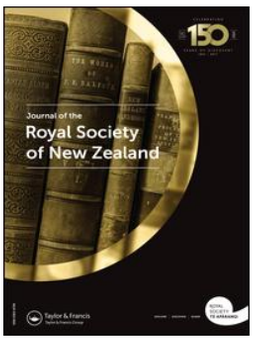

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'To honour the treaty, we must first settle colonisation' (Moana Jackson 2015): the long road from colonial devastation to balance, peace and harmony

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ABSTRACT

Māori leaders in New Zealand continue the battle to end British colonisation. The aim is to restore the balance between Māori and the Crown guaranteed in the treaty that Māori and the British Crown agreed to in 1840 so that we can live in peace and harmony. Early European visitors subjected our ancestors to numerous atrocities. Relying on the Doctrine of Discovery, they illegitimately usurped our power and dispossessed us, leaving us in a state of poverty, deprivation and marginalisation. They fabricated myths to justify their criminal activities, set up an illegitimate parliament with unfettered powers, passed laws legalising their crimes and then covered it up with amnesia. They established the Waitangi Tribunal in 1975 to inquire into breaches of the treaty, not realising that it would dismantle the myths and look beneath the amnesia. Governments then instigated the 'treaty claims settlement' process to extinguish all Māori claims, remove Māori rights and entrench colonisation. Research undertaken has shown that Māori loathe this process and do not accept that settlements are full and final. Research on constitutional transformation has identified a possible solution. The first step towards that goal involves implementing the United Nations Declaration on the Rights of Indigenous Peoples.

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Introduction

Māori leaders in New Zealand have always fought to end British colonisation. It seriously violates Te Tiriti o Waitangi, the 1840 treaty between Māori and the British Crown. Early British immigrants, whom the treaty promised to control, refused to honour it. They relied instead on myths they created to justify illegitimately dispossessing Māori and usurping our power, often brutally and violently, forcing us into poverty, deprivation, marginalisation and powerlessness that present day statistics reflect (Mutu 2017, p. 92–93).

In 1975, the government set up the Waitangi Tribunal to inquire into breaches of Te Tiriti o Waitangi. Māori have taken more than 2800 claims against the Crown. Over

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the past 25 years, governments have used legislation to extinguish many hundreds of those claims. There are thousands of claims still to be addressed. Claimants enter negotiations with governments to honour and uphold Te Tiriti and to achieve justice, peace and harmony. Governments on the other hand use the settlements to entrench colonisation.

In this article, I will draw on the traditions of my hapū (grouping of extended families) to consider first, my ancestors' experiences of early European visitors. In order to provide an explanation for the behaviour of these visitors, I will outline the notion of 'discovery' that the British and other Europeans have relied on since the fifteenth century to take over the territories of other people. I will then consider the evidence handed down to my generation and provided to various commissions of inquiry and courts of the understandings our Māori ancestors reached with the English and the foundations they laid for future generations in He Whakaputanga o te Rangatiranga o Nu Tireni in 1835 and Te Tiriti o Waitangi in 1840. I will consider the history that recorded our ancestors' experiences of the Crown's refusal to honour the treaty and the myths new immigrants created to achieve their goal of colonisation.

Since the 1800s, little has changed. The same attitude towards Māori that British immigrants were articulating in the 1840s remains in governments to this day. As an example of this, I will consider how the treaty claims settlement process entrenches colonisation. I will also consider a solution to the current situation located in constitutional transformation that honours Te Tiriti, settles colonisation, restores the balance between Māori as mana whenua (mana - power and authority derived from the gods, whenua – land; mana whenua is mana in the land) and predominantly European settlers, and allows the country to live in peace and harmony. The first step towards that goal is implementing the United Nations Declaration on the Rights of Indigenous Peoples. I will note the progress made recently in this area.

Early European Visitors

For Indigenous peoples, the early visitors from Europe were not discoverers. They were strangers, often in very poor health and in need of shelter and protection until they recovered. For my Ngāti Kahu ancestors, the first ones to arrive turned out to be murderous barbarians. Our history records a European ship arriving at Whatuwhiwhi, the home of my hapū, Te Whānau Moana, eight generations ago. Its crew were very weak and near death. The hapū took them ashore, housed, fed and looked after them, restoring them to health. In return, the crew ransacked the kāinga (village), burning whare (houses) and kidnapping the rangatira (leader), Ranginui. They left with Ranginui on board and never returned. Ranginui never returned. We were told that he died on board that ship. We were also told that the ship belonged to French people and that the captain was De Surville. We have never received an apology for this act of treachery. We did not support a plaque honouring the memory of De Surville. We honour the memory of the rangatira Ranginui, not only in Haititaimarangai marae (communal gathering and decision-making place) at Whatuwhiwhi, but also at Kēnana marae to the south of present day Mangōnui, where the wharenui (meeting house) is named after him (Mutu et al. 2017, p. 46).

The histories of hapū around the country record similar experiences with other Europeans who arrived at that time. Many recount their ancestors being shot and killed (Ngata 2017). Others were luckier and there was no loss of life. Europeans justified this

barbaric and uncivilised behaviour as a right they inherited from their ancestors. The apparent origin of the right was the illegitimate international law known today as the Doctrine of Discovery (Miller et al. 2010, p. 1). It is a myth that purports to give White people the right to dispossess and commit genocide against peoples who were not White and not Christian (United Nations Economic and Social Council 2010; Miller et al. 2010). Part of that myth involved dehumanising indigenous peoples and recasting them as mindless savages in order to justify driving them out of their own lands.

Colonising Myths

Our traditions record European immigrants, mainly from Britain, arriving in our territories seven generations ago. They clung to this 'discovery' myth then in the same way they do today (Mutu et al. 2017, p.195). They came seeking their fortunes in lands belonging to other people. All were driven by the desire to individually possess property, particularly land (Waitangi Tribunal 2014, p. 38–39; Moreton-Robinson 2015; Manuel and Derrickson 2017, p. 60). Although tikanga (Māori law) determined how land could be allocated and how visitors should conduct themselves, most British visitors were lawless and uncivilised (Wolfe 2005). This caused great consternation amongst the hapū. Several rangatira, including Hongi Hika and Waikato, undertook diplomatic missions to England that resulted in a British Resident and then a Governor being sent to stop the lawlessness of the British (Waitangi Tribunal 2014). Neither succeeded.

He Whakaputanga 1835

In 1835, the British Resident facilitated the drafting of He Whakaputanga o te Rangatiratanga o Nu Tireni that rangatira throughout the north and from Waikato and Ngāti Kahungunu signed (Mutu 2004, p. 17–18; Waitangi Tribunal 2014, p. 166–167). It was a declaration of the sovereignty of the rangatira of the many hapū throughout the country. It declared that they would never give law-making powers to anyone else (Mutu 2004, p. 18; Waitangi Tribunal 2014). It was formally acknowledged by the British (Waitangi Tribunal 2014). Many hapū, especially in the north, still consider He Whakaputanga to be the founding constitutional document of New Zealand and refer to it constantly as they exercise their mana. Europeans most often deny any knowledge of its existence.

Te Tiriti o Waitangi 1840

The lawlessness of British immigrants continued. Our history records that by 1840, the rangatira decided that the British rangatira had to take responsibility for them. On 6 February, they signed Te Tiriti o Waitangi, a treaty written in the Māori language that confirmed the 1835 He Whakaputanga, preserving the rangatiratanga (power and authority including sovereignty) of the rangatira, of the hapū and of the people. It devolved kāwanatanga (governance) over British immigrants to the Queen of England (Mutu 2010; Waitangi Tribunal 2014; Mutu et al. 2017). It also made English custom available for the benefit of all. It was a treaty of peace and friendship, one that promised what the rangatira had asked for: acknowledgement and respect for their absolute power and

authority throughout their territories, while relieving them of responsibility for lawless British immigrants (Mutu 2010).

Breaching the treaty – stealing land and misremembering

In spite of a solemn agreement to end European lawlessness, it increased rapidly. We provided evidence to the Waitangi Tribunal in the Muriwhenua claims showing that the aim of British immigrants was to gain exclusive possession of as much land as they could with no thought for those to whom it belonged (Waitangi Tribunal 1997; Mutu et al. 2017). They started in the north where they relied on their myth that English custom land sales had taken place rather than the Māori custom tuku whenua that actually happened (Waitangi Tribunal 1997). Tuku whenua are temporary allocations of land that mana whenua make to specific persons for specific purposes. Once the land was no longer needed by the person for the purpose it reverted to mana whenua (Mutu 2012). British immigrants misrepresented tuku whenua as land sales to claim ownership falsely and fraudulently to huge tracts of hapū lands, eventually pushing our ancestors off their own lands (ibid, p. 99). Most distressingly for our rangatira, Europeans who were purportedly representatives of the British Crown condoned the chicanery (Mutu et al. 2017).

Our histories are replete with accounts of this behaviour. In the accounts of the Matarahurahu hapū of Ngāti Kahu provided in evidence to the Waitangi Tribunal, Rose Huru recalls,

> Where a homeless Pākehā arrived at your doorway, our tūpuna [ancestor] would say, 'Noho mai koe ki kō'. Our tūpuna had no knowledge of acreage, just landmarks. Eventually, the Pākehā [European] was to claim thousands of acres because of that invitation to 'Live over there'. The Pākehā then relied on a piece of paper with tūpuna names attached with squiggly crosses and thumb marks on it as 'proof of sale'. The Crown not only enabled but encouraged the Pākehā settlers to acquire our land in this manner to the detriment of our hapū well-being (Mutu et al. 2017, p. 54).

In Ngāti Kahu, more than seventy per cent of our lands, some 320,000 acres, were taken fraudulently in this manner before 1865 (Waitangi Tribunal 1997; Mutu et al. 2017, p. 252–253). Following the establishment of the Māori Land Court in 1865, a further twenty five per cent was stolen (Mutu et al. 2017, p. 255) leaving us less than five per cent of our lands to survive on. Hapū throughout the country suffered a similar fate, but as Māori resistance to land theft hardened, so did European determination to possess everything. In Waikato, Taranaki, the Bay of Plenty and the central North Island, Māori refusal to give up their lands resulted in the British invasions of their territories and confiscation of their lands that started in the 1860s. To justify this they fabricated the myth that our ancestors had ceded our sovereignty to Queen Victoria in the 1840 treaty. They persisted with this lie until 2014 when the Waitangi Tribunal report *He Whakaputanga me te Tiriti: The Declaration and the Treaty* confirmed that sovereignty was not ceded.

Then there was the myth about the British being in charge of the country because they issued a proclamation saying they were. They hoped that if and when Māori found out about it we would believe it. We did not. It simply meant that everything they did that relied on that 'proclamation' was illegitimate (Charters 2019). Courts to this day rely on this proclamation giving them the power and authority to deny our rights and to

incarcerate our people at a rate that results in Māori being one of the most incarcerated peoples in the world (Mutu 2017, p.93). Another myth was that Māori were savages and marauding rebels (Prendergast 1877) rather than hapū desperately defending their homes, whānau (extended family) and lives (Waitangi Tribunal 2014 and their other historical reports). Once Europeans had secured the lands and either slaughtered or driven the hapū out, raping, plundering, pillaging and destroying homes, crops, waka (canoes) and wāhi tapu (sacred sites) as they went (Waitangi Tribunal 1996, 1999, 2004, 2017), they hid what they had done under a blanket of amnesia. Moana Jackson describes it as misremembering.

> In every society, there can be a kind of social amnesia where people may innocently forget what might have happened in the past. But, in this country, there has been a deliberate misremembering of history that has obscured the reality of what colonisation really was and is. It has replaced the harsh reality of its racist violence and its illegitimate usurpation of power with a feelgood rhetoric of Treaty-based good faith and Crown honour (Jackson 2019).

The Waitangi Tribunal carefully and methodically dismantled the myths and misremembering, but to this day, schools are not required to teach the real history of this country. No government has ever apologised to Māori for illegitimately taking over our country. Interviews conducted with claimants show that to date, governments have refused to discuss settling colonisation. As a result, many claimants report that they refuse to accept the apologies governments offer as part of settlements. The deliberate continuation of colonisation makes those apologies meaningless (Mutu 2018, p. 215).

Illegitimate power structures

Evidence provided to the Waitangi Tribunal over the past forty years and data collected from interviews we conducted with more than 150 claimants and negotiators about their experiences of the treaty claims settlement process shows that the same lawlessness the rangatira fought to stop in the 1840s has continued to this day. It has developed into a culture that struggles to understand itself because the only legitimate basis it has for being in this country – the treaty signed at Waitangi in 1840 – has been assiduously ignored and denied. That has effectively deprived the fledgling culture of any constitutional roots from which to develop and grow. British colonisers tried instead to transplant select parts of the English culture they had left behind on the other side of the world. To this, they added their colonising myths that they enacted as laws. The illegitimate laws they wrote claimed that the British and their institutions were absolutely and unquestionably supreme (Charters 2019; Jackson 2019). They denied all Māori power and authority, suppressing and trying to destroy Māori language, culture and intellectual prowess (Waitangi Tribunal 2011). They also legalised the theft of Māori lands, minerals, seas, waters, foreshore and seabed, flora, fauna, air, intellectual property and anything else that could be commodified (Waitangi Tribunal reports). None of the restrictions and respect for human rights that English law places on their sovereign and parliament that should have protected Māori were placed on the institution called Parliament in New Zealand. In particular, those who became ministers within the parliament gave themselves unfettered powers to 'rule by administrative fiat' while hiding behind the name of 'the Crown' (Miller et al. 2010, p. 208; Mikaere 2011, Chapter 6; Rishworth 2016; Te Aho

2017, p. 104). Europeans simply continued their lawlessness, constructing their own laws to hide their criminal activities.

All New Zealand governments and the institutions they established to wrest power and control from Māori have ignored the fact that large numbers of Māori throughout the country refused to accept all the myth-making and illegitimate power structures the British tried so desperately to impose. We are not alone in this refusal as can be seen in the works of the increasing number of Indigenous scholars writing about their battles against British colonisation (for example Deloria 1985, 1988; Barker 2005; Coulthard 2014; Simpson 2014; Moreton-Robinson 2015; Manuel and Derrickson 2015, 2017; Borrows 2016; Lee 2017 to name just a few). There were, of course, Māori who did believe the coloniser and assimilated into the strange new culture. But many others did not. They included those of us who are the descendants of the rangatira who deliberately passed on the histories of what really happened. My generation passed those on not only to our descendants but also to the Waitangi Tribunal for whom we constructed huge databases and compiled voluminous research reports (Waitangi Tribunal reports; Mutu et al. 2017).

In the meantime, indigenous people throughout the world were working with international experts in the United Nations to gain recognition for their human rights. Māori played an active role in drafting the United Nations Declaration of the Rights of Indigenous Peoples (the Declaration) (United Nations 2007; Jackson 2018). The Waitangi Tribunal imported the international standards they drafted into their reports (Waitangi Tribunal 1996, p. 307–308; 2011, p. 88, 233–234; 2012, p. 140; 2015). The Supreme Court has also started to reference the Declaration in its decisions (Charters 2019).

Not only did the Tribunal unravel carefully woven myths, its reports contained hundreds of recommendations about the actions governments had to take to remedy the damage and destruction. That includes returning stolen lands, territories and resources. International human rights instruments and in particular, the Declaration, require this. New Zealand announced its support for the Declaration in 2010. Yet implementing those recommendations would mean destroying the myths, so governments ignored the Tribunal or threatened to abolish it if it ever used its powers to make recommendations ordering the government to return lands (Hamer 2004, 7; McDowell 2018, p. 604–605). This is a very serious breach of the Rule of Law, but there are no constitutional fetters on Parliament or the executive (Rishworth 2016) to stop it. A good example of the lengths governments will go to uphold illegal dispossessions and to deny Māori rights upheld by the Tribunal is their treaty claims settlement process. Successive governments have been implementing it for the past twenty-four years to extinguish Māori claims. Government propaganda portrays the seventy settlements to date as a great success. Māori vehemently disagree.

Remedying colonial devastation

Waitangi Tribunal powers to order lands be returned …

Māori have always known that laws constructed in the New Zealand parliament focus on maintaining power, wealth and privilege in the hands of the coloniser and on denying Māori rights (Borell et al. 2018). That has not stopped us trying to have

the courts that the Crown established hold that same Crown accountable for the atrocities committed against Māori. We are rarely successful but there was a glimmer of hope in the 1980s.

The powers the Tribunal has had since 1988 were legal rights that Māori won in the famous Lands case, *New Zealand Maori Council v Attorney-General* 1987. In that case, the Court of Appeal directed the Crown to prepare safeguards to ensure that the transfer of lands was consistent with treaty principles (Miller et al. 2010, p. 230). The so-called 'principles of the Treaty of Waitangi' attempt to by-pass the original treaty. The 1975 Treaty of Waitangi Act, which established the Waitangi Tribunal, gives the Tribunal the impossible task of reconciling 'the Treaty in the Maori language' (the valid Treaty) and 'the Treaty in the English language' (the fraudulent document) and coming up with a set of 'principles' against which to make recommendations (Mutu 2010; Mikaere 2011). As a Crown body, the Tribunal (wrongly) assumed – without inquiring – that the Crown claim to sovereignty was legitimate. The 'principles' it arrived at were based on this with the result that all its recommendations fall well short of upholding hapū and iwi sovereignty. Once the Tribunal did inquire, it found that Māori had not ceded sovereignty (Waitangi Tribunal 2014).

Despite the 'principles' of the treaty wrongly redefining Māori sovereignty as being subject to Crown sovereignty, the result of the Lands case was that the Crown reached an out of court agreement with the Māori Council. The agreement resulted in legislative amendments that empowered the Waitangi Tribunal to order that state-owned enterprise, Crown forest and certain other lands be returned to Māori, along with compensation for forests (Waitangi Tribunal 2018). For the first time, there was legislation that Māori could call on to recover some of their lands (McDowell 2018; Mutu 2018).

… and a Minister's policy to remove the Tribunal's powers

In 1990, a newly appointed Minister in Charge of Treaty of Waitangi Negotiations, Douglas Graham, considered Māori claimants 'had a sword of Damocles which they happily held over the government' (Graham 1997, p. 50), something that could not be tolerated. He baldly asserted, ' … the fact is that these matters are political issues … Only the government can … decide … The courts cannot do this. Nor can Māori' (ibid, p. 41). The minister set about removing the threat, demonstrating the powerlessness of courts in New Zealand to restrict Parliament's behaviour (Miller et al. 2010, p. 246). Without consultation with Māori, he developed a policy that aimed to shut down claimants' access to the legal remedies available in the Tribunal. Rather he would send them into direct negotiations with the government where claims would be restricted to the realm of politics. In that arena, Māori are powerless and are at the whim and mercy of European politicians dedicated to preserving power, wealth and privilege in the hands of Europeans (McDowell 2018; Mutu 2018).

The politicisation of Māori rights is a tactic governments have employed on many occasions. More recently, this has led to passing legislation that extinguished our rights to our fisheries in 1992, that confiscated our rights to our foreshores and seabed in 2004, and that is extinguishing hundreds of treaty claims to this day. When Māori assert legal rights they have often been characterised by the courts as non-legal or non-

justiciable rights – although the recent Supreme Court decision in *Ngāti Whātua Ōrākei Trust v Attorney General* may signal a changing attitude (Charters 2019). Ngāti Whātua Ōrākei, a hapū in Auckland, sought a declaration of their rights to their lands. The Chief Justice noted that without the declarations they sought, Ngāti Whātua Ōrākei would be 'deprived of a forum in which it can seek to have its rights authoritatively established' [at paragraph 71] … the courts should not be quick to see inappropriateness where there are claims of rights to be determined: 'the plaintiff is entitled to have access to the courts' [at paragraph 126] (Barnett 2018).

The treaty claims extinguishment policy

Examination of the minister's own written account, *Trick or Treaty?* (Graham 1997) and private Cabinet papers and memoranda of the early 1990s released by the Office of Treaty Settlements (OTS 1994) revealed that rather than seeking to restore the honour of the Crown and right the wrongs of the past, the government's true and specific intent in embarking on its 'treaty claims settlement process' was:

- To unpick the legal rights won by Māori in the Lands case;
- To extinguish all historical claims;
- To preserve European control over Māori lives, lands and resources (McDowell 2018; Mutu 2018).

The data showed that in order to implement such a punitive regime, restrictions were placed on direct negotiations that included:

- there is no statutory framework within which negotiations are conducted (so that Māori who enter the process have no access to the courts);
- the Crown will side step individual claims lodged in the Tribunal and only negotiate settlements with large natural groupings of iwi (nations, groupings of hapū);
- the Crown decides settlements, not Māori;
- the total expenditure on settlements is not to exceed $1 billion over ten years;
- lands administered by the Department of Conservation, which make up one third of the country's lands, are not generally available and public access and recreation is guaranteed;
- natural resources including minerals, seas, water, foreshore and seabed, flora and fauna are not available (Coxhead 2002; Coyle 2011; Boast 2016; Mutu et al. 2017; McDowell 2018; Mutu 2018).

The data also showed that if claimants remained in the Tribunal seeking binding recommendations, they would face lengthy and costly delays as the Crown fought to stop them recovering potentially large tracts of their lands along with compensation (McDowell 2018, Mutu 2018). The few who have been able to persist with this route have been fighting through the Tribunal and the courts for more than 30 years for binding recommendations (Mutu et al. 2017). To date, no one has succeeded although the Court of Appeal in its 2017 decision in *Attorney-General v Haronga* ordered the Tribunal to make binding recommendations for two sets of claimants.

Claimant experiences of direct negotiations

Between 2015 and 2019, my colleague Tiopira McDowell and I conducted seventy-five semi-structured interviews with more than 150 claimants and their negotiators. These were part of the What do the Claimants Say? research project that originally planned to interview forty claimants and negotiators about their experiences of the treaty claims settlement process. Those interviewed recommended others who should be included. Others who heard about the project also asked to be included. An article reporting on the findings from the interviews thus far has been published (Mutu 2018).

During the interviews, claimants and negotiators told their stories of the current process. They are the stories of people who have often been locked in negotiations for years, sometimes decades, trying to achieve closure and some sense of justice for their people. The research is on-going and we are currently working with the interviewees to prepare many of the stories for publication in a book. A companion volume on the themes and analyses highlighted in the claimant stories is also being prepared. This includes undertaking comparative work on jurisdictions similar to that of New Zealand. As with the interviews, we are using Māori theoretical and methodological approaches to carry out this work.

The interviews we have conducted demonstrated conclusively that direct negotiations for Māori from the 1990s to the present day have been oppressive and traumatising. Many aspects of the settlement policy and process are perverse and the impact they have on Māori is a 'form of contortion' (Te Aho 2017, p. 105). The attitudes and behaviour of governments that led to the breaches are unchanged in direct negotiations. The common themes that emerged from the interviews included the following (Mutu 2018, p. 214–215):

- The Crown adopts divide-and-rule tactics and pursues them ruthlessly. Claimant negotiators reported almost without exception that the divisions and conflict caused will take generations to repair.
- The Crown requires negotiations to be conducted confidentially. This puts negotiators under enormous pressure from their own people who demand openness and honesty in all matters.
- Negotiators reported that there is no negotiation, the Crown dictates (Coxhead 2002; OTS 2002, 51–3; Mutu et al. 2017, p. 286).
- Public servants and ministers frequently misrepresent facts in order to push settlements through (Mutu 2018, p. 215–216).
- Deeds of settlement are lengthy, dense, legal documents that obscure numerous undisclosed conditions imposed by public servants, including the removal of rights.
- Public servants conducting the negotiations fully exploit the gross inequality between the Crown with its endless resources and the material poverty of claimants, often running claimants into the ground financially to facilitate the imposition of a 'settlement' (Tuuta 2003).
- Negotiators frequently report being bullied by public servants and Crown agents and many report having settled under duress.
- International standards New Zealand has endorsed, such as the Declaration, are banned from both negotiations and settlements (Jones 2016, p. 87–114; Mutu et al. 2017, p. 190, 289–299). The Crown simply refuses to talk about settling colonisation.

The Greatest Settlements myth

Ministers have been careful to foster and promote an understanding that settlements are full and final and that Māori are happy with them (Finlayson 2014). It is the greatest myth being promulgated about settlements. The number of protests still occurring throughout the country about the settlements are evidence of Māori anger and dissatisfaction (Mutu 2019, p.206). So are the numerous submissions to Māori Affairs Select Committees objecting to settlements (McDowell 2016). The chasm that exists between Māori and government expectations of settlements is huge. Claimants were clear in interviews that they do not accept government assertions that the settlements are full and final – especially when less than one per cent of what was stolen is returned (Maniapoto 2019a). The United Nations and the Waitangi Tribunal have both told governments the policy is deeply flawed. They have repeatedly recommended that governments reach agreement with Māori over the policy rather than persisting with imposing something that is so clearly loathed (Mutu 2018, p. 208–209). For those who have accepted settlements, it has been a pragmatic stance to accept, in the short term, the limited nature of Crown 'settlements' with the expectation that in the long term broader change may still occur or be forced by iwi (Bargh 2012, p. 169).

Finding a solution – constitutional transformation

Mutu (2018, pp. 216–217) briefly outlined the possibility of a solution through constitutional transformation. There has been increasing interest in this area and so I will outline the research conducted more fully, albeit still briefly.

It has been clear to Māori for a long time that the prospect of justice is unachievable under the current constitutional arrangements. Māori have continually questioned the legitimacy of the New Zealand state (Mikaere 2011, Chapter 6; Erueti 2017, p. 16; Charters 2019) and debated the need for constitutional reform for many decades (Bargh 2012, p. 180). In 2010, National Iwi Chairs Forum, a group of 72 chairpersons of nations throughout the country, established Matike Mai Aotearoa – the independent working group on constitutional transformation. The group was led by international law expert and legal philosopher, Dr Moana Jackson and Māori studies academic and iwi chair, Professor Margaret Mutu and was made up of iwi representatives, tikanga experts, elders, rangatahi (Māori youth), legal experts and academics. Its terms of reference were

> to develop and implement a model for an inclusive Constitution for Aotearoa based on tikanga and kawa [law, protocol], He Whakaputanga o te Rangatiratanga o Niu Tireni of 1835, Te Tiriti o Waitangi of 1840, and other indigenous human rights instruments which enjoy a wide degree of international recognition. (Matike Mai Aotearoa 2016)

The group conducted research over five years, convening more than 320 hui (gatherings) and consulting with experts on tikanga, constitutions and the United Nations Declaration on the Rights of Indigenous Peoples. In clarifying the purpose of its task, the group advised that it would not be considering how tikanga, kawa, He Whakaputanga and Te Tiriti might be accommodated within the current Westminster constitutional system that has been in place since 1840. It was clear to the group and to everyone they consulted that the current system does not and cannot give effect to He Whakaputanga and Te Tiriti

(ibid, p.14). Seven generations tried and failed and it was time find a new and different type of constitutional arrangement.

The research highlighted that the key features for the future environment for Māori would include Māori law, mana, knowledge, language, He Whakaputanga and Te Tiriti being part of the natural order of the country and all peoples having a respected constitutional place (ibid, p.17). There was extensive discussion and debate in the hui about the values that a constitution would be based on. The 2016 Matike Mai Aotearoa report listed them as essential requirements within a constitution, setting them out under the broad headings of values of tikanga, community, belonging, place, balance, conciliation and structure. The value of tikanga is the need to incorporate the core ideals of living in Aotearoa (the original name of New Zealand). The value of community is the need to facilitate fair representation and good relationships between all peoples. The value of belonging is the need to foster a sense of belonging for everyone in the community. The value of place is the need to promote relationships with and ensure protection of Papatūānuku (the Earth Mother). The value of balance is the need to ensure respect for the authority of rangatiratanga and kāwanatanga within the different spheres of influence. The value of conciliation is the need to have an underlying jurisdictional base and means of resolution to guarantee a conciliatory and consensual democracy. And the value of structure is the need to have structural conventions that promote basic democratic ideals of fair representation, openness and transparency (ibid, p.69).

The report recommended consideration of six indicative models. The models draw on the Waitangi Tribunal's 2014 report *He Whakaputanga me Te Tiriti: The Declaration and the Treaty* and its identification of the different 'spheres of influence' in which Māori and the Crown exercise their power and authority. Each model provides Māori and the Crown the independent exercise of their power and authority in their 'different spheres of influence', with Māori making decisions for Māori in the 'rangatiratanga sphere' and the Crown making decisions for its people in the 'kāwanatanga sphere'. Where Māori and the Crown work together they will do so as equals in the 'relational sphere' where the Tiriti relationship will operate. The report notes that the relational sphere is 'where a conciliatory and consensual democracy would be most needed' (ibid, p. 9).

The report has received widespread support from Māori and from a number of non-Māori. Constitutional transformation is being referred to regularly on Māori current affairs radio and television programmes (for example, M. Maniapoto 2019b) and in Māori-authored newspaper columns (Herbert-Graves 2016–2017). Not unexpectedly it has been subjected to strident attacks from those still clinging to the Doctrine of Discovery and its outlawed White New Zealand policy. In the meantime, the United Nations Committee for the Elimination of Racial Discrimination (2017), and the United Nations Committee on Economic, Social and Cultural Rights (2018) along with the 2019 Universal Periodic Review of New Zealand (United Nations General Assembly 2019) have all recommended to the government that it engage with Māori to discuss the report.

First steps towards constitutional transformation

Supported by the New Zealand Human Rights Commission, the National Iwi Chairs Forum adopted the United Nations Declaration on the Rights of Indigenous Peoples as a useful aid in promoting and achieving constitutional transformation. The Declaration

sets minimum standards for States in respect of the human rights of Indigenous Peoples and is normative (Charters 2019). It provides benchmarks against which to measure progress towards meeting those standards.

In 2014, the National Iwi Chairs Forum established the Aotearoa Independent Monitoring Mechanism to monitor New Zealand's performance in implementing the Declaration. Several members of Matike Mai Aotearoa belong to the Monitoring Mechanism, including the author. With the Human Rights Commission, it conducts research and writes annual reports that it delivers to the United Nations Expert Mechanism on the Rights of Indigenous Peoples. In 2015, it recommended that New Zealand draw up a National Plan of Action to implement the Declaration (AIMM 2015). In 2018, the New Zealand government agreed to do so and agreed that the UN Expert Mechanism could provide advice. Experts visited New Zealand and issued an Advisory Note (UNEMRIP 2019). As this article goes to press, the government has appointed a working group that is chaired by a member of the Monitoring Mechanism to work towards drafting a National Plan of Action.

Conclusion

Our battle against British colonisation has been long and tortuous but each generation is becoming more informed about and less tolerant of the myths. My generation has been prepared to accept far less than we are entitled to in order to have a chance to climb out of crippling poverty and deprivation. The next generation of my whānau, of my hapū and of my iwi accepts that it is their responsibility to exercise our mana and rangatiratanga to take back control of our lives, to have all the damage repaired and to restore the balance, peace and harmony envisaged in He Whakaputanga and Te Tiriti. It is their task to settle colonisation.

At every stage on the journey, we have been supported by Europeans who have also seen through the myths and have fought beside us to tear them down. Like us, many of them have been vilified, ostracised and marginalised. Without their support, the Waitangi Tribunal, for example, would never have been established. The findings and recommendations of the Tribunal have greatly strengthened our case in the United Nations. Once the New Zealand government starts meeting the United Nations requirements for it to comply with international human rights standards, the next generations' job will become much easier than the one that my generation inherited.

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References

Aotearoa Independent Monitoring Mechanism. 2015. Submission from the Monitoring Mechanism regarding the implementation of the United Nations Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand. United Nations Expert Mechanism on the Rights of Indigenous Peoples. [accessed 2019 September 8]. https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session8/A.HRC.EMRIP.2015.CRP.3.pdf.

Bargh M. 2012. Post settlement world (so far): impacts for Māori. In: Wheen NR, Haywood J, editor. Treaty of Waitangi settlements. Wellington: Bridget Williams Books; p. 166–181.

Barker J, editor. 2005. Sovereignty matters. Lincoln, University of Nebraska Press.

Barnett C. 2018. Supreme Court – Te Kōti Mana Nui: Judicial review – strike out reversed on final appeal – decisions in advance of proposed Treaty settlement: Ngāti Whātua Ōrākei v Attorney-General. (2018) Māori Law Review, September.

Boast R. 2016. Negotiations for reconciliation: how they can exacerbate division as well as promote reconciliation. In: Adds P, Bonisch-Brednich B, Hill RS, Whimp G, editors. Reconciliation, representation and indigeneity: 'biculturalism' in Aotearoa New Zealand. Heidelberg: Universitätsverlag Winter; p. 95–109.

Borell B, Moewaka Barnes H, McCreanor T. 2018. Conceptualising historical privilege: the flip side of historical trauma, a brief examination. AlterNative: An International Journal of Indigenous Peoples. 14(1):25–34.

Borrows J. 2016. Freedom & indigenous constitutionalism. Toronto: University of Toronto Press.

Charters C. 2019. Wakatū in peripheral vision: Māori raight-based judicial review of the executive and the courts' approach to the United Nations Declaration on the rights of indigenous peoples. New Zealand Law Review 1:85–118.

Coulthard G. 2014. Red skins, white masks: rejecting colonial politics of recognition. Minnesota: University of Minnesota Press.

Coxhead C. 2002. Where are the negotiations in the direct negotiations of treaty settlements? Waikato Law Review. 10:13–38.

Coyle M. 2011. Transcending colonialism? Power and the resolution of indigenous treaty claims in Canada and New Zealand. New Zealand Universities Law Review 24(11):596–620.

Deloria V. 1985. Behind the trail of broken treaties. Austin, Texas: University of Texas Press.

Deloria V. 1988. Custer died for your sins. Norman: University of Oklahoma Press.

Erueti A, editor. 2017. International indigenous rights in Aotearoa New Zealand. Wellington, Victoria University Press.

Finlayson C. 2014. Treaty settlements working for the betterment of us. New Zealand Herald 6 February. [accessed 2019 August 28]. http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=11197283.

Graham D. 1997. Trick or treaty? Wellington, Institute of Policy Studies.

Hamer P. 2004. A quarter century of the Waitangi Tribunal. In: Hayward J, Wheen NR, editor. The waitangi tribunal: Te Roopu Whakamana i Te Tiriti o Waitangi. Wellington: Bridget Williams Books; p. 3–14.

Herbert-Graves Ā. 2016–2017. Inside an Iwi (a weekly column). In: Northland Age. https://www.nzherald.co.nz/northlandage/news/headlines.cfm?c_id=1503402.

Jackson M. 2015. Interview 2015 Sep 7. Naenae, Wellington.

Jackson M. 2018. A personal reflection on the drafting of the United Nations Declaration on the rights of indigenous peoples. In: Katene S, Taonui R, editors. Conversations about Indigenous rights: the UN declaration on the rights of indigenous peoples and Aotearoa New Zealand. Auckland: Massey University Press; p. 48–56.

Jackson M. 2019 Mar 24. The connection between white supremacy and colonisation. E-tangata. [accessed 2019 May 11]. https://e-tangata.co.nz/comment-and-analysis/the-connection-between-white-supremacy/.
Jones C. 2016. New treaty new tradition: reconciling New Zealand and Māori Law. Vancouver: University of British Columbia Press.
Lee L. 2017. Navajo sovereignty: understandings and visions of Diné people. Tuscon: University of Arizona Press.
Maniapoto M. 2019a. How can there be justice if the process isn't just? E-tangata, 25 August. [accessed 2019 August 26]. https://e-tangata.co.nz/history/how-can-there-be-justice-if-the-process-isnt-just/.
Maniapoto M. 2019b. Te Ao with Moana, Series 1 Episode 12. Māori Television Service, 27 August. [accessed 2019 September 8]. https://www.maoritelevision.com/shows/te-ao-moana/S01E012/te-ao-moana-series-1-episode-12.
Manuel A, Derrickson R. 2015. Unsettling Canada: a national wake-up call. Toronto: Between the Lines.
Manuel A, Derrickson R. 2017. The reconciliaton manifesto: recovering the land, rebuilding the economy. Toronto: James Lorimer and Company Ltd.
Matike Mai Aotearoa. 2016. He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation. Auckland: the University of Auckland and National Iwi Chairs Forum. [accessed 2019 May 11]. http://www.converge.org.nz/pma/MatikeMaiAotearoaReport.pdf.
McDowell T. 2016. Screaming from the Shadows: Māori views on the treaty claims settlement process. Te Pouhere Kōrero: Māori History, Māori People 8:26–47.
McDowell T. 2018. Diverting the sword of damocles: why did the crown choose to settle Māori historical treaty claims? Australian Journal of Politics and History. 64(4):592–607.
Mikaere A. 2011. Colonising myths: Māori realities. Wellington: Huia.
Miller RJ, Ruru J, Behrendt L, Lindberg T. 2010. Discovering Indigenous lands: the doctrine of discovery in the English colonies. Oxford: Oxford University Press.
Moreton-Robinson A. 2015. The white possessive: property, power and indigenous sovereignty. Minneapolis: University of Minnesota Press.
Mutu M. 2004. The humpty dumpty principle at work: the role of mistranslation in the British settlement of Aotearoa. 'He Whakaputanga o te Rangatiratanga o Nu Tireni' and 'The Declaration of Independence'. In: Fenton S, editor. For better or for worse: translation as a tool for change in the Pacific. Manchester, UK: St Jerome; p. 11–36.
Mutu M. 2010. Constitutional intentions: the treaty texts. In: Mulholland M, Tawhai V, editor. Weeping waters: the Treaty of Waitangi and constitutional change. Wellington: Huia; p. 13–40.
Mutu M. 2012. Custom law and the advent of new Pākehā settlers: tuku whenua allocation of resource use rights. In: Keenan D, editor. Huia histories of Māori: Ngā Tāhuhu Kōrero. Wellington: Huia; p. 93–108.
Mutu M. 2017. Māori of New Zealand. In: Neely S, editor. Native nations: the survival of fourth world peoples. 2nd ed. Vernon, British Columbia, Canada: JCharlton Publishing; p. 87–113.
Mutu M. 2018. Behind the smoke and mirrors of the Treaty of Waitangi claims settlement process in New Zealand: no prospect for justice and reconciliation for māori without constitutional transformation. Journal of Global Ethics. 14(2): 208–221, doi:10.1080/17449626.2018.1507003.
Mutu M. 2019. Maori Issues. Contemporary Pacific: A Journal of Pacific Affairs. 31(1):202–211.
Mutu M, Pōpata L, Williams TK, Herbert-Graves A, Rēnata R, Cooze JA, Pineaha Z, Te Rūnanga-ā-Iwi o Ngāti Kahu, Wackrow, Williams and Davies Ltd. 2017. Ngāti Kahu: portrait of a sovereign nation. Wellington: Huia.
Ngata T. 2017. Guest blog: Tina Ngata – a crook by any other name: celebrating Cook. The Daily Blog 2017 Feb 20. [accessed 2019 May 13]. https://thedailyblog.co.nz/2017/02/20/guest-blog-tina-ngata-a-crook-by-any-other-name-celebrating-cook/.
Office of Treaty Settlements (OTS). 1994. Crown proposals for the settlement of Treaty of Waitangi claims – detailed proposals; Crown proposals for the settlement of Treaty of Waitangi claims –

summary; Crown proposals for the settlement of Treaty of Waitangi claims – consultation with Māori. Wellington: Office of Treaty Settlements.
Office of Treaty Settlements (OTS). 2002. Healing the past, building a future: a guide to Treaty of Waitangi claims and negotiations with the Crown. Wellington: Department of Justice.
Prendergast CJ. 1877. Wi Parata v the Bishop of Wellington. Wellington: Supreme Court of New Zealand.
Rishworth P. 2016. Writing things unwritten: common law in New Zealand's constitution. International Journal of Constitutional Law 14(1):137–155. https://doi.org/10.1093/icon/mow005
Simpson A. 2014. Mohawk interruptus: political life across the borders of settler states. Durham: Duke University Press.
Te Aho L. 2017. The 'false generosity' of treaty settlements: innovation and contortion. In: Erueti A, editor. International indigenous rights in Aotearoa New Zealand. Wellington: Victoria University Press; p. 99–117.
Tuuta D. 2003. Māori experiences of the direct negotiations process. Wellington: Crown Forestry Rental Trust.
United Nations. 2007. The Declaration on the Rights of Indigenous Peoples. New York, United Nations. [accessed 2019 May 15]. http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.
United Nations Committee on Economic, Social and Cultural Rights. 2018. Concluding observations on the fourth periodic report of New Zealand. Geneva: United Nations Human Rights Office of the High Commissioner, United Nations. [accessed 2019 May 15]. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fNZL%2fCO%2f4&Lang=en.
United Nations Committee on the Elimination of Racial Discrimination. 2017. Concluding observations on the combined twenty-first and twenty-second periodic reports of New Zealand, CERD/C/NZL/C/21-22. Geneva, United Nations Human Rights Council, United Nations. [accessed 2019 May 15]. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/NZL/CO/21-22&Lang=En.
United Nations Economic and Social Council. 2010. Preliminary study of the impact on indigenous peoples of the international legal construct known as the Doctrine of Discovery. [accessed 2019 May 15]. https://www.un.org/esa/socdev/unpfii/documents/E.C.19.2010.13%20EN.pdf.
United Nations General Assembly. 2019. Draft Report of the Working Group on the Universal Periodic Review: New Zealand, A/HRC/WG.6/32/L.1 [accessed 2019 May 15]. https://www.hrc.co.nz/files/1315/4984/7007/nzupr3-draftoutcome.pdf.
United Nations Office of the High Commissioner for Human Rights: The Expert Mechanism on the Rights of Indigenous Peoples (UNEMRIP). 2019. Country Engagement Mission (8–13 April 2019) – New Zealand 14 July 2019 Advisory Note. [accessed 2019 July 30]. https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Session12.aspx.
Waitangi Tribunal. 1996. Taranaki report: Kaupapa Tuatahi: Te Muru me te Raupatu (Wai 143). Wellington: GP Publications.
Waitangi Tribunal. 1997. Muriwhenua land report (Wai 45). Wellington: GP Publications.
Waitangi Tribunal. 1999. Ngāti Awa Raupatu report (Wai 46). Wellington: Legislation Direct.
Waitangi Tribunal. 2004. Te Raupatu o Tauranga Moana: report on the Tauranga Moana confiscation claims (Wai 215). Wellington: Legislation Direct.
Waitangi Tribunal. 2011. Ko Aotearoa Tēnei (Wai 262). Wellington: Legislation Direct.
Waitangi Tribunal. 2012. Stage 1 report on national freshwater and geothermal resources. Wellington: Legislation Direct.
Waitangi Tribunal. 2014. He Whakaputanga me Te Tiriti: the declaration and the treaty: the report on stage 1 of the Paparahi o Te Raki inquiry (Wai 1040). Wellington: Legislation Direct.
Waitangi Tribunal. 2015. Whaia te Mana Motuhake: report on the Māori community Development Act claim. Wellington: Legislation Direct.
Waitangi Tribunal. 2017. Te Urewera volume I (Wai 894). Wellington: Legislation Direct.
Waitangi Tribunal. 2018. Guide to the Practice and Procedure of the Waitangi Tribunal. Wellington, Waitangi Tribunal. [accessed 2019 August 22]. https://www.waitangitribunal.govt.nz/assets/Documents/Publications/Guide-to-Practice-and-Procedure-2018.pdf.
Wolfe R. 2005. The hell-hole of the Pacific. Auckland: Penguin Books.