CONTESTING THE COLONIAL

A CRITICAL ANALYSIS OF DEVELOPMENTS IN MĀORI–CROWN RELATIONS

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TABLE OF CONTENTS

INTRODUCTION

From October to December 2019, a "journey of national significance" will take place.[1] In a voyage traversing the northern coastline of Aotearoa New Zealand, a six-vessel flotilla will commemorate *Tuia 250*, the 250th anniversary of the first encounters between Māori and Pākehā following the arrival of Captain James Cook.[2] These commemorations, however, are contentious. They strike at the heart of New Zealand identity, exposing the wounds of colonisation that continue to fester beneath the powerful mythmaking of bicultural harmony. In this way, *Tuia 250* is a cause for both reflection and re-evaluation. In the 250 years since the violent collision of Māori and Pākehā legalities, how far have we truly come as a nation? Is the current state of Māori–Crown relations the most we can hope for? It is these questions that this dissertation seeks to answer.

To that end, this dissertation shall undertake a critical analysis of developments in Māori-Crown relations. Undoubtedly, momentous strides continue to be made in fashioning a more bicultural legality acknowledging Māori rights. However, conceptualising Māori-Crown relations within a positivistic rights-discourse produces an impoverished understanding of what the law *does*. Hence, this dissertation advocates a broader perspective that attends to the structures of power operating within and beyond the courts and legislature.

Chapter One explicates my theoretical framework. I construct a dichotomy between legality produced through legal and political models to articulate the processes involved in constructing a colonial structure of legality, namely, the 'doctrine of difference' operating through a rights-claim. In opposition to this legality, agonistic deliberative democracy may generate political contestation that reframes the state. I then chart influence of a rights-based discourse in the development of the doctrine of discovery.

Chapter Two provides a critical historiography of Māori-Crown relations. I apply the 'doctrine of difference' to chart the colonial legal structure in Treaty of Waitangi jurisprudence,

[1] Ministry for Culture and Heritage "Tuia 250" (26 June 2019) Tuia 250 <https://mch.govt.nz/tuia250>
[2] Ministry for Culture and Heritage "Tuia – Encounters 250 in the Classroom" (3 September 2019) New Zealand History <https://nzhistory.govt.nz/classroom/conversations/tuia-encounters-250>

highlighting the constitutive moments where a rights-discourse is employed. I end by considering recent cases that grapple with New Zealand's colonial foundations.

Chapter Three turns to address an alternative to the native title rights-discourse of Māori claiming international Indigenous rights. I evaluate the emancipatory and critical views of this internationally-based rights-discourse, noting that it may draw attention to pathologies of state sovereignty but re-inscribes a doctrine of difference.

Chapter Four evaluates a second alternative of legal personhood for the natural environment. It considers personhood in terms of an agonistic democratic approach that, through accepting incommensurability through political contestation, may begin to displace the colonial legal structure.

CHAPTER ONE: THE COLONIAL STRUCTURE OF LEGALITY

I Introduction

As Patrick Wolfe famously declared, settler colonialism is a "structure, not an event."[3] Colonialism is not a singular moment but a complex assemblage of structures and processes.[4] If colonialism comprises a structure, then the foundational structures of Aotearoa New Zealand's present-day legal institutions for Māori-Crown relations cannot simply be consigned to the annals of history. Instead, those fundamental hierarchies and configurations of power may continue to suffuse our culture, politics and law in unexpected ways. This chapter shall explicate a theoretical framework to assist in articulating the processes involved in creating and perpetuating the colonial structure of legality in Aotearoa New Zealand. I shall construct a dichotomy between law and politics, that is, between the colonising tendencies of legal models predicated on a rights-based discourse and the potentially de-colonising tendencies of political models predicated on agonistic deliberative democracy. As shall be explained, a rights-based discourse affirms a 'doctrine of difference' that perpetuates the universalising impulse of the doctrine of discovery. It also provides a partial picture of power that elides underlying colonial hierarchies. In contrast, agonistic contestation generates a legality that may re-centre Māori legality and attend to broader structures of power. Having established this dichotomy of legalities, I shall trace their influence in the development of the discovery doctrine prior to its implementation in New Zealand.

II The Legal Model of Legality: Rights-Based Discourse

Throughout this dissertation, I argue that deploying a legal model of rights-based discourse may reproduce colonial manifestations of power. Rights-granting was a central instrument in implementing the doctrine of discovery[5] that legitimised imperial expansion and the

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[3] Patrick Wolfe "Settler colonialism and the elimination of the native" (2006) 8 *Journal of Genocide Research* 387 at 388.

[4] Canadian First Nations Scholar Corntassel defines colonialism as "an irresistible outcome of a multigenerational and multifaceted process of forced dispossession and attempted acculturation – a disconnection from land, culture, and community": at 88, Taiaiake Alfred "Colonialism and State Dependence" (2009) 5 *Journal of Aboriginal Health* 42 at 52. In Jeff Corntassel "Re-Envisioning Resurgence: Indigenous Pathways to Decolonization and Sustainable Self-Determination" (2012) 1 *Decolonization: Indigeneity, Education & Society* 1 at 88.

[5] Robert J. Miller and others *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, New York, 2010).

imposition of a colonial legal structure. Hence, in order to understand the assimilatory logic of rights-granting, one must comprehend the doctrine of discovery and its foundation upon the "civilising mission" and "dynamic of difference"[6] processes that rights advance.

The doctrine of discovery is one of the earliest examples of international law.[7] Essentially, the doctrine legitimated European "claims to sovereignty and governmental and property rights" over non-European territories.[8] It provided that "newly arrived Europeans […]acquired legally recognised property rights in native lands" as well as gaining "governmental, political and commercial rights" over Indigenous inhabitants without their knowledge or consent.[9] The discovering European nation gained an "absolute ultimate title" that "necessarily diminished" Indigenous peoples'[10] rights to complete sovereignty.[11] Moreover, the doctrine was established to control European countries' "potential conflicts over exploration, trade and colonisation,"[12] creating a trans-oceanic system of relationships. The doctrine was 'universalising' in the sense that it operated to dominate multifarious Indigenous forms of life and assimilate them within European epistemologies. Universalisation is problematic insofar as it displaces unique Indigenous forms of life, diminishing their agency as self-determining peoples. This universal legality thereby enabled settlers to lay claim over 'newly discovered' lands, and acquire sovereignty over any non-Christian peoples, notwithstanding those peoples' first occupation of the land.[13] However, these monopolising processes of colonial hegemony[14] were not condemned by other colonising parties, but welcomed as "well-recognized legal procedure and ritual mandated by international law."[15] Hence, it is not difficult to see why the doctrine has been criticised as a

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[6] Antony Anghie *Imperialism. Sovereignty and the Making of International Law* (Cambridge University Press, New York, 2004) at 4
[7] Miller, above n 5, at 9.
[8] Miller, above n 5, at 2.
[9] Miller, above n 5, at 2.
[10] I recognise here that the most politically salient term for these peoples in the various and multifarious contexts is 'Indigenous peoples'. As shall be discussed in Chapter 3, Stephen Young problematises how 'Indigenous peoples', as a presumptively universal signifier, applies to all those peoples.
[11] *Johnson v M'Intosh* 21 US 543 (1823) at 592.
[12] Miller, above n 5, at 9.
[13] Miller, above n 5, at 11.
[14] Ernesto Laclau and Chantal Mouffe define 'hegemony' as a political relationship of power wherein a subordinate society perform social tasks that are culturally unnatural and not beneficial to them, but that are in exclusive benefit to the imperial interests of the hegemon, the superior power. See Laclau and Mouffe *Hegemony and Socialist Strategy* (2nd ed), London: Verso. 40–59.
[15] Miller, above n 5, at 2.

dangerous fiction justifying Indigenous subjugation, and no more than "an attempt to put a patina of legality on the armed confiscation of [Indigenous] assets."[16]

The doctrine of discovery relies on a rights-based discourse to normalise Indigenous peoples within the sovereign state. The normalising processes of discovery are animated by the "civilising mission" and its enactment of a "dynamic of difference."[17] These terms were popularised in legal scholarship by Antony Anghie, a key exponent of the burgeoning "political grouping or strategic engagement with international law"[18] known as 'Third World Approaches to International Law' or 'TWAIL.' This movement seeks to explicate the intimate relationship between the basic doctrines of international law and colonialism,[19] with Anghie viewing this relationship specifically in terms of "the civilising mission."[20] He defines the civilising mission as the overarching project that has legitimised colonialism as "a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe."[21] Based on such ethnocentric notions of European superiority,[22] this civilising mission is, in turn, propelled by a "dynamic of difference".[23] The dynamic of difference involves manufacturing "a gap between two cultures, demarcating one as 'universal' and civilized, and seeking to bridge the gap by developing techniques to normalise the aberrant society."[24]

Although there are differences between the Third and Fourth Worlds, the dynamic of difference helps explain some continuing features of the doctrine of discovery. Under this framework, the doctrine of discovery constructs a dynamic of difference. It does so by initially apportioning everyone equal rights under the law. However, these putatively equal rights are defined, determined and delimited by the western legal discourse of the colonising power as, according to the civilising mission, non-European peoples *need* western rights to become

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16 Miller, above n 5, at 6.
17 Anghie, above n 6, at 4.
18 Luis Eslava and Sundhya Pahuja "Between Resistance and Reform: TWAIL and the Universality of International Law" 3 (2011) *Trade Law and Development* 1 at 104.
19 Eslava and Pahuja, above n 18, 105.
20 Anghie, above n 6, at 6.
21 Anghie, above n 6, at 3
22 Miller, above n 5, at 2.
23 Anghie, above n 6, at 4.
24 Anghie, above n 6, at 4.

"civilised". Hence, the coloniser's legality only recognises Indigenous relationships under the law when they have been translated into that coloniser's Eurocentric legality as positivistic 'rights.' In requiring Indigenous peoples to use the rights constructed by the coloniser to claim what they already possessed under their own legality, the law thereby demarcates Indigenous legalities as aberrant, instituting the dynamic of difference. An aberration in this context denotes a form of life and practice of legality that departs from the hegemonic discourse – here, the imposed colonial legality. So, having been categorised as aberrant, Indigenous peoples are forced to translate their unique forms of life into the false equality of a right that is pre-regulated by the colonial hierarchies of state sovereignty established by the doctrine of discovery. In this way, rights-granting functions as a normalising technique for the 'discovering' state to "bridge the gap" between European and Indigenous peoples.[25] As further discussed in Chapter Two, in New Zealand, it was the granting to Māori of 'property rights to native title' under the common law that translated Māori land relationships into a rights-based discourse recognisable by the colonial legality and that thereby normalised Māori within the state.

The universalising process of a rights-based colonial legality does not appear as an obvious form of colonialism because Indigenous peoples claim these rights for their legal protection. However, the concealed nature of rights-based normalisation only makes it more dangerous, insofar as Indigenous peoples may not realise that in affirming their cultural practices *against* the state, they are in fact partaking in perfecting it. Channelling all Indigenous practices and acts of resistance through a rights-discourse may also displace alternative avenues for political contestation unconstrained by colonial legality. Moreover, the rights-based dynamic of difference is self-sustaining in that every act of arrival and bridging exposes new differences that the homogenising force of the discovery doctrine seeks to saturate and overcome.[26] In short, then, the universalising colonial legality "solves the problem of difference by preceding it".[27] The colonial structure is entrenched through a normalising rights-based process suffused by both the doctrine of discovery and dynamic of difference that I shall hereafter refer to as 'the doctrine of difference.'[28]

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[25] Anghie, above n 6, at 4.
[26] Anghie, above n 6, at 4.
[27] Anghie, above n 6, at 6.
[28] My thanks to Dr Stephen Young for suggesting this term.

Given the intimate connection between the doctrine of difference and a rights-based discourse, scholars who redeploy such legal models for Indigenous peoples today, such as native title and human rights, risk perpetuating the same colonial manifestations of power. These rights-based legal models for state-Indigenous relations also re-entrench the colonial structure of legality by relying "upon styles of analysis that provide a partial picture of power."[29] For instance, Michael Ignatieff argues that "human rights is only a systematic agenda of 'negative liberty', a tool-kit against oppression, a tool-kit that individual agents must be free to use as they see fit within the broader frame of cultural and religious beliefs that they live by."[30] In this way, human rights claimants engage in a rights-discourse where they make appeals to negative powers that can supposedly safeguard them from oppressive state power.[31] Viewing the state as subject to Indigenous peoples negative rights, however, elides over the processes whereby the doctrine of difference structured the prevailing configurations of power. Importantly, for my purposes, the rights-based discourse elides political contestation. In this way, Stephen Young asserts that human rights strategies fail to acknowledge that international legal discourse operates through a universalising trajectory that "preceded and produced Indigenous peoples" as subjects of its powers.[32] Hence, legal models are complicit in the truth-producing function of legal discourse wherein international law is constructed as a natural and inherent configuration of power.[33] Consequently, a rights-based legal model may re-embed Indigenous people as natural subjects of international law, and thereby negate their "ability to control or emancipate themselves from law."[34] Invoking the legal model of a rights claim therefore re-inscribes the same colonial structure that a rights-discourse was central in producing.

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[29] Stephen Young "The Legal Performativity of Indigenous Peoples' Free, Prior and Informed Consent" (PhD Dissertation, University of New South Wales, 2018) at 11.
[30] Michael Ignatieff "Human Rights as Politics, Human Rights as Idolatry" (Tanner Lectures on Human Values, Princeton University, 2000); cf Wendy Brown "'The Most We Can Hope for …': Human Rights and the Politics of Fatalism'" (2004) 103 *South Atlantic Quarterly* 451.
[31] Young, above n 29, at 29
[32] Young, above n 29, at 147.
[33] Young, above n 29, at 18.
[34] Young, above n 29, at 3.

III The Political Model of Legality: Agonistic Deliberative Democracy

I have established that legal models for state-Indigenous relations that are based on a rights-discourse embody a doctrine of difference that perpetuates a colonial structure of legality. This section shall turn to examine the theoretical foundations of an alternative model of legality predicated on political contestation as generated by agonistic deliberative democracy. This political model provides for ongoing negotiation between pluralistic parties in a way that attends to structures of power and, therefore, may harbour de-colonising potential. This model will be applied in Chapter Four in relation to the enactment of legal personhood for Te Urewera.

An agonistic approach to legality aims to attune theories of deliberative democracy to broader relationships of power and difference.[35] It shares with deliberative approaches, articulated by Benhabib and Habermas, the perspective that the liberal democratic paradigm of formal equality fails to account and provide for difference.[36] In Benhabib's view, "legitimacy and rationality" are attained through "processes of collective deliberation conducted rationally and fairly among free and equal individuals."[37] In this way, institutional legitimacy derives from the fact that coercive claims "represent an impartial standpoint" that is equally in everyone's interest.[38] Central to this theory is the notion of reaching "rational consensus" through realising the conditions of ideal Habermasian discourse: the more equal, impartial and open, and less coercive the process is, the more likely the common interest will prevail.[39] Discourse that fulfils these conditions is upheld as an "ideal speech situation."[40] Through such communication, rationality is supposedly generated that enables "reason to prevail over power".[41] However, agonistic pluralism parts ways with deliberative approaches in repudiating "rational argumentation" as the central issue in politics."[42]

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[35] Chantal Mouffe, "Deliberative Democracy or Agonistic Pluralism?" (1999) 66 *Social Research* 745 at 752.
[36] Ilan Kapoor "Deliberative Democracy or Agonistic Pluralism? The Relevance of the Habermas-Mouffe Debate for Third World Politics" (2002) 27 *Alternatives* 459 at 462.
[37] Seyla Benhabib "Democracy and Difference" (Princeton University Press, Princeton, 1966) at 69.
[38] Mouffe, above n 35, at 747.
[39] Mouffe, above n 35, at 752.
[40] Mouffe, above n 35, at 748.
[41] Kapoor, above n 36, at 463.
[42] Mouffe, above n 35, at 753.

An agonistic critique of deliberative democracy challenges the very notion of this "neutral and rational dialogue" and highlights the limits of consensus.[43] The author of this critique, Chantal Mouffe, emphasises that, to even agree on the rules of deliberation, one must first agree on the specific community worldview being espoused, meaning that "procedures always involve substantive ethical commitments."[44] Building on Stanley Cavell's critique of an ideal speech situation,[45] Mouffe argues that the deliberative approach denies the inescapable centrality of power and conflict to politics,[46] that renders the ideal Habermasian discourse impossible.[47] Indeed, for Mouffe, political objectivity is always "constituted through acts of power,"[48] meaning legitimacy emerges from "some form of successful power" that has imposed itself to be recognised as such.[49] An agonistic approach thus criticises deliberative models for failing to acknowledge the inherent "link between legitimacy and power" so that the question of democratic politics should not be "how to eliminate power" but how to create forms of power "compatible with democratic values."[50]

An agonistic model of legality therefore reinterprets the primary aim of politics as the "creation of unity in a context of conflict and diversity";[51] not relegating but mobilising "passions towards the promotion of democratic designs."[52] To these ends, unified pluralism emerges through a "conflictual consensus" that acknowledges "the impossibility of establishing a consensus without exclusion."[53] Compromises, therefore, should be viewed as temporary stabilisations of power in an "ongoing confrontation."[54] An agonistic approach, therefore, warns us against the illusion of full and final resolutions and thereby "forces us to

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43 Mouffe, above n 35, at 749.
44 Kapoor, above n 36, at 464.
45 Stanley Cavell offers the question: "[w]hat if there is a cry of justice that expresses a sense not of having lost out in an unequal yet fair struggle, but of having from the start being left out?" Cavell thus argues that removal of a voice in the conversation of justice can be the work of the rational consensus itself. He posits that "bringing a conversation to a close" is a personal decision that cannot be solely justified by the application of supposedly impartial procedures. This means that we should not invoke the "commands of general rules or principles" as a shield against "bearing responsibility for our actions." Stanley Cavell *Conditions Handsome and Unhandsome* (Chicago: Chicago University Press, 1990).
46 Mouffe, above n 35, at 752
47 Mouffe, above n 35, at 748.
48 Mouffe, above n 35, at 752.
49 Mouffe, above n 35, at 753.
50 Mouffe, above n 35, at 753.
51 Mouffe, above n 35, at 755.
52 Mouffe, above n 35, at 755.
53 Mouffe, above n 35, at 755.
54 Mouffe, above n 35, at 755.

keep the democratic contestation alive."[55] It militates against essentialising identities and is receptive to the "multiplicities of voices" and complexities of power "that a pluralist society encompasses".[56] Indeed, according to an agonistic political model, a "[r]adical democracy […] demands that we acknowledge difference",[57] and engage in a "constant struggle and renegotiation of social identity."[58] Only then, can we transform an 'antagonism' into the productive conflict of 'agonism'.[59]

Mark Hickford seeks to apply this notion of agonism to Treaty of Waitangi jurisprudence, which leads him to adopt a "historical-political" understanding of New Zealand's constitution.[60] Building on Mouffe's theorisation, Hickford postulates that "[h]uman plurality is the starting point for the condition of politics".[61] For Hickford, this pluralistic political model of legality has the potential to preserve "ongoing conversational spaces" wherein relations might be narrated and re-narrated. It is within a fluid political space that diverse actors may interact in the face of difference and disagreement.[62] Hickford asserts that it is these qualities of politics that best "resonate with Indigenous political efforts to resist the colonial assumptions of settler states, as well as to revisit and to modify those assumptions."[63]

Hickford contrasts this politics of negotiability with adjudicative legal models of decision-making in which the courts remain invariably "implicated within a colonial legal order" that only permits the Crown to be "critiqued in contained, narrowly ritualistic ways."[64] Indeed, a rights-based discourse is necessarily imbricated within the state's sovereign power. In this context, Hickford advocates for an historical-political approach to New Zealand's constitution that attends to the structures of power operating within and beyond the courts and legislature that are largely elided over by positivist legalistic evaluation.[65] Allied with an

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55 Mouffe, above n 35, at 757.
56 Mouffe, above n 35, at 757.
57 Mouffe, *The Return of the Political* (Verso, London, 1993) at 13.
58 Kapoor, above n 36, at 465.
59 Kapoor above n 36, at 465.
60 Mark Hickford "Reflecting on the Treaty of Waitangi and its constitutional dimensions: A case for a research agenda" in Mark Hickford and Carwyn Jones (ed) *Indigenous peoples and the State: International Perspectives on the Treaty of Waitangi* (Routledge, Oxford, 2019) 140 at 140.
61 Mark Hickford "Historicity and the Political Constitution" (2019) 30 *King's Law Journal* 97 at 98.
62 Hickford, above n 60, at 141.
63 Hickford, above n 60, at 144.
64 Hickford, above n 60, at 152.
65 Hickford, above n 60, at 154.

agonistic perspective, this approach contemplates the constitution as a "place of interdependencies between law and politics" that "beget[s] conversations without end" between Māori and the Crown.[66] Hickford therefore contends that the Treaty ought to be viewed as "a set of texts" that instantiate "contested and contestable, negotiated and negotiating communities of practice".[67] This agonistic Treaty legality is realised through the ongoing (re)negotiation of contemporary political settlements, as exemplified in the agonistic and deliberative mechanisms involved in recognising Te Urewera's legal personhood. It is these processes of political negotiation between pluralistic voices that "forces us to keep the democratic contestation alive,"[68] and thereby perhaps breaks from the colonial structure of legality re-inscribed through a rights-based discourse.

I have demonstrated a dichotomy between legality produced through rights-based legal models imbued by a doctrine of difference, and legality formed through the ongoing confrontation of agonistic political models that perhaps displaces a doctrine of difference. By combining the doctrine of discovery with TWAIL scholars' interest in the dynamic of difference, this doctrine of difference framework provides an updated method for analysing Māori-Crown relations situated within a rights-based discourse. By highlighting processes of universalisation and normalisation, it reveals the way in which the discovery doctrine is ongoing through contemporary civilising missions. Namely, it offers a means of excavating "histories of mentalities of self-determination" that insist on the "recognition of radical cultural and civilizational plurality and diversity."[69]

The next section shall apply this framework to the development of the doctrine of discovery. This historicisation shall excavate discovery's theological-imperial origins to reveal that this past is "constantly being retrieved as a source or rationalisation of present obligation".[70] It shall demonstrate the way in which the Catholic Church's universal natural law was secularised as a right-based colonial legality by Spanish jurists and, subsequently,

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[66] Hickford, above n 60, at 144.
[67] Hickford, above n 60, at 155.
[68] Mouffe, above n 35, at 757.
[69] Upendra Baxi "What May the 'Third World' Expect from International Law" (2007) 27 *Third World Review* 713 at 713.
[70] Anne Orford "The Past as Law or History? The Relevance of Imperialism for Modern International Law" (Research paper, Melbourne Legal Studies Research Paper No. 600, Melbourne Law School, 2011) at 9.

translated by settler-state courts into the foundation of the state as native title. Understanding that this colonial legality has operated structurally to subordinate Indigenous people as subjects of the state demonstrates that continuing to deploy rights-based legal models merely reinvests in the doctrine of difference. Comprehending this process may then militate against "the willed forgetting of international law's imperial past,"[71] and thereby open up potential spaces for confronting New Zealand's own colonial structure of legality.

IV The Origins of Discovery

The establishment of a colonial structure of legality via discovery has its origins in the Roman Catholic Church's notion of a "worldwide papal jurisdiction."[72] The Pope was exalted as possessing a "divine mandate to care for the entire world" that obligated the Church to amass a "universal Christian commonwealth".[73] This mandate overrode non-Christians' natural law right to self-governance defined by the Church, as any violations of this natural law by 'infidels' purportedly justified their invasion and dispossession.[74] The dynamic of difference was therefore central to the extension of papal authority as non-Christians' legality was demarcated as aberrant to the enlightenment of Christian natural law. Natural law rights were then employed to normalise them within Christianity.

With papal bulls protecting Portugal's African conquests, the Catholic monarchs of Spain launched a voyage of discovery to 'the New World'.[75] In 1493, Pope Alexander VI duly granted Spain ownership rights to any lands 'discovered' in the future, provided they were "not previously possessed by any Christian owner."[76] Consequently, the Church provided the foundations for the idea of international law between states. However, Spanish scholars began to question the legitimacy of papal authority as the foundation of imperial dominance. Francisco de Vitoria was pivotal in resolving this debate by translating the theological grounding of the doctrine into legalistic discourse. Vitoria accepted that Indigenous peoples possessed natural rights as "free and rational people" and land-owners so that European

[71] Orford, above n 70, at 11.
[72] Miller, above n 5, at 9.
[73] Miller, above n 5, at 9.
[74] Miller, above n 5, at 10.
[75] Miller, above n 5, at 12.
[76] Miller, above n 5, at 12.

discovery alone could not transfer title.[77] On this basis, he argued that papal grants in the Americas were "invalid and could not affect the inherent rights of the Indigenous peoples."[78] However, his next manoeuvre was to hold that any violations by 'natives' of European natural law encapsulated in the Law of Nations could justify Christian conquest.[79] That is, Vitoria promulgated that Indigenous peoples were required to provide space for Spaniards to practice their natural law rights in the New World."[80] Should the infidels then preclude Spanish explorers from exercising these natural law rights, Vitoria reasoned that Spain would be justified in "protecting its rights" through engaging in "just wars" against Indigenous peoples.[81]

In this way, Vitoria strengthened the colonial structure of Spanish imperialism through a rights-discourse that juridified Indigenous land relationships. He did this by constructing a firmer legal foundation for discovery based on the "universal obligations of a Eurocentrically constructed natural law."[82] Through instantiating this rights-based discourse, Vitoria provided a means for secularising the Catholic conception of universal natural law. Indigenous legalities were designated as aberrant and only rendered legally intelligible when translated into European natural law rights. Vitoria thereby constructed a colonial structure of legality premised on a rights-discourse that legitimated imperialism and displaced Indigenous peoples' forms of life through a doctrine of difference. It is this Vitorian colonial structure that was subsequently adopted by English colonisers and that continues to pre-regulate rights-based legal models deployed in New Zealand today.

V Translation into the State

The colonial structure of legality secularised by Vitoria was exploited by English imperialists to advance their trans-oceanic claims of discovery.[83] The settler-state courts of the United States, Canada and Australia translated Vitoria's natural law conceptions of Indigenous

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[77] Miller, above n 5, at 14.
[78] Miller, above n 5, at 14.
[79] Miller, above n 5, at 15.
[80] These included proto-capitalist rights to "travel to foreign lands, to engage in trade and commerce in native lands, and to take profits from items Indigenous peoples apparently held in common, like minerals. See Miller, above n 5, at 14.
[81] Miller, above n 5, at 9.
[82] Miller, above n 5, at 14.
[83] Miller, above n 5, at 15.

legalities into a rights-discourse of native title that legitimated the foundation of the colonial state. Again, the granting of rights was predicated on a universalising doctrine of difference. I shall focus on the American jurisprudence as it was foundational in articulating these native title rights.

In transforming Vitoria's rights-discourse, the US Supreme Court's "Marshall trilogy" cases relied on the Crown's right of pre-emption, that is, the Crown's monopoly over land purchased from Indigenous peoples.[84] Pre-emption imposed a paternalistic structure of state guardianship over Indigenous peoples by deeming them to lack "the legal personality to assert any legal opposition."[85] Indigenous legality was therefore automatically cast as aberrant from colonial legality and requiring normalisation. In this context, the case of *Johnson v M'Intosh* affirmed discovery as the foundation for Federal–Indian relations,[86] and deployed a legal model effacing the processes whereby the doctrine of difference structured these colonial hierarchies. Faced with the issue of competing titles, the case concerned "the power of Indians to give, and of private individuals to receive, a title" sustainable in the US.[87] From the outset, the Court's reasoning was regulated by the doctrine of difference. Marshall CJ opined that a court must look to the principles of its own government to determine the rules property acquisition,[88] and thus recognised discovery as "the original fundamental principle" governing American land titles.[89] Indeed, the Court reasoned that the state had "absolute title" in Indian lands "subject only to Indian right of occupancy", which, in turn, the government had "the exclusive power to extinguish."[90] On this basis, the Court held that Indian chiefs were incapable of transferring title to private individuals.[91]

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[84] The colonies also attempted to circumscribe trade between Indians and colonists, created trust relationships to putatively protect and guide Indians towards a 'civilised' state, and enacted legislation "to exercise the sovereign authority" that discovery was deemed to have granted them over Indian peoples. See Miller, above n 5, at X.

[85] Anghie, above n 6, at 34.

[86] Matthew LM Fletcher "The Court's Decision in *Cherokee Nation* Is Racist" in *Native American Rights* (Greenhaven Press, Farmington Hills, 2008) 38 at 38.

[87] *Johnson v M'Intosh* at 544.

[88] Miller, above n 5, at 23.

[89] *Johnson v M'Intosh* at 552.

[90] *Johnson v M'Intosh* at 551.

[91] *Johnson v M'Intosh* at 560.

In uncritically assuming the colonial government's supreme jurisdiction the Court displaced the violent processes involved in producing that institution, legitimated the colony's acts of systematic dispossession, and thereby constructed "Indian right[s] of occupancy" as the natural tools for Indigenous protection.[92] Indeed, Marshall CJ stated that "Humanity […] has established […] that the conquered shall not be wantonly oppressed", but "incorporated with the victorious nation."[93] Through the universalising signifier of "humanity", the Court postulated a gap between the "civilised" European and uncivilised Indigenous legalities.[94] It then employed the technique of granting occupation rights to translate and normalise these unrecognisable Indigenous legalities within the western political theory of "the victorious nation."[95] In granting rights, therefore, the Court replicated a Vitorian doctrine of difference that universalised the colonial structure of legality. In naturalising the colonial structures produced by discovery, the rights-based discourse employed in *Johnson* exemplifies a legal model that is necessarily entangled within the state's sovereign power. As Marshall CJ infamously proclaimed, "[c]onquest gives a title which the courts of the conqueror cannot deny."[96]

Johnson was followed by *Cherokee Nation*.[97] Here, the Court held that Cherokee Nation were unable to directly sue the State of Georgia as they possessed "limited […] property rights."[98] Cherokee were thus not foreign states but "within the jurisdictional limits of the United States."[99] Cherokee's relation to the Government was held to "resemble[] that of a ward to his guardian."[100] Hence, a rights-based discourse was used to construct tribal governments as dependent on the benevolent protection of the colonial state, thereby normalising them within a paternalistic hierarchy of subordination.

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[92] *Johnson v M'Intosh* at 550.
[93] *Johnson v M'Intosh* at 551
[94] *Johnson v M'Intosh* at 549.
[95] See Robert A Williams Jr *The American Indian in Western Legal Thought. The Discourses of Conquest* (Oxford University Press, Oxford, 1990).
[96] *Johnson v M'Intosh* at 550.
[97] *Cherokee Nation v Georgia* 30 US 1 (1831).
[98] *Cherokee Nation*, above n 97, at 13.
[99] *Cherokee Nation*, above n 97, at 14.
[100] *Cherokee Nation v Georgia*, above n 97, at 11.

I have demonstrated that American jurisprudence translated Vitoria's natural law rights-discourse into the foundation of the settler-state. Similar acts of translation followed in Canadian[101] and Australian[102] dealings with Indigenous peoples. Matthew Fletcher conceives of this American jurisprudence through the metaphor of a 200-year-old house.[103] He submits that this house's rooms contain the foundational discovery doctrine and that, as the law has developed, new rooms have been added to a rotting core.[104] However, no matter how attractive these new rooms appear, they embody a core characterised by "an iron cold of the deepest night."[105] Similarly, a rights-based discourse appears to provide Indigenous peoples with power to contest the state, but in fact reproduces the doctrine of difference central to the subordinating structures of colonial legality. Indeed, "the courts of the conqueror"[106] are constrained by the foundational colonial structures that created and continuously construct them. As the next chapter shall elucidate, the colonial structure of legality established by Vitoria and incorporated into the state by Marshall CJ was transplanted wholesale into New Zealand's legality. It is through applying a doctrine of difference framework that I shall reveal that the colonial hierarchies of Vitorian discovery in fact continue to permeate New Zealand's law.

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[101] The paramount discovery case in Canada was *St Catherine's Milling and Lumber Company v The Queen* [1888] UKPC 70. This case revolved around a dispute between the provincial and federal crowns of Canada as to who possessed the rights to Indian territories. The Royal Proclamation 1763 was upheld as good authority for the divestiture of Indigenous sovereignty and the assumption of colonial ownership via discovery. Canadian state-Indigenous relations, then, inherited a discovery jurisprudence that operated to universalise Indian legalities within overriding Crown imperium. This was achieved through the legal mechanism of statutory extinguishment of rights. See Miller, above n 5, at 120.

[102] In Australia, the discovery doctrine of terra nullius was deployed to legitimise the imposition of British sovereignty. In this way, the processes of discovery in Australia did not just normalise Aboriginal societies within Eurocentric epistemologies but overtly repudiated their legal existence. The discovery processes of normalisation, however, were applied unreservedly in the courts. For instance, *R v Murrell (1836)* 1 Legge 72 rejected the notion of Aboriginal sovereignty and independent jurisdiction. Then, in *Miliripum v Nabalco Pty Ltd* (1971) 17 FLR 141. Blackburn J determined that Australian common law did not recognise any Aboriginal interest in land as a property right. See Miller, above n 5, at 191.

[103] Fletcher, above n 86, at 88. Fletcher cites cites Louise Erdrich's poem, *The Ritual*, for this metaphor.

[104] Fletcher at 90

[105] Fletcher at 87

[106] *Johnson v M'Intosh*, above n 11, at 550.

CHAPTER TWO: COLONISATION BY LAW IN AOTEAROA NEW ZEALAND

I Introduction

The legal history of Aotearoa New Zealand is defined by structures of colonialism. This chapter shall argue that these subordinating configurations of power continue to plague New Zealand legality. This colonial legal structure persists through the implementation of a rights-based discourse which is necessarily imbricated within the state's sovereign power. Through the granting of rights, Māori legalities are translated into 'property rights to native title' under the integrationist logic of the doctrine of difference. Contemporary rights-based solutions may therefore re-entrench colonial hierarchies and elide political contestation. In this context, I shall provide a critical historiography of Māori-Crown relations, concentrating on the processes whereby a rights-based discourse has perpetuated a colonial legal structure.

II Establishing Sovereignty

Before a rights-based discourse could be introduced as a mechanism of assimilation in New Zealand, the British Crown had to acquire *imperium* over these lands. To this end, "Britain sought annexation of Aotearoa via a treaty of cession steeped in a Discovery mindset."[107] Following the strategic acknowledgement of the independent sovereignty of some iwi in the 1835 Declaration of Independence,[108] British annexation was accelerated by several events.[109] First, the doctrine of pre-emption was instituted through the three Proclamations of Governor Gipps.[110] Then, in 1840, forty-three northern rangatira assented to the Māori but not English version of the Treaty of Waitangi ('the Treaty') presented by the Crown.[111] Lieutenant-

[107] Miller, above n 5, at 207.
[108] The Colonial Office constructed Māori political systems as lacking in "settled government" and sought to bridge this difference by "recognising" the tribes' autonomy within a positivist discourse of "sovereign power and authority". See Miller, above n 5, at 210.
[109] A full exposition of the events leading up to the signing of the Treaty of Waitangi is outside the scope of this dissertation, as it aims to focus on the trajectory of a rights-based discourse in New Zealand's legality. For a detailed account, see Miller and others "Asserting the Doctrine of Discovery in Aotearoa New Zealand: 1840–1960s".
[110] Gipps was the Governor of New South Wales, the jurisdiction of which had been extended over the New Zealand colony in 1839. The doctrine of pre-emption instated here was later consolidated by Article 2 of the English version of the Treaty of Waitangi, and the Land Claims Ordinance 1841. Miller, above n 5, at 211.
[111] Miller, above n 5 at 212.

Governor Hobson thereafter issued two proclamations of sovereignty: the first over the North Island "by right of cession" and the second over the South Island "by right of discovery."[112]

The Treaty is widely heralded as New Zealand's pre-eminent constitutional document,[113] representing the mechanism through which British and Māori legal systems would "be formally brought together in some sort of single accommodation."[114] However, the seemingly irreconcilable translations of Articles 1 and 2 continue to stoke controversy, initiating a constitutional tension between a "Crown sovereignty narrative" and a "tino rangatiratanga narrative."[115] Whereas the English version exemplifies discovery principles, enunciating that Māori ceded absolute sovereignty to the Crown but that they retained full exclusive and undisturbed possession of their lands and properties, the Māori version outlines a coexistence of "respectful separation."[116] It articulates that Māori ceded only kāwanatanga (governance) and retained tino rangatiratanga (sovereignty) over their taonga (treasures).[117]

Any evidence, however, of the Treaty limiting Crown sovereignty is negated by the contemporaneous conduct of British colonisers, not least Hobson proclaiming discovery over the South Island on the basis that those Māori were "uncivilised".[118] The Treaty, therefore, was a consummate discovery document that provided for the "autochthonous legitimation of the existing [British] constitutional structures".[119] Nevertheless, as Hickford argues, the Treaty "ought not to be seen as an exhaustive representative or marker of the constitutional and political dimensions of Crown-iwi-hapū relations."[120] Therefore, to fully comprehend Treaty

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112 Miller, above n 5 at 212.
113 Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 5.
114 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" 21 Wai L Rev 1 at 7.
115 Edward Willis "The Treaty of Waitangi: Narrative, Tension, Constitutional Reform" (2019) 2 NZLR 185 at 190.
116 Miller, above n 5 at 213.
117 Katherine Sanders "'Beyond Human Ownership? Property, Power and Legal Personality for Nature in Aotearoa New Zealand" (2018) 30 *Journal of Environmental Law* 215. The ongoing false assumption that Māori voluntarily ceded their sovereignty has only exacerbated this clash of original intent. See The Waitangi Tribunal, *He Whakaputanga me te Tiriti, The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, Wai 1080 (2014) 527.
118 Miller, above n 5, at 220. Moreover, as only a fraction of rangatira signed the Treaty, any notion of collective Māori consent is a mere fiction of discovery.
119 David V Williams "The Constitutional Status of the Treaty of Waitangi: An Historical Perspective" (1990) 14 NZULR 9 at 16.
120 Hickford, above n 60, at 150..

jurisprudence it should be situated within the broader theoretical architecture of the 'doctrine of difference.'

Having established Crown imperium, the universalisation of colonial legality throughout Aotearoa could proceed undeterred. The acknowledgement of Crown sovereignty legitimised the establishment of Eurocentric legal models as the primary means of solving disputes. These transformations in structures of power enabled the doctrine of difference, and its modality of recognising a 'right to native title' to actively dispossess Māori through the common law. To demonstrate these processes, I shall now examine the constitutive moments in which the state legal institution has engaged a rights-based discourse to perfect the colonial legal structure. Predicated on binary legal models and state-centric hierarchies, the Crown-dominated development of Treaty jurisprudence has narrowed the conditions of possibility for alternative ways of configuring Māori-Crown relations. The juridification of Māori mana whenua[121] within a rights-discourse was established by the seminal case of *R v Symonds*.[122]

III R v Symonds

R v Symonds was a test case orchestrated by Governor Grey to ascertain the validity of sales under a waiver of the Crown's right of pre-emption.[123] A British colonist had purchased land directly from Māori vendors prior to the Treaty. The issue for the Court was whether that transaction meant the colonist had acquired bona fide title that invalidated the Crown's subsequent grant to another colonist. Chapman J observed that the "intercourse of civilised nations" with Indigenous communities had led to established principles of law – that is, the discovery-riven *ius gentium* articulated by the Marshall Court.[124] Citing the Treaty, Chapman J reasoned that, as "the Queen is the exclusive source of title", the Crown's right of pre-emption could not be waived.[125] In establishing native title, Chapman J enunciated that: "it cannot be

[121] Mana whenua translates roughly to the authority of a tribe over land. https://teara.govt.nz/en/take-whenua-maori-land-tenure.
[122] *R v Symonds* (1847) NZPCC 387.
[123] At 387.
[124] At 390.
[125] At 390.

too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native title occupiers."[126]

Consequently, *Symonds* formally adopted into New Zealand the "jurisprudential literature minted and honed in the United States" on Indian title.[127] In relation to Māori rights of native title, Chapman J observed that "for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it."[128] The vulnerability of native title to extinguishment "for the sake of humanity" exemplifies the doctrine of difference of a rights-based discourse.[129] Here, the Court appears to be instantiating equality by invoking the universal notion of "humanity." However, this "humanity" is defined and delimited by the western legal discourse of the colonising British. Recognising this "humanity" of Māori enabled the Court to translate Māori land relationships into positivistic rights positioned as a burden on the Crown's paramount title. In this process, the Court enacted the doctrine of difference by upholding a supposedly universal, but in fact Eurocentric, idea to rationalise the 'curing' of Indigenous difference that aberrated from British "proprietorial conceptions of rights in wealth".[130]

The Victorian colonial structure of a "Eurocentrically constructed" law was therefore sustained through a rights-based discourse that translated Māori land relationships into a Crown-sanctioned means of contestation. As Hickford argues, *Symonds* "distilled a tidier, self-contained narrative from what might otherwise have appeared messily contestable and unresolved."[131] But in effecting this distillation, *Symonds* "[did] not assert either in doctrine or in practice anything new and unsettled".[132] Instead, it reproduced the universalising dynamic central to the doctrine of difference, displacing Māori forms of life.[133]

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[126] At 388.
[127] Mark Hickford Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire (Oxford University Press, New York, 2011) at 5.
[128] *R v Symonds* at 390.
[129] *R v Symonds* at 387.
[130] Williams, above n 114, at 6.
[131] Hickford, above n 127, at 144.
[132] *R v Symonds*, above n 122, at 390.
[133] Nonetheless, it was to be another 150 years before a court again acknowledged Māori proprietary interests in land despite a change in sovereignty. See Miller, above n 5, at 216.

IV A "Tougher New Evangelism"

However, these covert rights-based mechanics of discovery soon degenerated into overt acts of conquest and dispossession.[134] Angered by the loss of independence concomitant with unfulfilled conditions of land alienation, the Kīngitanga Movement began opposing land sales.[135] This catalysed the New Zealand Wars,[136] and the emergence of a "tougher new evangelism" where law became "the central tool in destroying the Māori way of life."[137] In this era, British legality dispossessed through force as part of a "new cultural genocide crusade."[138]

Central to this crusade was the Native Land Court, established under the Native Lands Act 1862 and Native Rights Act 1865. The Crown waived its right of pre-emption and allowed Māori to freely alienate their land, thus transforming communally held land into individualised freehold title and removing its aberrational nature.[139] The purpose of the 1862 Act was suffused with the language of the civilising mission, being to "promote […] the advancement and civilization of the Natives" by ensuring "their rights to land were ascertained, defined and declared."[140] In this way, the court operated as a financial mediator of capitalist land transfer, and was animated by constructing a dynamic of difference between the universal British conception of Lockean private property and Māori communal responsibility.[141] Such an obligation towards "detribalisation" was totally consistent with the colonial hierarchies of international law domesticated by discovery. Indeed, under the 1865 Act, Māori were deemed to be natural-born subjects of Her Majesty, naturalising the universality of state sovereignty.[142] The Land Court was "extraordinarily effective", operating as a "veritable engine of destruction" of Māori legality and ensuring that colonial manifestations of power were deeply

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134 Miller, above n 5, at 217.
135 Miller, above n 5, at 217. Also known as the Māori King movement, it was founded in 1858 with the aim of uniting Māori under a single sovereign. In 1863, government troops invaded its seat in the Waikato, and war followed. Waikato were defeated and vast areas of their land confiscated. See Rahui Papa and Paul Meredith "Kīngitanga – the Māori King movement" (26 September) Te Ara - the Encyclopedia of New Zealand http://www.TeAra.govt.nz/en/kingitanga-the-maori-king-movement.
136 See Vincent O'Malley *The New Zealand Wars: Ngā Pakanga o Aotearoa* (Bridget Williams Books: 2019).
137 Miller, above n 5, at 217.
138 Miller, above n 5, at 218.
139 Miller, above n 5, at 218.
140 Native Rights Act 1862.
141 See Stuart Banner "Two Properties, One land" Law and Space in Nineteenth-Century New Zealand" (1999) 24 *Law & Social Inquiry* 807. See also *C B Macpherson The Political Theory of Possessive Individualism* (Clarendon Press, Oxford, 1962).
142 Miller, above n 5, at 218.

entrenched in capitalist proprietary relationships.[143] In this context, native title rights were upheld within a hegemonic structure of colonial legality that already "structured, shaped and limited how those rights were understandable".

V Wi Parata

The "new evangelism" of this assimilatory colonial legality arguably culminated in the *terra nullius* doctrine implicitly deployed in *Wi Parata*.[144] Notorious for declaring the Treaty "a simple nullity",[145] the case carries the doctrine of difference to the extreme. Ngāti Toa had gifted land to the Anglican Church for a school.[146] Given the Crown's pre-emption right, the issue was whether a subsequent Crown grant of the land was a voidable "fraud upon the donors."[147] Prendergast CJ "relied on a new version of historical events" to reject previously recognised Māori property rights.[148] To do so, Prendergast CJ held that Māori-Crown transactions were non-justiciable "acts of state".[149] However, this reasoning is based on Māori interacting with the Crown as nation-to-nation, and then antithetically revoking this status. Prendergast CJ's contradictory logic was substantiated through applying universal and racialised standards of civilisation, saying that, upon colonisation, "the aborigines were found without any kind of civil government, or any settled system of law."[150] Māori were therefore deemed "primitive barbarians", meaning that "the old law of the country" could be disregarded and "the Government must acquit itself […] of its obligation to respect native proprietary rights and of necessity must be the sole arbiter of its own justice."[151]

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143 Miller, above n 5, at 219.
144 *Wi Parata v Bishop of Wellington* [1877] NZJurRp 183.
145 At X. See also David V Williams *A Simple Nullity? The Wi Parata Case in New Zealand Law and History* (Auckland University Press, Auckland, 2011).
146 *Wi Parata*, above n 144, at 188.
147 Emma Gattey "Do New Zealand Courts Regard Tikanga Māori as a Source of Law Independent of Statutory Interpretation? Or Is Anglo-Inspired Common Law Still "the sole arbiter" of Justice in New Zealand" (Bachelor of Laws(Hons) dissertation, University of Otago, 2013).
148 Miller, above n 5, at 220.
149 At 190.
150 At 195.
151 At 192.

These sentiments are a direct application of the doctrine of discovery articulated in the US, and strongly resonate with the *terra nullius* doctrine espoused in Australia.[152] *Wi Parata* is widely condemned for exemplifying "judicial ethnocentrism".[153] However, I would contend that it simply explicates the integrationist colonial hierarchies of Crown sovereignty already embedded within the doctrine of pre-emption and the pre-regulating discovery structures. The Court justified this imposition through a civilising mission that dismissed Māori as "barbarians" in need of "civil government."[154] By not even attempting to translate Māori laws into a rights-discourse, *Wi Parata* bluntly denied Māori any legal recourse to dispossession and erased Māori as self-determining legal actors. In this way, *Wi Parata* perfected the doctrine of difference by constructing Māori legality not only as aberrant but as an abject other,[155] completely normalising Māori within colonial legality.[156]

Indeed, *Wi Parata* remains "New Zealand's paramount discovery case" and was not conclusively overruled until 2003.[157] In the intervening years, however, the socio-political milieu with regard to Māori-Crown relations metamorphosed. In 1975, the government established the Waitangi Tribunal as a permanent commission of inquiry empowered to receive, report, and recommend on alleged Crown breaches of Treaty principles, with jurisdiction extended to consider historical claims[158] in 1985.[159] Then, from the mid-1980s, the

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[152] David V Williams "Fiduciary Duty Remedies Stripped of Historical Encumbrances" (2019) NZLR 39 at X. These sentiments also directly contravened the statutory directions to the Native Land Court.The Native Land Court Act 1865 made explicit reference to the "Ancient custom and usage of the Maori people." Miller, above n 5, at 218.

[153] Gattey, above n 147, at 21.

[154] *Wi Parata*, above n 144, at 188.

[155] Young describes the 'abject domain' as inhabited by those who are not even recognised as "subjects" within the legal discourse but "who form the constitutive outside to the domain of the subject." See Young, above n 29, at 54.

[156] Such was the Court's departure from the norms of imperial jurisprudence that in *Nireaha Tamaki v Baker* [1901] PC the Privy Council overruled it, observing "it is rather late in the day" for a New Zealand court to find there is no Māori customary law which the courts can recognise. However, the domestic judiciary ignored the Privy Council's ruling, "the only recorded instance of a New Zealand Court's publicly avowing its disapproval of a superior tribunal". See Miller, above n 5, at 222.

[157] Miller, above n 5, at 221.

[158] Imperium constituted ultimate state sovereignty and radical title over all discovered land. See Miller, above n 5, at 8.

[159] Miller, above n 5, at 227, citing Treaty of Waitangi 1975 s 6. Amended by the Treaty of Waitangi Amendment Act 1985. For commentary see J Hayward and N R Wheen (eds) *The Waitangi Tribunal: Te Roopu Whakamana I te Tiriti o Waitangi* (Wellington: Bridget Williams Books, 2004); Alan Ward, *An Unsettled History: Treaty Claims in New Zealand Today* (Wellington: Bridget Williams Books, 1999).

Crown committed to engaging with Māori in a Treaty settlement process.[160] The *Lands* case,[161] moreover, enunciated the statutorily incorporated "principles of the Treaty of Waitangi" as "partnership, reasonableness, and good faith."[162]

However, throughout this time and beyond, the "underlying tenet of Discovery" continued to "haunt legal and political reasoning"[163] through deployment of a rights-based discourse. I will proceed with my critical historiography of discovery through the pioneering cases of *Ngāti Apa*[164] and *Wakatū*.[165] Although these cases see the courts grappling with the origins of New Zealand's colonial legality, these foundations persist through a redeployment of the rights-granting doctrine of difference.

VI Displacing Discovery?

A Ngāti Apa

Through upholding self-determined Māori legality as legitimate in particular instances, *Ngati Apa* provides glimpses of the possibility of rupturing the common law's universality.[166] *Ngati Apa* "poignantly recognises the interests of Indigenous peoples" and its reasoning is rightly regarded as possibly "the best yet to be made by a judiciary" in the Commonwealth.[167] In this way, the Court's emphasis on the unique nature of New Zealand's common law gestures towards a nascently place-based, historicised and hybridised understanding of Māori-Crown relations that embodies significant progress towards reconciliation. However, my concern is that framing Māori claims within the confines of the positivistic rights-discourse means that Māori rangatiratanga can be advanced only so far. In this way, *Ngati Apa* is necessarily

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160 These settlement processes were conducted to "provide the foundation for a new and continuing" Māori-Crown relationship according to Treaty principles. See Office of Treaty Settlements, *Ka tika ā muri, ka tika ā mua: Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Wellington: Office of Treaty Settlements, 1999).

161 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

162 Miller, above n 5, at 230. Cooke P stressed the importance of not freezing Treaty principles in time: "What matters is the spirit…The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas." *New Zealand Maori Council*, above n 161, at 663.

163 Miller, above n 5, at 227.

164 *Ngāti Apa v Attorney-General* [2003] NZCA 117.

165 *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17.

166 See Emilios Christodoulidis, 'Strategies of Rupture' (2008) 20(1) *Law & Critique* 1, 7–13 for an elaboration on the jurisprudential concept of 'rupture'.

167 Miller, above n 5, at 234.

predicated on a legal model of solving disputes that provides a partial picture of power in that it fails to properly account for the pre-regulating and formative influence of the discovery processes of international law. Hence, although in many respects revolutionary, the case ultimately remains premised on colonial structure of legality in which the Crown acquiring legitimate sovereignty.

Ngāti Apa followed enactment of Te Ture Whenua Māori Act 1993 which gave the Māori Land Court jurisdiction to determine whether any land is Māori customary land held according to tikanga.[168] The Māori Land Court can also grant vesting orders that change the land's status from Māori customary land to Māori freehold land held in fee of the Crown.[169] However, the Court in *Ngāti Apa* leaves open the extent to which "the new jurisdiction equips the Māori Land Court to recognise interests in land according to custom which do not translate into fee simple ownership."[170] This point gestures towards the emancipatory possibility of the ostensibly universalising common law allowing otherwise excluded Māori legality to be upheld as legitimate. It is a more bicultural means of recognition through the state's legal structures.

In this context, the Court was charged with discerning the Māori Land Court's jurisdiction to determine the status of land covering the foreshore and seabed. The Court affirmed the Māori Land Court's jurisdiction to do so, finding that the Crown's assumption of sovereignty had not itself extinguished Māori "customary property interests".[171] In reaching this conclusion, the Court overruled *Wi Parata* as "discredited authority".[172] Instead, the Crown's radical title was "burdened" by common law native title rights, capable of extinguishment "only by consent or in accordance with statutory authority."[173] The Court therefore "reintroduced the full spectrum of the Native title doctrine"[174] as Elias CJ found that "[a]ny property interest of the Crown in land over which it acquired sovereignty […] depends on any pre-existing customary interest and its nature."[175] Accordingly, *Ngati Apa* held that

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168 Te Ture Whenua Māori Act 1993, s 129(2)(a).
169 Te Ture Whenua Māori Act 1993, s 132.
170 At [46].
171 At page 655.
172 At [13].
173 At [85].
174 Miller, above n 5, at 232.
175 At [31]. The other four justices reaffirmed native title rights in similar terms. Tipping J, for instance, observed that the introduction of English common law "did not extinguish Māori customary title" but that

Crown sovereignty and native title co-existed, but only where Crown had not exhibited a clear and plain legislative intention to extinguish native title.[176]

Whilst many exalt *Ngāti Apa* as relegating *Wi Parata* jurisprudence "to an appendix of colonial injustices,"[177] a more critically-attuned evaluation is required. In starting from the proposition of Crown acquisition of radical title being *burdened* by 'native title rights', the Court assumes the discovery hierarchies that subordinate Māori legalities to the state. The Court then allocates land rights, instruments designed *inter alia* to underpin the relationship between the individual and state.[178] To prove they have native title rights, Māori are forced to subject themselves, their relationships and cultural practices to the legal scrutiny of the state, which wields sovereign power to unilaterally "extinguish" those rights. Although providing Māori with protection within the confines of the state, these rights thus transform Māori communal relationships with land into recognisable subjects of the Eurocentrically-constructed common law. In doing so, the court provides opportunities for the state to regulate and normalise Māori within the imported British legality.

Hence, *Ngāti Apa* upholds native title rights as what Māori need, but regulates and structures what they can do. This process of translation replicates a Vitorian dynamic of difference as Māori legalities are either cast as unintelligibly different and aberrant from the discourse of the common law or converted into native title. However, even as native title, the land remains aberrant as a burden on state sovereignty that, through its presence, renders the state imperfect. *Ngāti Apa* nonetheless retains the Crown's capacity to extinguish native title and thereby 'perfect' itself, as indeed happened with the legislative backlash of the Foreshore and Seabed Act 2004 asserting government ownership of that land.[179] The assimilatory process of such a rights-discourse accords with Glen Coulthard's insight from a Canadian context that

"such title was integrated into what then became the common law of New Zealand." This statement is a salient illustration of the common law's universalising power. Keith and Anderson JJ concurred with Tipping J, ruling that the determination of native land rights necessarily entails "the study of the history of the particular country and its usages." This caution was repeatedly related to "the vital rule" that English law became part of New Zealand's law from 1840 only "so far as applicable to the circumstances of New Zealand."

[176] *Ngāti* Apa, above n 164, page 643.

[177] Gattey, above n 147, at 31.

[178] Young, above n 29, at 126.

[179] See Jacinta Ruru, "A Politically Fuelled Tsunami: The Foreshore/Seabed Controversy in Aotearoa Me Te Wai Pounamu/New Zealand" *The Journal of the Polynesian Society* 113 1, 57–72.

"colonial powers will only recognize the collective rights and identities of Indigenous peoples insofar as this recognition does not jeopardize the structural underpinnings of the colonial relationship itself."[180]

Moreover, the banishment of the *Wi Parata* terra nullius precedent and acknowledgement of the pre-existence of native title undoubtedly represented a win for the Māori claimants. This proposition sounds compelling and intuitive as it upholds Māori as "sovereign and self-determining peoples who, when they claim rights, can control their futures."[181] Framing rights as "pre-existing" doubtlessly empowers Māori claims to practice their forms of life within the state apparatus. However, characterising native title as "pre-existing" the Crown acquisition of sovereignty also elides the violent discovery processes involved in constructing those rights and sovereignty. Namely, this interpretation is anachronistic[182] insofar as it presents the western legal construct of 'native title' as a natural ordering that has always governed Māori land relationships. The resolution of the claim through a rights-based model thus offers a partial picture of power by making appeals to negative powers imbricated within the state's sovereign power and naturalising that power. Therefore, through invoking these state-centric native title rights, *Ngāti Apa* ignores the formative influence of the doctrine of difference in structuring the colonial hierarchies between Māori and Crown. So, although a remarkable jurisprudential shift in favour of Māori rights, *Ngāti Apa*'s necessary reliance on a rights-based discourse may mean it does not fundamentally break from Vitoria's colonial legal structure.

The permeating influence of unjust colonial hierarchies in Aotearoa's legal discourse, however, may extend beyond *Ngāti Apa*. To investigate this claim, the next segment shall analyse the recent decision of *Wakatū* through a doctrine of difference. I chose this case because of its seemingly innovative conceptualisation of Māori-Crown relations as a fiduciary duty. The decision is also notable as it provides a judicial means for addressing an historical injustice – something usually resolved politically through the Treaty settlements process.

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[180] Glen Coulthard "Subjects of Empire: Indigenous Peoples and the Politics of Recognition in Colonial Contexts" (Research Paper, University of Toronto, 2006) at 13.
[181] Young, above n 29, at 147.
[182] See Young, above n 29, at 14, 18–19 for an elaboration on the problematic nature of anachronism in international legal discourse.

Whilst *Wakatū* represents a remarkable result for the specific Māori claimants, reinterpreting this case through the doctrine of difference reveals that the Court's reasoning relies on a normalising, rights-based discourse that may reproduce colonial manifestations of power.

B Wakatū

1 Factual context

The decision in *Wakatū* ushered in a new way of formulating Māori-Crown relations. A Supreme Court majority held that the Crown owed a fiduciary duty to reserve 15,100 acres for the benefit of the customary owners of land sold to the New Zealand Company.[183] The appeal revolved around the pre-Treaty purchase from iwi of 20 million acres of land by the New Zealand Company.[184] However, no land became alienable Crown land until native title was extinguished, either by the Crown exercising this pre-emption right, or through "determination by a Commissioner under the Land Claims Ordinance process that a pre-1840 purchase had been on equitable terms."[185] In this context, Commissioner Spain recommended that, provided the Company reserved one-tenths of the Nelson allotments for the benefit of Māori owners, as well as land occupied by Māori pa, urupā and cultivations, the sale would be valid as being on 'equitable terms'.[186]

The Spain award was the basis of the 1845 Crown grant to the Company under the same terms.[187] Importantly, after the grant, the Crown continued to manage the reserves in accordance with an 1840 agreement stipulating that it would assume responsibility for lands reserved for Māori in Company purchase deeds.[188] However, the tenths reserves were never identified and fully reserved.[189] By the time the reserves were vested in the Public Trustee in 1882, they had been substantially diminished by exchanges undertaken by the officials supposedly managing them.[190] It was the Crown's failure to reserve the 'tenths reserves' that

[183] At [1].
[184] At [108]. The New Zealand Company was "a private venture of systematic settlement in New Zealand."
[185] At [99].
[186] At [18].
[187] At [20].
[188] At [111].
[189] At [28]. The Reserves were not even statutorily regulated until 1856. See [29].
[190] At [31].

the appellants claimed was in breach of the fiduciary duties it owed to those reserves' beneficiaries.[191]

Speaking for the majority, Elias CJ held that "the circumstances meant that the Crown was subject to fiduciary duties owed to the Māori proprietors to observe the conditions on which the alienation was approved".[192] In ascertaining this, her Honour had substantial recourse to Canadian and Australian law, observing that the reasoning adopted therein "applies *a fortiori* to Māori interests in land."[193] Elias CJ then compared New Zealand native title rights with those in Canada. In New Zealand, they were "pre-existing rights of property which were exclusive and inalienable",[194] whereas in Canada native American land only became "unencumbered Crown property" via surrender to or extinguishment by the Crown under the Royal Proclamation 1763.[195]

Elias CJ relied on the Canadian case of *Guerin*[196] for the fact that this pre-surrender native right was "a pre-existing legal right" not created under any "Crown actions",[197] and therefore "sui generis".[198] Indeed, in *Guerin*, the Court held that it was in the "surrender requirement, and the responsibility it entails" to act for another's benefit that "the source of a distinct fiduciary obligation owed by the Crown to the Indians" was found.[199] Her Honour then deemed the approach taken by Brennan CJ in the Australian case of *Wik Peoples*[200] to be consistent with *Guerin*. Elias CJ cited *Wik* as finding that "a fiduciary duty may arise where the Crown is exercising discretionary powers […] on behalf of or for the benefit of others."[201]

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191 At [28]. The reserves were later subject of a Waitangi Tribunal claim, wherein the Crown accepted it had committed various breaches of Treaty principles in connection with the reserves. The iwi and Crown subsequently initiated a Treaty settlements process but, when the Crown refused to enter into "a distinct settlement of the Nelson tenths claims", negotiations foundered and these proceedings were brought in the High Court.
192 At [390].
193 At [340].
194 At [340].
195 At [341].
196 *Guerin v The Queen* [1984] 2 SCR 335.
197 At [345]. Citing *Guerin*, above n 196, at [378].
198 At [345]. Citing *Guerin*, above n 196, at [378].
199 At [348]. In *Guerin*, as the Indian Band's surrender had been on terms well known to the Crown, and the Crown failed to observe those terms, the Crown had breached its fiduciary duties to the Band.
200 *Wik Peoples v The State of Queensland* (1996) 187 CLR 1.
201 At [365].

On this basis, Elias CJ found that this *Guerin* approach was sufficient to position the Crown as fiduciary.[202] The alienation of Māori property via the Land Claims process occurred "on terms which could only be fulfilled by the Crown", and which necessitated "assumption of responsibility to act in the interests of Māori whose interests were surrendered."[203] The Court buttressed this responsibility with reference to the Treaty,[204] and obiter statements that extinguishment of native title "by less than fair conduct or on less than fair terms" was likely to constitute "a breach of fiduciary duty…falling on the colonising power."[205] Her Honour analogised the Land Claims process with the surrender in *Guerin* and found that in both cases there was a sui generis relationship wherein "the Crown undertook control of the surrender of existing interests of property it had undertaken to protect."[206] Therefore, where the 'equitable terms' of purchase included exclusion of land "intended to be retained in [Māori] possession and control" and the Crown "obtained exclusive authority over the land when it was cleared of native title", this created "conditions of dependence and obligation"[207] and "a relationship of power"[208] in which the Crown owed fiduciary duties to the Māori proprietors. However, the Court emphasised that "none of this is to suggest that there is a fiduciary duty at large owed by the Crown to Māori."[209]

2 Responses

Wakatū is undoubtedly a positive development in terms of providing some measure of justice to the descendants of Māori owners of confiscated land. Viewed through the doctrine of difference, however, a fiduciary model may have unintended ramifications. In this way, although Elias CJ posited that "this is not a claim based on native title",[210] the court's reasoning may function to naturalise the doctrine of difference embodied in a rights-discourse and thereby continue to universalise the colonial legality of the state.

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202 At [366].
203 At [366].
204 At [381].
205 At [381]. Citing *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA).
206 At [384].
207 At [388].
208 At [391].
209 At [391].
210 At [344].

David Williams argues that the fiduciary duty in *Wakatū* constitutes a "modern development to provide justice on the actual facts of the case rather than an ongoing application of colonialist paradigms".[211] He contends that the Supreme Court has "stripped away the historical encumbrances of 19th Century reasoning" and adapted Canadian doctrines to meet contemporary local circumstances.[212] Similarly, Dwight Newman argues that the Court's use of "transnational legal materials" has "transformative potential"[213] to "open up different options" so that the court could "develop a remedy in some complex historical circumstances."[214] In this way, Newman urges for a transnational dialogue whereby settler-state jurisdictions learn and borrow successful rules from each other, and thus elaborate on "what the past incorporation of Indigenous peoples into democratic states means for just approaches today."[215]

However, the act of borrowing from other settler-states' native title jurisprudence may reinvest in the colonial hierarchies of discovery. In assuming that rights-discourse from other common law jurisdictions "applies a fortiori" to Māori relationships with land, the Court imported the historically contingent legalities of foreign states. This homogenises these countries' relationships with Indigenous people and thus applies the same approaches to distinctive socio-political circumstances. Doing so means that the particular hierarchies and notions of justice that have structured these foreign states' dealings with Indigenous people may be imposed on Māori, thereby displacing Māori communities' particular legalities and New Zealand's unique Treaty jurisprudence. Transplanting overseas law also re-legitimises the state sovereignty constructed by the violent dynamics of discovery, concealing the historical strategies of dispossession employed. Therefore, even if it provides a just result for a specific party, upholding transnational jurisprudence as the answer to enduring inequities may re-entrench the colonial hierarchies that operated to subordinate Māori in the original collisions of discovery.

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211 Williams, above n 152, at 40.
212 Williams, above n 212, at 45.
213 Dwight Newman "*Wakatū* and Transnational Dimensions of Indigenous Rights Discourse" (2019) NZLR 61 at X.
214 Newman, above n 214, at 67.
215 Newman, above n 214, at .

Furthermore, the Court's finding that Māori proprietary relationships were "pre-existing rights of property"[216] may, as elaborated in terms of *Ngāti Apa*, reinforce a doctrine of difference. It is an anachronistic interpretation that, by naturalising 'native title rights' elides the possibility that Māori legalities do not translate into this state-centric concept. Such displacement is especially likely if the court relies on de-contextualised international authorities. Therefore, there is a danger that characterising rights as "pre-existing" universalises the state, normalising Māori within it. This is not to conclude that *Wakatū* came to the wrong result, but that it is necessarily constrained by the rights-based legal model under which it operates. Indeed, "the court is not free to adopt laws consistent with contemporary justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency."[217]

It was on these foundations that *Wakatū* situated the rights-discourse of native title within a fiduciary relationship. Elias CJ cited *Guerin*'s endorsement of Weinrib's view that "the hallmark of a fiduciary relation is that […] one party is at the mercy of the other's discretion."[218] Endowing the Crown with such discretionary powers over the Māori interests dispenses an unequal entitlement to power. Whilst the language of Māori "dependence" and Crown "obligation"[219] following Crown "assumption of responsibility in respect of the tenths reserves"[220] may make sense in terms of securing a just outcome in the particular circumstances of this case, it has worrying implications for the future of Māori-Crown relations. A fiduciary analysis is ultimately grounded in a relationship where one party assumed control of another's affairs, so may reinforce conceptualisations of Māori as lacking agency and perpetuate a "paternalistic and constitutionally immoral power structure."[221] This language of "power and dependency,"[222] appears to reproduce the unequal discovery hierarchies set down in *Cherokee* where the Native Americans' relation to the United States was held to "resemble[] that of a ward to his guardian."[223] The "infantilising implications"[224] of such Māori dependency,

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216 At [340].
217 *Mabo v The State of Queensland* (No 2) (1992) 175 CLR 1 at [29].
218 At [349].
219 At [388].
220 At [366].
221 Newman, above n 214, at 74.
222 *Wakatū*, above n 183, at [391].
223 *Cherokee Nation v Georgia* 30 US 1 (1831).
224 Nicole Roughan "Public/Private Distortions and State-Indigenous Fiduciary Relationships" NZLR 9 at 28.

moreover, appear to undermine the fundamental Treaty principle of a "partnership" between Māori and the Crown.[225]

Thus, by constructing Māori land relationships as 'native title rights', and then obligating the state to assume responsibility over those rights, *Wakatū* may be enacting the same doctrine of difference as Vitoria. As Indigenous violations of Vitoria's "Eurocentrically constructed natural law" obligated European colonising powers to intervene,[226] so does a fiduciary duty involve a conferral of obligation and power in the state that operates to normalise Māori within it. Admittedly, a fiduciary duty may temper the unilateral capacity of Crown extinguishment attendant on a rights-discourse by ensuring that, when the Crown assumes power over Māori, it exercises that power in a way that protects existing Māori interests. In this way, it amends the rights-discourse by maintaining the land's aberrancy as native title and thus militating against extinguishment and full normalisation. However, it continues to operate on assumptions of anachronistic native title, universalising pre-emption, and unequal power structures that maintain underlying colonial paradigms.

Having demonstrated that a colonial structure remains embedded within a rights-based approach to legality, it appears that discovery foundations of New Zealand's law must be displaced through different means. I shall therefore now turn to examine potential alternatives to legal approaches to Crown-Māori relations, specifically: the internationally-based right-discourse of human rights and the agonistic encounter of legal personhood. Perhaps through these legal mechanisms, the saturating colonial structure of our Eurocentric legality can be ruptured, enabling substantive moves towards de-colonisation.

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[225] *New Zealand Māori Council v Attorney-General* [1986]. Notably, Treaty principles are not mentioned in *Wakatū*, despite the Court acknowledging that the Crown's obligations are "amplified by" the recognition of Māori property in the Treaty. See *Wakatū*, above n X165 at [385].
[226] Anghie, above n 6, at 9.

CHAPTER THREE: THE DUAL NARRATIVES OF INTERNATIONAL INDIGENOUS RIGHTS

I Introduction

The rise of international Indigenous rights in recent decades has been upheld as evidence that "international law, although once an instrument of colonialism, has developed […] however grudgingly or imperfectly, to support indigenous peoples' demands."[227] Recognised in the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*'),[228] Indigenous rights draw attention to the "pathologies" produced by the international legal order.[229] Through offering an *internationally*-based rights-discourse, Indigenous rights could be viewed as an emancipatory alternative to the *state*-based rights-discourse of native title. However, this chapter shall build on Young's sustained critique to demonstrate that human rights may perpetuate the same doctrine of difference.[230]

II UNDRIP

The endorsement by the United Nations General Assembly of *UNDRIP* in 2007 was a "jurisgenerative moment" in the development of Indigenous rights.[231] It recognised Indigenous peoples' pursuit of international personality and their many political demands.[232] On this basis, it appears open to assume that, where states recognise these rights, Indigenous peoples will be able rely on them to control how non-Indigenous laws will affect them, and uphold their legality.[233]

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[227] S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004) at 4, 291.
[228] *United Nations Declaration on the Rights of Indigenous Peoples*, UN GAOR, 61st sess, 107th mtg, UN Doc A/61/L.67 (13 September 2007) ('*UNDRIP*').
[229] Patrick Macklem, *The Sovereignty of Human Rights* (New York: Oxford University Press) at 64.
[230] Young, above n 29.
[231] Kirsten A Carpenter and Angela R Riley, "Indigenous Peoples and the Jurisgenerative Moment in Human Rights" (2014) 102 *California Law Review* 173.
[232] Young, above n 29, at 5. Chief among these demands was that states should seek Indigenous peoples' free, prior and informed consent ('FPIC') when non-Indigenous peoples' decisions will affect them, their territories or their ways of life. See *UNDRIP* arts 10, 11, 19, 28, 29, 32.
[233] Young, above n 29, at 7.

However, several states initially voted against endorsing *UNDRIP* as they viewed Indigenous peoples' right to self-determination as endangering state sovereignty.[234] These states were the western settler-states: Canada, Australia, New Zealand, and the United States.[235] Indeed, New Zealand is anxious to insulate Treaty jurisprudence from the power redistributions enacted by Indigenous rights claims.[236]

Since New Zealand's endorsement of *UNDRIP*, judicial references to it have incrementally increased.[237] Although human rights are yet to affect substantive legal argument, they should be considered as a possible future alternative for Māori. Hence, the next sections shall interrogate the emancipatory potential and possible critiques of Māori claiming Indigenous rights.

III An Emancipatory Potential

Communities claiming human rights anticipate that their realisation will safeguard those communities' rights to land, culture and self-determination[238] that they have been

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[234] Cathal Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge, 2015) 160.

[235] All four states have subsequently 'endorsed' *UNDRIP* but emphasised they did not consider it "a suitable basis for the development of a binding treaty." Kirsty Gover, "Settler–State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous peoples" (2015) *The European Journal of International Law* 26(2), 355.

[236] Gover explains this hesitant endorsement in terms of the CANZUS states' settler-state constitutionalism. She argues that international Indigenous rights may be viewed as irreconcilable with "the processes and structures used by settler states to settle indigenous claims domestically," as "indigenous claims to property and self-governance are not channelled through human rights provisions […] but, rather, through distinctive political and legal mechanisms developed to facilitate state-indigenous inter-governmentalism." Although it is quite feasible that CANZUS states remain cognizant of insulating these "network of reciprocal trade-offs and compromises" from "competing claims based on rights originating outside of that matrix", I would affirm Gover's view that their aversion to UNDRIP stems primarily from a desire to protect state monopoly on power. Consequently, Treaty jurisprudence that borrows from international law can remain firmly couched in a discourse of discovery and dispossession. See Gover, above n 235.

[237] In *Takamore v Clarke* [2013] 2 NZLR 733, Elias CJ used UNDRIP only to emphasise the significance attributed to repatriation of the dead by many Indigenous peoples. However, the outcome in Takamore falls especially short of the Declaration's articles on Indigenous peoples' right to self-determination in that tikanga is held to be merely a factor to be balanced amongst others. UNDRIP was cited with similar brevity by Elias CJ in *Paki v Attorney-General* [2015] 1 NZLR 67, in support of a preference for providing restitutionary remedies where possible, and in obiter statements regarding potential equitable duties owed by the Crown to Māori. Then in *Wakatu*, Elias CJ used UNDRIP as a "clear legal source", as the fact that a particular approach to the law would be "difficult to reconcile" with UNDRIP becomes a reason against that approach.

[238] Young, above n 29, at 10.

entitled to "since time immemorial."[239] Macklem and Doyle provide two accounts of the de-colonising potential of an *internationally*-based rights-discourse.

Macklem aims to demonstrate how human rights distribute justice as legal concepts, acquiring validity from the positivist international legal order from which they originate.[240] Unlike other norms of international law, Macklem hypothesises that human rights "vest rights in individuals and collectivities not necessarily coextensive with the population of States."[241] Importantly, Macklem then asserts that, as exclusively legal instruments, human rights claims "monitor the structure and operation of the international legal order"[242] and thereby "require the international legal order to attend to pathologies of its own making."[243] As a result, human rights "mobilize critical judgment" and "impose obligations on sovereign […] actors to exercise the authority they receive from international law in ways that respect the rights of all."[244]

For Macklem, then, human rights serve as a corrective to state deployments of "coercive power" on which international law confers validity by affirming them as "state sovereignty."[245] As part of this process, international law also distributes power to states in a manner that effaces Indigenous self-determination. This elision leads to various "pathological effects", which Macklem leaves undefined.[246] In this context, human rights' emancipatory potential ostensibly resides in "their capacity to mitigate adverse consequences that arise from the structure and operation of international law" by redistributing justice within states or, at least, by foregrounding instances of injustice.[247] For example, should Māori claim *UNDRIP* rights which the New Zealand state refuses to enforce, those claims will create controversy and impugn international law's foundational distribution of power in states, so that state and international law lose legitimacy. Unlike a state-based rights-discourse, human rights thus

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[239] Erica-Irene A Daes, "The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal" in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 37.
[240] Macklem, above n 229, at 18.
[241] Macklem, above n 229, at 22.
[242] Macklem, above n 229, at 25.
[243] Macklem, above n 229, at 22.
[244] Macklem, above n 229, at 1.
[245] Macklem, above n 229, at 29.
[246] Macklem, above n 229, at 40.
[247] Macklem, above n 229, at 45.

appear as effective vehicles for contesting the universality of colonial structures of legality and calling attention to the disjunction between the realities of Treaty jurisprudence and promised tino rangatiratanga.[248] Hence, an internationally-based rights-discourse can at least foreground the unjust configurations of power instantiated by international law, whilst a state-based rights-discourse cannot be remain blindly trapped within them.

In contrast to Macklem's positivistic foundations, Doyle identifies the roots of Indigenous rights, "in conceptions of inherent rights premised on natural law."[249] He aims to examine the role which "the consent requirement played in the legitimization of title to territory and sovereignty" under international law.[250] Doyle concentrates on the right of "free, prior and informed consent" ("FPIC")[251] and highlights that the *free*, *prior* and *informed* elements are safeguards of consent "which indigenous peoples themselves define and use to protect their […] rights to sovereignty and self-determination."[252] Therefore, Doyle sees human rights as conferring on Indigenous peoples the capacity to themselves decide how to live independently as a community. From this position, he asserts that states' recognition of human rights like FPIC will provide Indigenous peoples with the "'philosophical space' within which they can continue to construct their own perspectives and worldviews."[253]

Paramount to Doyle's thesis is his assertion that the colonial encounter was central to international law's formation.[254] Doyle evaluates this encounter through consent to demonstrate that rights are grounded in the self-determination of Indigenous peoples articulated by Spanish theological scholars like Vitoria.[255] Under this approach, the original colonial agreements were briefly defined by a "genuine rights-based conception of consent",[256] which soon degenerated into a "rights-constraining colonial legal doctrine".[257] This rights-constraining doctrine was defined by power inequalities that enabled Europeans to define

[248] See Chapter 2 on the Treaty of Waitangi.
[249] Doyle, above n 234, at 16.
[250] Doyle, above n 234, at 5.
[251] See *UNDRIP* arts 10, 11, 19, 28, 29, 32.
[252] Doyle, above n 234, at 135.
[253] Doyle, above n 234, at 267.
[254] Doyle, above n 234, at 14.
[255] Doyle, above n 234, at 15.
[256] Doyle, above n 234, at 7.
[257] Doyle, above n 234, at 6.

'consent' as they pleased.[258] Therefore, Doyle insists that Indigenous claims to self-determination are instead situated within a "rights-based framework."[259] This framework will ensure that implementing *UNDRIP* rights "draws on indigenous perspectives"[260] and operates according to "their self-chosen and autonomously managed decision-making processes" and legalities.[261] The prospect of Māori claiming human rights under Doyle's model therefore presents the emancipatory possibility of restoring parity in Māori-Crown relations. Establishing such a rights-based conception of consent predicated on self-determination should, under this view, create a spatial defence against the universalising encroachment of discovery norms unlike the inescapable imbrication within them of a state-based rights-discourse.

IV Critiques of Human Rights

However, these oft-exalted human rights harbour a dark underbelly.[262] Building on Young's critique of Doyle, I shall argue that advocates of Indigenous rights may, in presenting Māori communities' demands as international rights, unintentionally perpetuate the integrationist logic of the doctrine of difference.[263]

Like a state-based rights-discourse, claiming Indigenous rights may, counterintuitively, enact a legality that perpetuates the subordinating hierarchies of colonialism. Central to this unequal structure of power is the process whereby claimants of Indigenous rights must transform themselves to be identifiable as 'Indigenous peoples'.[264] Young highlights that the particular identifier 'Indigenous peoples' only materialised in the 1980s, so peoples like Māori could not have invoked any such self-determination right, itself a 20th Century creation,[265]

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[258] Doyle, above n 234, at xiii.
[259] Doyle, above n 234, at 5.
[260] Doyle, above n 234, at 6.
[261] Doyle, above n 234, at 16.
[262] The literature critiquing human rights is vast. See, e.g., Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20(1) *Constellations* 51–67; Costas Douzinas, 'The End(s) of Human Rights' (2002) 26(2) *Melbourne University Law Review* 445–64; Wendy Brown, '"The Most We Can Hope for …": Human Rights and the Politics of Fatalism' (2004) 103(2/3) *South Atlantic Quarterly* 451; Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2014) 77 *Law and Contemporary Problems* 147.
[263] Young, above n 29, at 35.
[264] Young, above n 29, at 3.
[265] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

before then.[266] Moreover, to be viewed as an 'authentic' Indigenous person, such communities often must cast themselves as pure protectors of nature, a form of displacing essentialisation that Sissons describes as "oppressive authenticity."[267]

By way of illustration, Daes' argument that "Indigenous peoples have been entitled to a right of self-determination since time immemorial,"[268] represents an anachronistic statement that constructs the grouping of 'Indigenous people' as natural.[269] As 'Indigenous peoples' are upheld as international actors, this anachronism may also frame international law as a natural configuration of power, thereby eliding the imperialist violence of discovery processes. Moreover, this naturalisation process may, instead of displacing discovery, displace the specific histories of iwi when they re-identify as Indigenous peoples.

Therefore, the tendency of the internationally-based rights-discourse of human rights to uphold Indigenous peoples as natural subjects means that it fails to recognise that re-identification as Indigenous peoples requires conformity with the international and state legal discourses, such as the doctrine of discovery, that already define and saturate the meaning of 'Indigenous peoples.' The rights-based discourse of Indigenous rights thus elides the way in which communities claiming Indigenous rights are vulnerable to the pre-regulating structures of power operating within that discourse. Hence, despite the potential of Indigenous rights to call attention to pathologies in the international legal system, absent from the vocabulary of scholars invoking them is the way in which the doctrine of discovery, as a formative driver of international legal discourse, has in fact produced the Indigenous peoples who now claim rights against the state.[270]

In this context, Young argues that, although "normatively appealing,"[271] Doyle's deployment of a rights-based discourse "insufficiently credit[s]" the way in which the

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[266] Young provides a comprehensive history of the emergence of 'Indigenous peoples' as international legal subjects. Young, above n 29, at 60–122.
[267] Jeffrey Sissons, *First Peoples. Indigenous Cultures and Their Futures* (Reaktion Books, 2005) 37–59.
[268] Erica-Irene A Daes, "The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal" in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 37.
[269] Young, above n 29, at 18.
[270] Young, above n 29, at 47.
[271] Young, above n 29, at 147.

international law processes of discovery have been central in creating the power structures of state-Indigenous relations.[272] He substantiates this claim in three parts. Firstly, Young asserts that Doyle treats Indigenous peoples as "natural pre-legal subjects" rather than historically contingent subjects constructed by international law, such as processes of discovery. As alluded to above, doing so "underestimate[s] the demands" imposed on these communities to identify as Indigenous peoples.[273] Second, by upholding human rights as "the re-emergence of natural rights", Doyle treats these "rights as natural, neutral and idealised objects that Indigenous peoples imbue with their own content."[274] But by naturalising a rights-based discourse, Doyle ignores "the powers at work in constructing and reproducing legal hierarchies through legal discourses"[275] such as the doctrine of discovery.

Thirdly, Young explains that, in seeking to realise an emancipatory "philosophical space" for Indigenous peoples through a rights-based discourse, Doyle "inserts Indigenous peoples and their rights within a discourse that already structures, shapes and limits how those rights are understandable."[276] By failing to appreciate that Indigenous peoples are subjects of international legal discourse, Doyle may therefore be "restaging a dynamic of difference".[277] In upholding human rights as universal and Indigenous peoples as "civilised and sovereign", terms defined through the Eurocentric lens of international law, communities like Māori are encouraged to insert themselves into the human rights discourse in a way that normalises them as "willing legal subjects".[278] Therefore, in claiming human rights, communities like Māori will be brought within a legality that has long operated to dispossess them.[279] As a result of this normalisation, international legal discourse may continue to universalise itself, thereby re-constructing the hierarchies of international law inaugurated by the doctrine of discovery. As Jennifer Beard attests, "colonized subjects are required both materially and politically to bring themselves into subjection to Empire, 'not to make themselves equal' […] but rather to

[272] Young, above n 29, at 150.
[273] At 147–8.
[274] At 148.
[275] At 148.
[276] At 150.
[277] At 151. Citing Anghie, above n 6, at 4.
[278] At 151.
[279] At 151.

maintain recognition by an international audience that promises salvation."[280] This promise of salvation may, instead of re-centring Māori legality, privilege a colonial structure of legality that displaces Māori forms of life.

For instance, Macklem's insistence on situating human rights within a positivist framework means that, even if justice is redistributed within states, this 'justice' is structured and defined by the terms of international legal discourse. Therefore, international law's configuration of power is re-legitimated, and Māori would not be empowered to express justice in and under their own terms. International law predicated on discovery processes thereby further saturates Māori conceptions of law and justice, meaning that European law continues to totalise all forms of legitimate legality. Claiming Indigenous rights might thus reproduce the universalising dynamic of the doctrine of discovery.

Indeed, advancing a rights-based discourse like Doyle's may enable momentary 'wins' for Indigenous people against the state, but simultaneously position state-sanctioned resistance as the only possible alternative. As Patrick Glenn asserts, human rights "emerge not in opposition to the state […] but as the sole, approved means of resistance [which is] entirely consistent with an ongoing, imperial constitutional structure."[281] Hence, by claiming international Indigenous rights, Māori may become further entrenched in their position as subjects of the state, and, in doing so, seek to be protected by the legal institution *from* which they originally desired protection.

V Conclusion

In sum, human rights claims have the emancipatory potential to redistribute justice within states and to restore parity in state-Indigenous relationships by providing a consent-based "philosophical space" of self-determination. However, Indigenous rights may also be

[280] Jennifer L Beard, *The Political Economy of Desire: International Law, Development and the Nation State* (Routledge, 2007) at 27.
[281] H Patrick Glenn, "The Three Ironies of the UN Declaration on the Rights of Indigenous Peoples" in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 176-7.

complicit in a kind of "cruel optimism" – a relation where one's object of desire is in fact an obstacle of one's flourishing – that reproduces the colonial legal mechanisms of the past.[282]

Therefore, it may be preferable to enable Māori communities to develop their own political and legal strategies unconstrained by the universalising and regulatory tendencies of a rights-based discourse. The next chapter shall explore the creation of legal personhood for the natural environment as another alternative for displacing New Zealand's colonial legal structure. Unlike the legal models previously discussed, personhood appears to facilitate political contestation between Māori and European legalities. Perhaps it is through this political model of legality that we can maintain a valuable tension between the competing narratives of state legitimacy and thereby expose the non-universality of colonial legality. Doing so may begin to initiate a decolonising process characteristic of true Māori-Crown partnership.

[282] Lauren Berlant, *Cruel Optimism* (Duke University Press, 2011) at 1.

CHAPTER FOUR: THE POLITICS OF LEGAL PERSONHOOD

I Introduction

Extolled as a "world-leading piece of legislation",[283] the Te Urewera Act 2014 paved a new way forward for Māori-Crown relations. The legislation recognised the former Te Urewera National Park as a "legal entity" possessing "all the rights, powers, duties, and liabilities of a legal person."[284] Te Urewera thus gained "an independent existence as a self-owning entity under the law."[285] The enactment of Te Urewera as a 'legal person' was then followed by the vesting of legal personhood in Te Awa Tupua (the Whanganui River) in 2017.[286] Focusing on Te Urewera, this chapter shall evaluate legal personhood as another alternative to the colonial structure of the doctrine of difference reproduced in the common law and human rights claims. Unlike those legal avenues, personhood facilitates an encounter between Māori and European legalities predicated on an agonistic and pluralistic political model that generates contestation through negotiation. However, it is possible that even this innovative legal body remains vulnerable to co-option by state and international law.

I have chosen to concentrate on the Te Urewera personhood settlement as it purports to reconcile the Treaty claims of Ngāi Tūhoe, an iwi that has experienced the worst ravages of settler colonialism.[287] Tūhoe's traditional lands centre on the rugged, inaccessible forests of Te Urewera.[288] Encircled by imposing mountains and fast-flowing rivers, Tūhoe were long isolated from Pākehā settlement, and cultivated a distinctive way of life underpinned by a place-based philosophy of *mana motuhake*.[289] Tūhoe did not sign the Treaty of Waitangi, although they were conscious of it and what it represented.[290] Consequently, Tūhoe's

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[283] Rawinia Higgins, "Ko te mana tuatoru, ko te mana motuhake." In Mark Hickford and Carwyn Jones (eds) *Indigenous Peoples and the State. International Perspectives on the Treaty of Waitangi* (2019) 135.
[284] Te Urewera Act 2014, s 11(1).
[285] Andrew Geddis and Jacinta Ruru "Places as Persons: Creating a New Framework for Māori-Crown Relations" *Forthcoming in Jason Varuhas (ed), "The Frontiers of Public Law" (Hart Publishing, 2019)*. It is deemed to be the holder of its own rights able to be asserted in legal proceedings.
[286] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. Then in late 2017, the Crown and Taranaki Māori signed a record of understanding that Parliament will in future legislate to grant Mount Taranaki/Mount Egmont legal personhood. See Te Anga Pūtakerongo – Record of Understanding.
[287] Judith Binney *Encircled Lands: Te Urewera, 1820–1921* (Wellington, Bridget Williams Books, 2009).
[288] Rangi McGarvey, "Ngāi Tūhoe – The land and environment", Te Ara – the Encyclopedia of New Zealand http://www.TeAra.govt.nz/en/ngai-tuhoe/page-3 (accessed 26 September 2019).
[289] McGarvey, above n 288.
[290] Higgins, above n 283, at 135.

engagements with the Crown have been premised not necessarily on a desire that the Treaty be honoured, but "as a vehicle to ensure that *te mana motuhake o Tūhoe* is recognised."[291] Mana motuhake is classically defined as "autonomy or independence".[292] However, Higgins emphasises that, for Tūhoe, mana motuhake "is not about separatism or anarchy against the State, but rather [Tūhoe's] interdependence with others" as realised through relationships with people and the land and expressed as Tūhoetanga.[293] Tūhoe's approach to negotiations with the Crown thus emerges as a salient example of Māori working against the assimilatory logic of the state and seeking to practice their traditional forms of life under their own terms.

Hence, the legal personhood entity created as part of Tūhoe's Treaty settlement provides an example of a nascent possibility for displacing the colonial structures embedded within New Zealand's legal system. The "principled compromise" of "recognising places-as-persons"[294] exemplified in the formation of Te Urewera appears to depart from the normalising rights-granting mechanisms driving the doctrine of difference in the common law. Nonetheless, we must remain attentive to any acts of translation that may continue to subsume Tūhoe relationships with land into Eurocentrically recognisable discourse, such as claims co-opting personhood for human rights or 'rights-of-nature.'

II A History of Discovery and Dispute in Te Urewera

Te Urewera was the last "major bastion of Māori de-facto autonomy."[295] However, since 1840, imported colonial law has operated to "incrementally undermine[] Urewera self-government" through the processes of discovery.[296] Although Tūhoe rangatira did not sign the Treaty in 1840, the Crown deemed itself to have assumed sovereignty over their territory.[297] This unilateral declaration of sovereignty was a cardinal application of discovery as Crown

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[291] Higgins, above n 283, at 130.
[292] Mason Durie *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) at 220. It has much in common with the tino rangatiratanga enshrined in Te Tiriti, but "more strongly emphasises independence from the state and crown and implies a measure of defiance." In the many Tūhoe negotiations for mana motuhake, then, "resistance to hegemony" assumes prominence as "a key objective." See Higgins, above n 283, at 130.
[293] Higgins, above n 283, at 138.
[294] Geddis and Ruru, above n 285, at 4.
[295] Richard Boast *Buying the Land, Selling the Land – Governments and Māori Land in the North Island 1865–1921* (Victoria University Press, Wellington, 2008) at 202.
[296] Vincent O'Malley, "Tūhoe-Crown Settlement – historical background." [2014] *Maori Law Review*.
[297] Waitangi Tribunal, Te Urewera Pre-publication Report, Part 1, Sec. 3.3.

imperium over Te Urewera was established without Tūhoe consent. From the mid-1860s, Te Urewera was subject to "repeated and brutal invasions"[298] and scorched earth campaignsto capture Māori dissidents.[299]

Exhausted by these waves of violence, in 1871 Tūhoe rangatira reached an agreement with the Government in which the Crown undertook to respect Tūhoe's rohe pōtae (internal autonomy).[300] However, the rohe pōtae promised was steadily eroded as "colonisation became largely a matter of legal procedure rather than military might."[301] These military incursions and the Crown's subsequent dismissal of the 1871 agreement as "merely a temporary expedient at a time of war" were governed by a discovery hierarchy of state sovereignty. In this way, the Crown proceeded to pursue a "prime objective" in Te Urewera of land sales.[302] The Crown exploited "indebtedness" as a "key tool for prising open the district"[303] by making surreptitious advances to impoverished Tūhoe individuals that had to be repaid in land.[304] Despite resistance, the relentless Crown drive for alienation and individualisation of land rendered Tūhoe "deeply vulnerable to rifts and infighting prompted by land disputes."[305]

Increasing tensions then triggered the Urewera District Native Reserve Act 1896 which stipulated that Tūhoe's internal autonomy would be protected and their lands not channelled through the Native Land Court, provided that Tūhoe assent to an "alternative title investigation process" and recognise the Crown's ultimate authority.[306] However, the Urewera Commission created under the legislation effectively functioned as the Native Land Court: to dispossess.[307] In this way, relationships with land under Tūhoetanga were demarcated by the Crown as aberrant under the common law. Their communal and non-marketised nature meant they departed from British notions of autonomous individuality. They were only rendered

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[298] Binney, above n 287, at 68.
[299] Waitangi Tribunal, above n 297, at Part 1, Sec. 5.5.
[300] O'Malley, above n 296.
[301] O'Malley, above n 296.
[302] O'Malley, above n 296.
[303] Waitangi Tribunal, above n 287, at Part 2, Sec. 10.4.
[304] O'Malley, above n 296.
[305] Binney, above n 287, at 329.
[306] Waitangi Tribunal, above n 297, at Part 2, Sec. 9.5
[307] O'Malley, above n 296.

intelligible within legal discourse, and thus normalised within the state, when translated into individualised, alienable title.

Indeed, in opposition to Tūhoe wishes, the 1896 Act reserved the right to purchase land solely in the Crown, thereby reasserting the Crown's universalising pre-emption right.[308] And then, in 1910, the Government took the extraordinary step of contravening its own laws by purchasing land interests directly from individuals,[309] illustrating the arbitrary construction of native title. The Government then repealed the 1896 Act and enacted The Urewera Lands Act of 1921-22 which authorised the translation of scattered Crown interests into full ownership.[310] Consequently, Tūhoe were left with only 16 per cent of Urewera Reserve, the majority of which was 'unsuited to settlement or economic development."[311] Hence, many Tūhoe moved elsewhere for employment opportunities, an exodus compounded by the further restrictions imposed on access to customary resources when Te Urewera was declared a National Park in 1954.[312] This process occurred without consulting Tūhoe or recognising Tūhoe as having any special interest in the park.[313] The result is that today approximately 85 per cent of Tūhoe live outside Te Urewera and many of those who remain "suffer from socio-economic deprivation of a severe nature."[314]

Hence, the legal history of Tūhoe and Te Urewera is defined by a "determined Crown assault on Te Urewera reserve lands",[315] effected through a predatory, and often illegal, purchasing campaign.[316] For these reasons, the Waitangi Tribunal concluded that the National Park was established in breach of the Treaty and recommended title be returned to Tūhoe, and the park jointly managed by Tūhoe and the Crown.[317] As all native title "had been systematically extinguished" through the processes of land purchase and alienation, Tūhoe

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[308] O'Malley, above n 296.
[309] Waitangi Tribunal, above n 297, at Part 3, Sec. 13.7
[310] O'Malley, above n 296. Through these developments, any residual Tūhoe autonomy was categorically extinguished.
[311] Tūhoe Claims Settlement Act 2014, s 8(9).
[312] O'Malley; Tūhoe Claims Settlement Act 2014, s 8(10).
[313] Tūhoe Claims Settlement Act 2014, s 8(10).
[314] Tūhoe Claims Settlement Act 2014, s 8(11).
[315] Waitangi Tribunal, "Te Urewera Part III" (Wai 894, 2012) Letter of Transmittal, 19 October 2012.
[316] Waitangi Tribunal, above n 315, at 482. See generally Richard Boast, *Buying the Land, Selling the Land. Governments and Maori Land in the North Island 1865-1921* (Victoria University Press 2008) 416-22.
[317] Waitangi Tribunal, above n 315, at 890.

could not claim a right of native title.[318] Historicising the Tūhoe-Crown relationship in this way demonstrates that, for Tūhoe, law was not an instrument of emancipation but one of profound violence. Hence, the creation of legal personhood took place within a context of political contestation that required patient negotiation. It is to the resulting personhood legislation that I now turn.

III Breaking The Stalemate

Following protracted disputes surrounding Crown refusal to transfer ownership of Te Urewera to Tūhoe,[319] the parties reached a compromise: the granting of legal personhood to Te Urewera.[320] This was given effect to through the Tūhoe Claims Settlement Act 2014 and Te Urewera Act 2014.[321] Reconceptualising Te Urewera as a legal person therefore provided "a mutually satisfactory solution" to a pernicious deadlock, but nonetheless failed to return Te Urewera to Tūhoe ownership and break from the foundational structure of Crown sovereignty.[322]

The unprecedent personhood compromise generated prolific media[323] and academic[324] interest. Personhood "recognises the way in which Māori […] conceive of and relate to" place.[325] Te Urewera Act first explicates the personhood entity, defining Urewera's tikanga-centred ethos in section 3.[326]

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[318] Sanders, above n 117, at 215.
[319] For extensive analysis of the negotiation process, see Rawinia Higgins, "Tūhoe-Crown settlement – Te Wharehou o Tūhoe: The house that 'we' built" *Maori Law Review* [2014]
[320] S Warren, "Whanganui River and Te Urewera Treaty Settlements: Innovative Developments for the Practice of Rangatiratanga in Resource Management", Thesis submitted to Victoria University of Wellington in fulfilment of the requirements for the degree of Master of New Zealand Studies (2016) 66, available at http://researcharchive.vuw.ac.nz/handle/10063/6198.
[321] Geddis and Ruru, above n 285, at 11.
[322] Geddis and Ruru, above n 285, at 5.
[323] Kennedy Warne "A Voice for Nature" (April 2009) National Geographic https://www.nationalgeographic.com/culture/2019/04/maori-river-in-new-zealand-is-a-legal-person/?fbclid=IwAR1VIHaB5LW6d69nzfBvlV8FgEIuf23SQCNI5AfHN8Nb4oxf7ZIhHjQ8HYA
[324] See Abigail Hutchison, 'Whanganui River as a Legal Person' (2014) 39 *Alternative Law Journal* 179; CJ Iorns Magallanes, 'Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand' (September 2015) 22 *VertigO – La Revue Électronique en Sciences de l'Environnement,* available at https://vertigo.revues.org/16199; Gwendolyn Gordon, 'Environmental Personhood' (2018) 43 *Columbia Journal of Environmental Law* 49; Liz Charpleix, 'The Whanganui River as Te Awa Tupua: Place-based Law in a Legally Pluralistic Society' (2018) 184 *Geographic Journal* 19.
[325] Geddis and Ruru, above n 285, at 3.
[326] Namely, the Act sets out that "Te Urewera is ancient and enduring", "a place of spiritual value, with its own mana and mauri", and "has an identity in and of itself, inspiring people to commit to its care." The Act also

However, Parliament has "mandated that Te Urewera retain a particular teleology."[327] Hence, Te Urewera's powers must be exercised "in the manner provided for in this Act."[328] For example, Te Urewera cannot charge non-commercial users for access, as the legislation "provide[s] for Te Urewera as a place for public use and enjoyment".[329] Furthermore, the Act emphasises that the general laws of New Zealand continue to apply to and within the entity.[330] The state has thus re-asserted its underlying authority to "determine property rights",[331] in a way that continues to dilute mana motuhake. The entity is therefore situated within the regulating discovery powers of underlying state sovereignty which potentially limits its emancipatory capacity.

The Act then establishes the guardianship structure of a Board,[332] that acts on behalf of Te Urewera.[333] This authority is exercised primarily by preparing and approving a management plan for Te Urewera,[334] Importantly, this Board comprises nine members: six Tūhoe-appointed and three Crown-appointed.[335] When making decisions: (a) the Board must initially seek unanimity; (b) if this is not possible then a decision by consensus must be sought; (c) If this is not possible then the Board Chair may initiate mediation to try and reach consensus; (d) and, if this is unattainable, a vote must be taken, which requires the support of at least 80 per cent of all Board members and at least two out of three Crown appointees to pass.[336] Hence, the governance structure for Te Urewera endows "extensive decision-making

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recognises that "Te Urewera expresses and gives meaning to Tūhoe culture, language, customs, and identity. There Tūhoe hold mana by ahikāroa; they are tangata whenua and kaitiaki of Te Urewera."

327 Geddis and Ruru, above n 285, at 21.

328 Te Urewera Act 2014, s 11(2)(a)(ii). Accordingly, the scope of the personhood designation accorded to Te Urewera is constrained by the overall purpose for and specific provisions of the Act. See Geddis and Ruru, above n 285, at 23.

329 Te Urewera Act 2014, s 4(c). Similarly, the Act outlines that no prior authorisation is necessary for any "cultural, recreational or educational activity" carried out without "specific gain or reward". See Te Urewera Act 2014, s 56.

330 Geddis and Ruru, above n 285, at X. Citing Te Urewera Act 2014, s 41.

331 Sanders, above n 117, at 221.

332 Te Urewera Act 2014, s 16

333 Te Urewera Act 2014, s 17

334 Te Urewera Act 2014, ss 18(1)(a), 44–47. The management plan is then implemented by the Chief Executive of Tūhoe Te Uru Taumatua and the Director-General of the Department of Conservation. Te Urewera Act 2014, s 50. The Board also may make bylaws to regulate conduct within Te Urewera (Te Urewera Act 2014, ss 18(1)(d), 70).

335 Geddis and Ruru, above n 285, at 23.

336 Te Urewera Act 2014, ss 33–36. See Geddis and Ruru, above n 285, for a clear exposition of this decision-making procedure.

and regulatory powers" in Tūhoe representatives, notwithstanding the requirement that these powers are exercised with the agreement of "at least a majority of the Crown's representatives."[337] The Board's powers thus enable "substantial incorporation" of Māori legality.[338]

The Te Urewera Management Plan since developed by the Board has been applauded as "highly innovative."[339] The Plan has inverted the anthropocentric and Eurocentric human-nature relationship to create "rules to manage the people rather than the land."[340] Indeed, its Preamble runs thus: "Deliberatively, we are resetting our human relationship and behaviour towards nature. Our disconnection from Te Urewera has changed our humanness. We wish for its return."[341] It is within this reframed relationship of political negotiability, deliberation and contestation between Māori and colonial legalities that an emancipatory potential to displace the structures of discovery may reside.

IV A Deliberative Potential For Agency

The enactment of Te Urewera as a legal person is "undoubtedly legally revolutionary".[342] Personhood reframes the "ongoing debate about land, authority and colonisation",[343] enabling an acceptable compromise between competing legalities in a particular deliberative space. This negotiated deliberative space presents opportunities for those operating within a Pākehā legality to listen to and learn from Māori and thereby adopt legal relationships that may not directly translate into the common law. This section shall demonstrate that personhood embodies a political model that departs from a rights-based discourse. Instead, it articulates a redemptive interpretation of the Treaty as "the site and […] ongoing subject of *agonistic*, deliberative politics."[344]

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337 Geddis and Ruru, above n 285, at 23.
338 Geddis and Ruru, above n 285, at 23.
339 Geddis and Ruru, above n 285, at 23.
340 See "Te Kawa o Te Urewera" (2017), Tūhoe <www.ngaituhoe.iwi.nz/te-kawa-o-te-urewera>
341 Te Kawa, above n 341.
342 Jacinta Ruru, "Tūhoe-Crown settlement – Te Urewera Act 2014" [2014] *Māori Law Review* 1.
343 Sanders, above n 117, at 231.
344 Mark Hickford "The Historical, Political Constitution – Some Reflections on Political Constitutionalism in New Zealand's History and its Possible Normative Value" [2013] NZ L R 585 at 617 (emphasis in the original).

Within this framework, the process and mechanics involved in recognising of Te Urewera as a legal person can be viewed as facilitating an agonistic encounter between Tūhoe and the state. Unlike judicial decisions such as *Wakatū* and invoking Indigenous rights, this agonistic encounter offers the potential to reconceptualise Māori-Crown relations and militate against the doctrine of difference. Katherine Sanders, for instance, emphasises the way in which the guardianship structures created for Te Urewera introduce procedural requirements that "engage the parties in participatory, deliberative decision-making."[345] Board members must promote unanimous or consensus decisions, encouraging "ongoing deliberation over contesting purposes and principles".[346] The governance mechanisms reframe that contest so that it "reflects the understanding that settlement is contingent upon the maintenance of relationships."[347] Moreover, in keeping with an agonistic encounter, the "principled compromise"[348] of personhood acknowledges fundamental conflict and disagreement regarding public authority over land and "reframe[s] the terms under which this conflict continues."[349] Consequently, the Crown's settlement of Tūhoe's Treaty grievances "is not a single event but an iterative process"[350] predicated on "chains of continual intercultural negotiations".[351]

Hence, this agonistic personhood construct creates a model for Māori-Crown relations that is substantively different to the colonial hierarchies defining the doctrine of difference. Personhood does not coercively impose a Eurocentric legality on Māori but engages in deliberative negotiation that gives Māori agency to advocate for their own legality on their own terms. Personhood departs from the rights-granting common law universal in which the state demarcates Māori relationships with land as aberrational and translates those relationships into 'rights to native title' that are defined under the terms of the colonial power's legal discourse. Instead, the land is allowed to remain aberrational. This means that the difference between the legalities is accepted but the colonial legality does not necessarily deploy the same techniques of normalisation, such as native title rights, so that one legality struggles to universalise the

345 Sanders, above n 117, at 229.
346 Sanders, above n 117, at 224.
347 Sanders, above n 117, at 223.
348 Geddis and Ruru, above n 285, at 4.
349 Sanders, above n 117, at 209.
350 Sanders, above n 117, at 233,
351 James Tully, *Strange Multiplicity. Constitutionalism in an Age of Diversity* (CUP 1995) at 139.

other. Difference and conflict are embraced in an ongoing relationship, not eliminated by the universalising impulses of the common law. Hence, the dynamic of difference employed to normalise Māori within the colonial legal structure is largely diminished and a generative bicultural tension allowed to persist in its place.

The priority and legitimacy accorded to Māori legality as well as the emphasis given to a contextualised responsibility to place adds to this discovery-displacing trajectory. As one scholar explains, recognising personhood of natural features like Te Urewera, "truly reflects the indigenous cosmological view of people as part of nature, not separate nor above it."[352] As aspects of nature are regarded by Māori as tupuna (ancestors), the recognition of Te Urewera as an entity in itself also recognises the land's mana and mauri;[353] its "intrinsic value and moral worth."[354] Within the legal framework itself, moreover, "the claim to exercise authority legitimately is bound […] to responsibility to place",[355] as those exercising powers under the Act must act so that, as far as possible, "Tūhoetanga […] is valued and respected."[356] The opportunity for Tūhoe to appropriately exercise their kaitiaki responsibilities, moreover, maintains the legitimacy of Māori authority in relation to land.[357] Similarly, the recently released Te Urewera Management Plan unapologetically "pioneers approaches to management firmly located in the principles of mana motuhake."[358] Consequently, the joint stewardship of Te Urewera "commences from a prioritised Māori worldview of place",[359] in which the land is reconceived as an interdependent "object of responsibility […] rather than a site of control."[360]

The primacy given to Tūhoetanga and mana motuhake within this agonistic encounter therefore enacts a "constitution in situ" that reconfigures colonial structures of power in

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[352] CJ Iorns Magallanes, "Māori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology That Protects the Environment" (2015) 21 *Widener Law Review* 271, 325.
[353] See James Morris and Jacinta Ruru, "Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water?" (2010) 14(2) *Australian Indigenous L Rev* at 49, 50.
[354] Geddis and Ruru, above n 285, at 5.
[355] Sanders, above n 117, at 231.
[356] Te Urewera Act 2014, s 5.
[357] IH Kawharu, "Mana and the Crown: A marae at Orakei" in IH Kawharu (ed), *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (OUP 1989) 211.
[358] Sanders, above n 117, at 218. Te Kawa pronounces that: "Humanity has much to gain from reigniting a responsibility to Te Urewera for within these customs and behaviours lies the answers to our resilience, to meet a forever changing climate" See Higgins, above n 283, at 132.
[359] Geddis and Ruru, above n 285, at 28.
[360] Sanders, above n 117, at 234.

respect of a particular iwi and place.[361] Within this negotiated space, tikanga is not displaced as it is when translated into a right extinguishable by the state, but upheld as legitimate legality. By reframing contestation over authority within a place-based forum predicated on respecting the specific histories, tikanga and mātauranga of Tūhoe, the settlement markedly departs from the international legal discourse of discovery at the core of the colonial structure. Unlike the reasoning in *Wakatū* and claiming Indigenous rights, the Te Urewera settlement provides space for political contestation that does not necessarily redeploy the oppressive powers and hierarchies of international and state legal discourse. Instead, it empowers Tūhoe to express justice under their own terms and develop their own strategies of resistance in ongoing conversation with the state. The rights-granting mechanism of the doctrine of difference is not engaged and the European law of discovery therefore does not totalise all forms of legitimate legality in the same way as in *Wakatū* or a human rights claim.

Rather than the universalising processes of a legal model whereby the translation of tikanga into 'rights' implicitly attempts to transform Māori in line with the civilising mission, personhood engages a pluralistic form of authority. It does not seek to solve "the problem of difference by preceding it,"[362] but envisages a Māori-Crown relationship wherein "authorities participate together to decide how different incommensurate reasons can be best accommodated."[363] In this way, the Māori-Crown relationship is fundamentally reframed, albeit within the bounds of underlying Crown sovereignty.

V An Inescapable Structure?

Despite its emancipatory potential, personhood remains susceptible to co-option by state and international legal discourses. Notably, personhood does not dramatically alter much of the regulation that had applied to Te Urewera as a National Park, maintaining an underlying Crown monopoly on power.[364] As aforementioned, the state has required that Te Urewera "retain a particular teleology" that "reflect[s] the notion of a forest protected from private

[361] Sanders, above n 117, at 231
[362] Anghie, above n 6, at 6.
[363] Nicole Roughan, *Authorities: Conflicts, Cooperation and Transnational Legal Theory* (OUP 2013) 238. Personhood perhaps accords with Roughan's theory of relative authority.
[364] Geddis and Ruru, above n 285, at 16.

spoliation, which all New Zealanders may access and enjoy."[365] The Board must also continue to consult certain groups when making decisions.[366]

In recognising personhood, the state also stopped short of transferring ownership of Te Urewera to Tūhoe. Sanders posits that this refusal should be understood as a "public assertion of the authority of the state to determine property rights".[367] Indeed, the legislation by no means radically repudiates property as "a means of ordering entitlements" or diminishes Parliament's capacity to repeal the legislation by bare majority.[368] Sanders concedes that the personhood model may equally be conceived as Māori resistance to Eurocentric concepts of property.[369] However, even if this is true, personhood must be situated within broader configurations of power.

In this way, the agonistic deliberative encounter instituted by Te Urewera's guardianship structures is imbricated within the discovery powers of underlying state sovereignty. The political negotiation preceding the settlement remains premised on the Crown's overriding authority in which the settlement deal-making reflects underlying relationships of power.[370] For instance, the Post-Settlement Governance Entities (PSGEs) created under these settlements are determined by the Crown and "force Māori in to a dichotomy whereby they are negotiating 'customary Māori systems of authority'".[371] Specifically, the Crown requirement for Tūhoe to first create "mandated large natural groupings" conflicted with the iwi's hapū-based governance practices.[372] The resulting PSGE then tends to "support a dominant social group" and foment division within iwi as tensions invariably emerge between the seemingly pragmatic pursuit of economic development and the strengthening of 'customary systems of authority'.[373]

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365 Geddis and Ruru, above n 285, at 17. To this end, Te Urewera Act stipulates that the entity must, so far as possible, be "preserved in its natural state," (Te Urewera Act 2014, s 5(a)), and managed "as a place for public use and enjoyment". See Te Urewera Act 2014, s 4(c).
366 Geddis and Ruru, above n 285, at 17. For example, Urewera Act 2014, s 61 requires the Board and the Fish and Game Council to commence discussion to enter a memorandum of understanding for working together.
367 Sanders, above n 117, at 221.
368 Sanders, above n 117, at 230–31.
369 Sanders, above n 117, at 221.
370 David Ritter *Contesting Native Title – From Controversy to Consensus in the Struggle over Indigenous Land Rights* (Allen & Unwin, Sydney, 2009) at 174.
371 Higgins above n 283, at 131. Citing Durie, above n 292 at 220.
372 Higgins above n 283, at 132.
373 Higgins above n 283, at 132.

Cultivating these relationships of "conflictual consensus"[374] through legal personhood may highlight pathologies in Crown law-making and in its monopoly over proprietary allocation, thereby recognising Māori difference. However, they continue to conceal the formative power of the colonial legal discourse as the violent processes of discovery that systematically dispossessed Tūhoe are naturalised through enduring state sovereignty. Indeed, as with a rights-based discourse of native title, there is a new translation of Tūhoe mana whenua and mana motuhake into something recognisable by the universalising common law – in this case, legal personhood.[375] Tūhoe's specific forms of life are still, to an extent, demarcated as aberrant, and then normalised within the state through translation into the legislated form of personhood. Personhood still inserts Māori within a legal discourse that structures, shapes and limits how mātauranga Māori is understandable. So, although recognising such places-as-persons manifests the potential of law to serve as a reconciliatory "bridge between worlds",[376] there is a need for caution that Māori legality is not assimilated within colonial law and alternative contestation based on tikanga Māori displaced. The requirement, nonetheless, that difference be negotiated deliberatively within a guiding framework that re-centres tikanga and responsibility to place certainly begins to stem the saturating impulses of the colonial structure.

Furthermore, through the state giving Māori conceptions of the natural world its legislative imprint, personhood becomes vulnerable to co-option. Many scholars have claimed that Te Urewera represents the recognition of so-called 'rights of nature' in New Zealand law.[377] That is, many understood legal personhood foremost as "a mechanism to improve the environmental protection afforded to" such geographic entities via "better empowering them to defend themselves against forms of human development and degradation."[378] Such explanations, however, are "at worst mistaken and at least are incomplete".[379] Under this rights-of-nature model, Te Urewera may be endowed by states with Eurocentric rights that

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374 Mouffe, above n 35, at 756.
375 Examples of entities that are legal persons within colonial legality are companies and trusts: *New Zealand Law Dictionary* (6th ed, 2005) 'legal person'.
376 Geddis and Ruru, above n 285, at 29.
377 Christopher Stone, 'Should Trees Have Standing? Towards Legal Rights for Material Agents' (1972) 45 *Southern California Law Review* 450. See, Mari Margil, 'Building an International Movement for Rights of Nature' in M Maloney and P Burdon (eds), Wild Law – In Practice (Abingdon, Routledge, 2014) 156.
378 Geddis and Ruru, above n 285, at 3.
379 Geddis and Ruru, above n 285, at 3.

position state-sanctioned contestation as the only solution. It may reproduce a Vitorian dynamic of difference, as the state apportions rights to Te Urewera but, in doing so, translates Tūhoe legalities so that they are intelligible within, and therefore susceptible to regulation by, the state legal discourse. Emphasising these rights would also corral tikanga within the courts' jurisdiction, empowering the majority-Pākehā judiciary to unilaterally define Māori legality.[380] The discovery-based colonial legal system can therefore remain "a colonising leviathan that can choose which norms of the oppressed will be validated and which will be dismissed".[381]

Others have analysed personhood in terms of compliance with *UNDRIP*.[382] For instance, Collins and Esterling set out to examine the granting of personhood to the Whanganui River[383] in light of international human rights law without explaining whether these iwi wish to make claims within this international legal discourse. The authors write that omitting reference to *UNDRIP* in the legislation "is a missed opportunity to bolster the legitimacy of the UNDRIP and New Zealand's commitment to it",[384] which "begins to look like political resistance to international human rights law". Although the scholarship demonstrates an admirable desire to use international rights to bolster Māori claims to ownership, is it not clear that these iwi want to be identified as 'Indigenous peoples' for the purposes of invoking international human rights law.

Indeed, co-opting personhood within these discourses de-contextualises the historicised settlement reached via deliberative Māori-Crown negotiation. Under a human rights paradigm, notions of justice are structured and defined by the terms of international legal discourse. If Indigenous rights come to dominate the discourse, then iwi with unique relationships with the land like Tūhoe will also be forced to transform themselves to be identifiable as 'Indigenous peoples' for the purposes of a rights claim. In this way, scholars analyse personhood in terms of *UNDRIP* fail to realise that such re-identification processes require iwi to conform with international discourses. These discourses pre-regulate and

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380 Gattey, above n 147, at 61.
381 Gattey, above n 147, at 61.
382 Toni Collins and Shea Esterling "Fluid Personality: Indigenous Rights and the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* In Aotearoa New Zealand" *Melbourne Journal of International Law* 20.
383 Under the Te Awa Tupua (Whanganui River Claims Settlement) Act 2014.
384 Collins and Esterling, above n 383, at 22.

saturate the meanings of terms like 'Indigenous peoples' and so remove personhood from those iwi's control. Therefore, although well-intentioned, these scholars may be perpetrating a colonial move in re-mobilising personhood's specific purposes for their own ends.

VI Conclusion

This chapter has demonstrated that the recognition of Te Urewera as a legal person emerges as a powerful alternative to the subordinating hierarchies of the colonial legal structure. The agonistic deliberation prioritised by personhood may not be emancipatory, in the sense of fully displacing the doctrine of difference and de-subjecting Māori from the state legal institution. Indeed, the Crown's refusal to transfer Tūhoe ownership precludes Tūhoe from genuinely realising their freedom to practice their forms of life unconstrained from colonial legal models, and thereby remakes the burden of Māori legality on Crown sovereignty. However, even if this agonistic encounter is not emancipatory, it is undoubtedly a massive step in a Māori-enabling direction and is perhaps the best way forward whilst operating within the confines of the state.

CONCLUSION

Aotearoa New Zealand remains a deeply colonial state. The foundational structures of our contemporary legal institutions for Māori-Crown relations are permeated by colonial hierarchies. However, the legal mechanisms effecting the subordination of Māori legality by the state were not conceived upon Captain Cook's arrival on our shores. Instead, they had their origins in universal natural law of the Catholic Church, later translated into firmer legal foundations by European powers, systematising their global designs of Indigenous subjugation. Law has played a pivotal role in facilitating and legitimising these processes of dispossession and violence.

This dissertation has sought to explicate this colonial legal structure through constructing a dichotomy between legal and political models. I have argued that legal models are predicated on a rights-based discourse that perpetuates colonial structures through a 'doctrine of difference.' Political models, however, are predicated on an agonistic encounter between Māori and European legalities that generates ongoing contestation. I then applied this framework to construct a critical historiography of Māori–Crown relations, excavating the processes whereby a rights-discourse of native title embedded a Crown sovereignty narrative. I found that, although great progress has been made, European legality continues to displace Māori forms of life.

Subsequently, I turned to consider alternatives. I found that, although Indigenous rights offer emancipatory potential, they re-legitimate colonial hierarchies. However, legal personhood and its processes of agonistic deliberative democracy, gesture towards a new way forward. Although not fully emancipatory, this innovative settlement recentres tikanga and preserves a politics that maintains democratic contestation. It is my hope that, through enabling an ongoing conversation about our origin stories on these islands, Māori and Pākehā can create forms of power that challenge our assumptions, cultivate responsive relationships, and continuously contest the colonial.

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