Vatican
News
Indigenous people hold a banner calling on Pope Francis to "rescind the doctrine," during a pa

Indigenous people hold a banner calling on Pope Francis to "rescind the doctrine," referring to the "Doctrine of Discovery," during a papal Mass at the National Shrine of Sainte-Anne-de-Beaupré in Quebec in this July 28, 2022, file photo. (CNS/Reuters/Guglielmo Mangiapane)

Michael Swan

View Author Profile


Catholic News Service

View Author Profile

Join the Conversation

Send your thoughts to *Letters to the Editor*. Learn more

Toronto — September 20, 2022
Share on BlueskyShare on FacebookShare on TwitterEmail to a friendPrint

A date for a new papal statement on the Doctrine of Discovery, promised by Pope Francis on his way home from Canada to Rome in July, has not been announced. But whenever it happens, it is likely to address core concerns of Indigenous people in Canada and in many other parts of the world.

The Canadian Conference of Catholic Bishops is working with Vatican officials in Rome on the wording for a new statement rejecting an entire tradition of legal reasoning, said Jonathan Lesarge, CCCB spokesman.

"Galvanized by the calls of our Indigenous partners and by the Holy Father's remarks, Canada's bishops have engaged and are actively working with the Vatican

with the goal of issuing a new statement from the church," he said in mid-September. "We do not have a confirmed timeline for when the Holy See intends to release this statement; however, the work is ongoing, and we hope to have an update in the coming weeks."

American legal scholar Robert Miller estimates the key 1823 U.S. Supreme Court decision that entrenched the Doctrine of Discovery into common law around the world has been cited by courts in Canada 70 times and is the very foundation of property law in the United States.

"How do we acquire title (to property) in the United States?" asked the law professor. "Either you got it from the king of England, or you got it from the king of Spain, or you got it from the king or queen of France. And you got it from the colonies and then you got it from the Continental Congress and our Articles of Confederation, or you bought it from the United States government we have now. The U.S. got it by treaties or by conquest. That is all based on the Doctrine of Discovery."

Miller teaches at Arizona State University's Sandra Day O'Connor Law School and is a member of the Eastern Shawnee. His lineage traces back to Tecumseh, who went to war against the United States allied with the British in 1812, fighting against U.S. expansion into Indigenous lands. Miller is a leading expert on the Doctrine of Discovery and the essential U.S. Supreme Court decision of *Johnson v. McIntosh*, in which European justifications for colonizing the New World were first codified into a legal doctrine.

Among those justifications cited by Justice John Marshall in his decision were the 1493 papal bull *Inter Caetera* issued by Pope Alexander VI.

In his extensive writing, including the 2010 book *The Doctrine of Discovery: The International Law of Colonialism*, Miller argues it's past time for the United States to come up with some alternative, morally justifiable, basis for property law.

The result is nearly 70 million acres of Indigenous land in the United States that Indigenous people cannot fully own. Instead, Indigenous people and nations are "beneficial owners," while the U.S. government retains trust ownership in much the same way as the Crown in Canada holds Indigenous lands in trust.

Advertisement

Miller entertains no illusion that any statement or gesture by Francis will put a legal dent in *Johnson v. McIntosh*.

"The pope's statements today do not make law. If the pope were to do such a thing, it would be a monumental educational moment."

Countries are beginning to sever their legal ties to *Johnson v. McIntosh* by signing on to the nonbinding U.N. Declaration on the Rights of Indigenous Peoples. After rejecting the declaration in 2007, in 2021 Canada passed the U.N. Declaration on the Rights of Indigenous Peoples Act. The preamble to the new federal law declares, "all doctrines, policies and practices based on or advocating the superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences, including the Doctrines of Discovery and terra nullius, are racist, scientifically false, legally invalid, morally condemnable and socially unjust."

Despite assumptions of *terra nullius* -- territory without a master -- and the Doctrine of Discovery in the 1763 Royal Proclamation, in which King George III established guidelines for European settlement of Indigenous territories in what is now North America, Canada no longer wants anything to do with *Johnson v. McIntosh* or the Doctrine of Discovery, said Ian McLeod, Canadian Department of Justice spokesman.

"The Government of Canada's position is that these ancient doctrines have no place in modern Canadian law and do not inform our ongoing relationship with First Nations, Inuit and Metis," McLeod said in an email to The Catholic Register, Toronto.

He said Canada's Supreme Court declared in the 2014 Tsilhqot'in decision that terra nullius never applied in Canada.

Next up for the government of Canada is developing a "Covenant of Reconciliation" that will specifically reject the Doctrine of Discovery and respond to Call to Action #46 of the 2015 Truth and Reconciliation Commission's final report to work "collaboratively to advance reconciliation in Canadian society."

If the church's response includes a papal statement that pulls the threadbare moral justifications out from under *Johnson v. McIntosh*, that will be a shot heard round the world, said Miller.

"It's not meaningless. It has a symbolic, educative, name-and-shame importance," he said. "But will it change one legal title in the United States or in your country? No."

[Swan is associate editor of The Catholic Register, Toronto.]