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Te Purenga

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TE PURENGA

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INTRODUCTION

Memory is the site of our remembrance of the past; our compass as we navigate our way in the present; and the site of our dreams. Dreams help us project our imagination into the future.¹

This simple yet profound statement by Ngugi wa Thiong’o provides an apt beginning for this collection of writings by Māori lawyers and legal academics. A shared view that remembering and understanding the past is crucial is clearly discernable throughout the contributions. With an appreciation of the past providing a solid foundation, the papers identify constructive strategies for the present and, despite the often difficult challenges they raise, display a quietly determined optimism for the future.

Moana Jackson’s chapter looks at the tireless efforts of indigenous peoples to achieve recognition of their status and rights in the international arena. He discusses the involvement of Māori in the drafting of the United Nations Declaration on the Rights of Indigenous Peoples, noting that it has been an experience “in which the often frustrating task of dealing with one Crown in Aotearoa/New Zealand is exacerbated by having to deal with over one hundred of them in Geneva”. Most significant, according to Jackson, is the colonising construct within which United Nations processes operate, a construct which historically defined indigenous peoples as less human than their colonisers. He traces the origins and development of this viewpoint and explains how it has continued to manifest itself in the behaviour of various state representatives (including those from New Zealand) as they have bickered over the wording and interpretation of the Declaration. Despite the obstacles that he describes, however, he points out that “our tīpuna did not leave us a legacy of timidity”. He concludes that it is a matter of obligation, both to the generations who have gone before and to those who are yet to come, that the struggle to reclaim our full humanity be continued.

¹ Wa Thiong’o, Ngugi “Church should empower Africans”, speech delivered at the 57th Assembly of the National Council of Churches, 24 August 2004.
Kerensa Johnston continues the international law focus by considering the potential for international human rights law to assist Māori women seeking protection against discrimination. Johnston argues that the Crown’s actions and policies have undermined the role and status of Māori women, leading to their marginalisation from the political life of the state. She discusses the international law instruments that are available to indigenous women who seek to challenge discriminatory laws and practices, paying particular attention to the Women’s Convention and the Optional Protocol to the Convention on the Elimination of Discrimination Against Women. Important questions are raised about the appropriateness of utilising international human rights law to deal with issues affecting indigenous women, given criticism that it fails to recognise the significance of community or the indigenous struggle for self-determination. Despite these shortcomings, Johnston concludes that Māori women should consider submitting an individual complaint to the Women’s Committee based on a breach of article 7 of the Women’s Convention, which concerns the state’s failure to eliminate discrimination against women in political and public life. On the other hand, she suggests that international fora may not provide the most appropriate means of remedying arguably discriminatory cultural practices that might be sourced in tikanga Māori. She acknowledges the complexity of issues such as women’s speaking rights on the marae, noting that they may reflect the complementarity of male and female roles rather than discrimination against women and also acknowledging that these roles as they are currently constructed may be more reflective of the influence of colonisation than they are of tikanga Māori. However, even on the assumption that such practices are both discriminatory and sourced in tikanga Māori, Johnston suggests that taking a case to the Women’s Committee would, while perhaps serving the useful purpose of triggering serious re-examination amongst Māori of potentially discriminatory practices, ultimately be less productive than committing to a process whereby Māori principles and practices as they relate to Māori women might be rediscovered.

The rediscovery of such principles and practices is the subject-matter of Kirsten Gabel’s paper, which examines the role of taonga-ā-waha (oral forms of expression) in Māori society. She suggests that taonga-ā-waha reflected the complementary relationship between men and women but that the importation of Western values has led to the devaluing
of female taonga-ā-waha (such as the karanga) and a corresponding overvaluing of male taonga-ā-waha (such as the whaikōrero). She argues, for example, that the karanga has “an intense and deep relationship . . . with both the traditional and contemporary spiritual realms” but that, due to the influence of Pākehā ideals it is often now regarded as being merely “a curtain-raiser for the main whaikōrero event”. Importantly, she has chosen to express her views about the true significance of female taonga-ā-waha in te reo Māori, a deliberate choice which would clearly meet with approval from Ngugi wa Thiong’o:

Language is a way of organizing and conceptualising reality and it also becomes a bank for the memory generated by human interaction with the world. Each language no matter how small carries its memory of the world.²

To write about the significance of the karanga in Māori is to consciously reassert the Māori memory, thereby actively resisting what wa Thiongo’o has called the planting of the coloniser’s memory on the intellect of the colonised.³ Gabel concludes that Māori must not merely reclaim our traditional knowledge about the karanga, but that we must also reinstate its physical presence on the marae. This will require no less than the “sustained and collective assertion by Māori women of their vocal capacities on the marae”. It is only by taking such action that the gender complementarity that was formerly inherent in tikanga Māori can be reclaimed.

The link between performing the karanga and fulfilling leadership roles within the whānau and hapū is clearly illustrated by the kuia interviewed for Matiu Dickson’s piece on Māori women and their experiences of the education system. Each of them were kai-karanga on their marae and each of them were leaders for their whānau and hapū. Despite their talents and abilities, however, Dickson concludes that they “were not given the opportunity to realise their full potential and therefore their contribution to their own whānau and hapū may have been less

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² Wa Thiong’o, Ngugi “Church should empower Africans”, speech delivered at the 57th Assembly of the National Council of Churches, 24 August 2004.
³ Wa Thiong’o, Ngugi “Church should empower Africans”, speech delivered at the 57th Assembly of the National Council of Churches, 24 August 2004.
than what it could have been”. This he puts down to a colonial education system that introduced and perpetuated the idea that women were of less value than men. A lack of resources and gender-stereotyping had resulted in these women being forced to leave school early in order to earn wages to support their whānau. Meanwhile, their male kin were often given greater educational opportunities, deemed at that time to be appropriate for them. In later life, the women came to fulfil leadership roles and all expressed a determination that their own daughters and grand-daughters should have the educational opportunities that they had been denied. Despite the sacrifices that they had been expected to make, however, their resilience and generosity of spirit is revealed in Dickson’s conclusion that “these kuia were generally optimistic about the future of Māori people and philosophical about the past”.

The next paper, addressed to Māori secondary school teachers, is concerned with the impact of education on young Māori minds. It examines tikanga Māori as the practical expression of a philosophical view of the world that was unique to Māori, focusing particularly on Māori cosmogony which, it argues, is where the philosophical foundation of that world view is to be found. It also considers the effect that foreign influences, particularly Christianity, have had on that world view and, consequently, on tikanga Māori. It concludes that tikanga Māori has, to a large extent, been colonised by the influence of Christianity and Western law, resulting in the replacement of the once-central principle of gender balance with one of male dominance. The discussion is set within the context of Freire’s concept of cultural invasion and conquest, whereby “the invaders penetrate the cultural context of another group . . . impos[ing] their own view of the world upon those they invade”, a process which leads ultimately to “the cultural inauthenticity” of the invaded who, by mimicking the invaders, merely cement their position still further. The paper suggests that teachers of young Māori women and men are in a position to either sustain or deconstruct some of the harmful myths surrounding the roles and responsibilities of women and men according to tikanga Māori. It urges them to use their influence to do the latter, in particular by taking care not to force Christianity unquestioningly upon their pupils. In bringing a critical eye to bear upon the patriarchal influence of Christian principles

on Māori cosmogony, the paper argues, these teachers will contribute to the dismantling rather than the perpetuation of the ongoing project of colonisation.

Leah Whiu and Stephanie Milroy also cite Freire in identifying the key role that Māori must play in liberating themselves from the oppression of colonisation. Māori, they argue, “must ultimately face the source of oppression with the purpose of transforming ourselves, our lives and the fundamental basis of our inauthentic existence”. Their chapter traces the establishment and development of Waikato Law School, a law school which has, since its inception, included biculturalism as one of its founding principles. Stephanie Milroy examines the terms “biculturalism” and “multiculturalism” in the context of education policy, before turning to examine biculturalism in more depth. Her discussion reveals that biculturalism is a contested concept but concludes that, when applied to a law school, it must include “transfer and sharing of resources and decision-making power; acknowledgement of our history; and practices and procedures that deliver a legal education service that works for Māori as well as for Pākehā”. She goes on to consider the place of biculturalism in the founding of Waikato Law School. In the second part of the chapter, Leah Whiu examines the experiences of Māori students who have attended Waikato law school and reaches the sobering conclusion that many have been disappointed at what they have perceived to be a lack of commitment to the founding principle of biculturalism. She summarises the progress made since the law school’s establishment and outlines a range of suggestions designed to progress the bicultural project further, concluding that “[t]he bicultural objective is not just a site for struggle, it is symbolic of a much bigger project of transformation and liberation from oppression”.

It is not surprising, perhaps, that the vast majority of full-time Māori academic staff at Waikato Law School have been women. As Caren Wickliffe points out, Māori women have been at the forefront of Māori demands for justice in Aotearoa. Her chapter carefully tracks the role that the law has played in undermining Māori self-government. It

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5 Of the twelve Māori academic staff that have worked full-time at Waikato Law School at different periods since its inception, all but two have been women.
describes the process whereby Māori have become subject to imposed models of government and law. While celebrating the contribution of a number of exceptional Māori women in the face of aggressively assimilationist policies, she concludes that overall “the law as a tool of assimilation, colonisation and social control has taken its toll on the status and role of the great majority of women”. Māori women have been marginalised politically and denied access to justice. Their well-being, and that of their whānau, has been detrimentally affected as a result.

The impact of colonisation is also a theme in Craig Coxhead’s paper on Māori and the media reporting of crime. He supports Ranginui Walker’s view that the media “functioned and functions to maintain the status quo and the structural relationship of Māori subordination”. His chapter, prompted by a front page article in the Waikato Times headed “Warning: this man kills” and accompanied by a mug shot of a young Māori man, focuses on the media’s negative portrayal of Māori. In truth, the article in question had contained a number of factual errors, errors for which an apology was printed on page three the following night. As Coxhead notes, however, the apology would have done little to alter the impact that the story had already had on the newspaper’s readership. He provides historical examples of the media’s damaging depiction of Māori and goes on to consider the importance of news values as a determining factor in the selection of topics deemed by journalists to be newsworthy. He argues that with the overwhelming majority of journalists being Pākehā, it is unsurprising that the bulk of media reporting continues to be aimed at a predominantly Pākehā audience. Coxhead also examines the media obsession with reporting crime and the association commonly made between Māori and crime, concluding that “[t]his association . . . leads to an out-of-proportion amplification of a situation, resulting in sensationalism and in Māori being projected in a negative manner”.

Linda Te Aho looks at important issues raised in the wake of Treaty settlements. She notes that the settlement process has resulted in the return of assets to claimants and the establishment of Māori economic entities designed to receive and manage those assets. She also points out that company structures have been set up for the purpose of wealth creation, and her paper explores some of the dilemmas that Māori directors face as they seek to balance commercial objectives with Māori
philosophies. Te Aho provides examples of how tikanga may clash with commercial goals, and raises the very real possibility of “corporate warriors hid[ing] behind the veil of these corporate structures whilst mimicking the exploitative behaviour of their non-Māori counterparts”. Such behaviour, she suggests, demonstrates Freire's observations about the internalisation by the oppressed of the oppressor's values. Despite the commercial pressures that inevitably impinge upon a company with a profit-making incentive, however, Te Aho considers that there are possible solutions to this seemingly intractable problem: “[b]eing both indigenous and a company director need not be mutually exclusive”. She proposes a range of ways in which such companies may conduct their affairs while maintaining consistency with Māori philosophical beliefs.

Jacinta Ruru also discusses the management of assets, in this case, the country’s fourteen national parks, which are currently owned and managed by the Department of Conservation. She evaluates Waitangi Tribunal jurisprudence on claims concerning natural resources, concluding that a Tiriti management model would endorse the Crown's right to govern while upholding the Māori right to exercise tino rangatiratanga. Her assessment of the present management regime is that it clearly falls short with respect to the goal of endorsing the Māori right to tino rangatiratanga. Drawing on the work of Tania Ruru, she evaluates a variety of ways in which Māori representation could be expressed in resource management legislation and identifies those representation models which she believes would best reflect the Treaty relationship between the Crown and Māori. She then suggests a number of avenues which would lead to better provision for the exercise of tino rangatiratanga by Māori with respect to the management of national parks. These range from better use of provisions within the current legislative regime, to amendment of the legislation, to replacing the legislation altogether and creating an entirely new management regime. While she provides a spectrum of possible ways forward, doing nothing is clearly not regarded as a viable option: her conclusion is that the right to express tino rangatiratanga must be given effect to in the management of national parks, and that in order for this to occur “attention to this legislation is urgently required”.

In the final chapter, Tania Waikato looks at the exercise of tino rangatiratanga over another taonga: mātauranga (traditional
knowledge). She points out that “[i]n the space of a year, the instances of Māori traditional knowledge being used by non-Māori without authorisation in commercial products, branding and other media has increased exponentially” and finds that the current intellectual property rights regime offers little or no protection from such exploitation. She considers that the reasons for this are derived from the fundamental ideological clash between the two cultures. It is not, she suggests, that the current intellectual property rights regime is ill-suited for the purposes for which it has been designed; rather, that it was never designed for mātauranga and can therefore never hope to meet the needs of Māori. That Māori have been proactive in seeking to have their traditional knowledge protected is apparent from such initiatives as the Flora and Fauna claim currently being taken before the Waitangi Tribunal and the 1993 Mataatua Declaration. Waikato contends that the answer does not lie in reform of the current legislative regime, arguing instead that a new protective model must be devised, based on Māori ideological concepts and giving Māori ultimate control. She describes this as “a hybrid model, a Pākehā law based on Māori principles” and, while noting the numerous difficulties posed by pursuing such a course, nevertheless believes that it is important to try and formulate a culturally appropriate protection scheme “while there is still something left to protect”.

While highly diverse in their choice of subject-matter, the contributors to this journal have much in common: a firm belief in the value of Māori ways of thinking about the world; a commitment to preserve that which is authentically Māori; and a preparedness to utilise whatever tools are at hand in order to ensure Māori survival. Importantly, this concept of survival is not limited to outmoded notions of blood quantum or to conducting a head count of people with Māori ancestry. While it was once widely believed that Māori were destined for extinction, a reversal in population trends since the late nineteenth century means now that “as long as there are humans on this earth there is the prospect that there will be some with Māori ancestry”.6 The crude measure of

mere human survival, however, is not in itself a particularly useful gauge of cultural endurance. The important question now, as recently posed by Whatarangi Winiata, is whether a substantial number of people of Māori descent continue to live “according to kaupapa and tikanga tuku iho that are distinctive in the global cultural mosaic”. This collection of writings, brimming with uniquely Māori ideas and strategies for the future, exudes a tenacity of spirit that bodes well for our cultural survival.

Mā te tokomaha ka kā te ahi.

By the many will the fire be kept burning.

7 This phrase is taken from Durie, M Ngā Tai Matatū: Tides of Māori Endurance (Melbourne: Oxford University Press, 2005) 1.

In recent years Māori people have adopted many strategies to protect and advance the well being and visions implicit in the exercise of tino rangatiratanga. Much of that work has been done at home, but an increasing number of Iwi and other Māori organisations are now participating in international affairs that are seen to have some relevance to our lives. They are joining a worldwide movement by Indigenous Peoples to reassert their rights and reclaim their rightful place.

One particular area of Māori involvement has been the drafting of the United Nations Declaration on the Rights of Indigenous Peoples. It has been at times an experience in which the often frustrating task of dealing with one Crown in Aotearoa/New Zealand is exacerbated by having to deal with over one hundred of them in Geneva. But it is made more difficult by the fact that the colonising construct that continues to shape events in this land is writ even larger in the international arena. Ani Mikaere recently (and correctly) observed that colonisation is more than a process from history because “for Māori, there has been no end to it. It is not simply part of our recent past, nor does it merely inform our present. Colonisation is our present.” 1 At the United Nations it informs everything that happens in the drafting of the Declaration, and nowhere more so than in the constructs of law which shape the process.

* Moana Jackson is Ngāti Kahungunu/Ngāti Porou. A graduate in law from Victoria University he works mainly on Treaty/constitutional issues and international indigenous rights. He has served as Chair of the Indigenous Caucus of the United Nations Working Group on the Rights of Indigenous Peoples and is a member of the UN Committee on Indigenous Rights. He has also sat as a judge on the International People’s Tribunal hearing indigenous claims in Hawaii, Mexico and Canada.

LAW AS MAGIC:

Any contemporary consideration of the rights of Indigenous Peoples at international or domestic law takes place within a discourse where history jostles with myth and different notions of reality collide. In New Zealand, where recent (if now somewhat stultified) judicial activism led to the perception that the courts could deliver "victories" to Māori, that discourse has been particularly misleading.²

Indeed the whole basis of the recent Treaty of Waitangi jurisprudence has been a text of rights taken out of context and a Treaty reading firmly sourced in just one reality. The Courts and the Waitangi Tribunal have constructed a notion of Treaty rights that depends upon the transformation of the treaty idea from an international context to a domestic one, and the description of Māori rights as inherently subordinate to those of the Crown. One result has been a frenetic and profitable exercise in which lawyers have struggled to find ways of defining Māori rights that appear to acknowledge the special place of the tangata whenua without disturbing the Crown’s insistence on a reality where it has the only special place that really matters. Another, and more important result, is that the Māori rights that should be recognised in terms of our humanity are actually reconceptualised within a framework where they depend on the extent to which law is prepared to concede that we are human.

That result flows inevitably from the historical context of colonisation where the states of Europe developed their whole notion of indigenous rights within a religious, social and political debate about whether Indigenous Peoples were in fact human. For a long time they simply concluded that they were not, and they drew on ancient Greek ideas about the "natural" slave and Christian doctrines about the evil heathens to conclude that beings so naturally inferior could not possibly be human.

When they finally concluded that Indigenous Peoples had souls and were in fact human they nevertheless continued to argue that their

heathenness and general savagery consigned them to a lesser human status. They were trapped on a lower rung on the ladder of human progress and worth, and had not attained the full human state of those who lived in Europe. They were defined within what the Iroquois historian John Mohawk has called the “utopian vision” of European thought that “presented western civilisation as an adventure of discovering the perfection of human potentials... the vanguard of... human societies”. To be European was to be the perfect human, to be indigenous was to be naturally less so.

When that cultural certainty was translated into the jurisprudence that would deal with the relationship between European and Indigenous Peoples after 1492, the result was inevitable. Any rights which the colonisers were prepared to grant those they wished to colonise would be lesser rights in keeping with their worth. Thus the very notion of a colonising state’s obligation to “protect” indigenous rights requires an assumed relationship between a superior or dominant figure of power and a less powerful, childlike one. Rather like a father’s obligation to protect his child it was a relationship that necessarily implied an inequality of power and an inability or incapacity on the child-like party to exercise proper adult rights. The child was deemed to be naturally less capable and therefore needed to be protected from his or her own inadequacies.

The Spanish canon lawyer Franciscus de Victoria summed up the legal ramifications of those inadequacies in 1532.

“Although the aborigines are... not wholly unintelligent, yet they are little short of that condition and so are unfit to found or administer a lawful State up to the standard required. It might therefore be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country... There is no doubt that this would not only be permissible, but also a highly proper course to take; nay our sovereigns would be bound to take it just as if the natives were infants”.


That sort of protection of Indigenous Peoples effectively meant their dispossession. Indeed Caren Wickliffe has noted that “In this situation a tutelage relationship could be established whereby the sovereignty of these ‘inferior’ indigenous polities could be usurped by the superior European civilisations. Indigenous peoples would be the recipients of this new, more civilised order, under the guardianship of their colonisers”.

The Anglo-American jurisprudence of “aboriginal rights” or “aboriginal title” proceeded from a similar assumption. While good Christian nations acknowledged that all peoples were the children of God, Indigenous Peoples were nevertheless “unfit” to have all of the full rights that He intended. Thus while the colonisers’ law placed an obligation on colonising states to protect Aboriginal title in the land that they had held since time immemorial, the title itself was subject to the newly assumed and naturally superior power of the colonisers. They could extinguish it (through the proper channels), they could determine what it was, and they could demand that the aboriginals proved that they had in fact had it since time immemorial.

It was a title that vested in Indigenous Peoples not by virtue of their humanity, but in terms of their lesser human worth as defined by the colonisers. It was based upon a presumption that when the superior protector arrived on the scene “the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily to a considerable extent, impaired... Their rights... were necessarily diminished”. Their place was “necessarily” not as human as others were.

Those views “necessarily” underpin the contemporary Treaty jurisprudence in this country. The context that it grew from, and its inherent denial of the humanness of our people is not acknowledged today, but is instead cloaked in the language of partnership and a

6. Johnson v McIntosh 21 US (8 Wheat) 514, 1823.
relationship built upon the Treaty as the “nation’s founding document. Yet inherent in the whole discourse is the persistent assumption that Indigenous Peoples necessarily have lesser rights because we are less human. When the Court of Appeal stated that “the Queen was to govern and Māori were to be her subjects” it used the language of constitutional convention but reaffirmed the language of our necessary subjection. 7

It was another instance of what Sir Paul Reeves once referred to at the United Nations as the “colonial power” using “the treaty to legitimise its own presence”. 8 It was also a case of law transforming its dubious origins into a new mythology where its reaffirmation of the colonial status quo is masked behind a new image of good faith. It is what the Lumbee jurist David E. Wilkins has called “law as magic”. 9

The recent efforts of Indigenous Peoples to define and protect their rights through the United Nations Draft Declaration on the Rights of Indigenous Peoples have encountered the same “magic”. Indeed the debate on the right of self-determination within the Draft has been for Indigenous Peoples a long and difficult struggle with an illusion that the old ideas of our “necessarily diminished” rights may have at last been rejected. Sadly that is not the case, and the Indigenous Peoples involved have constantly been confronted with the reality that the unacknowledged interrelationship between law and the colonising imperative is still the guiding motive of most of the states involved, including New Zealand. The debate continues to occur within a discourse where history jostles with myth and different notions of reality collide.

INTERNATIONAL LAW AND INDIGENOUS PEOPLES:

Indigenous Peoples have been going to the United Nations to seek international recognition of their rights since 1977 when a group of mainly North and South American Indians met in Geneva. Others had

7. NZMC v Attorney General, supra, 372.
sought international acknowledgement before, including our people on several frustrating trips to England in the 19th century. A delegation of Māori even tried to get to the League of Nations in 1923, as did the Iroquois and Onandaga peoples. In each case they were either denied access or their complaints were rejected because they had no standing in international law.

When the UN Working Group on Indigenous Populations (WGIP) was finally established after the 1977 conference the reasons for those earlier rejections continued to underpin its operations and most of the views of the states that chose to get involved. For although WGIP was originally mandated in 1982 to develop a minimum set of "international standards" concerning the rights of Indigenous Peoples it was inevitably bound by the context and history of international law.

International law developed originally between the Christian states of Europe as a means of regulating their behaviour with each other. It was a unique and restricted club that Chancellor Woolsey defined as dealing with "the aggregate of the rules which Christian States acknowledge as obligatory in their relations to each other, and to each other's subjects". It existed to protect Christian interests, and although some early natural law theorists hinted at the existence of "universal" rights that might apply to non-Christians they were necessarily seen as subordinate. Even that limited recognition was dismissed when the Christian States became Christian colonisers. The Apache jurist James Anaya has noted that in fact international law "changed into a state-centred system, strongly grounded in the Western world-view; it developed to facilitate colonial patterns developed by European states and their offspring, to the detriment of Indigenous Peoples".

It assumed that if the Indigenous Peoples being colonised by Europe were to have any rights at an international level they would "necessarily" be of a lesser nature. For inherent in the process of colonisation was

the assumption that Indigenous Peoples did not make up States or nations. Instead they were trapped in a primitive form of tribalism that lacked the characteristics of civilised Statehood as understood in Europe. It was therefore impossible to acknowledge them fully within an “international” law because as Thomas Hobbes noted “the savage people.. .have no government at all; and live at this day in that brutish manner”. 12 If they did not have States, they could not have the rights of the people in States.

Although that reality is as unacknowledged in WGIP as it is in the domestic context of Treaty rights, it has nevertheless hampered the constructive development of a Declaration to acknowledge the full rights of Indigenous Peoples. Indeed in the fundamental discussion on the right of Indigenous Peoples to be self-determining it has proved to be almost insurmountable. It is creating a situation in which the good faith involvement of many Indigenous Peoples in the drafting process is being frustrated. It also raises the very real possibility that the Draft will not be a declaration of indigenous rights as understood by Indigenous Peoples but rather a set of rights defined for them by States.

THE DRAFTING PROCESS:

The result of that context has been that the commitment and camaraderie of the Indigenous Peoples who have worked on the Draft Declaration have all too often been underpinned with despair and pessimism. Although many delegations have included indigenous scholars who are recognised among the leading experts on international law, their involvement has always been more than a drafting exercise or an abstract dialogue about the textual accuracy of a particular right. Instead it has been an attempt to break through the abstractions in order to see both the context in which international law continues to situate Indigenous Peoples, and to clearly re-site our rights in our inherent humanity rather than within a concept where someone else defines their nature and extent. It is a textual issue only in the sense that it is an attempt to articulate our reaffirmation and our survival as full human beings.

The late Kawaipuna Prejean expressed this motivation in 1990 when he told the indigenous caucus “Very few of us here are lawyers and academics. But we are all indigenous, and that is what drives us. It is the need after hundreds of years of colonisation to restate that we are human, and we are therefore entitled to all the rights which international law now says all humans are entitled to. If the States do not recognise that, then all their legal talk and all their concerns about whether the Draft is consistent with international norms are just a smokescreen that hides the oppressive face behind their law. For them it might seem just a debate about fine legal points, but for us it’s survival.”

The drafting of the Declaration in WGIP and its subsequent transfer to a special “Inter-Sessional Working Group” (ISWG) has been marked by the different imperatives of Indigenous Peoples and States. In essence it is a tension between realities. That of Indigenous Peoples seeks protection from an ongoing oppression, and a rejection of the colonial construct of our lesser humanity that has effectively excluded us from being full members of what used to be called the “Family of Nations”. It is indeed a matter of survival. That of the states is the contextual legacy of colonial law (whether domestic or international) and the consequent ideas it developed about the nature of States, their sovereignty, their territorial integrity, and their legitimacy. It is a matter of holding onto the reality of power that colonial dispossession has helped create.

Although a number of States have been increasingly responsive to the indigenous reality (most notably some Scandinavian states and Fiji), the majority have been unwilling to move beyond the narrow paradigm of state-centred authority. The so-called CANZUS group of Canada, Australia, New Zealand and the United States has been actively involved in all stages of the process and often appears to ally itself with the Scandinavian bloc. However a close analysis of their interventions indicate that an apparent good faith willingness to articulate meaningful rights standards is in fact merely a subtle tinkering with the colonising

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legacy that some other states are more honestly open about protecting. Indeed the CANZUS group has adopted the same sort of approach as that taken in the domestic law's present refinement of Treaty or aboriginal rights. It proclaims its approach to the Declaration as a victory for Indigenous Peoples without acknowledging that it actually sustains the subordination first demanded in the process of colonisation. The difficulties created by this tension between the indigenous and State parties are a persistent undercurrent in the drafting of the Declaration. Its origins lie in the history of law as colonising magic.

THE BASIS OF THE TENSION:

The tension first came to the fore during the 1980's when the International Labour Organisation (which is an organ of the UN) began to draft the ILO Convention on Indigenous and Tribal Peoples. In the UN and international law context the term “self determination had a particular meaning that arose essentially as a right for those “peoples” in colonised territories who were granted independence after World War Two.

They were all Indigenous Peoples of course, but the States members of the UN devised a decolonising project that only recognised a right of self-determination in certain cases. They drew a distinction between those who were still colonised by a foreign power across the sea (as, say, Kenya was by Britain) and those who were colonised by settlers who now constituted a majority sovereign State (such as New Zealand). The former group, who became known as “blue water” or “salt water” colonies, were entitled to be independent in their own lands again. However those who had become a minority in a “settler colony” were not, ostensibly because the Western concept of majoritarian democracy applied and to grant self-determination to the minority colonised might jeopardise the rights of the majority coloniser.

It was in fact a very self-serving project situated firmly in the colonising context. In a country such as New Zealand the ideal of majority rule never had sanctity or currency when Māori people were the majority, and the notion that colonisation only occurred “over the water” was simply a myth. Perhaps more importantly, however, the decolonising
project meant that the right of self determination came to be seen as something that only vested in those peoples entitled to be decolonised according to the Statist interests of the United Nations. It implied a right to secede from the former colonial power and establish (or re-establish) their own polity on terms acceptable to their former colonisers. An equally important consequence was that the process actually redefined the UN Charter. Article One, para 2 of the Charter stated that one of the aims of the organisation was to promote the “equal rights and self determination of peoples,” yet the arbitrary nature of decolonisation created a distinction between peoples in the “blue water” colonies, and those in the “settler colonies”. The former were effectively redefined as independent citizens of a new State who became “real” people at international law. The latter became an “ethnic” minority still trapped as not really real people in the language of colonisation.

Of course Indigenous Peoples have never regarded themselves as either ethnic or a minority. Indeed counsel for the Lubicon Cree Sharon Venne told WGIP in 1992 “Indigenous Peoples are not ethnic. Ethnic groups are inventions of the White colonisers who are restricted to dancing, singing, and owning restaurants. We are not ‘minorities’ because that term places us in relation to a dominant numerical group when the only relationship that our creator put us in was the one with our lands. The numbers game is a peculiarly Western one”.  

That has been a consistent view of all Indigenous Peoples, including Māori, whose self defining process has always been “tangata whenua” not “tangata nama”. But the distinctions between “peoples” that was created by the decolonising process, and the consequent meaning of “self determination,” were embedded as realities within the relations between States. When the ILO Convention was drafted using the term “peoples” it was therefore inevitable that States would voice opposition and raise fears that the rights included in the Convention might be interpreted as self-determination and therefore imply a right to secede. To indigenous representatives however, the term was the obvious

expression of who they were, and a simple recognition of their humanness.

Those fundamentally different realities eventually led to a States’ driven compromise in ILO 169 that was to resurface in the work on the UN Draft Declaration. For the final Convention included an addition to the text that read “The use of the term ‘peoples’ in this convention shall not be construed as having any implications as regards the rights which may attach to the term under international law”. 15

States also demanded that the record of the proceedings leading to the final convention should include the following clarification: “It is understood by the committee that the use of the term ‘peoples’ in this Convention has no implication as regards the right to self determination as understood in international law”. 16

The strange result in textual terms was that the term “peoples” in the International Labour Organisation Convention had no real meaning in international law. That was a paradox that States parties were comfortable with because it preserved the abstraction and the limiting reality of who could be self determining to those they had already decided were appropriate in terms of blue water colonies. However many Indigenous Peoples have been more than discomforted by it because the meaninglessness of the phrase is a reaffirmation of the essential meaninglessness of their status in an international law context.

Unfortunately both the tension and the same sort of Statist arguments have persisted right through to the 1999 meeting of the ISWG, and they surface every time that the right of self determination has been raised.

THE RIGHT OF SELF DETERMINATION:

15. LLO Convention 169, Art 1 (3).
Most commentators now regard the right of self-determination as a foundational right even in international law. Anaya notes that "self determination is widely acknowledged to be a principle of customary international law and even jus cogens, a peremptory norm, (and) notwithstanding rhetorical extremism or aversion to express invocation of the term self determination, the concept underlying the term entails a certain nexus of widely shared values". 17

It is a right now embedded in many international documents and discourse. Indeed it is the definition of the right in the Human Rights Covenants such as the International Covenant on Civil and Political Rights that was adopted by indigenous representatives and inserted into the Draft Declaration as Article Three:

"Indigenous Peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

To Indigenous Peoples it is an expression of their complete humanness acknowledged in law, a reaffirmation of something that has for too long been denied. To States it is a right that they had given a specific meaning and was therefore a norm restricted in its application and intent. In their eyes it has no place in the Declaration. If it remains it must be clearly defined and hedged with restrictions.

That basic difference has largely shaped the drafting process and can only be understood, and therefore hopefully resolved, if the text of the Declaration is read in the context of the same colonising framework that has always shaped the relations between international law and Indigenous Peoples. For the same perceptions and assumptions that have underpinned the legal and ideological justifications for the dispossession of Indigenous Peoples are those which now abstract the notion of indigenous rights within the Draft declaration. They provide

17. Anaya, S James, supra, P75.
States with the mechanisms to oppose the full inclusion of the right of self-determination in the Draft, and they effectively reaffirm that we are somehow less human. For if the right is a human right that inheres in peoples because of their humanity, then the attempts that States make to deny or limit the application of Article Three is to impose the same assumptions of human worthlessness that colonisation has always done. That is the fact behind the face of most States at the UN Working Group, including New Zealand.

THE INDIGENOUS APPROACH:

The Indigenous Peoples who have attended the Working Groups represent millions of peoples throughout the world. They bring backgrounds in rich and diverse cultures as well as different life experiences and languages. However they share the common experience of colonisation and the imposition of a foreign power and culture in their lands. Amidst a shared reverence for the mother earth and a recognition of the interrelatedness of all things, it is that shared oppression which most drives their approach to the Declaration. For that reason there has always been absolute agreement on the paramountcy of Article Three. The right of self-determination is the recognition of our complete humanness from which all other rights flow. Without it we are incomplete and the Declaration loses its meaning.

Over the years literally hundreds of indigenous representatives have reaffirmed its fundamental nature. In 1992 the Shawnee jurist Glenn Morris stated:

“Self determination is the heart of the draft. It is recognised in the International Human Rights Covenants as vesting in peoples, yet many States act as though there is still an exclusive self-determination club from which millions of peoples can be excluded. Once they enter through the self determination club’s doors they slam the doors closed and change the entrance rules, denying the rights that they possess as peoples to those they have locked outside. We are the ones you have shut out, and we simply and quietly say as our ancestors have done for centuries that we are peoples too. You cannot deny or restrict our right to self determination without denying or restricting our right to be human”. 18

The 1993 Joint Statement from the entire indigenous caucus stated:

“Self determination is the critical and essential element of the draft Declaration. Discussion on the right of self-determination has been and still is the sine qua non condition of our participation. It must therefore be expressed clearly, explicitly and without proviso”. 19

The 1995 Joint Statement read:

“The right of self determination is a precondition for the exercise of all other rights and to delimit it. . . is in effect to delimit all our rights”. 20

In the same year the Navajo Nation reminded States that:

“In accordance with Article 1 of the International Covenant on Civil and Political Rights.. .all peoples have the right of self determination.. .The only question can be whether or not Indigenous Peoples are peoples. In the view of the Navajo Nation the answer must be yes. Indigenous Peoples are indeed peoples with the same right of self determination as other peoples”. 21

Willie Littlechild of the Canadian Cree reaffirmed its fundamental nature at the 1996 ISWG:

“I ask for the co-operation of governments to go past the outmoded colonial relationship and acknowledge that recognising self determination is the key to doing so. I seek trust, but Indigenous Peoples have paid a price in trusting the goodwill of States.” 22

In 1996 the Mapuche delegation said:

"There can be no debate about self determination. If you deny it to us you are denying that we are peoples. How in God's law, let alone international law, can you do that?" 23

In interventions that are often eloquent, frustrated, or hurt, Indigenous Peoples have continued to argue the humanness of the right rather than its abstraction. They have continued to try and deconstruct the colonising context within which most States still seem determined to articulate the right.

THE STRATEGIES OF STATES:

States involved in the drafting of the Declaration have adopted a number of strategies to seek either the removal of the right to self-determination or a revised wording which will restrict its import.

The most obvious strategy was to simply replace the word "peoples" with some other term such as "populations" or the singular "people". Both would render Article Three meaningless because of the international vesting of the right in the plural "peoples". The fact that States have nevertheless regularly proposed this approach has been frustrating for Indigenous Peoples. The suggested dropping of the letter "s" has been particularly tiresome because although it has seemed such a petty and semantic issue it is clearly one that has profound implications. In fact its seriousness led to an unprecedented protest on the floor of the Assembly in Geneva in 1991 when most of the indigenous delegates arrived at WGIP wearing T-shirts bearing a new kind of designer label "Don't forget the S".

Another State strategy has been to draw on the precedents of ILO Convention 169 and argue that the word "peoples" in the Draft has "no implication as regards the right to self determination as understood in international law". This approach seems to be gaining support among

some South American and European governments, and was advocated at one point by New Zealand.

A third strategy, which the New Zealand government now appears to favour, is based on some scholarly work that advocates a dichotomy of “internal” and “external” self-determination. At one level it recognises that Indigenous Peoples might have a right to determine some matters such as health care within a State, while the State retains the right to control all external affairs. It is a division of the exercise of the right within the construct and authority of the State, with the internal aspect often referred to as indigenous autonomy. At another level it views the right itself as having two distinctive domains. The first has to do with matters that are internal to a people (such as a right of political participation) and the second has to do exclusively with a people’s status vis-à-vis other peoples (such as freedom from alien rule). 24

In a statement to the ISWG in 1998 the New Zealand government framed its response to Article 3 by linking it to the current Treaty jurisprudence. It acknowledged that the “question of self determination is central to the draft Declaration” and noted that “Many of New Zealand’s laws and policies, especially where these relate to the partnership enshrined in the Treaty of Waitangi, are already consistent with principles found elsewhere in the Draft. The New Zealand approach to Article 3 reflects those developments. On this basis... New Zealand supports the right of Indigenous Peoples to exist as a community with their own cultural identity, and to be involved in determining their own economic and social destiny”. 25

Briefing Papers prepared by the Crown in 1999 reaffirmed this approach. The Crown repeated its support for Indigenous Peoples’ right to “exist as a community” and specifically acknowledged the Treaty as the “founding document of the nation state of New Zealand”. 26

24. See Anaya, S James, supra, P81.
However it was more specific in the limitations that it thought should be applied to Article Three.

It rejected any idea that internal self-determination might mean “self government” or “autonomy” and said instead “The government could accept reference... .for example to a form of responsibility closer to self management in meaning... The term used needs to be one which is consistent with and does not extend beyond New Zealand’s situation... With regard to political participation, any such rights would have to be established within the the overall constitutional system and be subject to Parliamentary sovereignty”. 27

This statement marked a refinement in New Zealand’s approach that is still trapped within the context of colonisation. As it does with the concept of tino rangatiratanga in its Treaty jurisprudence it clearly sees the right of self-determination for Māori as something akin to an aboriginal right. It needs to be recognised (and is in fact a “burden” on its sovereignty) but it is nevertheless a subordinate right. It restricts for example the recognition in Article 3 of the right of peoples to determine their “political status” to something subordinate to the Crown’s authority and thus denies the fundamental exercise of power that inheres in self-determination. In fact what the Crown appears to be suggesting is a form of Māori self-determination which it will determine.

The Briefing Paper also noted that governments at the UN have never been willing to accept an “unqualified” right to self-determination largely because it implies a right to secede from an existing State. It argues that the right to secede is always “counterbalanced by the principle of territorial integrity... Consequently... if the term ‘self-determination’ is to be used in the declaration it will either have to be qualified or explained”. 28 Clearly the colonial protector will do the “explaining” on behalf of the child-like Māori.

27. Supra, P115.
28. Supra, P34.
THE CONFLICT OF REALITY:

All of the strategies used by the States are based upon the old colonising right to define Indigenous Peoples that was assumed by Europe as part of the mad rush to the "New World" after 1492. They maintain a new age illusion of respect for indigenous rights yet insist that the "reality" of international law dictates that they should determine what they are. If they profess to have difficulties with something like the right of self-determination they explain it in terms of counterbalancing rights and seek a reasonable compromise that will grant it to Indigenous Peoples with the appropriate normative safeguards. They never admit to the colonising constructs that guide their perceptions. Instead they find reasons to limit the Declaration's reach with arguments which assert that a particular article conflicts either with an existing and oxymoronic "domestic treaty" or the fiscal restraints of the State's current economic ideology. Like David Wilkins's perception of "law as magic" they cloak their stubborn resistance in an illusion of logic. Andrew Grey summed up their resistance in 1994 by observing that "A cynic might remark that States must think that treaties are never between sovereign parties but are just like a used car contract. He might also remark that perhaps one day the right to be free from torture or the right to be protected against genocide might also only be indigenous rights if they don't impose fiscal restraints on a State" 29

In effect the attempts to limit the right of self-determination simply reflect Ani Mikaere's view that colonisation is our present. For in the end States site their arguments in a political "reality" that simply will not tolerate any notion of self determination unless it is on their terms. But reality is a changing human construct, and the fact that there are now more independent member States within the UN than there were twenty years ago is testimony to that fact. The challenge for Indigenous Peoples within the drafting process is to constantly affirm a reality that does not see rights as unique to colonising systems or as definable only by them. Taking that stance is not an act just to safeguard abstractions within the draft text but to strengthen an indigenous sense of reality. It is an assertion that the right to self-determination necessarily includes

the right to give meaning to one’s sense of what reality is. In that view, the State’s persistent proclamation of “the reality is” as something that they control is in fact a denial of the indigenous spirit. It is a rejection of the full humanness of Indigenous Peoples that has always marked the colonising face.

CHANGING THE FACE:

After more than a decade of involvement Māori withdrew from the drafting of the Declaration. The decision was an extremely difficult one, and it was made by the delegation in Geneva only after consultation with people at home. It was not necessarily intended to be permanent but was prompted by an increasing level of frustration over the process and the difficulty Indigenous Peoples were experiencing in changing the colonising face. The specific catalyst, which also led to a walkout of all indigenous delegates, was a rejection by States of an earlier joint resolution tabled before the Working Group that the text was a minimum set of standards which should not be amended. The resolution included Article Three, and the continued attempts by States to seek substantive amendment or rejection was seen as yet another attempt by them to consign us to a subordinate status.

In its final intervention the Māori delegation referred to the earlier unsuccessful attempts of our people to travel to the League of Nations at a time when there was “no Māori voice in this place but one day it would be ready to hear us”. It went on to note that the joint resolutions reflected the indigenous belief that “the Declaration must remain in its present form,” and that the States’ particular determination to amend Article Three indicated that “at this time the structures and processes of this Working Group . . . endanger the text as a whole...it seems that this session has still not been prepared to adequately hear our voice”.

The consequent withdrawal was not necessarily intended to be permanent but was rather a recognition that “In any process of discussion or negotiation, parties can reserve the right to withdraw in order to consider further responses, to take advice, or simply to ease...

30. Intervention at the Second Session of the ISWG, November, 1996.
frustrations. To do so is to be self determining.” Indeed it was done in the hope that one day States might hear our voice and acknowledge the reality of what self-determination actually is.

In the intervening years the process has dragged on in Geneva, and States still attempt to find ways of restricting Article Three. **Indeed when Māori delegations returned in 1998 and 1999** as observers there was an even greater sense of frustration that has led to further indigenous withdrawals. Yet the process will continue there and elsewhere because Indigenous Peoples will continue to proclaim their right as humans to be self-determining. Indeed there are now a range of regional documents including the Mataatua Declaration in which Indigenous Peoples exercise their right to self determination to declare that that is what they are.

In doing so they know however that changing the face behind the law of colonisation will take time. They therefore work to clarify the meaning of the right as a “humanity right”, and to dispel the certainties that colonisation has created about our place and our worth. They struggle particularly with the State argument that the right implies a right to secede that could lead to the break-up of existing States.

The assumption of secession as a corollary of self-determination is one that is clearly sourced in the narrow confines of the post-war decolonisation project. It is the view of many Indigenous Peoples that that process was itself flawed because of the distinction between peoples in blue water and settler colonies, and that to now promote the sanctity of territorial integrity is simply to cling to the injustice of that distinction. However they also argue that the right excised from the decolonisation context need not necessarily imply secession in terms of the territorial break-up of a polity. In that argument self determination is returned to its status as a “humanity right” that sanctifies human interests rather than physical borders. It reaffirms that Indigenous Peoples are rather more interested in jurisdictional than territorial authority, and that in the end the earth mother is indivisible.

31. Supra.
In the New Zealand context the recognition of an unqualified right would require the formation of a different Māori polity that necessarily questions the legitimacy of the colonising one and requires something more than “self management” or even “autonomy” within the existing constitutional framework. However that is not secession so much as it is reclaiming what was illegitimately taken. For the recognition of a Māori constitutional and legal framework does not seek the dismemberment of the polity of the Crown (is not “secessionist”) but rather seeks a rejection of the Crown’s assumption of superiority that led to the subordination of ours. It recognises that the current Treaty assumption that Māori consented to an inferior place is simply based on the colonising belief in our lesser worth rather than our own political and cultural realities in 1840.

There is no place for such an assumption in a truly post-colonial world, and Māori are willing to negotiate the necessary process of constitutional change that will remove it. The Crown has to acknowledge our right of self-determination to do so.

That will not only require a change of face on the Crown’s part but a continued willingness on the part of our people to be as bold and imaginative in maintaining the right of self determination as other Indigenous Peoples have been. We can take hope in that struggle from the fact that our tipuna did not leave us a legacy of timidity, nor did they expect that we would forever be subordinate in our own land. Instead they expected that our right would find its place alongside that of others that the Treaty envisaged. Since that is the bequest they left to us we must always ask how we can make it real for our mokopuna so that they never have to doubt their complete humanness. That means seeing the goal of self determination as part of the ongoing need to question the assumptions upon which law and indeed the institutions of this country are constructed.

One of my tipuna wrote in 1893 that “the waves which first brought us to Aotearoa were an often turbulent but necessary path to a new life”. The work undertaken by our people to proclaim the right of self-determination at the United Nations and elsewhere has been part of that new life, turbulent but necessary. It is but one way of changing the colonisers’ face, one way of reclaiming our humanity.
DISCRIMINATION, THE STATE AND MĀORI WOMEN:

An Analysis of International Human Rights Law and the Convention on the Elimination of All Forms of Discrimination Against Women

Kerensa Johnston*

The question of Rights. What are they? From my youthful thinking, dreaming and understandings of the word, from the context of a rights discourse, the word appeared like magic, making all things right and light. The darkness descending, and a happy ending. If this was to be, then why so hard, why was there no end in sight, no light at the end of the tunnel? Is the critical analysis of a rights discourse an academic wank, one that only those living in privileged comfort are able to indulge, in the feast of discussion? Or is this rights discourse, and the struggle to bring about ‘rights’, the path to follow; the one that will keep us from being consumed entirely from the belly of genocide, a place where the majority of Indigenous peoples in this country reside. Irene Watson

INTRODUCTION

In November 1999, I was one of a team of four women lawyers instructed by a Māori group to take a case to the Waitangi Tribunal. The team’s first meeting with our clients took place at their ancestral meeting house. Upon arrival, my team was invited into the meeting house for formal introductions and to discuss the case. Once inside, my team were asked to sit on the floor of the meeting house as marae protocol required, while the local men sat at tables and chairs which had been set up for the meeting.

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** My thanks to Nga Pae o Te Maramatanga, The National Institute of Research Excellence for Māori Development and Advancement, for their assistance and support while writing this article.

1 Quoted in “One Indigenous Perspective” in Garkawe (ed) Indigenous Human Rights (Sydney, The Sydney Institute of Criminology, 2001) at 22.
This arrangement was not conducive to doing legal work and discussing their case. So, as the formal part of the meeting came to a close, the head of our legal team, a woman, stood and told the group that if they wanted us to act for them then we needed to be seated at the table - alongside the men.

The following month we returned to the marae for our next meeting to find tables and chairs had been provided for us in the meeting house - opposite the men at a separate table. It was clear, however, that we had been given a place at the table because we were ‘the lawyers’ and that an exception to the general rule that women did not sit alongside the men inside the meeting house had been made. The local women attending the meeting sat on the floor.

This incident happened at the end of a decade in which Māori women had made several public challenges to the discriminatory practices of the Crown and others, including Māori men. These challenges attracted considerable publicity, one incident in particular because it involved the Prime Minister, Helen Clark. On Waitangi Day in February 1999, the Prime Minister was invited to sit on the paepae during the formal celebrations at Waitangi. In most areas, the paepae is reserved for male-speakers, who stand to speak and welcome visitors to the marae as part of the formal proceedings. Titewhai Harawira, a local Māori woman, challenged the Prime Minister’s right to speak, referring to the double standard that allowed Pākehā women (and Pākehā men) to speak - but not Māori women on their own marae.²

In 1995, Cathy Dewes was elected as the Ngāti Rangitihi representative to the Te Arawa Māori Trust Board in Rotorua. The existing trustees, all male, refused to allow her to take up her position on the basis that Te Arawa customs do not permit a women to act as a spokesperson for her iwi. She was eventually able to take up her position on the board, but only after High Court action.³ This incident raised Māori

women’s awareness of how tikanga can be used to justify discrimination against women in Crown-imposed structures.4

In 1993, a group of Māori women submitted a claim to the Waitangi Tribunal (hereafter referred to as the Mana Wahine claim) alleging that the Crown’s actions and policies since 1840 have systematically discriminated against Māori women and deprived us of our spiritual, cultural, social and economic well-being which is protected by the Treaty of Waitangi.5 The impetus for the claim was the removal of a respected Māori woman elder from the shortlist of appointees to the Treaty of Waitangi Fisheries Commission and the control of the fisheries settlement process almost exclusively by the Crown and Māori men.6 The Minister of Māori Affairs at the time, Doug Kidd, responded to news of the claim with the comment that the lack of status accorded to Māori women was the fault of Māori men — not the Crown.7 The Minister’s comment illustrated the Crown’s unsympathetic attitude towards the position of Māori women and the Crown’s unwillingness to consider its part in discriminating against Māori women. The Mana Wahine claim is yet to be heard by the Waitangi Tribunal.

In December 2000, The Optional Protocol to the Convention on the Elimination of Discrimination Against Women (hereafter referred to as the Optional Protocol) came into force in New Zealand. The preamble to the Optional Protocol refers to the principles of equality and non-discrimination as embodied in the Charter of the United Nations, the Universal Declaration of Human Rights, and other international human rights instruments, including the Convention on the Elimination of All Forms of Discrimination against Women (hereafter referred to as the

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5 Dame Mira Szaszy and Others Claim to the Waitangi Tribunal, WAI 381, 1993 (hereafter referred to as the Mana Wahine claim); also see infra note 21.
6 Only four Māori men were involved in negotiating the controversial ‘Sealord’ deal — although they purported to act on behalf of all Māori. Eventually, only one Māori woman was appointed to the Treaty of Waitangi Fisheries Commission.
Women’s Convention). The Optional Protocol reaffirms the determination of State parties, including New Zealand, to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms in all areas of life and to take effective action to prevent violations of these rights and freedoms.

The Optional Protocol empowers the Committee for the Elimination of Discrimination Against Women (hereafter referred to as the Women’s Committee) to consider individual communications submitted by a woman (or group of women) from New Zealand complaining of state party violations of the Women’s Convention and the Optional Protocol since December 2000.

The Optional Protocol procedure, along with other international human rights fora and procedures, is available to Māori women who wish to challenge discriminatory laws and practices, such as those described above, using international law.

In this article, I explore how effective international human rights law and in particular, the treaty-based committees such as the Women’s Committee, is at protecting Māori women against discriminatory laws and practices. What, if anything, can Māori women achieve in international law fora? Is the struggle to bring about human rights, as Irene Watson, a Nunga women from South Australia, says, “the path to follow, the one that will keep us from being consumed entirely from the belly of genocide”? Or, is rights talk an indulgence that those living in privileged comfort enjoy – an indulgence that ultimately distracts Māori women (and all Indigenous peoples) from rebuilding our own communities and revitalising our own law?

Part one provides the background to the position of Māori women in New Zealand since 1840, focusing on the discriminatory impact of

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9 The Optional Protocol also entitles the Committee of its own accord to investigate grave or systematic violations of the Convention in those states, which have accepted this procedure, online: .
colonial laws and values on Māori women. I argue that since 1840, the
Crown’s actions and policies have undermined the role and status of
Māori women. In particular, Māori women have been almost entirely
excluded from the political and public life of the state. The political
marginalisation of Māori women has led to the marginalisation of Māori
women’s interests generally and contributes to the discriminatory laws
and practices Māori women continue to face in New Zealand.

Part two discusses the international law fora that are available to
Indigenous women who wish to challenge discriminatory laws and
practices. Drawing on feminist perspectives, I consider some of the
problems with the international human rights system and the treaty-
based Committees, such as the Women’s Committee. In particular, I
examine the Women’s Convention, alongside New Zealand’s latest
report to the Women’s Committee. I discuss the Optional Protocol
procedure and conclude that Māori women are more likely to obtain an
effective remedy against discrimination using the Optional Protocol
procedure and that they should not rely on state and non-governmental
organisations reporting to the Women’s Committee to address their
concerns.

In Part three I question whether Indigenous women (and in particular
Māori women) should consider turning to international law at all in our
attempts to remedy discriminatory laws and practices. This is because
Indigenous women have particular concerns about the development
and application of international human rights. The concept of universal
human rights, and in particular the emphasis on individual rights does
not sit easily with many Indigenous women because it fails to recognise
the importance of our communities and our struggle for self-
determination. Despite my criticisms of the international human rights
system, I conclude that Māori women should consider submitting an
individual complaint to the Women’s Committee based on a breach of
article 7 of the Women’s Convention (the failure to eliminate
discrimination against women in political and public life).

I argue that Māori women should not submit a complaint based on
article 5 of the Women’s Convention, which requires New Zealand to
take all appropriate measures to modify discriminatory cultural practices
against women, which could include, for example, the restriction on
women's speaking rights on the marae. For the purposes of my discussion, I assume that the denial of women's speaking rights on the marae constitutes discrimination under the Women's Convention. I acknowledge, however, that this may not be the case if men and women's roles on the marae are seen as complementary and having different but equal status. Furthermore, the extent to which colonisation has altered and influenced male and female roles on the marae (and tikanga Māori generally) is not fully considered here.

Ultimately, I conclude that international fora, such as the Women's Committee, are not the right places to remedy discriminatory cultural practices that are (arguably) sourced in tikanga Māori. What is needed is a rediscovery of Māori principles and practices as they relate to Māori women.10

Despite my conclusion that Māori women should not submit a tikanga-based complaint to the Women's Committee, I am not confident that a serious Māori re-examination of discriminatory practices, which have traditionally been justified according to tikanga, will take place in New Zealand any time soon. The only benefit, therefore, of submitting an individual complaint based on discriminatory customary practices, is that it may stimulate Māori discussion about the issues. There are, however, many pitfalls for Māori women to be wary of if they choose to submit a tikanga-based complaint. These issues are also discussed in part three.

I THE DENIAL OF MANA WAHINE*  
A. INTRODUCTION

She is my goods, my chattels; she is my house  
My household stuff, my field, my barn  
My horse, my ox, my ass, my anything.  
(The Taming of the Shrew, 3.2)

10 See Mikaere, A, "Māori Women: Caught in the Contradictions of a Colonized Reality" (1994) 2 WLR 149.
Ani Mikaere, Linda Smith, Leonie Pihama, Clea Te Kawehau Hoskins and many others have written about the role and status of Māori women in New Zealand prior to colonisation and the introduction of colonial laws.11 There is still a great deal to rediscover and learn about Māori women's pre-colonial history, particularly as some of the stories about Māori women been retold and recorded by officials, historians and writers to diminish the importance and contribution of Māori women.12

It is known that prior to the introduction of colonial laws, and for some time afterwards, in some areas of New Zealand, Māori women were political leaders who exercised considerable power within their hapū and iwi.13 Te Rohu (Ngāti Tuwharetoa - the eldest daughter of Te Heuheu Tukino II and Nohopapa) was active in Tuwharetoa's military and political campaigns. Similarly, Waitohi (Ngāti Toa/Ngāti Raukawa) led war campaigns in the North and South Islands. Her daughter, Rangi Topeora, signed The Treaty of Waitangi.14

Prior to the introduction of colonial laws and according to tikanga Māori, women were not regarded as chattels or possessions. Māori women retained their property rights upon marriage and both ambilateral and ambilineal descent was recognised.15 Women's sexuality was not

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12 See Williams, D, “He Aha te Tikanga?” (Wellington, New Zealand Law Commission, 10 November 1998) [unpublished] at 16; where he argues that Mana Wahine was distorted by the perception of officials and writers during the contact period to diminish the importance of Māori women; also see Mikaere, supra note 7 at 81-83 where she explains how Māori cosmology stories have been reworked to exaggerate the importance of Māori men.

13 Mikaere, supra note 7 at 69.

14 Ibid.

15 New Zealand Law Commission, Māori Custom and Values in New Zealand, (2001) NZLC SP9, 35. I make these points to provide evidence of Māori women's equality in pre-colonial society - for an alternative view see Te Kawehau Hoskins, C, supra note 11 at 33 where she argues that although martilineality (as it pertains to the practices of descent and handing on of land) is often invoked as evidence of the equal status of Māori women and Māori men, this practice can sit comfortably within patriarchy, particularly if it simply channels the power held by males through female descent.
suppressed and childbearing was considered a healthy and normal part of life.\textsuperscript{16} Furthermore, the Māori language is gender neutral in a way that English is not – \textit{ia}, for example, means he and she.

The New Zealand Law Commission, in a recent report examining tikanga Māori chose Shakespeare’s words, from the \textit{Taming of the Shrew}, which are quoted at the beginning of this part of the article, to begin its discussion about the impact of colonial law and values on Māori women from 1840 onwards.\textsuperscript{17} The verse illustrates the attitude towards women of Pākehā men, who from 1840 onwards, dominated the development of New Zealand’s law and the state. Petrucho, in the \textit{Taming of the Shrew}, refers to his wife as, “my goods, my chattels, […] my house” and his view reflects English law at that time. Women were considered male property and did not enjoy legal personality in the same way as did men: a married woman could not, for example, initiate legal action without her husband’s consent.\textsuperscript{18} Furthermore, colonial law legitimised violence against women and until recently, the law in New Zealand did not recognise rape as a crime against a woman if her husband committed it.\textsuperscript{19} Upon marriage, most women were expected to assume the domestic duties of wife and mother, while ‘the man of the house’ purported to represent his wife and family’s interests outside of the home in public affairs.\textsuperscript{20}

Pākehā men came to New Zealand influenced by a long history of law and practice that assumed that a woman’s role was confined to the domestic, ‘private’ sphere. These powerful assumptions prevented Pākehā men from recognizing Māori women as political leaders and representatives of their tribal groups and led ultimately to the state’s denial of Mana Wahine.

\textsuperscript{16} Buck, P, \textit{The Coming of the Māori}, quoted in Mikaere, A, infra note 67 at 38.
\textsuperscript{17} New Zealand Law Commission, \textit{Justice: The Experiences of Māori Women} (1999) NZLC R53 at 35.
\textsuperscript{19} In New Zealand, a man could not be charged with raping his wife until an amendment to the Crimes Act was made in 1985.
\textsuperscript{20} Blackstone, supra note 18; also see Mikaere, supra note 7, 107-110.
The state’s active denial of Mana Wahine began with the signing of Te Tiriti o Waitangi (hereafter called The Treaty) in 1840. Between February and October 1840, over 500 Māori leaders signed the Treaty on behalf of hapū and iwi. These Māori leaders possessed the requisite mana (authority) which enabled them to enter into such an important contract.

At least thirteen Māori women signed the Treaty, including Ana Hamu (the original patron of Pahia Mission), Te Rau o Te Rangi (Te Whānau Wharekauri/Ngāti Toa) and Rangi Topeora (Ngāti Toa/Raukawa). It is possible that more Māori women signed the Treaty. This is because many Māori names at that time were gender neutral – the unknown signatories could therefore be male or female.

The history books, until very recently, did not refer to the women who signed the Treaty, or when they did, they claimed that only a few women – three or four at the most had signed. These women were portrayed as the exception to the norm and it was generally assumed that the exercise of political authority in Māori society was a male prerogative.

It is possible that more women would have signed the Treaty but for the attitudes of the Crown agents who were responsible for negotiating the Treaty and collecting signatures. In some areas, Crown agents

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21 The Treaty of Waitangi was signed by Māori and the British Crown in 1840. The Māori text of the Treaty authorises the Crown to fulfill the functions of governorship, preserve law and order between Māori and the settler population and affirm and protect Māori authority and control of land, resources and taonga katoa (all things precious). The English text vests absolute sovereignty in the Crown and recognises and protects Māori property rights; for further discussion see Orange, C, The Treaty of Waitangi (Wellington, Allen & Unwin, 1987).

22 See Mahuika, A, “Leadership: Inherited and Achieved” in King, M (ed) Te Ao Hurihuri (Auckland, Reed Books, 1992) at 42, for a discussion of Māori women and leadership prior to The Treaty.

23 See Mikaere, supra note 7 at 71, where she says that more research is needed to identify the people who signed the Treaty. Māori families in particular, should examine the signatures in order to identify their ancestors.

24 See Williams, supra note 12 at 16.

25 See Sykes, supra note 4 and Mikaere, supra note 7.
refused to negotiate the Treaty with Māori women and would not allow them to sign. In the Ngāti Toa region, for example, Major Bunbury refused to allow a high-ranking Ngāti Toa woman to sign the Treaty. As a result of the insult her husband refused to sign.\footnote{See Orange, C., \textit{The Treaty of Waitangi}, supra note 21 at 90.} This incident was an early sign that the relationship between Māori women and the Crown would be problematic.\footnote{Rei, T, "Te Tiriti o Waitangi: Māori Women and the State" in Du Plessis (ed) \textit{Feminist Thought in Aotearoa/New Zealand: Connections and Differences} (Auckland, Oxford University Press, 1998) at 198.} As Annette Sykes has pointed out "this is a dramatic illustration of the imported cultural values and attitudes imposed by representatives of the English Settler Government. It is perhaps the first recorded example of the continuing practice of Pākehā men imposing their mono-cultural based decisions and restrictions on Māori women."\footnote{Sykes, supra note 4.}

C. THE IMPACT OF COLONIAL LAW AND VALUES ON MANA WAHINE

In 2001, the New Zealand Law Commission released its report entitled \textit{Māori Custom and Values in New Zealand Law} which followed an earlier report entitled \textit{Justice: The Experiences of Māori Women}\.\footnote{NZLC SP9 [2001]; NZLC R53 [1999].} Both reports discuss the impact of colonisation on Māori women in detail. My intention in this part is to provide a brief background to the impact of colonisation on Māori women after the signing of the Treaty in 1840, to show how Māori women have been (and continue to be) excluded from public and political decision-making bodies and to illustrate the level of discrimination Māori women experience generally. This background is provided in order to inform my discussion in parts two and three, where I consider the international law remedies available to Māori women who wish to challenge discriminatory laws and practices.

It is difficult to overestimate the severe impact colonisation has had on Māori women. Colonial law and values intruded upon every aspect of Māori women’s lives, dramatically changing our position and status within whānau, hapū and iwi structures.\footnote{See supra note 11 and supra note 15.} The progress of colonisation
in New Zealand after 1840 was rapid and aggressive. By 1856, the settler population outnumbered the Māori population, which created an urgent settler demand for land and autonomy.\textsuperscript{31} This combined with the Māori realization that the Crown had no intention of respecting Māori authority, which had been guaranteed by the Treaty of Waitangi.

By 1860, Māori throughout the North Island were engaged in a large-scale war with the Colonial Government in an attempt to prevent further Pākehā incursions into autonomous Māori areas.\textsuperscript{32} The war continued throughout the 1860s and although there was never a decisive British victory, by 1870 fighting had come to an end in most areas of New Zealand. Māori communities, particularly in the Taranaki, Waikato and Bay of Plenty regions, were devastated.\textsuperscript{33}

As is the case with most wars, women and children suffered considerable hardship.\textsuperscript{34} Māori Men (and some Māori women) were away from their homes and cultivations for long periods of time fighting. As a result, cultivations were neglected and resources were stretched. The combination of the loss of life as a result of the fighting, poor health and increasing mortality rates due to inadequate food and resources, created tension and uncertainty and laid the foundation for the economic and political unrest which followed.\textsuperscript{35}

In 1863, the Government passed the New Zealand Settlements Act which authorized the confiscation of large areas of land from Māori who fought against the Crown or assisted or sheltered those who had participated in the fighting.\textsuperscript{36} This led to the forced removal of Māori

\textsuperscript{31} Olssen & Stenson (eds), \textit{A Century of Change} (Auckland, Longman Paul, 1989) at 131.
\textsuperscript{32} At the height of the war in New Zealand, eighteen thousand British Troops were employed (along with colonial and some Māori troops) at a cost to the British Government of 500,000 pounds per year.
\textsuperscript{34} Ibid.
\textsuperscript{35} Ibid; also see Scott, Dick, \textit{Ask that Mountain} (Auckland, Reed Books, 1975) at 125-130.
\textsuperscript{36} Land was also confiscated from hapū and iwi who had not participated in the fighting. In Taranaki, for example, there was a blanket confiscation of over one million acres of Māori land which affected all hapū and iwi in the region, see supra note 33 at 12.
women and their families from their land. In areas, such as Taranaki, Māori men were imprisoned, without trial, and separated from their families and communities for long periods of time.\(^{37}\)

The ostensible aim of the land confiscations was to punish Māori ‘rebels’ for their part in the war. The Government’s real objective, however, was to acquire valuable Māori land to satisfy the increasing settler demand for land.\(^{38}\)

The confiscation of Māori land coincided with the enactment of the Native Land Act 1865 and the establishment of the Native Land Court. The Native Land Court aimed to facilitate the conversion of all Māori customary ownership of land (whereby whānau, hapū and iwi had communal rights to defined territorial areas) to individual title. The Native Land Court was phenomenally successful at fulfilling its task. By 1900, less than 10% of land in New Zealand was held according to Māori customary law.\(^{39}\)

According to Ballara, from 1865 onwards, “Māori land tenure with respect to women was progressively undermined”.\(^{40}\) This was partly because the Native Land Court consisted entirely of Pākehā men. They controlled the process of individualization of Māori land and were more likely to list Māori men as landowners of communal hapū land, rather than as the guardians of the land on behalf of the hapū.\(^{41}\)

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37 Over 1000 men and women were forcibly removed from Parihaka (South Taranaki) between 1881 and 1890. Most of the men were taken to the South Island where they were imprisoned indefinitely without trial. Māori women from outside of the Taranaki area living at Parihaka at the time of the invasion were forced to return home. Those women who stayed at Parihaka were subjected to raids, their homes and cultivations were burned and cleared and some women were raped by colonial soldiers; see supra note 33.

38 The Taranaki Report, supra note 33 at 10,108,113-114.


40 Hohepa and Williams (eds) (1996) para 98; quoted in New Zealand Law Commission, Justice: The Experiences of Māori Women (1999) NZLC R53, 20; In 1873, for example, the Native Land Act was amended to require husbands to be a party to any deed executed by a married Māori women, although Māori men were free to dispose of the land interests of their wives without their consent.

41 New Zealand Law Commission, Justice: The Experiences of Māori Women, ibid at 21 – 22.
The effect of land alienation on Māori women was severe. Māori were forced to move away from their hapū and iwi areas in search of employment. This led to the breakdown of whānau, hapū and iwi relationships and Māori social, political and economic structures. Māori society had never been organized around the nuclear-family, but as women were forced away from their hapū and iwi base in search of work, the benefits of caring for their whānau in a communal environment, with all the support that it entails, were lost. Māori women relied less on the wider kin group and more on their male partners. As economic dependency on male partners grew so did the influence of colonial values, which required women to stay at home and fulfill the role of the good Christian wife. The state education of Māori girls reinforced the view that the woman’s role was to fulfill subservient, domestic roles. Māori girls boarding schools such as Hukarere Protestant Girls’ School and Queen Victoria Māori Girls School, focused on the domestic training of Māori girls and “providing good Christian wives for the boys of Te Aute.”

Since the signing of the Treaty, the Crown had never seriously considered Māori women as political leaders, and now the ideological forces of colonisation were beginning to influence Māori men to adopt discriminatory attitudes towards Māori women. In 1893, for example, Meri Mangakahia (Te Rarawa) had to petition Māori men in Te Kotahitanga (Māori Parliament) for Māori women’s right to vote. Māori women finally gained the right to vote in Te Kotahitanga in 1897 – four years after universal suffrage had been attained in New Zealand. However, some Māori men remained resistant to women’s right to vote and participate in political affairs. In 1933, for example, a group of Māori men from Te Arawa, went to Parliament for the express purpose of walking out in protest when Elizabeth McCombs, the first woman Member of Parliament, rose to give her maiden speech.

42 Barrington, JM, Māori Schools in a Changing Society quoted in Mikaere, supra note 7 at 43.
43 Rei, T, McDonald G and Te Awekotuku, N, “Māori Women’s Organisations” in Else (ed) Women Together (Wellington, Daphne Brasell Associate Press, 1993) at 313.
44 See Te Kawehau Hoskins, C, supra note 11 at 25.
Although, by the early twentieth century, the opportunities for Māori women to participate in political life and engage with the Crown, were limited, Māori women continued to be politically active to the extent that was possible within colonial society. In 1951, Māori women established the Māori Women’s Welfare League (hereafter referred to as the League) in an attempt to influence and implement Government policy that affected Māori. As Mira Szaszy, a former President of the League recalled, it was established “to set up a structure which was not dominated by men, that is, on non-Māori lines.”

The League had its origins in the Māori Social and Economic Advancement Act 1945 which expanded the Māori Affairs portfolio to include housing, education and social welfare. The Act allowed for the appointment of Māori welfare officers to administer services and implement government policies. Initially, all of the officers appointed were male but it soon became clear that Māori women were needed to work with Māori women and children.

Described as “the most comprehensively representative and durable of the national Māori organisations”, the League enjoyed considerable support from Māori women and throughout the 1950s its membership grew steadily. The League provided a forum where Māori women could express themselves and coordinate, irrespective of tribal differences and the restrictions that may have prevented women from participating formally in the tribal context.

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45 Mikaere, supra note 7 at 162; also see Rei, supra note 43 at 313.
46 For example, one of the main concerns at the first meeting of the League was the survival and development of Te Reo Māori (the Māori language).
47 Szaszy, M, “Me Aroha Ko e Hā o Hineahuone”, in Witi Ihimaera (ed) Te Ao Marama 2, Regaining Aotearoa: Māori Writers Speak Out (Auckland, Reed Books, 1993) at 289.
48 Nga Komiti Wahine (tribally based Māori women’s committees) formed the nucleus of the League; see supra note 43, 3 for more detail about Māori women’s organisations from the 1880s onwards.
Unfortunately, not all Māori men supported the League. A letter to the Minister of Māori Affairs in 1953 complained that the League had usurped the authority of men and that Māori women had taken over control of the pā.\(^{51}\) Crown officials were equally unenthused. In 1952, a Māori Affairs’ Departmental officer observed:

> [T]he Welfare League’s activities are centered on the house and all its aspects. Our problems start at the house and in this respect the women can do a great deal of good. But they will not get very far without the backing of tribal committees. They were created to assist tribal committees on aspects of welfare which are the prerogative of women. As long as they confine themselves to that particular field they will do good.\(^{52}\)

Fortunately, the League did not, as Rei points out, confine its activities to the house.\(^{53}\) It continued to assert itself as a pan-tribal political organisation, which sought to influence Māori policy generally, as well as policy which was particularly relevant to Māori women.

The criticism that Māori women were ‘taking over’ the political affairs of Māori men and asserting too much political authority led the Department of Māori Affairs to withdraw the League’s administrative support in 1962.\(^{54}\) This coincided with the National Government’s enactment of the Māori Welfare Act 1962, which established the New Zealand Māori Council (hereafter referred to as the NZ Māori Council). Dominated by Māori men, the NZ Māori Council modeled itself on Pākehā (white) male-dominated bureaucratic systems, which the (predominantly male) National Government related to and understood. The NZ Māori Council became the main pan-tribal body that the Government consulted on Māori policy, effectively replacing the League as a central political voice on Māori affairs. Until the 1980s, the NZ Māori Council maintained a strong and viable male leadership and

\(^{51}\) 15 January 1953, Māori Affairs Files, 36/26, Box 40, National Archives, quoted in supra note 43 at 9.

\(^{52}\) Department of Māori Affairs, Internal Memorandum, 22 March 1952, Māori Affairs Files, MA 36/26, Box 39, National Archives, quoted in supra note 43 at 10.

\(^{53}\) Rei, supra note 43 at 9.

\(^{54}\) Ibid, 11.
provided advice on Māori issues to the Government. By the early 1990s, however, the NZ Māori Council was under attack from those it purported to represent for its lack of accountability. 55

The National Government’s decision to establish the NZ Māori Council in preference to developing its relationship with Māori women and the League, illustrated the continuing force of colonial assumptions about the political power of Māori women. The assumption that Māori men, not Māori women, were able and entitled to exercise political power was still firmly entrenched in the minds of Crown officials. The establishment of the NZ Māori Council was a sign that Crown initiatives would continue to be imposed so as to exclude Māori women from decision-making roles, and worse, that Māori men were willing to collude with the Crown in this process. As Mikaere points out, perhaps the greatest tragedy in this event “[I]s that Māori men at that time perceived the threat to have been their own women rather than the white male structure they so wanted to be a part of.” 56

Throughout the 1980s and 1990s successive New Zealand governments embarked on neo-liberal reform of the market, introducing trade liberalisation and restructuring state activities. 57 Job losses as a result of economic restructuring and state sector reform during this period fell heavily on Māori women employed in state-owned industries. 58 The decline in job opportunities, combined with the increase in single-parent families, limited Māori women’s employment and economic opportunities. 59

56 See Mikaere, supra note 11 at 97.
57 See Macklem, supra note 39; also see Kelsey, J, At the Crossroads (Wellington, Bridget Williams Books, 2002).
58 Ministry of Women’s Affairs, Māori Women in Focus: Titiro Hangai, Ka Marama (Wellington, Te Puni Kokiri/Ministry of Women’s Affairs, 1999) at 2, online: http://www.tpk.govt.nz/publications/factsheets/default.asp.
59 Ibid.

The Māori population in New Zealand is approximately 500,000, amounting to fifteen per cent of the population; see supra note 58 (note: these statistics are based on a report prepared by Te Puni Kokiri in 1999 which relied on 1996 census figures. According to the 2001 Census, the Maori population comprised 526,281 of New Zealand’s population. This figure is forecast to reach 750,000 (16.6% of the total population) by 2021: see http://www.teara.govt.nz/NewZealandInBrief/Maori/i/en.
Today, Māori women account for about seven per cent of New Zealand's total population, which is approximately four million people. Māori women hold only 2.1% of senior management positions (although this number is increasing very gradually). Māori women have the highest rate of unemployment in New Zealand and generally receive lower incomes than men. The health of Māori women on low incomes is poor, with many women suffering from high rates of vitamin deficiency and anemia. At least a third of all Māori women and their families in the lowest income group cannot afford to eat properly all the time and basic food runs out for a third of Māori families in the low-income bracket.

The trend towards privatisation and the process of economic globalisation has had a negative impact on Māori women's communities and lands, and on their ability to participate in public and political life.

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62 Māori women are the highest proportion of New Zealand's population to have an income below $20,000; the median personal weekly income for Māori women is $278 (compared to $479 for non-Māori men); see supra note 58 at 60. In 2001, the median income for Maori men per annum was $18,600 compared with $13,200 for Maori women: see tpk.govt.nz/news/archive.arp?action+news&id=85.

63 The experience of Māori women in New Zealand should not be seen in isolation. The majority of the world's 1.3 million people living in poverty are women. The majority of the world's illiterate are women; women in Asia and Africa work 13 hours a week more than men and are mostly unpaid. Worldwide, women earn 30 to 40 per cent less than men for doing equal work. Women hold between 10 and 20 per cent of managerial and administrative jobs worldwide and less than 20 per cent of jobs in manufacturing. Women make up less than 5 per cent of the world's heads of state; from The World's Women 1970-1990: Trends and Statistics (United Nations publication, Sales No. E.90.XVII.3), online: ; also see supra note 61 at 34.

64 Māori Women, supra note 58 at 2.
Economic marginalisation and political marginalization go hand in hand, so it is not surprising that the economic reforms failed to improve the social, economic and political position of Māori women, nor have these reforms created more opportunities for Māori women to participate in political affairs and decision making bodies. The low level of political participation and representation of Māori women in political institutions and decision making bodies contributes to the marginalisation of Māori women’s concerns and interests. In communities, such as Te Arawa, Māori women such as Cathy Dewes, have been denied the right to manage and account for the allocation of iwi resources. On the national level, respected Māori women elders have been excluded from making important, far-reaching decisions about Treaty rights and the Treaty settlement process. Māori women recognise that their exclusion from decision making processes contributes to their worsening economic position and that the so-called “trickle down” effect from Treaty settlements is unlikely to benefit most Māori women and children.65

As Ngahuia Te Awekotuku acknowledges:

I’d like to think that the proceeds of the Sealord deal will go to Māori women in the refuge movement, will go to kids with glue ear at kohanga reo [...] I’d like to think that proceeds from various initiatives will go into ensuring that Delcelia Whittaker and Craig Manukau will never happen again. But you know, will it? I see all these late model corporate cars with personalized Māori plates cruising Queen Street and Lambton Quay and I truly do wonder.”66

D. CONCLUSION

With the exception of the Māori Women’s Welfare League, Māori leadership and representation in the context of the Crown-Māori relationship, has been defined and controlled according to Pākehā patriarchal beliefs. Māori women, as a result, have been excluded from effective participation in most areas of governance and have been subject to discriminatory laws and practices.67


What can Māori women do to address this problem? What can international law offer Māori women, and Indigenous women generally, who wish to challenge discriminatory laws and practices? How effective is international human rights law at protecting Indigenous women from discriminatory laws and practices? Is international human rights law the best way of protecting Indigenous women against discriminatory laws and practices? These questions, along with an examination of the international human rights system, are considered in parts two and three.68

II MANA WAHINE AND INTERNATIONAL LAW

A. INTRODUCTION

New Zealand is a party to many international agreements that are relevant to women’s rights.69 They include the Universal Declaration on Human Rights (1948), the Convention on the Political Rights of Women (1952), the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1976), the Convention on the Elimination of All Forms of Discrimination Against Women (1979), the Beijing Platform for Action (adopted at the 4th World Conference on Women 1995) and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (1999).70

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68 It is not possible here to consider every aspect of the international human rights system and how it has developed, with respect to women’s rights. I do not discuss, for example, the issues surrounding the enforcement of international human rights law. This topic deserves detailed examination in its own right. Instead, I have raised the issues that concern me most when I think about Indigenous women and international human rights law, with the hope, that in some way, these thoughts will contribute to the discussion about restoring Mana Wahine.

69 New Zealand’s practice is to ratify international treaties once the provisions are substantially consistent with domestic law, although an international treaty, such as the Women’s Convention, has no legal status in and of itself until it is incorporated into the domestic law by Parliament (see Ashby v Minister of Immigration [1981] 1 NZLR 222 (CA) at 223).

70 There are others which include; The Declaration on the Elimination of Violence Against Women (1993); Programme of Action adopted at the International Conference on Population and Development (1994); Beijing + 5 Resolution (Further actions and initiatives to implement the Beijing Declaration and Platform for Action) (2000).
Despite the array of international instruments that are relevant to women’s rights, there is a lack of consciousness about women’s issues within the United Nations (hereafter called the UN).\(^7\) This may be due to the lack of women on UN treaty-based committees and the lack of women in professional and high-level posts within the UN generally.\(^7\) With the exception of the Women’s Committee, the treaty-based committees are male-dominated and Indigenous peoples are poorly represented.\(^7\) All 23 members of the Women’s Committee are women and on this basis the Economic and Social Council (ECOSOC) has criticised the Women’s Committee for its gender imbalance.\(^7\) Ironically, in the one area where women are over-represented in the UN system, ECOSOC has made efforts to decrease female participation, while the invisibility of women in other areas has not seriously been challenged.\(^7\)

In 1993 the Vienna World Conference on Human Rights recognised that the human rights system did not adequately reflect the reality of women’s lives.\(^7\) In 1995 the Beijing Declaration and Platform for Action went further by acknowledging the range of factors such as

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72 The General Assembly’s target of fifty percent women in all professional and higher posts within the UN Secretariat and UN system is far from being met. As of June 2002, women held only 34 percent of professional and higher posts within the UN system; see statement by Angela King, Special Advisor on Gender Issues and Advancement of Women, to the Women’s Committee, online: http://www.un.org/womenwatch/daw/cedaw.

73 The United Nations has attempted to address this problem by creating the Permanent Forum on Indigenous Issues, which held its first session in New York in May 2002. The Forum consists of 8 state representatives and 8 Indigenous representatives whose short-term aims are to improve communication and interaction between the United Nations and Indigenous peoples.

74 Charlesworth, supra note 71 at 66.


race, age, ethnicity and gender, which operate against women. As Burrows reminds us, "[f]or most women, what it is to be human is to work long hours in [...] agriculture or the home, to receive little or no remuneration, and to be faced with political and legal processes which ignore their contribution to society and accord no recognition of their particular needs". These political and legal processes include the international human rights system which, for the most part, ignore the reality of women's lives. The treaty-based committees, for example, apart from the Women's Committee, have not adequately addressed women's rights. The Human Rights Committee, in particular, has been slow to recognise the position and experience of women. General Comment No 9 (the right to privacy) of the Human Rights Committee, for example, makes no reference to reproduction rights. General Comment No 6 (right to life) makes no reference to the tensions between the right to life and a women's right to abortion, nor does it refer to gender-based violence or genital mutilation.

Feminist writers and critical legal theory scholars such as Hilary Charlesworth, Christine Chinkin and Catherine MacKinnon, have criticised the development of the international human rights system, arguing that it is dominated by men and as a result, reflects male concerns and interests. International human rights, as they have developed and been expressed in declarations, conventions and treaties do not reflect issues of immediate and central concern to most women,

77 See Beijing Platform for Action, para 46; according to Professor Feride Acar, Vice-Chair of the Women's Committee, there is a growing recognition within the treaty-based committee's, that discrimination is multi-faceted and that women are discriminated against based on a range of factors, including age, sex, economic position and race, Professor Feride Acar "Address", (presentation to the Faculty of Law, University of Auckland, 1 October 2002) [unpublished].


81 Charlesworth and Chinkin, supra note 76.
such as protection against gender-based violence, access to conditions for healthy child-bearing and sufficient resources to sustain themselves and their families.\textsuperscript{82}

Furthermore, international law has traditionally played a limited role in the private lives of individuals and has been most concerned with regulating state behavior.\textsuperscript{83} The traditional focus of international human rights law on the public life of individuals and the role of the state has had serious consequences for women because the worst abuses of women’s human rights, such as murder, rape and assault, take place in the ‘private’ sphere – that is, in women’s homes and communities.

In recent years, the public and private distinction has been challenged and the international community has shown a greater willingness to uphold rights in the private sphere, in extreme cases holding individuals (rather than the state) accountable.\textsuperscript{84} The Women’s Convention reflects the relaxation of the distinction between the public and private sphere by requiring, in article 2(e) for example, the state party to take “all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise”. Article 5 requires state regulation of society and cultural patterns of conduct regardless of whether the conduct is public or private. Similarly, article 16 requires states to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family.\textsuperscript{85}

\textsuperscript{82} Ibid, 231.
\textsuperscript{83} Charters, supra note 3 at 22.
\textsuperscript{84} Ibid, where the establishment of the International Criminal Court in July 2002, which allows individuals to be held criminally liable for crimes such as genocide and crimes against humanity, is discussed as a recent example of the willingness of the international community to apply international human rights norms to individuals rather than states.
\textsuperscript{85} Writers such as Meron argue that the relaxation of the public/private divide has gone too far. He asserts that state regulation of interpersonal conduct (as required under the Women’s Convention) violates privacy rights and associated individual human rights such as the freedom of expression, opinion and belief; see Meron, T, “Human Rights Law-Making in the United Nations” (1986) 60 quoted in Alston, supra note 81, 949; also see Charters, supra note 3 at 34.
B. THE WOMEN'S CONVENTION

1. Substantive Provisions

The Women’s Convention is the most comprehensive legally binding treaty on women’s rights. It was adopted by the United Nations in 1979 and entered into force in 1981. New Zealand ratified the Women’s Convention in January 1985.

The Women’s Convention reaffirms the fundamental human rights of men and women and establishes minimum standards for overcoming discrimination. The preamble recalls that discrimination against women "violates the principles of equality of rights and respect for human dignity [and] is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries."

Article 1 defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality with men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." The definition is not limited to state-imposed discrimination and is wide-ranging, applying to discrimination in the political, economic and cultural sphere or any other field.

Article 2 requires state parties to the Women’s Convention to pursue "by all appropriate means and without delay a policy of eliminating discrimination against women." Article 2(d) requires the state to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions conform with this obligation; Article 2(e) requires the state to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. Article 2(f) requires the state "to take all appropriate steps, including legislation, to modify or abolish existing laws, regulations,

86 United Nations, Treaty Series, vol 1249, 13, and online:
87 See supra note 69.
customs and practices which constitute discrimination against women.” The application of article 2 is, again, potentially very wide, requiring states to take steps to eliminate or modify discriminatory laws, practices and customs which discriminate against women.

Article 5 of the Women’s Convention refers to the social and cultural life of women and requires states to take all appropriate measures:

To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

The Women’s Convention is the only international treaty to require the eradication of discriminatory customary practices. 88

Article 7 relates to the political and public life of women and requires states to ensure equality with respect to voting rights and participation in the formulation and implementation of government policy.

The Women’s Convention has been ratified by almost every country – by March 2005, 180 countries (over ninety percent of the UN) had ratified the Women’s Convention. 89

2. Some Criticisms of the Women’s Convention

Although there is a limited acknowledgment (for example in article 5 and article 16) that women experience oppression in the home and family sphere, the Women’s Convention has come under attack for focusing too much on rights which relate to public life, rather than on the issues that most concern women. 90 Like other international instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the rights expressed in the Women’s

88 Charters, supra note 3 at 13; also see Alston & Steiner, supra note 79 at 193.
90 Charlesworth and Chinkin, supra note 76 at 231.
Convention focus mainly on public life, the economy, education, the legal system and the equal status of men and women in relation to these rights.

Charlesworth and Chinkin have criticised the Women's Convention for reinforcing male views of equality with little consideration of whether the existing male standards are appropriate. This, Charlesworth and Chinkin argue, promotes the view that gender-based discrimination is remedied once men and women are equally represented on decision-making bodies. While increasing the number of women in decision-making positions is important this will not in itself necessarily change the underlying attitudes and behavior that oppress women. Increasing the number of Māori women (on Trust Boards for example) may go some way towards remedying discrimination towards Māori women. It should, however, coincide with the recognition that the way men do things may not be appropriate or desirable for women.

As Denese Henare, Counsel for the Mana Wahine claimants has explained, the Mana Wahine claim is not just about challenging discriminatory practices towards Māori women, the claim is also about protecting those aspects which Māori women bring to decision-making processes – such as humanity, care and "[t]he quality of aroha, not only for whānau, but for hapū and iwi as well." So, increasing the number of women in decision-making roles must be accompanied by support structures for women in traditionally male-dominated environments, otherwise there is a risk that discriminatory practices will continue to operate against women in those environments to undermine their work and contribution.

C. THE OPTIONAL PROTOCOL

The Optional Protocol to the Convention on the Elimination of Discrimination Against Women (hereafter called the Optional Protocol) came into force in December 2000. The Optional Protocol empowers

91 Ibid.
92 Charlesworth and Chinkin, supra note 76 at 231.
the Women’s Committee to consider individual communications submitted by a woman (or group of women) complaining of state party violations of the Women’s Convention and the Optional Protocol.94

Under the Optional Protocol Procedure, all domestic remedies must be exhausted before the Women’s Committee will consider a complaint.95 Furthermore, the violation must be committed by the state after the state has ratified the Optional Protocol.96 If the Mana Wahine claim is to go before the Women’s Committee, it would therefore need to be amended to refer to alleged discrimination suffered after December 2000. Furthermore, the Women’s Committee would need to be satisfied that all domestic remedies have been exhausted in New Zealand.

Any woman or group of women within New Zealand can submit a complaint to the Committee for an alleged breach by the state of any of the rights contained in the Women’s Convention.97 Māori women could submit a complaint arguing a breach of the rights in article 7 which requires New Zealand to take all appropriate measures to eliminate discrimination against women in political and public life (for example, when appointing Commissioners to the Fisheries Commission or Māori Trust Boards), or under article 2(t) which requires states “to take all appropriate measures, including legislation, to abolish […] customs and practices which constitute discrimination against women.”

As Māori academic, Claire Charters has suggested, Māori women could also submit a complaint based on article 5(a) which requires New Zealand to take all appropriate measures to modify (with a view to achieving the elimination of) discriminatory cultural practices and all other practices which discriminate against women.98 As Charters

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94 The Optional Protocol also entitles the Committee of its own accord to investigate grave or systematic violations of the Convention in those states, which have accepted this procedure.
95 In New Zealand, the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993 and the Employment Relations Act 2000 provide protection against discrimination.
96 Article 3 of the Optional Protocol.
97 Article 2 of the Optional Protocol.
pointed out, Māori women may therefore argue that the state has failed to take an active role to modify the custom that in some areas of New Zealand prevents Māori women from speaking on the Marae Atea during formal proceedings (although whether this course of action is desirable or not is discussed in part three).\textsuperscript{99}

1. The Optional Protocol Procedure

Articles 6 and 7 of the Optional Protocol establish the communications procedure.\textsuperscript{100} According to the provisions of the Optional Protocol, the Women's Committee examines all information provided by a complainant in closed meetings. The Women's Committee's views and recommendations are then transmitted to the parties concerned. The state party has six months to consider the Women's Committee's views and provide a written response, including remedial steps taken. Importantly, article 11 of the Optional Protocol requires a state party to protect women submitting a complaint from ill treatment or intimidation, which may result from making the complaint.

Under the Optional Protocol, the Women's Committee can request the state party concerned to take specific measures to remedy violations of the Women's Convention. The requests could include, the amendment of legislation, or temporary measures such as affirmative action schemes and quotas to advance women's integration into politics or employment.\textsuperscript{101}

D. THE REPORTING PROCEDURE

Another of the Women's Committee's functions is to monitor the progress of the implementation of the Women's Convention by examining

\textsuperscript{99} Ibid.
\textsuperscript{100} Article 6 establishes that where a communication has been found admissible, the Women's Committee will confidentially bring it to the state party's attention, provided the complainant consents to the disclosure of their identity to the state party. The state party is given six months to provide a written explanation or statement to the complainant.
\textsuperscript{101} See Article 4 of the Women's Convention and General Recommendation No 5 (Women's Committee) (seventh session, 1988).
state reports submitted in accordance with Article 18 of the Women's Convention.102

New Zealand last reported to the Women's Committee in July 2003.103 The report covered the period March 1998 to February 2002. Prior to that, the last time the Women's Committee considered a report from New Zealand was in 1999. Commenting on New Zealand's report in 1999, the Women's Committee made the following comments about the situation of Māori women in New Zealand:

The Committee is concerned that the situation of Māori women remains unsatisfactory in many areas, including the high percentage of Māori girls leaving school early, higher-than-average teenage pregnancy rates, the continuing low number of Māori women in tertiary education, their employment situation, their absence from the judiciary and political decision-making, their health situation and access to health services and higher-than-average incidences of domestic violence.104 (my emphasis added)

The Women's Committee urged the Government to continue its efforts to implement fully the Treaty of Waitangi, with particular emphasis on achieving equality for Māori women in all areas covered by the Women's Convention. The Committee did not refer to the Mana Wahine claim (although it was mentioned in New Zealand's last (1998) report), nor did they criticise New Zealand for the Waitangi Tribunal's failure to hear the claim.

In New Zealand's latest report (hereafter referred to as the 2002 Report), the Government responded to the Women's Committee's concerns by noting that the Government is implementing a "whole of government" approach to addressing inequalities.105 This approach

102 State parties must submit a national report to the Women's Committee, outlining measures they have taken to comply with the Women's Convention, within one year of accession or ratification of CEDAW and thereafter every 4 years or at the Women's Committee's request.


105 The 2002 Report, supra note 103 at 18-19.
requires Government departments such as the Ministry of Women’s Affairs and Te Puni Kokiri (Ministry of Māori Development), to undertake policy work to analyse impacts and links policy initiatives across sectors and to develop a Women’s Strategy that will address these issues for Māori.\textsuperscript{106}

The 2002 Report refers to the Ministry of Women’s Affairs’ recent publication, \textit{Māori Women: Mapping Inequalities & Pointing Ways Forward} (September, 2001). This document provides disaggregated data on the status of Māori women compared with Māori men and non-Māori women and men across six sectors—education, employment, income, health, housing, and criminal justice.\textsuperscript{107}

In response to the Women’s Committee’s second criticism (relating to the implementation of the Treaty) the 2002 Report pointed to the Government’s efforts to uphold the principles of the Treaty of Waitangi.\textsuperscript{108} This time, however, the 2002 Report did not refer to the Mana Wahine claim or to the fact that the claim is yet to be heard by the Waitangi Tribunal.

In the last reporting period, the Women’s Committee referred to article 7 (participation in political and public life) and expressed concern about New Zealand’s failure to set targets for gender balance through the use of temporary special measures, such as positive action, preferential treatment programmes or quota systems to advance women’s integration into politics.\textsuperscript{109} The Committee recommended the use of targets and flexible numerical goals to achieve gender equity.

\textsuperscript{106} Ibid.
\textsuperscript{107} The 2002 Report, ibid, at 19, is intended to provide a tool to assist agencies to: undertake gender analysis as it applies to Māori women and their roles within whānau, hapū, iwi and Māori society. The report identifies persistent inequalities that continue to be experienced by Māori women across all six sectors and suggests areas where further government attention is necessary and work is currently being undertaken.
\textsuperscript{108} For instance, the first of six key Government goals guiding public sector policy and performance is to strengthen national identity and uphold the principles of the Treaty of Waitangi. Another goal refers to reducing inequalities in health, housing, education, employment and housing; see supra note 104 at 20.
\textsuperscript{109} See Article 4 of the Women’s Convention and General Recommendation No 5 (CEDAW) (seventh session, 1988).
For the first time in 2003, a New Zealand Women’s non-governmental organisation prepared a separate report (hereafter referred to as the NGO Report) to accompany New Zealand’s report to the Women’s Committee.\(^{110}\) The NGO Report criticised the Government’s failure to take action since the last reporting period to actually improve the human rights status of Māori women and girls. As the NGO Report highlighted, the Government has spent valuable time and resources analysing the situation of Māori women and collecting data about them. It is action, however, not more publications about the position of Māori women, that is needed to improve the quality of women’s lives.\(^{111}\) This view is consistent with the views of Māori women who were consulted by the Ministry of Women’s Affairs, on the 2002 Report. The Māori women consulted raised concerns about the lack of recognition by government of their status as Treaty partners, and in particular they were concerned about:\(^{112}\)

\[T\]he government using data to articulate Māori women’s status from a disadvantage or deprivation perspective, which fails to recognise Māori women’s innovation to pursue, develop and control their own solutions and strategies...

The Māori women consulted suggested that the government recognise the status of Māori women within the context of iwi, hapū and whānau, and the role and value of Māori women in communities. In particular, the government needed to focus more on developing solutions for Māori women, rather than on defining problems.

E. TREATIES AND DECLARATIONS RELATING TO INDIGENOUS PEOPLES

As well as the aforementioned international treaties, conventions and fora, there are instruments and declarations that refer specifically to Indigenous peoples’ rights although significantly there are no reporting


\(^{111}\) Ibid at 13.

\(^{112}\) The 2002 Report, supra note 103 at 159.
or complaint procedures in place to examine complaints of individual or group infringements of Indigenous Peoples rights.

Article 3 of The International Labour Organisation Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) provides that Indigenous peoples shall enjoy the full measure of human rights without discrimination to male and female members. 113

Article 2 of Draft Declaration on the Rights of Indigenous Peoples (Draft Declaration) provides that Indigenous peoples are "free and equal to all other individuals and have the right to be free from any kind of adverse discrimination." 114 In addition, according to article 16, states must take appropriate measures, in consultation with the Indigenous peoples concerned, to "eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society." Although the Draft Declaration has yet to be adopted by the General Assembly, there is widespread support among Indigenous Peoples for the Draft Declaration, largely due to the role we have played in drafting and negotiating the Draft Declaration. 115

F. CONCLUSION

The aforementioned instruments, declarations and fora are some possible options for Indigenous women to consider when challenging discriminatory laws and practices.

In my view, if Māori women are considering utilising international human rights law to address discriminatory laws and practices in New Zealand, then the Optional Protocol procedure, which is available under the Women’s Convention may provide an effective remedy for a complaint submitted (for example) under article 7 of the Women’s Convention (political and public representation).

113 The ILO Convention 169 is a revision of the ILO Convention No 107 (adopted in 1957).
115 Charters, supra note 3 at 48.
The Optional Protocol procedure enables the Women’s Committee to make recommendations on a specific complaint and to request the state to take immediate action to remedy the violation. The Women’s Committee’s recommendations could include implementing temporary measures such as affirmative action programmes or quotas, to ensure the equal participation of Māori women on public decision making bodies such as the Treaty of Waitangi Fisheries Commission.

There may be other benefits to the Optional Protocol procedure, such as the level of publicity the complaint could attract internationally and in New Zealand (compared with the Women’s Committee’s country reports which receive little attention). This publicity, along with a recommendation from the Women’s Committee that action must be taken to remedy discrimination against Māori women, could bring considerable political pressure to bear on the Crown to take remedial action to address the low level of Māori women’s participation in political and public decision-making bodies. It may also stimulate discussions within Māori society and among Māori women about our own role and position, and the effect that the Crown’s discriminatory actions has had on Māori women and on Māori society generally.

Although Māori women may see immediate results from submitting a complaint to the Women’s Committee or any other international forum (such as receiving a positive recommendation, gaining publicity and promoting discussion and debate about Mana Wahine), whether there is any long term benefit to Māori women and our communities, particularly when the complaint involves tikanga Māori, is questionable. The international human rights system poses many challenges to Indigenous women seeking to remedy discriminatory laws and practices. Some of these challenges are discussed in part three.

116 Charlesworth, supra note 71 at 68-69.
III INDIGENOUS WOMEN AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM

A. INTRODUCTION

The following discussion of the international human rights system is intended to provide some insight into the system from an indigenous feminist perspective. The purpose of my discussion is to shed light on some of the issues Indigenous women, and particularly Māori women, may confront when engaging with international law and its processes in order to examine whether, as Watson suggests, rights are the "path to follow"? If so, what hazards should Indigenous women be aware of along the way?

B. THE UNIVERSAL LANGUAGE OF RIGHTS – AN INDIGNEOUS PERSPECTIVE

There is a growing body of work from Indigenous women who are critical of the application of western feminist theories to international human rights law. This work has grown out of the recognition that the application of Western feminist theories (which focus on gender and class oppression) to international human rights law does not adequately explain or reflect Indigenous women's experiences of racism and colonialism. To even talk using the language of universal rights

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117 See for example, Tomas, supra note 2, 21; Watson, supra note 1, 21 and Trask, H, *From a Native Daughter: Colonialism and Sovereignty in Hawaii* (Hawaii, University of Hawaii Press, 1993) at 112; see also Te Kawehau Hoskins, supra note 11.

118 See Tomas, supra note 2; and Watson, supra note 1.
is the antithesis to some Indigenous women of what it means to be indigenous. As Trask, an Indigenous Hawaiian woman has said:

I ideologically, 'rights' talk is part of the larger, greatly obscured historical reality of American colonialism... by entering legalistic discussions wholly internal to the American system, Natives participate in their own mental colonisation. Once [I]ndigenous peoples begin to use terms like language 'rights' and burial 'rights', they are moving away from their cultural universe, from the understanding that language and burial places come out of our ancestral association with our lands of origin. These [I]ndigenous, Native practices are not 'rights' which are given as the largesse of colonial governments. These practices are, instead, part of who we are, where we live, and how we feel... When Hawaiians begin to think otherwise, that is, to think in terms of 'rights', the identification as “Americans' is not far off.\textsuperscript{119}

Indigenous women are naturally wary of turning to a 'universal' language of rights that is foreign to us.\textsuperscript{120} Apart from the Draft Declaration on the Rights of Indigenous Peoples, Indigenous women have not played a part in drafting and developing international human rights instruments.

A cursory examination of human rights declarations Indigenous people have drafted shows how differently we think about and express our rights. They are often expressed in relation to land (and in particular a woman’s relationship with the land) as the following quote from the

\begin{footnotes}
\footnote{119} Trask, supra note 117, 23; Moana Jackson makes a similar point reminding us that the debate about self-determination (in the context of the Draft Declaration on the Rights of Indigenous Peoples) has been “[C]aptured by lawyers, reworked by political scientists, and sloganised by new age colonizers”; see Jackson, M, “Self-Determination: The Principle and the Process” (Paper presented to the New Zealand Human Rights Commission, Wellington, New Zealand, 8-9 August 2002) at 1 [unpublished].
\footnote{120} Tomas, supra note 2 at 118.
\end{footnotes}
Kimberley Declaration, which was drafted by Indigenous peoples attending the Johannesburg Earth Summit in August 2002, illustrates:

We are the original peoples tied to the land by our umbilical cords and the dust of our ancestors.121

Indigenous peoples tend to emphasize the obligations we owe to each other and to our land. The Kari-Oca Declaration (which was drafted by Indigenous People at the 1992 Earth Summit in Brazil) expresses rights and obligations in the following way:

We the Indigenous peoples walk to the future in the footprints of our ancestors...the footprints of our ancestors are permanently etched upon the lands of our peoples...we maintain our inalienable rights to our lands and territories, to all of our resources, above and below – and to our waters, we assert our ongoing responsibility to pass these on to future generations...122

This language contrasts sharply with the language of existing human rights instruments such as Article 17 of the UDHR, which recognises “the right to own property alone as well as in association with others.”123

As well as questioning the language of human rights, Indigenous women have questioned the value of turning to international law for protection when international law has traditionally been used against them to justify colonial expansion and the removal of Indigenous women from their land.124 As Irene Watson says:

121 The Kimberley Declaration, International Summit on Sustainable Development, Khoi-San Territory, Kimberley, South Africa, 20-23 August 2002; For other examples of Declarations drafted by Indigenous People see the Charter of the International Alliance of Indigenous and Tribal Peoples of the Tropical Forests; the Mataatua Declaration; the Santa Cruz Declaration on Intellectual Property; the Leticia Declaration of Indigenous Peoples and Other Forest Dependent Peoples on the Sustainable Use and Management of All Types of Forests; the Charter of Indigenous Peoples of the Arctic and the Far East Siberia; the Bali Indigenous Peoples Political Declaration; and the Declaration of the Indigenous Peoples of Eastern Africa in the Regional WSSD Preparatory Meeting.

122 Kari-Oca Declaration, signed at Brazil, 30 May 1992.

123 Universal Declaration of Human Rights 1948, UN Doc A/810 at 71.

124 Watson, supra note 1 at 29-30.

125 Ibid.
How do we negotiate rights with the unequal power of thieves? How do we engage with their law when we have never consented to their stolen title of our lands? When is it our turn to de-colonise in a universal world order, which nurtures the myth and language of post-colonialism?125

C. UNIVERSAL RIGHTS AND CULTURAL RELATIVISM

Indigenous women have criticised the value of universal human rights and in particular the emphasis on individual rights, which it is argued, fail to recognise the importance of communities and groups to Indigenous women.126

The assumption that rights attach to all human beings and must therefore be applied universally, irrespective of the cultural context, raises serious issues for Indigenous women.127 Critics of the universal application of human rights (or cultural relativists, as they are sometimes called) challenge the assumption that international human rights should be applied universally on the basis that the perception and valuation of rights is culturally partial and that practices which are valid according to a particular culture should not be overridden by ‘outsiders’.128

Cultural relativists argue that human rights should be applied in context and that a woman’s particular cultural, ethnic, religious or other beliefs must be considered when applying rights. They are critical of a human rights regime that ignores the impact of colonialism, makes assumptions about the history, position and experiences of women worldwide and

126 See Watson, supra note 1, 30 for a discussion of how Western philosophy and rights are separated from Indigenous Peoples’ understandings of the natural world; also see Hunt, P “Reflections on International Human Rights Land and Cultural Rights” in Culture, Rights and Culture Rights, (Wilson and Hunt ed) (Wellington, Huia Publishers, 1998) at 25 for a review of existing rights (such as Article 27 of the Universal Declaration of Human Rights and Article 27 of the International Covenant on Civil and Political Rights, for example) and a discussion of how existing rights fail to recognise Indigenous Peoples rights; also see Kenyatta, J, “Facing Mount Kenya: The Tribal Life of the Gikuyu” (United States, Vintage Books, 1965) at 109, where he explains that Kenyan social and economic organisation depends on family and tribal obligations and in Kenya, an individualist is looked upon with suspicion.


128 Ibid.

129 See Charlesworth and Chinkin, supra note 76 at 225.
assumes everyone in the world wants to be treated the same. Some Indigenous critics go further, arguing that the imposition of universal human rights on indigenous cultures is another form of colonialism and that the universalisation of norms risks destroying the diversity of cultures.

Supporters of the universal application of human rights reject the claim that if human rights norms conflict with cultural practices, the particularity of the culture takes precedence over the universal standard. This, they say, challenges the validity of human rights (and the belief that all human beings are equal and therefore, are entitled to equal protection) and retards the development of universal standards. Universalists claim that an objective yardstick must be used to measure behavior and allowances should not be made for cultural preferences. These arguments are probably not all that helpful for Indigenous women who are trying to improve their immediate situation. As Rosalind Higgins points out:

[I]t is sometimes suggested that there can be no fully universal concept of human rights, for it is necessary to take into account the diverse cultures and political systems of the world. In my view this is a point advanced mostly by states, and by liberal scholars anxious not to impose the western view of things on others. It is rarely advanced by the oppressed who are only too anxious to benefit from perceived universal standards.

This statement may be true, particularly for Indigenous women who are facing serious and imminent threats to their lives. There are, however, good reasons for Indigenous women to question the concept

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129 Some
130 Charlesworth and Chinkin, ibid at 223.
131 Charlesworth and Chinkin, supra note 76 at 223; also see Alston, supra note 79 at 193.
132 Section 1, para 5 of the Vienna Declaration (adopted at the 2nd World Conference on Human Rights) reinforces this view. It states: [a]ll human rights are universal, indivisible and interdependent and interrelated...While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.
133 See supra note 80 at 219.
134 Such as Muslim women in Northern India (Gujarat) who have been the target of brutal Hindu attacks; see "How has the Gujarat Massacre Affected Minority Women? The Survivors Speak", online: http://www.isiswomenorg/pub/we/archive/msg00074.html.
of universality and the application of universal human rights to us and to our communities. This is because the application and enforcement of universal human rights may not always lead to an improvement in the lives of Indigenous women.\textsuperscript{135}

\textit{Lovelace v Canada} is a case which concerned an individual complaint brought under the Optional Protocol to the ICCPR against Canada.\textsuperscript{136} Sandra Lovelace, a Native American woman who argued that the Indian Act which provided that an Indian woman lost her legal status as an Indian upon marriage to a non-Indian male breached her right to enjoy culture in Article 27 of the ICCPR. Although the complaint was upheld and amending legislation was passed to remedy the situation, the practical effect of the amendments led to further discrimination against Indian women from within their own tribes.\textsuperscript{137}

Māori women seeking to enforce rights using international law should be aware of the practical impact of a decision like \textit{Lovelace} on indigenous communities. In \textit{Lovelace}, the enforcement of the right to enjoy one’s culture created resentment within her group due to a perceived increased burden on resources and this may have contributed to Lovelace’s exclusion from her group. Māori women who consider that we suffer discrimination on the marae and seek to enforce the right to speak on the marae during the formal proceedings using international law, are particularly vulnerable to criticism and exclusion from the rest of the group (although this is of course different from the situation in \textit{Lovelace}, where the decision involved an increased burden on overstretched tribal resources). Regardless of what the Women’s Committee say about the right to speak on the marae, it is impossible to exercise that right as an individual. The enjoyment of a Māori women’s right to speak on the marae (and her participation in iwi and hapū fora and Māori society generally) depends on the support and consent of

\begin{itemize}
  \item \textsuperscript{135} Charters, C, “The utility of international and constitutional law in resolving the tensions between Indigenous Peoples’ rights to self-determination and culture and discrimination against indigenous women”, (Paper presented to Faculty of Law staff, Victoria University of Wellington, New Zealand, 27 November 2001) at 6 [unpublished].
  \item \textsuperscript{136} \textit{Sandra Lovelace v Canada}, Communication No R/6/24 (29 December 1977) UN Doc Supp, No 40 (A/36/40) (1981).
  \item \textsuperscript{137} Charters, supra note 3 at 45.
\end{itemize}
the wider Māori group. This highlights the main conflict between individual and group rights and why the emphasis on individual human rights often does not serve Indigenous women well.\textsuperscript{138}

Furthermore, the New Zealand Government may be unwilling to take steps to modify discriminatory practices on the marae, even if the Women's Committee recommends that it do so. The language of the Women's Convention, like other international instruments, is broad and vague which allows the state to argue that that it is not "appropriate" (using the language in articles 2 and 5) in the political circumstances to take steps to remedy the discrimination.\textsuperscript{139} The Government could, for example, point to its Treaty of Waitangi obligations, which require the state to protect and recognise rangatiratanga, arguing that this prevents the state from interfering in marae protocols.

Another important issue for Māori women to be wary of when submitting a complaint to the Women's Committee based on allegedly discriminatory cultural practices is that tikanga Māori risks being distorted further by an international body such as the Women's Committee, which has developed out of its own particular western liberal tradition. The risk of distorting tikanga Māori (or any culture's practices and principles) exists whenever those practices and principles are considered out of context.\textsuperscript{140} The rules of tikanga Māori, for example, have developed over a long period of time, in connection with different territorial areas and environments in New Zealand. Importantly, the rules of tikanga Māori are based in the Māori language and make the most sense when they are explained and discussed in the Māori language. There is a serious risk that tikanga Māori will be

\textsuperscript{138} Although see Tomas, supra note 2 at 130, where she argues that once Indigenous groups have had the opportunity to develop their nationhood, the rights of individuals will become more of an issue in the same way that they have within existing western state practice.

\textsuperscript{139} Article 2 requires the state to pursue "by all appropriate means" a policy of eliminating discrimination; article 5 requires states to "take all appropriate measures" to modify and eliminate discrimination.

\textsuperscript{140} Tikanga Māori can be translated as a flexible set of laws, practices and principles which have been handed down by the ancestors and establish the correct way to live in harmony with one another and the environment; "tika" is also used to refer to the right or correct way of doing or saying something.
misunderstood and misapplied if considered out of context by Committee members with no (or a limited) understanding of the indigenous culture.

In my view, the risks associated with a tikanga-based complaint to the Women’s Committee, do not apply to a complaint concerning discrimination in the context of the Crown-Māori relationship (for example, a complaint based on the state’s failure to take steps to eliminate discrimination against Māori women in New Zealand’s political and public life by ensuring equal representation of men and women on the Treaty of Waitangi Fisheries Commission). The Human Rights Committee has already considered an individual complaint submitted under the Optional Protocol (to the ICCPR) about Māori representation issues and the Treaty of Waitangi Fisheries settlement process. This case provides an indication of how the Women’s Committee may deal with a similar claim from Māori women.

*Mahuika et al v New Zealand*\(^\text{141}\) concerned a complaint made to the Human Rights Committee by nineteen Māori authors about the Treaty of Waitangi (Fisheries Claims) Act 1992 and the process that led to its enactment. The Human Rights Committee rejected the complaint, acknowledging that although the Settlement Act and its mechanisms limited the right in Article 27 to enjoy one’s culture, “the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures.”\(^\text{142}\)

In *Mahuika*, the Human Rights Committee considered that wide-ranging and effective consultation had taken place and the settlement legislation was enacted only after following the Māori representatives’ report that substantial Māori support for the settlement deal existed. In making this finding, the Human Rights Committee relied on the report, rather than the evidence to the contrary – that is that substantial Māori support for the proposal did not exist. The Human Right’s Committee

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accepted New Zealand’s argument that there should be no inquiry into the (Māori) internal decision making process.\textsuperscript{143}

The Human Rights Committee did not agree that the author’s minority rights had been interfered with. The Committee stated “where the right of individuals to enjoy their own culture is in conflict with the exercise of parallel rights by other members of the minority group, or of the minority as a whole, the Committee may consider whether the limitation in issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected”.\textsuperscript{144}

It is difficult to predict accurately whether the Women’s Committee will reach the same result as the Human Rights Committee, particularly as the Women’s Committee complaint is more likely to focus on the low level of Māori women’s participation and discrimination issues with respect to the fisheries settlement process. The result in Mahuika, however, illustrates the Human Rights Committee unwillingness to inquire into internal decision making processes where the issue of race-based mandates and representation is involved. This may suggest an uncertainty on the part of the treaty-committee bodies generally about how to determine cases involving Indigenous Peoples’ rights and internal conflicts within Indigenous Groups.

D. INDIGNEOUS WOMEN, SELF-DETERMINATION AND GENDER EQUALITY

In 1995, Indigenous women attending the 4th World Conference of Women in Beijing argued that the women’s movement should be framed in terms of self-determination for women – not gender equity.\textsuperscript{145} This

\textsuperscript{143} The Government relied on the case of Grand Chief Donald Marshall et al v Canada, Communication No 205/1986, Views adopted on 4 November 1991, CCPR/C/43/D/205/1986, in which the Human Rights Committee rejected a claim that all tribal groups should have a right to participate in consultations on aboriginal matters. (However, this case did not require a minority group’s consent to extinguish its property rights or deny access to the courts to enforce those rights).

\textsuperscript{144} Mahuika, supra note 141 at 13.

\textsuperscript{145} Watson, supra note 1 at 35.
view is reflected in article 5 of the Beijing Declaration which states: "We the women of the original peoples of the world have struggled actively to defend our rights to self-determination and to our territories which have been invaded and colonized by powerful nations and interests." 146

The international community has not yet recognised Indigenous peoples’ right of self-determination. The Draft Declaration has not been adopted by the General Assembly and many states, including New Zealand, oppose the inclusion of the right of self-determination in the Draft Declaration. 147 This is a serious concern to many Indigenous women who are actively working towards realizing self-determination in their communities.

Indigenous women seeking to address discriminatory laws and practices using international law have recognised that their aspirations for gender-equity can become subsumed by their aspirations for self-determination. In New Zealand, Māori women such as Clea Te Kawehau Hoskins acknowledge that the primary (but not exclusive) site of struggle for Māori women is within a struggle for Māori independence. 148 Māori women’s status, as tangata whenua, along with Māori men, their shared culture and experiences of colonisation, places Māori women in a much larger reality than that of women’s rights.149 This explains why some Māori women will not openly challenge discriminatory practices from within their group, when interacting with the state or the dominant Pākehā culture. They may choose not to disagree publicly with a male speaker or air grievances with respect to sexist behavior - in the interests of protecting the integrity of the group and to avoid exposing the group to criticism. 150

146 Ibid.
148 See Te Kawehau Hoskins, supra note 11, 38-39; Although Te Kawehau Hoskins argues that the struggle for self-determination necessarily includes the struggle for gender equality both within Māori culture and the wider society.
149 Ibid.
150 Ibid.
Unfortunately Māori men are not always as concerned about protecting Māori women and will sometimes side with the dominant Pākehā view at the expense of Mana Wahine. Nin Tomas illustrates this point when relaying the incident involving Titewhai Harawira, discussed at the beginning of this article, at Waitangi in 1999. She describes entering the wharenui with Titewhai Harawira to a chorus of young Māori men (some of whom were relatives) shouting “you’re just shit, that’s what you are, shit!” 151 Tomas explains that although many Māori women will not tolerate this type of behavior, a significant number still do because of the whakamā (shame) it attaches to the whānau when male elders are publicly disgraced.152

Māori women who submit a complaint to the Women’s Committee, regardless of its subject matter, are potentially vulnerable to a host of criticisms - that by submitting a complaint to an ‘outside’ international forum they are compromising tino rangatiratanga; that they are overly litigious; anti-Māori or not really Māori at all.

I am not convinced that these criticisms are justified, particularly with respect to a complaint concerning discrimination in the context of the Crown-Māori relationship (for example, a complaint based on the state’s failure to take steps to eliminate discrimination against women in New Zealand’s political and public life). An individual complaint of this nature concerns the relationship between Māori women and the Crown and an examination of how Crown actions and structures have discriminated against Māori women. Māori have a long history of challenging the Crown’s discriminatory practices using the Crown’s own tools (by going to Court or petitioning the Queen, for example). Furthermore, Māori women have already sought ‘outside’ help by submitting the Mana Wahine claim to the Waitangi Tribunal.

There are good practical reasons for submitting a complaint to the Women’s Committee based on discrimination in the Crown-Māori context. The research and legal work for the Mana Wahine claim is underway and so the cost of preparing and submitting the written submissions could be low.153 Provided the claim is amended to refer

151 Tomas, supra note 2 at 133.
152 Ibid.
153 Email received from Areta Koopu, Mana Wahine Claimant, 8 October 2002.
to incidents of discrimination, which occurred after December 2000 (and once all domestic remedies are exhausted)\textsuperscript{154} it can be submitted to the Women’s Committee for determination.

The issue of allegedly discriminatory practices on the marae and in the Māori customary context is more complicated and requires a consideration of whether domestic and international law are appropriate tools for eliminating discrimination against Māori women pursuant to their culture. In my view, Māori criticism will be widespread and virulent with respect to a complaint concerning tikanga Māori, such as women’s speaking rights on the marae. This is because the marae is considered a wholly Māori domain and is one of the few places where Māori can, at present, exercise limited rights of self-determination in New Zealand. Māori are likely to be extremely resistant to any outside interference in marae protocols. A Tuhoe elder explains why, affirming that: “Tuhoe will make no concessions whatsoever in things that happen on their marae because we have given way in every other area of Māoriness.”\textsuperscript{155}

In my view, the Optional Protocol procedure is not the appropriate mechanism, at present, for Māori women seeking to remedy allegedly discriminatory practices on the marae. Even if the Women’s Committee is prepared to make a recommendation, for example, that the state should take steps to modify, with a view to eliminating, discriminatory cultural practices on the marae, the Government is unlikely to be willing to take action to implement the recommendation, and would probably argue that it is not politically or constitutionally appropriate for it to do so in New Zealand’s present political circumstances.

Māori are unlikely to accept any state intrusion into marae affairs. Ultimately a Māori women trying to enforce a recommendation of the

\textsuperscript{154} Claimants will need to persuade the Women’s Committee that domestic remedies have effectively been exhausted in New Zealand, perhaps by arguing that because the Waitangi Tribunal is under resourced and faces a backlog of historical and contemporary claims, the Mana Wahine claim is unlikely to be heard in the near future.

\textsuperscript{155} Quoted in Mikaere, supra note 7, 126 (this view tends to ignore the impact of colonization on the marae, and the degree to which Māori custom has been influenced by colonization).
Women’s Committee, could find herself excluded from her group or the subject of extreme criticism and ridicule – this is hardly the desired result. The only benefit I can see, therefore, of submitting an individual complaint based on discriminatory customary practices is that it may provoke Māori women and Māori men to debate and discuss the role and status of Māori women in modern Māori society. This may in turn, contribute in some way, towards recognizing and restoring Mana Wahine.

Māori women such as Ani Mikaere and others have argued that a complaint about discriminatory practices within Māori society, can only be resolved by Māori. What is needed is a re-examination and rediscovery of Māori principles and practices as they relate to women. As Mikaere says:

The challenge for Māori, women and men, is to rediscover and reassert tikanga Māori within our own whānau, and to understand that an existence where men have power and authority over women and children is not in accordance with tikanga Māori.

This re-examination will require a flexible attitude and the willingness to think about the justifications for certain practices (rather than blind acceptance of them) and the extent to which those practices are sourced in tikanga Māori or have been corrupted by the influence of colonial law and practice.

CONCLUSION

Many of the issues I have raised in this article have been discussed by Māori women elsewhere – in books and articles, on the marae and in our homes. I have attempted to bring together these different ideas and my understanding of international human rights law – in order to determine whether international human rights law is, as Irene Watson says at the beginning of this article, “the path to follow, the one that will keep [Indigenous women] from being consumed entirely from the belly of genocide, the place where the majority of Indigenous People reside.”

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156 Mikaere, supra note 11.
157 Mikaere, supra note 10 at 149.
In my view, there may be some benefits for Māori women utilising the Optional Protocol procedure, under the Women’s Convention, who submit an individual complaint based on the discriminatory laws and practices of the Crown. The Women’s Committee could, for example, recommend that New Zealand takes urgent remedial action to address the low level of Māori women’s participation in political affairs by implementing temporary measures such as quotas or affirmative action programmes to improve the representation of Māori women on Crown-Māori decision-making bodies. Even if the Women’s Committee follows the Human Rights Committee’s approach in Mahuika, and refuses to inquire into the internal processes which lead to the appointment of Māori representatives on Crown-Māori decision-making bodies such as the Treaty of Waitangi Fisheries Commission, the complaint may help to raise national and international awareness about the discrimination Māori women face and the barriers we are seeking to overcome.

I do not think the Optional Protocol Procedure, or international law and its processes generally, is the best way at present of addressing allegedly discriminatory cultural practices on, for example, the marae. The solution lies with Māori to resolve complaints about allegedly discriminatory practices and to determine the extent to which those practices are inherent in our culture.

Ultimately, Māori women, Māori men and the state, (as the Treaty partner and consistent with its international obligations) must face the challenge of recognising and restoring Mana Wahine so that Māori women can contribute and participate equally in our society. The richness and diversity of our culture and the survival of Māori as a people, depends on it.
### GLOSSARY OF TERMS

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td>Aroha</td>
<td>Love, support</td>
</tr>
<tr>
<td>Hapū</td>
<td>Sub-tribe (economic, social and political group consisting of extended families or whānau who are related by blood and shared customary practices)</td>
</tr>
<tr>
<td>Iwi</td>
<td>Tribe (larger economic, social and political group related by blood and shared customary practices)</td>
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<tr>
<td>Mana Wahine</td>
<td>The power and strength of Māori women</td>
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<tr>
<td>Marae Ātea</td>
<td>The area directly in front of the meeting house, usually where speakers stand to welcome visitors to the marae.</td>
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<tr>
<td>Marae</td>
<td>The meeting place. This term refers to a collection of land and buildings, which includes the meeting house, dining areas and ablution blocks. The marae is usually, (although not always) situated on ancestral Māori land belonging to the whānau, hapū and iwi groups who are responsible for the marae.</td>
</tr>
<tr>
<td>Ngāti Toa</td>
<td>Lower North Island tribe.</td>
</tr>
<tr>
<td>Ngāti Raukawa</td>
<td>Lower North Island tribe.</td>
</tr>
<tr>
<td>Pākehā</td>
<td>Person of European (usually British) descent.</td>
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<tr>
<td>Paepae</td>
<td>The area outside of the meeting house, usually beside or at the front of the meeting house, where the home people (tangata whenua) sit to welcome visitors during formal proceedings. In many areas of New Zealand, although not all, this area is reserved for men.</td>
</tr>
<tr>
<td>Tangata Whenua</td>
<td>Literally meaning people of the land (refers to the local Māori people from a particular area)</td>
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<tr>
<td>Tikanga Māori</td>
<td>Māori custom law – the right way of doing things according to Māori law and custom.</td>
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<tr>
<td>Tino rangatiratanga</td>
<td>Māori authority or sovereignty; this term can also be translated as Māori self-determination.</td>
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<tr>
<td>Tuhoe</td>
<td>Māori Tribe located in the central eastern area of the North Island of New Zealand.</td>
</tr>
<tr>
<td>Tuwharetoa</td>
<td>Central North Island tribe.</td>
</tr>
<tr>
<td>Whānau</td>
<td>Extended family.</td>
</tr>
<tr>
<td>Wharehui</td>
<td>Ancestral meeting house.</td>
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"HINE TŪ, HINE ORA"

Kirsten Aroha Gabel*

What place does karanga and other forms of taonga-ā-waha have in contemporary mana wahine discourses?

INTRODUCTION

Taonga-ā-waha were an exceptional part of traditional Māori society. They reflected the complementary relationship between men and women, and empowered both genders in different but reciprocal ways. The taonga-ā-waha of women, including karanga, kīnaki and karakia were significant expressions of tribal tikanga and considered vital for the survival of the tribal group. Colonisers imposed their own Western values and interpretations of the oral arts on Māori society by placing emphasis on the largely male domain of whaiākōrero and essentially rendering the female taonga-ā-waha (especially karanga) invisible. Contemporary constructs of the marae environment have dutifully followed these Pākeha ideals and this has resulted in the devaluing of female taonga-ā-waha and the overvaluing of male taonga-ā-waha by both men and women.

This paper is about Mana Wahine, and the importance of reclaiming our traditional and equitable voice on the marae. It will begin with an outline of the traditional forms of taonga-ā-waha specific to Māori women, focussing on karanga. I will also discuss the evolvement of the kawa pertaining to these taonga with the arrival of tauiwi, including the current misuse and abuse of whaiākōrero. Lastly, I will outline a future direction for Mana Wahine, based on the reclamation of our voice on the marae and the re-establishment of the complementary relationship of our taonga-ā-waha.

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Research Interests: Māori Women and the Law, Ngā Atua Wahine, Māori Spirituality in schools (E hiahia ana au ki te whai he tohu paerata e pā ana ki tēnei kaupapa rangahau)
As a starting point for this essay it is necessary to lay the foundations of my arguments in the form of a detailed analysis of karanga and the intense and deep relationship the karanga has with both the traditional and contemporary spiritual realms. It is my experience that this knowledge is not widely talked about or discussed and that, like myself, many of our young women are growing up oblivious and ignorant of the actual spiritual and ceremonial depth that karanga has. I indeed once held the mistaken view that karanga was to be seen as somewhat of a curtain-raiser for the main whaikōrero event and actually felt resentful when being asked to perform it.

One might argue that this knowledge should not be readily available to all but rather to a select few, and that karanga is an art learned only through observation of kuia. It is my contention however that unless this information is made more available to those who seek it, there will be continued to be widespread ignorance in this area – on the part of both men and women.

This is not intended to be an exhaustive description of karanga, rather an overview of some of the general points that I, as a young Ngāti Kahu woman, have discovered in the course of my life journey so far.

Ko te Karanga –

Ko tētahi o ngā tino take tiketike o te karanga, ko te tūranga o te wahine i waenganui i ngā ao e rua, arā, “[k]o te kaikaranga te takawaenga i waenganui i te ao wairua me te ao kikokiko (te hungamate me te hungaora)”.

He mea whakahirahira rawa atu te karanga ki te Māori. He mea hei whakamana i te tangata, hei whakanui i te iwi hoki. Ko te tino mahi o te karanga, ko te whakatakoto i te wairua o te hui, ko te whakamana i ngā take o te hui hoki, hei whāinga mā te iwi.

Mā te karanga e para te huarahi mō te hui, otirā mō ngā kaikōrero.

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1 Yates-Smith, A Te Ao Wahine Lecture Notes/Handout - Karanga (May, 2002).
When a kaikōrero speaks ... they are nothing without the kaikaranga that brought people on to listen in the first place. In tradition mahi tangata and mahi wahine stood together they were he aha te kūpu Pākehā? Complementary – the mahi is complementary

Ko te karanga tētahi o ngā reo o te wahine ki runga i te marae, ki roto hoki i ngā momo huhiuanga o te whenua. He reo mana, he reo ihi, otirā he reo e whakamana ana i te hā o te wahine Māori.

Until women have opened their mouths the men, strictly speaking, cannot speak...many kaumatua would accept that the karanga and the poroporoaki are the whaikōrero of women.3

Ngā Atua Wāhine e pā ana ki te karanga 4

Ko ngā tikanga o te karanga, he tikanga nō te ao tawhito, nā ngā Atua wahine i whakatakoto, ā, nā ngā tūpuna wāhine i tuku iho mai ki a tātou.

Ko Papatūānuku te kaikaranga tuatahi o te ao. Nānā i whakatakoto ngā tikanga o te karanga. Ka puta tōna karanga tuatahi i te wā o tōna wehenga atu i a Rangi - he karanga aroha, he karanga tangi, he karanga poroporoaki hoki5.

Ko Hinerauwharangi tētahi atu atua wahine e pā ana ki te karanga. Ka taea e te tangata te kite i a ia i roto i ngā pōwhiri, arā, ko ngā pare kawakawa me ngā rau karanga he whakatinatanga o tōna hanga. I roto i ngā mahi a te kaikaranga hei takawaenga i waenganui i ngā ao e rua, ka pā hoki ia ki a Hinenuitepo.

Ko Hineteiwaiwa te kaitiaki o te tinana o te wahine Māori, i roto i ngā wā o te mate marama me te whakawhānau tamariki, ā, nāna hoki ngā tikanga mō ngā mahi katoa o te wahine Māori i whakatakoto.

3 Karetu, S “Kawa in Crisis” in King, M (ed) Te Ao Hurihuri (1975) 71.
5 Yates-Smith, A Te Ao Wahine Lecture Notes/Handout - Karanga (May, 2002).
Ngā momo karanga:

He maha ngā momo karanga o te Māori. Ka taea e te tangata wēnui momo karanga te kite i roto i ngā pōwhiri, ngā tangi, ngā poroporoaki, ngā kaupapa waka, ngā whakapōtaetanga, ngā whakataetae kapa haka, me wētahi atu wā e hui ana te iwi Māori. Otitā, he rerekē rawa atu te hanga o ia hui, ā, nā tēnā, he rerekē hoki ngā reo karanga. Mena he hui harikoa ka harikoa anō te āhua o te reo karanga. Mena he hui pōuri, taimaha raini, ko tērā anō te hanga o te reo karanga. Mutu atu, ko te reo karanga he reo ka taea te kōrero i te maha o ngā momo hui o te Māori, me wētahi hui o te Pākehā. He rerekē tēnei āhuatanga ki tērā o te whai korero. Ko te whai korero he reo mo ngā pōwhiri anake.

He aha ngā tino tikanga o te karanga?

He tohu whakapūrea tā te karanga, hei para i te huarahi mō ngā whakahaerenga o te hui, hei horoi i te tangata, kia mahue ake ai ngā paru, ngā taimahatanga o te ao Pākeha i mua i tōna urunga ki roto i te Ao Māori. 6

He karanga ki te hungamate kia hoki mai ki te noho i waenganui i te ao kikokiko, ki te whakakanui i ngā take o te hui. 7

The kuia is a peacemaker. She leads her people onto any marae, to any venue with dignity, courage, respect, and arohanui; she carries her people’s canoe on her back spiritually. That load is heavy at times because the ancestors may choose to go along as well, especially if there is a tangi. In my old age I have felt their presence and have been glad to have them there. 8

Ko te karanga he mihi hoki ki te marae, ki ngā momo whare o te marae, me ngā āhuatanga o te marae. He mihi hoki ki ngā awa, ki ngā maunga, ki wētahi atu āhuatanga o te taiāo e tū whakahihahira ana mō te hunga kāinga (hei whakatau hoki ki te hunga manuhiri) 9.

7 Yates-Smith, A Te Ao Wahine Lecture Notes/Handout - Karanga (May, 2002).
9 Yates-Smith, A Te Ao Wahine Lecture Notes/Handout - Karanga (May, 2002).
Ka taea e te kaikaranga te kōrero mō ngā take o te hui, ka taea hoki e ia te whakapuaki i wōna ake whakaaro e pā ana ki waua take. Mēnā he tangi te hui, ka whakaatu ki ngā tāngata, ko wai te tūpāpaku e takoto ana, nō hea hoki ia, mēnā he tāiohi, he kaumātua raini.

He mahi whakahirahira anō tā te kaikaranga arā, ko te whakaoho i te hunga kāinga, hei whakamōhio atu ki ngā kaikōrero, ki ngā ringawera, me ngā tāngata kātoa ki roto i te whare i kua tae mai he manuhiri. Ka whakaatu anō hoki ki a rātou ko wai te ope whakaeke.

Otirā, ka whakamana, ka tuitui te kaikaranga i ngā momo kōrero o nehera kia whakanikoniko, kia whakaoho i tōnā reo pōwhiri ki te tangata.10

*Mā wai e karanga?*

He ōrite ngā kawa o te karanga ki ngā kawa o te whaikōrero, arā, i te tuatahi, kei te hunga kaumātua (kuia) me te tuākana te mana karanga i te nuinga o ngā wā. Atu i tēnā, ka taea e te whaea, e te tāiohi, e te teina hoki te tū, mena rawa kē he kuia, he tuakana ki reira hei mahi i te karanga. Engari anō, ko te tino mahi a te teina me te rangatahi, he hiki i ngā huarahi āwhina.11

Me rite tonu hoki te tūranga o ngā kaikaranga o ia taha, arā, mā te kuia te kuia e karanga, (kia kaua te tāiohi e karanga ki te kuia).

...it's an insult for a young person to call an older person on, it's the same with whaikōrero. The young talk to the young, and the young women karanga to the young reo-karanga. The time for the kuia to karanga is when everything is finished. Then she will cover them.12

E ai ki wētahi, mā te ārero matatau noa e karanga, ā, kei ia wahine te reo karanga māna, mā te kaikaranga e tito i tōnā ake karanga hei whakaatu i wōna ake whakaaro.

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13 Ibid.
Before I karanga I ask questions. Who are they? Whare do they come from? What is the topic of the day? Then I can phrase my words accordingly. You don’t just use words because you’ve heard them or rehearsed them, you have to be a fluent Māori speaker to get up and do that sort of thing, because then it comes from the heart. You don’t copy, you compose.  

E tika ana kia rerekē ngā karanga kia ia ope manuhiri, hei whakamana i a rātou. 

Nā te tino whakahirahira me te tino taimaha o ngā māhi o te karanga, ehara i te pai kia karanga te wahine i wētahi wā: 

• I te wā o te mate wahine me te tūroro hoki, arā ngā wā e pā ana te mate ki runga i te tinana. 

• Mēnā e hapū ana te wahine (ehara i te pai kia mārakerake te pepi ki te ao wairua). 

• Mēnā he whānau pani, he taimaha rawa raini te hinengaro o te wahine (kāhore te wahine e tino āhei ana ki te whakapūare i tōna hinengaro ki te ao wairua.)  

Ko te Kānaki? (He aha te tikanga o tēnei kupu ‘kānaki’?)

Ko te kānaki he waiata tautoko a muri atu i te whai kōrero o te tāne. E ai ki te kōrero ko te kupu kānaki he kupu e whakaatu ana i te hanga o tēnei waiata, arā, he waiata hei whakaniko i te whai kōrero o te tāne, hei whakaoti i wana kōrero hoki. 

Ki ahau nei, he mana anō tō tēnei waiata, ehara i te kānaki noa iho mō te kōrero o te tane. 

Ma tēnei waiata e whakamana i te wahine Māori –  

• ki te whakaatu i wōna ake whakaaro mō ngā take o te hui  

• ki te whakamutu i ngā kōrero o te tāne (mēnā he koretake, he huke, e kōtiti haere ana raini). 

13 Ibid. 
14 Gabel, R (Unpublished Manuscript) 
15 Yates-Smith, A Te Ao Wahine Lecture Notes/Handout - Karanga (May, 2002).
Kua hanga ngaro waua āhuatanga ki runga i ngā marae i wēnei rā. He rite anō te kuia whakakati kōrero ki te ‘kōtuku rerenga tahi’, arā, he ruarua noa iho ngā wā e kite ana tātou i wēnei tūmomo mahi. He rerekē hoki te hanga o ngā waiata ki te maha o ngā hui ki ngā marae o te motu. Ka taea e te tangata te rongo i ngā waiata pērā i te ‘Ehara’, i te ‘Māku rā pea’, i te waiata ‘E toru ngā mea’, aha atu, a, ehara i te waiata kīnaki, he waiata noa iho kē.

Horekau ahau e hiahia ana kia roa atu waku kōrero mō te taonga nei i te mea, ko te tino kiko o tēnei tuhinga, ko te āta titiro ki nga hononga ki waenga i te mana o te karanga me te mana o te wahine. Engari anō kua whakatakotoria e ahau wōku whakaaro mō tēnei take, ahakoa anō, he poto.

**TE TAENGA MAI O TE PĀKEHĀ**

Consequences for Māori Women – Māori adoption (Pākeha imposition) of Pākeha tikanga in relation to oral ‘arts’ and overall position of Māori women.

For a long time Pākehā looked at what was going on the marae and made judgements...they assumed that what men did was important and what women did wasn’t. An outside culture looked at Māori women, as first speakers through karanga, and started redefining who was doing what.16

In essence, the tauiwi people who arrived in early New Zealand gave little recognition to the karanga and its role in maintaining the strict balance necessary for the prosperity of the iwi. A colonised perception of oral arts on the marae resulted and has been sustained ever since.

At the heart of the matter is the assertion that men whaikōrero, that women don’t and that this is an example of sexism, the denial of women’s rights. Here the principle of equal rights is being argued in the context where male behaviour is used as the norm against which female behaviour is judged. Women weren’t doing exactly what men did, therefore what they were doing, didn’t count, in its own right.17

17 Ibid, 10
One needs only look at various writings in this area to see evidence of the mistaken perceptions tauiwi held. The writings of Ann Salmond, for example reflect a typical tauiwi perception of whaikōrero, Salmond states;

The orator is an esteemed figure in the Māori world. A skilled orator is a master of genealogy, ancient chants, local history and proverbs...[T]he east coast custom [of women speaking] is occasionally used to infuriate guests, as visitors from other areas consider it an insult to be welcomed by a woman. 18

Salmond also comments on the meaning of the whakapohane in Māori society; “[This whakapohane] expressed the opinion that the speaker was noa, like a woman and should no longer speak on the marae” 19 and makes comments about the status of women on the marae -

When a women speaks on the marae today she should ideally follow the male orator, and justify herself by referring to her illustrious predecessors. In other areas women speak only in the meeting-house at night, and then only if she has something important to say.” 20

Salmond makes a number of assumptions that demonstrate the colonised perception that she holds: That women are noa (and men, by implication, are tapu), that only women who have ‘illustrious predecessors’ with something important to say can speak (as opposed to men, any of whom can speak and apparently about anything) and that such speaking should be done at night and only after a male has seemingly cleared the way for her. She also makes the assumption that success in the Pākehā world equates to reverence on the marae.21 Most unbelievable however is her statement that to be welcomed by a woman is an insult: what, therefore, does she perceive the karanga to be?

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19 Ibid.
20 Ibid, 152.
This is merely an indication of some of the fallacies that exist in both older and contemporary historical accounts of Māori society. There are many more examples of patriarchal assumptions and general downplaying or invisibilising of female taonga-ā-waha readily available in Pākeha and Māori written literature; authors of which include Buck\textsuperscript{22} and Best\textsuperscript{23}. In a contemporary form however, ‘acclaimed’ Māori author, Alan Duff also displays a disturbing perception of our taonga-ā-waha in line with the writings of the Pākeha historians.

The old way has women considered of lower status than men. In most tribes they have no speaking rights on the marae. And to die-hard traditionalists, they should be seen... and not heard...Māori women claim to be satisfied with their lot in life... that they anyway have “our ways of influencing” even if it is by an indirect route. They have, I contend, been brainwashed by the very male power structure that...continues to deny them. You’ll hear the argument... that ...women in fact play a vital role in Māori society, or why else should it be a women’s voice heard first as welcome...? This is not a valid argument; it is nothing but a foil.\textsuperscript{24}

Writing like this perpetuates the idea that the speaking kawa on the marae is inherently wrong, and traditionally so. It continues to reinforce the degradation of karanga and female taonga-ā-waha in general, and goes as far as to be critical of women who accept this ‘subordinate’ role on the marae.

It does, however, highlight an important issue for Māori women on the marae, that is, what counts as speaking? Kathie Irwin has sought to discuss this issue. She comments:

Protagonists in this debate have recognized only whaikōrero as speaking. The other forms of oral art, some in which women only speak, have not perhaps been regarded as real speech making...\textsuperscript{25}

\begin{thebibliography}
\bibitem{22} Buck, P \textit{The Coming of the Māori} (1949) 361.
\bibitem{23} Best, E \textit{The Māori as He Was} (1924) 100.
\bibitem{24} Duff, A \textit{Māori – The Crisis and the Challenge} (1993) 89.
\end{thebibliography}
So what does count as ‘speaking’? Certainly, a close analysis of karanga will tell you that it includes a huge amount of self-expression on behalf on the kaikaranga. Further to this, however, it is essential that we have a full understanding of just what speaking is done on the marae and under what circumstances. It is therefore necessary to draw attention to the distinction between whaikōrero and what is simply kōrero on the marae. It is my understanding that whaikōrero is the oratory performed during the formal process of the pōwhiri whereas kōrero refers to other oratory on the marae. For that reason I would state that women do not generally perform whaikōrero for the simple reason that they instead perform karanga.

I would also like to clarify my personal understanding of marae speaking kawa in relation to women. This understanding is not to be considered an absolute authority but merely a reflection of some of the observations I have made and knowledge I have attained during the course of my life so far, inclusive of my upbringing in Ngāti Hine for eighteen years:

Women are allowed to speak within the wharenui as it is the domain of Rongo-mā-Tane and Hineteiwaiwa. Women are not permitted to speak on the marae ātea, as it is the domain of Tumātauenga. In some areas, (Tai Tokerau included) women are not allowed to speak (whaikōrero) during the formal process of pōwhiri whether that takes place in either domain. In other areas, such as Ngāti Porou, women are permitted to whaikōrero in both domains under certain conditions. For the most part, however, the kawa of not allowing women to whaikōrero is directly related to the role of women as whare tangata, and is necessary to protect them from the physical and metaphysical dangers that whaikōrero (and the marae ātea) may present in the course of a specific ceremonial occasion. It is also recognition of the unique role that women played as the intermediary between Te Ao Kikokiko and Te Ao Wairua (a role particular to the feminine alone).

The prohibition on women is not because of blatant chauvinism but because my kaumatua believe in the sanctity of woman...[s]o while some people might accuse Māori society of being chauvinistic, it should be borne in mind that the role of women is very important in ritualistic and practical terms."26

26 Karetu, S “Kawa in Crisis” in King, M (ed) Te Ao Hurihuri (1975) 72.
It has been argued that the adherence to such tikanga is just ritualistic and not really that relevant to ‘te ao nei e tītīni haere ana’, and that in order for te iwi Maori to move forward in this world there must be change and evolvement of our tikanga along with the evolvement of ourselves as Māori. So why do we hold on to these seemingly antiquated kawa?

There are many who advocate that strict observance of kawa is really of little use because attitudes are continually changing and, therefore kawa, if it is to be of any relevance, must also adapt… What in fact is the point of retaining kawa? Initially, and, fundamentally, it makes behaviour simple and clear cut… Many tribes are now settling for convenience rather than what is… correct… It makes all observance of kawa meaningless and useless.27

Therefore it is important to maintain these tikanga if only to provide a constant in the ever-changing environment we live in. In olden times interaction with other tribal groups in New Zealand was restricted by many environmental factors, but the fact that present day allows this interaction quite easily, is good reason for kawa to be retained stringently - for the simple reason of allowing it to be observed effectively by other visiting parties to a marae. Imperative to Maori women in this argument however, is that all knowledge of these tikanga and kawa be retained and utilised effectively. “If we accept that there is some virtue in the retention of kawa then women must be taught to perform their own role well”.28

There is also a voice which supports the evolvement of our speaking kawa in order to provide Māori women with the authority that is so often vested in Pākehā men;

When a Pākehā man, who is tauiwi, not a speaker of the language, or tangata whenua in a Māori sense of the word, is allowed to stand and whaikōrero on the marae atea simply because he is a man, then Māori women surely have cause for concern… if the kawa of these tikanga is to change to fit a contemporary context, is there not logic to the position that the changes should include Māori women before Pākehā men if they are to be accepted as cultural changes and not patriarchal bonding?29

27 Ibid, 69.
28 Ibid, 72.
This is indeed a valid and concerning point. Engari anō, kei a wai te mana o te whai korero? I te mutunga o te rā kei te tāne - he mahi tā te tāne, he mahi anō tā te wahine. Perhaps the real underlying issue is not that women should have whai korero rights over Pākehā men but that Pākehā men should not have whai korero rights at all! However, is it not up to our men to decide whether or not they devalue their own taonga-ā-waha by allowing it to be desecrated by an English tongue?

In some regards Māori women can count themselves as lucky that our taonga have essentially evaded intrusion by Pākehā, perhaps because they (Pākehā) undervalue its contribution to society but, and more likely in my opinion, because it requires he reo manutioriori, a skill and taonga our women are more likely to possess than our Pākehā counterparts!

The major point in this argument however, as Ani Mikaere30 and Kathie Irwin31 assert, is that careful consideration should be given to any adaptations of tikanga that occur in the Māori arena, simply because such adaptations can and have had a devastating impact on the fine complementary balance that once existed between Māori women and men.

I will now discuss some of these such impacts and the effect that a warped perception of our taonga-ā-waha has had on Māori women and their specific roles in society, both in Te Ao Māori and Te Ao Pākehā.

TE AO HURIHURI

The reality for Māori women in New Zealand is that they have to survive in two worlds: the Māori world and in the Pākehā world. Each world has its own separate reality. Each has its own values, mores and beliefs and each demand conformity and allegiance. In her daily experiences a Māori women is constantly in transition from one reality to the other.32

30 Mikaere, A “Colonisation and the Imposition of Patriarchy: A Ngati Raukawa Woman’s Perspective” in Te Ukaipo (December 1999) 47.
There can be no one definition or perception of what constitutes a Māori Woman in this new millennium. Recent writing reflecting this, centering around the intersectionality theory, has been authored by Paul Meredith\(^{33}\), among others. However, in general, a Māori woman is (in Pākehā statistical terms) a woman of Māori descent and (in Māori terms) one who recognises and celebrates herself as Māori.

Many issues then arise for the Māori woman living in New Zealand. The statistics (albeit the Pākehā ones) tell the story:

For Māori women [the] oppression is threefold. They are oppressed in terms of gender class and race. All three are interwoven into a complex mantel of oppression that cloaks every aspect of their lives. Their statistics in terms of ‘success’ in the areas of education, health and work are devastating.\(^{34}\)

For each individual Māori woman, the experience of marae kawa, tikanga and karanga differs immensely.

\textit{Te tūranga o te wahine Māori ki runga i te marae –}

Rerekē kē tēnei ao, kāre i rite te mauri, nā te mea kua kaha te whakauru mai o te ao Pākehā ki roto i ngā whakahaere. Ana kua memeha haere te mauri; kua kore i tarekate kawe [ngā tikanga]. Ko au tētahi o ngā wāhine haere ki ngā hui katoa, ana, kai te kite au i te hīkoi o tēnei wā.\(^{35}\)

One of the most concerning problems is the level of internalisation among our women of the colonised views of our roles on the marae. Many Māori women are inclined to just accept a subordinate role given to them (and justified as kawa) and just as many men are under the impression that their role on the marae is much more important than the feminine one.


A huge part of the problem is the extent to which we ourselves have internalised colonised perceptions of male and female roles. How many of us have the sense that our contribution is somewhat valued less than that of our male relatives? Just as important, how many of our men have bought into the idea that the privileging of men over women is part of our tradition? How many of them have yet confronted the possibility that colonisation has made them collaborators with the colonisers against their own women?  

The colonised perceptions that are referred to above include our speaking roles, namely, karanga and whaikōrero. There is a growing insistency within Māori institutions that male-only speaking roles on the marae are not exclusively restricted to whaikōrero, and that in general women do not have a speaking voice on the marae outside of karanga and waiata. This is coupled with the belief that these feminine speaking roles are less important and valuable. Many marae around the country are persisting with this sophism and effectively silencing Māori women on the marae, excluding them from important decision-making forums and rendering them quiescent. More concerning is the passive acceptance of this by many women, fortified by a general reluctance to step outside the established ‘comfort zone’ as kaitautoko to the men. 

The marae rituals, rather than being the means to an end, risk becoming the end itself. At many hui, Māori are in danger of becoming automatons... Any deviation from the standard is likely to draw accusations of breaching tikanga, of not being truly Māori.  

An issue within this that has been identified by a number of Māori writers is the perception of the marae as the last “bastion of Māoridom”, an arena within Māori society that has resisted the colonisation process. For this reason there is an almost desperate retention of what is perceived to be kawa. Interference in this institution is severely resented.  

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36 Mikaere, A “Colonisation and the Imposition of Patriarchy: A Ngati Raukawa Woman’s Perspective” in Te Ukaipo (December 1999)47
38 Ibid, 126.
This issue has challenged the marae, a central institution in Māori life and
culture, and ideas about the role and status of women. Targeting the marae
as it has, this controversy has hit at the very heart of Māoridom and
caused great pain. As a result, over the years, the subject has become
virtually untouchable. 39

Therefore the issue of Mana Wahine becomes secondary to that of
Mana Maori, despite the ultimate intertwining and co-dependent nature
of both realms.

Another issue that becomes even more debilitating to women than the
perception of karanga as a subsidiary voice on the marae, is the
somewhat perfunctory manner in which the karanga is being performed
on many marae around the country. "In many places karanga are brief
and very generalized, simply covering the bare minimum to satisfy the
standard requirements". 40 This is also indicative of a passive
acceptance of an inferior vocal role on the marae and the general
internal perception that the realm of karanga is not an avenue for the
kaikaranga to express her own thoughts.

Tīmoti Kāretu also discusses a more contemporary issue facing young
Māori seeking to establish a place on the marae.

The tragedy of the situation is the way in which the younger Māori
person is suddenly becoming increasingly aware of his ignorance of what
he should do in a given marae situation and, more importantly, why he
should be doing something. 41

With ignorance comes confusion and error and this is likely to affect
Māori women in a more detrimental manner than Māori men. A
desperate retention of so-called kawa, coupled with an ignorance of
the spiritual and traditional rationale for such kawa, leaves Māori women
in a very vulnerable position on the marae.

39 Irwin, K "Towards Theories of Māori Feminisms" in Du Plessis, R, Bunkle, P
40 Mikaere, A, The Balance Destroyed: The Consequences for Māori Women of
41 Karetu, S "Kawa in Crisis" in King, M (ed) Te Ao Hurihuri (1975) 68.
TE TŪRANGA O TE WAHINE KI ROTO I TE AO MĀORI

How has/does the constructed vocal imbalance impact on Māori women within Māori institutions?

The persistent sophistry regarding speaking roles on the marae is also continuing to have a detrimental effect on Māori women within Māori institutions outside of the marae also. The internalised perception that Māori men have a defined special role within society to represent the vocal interests of their people, has resulted in the marginalisation of Māori women within Māori institutions.

Māori women are 'on the outside looking in'. There is no system guaranteeing a place for Māori women within our own institutions...[a]ny talk of structural change sends some of our men into a tail-spin...

This can be illustrated to the extreme within many of our Rūnanga-a-Iwi, where we see the importation of ‘marae kawa’ into the boardroom. As if it is not enough that many of these institutions use Pākeha concepts of meeting and board structure, it is as though there is a further need to import patriarchal quasi-kawa in order to legitimise the institution as Māori. Instances have arisen where ‘speaking kawa’ has been taken from the marae and imposed on these boards, and in some cases this has been a deliberate ploy to silence the voice of female members of the board. A classic example of this, outlined by Linda Te Aho, is the relocation of a board meeting to a marae in order to place restriction on the speaking input of a female member.

The origins of present day Trust Board structures can also be traced to Crown Legislation. Annette Sykes questions the structure of the Te Arawa Trust Board and states that “since its inception [it] has traditionally asserted that the kawa o Te Arawa denies the right of Māori Women to participate fully.” She rejects this notion and

42 Evans, R “Māori Women as Agents of Change” in Te Pua (1994) 35.
44 For example, the Māori Trust Boards Act 1955
reiterates that rather than this being a traditional kawa of Te Arawa, it is instead a reflection of the "consequence of the patriarchal methods of decision-making which permeate Pākeha power structures..."\textsuperscript{46}

The legislation she speaks of was passed in 1955, a period of New Zealand history where many monocultural policies and laws\textsuperscript{47} were created which unfortunately still apply to this day.

Ngāhuia Te Awekotuku also discusses the problem of qualification in Māori institutions:

\begin{quote}
...if you sit back with a PhD or Masters and wait to be invited...all the boys with BAs will score the jobs, or muscle in...It becomes a very cruel and ironic situation, because you know you should be pleased for them...\textsuperscript{48}
\end{quote}

This characteristic is one common to Pākehā society where it is well known that the average female employee requires better qualifications than her male counterparts to gain recognition in senior positions. In Māori terms, however, it seems as though no matter how specialized the role is, qualification comes second to 'kawa'.

\begin{quote}
...the perception exists that Māori women are discriminated against on the basis of illogical reliance upon tikanga and kawa...Māori organisations may consider Māori women unable to lead or be placed in certain management positions because, as women, they will not be able to whaikōrero. The inability to whaikōrero becomes more important than other qualifications, skills and talents that may be more critical to the job.\textsuperscript{49}
\end{quote}

When you consider the fact that Māori women are significantly more likely to attain a tertiary qualification than Māori men\textsuperscript{50}, the injustice of the situation becomes highly obvious.

\textsuperscript{46} Ibid, 17.
\textsuperscript{47} Adoption Act 1955, Guardianship Act 1968
\textsuperscript{48} Te Awekotuku, N "Māori Women and Research: Researching Ourselves" (1992) 62.
\textsuperscript{49} Ibid, 200.
\textsuperscript{50} Ministry of Women's Affairs Māori Women: Mapping Inequalities & Pointing Ways Forward (2001).
How does the constructed vocal imbalance impact on Māori women within Pākeha institutions?

The perception of women having a limited or non-existent voice on the marae has been the cause of much distress for Māori women within Pākeha society. The importation of these post-colonial and patriarchal ‘kawa’ into the Pākeha world and the reinforcing of those erroneous beliefs regarding Māori society has resulted in the marginalisation of Māori women, intensifying a continued invisibility in New Zealand public administration sectors.

The first example to be given of the lack of understanding shown by the Crown for the position of Māori women is the signing of the Treaty of Waitangi, whereby Māori women were not allowed to sign as authorities for their respective tribes. “The concept of women as...spokespersons for their iwi would have been beyond the comprehension of the...Crown representatives...” Calamitously, this view of Māori women has persisted ever since.

Māori women are essentially left out of decision-making in many facets of Pākeha society. The major area of concern in this regard is the fact that despite being particularly affected by poor socio-economic lifestyles, Māori women remain largely underrepresented in the consultative policy and legislative bodies.

...just as significant as the debate on the effectiveness or otherwise of the legislative provisions incorporating the Treaty, is the fact that Māori women as an identifiable group with particularly pressing needs have remained virtually invisible to the law.

Of course this invisibility is not only due to the fallacies present regarding female and male speaking roles in Māori society, but could also be attributed to an intrinsically sourced system of patriarchy present in

51 Mikaere, A “Colonisation and the Imposition of Patriarchy: A Ngati Raukawa Woman’s Perspective” in Te Ukaipo (December 1999) 41.
Pākehā society. What can be said in regard to speaking roles, however, is the fact that these are often used as justifications for such under-representation, that is, that Māori women would not be an effective voice on a consultative body because they simply lack the capacity to speak in various important situations, and thus pragmatically serve the interests of their people.

There remains the perception that Māori men are the speakers and thus the representatives of Māori society. A claim with the Waitangi Tribunal to deal with this issue brought the retaliative comment from the Crown that it was Māori men who were perpetuating the subordinate role of Māori women, and that the Crown was therefore powerless to change that. The Crown essentially fails to recognise any leadership roles Māori women may take, and on the odd occasion that this is recognised it is also downplayed as being an exception to the rule.

Māori men are also making significant contribution to sustaining this representative vocal imbalance, having become “accustomed to acting as spokespersons on behalf of all Māori...” and feeling no doubts about their ability to represent Māori in negotiations with the Crown. Therefore, the effect of the Crown’s erroneous perception is twofold: it not only acts to place Māori women in an inferior position in society, but also seeks to endorse and encourage the promotion of Māori men as spokespersons and leaders for Māori, while introducing Māori men to the traditional Pākehā ‘boys club’ mentality.

TE HAERE WHAKAMUA
Ko tēheā ngā huarahi mārika mō te Mana Wahine?

Māori women are exploding the colonial myths that have been constructed, whilst simultaneously redefining boundaries... we are constantly confronted with the need to decolonise that which we have internalised about ourselves.55

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53 Ibid, 147.
54 Ibid, 151
Mēnā e hiahia ana tātou te iwi Māori ki te anga whakamua, ko te tino mea whakahirahira, ko te whakamana ake i te tūranga o te wahine Māori. Mā te hunga Māori anake tēnei mahi, kia kaua ake tātou e taka ki ngā kaupapa Pākehā, waihotia atu rātou ki te whakatūtuki i wā rātou anō raruraru. Engari, rawa kē anō he mahi mā ngā wāhine Māori anake. Ina kore te tāne Māori e whakakaha, e tautoko i te mana o te wahine, kore ōngā, ka raru te iwi Māori katoa. Ahakoa anō tēnā, kei a tātou te wahine anō tō tātou tū, a, kei te tāne anō tō rātou.

The future for Mana Wahine lies in our past. That is, in order to move forward we must as a collective and as individuals reclaim and celebrate what is essentially ours. It is imperative that we take our roles on the marae seriously and give them the adequate authority and prestige they deserve. This means correcting the fallacies that exist but above all celebrating the truths that persevere. Our taonga-ā-waha can provide a starting point and platform for Mana Wahine.

Ko te reo te Mauri o te mana Māori

Needless to say what is most relevant to the whole concept of kawa is the Māori language. The marae is the last situation where one is expected to speak in the vernacular and, once it is no longer so, our language along with our kawa will be no more.56

The retention of our reo has long been recognised as an essential factor in our survival as a people. So too does it have huge relevance for the survival of our taonga-ā-waha. Just as we as wahine resent the arero kūare that stand and whaikōrero on our marae, so too must we seek to purify and give authority to the reo karanga on our marae.

“Me aro ki te hā o Hineahuone”

For Māori women ‘redrawing the maps’ necessitates a deconstruction of the existing landscape. This is essential in that it allows for the reclaiming of Māori women’s knowledge forms, of Māori women’s stories, which will aid us in the reconstitution of our own world views57

56 Karetu, S “Kawa in Crisis” in King, M (ed) Te Ao Hurihuri (1975) 75.
Kei ô tätou tūpuna wāhine te huarahi whai mana mā tätou. We must look to our tūpuna wāhine and our atua wāhine and draw strength from their unique roles. Not enough is heard about our tūpuna wāhine and the roles that they played in the shaping of our people. They were an important and crucial part our traditional society. Let us draw strength from our atua wāhine especially, who continue to permeate our lives in various natural and spiritual manifestations.

The goddesses names collectively form the feminine principle, Hine, the ultimate source of creativity born of the primal parents. Together with the male gods and all of our tūpuna they guide us into the future. It is therefore with the renewed vigour of the ancients that we Māori move forward, intent on retaining that which is uniquely Māori in a modern world.58

From our tūpuna wāhine we can also draw on the evidence of our equitable voice and role on the marae. They were not only known for their capacity to kōrero on the marae in various forms, but for their effectiveness in that capacity to provide our people with leadership and direction. Let us celebrate and venerate this aspect of our history, and remember that they continue to be a part of our everyday lives.

It must also be reiterated, however, that if we are to truly pay homage to our own distinct tūpuna wāhine then it is imperative that we do this at home - i raro iho i ngā wairua me ngā manaakitanga o te hau kāinga.

"Me hoki ki te ūkaipō"

We earth our mana wahine to Papatūanuku the earth mother and her mauri. From this whakapapa Māori women established their identity as being the land itself...59

Me whakanui ake tätou i to tätou ūkaipō, i a Papatūanuku, me te whare tangata.

59 Sykes, A “Constitutional Reform and Mana Wahine” Te Pua (1994;3:1)
We must celebrate ourselves as whare tangata, and as ākaiipō and draw strength from Papatūānuku, our tupuna and whaea who gave us a strong voice on the marae. This is not an action for Māori women alone - the restoration and celebration of our complementary roles can only be actioned by a collective whole.

Mena ka taea e tātau te tangata ngā tikanga toiora i tauratia mai e Ranginui raua ko Papatūānuku me a rātou tamariki, i whakaaataatia ki a tātau, ākene ka noho roa tātau ki tēnei ao. Mena ka kawea tātau te tangata ko te taha tangata anahē, ia ka mahue i a tātau te taha wairua ka tihoretia ngā mana tiaki i te hinengaro, i te mahara, i te wairua ka mate ko te tīna.60

It is therefore essential that a holistic approach is undertaken, one that gives authority to all facets of our existence. All elements of Mana Wahine and, as such, Mana Māori, are distinctly intertwined with our whaea, Papatūānuku, and rightly so. She has continued to provide us with both spiritual and physical sustenance from the beginning and provides also an eternal touchstone and focal point for Māori women.

A lot of our young ones talk about the reclaiming of ngā mea Māori and that’s what we need to do reclaim ngā whakaaro o ngā tuipuna. Because we are all joined together by the whakapapa our mana is all joined together ...and each tamaiti, kotiro every wahine has her own mana that makes her special but joins her too to everything else...61

Otirā, kei a tātau te iwi Māori katoa, te tino mana whakanui i ngā tikanga nei. Essential in the advancement of Mana Wahine is the collective Māori unit. While the reclaiming of our female taonga-ā-waha can only be effected by Māori women, the ultimate goal is of course the reestablishment of the complementary relationship of the taonga-ā-waha of both genders. Therefore it is up to both men and women to reaffirm our traditional and tūturu kawa on the marae.

60 Campbell, H “Nga Whakakitenga nui ki te Ao Māori mo te Ao Waiora, Te Hāora me te Mauriora” in He Pukenga Kōrero (1997; 2:2) 34.
This essay has sought to reinforce the traditional and equitable taonga-ā-waha of Māori women on the marae while dispelling the imported patriarchal values imposed on our people since the arrival of tauiwi. An in-depth analysis of the tikanga and kawa in relation to karanga is evidence enough of the esteem and power of the reo of Māori women on the marae. It is not enough to merely reclaim the knowledge of this taonga, we must also reclaim its physical presence on the marae. It is my view that until this taonga is given the reverence it is due, our vocal position within the marae cannot change. It is imperative that we firstly concentrate on the reclamation of our own taonga-ā-waha before finding cause to question the taonga-ā-waha fallacies perpetuated by our tāne. It is by no means a simplistic task, but one that rather requires a sustained and collective assertion by Māori women of their vocal capacities on the marae.

Heoi nāno, kia kaua ake tātou e wareware, ko te mana wahine Māori he mana nō te ao tawhito, nō te ao wairua. He kōpu mana e ora tonu ana ki te hinengaro o te wahine Māori. Me whakanui tātou i tēnei mana hei ārahi i a tātou, hei whakakaha hoki i a tātou kia tū tika ai tātou ki roto i tēnei ao hurihuri. Me whai hoki tātou i ngā akoranga o wō tātou tūpuna wāhine, nga akoranga hoki o wo tātou atua wāhine, nā rātou anō ngā tikanga o wō tātou taonga-ā-waha i whakatakoto. Kia kaua ake tātou e wareware i roto i wō tātou hikoī huarahi katoa ki tēnei ao, ā, ko ngā atua wāhine i reirā e manaaki, e tiaki ana i a tātou. Mai i to tātou whaea a Papatūānuku ko riro i a tātou te reo karanga. Me whakanui ake i tēnei taonga, hei whakakori i ō tātou hinengaro, kia tū kaha ai tātou ki te ao nei, otirā kia tūtuki ai te kōrero - “Hine tū, Hine ora!”
Ngā Rauemi

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MĀORI WOMEN AND EDUCATION.

Whakatauākī: “He mana te Mātauranga – Knowledge is Power”  
Matiu Dickson*

INTRODUCTION

Acquiring knowledge allows individuals to aspire to their full potential and to contribute immeasurably to the benefit of communities. This chapter will look at how the introduction of the colonialist education system impacted upon the role of Māori women in their communities, both initially and long term. Recent Māori women writers have stated that the salvation and future of Māori people lies firmly in the hands of its women.¹ I agree with this assessment. The present statistics show that Māori are at the bottom of the economic and social ladder, struggling to improve their lot as compared to that of their Pākehā counterparts.² However there has been improvement, brought about by Māori themselves.

For this paper, I interviewed three Māori women of my community. The purpose of the interviews was to find out whether the education system in fact gave these Māori women the same opportunities that others had had. And if not, why was this so. Traditional Māori learning is also considered and the policies of the colonialist education system are looked at, as is the impact of that system on Māori generally. However the emphasis for this paper is on Māori women and how the system disadvantaged them.

TRADITIONAL MĀORI LEARNING METHODS.

In Māori traditional stories, Tāne-nui-a-rangi wanted to find the origin of knowledge for his people. He reached the sacred twelfth realm of

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¹ Smith L, in Middleton, S Women and Education in Aotearoa p33.
² Department of Labour, Trends in Māori Labour Market Outcomes, p1.
the Gods, called Rangitūhāhā, and brought back to earth the pūtea wānanga, or three baskets of knowledge. These baskets were called te kete tuauri, containing ritual knowledge such as karakia or chants; te kete tuatea, which held the knowledge of the occult; and te kete aronui, which was the source of the secular knowledge or knowledge about the world.3

Because this knowledge originated from the Gods it is noted that:

...all knowledge has tapu, that knowledge belongs to the group, that people have the responsibility to treat knowledge carefully, that knowledge should be used to benefit others, that knowledge can lead to the “world of light” (enlightenment), that knowledge acquisition and learning can be an end in itself.4

Early Pākehā ethnographers found traditional Māori society an interesting and fertile ground for research but it is debatable whether the research was for the benefit of Māori:

Distortions of Māori social reality by ethnocentric researchers overly given to generalisations were initially apparent only to Māori people. While this type of research was validated by ‘scientific method’ and ‘colonial affirmation’, it did little to extend the knowledge of Māori people. Instead, it left a foundation of ideologically laden data about Māori society, which has distorted notions of what it means to be Māori.5

One of those early ethnographers, Felix Keesing, in discussing Māori methods of learning, concentrated on the physical aspect of the Māori world and the ability of the early Māori to become “splendid physical machines”.6 This patronising attitude to Māori was compounded by his insulting generalisation that;

3 Barlow C, Tikanga Whakaaro p158 for a fuller discussion.
4 Ibid p162.
5 Ibid p170.
"...the hardening effect of the active open-air life kept the people fit, in spite of a considerable lack of knowledge of even elementary laws of hygiene and a resulting lack of cleanliness and fastidiousness of taste and smell.\textsuperscript{7}

It is important, then, to discern the real facts of traditional learning from the biased opinions of these early ethnographers whose influence was widespread. Reference was made by Keesing to the fact that Māori had no form of writing (which was true) or symbolism (which was not true). Keesing also noted that all lore and thus learning was acquired and passed down by word of mouth, with the family group being the main educational institution. This last observation by Keesing was true, but was coloured by his later statement:

...the fact that the Māori had to depend entirely upon the memory of the individual for the preservation of tribal lore, tradition and history made everyone in some measure responsible for maintaining unimpaired the cultural heritage of the race. Thus the whole atmosphere of primitive life guided thought into these fossilised concepts, and the narrow content of the Māori language, together with the priestly domination, prevented any development.\textsuperscript{8}

Peter Buck\textsuperscript{9} in his writing about learning in traditional society, referred to learning beginning in the home. More importantly, he noted that learning was not separated from any other of the usual activities of the family. Children learned by copying and asking questions about any matter that was of interest. Explanations were given and mistakes in understanding were corrected by the elders without any rancour. As children grew and became part of the world of the elders, they were taught aspects of behaviour that made them more part of the whānau or group. For example, they were taught how to greet their elders and how to behave toward them.

\textsuperscript{7} Ibid p22.
\textsuperscript{8} Ibid p27.
\textsuperscript{9} Ewing & Shallcrass, Introduction to Māori Education p13.
It was noted that by Buck that;

...a high standard of education was given to the sons of chiefs and priests by selected members of the tribe, who, because of their knowledge were regarded as repositories of tribal lore....some men famous for their learning gave courses in high education to a number of selected students whose admission was not by examination as to intellectual ability but by the qualification of birth. The courses were given in houses set apart for the purpose and termed whare wananga.10

There is an inference from the above that women did not take part in wānanga but in his book on tikanga11, Cleve Barlow refers to the fact that wānanga included two priests, a man and a woman. The latter helped in the freeing of the participants from tapu. I have been unable to find written record of women being part of traditional wānanga, although it is accepted that the wānanga were for the rangatira class, to which women belonged. It is possible that early ethnographers simply assumed that women did not take part because the activity was tapu and women were excluded. But, more importantly, they applied their own cultural norms in making assumptions of non-involvement by Māori women, which was plainly wrong. I suggest that if the type of wānanga warranted the inclusion of women, that would have been done, because women were considered tohunga in some activities.

The teaching and learning of very tapu knowledge was carried on in a controlled and restricted context, sometimes in specially constructed houses called whare wānanga or houses of learning. Teaching was by tohunga or experts. The tapu sanctions served to protect the participants from the power implicit in the acquiring of knowledge. They also served to maintain the authority and validity of the knowledge.12

Traditional Māori knowledge was perceived to belong to the whole group and not the individual who, in any case, had the responsibility to contribute his or her knowledge for the benefit of the group. It was said that;

...in the traditional Māori worldview, all knowledge was regarded as being tapu...although some forms of knowledge and some skills were regarded

11 Supra no 3 p158.
12 Supra no 1 p37.
as being more tapu than others. Contextual variables such as ‘what could be learned’, ‘how it could be taught’ and ‘when it could be taught’ could both affect and effect the level of tapu attached to that particular form of knowledge....Generally more informal (less tapu) learning and teaching was related to eking out a living and to skill acquisition for survival in the physical sense.\textsuperscript{13}

So, contrary to the observations of the early ethnographers, traditional Māori society had a system of education which suited their cultural needs and world view. It included the basic requirements of an educational system, that of a knowledge base, an oral tradition and an ability to adapt to the changing environment.

THE POSITION OF WOMEN IN TRADITIONAL MĀORI SOCIETY.

The book \textit{Māori Women} by Beryl Heuer\textsuperscript{14} has been criticised by Huia Jahnke because in her view Heuer relied too heavily on the Victorian interpretations of white male ethnographers which resulted in a book filled with inaccuracies, generalisations and dubious interpretations.\textsuperscript{15} I agree with this criticism. Jahnke refers to Heuer’s description of Māori women in traditional society as ‘passive receptacles for the dominant male spirit’ or as being ‘responsible...for the greater number of Māori wars’ and ‘high-born women as not eligible for leadership’, as being inaccurate and offensive. Particularly offensive too, for Jahnke, was the negative interpretation given by Heuer on Māori women’s role in the creation and death traditions, and in the symbolism of menstruation.

A more accurate view on the position of Māori women and leadership in traditional society is given by Ani Mikaere where she says:

...Both men and women were the essential parts of the collective whole, both formed part of the whakapapa that linked Māori people back to the beginning of the world and women in particular played a key role in linking the past with the present and the future. The very survival of the whole was absolutely dependent upon everyone who made it up, and therefore each and every person within the group had his or her own intrinsic value. They were all a part of the collective; it was therefore a collective responsibility to see that their respective roles were valued and protected.\textsuperscript{16}

\textsuperscript{13} Supra no 1 p34.  
\textsuperscript{14} Heuer B, Māori Women, p 62.  
\textsuperscript{15} Jahnke, H in Middleton, S Māori Women and Education, p 22.  
This view is supported by Rose Pere in her very informative writing on the spirituality of Māori society with reference to her background where she says:

...my female forebears, prior to the introduction of Christianity...were extremely liberated as compared to my English Tupuna....the women were never regarded as chattels or possessions; they retained their own names on marriage...Retaining their own identity and whakapapa (genealogy) was of the utmost importance and children could identify with the kinship group of either or both parents17

Māori women, particularly those of rank, found no difficulty in assuming roles of leadership within their hapū and iwi. These roles were of equal importance, and in some cases of more importance,18 than the leadership roles of their male kin. The loss of emphasis on Māori women’s leadership roles can be attributed to the Victorian attitude of the colonisers and ethnographers, and the acceptance by some Māori males of those attitudes.

Marriage did not prevent Māori women of rank from asserting themselves as leaders. One such woman was my paternal kuia, whose name was Hineaturama, of Ngati Whakaaue in Rotorua. She was a kinswoman of Te Amohau and a daughter of Tokowaru of Ngati Raukawa. She was offered as a wife to the Pākehā Tapsell to bring him into the Te Arawa district to trade. She had children to him but lived an independent life, moving to the Waikato where she became involved in the land wars, and died in the battle at Orākau. She was a great composer and a leader of her people.

Another tupuna kuia of mine was Ruawahine Faulkner of Ngaitukairangi, whose marriage to John Lees Faulkner left many descendants in the Tauranga district.

Despite the number of recorded historic incidents involving such women, what Kathie Irwin has to say is true;

...Throughout our story as a people, Māori women have been successful innovators and leaders. Our work and deeds have had a significant impact

17 Pere R, Te Wheke p9.
18 Supra no 16 p132.
on Māori culture and society, breaking new ground, often in radical ways. And yet, our women, and their stories, have been buried deeper and deeper in the annals of time by the processes of oppression the seek to render us invisible and keep us out of the records.

For Māori women, their leadership roles in traditional society should have given them the opportunity to take advantage of the new education system but because that system came with a new world view this potential advantage was taken away from them. Despite this, there were examples of very successful Māori businesswomen after colonisation.

THE INTRODUCTION OF THE PĀKEHĀ EDUCATION SYSTEM THROUGH THE MISSIONARY SCHOOLS.

The first missionary School was set up in 1816 in the Bay of Islands but it wasn’t until the 1830s that Māori began to take a real interest in the new style of education. That the Bible had been translated increased the interest in literacy in the Māori language and it was reported that literacy had reached remote parts of the country where no Pākehā teachers had even been. So Māori themselves were spreading this new knowledge. The spread of literacy meant that by the late 1850s about half of all adult Māori could read in the Māori language and about a third could write it. It is important to note that because there was no gender discrimination in the acquiring of knowledge it was conceivable that as many Māori women as men had acquired the new literacy. But there was a down side to all of this because it resulted in Māori being influenced and persuaded by Christian teachings, and the ethnocentric ideas of the colonisers that Māori culture was inferior.

It was commonly thought that Māori knowledge, culture and practice were primitive and barbaric. The colonisers came intending to enlighten, uplift and protect Māori and at the same time to impose their ‘superior’

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19 Irwin K, Feminist Voices- Towards Theories of Māori Feminisms p1.
20 An example is Airini O’Donelly of Ngati Kahungunu, see MacGregor M Petticoat Pioneers: North Island Women of the Colonial Era (Book 1, Wellington, 1973).
21 Simon J, Nga Kura Māori p3.
22 Ibid p7.
English systems on the natives. Settlement meant that land was needed and therefore it was necessary to deal with Māori, and at that time the most potent agents of change for Māori were the Church and the school. The important points to be noted have been set out thus:

i) Māori people were genuinely interested in and excited by the new technology and knowledge brought by Pākehā and actively sought ways of gaining access to that knowledge.

ii) Māori people were initially very successful at gaining access to these ideas, for example, by gaining control over the printed word.

iii) Something changed which caused this early excitement and participation to wane quite dramatically.23

The “something” referred to above was the change in the political and economical situation of Māori and the land wars of the 1860s. State funding of the missionary schools pursuant to the Education Ordinance of 1847 required that instruction be in the English language, although bilingualism was the reality. While Māori did not have to attend school there was an enthusiasm for it and some Māori provided land and money for the establishment of the schools. To qualify for the subsidies, schools had to teach industrial training as well as religious training. The authorities of the time considered that it was their duty to civilise the native peoples and to assimilate them as soon as possible so that they could enjoy the benefits of a superior culture.

However, during this period there was a change for the worse in the relations between Māori and Pākehā because of the settler demand for land and the Māori refusal to sell. Given the assimilationist agenda of the settler government, there was an inevitability that conflict would arise. It did, in the form of the land wars, provoked by the government policies and deals.

The results of defeat in the land wars saw a rapid and dramatic decline in the health and vitality of Māori, so much so that by the end of the century it was commonly believed by Pākehā that the Māori race would die out if nothing were done to reverse the downturn in health and low numbers.

23 Supra no 1 p39.
As for the impact of colonialist policies on Māori women in this period, it has been succinctly written by Jahnke that;

Within the context of colonisation, the oppressive forces of missionary evangelism and assimilationist policies instituted by the settler government successfully rendered invisible any notion of Māori women’s customary autonomy, role and status. Schools were established as major sites for transforming gender roles in Māori society by constructing and redefining the roles of Māori women and men, first by the missionaries and their wives...as early as 1816 ...and later by the state. The church and the state were intent on an agenda aimed at the domestication of Māori women and girls....

Jahnke goes on further to say;

...This provided the rationale for industrial training. Māori men were trained as agricultural labourers and their Māori wives as domestic workers in Pākehā (missionary) homes. Underpinning this new social order were assumptions about the innate racial inferiority of Māori and the identification of Māori with the working class of England...British cultural practices and images embedded in the dominant attitudes towards women emphasised women’s subordination to men...Thus Māori women were seen not only as inferior to Pākehā men and Pākehā women but also to Māori men...the work of the wives and educator in the church mission schools attest to their active involvement in an agenda aimed at the social control of Māori women and girls...

There was a concern for the moral development of the Māori girls. Some schools became boarding schools but the girls had to first reject their own Māori values and culture and accept Christian values in their place. They had to learn to be Pākehā. These girls were taught to be good domestics servants for the missionaries and to be good wives for their Māori men. Little, if any, recognition was given to the fact that some of these Māori women held important leadership roles and mana in their own communities. Only Māori teachers who renounced their native ways progressed in the teaching system.

24 Supra no 15 p4.
25 Supra no 15 p6.
Kaai-Oldman sums up the situation thus:

...Sir George Grey was totally convinced of the appropriateness of the Pākehā’s civilising mission and established the policy of assimilation as the solution to the Māori problem. He subsidised the mission schools ...in the hope of isolating Māori children from the ‘demoralising influence of the Māori villages’ and thus speedily assimilating the Māori to the habits and usages of the European.

The combined effects of war, epidemic and low morale accounted for a dramatic drop in the Māori population and a despair as to whether they would survive into the new century. It did not help that the colonialist government continued its legislative programme to further assimilate Māori people and deny the importance of their language, culture and land.

**EDUCATION ORDINANCE 1847**

This Ordinance was passed after the signing of the Treaty of Waitangi 1840 which, for Māori who signed, reaffirmed their authority to look after their own affairs. The Ordinance allowed state funding of Mission Schools, provided that the language of instruction was English, that industrial training was taught as well as religious training and that the schools were open to inspection by government officials. As to the teaching of industrial training, Judith Simon recounts that the parents of children in Otaki complained because too much time was spent on industrial training and too little time on class lessons.

The Ordinance reinforced the government policy of assimilation and although it was not compulsory to attend school, Māori were encouraged to gift land to the government for the setting up of schools. Many Māori did this because they saw the new system as potentially useful for them and, as indicated above, complained if they felt that their children were not being taught properly but were instead being used as slaves.

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26 Kaai-Oldman T, Getting it Right p22.
27 Supra no 21 p7.
28 Simon J Thesis p75.
29 Some land was kept though not used for a school, other land was sold after the use for schooling had finished. See; Wiparata v Bishop of Wellington (1877) 3 NZJuris (NS) SC 72.
30 Supra no 21 p11.
For Māori women, this Ordinance merely confirmed for them the few choices in the educational system that were available for them. Besides suffering the negative effects of the assimilationist policies imposed on all Māori, their choice of vocation was limited to the domestic sphere. The successes of the Te Aute graduates, all men, exasperated the situation because it implied that the attainment of such higher learning was for Māori male relatives and only exceptionally, if at all, for Māori women. The conservative view of Pākehā expectations of women was prevalent, that is, that a woman’s place was to be a good wife and mother, and to work in the home. She could not expect to seek a lifetime vocation other that of supporting her husband. This was and still is, in some cases, the view of society (and some Māori men) towards Māori women.

**NATIVE SCHOOLS ACT 1867**

This Act set up secular village day schools for Māori children. They were primary schools and were simply called Native Schools. The language of instruction was Māori, although Māori could be used only as an aid to teaching English. The Māori community that wanted a school had to provide the land for the school and to contribute to the teacher’s salary.

The Act therefore established a national system of schooling and administration, with the decision making resting with the government. The curriculum still emphasised practical and domestic training for Māori, and this was to be so until the middle of the next century.

**NATIVE SCHOOLS CODE 1880**

This Code was written to improve teaching standards, and emphasised the requirement for the teaching of reading and writing in the English language. There was to be a strong emphasis on the ‘Europeanising’

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31 This was the strong view of one of the interviewees, her brother was sent to University and she had to stay home to work and support him financially. Her mother told her that this was to be and at the time she accepted the situation. She did not say whether her view had changed.

32 Supra no 21 p11.
of the Māori as quickly as possible.\textsuperscript{33} To this end teachers were advised that:

Besides giving due attention to the school instruction of the children, teachers will be expected to exercise a beneficial influence on the natives, old and young; to show by their own conduct that it is possible to live a useful and blameless life, and in smaller matters, by their dress, in their house, and by their manner and habits at home and abroad to set the Māoris an example that they may advantageously imitate.\textsuperscript{34}

There was also a sinister development in the treatment of the Māori language. Māori language was excluded from any school curriculum and focussed on negatively by the teachers and education policies. After 1900 a hard line was taken and it was decreed that speaking Māori language in the school and playground was forbidden. Those caught speaking Māori were given corporal punishment.\textsuperscript{35}

\textbf{THE POLICY OF ASSIMILATION.}

By the time of the Education Act 1877, it appears that Māori realised that they needed to complement their traditional culture with that of the Pākehā to be able to survive in what looked like being a Pākehā dominated society. The ammunition that Māori needed was Pākehā knowledge.\textsuperscript{36}

The 1877 Act introduced a national, free, secular and compulsory state-funded primary school system. A central Department of Education administered the system which ran parallel to that of the Native schools system. There was no compulsion to attend either school by race and this was not for any altruistic reason. It was because the authorities thought that the Native schools would serve their purpose in turning out Pākehā Māori and that all students would eventually become part of a single-school system.

\begin{footnotesize}
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\item \textsuperscript{33} Supra no 1 p41.
\item \textsuperscript{34} Supra no 1 p43.
\item \textsuperscript{35} This was the official education approach during the time that the women interviewed by the writer went to primary school. It is sadly one of the main memories they had of their school days.
\item \textsuperscript{36} Supra no 21 p12.
\end{itemize}
\end{footnotesize}
It was the Native Schools Code 1880 which sealed the fate of the Native Schools for the next 80 years or so. The main objective of the Native Schools system was to assimilate Māori in the ways of the dominant Pākehā culture so that Māori became more ‘civilised’. The organising Inspector of Native schools James Pope reiterated the objective of Native School policy as:

...to bring an untutored but intelligent and high-spirited people into line with our civilisation and by placing in Māori settlements European school buildings and European families to serve as teachers, especially as exemplars of a new and more desirable mode of life.\(^{37}\)

The above statement is interesting, given that it was made in 1900. When I started school in 1957 at Matakana Island, a remote rural Māori community in the Bay of Plenty, the only Pākehā living in the community were the headmaster’s family. There was also the occasional visit from the Pākehā Catholic priest. So, even up to that time the main colonialist influences on Māori still had a presence in their communities.

THE POLICY OF INTEGRATION AND BICULTURALISM.

The Hunn Report on Māori Affairs 1960 best defines the integration policy of government thus:

Assimilation (is) to become absorbed, blended amalgamated, with complete loss of Māori culture. Integration (is) to combine (not fuse) the Māori and Pākehā elements to form one nation wherein the Māori culture remains distinct.\(^{38}\)

The objective of this policy was to create a singular New Zealand culture by incorporating the “better” aspects of Māori culture and the ‘progressive’ aspects of Pākehā culture. The new singular culture would be taught to impressionable children and when they became adults, all New Zealanders would live in a ‘perfect’ mono-cultural world. There was encouragement for Māori children, because they came from a primitive culture, to accept this new arrangement but no compulsion was made on Pākehā children to avail themselves of this new policy.\(^{39}\)

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37 Supra no 21 p14.
39 Middleton, S Women and Education in Aotearoa p175.
For the Māori women whom the writer interviewed this was a period when they were putting their own children through the school system. All of the women were fluent in the Māori language. Their children, not fluent in the Māori language, were receiving information about their own culture at school but this was usually in the form of superficial activities like action songs, and arts and crafts.

All of the women seemed to accept that this was sufficient, consciously deciding not to teach their own children the language, and thus obviate the potential for punishment, even though the communities in which they lived at that time were very Māori orientated. The desire to teach the fundamentals of Māori culture, especially the Māori language, was to come later when these women came to look at their mokopuna and the kohanga reo.

There was at least some recognition by the educational authorities that New Zealand was made up of a number of cultures. The increase in the numbers of some ethnic groups, particularly the people of the Pacific islands, brought home the idea of multiculturalism.

The Māori response was to give an importance to their own culture as the indigenous people of the country, thus biculturalism was introduced to schools to accommodate this viewpoint. Some Māori educators have interpreted the need for bicultural policies as a necessity for Māori to retain their identity as Māori in the modern (Pākehā) world.

Another benefit of the change in attitudes has been that women like those interviewed have been called upon or have volunteered to teach the important aspects of Māori culture in the schools of their mokopuna. All of the women did this with varying degrees of involvement and felt that their contribution was appreciated and valuable.

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40 Middleton, S Women and Education in Aotearoa p 178; where on p 201 there is also a useful Chronology of the education system and Māori.

RECENT DEVELOPMENTS IN MĀORI EDUCATION AND THE ROLE PLAYED BY MĀORI WOMEN

The most significant recent developments in Māori education have been the beginning of the kohanga reo, kura kaupapa Māori, whare kura and wānanga.

These developments have all been initiatives of the Māori Community. The kohanga reo were intended to revitalise the speaking of the Māori language by immersing pre-school children in a totally Māori language environment. These kohanga reo have been phenomenally successful. The first pre-school participants are now the parents of new pre-schoolers for kohanga reo.

The kura kaupapa Māori and whare kura have been a natural progression from kohanga reo and share the same philosophies and principles or kaupapa as the kohanga reo. The teaching and learning of the curriculum is through the immersion of the students in the Māori language. While attending kura kaupapa Māori the notion of being Māori is the norm and there are no doubts about identity and self worth. The kura are strongly supported by the kura families because it is the first time that Māori families have had a direct input into the control and direction of the schools their children attend. Similarly, the development and growth of the wānanga has lifted the numbers of Māori seeking a tertiary education.

It is said that the lifeblood of any culture is its language. Without its language, the culture becomes irrelevant, unimportant and pointless. The culture will eventually die. According to Dr Kuni Jenkins:

...Anthropologists and Linguists discuss the significance of language as a culture-bearing mechanism which holds and binds societies together...the decisions from many hui in the early 1980s were to the effect that any attempt to legitimate and validate Māori society, without its own distinctive language and culture, was not merely inconceivable but was also insufferable.

42 The Language Commission, Te Taura Whiri was established by Government in 1990s to promote the use of the Māori language.
A good modern example of the determination of Māori to retain their language is the Kohanga reo Movement which was established in 1982.

My experience in establishing a Kohanga reo at Matapihi in Tauranga in 1984 for my own children convinced me that it was my female relatives, young and old, who were going to and did in fact carry the kaupapa of the Kohanga. Subsequently, in becoming involved in other Kohanga, I found this to be the norm. Further to this, the majority of native Māori speakers in my community were women so their involvement was inevitable.

In 1980, the National Advisory Committee on Māori Education released a report called "He Huarahi" (meaning a pathway) which included reference to research carried out by Dr Richard Benton. This research pointed out that the demise of the Māori language was imminent if nothing were done to reverse the loss of the spoken language. In referring to the disappearance of the Māori language, Dr Benton stated:

...the decision that the minority language shall not be transmitted is made by the dominant speech community, whose members will not themselves learn the minority language and who, through conscious and unconscious pressures transmitted through social institutions like the school, and mass media, encourage children to resist their parents' efforts to transmit to them their linguistic heritage.

This report naturally alarmed Māori leaders gathered at a Hui Whakatauira in 1981 and after much debate it was decided to go back to the old methods of teaching. The idea of the kohanga reo or the language nest was the response of those leaders. Thus the kohanga reo was put into place with the full support of those kaumatua and kuia. It was a Māori solution to a dire situation and was intended to revitalise the use of the Māori language.

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44 The membership of the Committee included the well known Māori educators of the day and like Advisory Committees before it, this one was mainly concerned with the underachievement of Māori and sought ways to improve the system.

45 Benton R, He Huarahi p17.

46 The name Kohanga Reo or language nest was chosen for the nurturing aspect of this method of transferring language to youngsters.
The idea was that Māori language would be the reo or language of instruction in the kohanga reo, it being spoken by fluent and not so fluent speakers of Māori to the mokopuna or toddlers and preschoolers of the community. The programmes for the mokopuna would be similar to programmes for pre-schoolers, but with a Māori cultural input.

This approach was new and innovative:

The aim of the kohanga programme launched by Māori communities in partnership with the Māori affairs Departments was first to arrest the decline of Māori speaking persons in New Zealand; secondly to give Māori people greater control over their own lives and the ability to plan and organise their own future within the context of the extended family; and thirdly, to achieve Māori control over Māori resources.

The method of instruction and the need for community and whānau involvement made it natural that Māori women would participate and later take over the process of the setting up and managing of kohanga reo, thus ensuring its success. Importantly, in day to day activities kaupapa Māori was the priority and was to be observed. This was a first for Māori in the education system.

Many Māori women were attracted to and then excelled in the application of the teaching methods. They were able to utilise their already existing authority within their own communities to make kohanga reo succeed. It allowed kuia to learn new ways and to contribute their own knowledge and wisdom to the kaupapa. But in my experience, this did not always go smoothly and compromise was sometimes necessary.

For example, I recall that in the kohanga reo established on my marae, the kuia were reluctant to allow the children to play with water toys and the like because, as they said, "kei mākū!" They did not like the children getting their clothes wet and it took some explaining to them.

47 Kaai-Oidman T, Māori Education, p27.
48 Meaning "but they'll get wet!" Nor did they like the children to paint because 'Kei paruparu!' They might get paint over themselves. Playing for playing sake was new and innovative! But it also reflected the habit of having separate clothes for school and home as was the practice in most Māori homes where money was short.
that this activity was a normal part of pre-school learning. The kuia, however, explained that their learning background was that they learnt while doing an activity which was for the benefit of the whānau, usually collecting kai. It wasn’t only for play. A common example used by the kuia was the collecting of titiko (mud snails) for the whānau table in Waipu bay, below the marae. They went swimming after the collecting had been done. Later, during the summer, this activity in fact became the favourite of the kohanga reo mokopuna.

That many kohanga reo were marae-based allowed these Māori women, young and old, to use their influence from the marae setting to establish and run the kohanga. It was an environment they were used to. As has been noted:

Te Kohanga Reo is one of the most dynamic and innovative educational programmes in the country...while these centres exist to teach pre-schoolers the Māori language, the unforeseen side effects extend to the many young parents who are not only learning their own language with their children but also becoming politically active as they grapple with the constraints imposed by the Pākehā for an equitable distribution of those resources required to attain their goals.

The first kohanga reo opened in 1982 at Waiwhetū marae in Lower Hutt. It was an immediate success and that success was attributable to the support of the whānau of the marae. The enthusiasm spread and before long many Māori communities wanted to set up kohanga reo to teach their own mokopuna. Public reaction was very positive: in fact the kohanga reo was the only positive development going for Māori education at that time. More was to come later.

In 1986, the Waitangi Tribunal subjected the education system to scrutiny by delivering a damning report concerning the state of Māori education. It was reporting on a claim concerning the Crown’s duty toward the protection and promotion of the Māori language. The Tribunal made the observation;

49 Supra no 47 p27.
...The education system in New Zealand is operating unsuccessfully because too many Māori children are not reaching an acceptable standard of education. For some reason they do not or cannot take full advantage of it. Their language is not adequately protected and their scholastic achievements fall far short of what they should be. The promises of the Treaty of Waitangi of equality in education as in all other human rights are undeniable. Judged by the system's own standards Māori children are not being successfully taught, and for that reason alone, quite apart from a duty to protect the Māori language, the education system is being operated in breach of the Treaty.⁵⁰

It is useful in looking at the above to remember that, apart from the Māori initiative of starting the Kohanga reo, nothing much had changed since the introduction by earlier Pākehā colonisers of their education system.

Evidence of the success of kohanga reo was that by 2003 the number of enrolments had reached 10,319 children, which was up from 4,123 in 1983.⁵¹ The majority of kohanga reo were started by Māori women and continued to be organised and run by them. It is generally accepted that had it not been for the input of these Māori women and their support of the kaupapa, kohanga reo would have been struggling. And, as a likely consequence, there would have been the loss of the Māori language as well.⁵²

Professor Mason Durie has pointed out that there has been a steady increase in the numbers of Māori speakers as a result of the introduction of Kohanga reo, while noting that the state of the language may not yet be fully secure:

A decade or more of innovative Māori Language development has almost certainly saved te reo Māori from extinction. Though not on an absolute secure footing, the level of awareness, and the enthusiasm for learning and, perhaps more important, for speaking Māori escalated well beyond the popular forecasts of 1984. Success in one sphere has generated enthusiasm

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⁵¹ Ministry of Education, Māori in Early Childhood Education and Schools 2003 p2 NB: The Māori enrolments at pre-school level was 62% of 2 to 4 year olds compared to the non- Māori rate of 76%.
⁵² A new generation of Māori speakers was born with a better general appreciation of Māori reo. All of the interviewees for this assignment worked or were connected through their mokopuna to their marae kohanga reo.
in another, a snowballing effect which has given confidence to both young
and old speakers of Māori.\textsuperscript{53}

Other positive effects of the kohanga reo have been described as follows:

...Te Kohanga Reo, furthermore, discouraged research but encouraged
autonomy amongst its individual units. A consequence of such autonomy
is there was space for whānau to solve problems for themselves and this
process generated a wide range of activities, one of which was information
gathering. It was also a process which committed parents to thinking far
more seriously about education and the relationship between schooling and
society.\textsuperscript{54}

It bears repeating, then, that the success of kohanga reo resulted mostly
from the input of Māori women. Despite this, it has taken too long for
the abilities of these women to be recognised by their own communities
and the wider community.

CASE STUDIES OF MĀORI WOMEN WHO ATTENDED NATIVE
SCHOOLS

Methodology

In referring to Stephanie Milroy's guidelines in conducting Māori
interviews,\textsuperscript{55} I decided to interview Māori women who are members
of my own iwi and hapū. The iwi is Ngaiterangi and the hapū is
Ngaitukairangi. The name of the Māori community is Matapihi in
Tauranga. A number of factors should be mentioned.

The women were my close kin and therefore I knew that I would at
some stage be answerable to them to explain the purpose and results
of the research. I always meet these women on frequent trips back to
my community and take every opportunity to keep them informed. I
intend to give the women copies of the research paper, together with
further explanations if necessary.

\textsuperscript{53} Durie M, Te Mana Te Kawanatanga p74.
\textsuperscript{54} Smith L, Decolonising Methodologies p169.
\textsuperscript{55} Milroy S Māori Women and Domestic Violence. p62.
I know the women well: they are kuia at my marae, and I approached them informally first to see whether they would feel comfortable about being interviewed. They were happy to do so and in fact had contributed in the same way to research by my cousin, Ngareta Timutimu, who completed a Master of Arts (Honours) in Education. She dealt with the interviewees in a way similar to the writer and this made them comfortable.

These kuia have always supported the younger members of their hapū in the pursuit of ‘higher’ knowledge. Although they initially questioned whether what they had to say would be of any use, their contribution was invaluable and their memories improved during the time of the interview.

The kuia were all fluent in the Māori language and, without prompting, the interviews were held entirely in Māori. Using the Māori language to interview them made the kuia more relaxed and forth-coming in telling their stories. I speak Māori and I transcribed the tapes.

The interviews took place in the homes of the interviewees. The ‘home-place’ situation is the most desirable for the interviewing of Māori, especially the elderly, because they are relaxed and comfortable and are able to relate to their physical surroundings. In this case it was the home-place of the Māori community in which they lived. One interviewee lived in the Kaumatua flats of the marae, another lived within view and walking distance and the other lived equal-distant from her two marae.

I wanted to increase the recorded information for the hapū and iwi to which the I belong.

There is a lack of recorded knowledge for the Ngaitukairangi hapū, particularly stories of hapū elders.

56 The writer attended an Oral Traditions Hui at Massey University on 4 June 1999 and attended a presentation by Huia Jahnke. The reference to home-place was part of her presentation about interviewing Māori for research.
MARATA

Marata is the second youngest of her twelve siblings. Her parents were dairy farmers. She is seventy four years old and is the last of her siblings still living. She is renown in the whole of Tauranga for her expertise in karanga and her contribution to the kohanga reo in the region. With other younger female relatives she started the first kohanga reo in the Tauranga district and her advice is always sought concerning tikanga for Ngaiterangi and Ngati Ranginui tribes.

When she was six years old she started school. Her first language was Māori but she had an understanding of English. She remembers vividly being strapped for speaking Māori when not allowed to do so. She and other Māori students spoke Māori secretly among themselves. She was taught English and, while learning it, was allowed to speak Māori but as her fluency in English improved she was not permitted to speak Māori anywhere at school. Her parents spoke Māori only although her mother, a half-caste, knew some English.

Her mother was the main influence in her schooling. Her mother believed that it was better for the boys in the family to further their education. Marata’s oldest brother was sent to Auckland Grammar School in the 1920s and he went to university. He was supposed to have studied law but got into some minor trouble and was sent home. He became an interpreter for the Māori Land Court. The brother just older than her went to the local secondary school and eventually became the Member of Parliament for the Eastern Māori seat. He held that position for nearly 20 years. Only one of her six sisters went to secondary school and Marata thinks this was only because that sister was being brought up by a maternal aunt who had no children.

Marata describes her family as poor but hardworking. Her mother took in washing from Pākehā families to pay for the fees of the boys who went to secondary school. The girls were to help their mother in this purpose. Their mother explained that it were better for the boys to further their education because they would come back to the community.

57 Names are fictitious.
58 She was awarded the OBE for services to the community not long after the interview.
to assist their relatives. Marata accepted this explanation and did not question her mother about it, in fact she admired this attitude and did all she could, then and later, to promote the leadership of her brothers. Marata said her family came to be known in the Māori community as the “clever” family, whichever way one interpreted that. 59

She said, however, that she treated the academic abilities of her own children equally. She had seven daughters and one son and at her insistence they all went to secondary school. She got extra work so they could go to secondary school.

Her mother died when she was twelve years old and she was expected to finish school and stay at home to help her father with the farm. She did all the cooking and household chores. She did this for several years before getting employment in the town. The employment was that of a housekeeper for a Pākehā family. After that she got work as a waitress in a hotel and then went to work at the hospital as a cleaner.

When she had mokopuna she started the first kohanga reo for Tauranga, and her leadership in this area of the Māori community has been strong. She later regretted that she never had the opportunity to go to University.

RANGI

Rangi is sixty nine years old and was born at Rangiwaea Island, a very rural district of Tauranga. The community was totally Māori. Māori was the first language. She married a man from Ngaitukairangi and has lived within her husband’s community for fifty years. She has whakapapa connections to the hapū. Her parents were farmers and she was brought up by her maternal grandparents.

When, aged seven, she started school at Matakana Island she could not speak English and she assumed that speaking Māori was allowed. She was caught speaking Māori and strapped for it. When she told her

59 This comment is added because not all Māori families in the community thought Pākehā knowledge was the ultimate achievement. Some families not “highly” educated were still the authorities on tikanga within the hapū. Pākehā knowledge was sometimes looked at with suspicion by Māori even when acquired by other Māori.
grandmother why her hand hurt, her grandmother got on her horse, went to the school and threatened to report the teacher to the police for assault. Rangi recalls this incident and admires her grandmother for her tenacity.

Getting to school was a problem because the wagon carrying the children had to cross to Matakana Island on the tide. If the tide was too high the children did not go to school. Rangi feels that she missed a lot of school for that reason and because her grandmother would not send her if she were even slightly sick.

When she got older Rangi was sent to Hukarere Boarding School. She thought that it was too strict and that she was only taught things she could have learned at home like cooking and house keeping. She played up at school and spent most of her time in trouble. She did not enjoy being there and was very hurt that when her mother died she and her older sister, who was also at the school, were not allowed to travel home to the tangihanga but had to wait until later in the year.

Rangi left school and went to work as a waitress and then as a cook at one of the hotels in Tauranga. She did this for some twenty years and then she worked in a clothing business as a supervisor. She was well known in her community for her business acumen but had to give up her employment for health reasons. She was responsible during the 1960s and 1970s for securing employment for many of the young Māori girls in her community. During the 1980s she involved herself with Kohanga reo and the teaching of sewing courses to unemployed youngsters at the marae.

She and her husband are now teachers of Ngaiterangi traditional waiata at the marae and travel with other members of the hapū to all of the hui in Tauranga and elsewhere. She is a kai-karanga of her marae.

(Sadly this kuia passed away in 2003 from the long term effects of diabetes, an illness too common among Māori.)
HOANA

Hoana is from Ngai-Tuhoe. She is sixty nine years old and was born at Whakatane. She married a man from Ngaitukairangi and has lived in Matapihi for fifty years. She regards herself as Ngaitukairangi and they accept her as such. She has accepted the task of being one of several kai-karanga at the marae, such is her feeling for the community.

Hoana says that Māori is her first language. She did not teach her children to speak Māori when they were going to school at Matapihi in the 1950s and 1960s because she says that that was the acceptable thing to do, even though the community was a bilingual community. Two of her children were brought up in Ruatoki by kin there and they are fluent Māori speakers.

There were twelve children in her family and when she started school in Ruatoki, if they were caught speaking Māori, “ka strapnga mātou!”. Her father valued learning and would encourage them to acquire Pākehā knowledge, especially the ability to speak and write English.

Her older brother was sent to St Stephen’s Boarding School but unfortunately he died in an accident. Her sister went to Hukarere on a scholarship but she died of meningitis. When it came to Hoana, her parents had no money to send her to secondary school. When she was fifteen years old her father asked her to finish school so that she could go and work. She ended up working at the Rotorua hospital as an untrained nurse with Māori patients. She liked her work but, in retrospect, would have liked the opportunity to be a trained nurse, as was her older sister. She met her husband at Rotorua, and returned to Matapihi to live and raise their fourteen children.

HOW THE CASE STUDIES REFLECT HISTORY.

In the case studies the kuia accepted that it was their lot to support their male siblings in their pursuit of Pākehā knowledge because they were part of a whānau and it was believed that the benefits would come back to the whānau and wider iwi in due course. The choice of males seems to me to be a carry over of the Pākehā attitude as to the position of men. Some Māori whānau may have conformed simply because it was less troublesome than trying to explain why women were not sent away to school, or not to upset Pākehā who dominated the system anyway.
As a consequence of not enjoying the full benefits of the education system, these kuia were resigned to the fact that their employment opportunities were limited to menial and domestic work. One kuia had wished she could have been the doctor rather than the nurse aide that she was. Another realised that she could have been an effective teacher and was carrying out volunteer work at the kura kaupapa Māori for which her colleagues were being paid.

All of the kuia attended Native Schools during the 1930s when the assimilationist policies of government were in full force. The kuia related stories of how they were treated if they or other Māori children spoke Māori anywhere near the school. At primary school allowance was made in some cases for Māori to be used, but only for the purpose of learning English. In the case of Rangi, her grandmother took exception to her being punished for speaking Māori. But it is interesting that although Rangi’s mother went along as well to confront the teacher, she was more apologetic for the grandmother’s behaviour than anything else. This showed the different attitudes of each generation. The parents of the other two kuia accepted that it was for their children’s benefit to learn English, although they disapproved of the methods of punishment employed for those who spoke Māori.

It appears that as a result of their language being put down while they themselves were at school and the acceptance by them (and their parents) that what this was acceptable, none of the kuia actively taught their own children Māori. Their children have an understanding of Māori from living in a bilingual community but there is a whole generation whose fluency in reo is diminished. The mokopuna of the kuia, however, have had the benefit of being taught in the Māori language and acquiring fluency.

The children of these kuia attended school during the time when the policies of integration and biculturalism were being implemented. While those policies gave only a superficial knowledge of Māori culture, they nevertheless constituted some form of recognition, and Māori were lulled into believing that that was enough. Fortunately for the Matapihi community and the mokopuna, these kuia have since come into their own as the teachers of Māori language both at kohanga reo and primary school level.
All of the kuia said that they came from poor but hardworking backgrounds. All felt that they belonged to their whānau and hapū, and accepted that any decisions made by the elders were for the good of all. Therefore all of the kuia accepted that if there was no money to further their own education, it was right that it should go to a male relative in the family or hapū who could in the long term return the support. That relative was usually the tuakana of the family.

Being poor was the main reason given by the kuia for their parents not furthering their education. This of course is a good reason but where resources were limited it was decided to do what the majority of Māori whānau were doing and that was to fully educate only selected members of the whānau. This was all undone for some whānau whose sons and fathers went to fight in the two world wars and died.

When it came time for their own children to go further in their education, the kuia worked extra jobs for this to happen. They wanted their children to have better opportunities and greater choice than they themselves had had.

The expectations of the kuia were not raised higher than that of getting jobs as waitresses, housekeepers, cooks and the like. Although in later life they showed aptitude, while at school they were focussed by the school system to accept that their future was in domestic type jobs. Because there was plenty of that type of paid employment around, these kuia accepted this as their lot. Getting paid meant independence from family but also an ability to repay and support them.

Thus, the life experiences of these kuia have moulded their present attitudes toward education of their own children and mokopuna.

However, these attitudes should be understood as being the end result of the educational policies that have impacted on Māori since the first contact with Pākehā. The traditional Māori roles of men and women, the tuakana and teina, were completely turned around by the colonialist education system and the different world view it brought with it. Part of the reason for the survival of Māori as a cultural identity and as a people has been their tenacity and the collective strength of whānau and hapū.
It is my contention that the lowered expectations of these kuia in the education system and the poverty of their whānau forced them to make decisions which showed their loyalty to whānau members, especially to their parents and elders. Their decisions were based on tikanga, that is, the survival of the group. But in doing this, these particular kuia and many besides, were not given the opportunity to realise their full potential and therefore their contribution to their own whānau and community may have been less than what it could have been. That is not to say that these kuia were not leaders for the whānau and hapū, for clearly they were.

However, despite their missed opportunities, these kuia were generally optimistic about the future of Māori people and philosophical about the past. They indicated to me that their experience should not be forgotten but rather used to build a better future for their mokopuna, that too being a fundamental tenet of Māori cultural belief.

CONCLUSION

Throughout this chapter I have endeavoured to show how the education system affected Māori generally and Māori women specifically. It appears that even though Māori women held positions of power and leadership before Pākehā contact and subsequently, for a time, the Pākehā system took that influence from them and reduced them to mere supporters of their male kin.

The colonial education system perpetuated the stereotype that women, Māori and European, were chattels of their husbands and fathers. In fact, Māori women had formerly been of equal status to Māori men, and sometimes of a higher status. Their roles were of a complementary nature.

Colonisation ignored and distorted this position and regrettably some Māori men collaborated in this process. This attitude persisted until these last several decades when on the back of a renaissance of Māori reo and culture, Māori women have deservedly placed themselves in roles of leadership, as their tupuna Papatuanuku did, to nourish the people.
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CULTURAL INVASION CONTINUED: THE ONGOING COLONISATION OF TIKANGA MĀORI

Ani Mikaere*

INTRODUCTION

[C]ultural invasion . . . serves the ends of conquest . . . the invaders penetrate the cultural context of another group, in disrespect of the latter’s potentialities; they impose their own view of the world upon those they invade and inhibit the creativity of the invaded by curbing their expression.

Cultural conquest leads to the cultural inauthenticity of those who are invaded; they begin to respond to the values, the standards, and the goals of the invaders. . . In cultural invasion, it is essential that those who are invaded come to see their reality with the outlook of the invaders rather than their own; for the more they mimic the invaders, the more stable the position of the latter becomes.1

I begin today with this quote from Paulo Freire because of what I regard to be an inescapable truth about colonisation: in Aotearoa, as elsewhere, colonisation has always been about much more than simply the theft of land, the decimation of an indigenous population by introduced disease and the seizure of political power. It has always been about recreating the colonised in the image of the coloniser. Our colonizers regarded our collectivism as beastly communism, our language as inferior, and our spiritual beliefs as heathen. All had to be destroyed and replaced, with individualism, with English and with Christianity, as a matter of urgency. The destruction of the gender balance that had characterised tikanga Māori and its replacement with patriarchy was just one more aspect of the assimilation process that sought to transform us into brown versions of our colonisers.

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As Māori educators, you will already be keenly aware of the major role that the education system has played in the process of assimilation. You will all know about the “civilising mission” of the Native Schools and will have seen the heart-wrenching photographs of Māori children of generations past working in the gardens and model cottages, being equipped for the roles deemed appropriate for them by the educational authorities.

I do not propose to dwell on matters with which you are doubtless already familiar. What I want to do is to talk about tikanga Māori, the first law of Aotearoa. I begin by examining tikanga as the practical expression of a philosophical view of the world that was unique to our tūpuna. I will be concentrating my discussion on Māori cosmogony, for that is where the philosophical foundation of our world view is to be found. From there I will move on to consider the impact that foreign influences, particularly Christianity, have had on that world view and, consequently, on tikanga Māori. Finally, I pose a series of questions to each of you as Māori teachers: to what extent is the project of cultural invasion being continued in our schools, at a time when many would have us believe that the worst excesses of colonization are behind us? Is our cultural authenticity under threat or, worse still, lost? How do we see our reality—from our own outlook or from that of our invaders? These are not easy questions with which to grapple, but given the crucial role that Māori teachers play in securing Māori cultural survival, I believe they need to be confronted.

As I address these matters, my principal focus will be on issues of gender: I have argued elsewhere that the imposition of patriarchy has been the single most damaging impact of colonization, representing the ultimate divide and rule tactic by turning one half of the Māori population against the other. As the teachers of our young women and our young men, you are well-placed to either sustain or debunk some of the harmful myths surrounding the roles and responsibilities of women and men according to tikanga Māori. It is my hope that you will use the influence that you have to do the latter and that in so doing you will contribute to the dismantling, rather than the perpetuation, of the ongoing project of colonization.

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4 Mikaere, A “Patriarchy as the Ultimate Divide and Rule Tactic: The Assault on Tikanga Māori by Pākehā Law”, paper presented at “Mai i te Ata Hāpara”, a
TIKANGA MĀORI

Tikanga Māori was the first law of Aotearoa, a law that served the needs of tangata whenua for a thousand years before the arrival of tauiwi. The roles of men and women according to tikanga Māori can be understood only in the context of a Māori worldview, which acknowledged the natural order of the universe, the interrelationship or whanaungatanga of all living things to one another, and the overarching principle of balance. Both men and women were essential parts in the collective whole because both formed part of the whakapapa that linked Māori people back to the beginning of the world. Women played a key role in linking the past with the present and the future. The very survival of the whole was absolutely dependent upon everyone who made it up, and therefore each and every person within the group had his or her own intrinsic value. They were all a part of the collective; it was therefore a collective responsibility to see that their respective roles were valued and protected.

Female strength formed part of the core of Māori existence, and was sourced in the power of female sexual and reproductive functions. This emerged clearly in the cosmogonic accounts, the potency of female sexuality being implicit in the womb symbolism of Te Kore and Te Pō and in the birth of Papatūānuku and Ranginui’s children into the world of light, Te Ao Mārama. The creation of humankind upon the advice of Papatūānuku further reflected this theme, with Tāne Māhuta being sent by his mother to Kurawaka, her pubic region, to gather the red earth containing the necessary uha or female element from which Hine-ahu-one, the first woman could be shaped. Tāne Mahuta and Hine-ahu-one created Hinetitama who, along with Tāne produced many children. When she discovered that her husband, Tāne, was also her father she recited a karakia to render him strengthless to pursue her and she left him. She commanded him to remain behind and care for their children in their earthly life while she descended to one of the underworlds, Rarohenga, to prepare a place for them and to care for them in death. She has remained there ever since, known as Hine-nui-te-pō, guardian of the spirits of all her human descendants.

The tales of one of her descendants, Māui-tikitiki-ā-Taranga, are particularly instructive as to the influential roles that women held. Māui acquired fire from his kuia, Mahuika. It was with the jawbone of his kuia, Muriranga-whenua, that he fished up Te Ika a Māui (the North
Island) and made the patu with which to subdue the sun. And it was to his ancestress, Hine-nui-te-pō, that he eventually succumbed when he failed in his quest to attain immortality. These stories tell us a great deal about the role of kuia as repositories of knowledge, and the conditions under which they are prepared to share that knowledge. These kuia possessed vast amounts of knowledge and supernatural powers. They identified Māui as a special person, one with whom they were prepared to share their expertise to ensure that certain benefits would be passed on to their human descendants. But it was also their role to set the limits of what could be achieved. So when Māui sought immortality by attempting to reverse the birth process, that is, by crawling up into Hine-nui-te-pō’s vagina, it fell to her to provide Māui with his final teaching:

Come Maui-tikitiki-a-Taranga... In this your last journey, you will give your final gift to those of earth, the gift not of immortality, but of homecoming, following death... I do not cause death, and did not ordain it. Human death was ordained when human life was ordained... I will wait at this side of death for those who follow, because I am the mother who welcomes and cares for those children whose earthly life has ended.

It is here, in the story of Māui’s death that the potency of the female sexual organs becomes most explicit of all. The passage through which each of us passes to enter Te Ao Mārama is the same passage through which each of us must pass on our inevitable journey back to Te Pō. The process which brings each of us into being, brought the world into being. Our very existence is centred around the sexual power of women.

There are numerous ways in which the principle of gender-balance and the significance of female sexuality were reflected in daily life. By way of example, let us consider the concepts of tapu and noa. There has been so much harmful distortion concerning tapu and noa, particularly in the context of gender roles, that this area merits special attention.

Tapu has two major aspects. The first is what some have called intrinsic tapu.

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5 Kahukiwa, R & Grace, P Wahine Toa (1984) 58
the sacredness of each life. No individual stands alone: through the tapu of whakapapa, she or he is linked to other members of the whānau, hapū and iwi, and to other Māori as well. Every person is linked to the generations to come and to those that have been before. Every person has a sacred connection to Rangi and Papa and to the natural world around them. Jackson aptly refers to tapu in this sense as “the major cohesive force in Māori life”.7

The second major facet of tapu involves spiritual prohibition or protection and may be applied in a multitude of contexts. Pere has noted that the main functions of tapu are the maintenance of social control and discipline, and the protection of people and property.8 Tapu in this sense impacted on every conceivable facet of daily life. To defy the laws of tapu, or even to break them in ignorance, was to court disaster. Retribution was considered inevitable, regardless of whether or not the breach had been detected by others in the community, for what had been breached was much more than a compact with the whānau, hapū and iwi. It was a covenant with the atua, reinforced through centuries of ancestral precedent.

Absolutely pivotal to the effectiveness of tapu as a means of social control, was the complementary institution of noa. Just as vital as the ability to impose restrictions through the use of tapu was the ability to remove such restrictions. For the majority of people, the roles and tasks of daily life led them backwards and forwards across the boundaries of tapu and noa. It was imperative that this be so, that spiritual balance be preserved. The whare mate could not remain so indefinitely: they had to be repatriated back into the fold of the living. A new whare tupuna could not stand completed and empty: the tapu had to be lifted so that it could be used. This was the power of noa: the undoing of the restrictions imposed by tapu.

It should be noted, however, that tapu and noa were not mutually exclusive categories. The process of whakanoa merely entailed the removal of some particular restrictions imposed by tapu, it did not completely remove every trace of tapu. For example, the lifting of the

particular tapu imposed on a whare whilst it was being built did not then make the whare completely unrestricted. It simply meant that the particular restriction against anyone but those who were working on it entering the building was lifted. The iwi were now free to enter and to use the whare. However, the whare itself remained a tapu place in the sense that it represented a revered tupuna, and there remained many restrictions on conduct within it.

Rose Pere has noted that the concept of noa is usually associated with “warm, benevolent, life-giving, constructive influences”. She also writes of the special association with women of the ability to whakanoa (to make noa, or to lift the restrictions of tapu). It is a high ranking woman who is the first to enter a completed whare tupuna, thereby lifting the tapu. Pere gives an example of a woman who was specially chosen to be trained for the role of protecting her whānau from negative spiritual influences through the process of whakanoa. And in former times, when warriors returned from the field of battle, it was customary for the tapu of blood to be lifted from them by their crawling between the legs of a ruahine, an woman elder of high rank.

While it was possible for certain men to conduct whakanoa rituals, the special role that women played with respect to such rituals, principally by virtue of their being women, is an indication of what Kuni Jenkins has described as the supremacy of their spiritual power. Jenkins supports this claim with the argument that by having the power to whakanoa, Māori women controlled the organisation of their tribal rituals. Henare summarises the significance of the female role in whakanoa rituals as follows:

This is the mana and the tapu of women, in that they have the ability to free areas, things and people from restrictions imposed by tapu. Women are agents to whakanoa. This is their tapu, and they are tohunga because of their own specific areas of activity.

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11 Pere points out that “men who are specialists in certain skills or gifts also perform whakanoa rites”, Pere, R Ako: Concepts and Learning in the Māori Tradition (1994) 38.
13 Henare, M “Nga Tikanga me nga Ritenga o Te Ao Mā
The power of women to whakanoa is clearly of vital importance, for it establishes their ability to traverse the spiritual boundaries of tapu and noa, thereby nurturing and protecting their communities. However, it does limit the recognition of women’s roles to a one-way process: the transformation of people and things from a tapu state to a noa state. It is my contention that this may be only half of the full picture. It may be that women’s powers in fact allowed movement both to and from the state of tapu - in other words, that women possessed not only the ability to whakanoa, but also the power to whakatapu.

Support for this view can be found in the ritual employed when a warrior preparing for battle had inexplicably become weak or fearful: a ruahine would step over him, thus rendering him tapu and restoring his courage. Another ritual which suggests that women had the power to whakatapu concerns the preparation of students for learning in the whare wānanga. In order to achieve the necessary tapu state for them to learn, they ate a piece of cooked fernroot after it had been passed under the thigh of a ruahine.

I have often wondered whether the circumstances giving rise to the composition of “Ka mate, ka mate” by Te Rauparaha do not further illustrate the possibility that women indeed possessed the power not only of whakanoa, but also of whakatapu. When Te Rauparaha’s pursuers arrived at Rotoaira and asked Wharerangi whether their enemy had been seen, Wharerangi replied that he had been and gone. The Waikato ope nevertheless conducted a thorough search of the area, led by their tohunga who chanted karakia to assist the search. When they approached the kūmara pit where Te Rauparaha was hiding, the karakia were rendered ineffective by the presence of Te Rangikokaea, whom Wharerangi had asked to sit over the pit. Te Rauparaha therefore remained undetected, hence the composition of the haka, a celebration of his surviving an extremely close brush with certain death.

There are at least two possible interpretations that can be placed on Te Rangikokaea’s role in sitting over the kumara pit. One is that her

16 F. Allan Hanson, “Female Pollution in Polynesia?” 1982 JPS 335, 349.
17 F. Allan Hanson, “Female Pollution in Polynesia?” 1982 JPS 335, 349.
18 This account is drawn from Te Rei, P “Kikiki Kakaka: He Pokeka na Te Rauparaha” in Royal, TA Kaati Au i Konei: He Kohikohinga i nga Waiata a Ngāti Toarangatira, a Ngāti Raukawa (1994) 83-84.
presence rendered the tohunga’s karakia noa, and therefore ineffective. But another is that her presence over the pit made Te Rauparaha tapu, and therefore placed him beyond the reach of the tohunga’s karakia and the keen eyes of the rest of his pursuers. Whatever interpretation is placed on the role of Te Rangikoaee in this story, however, it is indisputable that her female presence makes the difference between life and death. It is also clear that the female sexual organs have an extraordinary spiritual force, a force that is capable of turning a certain-death scenario into one of survival. He who passes beneath a woman’s genitals is granted the gift of life.

This is entirely consistent with Māori cosmogony. Not only do the female organs form an integral part of the creation of the world, but they constitute the pathway into this world for all human life and, through Hine-nui-te-pō, the pathway out again. With respect to both the creation of the world and human life itself, the birth canal runs between the realms of Te Pō and Te Ao Mārama. The female role in negotiating the boundaries between tapu and noa reflects and reinforces the cosmogonic blueprint for Māori life.

The pattern of acknowledging the worth of women was reflected in whānau life. Whānau dynamics operated to ensure that women were well-treated by their husbands and in-laws (serious repercussions would follow in the even that this was not the case) and the presence of many to assume responsibility for child rearing enabled women to perform a wide range of roles, including leadership roles.

To summarise, the cosmogonic blueprint established by the creation stories laid the philosophical foundation for Māori life. Tikanga Māori therefore upheld the concept of gender balance and acknowledged the sexual potency of women. As valued members of their whānau, hapū and iwi women were affirmed and supported throughout their lives.19

While it is not my intention here to discuss either the Declaration of Independence or the Treaty of Waitangi, it is clear that the declaration of Māori rangatiratanga in 183520 and its reaffirmation in 184021

19 For more detail on the way in which whānau operated to enable women to fulfil their potential, see Mikaere, A The Balance Destroyed: The Consequences for Māori Women of the Colonisation of Tikanga Māori (Auckland: The Indigenous Research Institute for Māori and Indigenous Education, 2003).
20 Declaration of Independence 1835.
21 Treaty of Waitangi 1840.
indicated that the highly developed and successful system of tikanga that had prevailed within iwi and hapū for a thousand years would retain its status as first law in Aotearoa: the development of Pākehā law, as contemplated by the granting of kawanatanga to the Crown, was to remain firmly subject to tikanga Māori.22

CULTURAL INVASION

Far from acknowledging tikanga as the first law of Aotearoa, the colonists proceeded upon the racist assumption that Māori had no “real” law before the British arrived here to provide it. As Governor Gore-Browne wrote in a letter addressed to Māori in 1858:

Before, this land was occupied by evil, darkness and wrongdoing:
there were no upholders of good, no preventers of evil.23

As this language suggests, early attitudes towards the validity of tikanga as a system of law were heavily influenced by missionary views. Conversion to Christianity was, after all, regarded as a corequisite to colonization. With the arrival of the missionaries there began a concerted campaign of attack on Māori belief systems, a process which Moana Jackson has described as an “attack on the indigenous soul”, a soul that had to be destroyed in order for colonization to succeed.24 The colonisers refused to acknowledge the validity of Māori spiritual beliefs, branding them as “puerile”25 and insisting on the superiority of their own faith:

23 In Fenton, F the Laws of England: Compiled and Translated into the Māori Language (1858) i.
The native races who believed in these traditions or superstitions are in no way deficient in intellect, and in no respect incapable of receiving the truths of Christianity; on the contrary, they readily embrace its doctrines and admit to its rules...and, when instructed in Christian truths, blush at their own former ignorance and superstitions, and look back with shame and loathing upon their previous state of wickedness and credulity...

For the missionaries, therefore, the challenge was to stamp out any trace of Māori belief systems and to replace them with their own. Indeed, they measured their success in terms of the extent to which this had been achieved. In 1878, for instance, Reverend James Buller denied vehemently the suggestion that the missionaries had failed in their task, arguing that “[i]n forming our judgment of this matter, we should consider what the Gospel has destroyed as well as what it has bestowed. It had much to pull down before it could begin to build up a ‘holy temple in the Lord’.”

One of the many aspects of tikanga Māori that the missionaries disapproved of was the significance of women and the upholding of gender balance:

Western civilisation when it arrived on Aotearoa’s shore, did not allow its womenfolk any power at all - they were merely chattels in some cases less worthy than the men’s horses. What the colonizer found was a land of noble savages narrating...stories of the wonder of women. Their myths and beliefs had to be reshaped and retold. The missionaries were hell-bent (heaven-bent) on destroying their pagan ways. Hence, in the re-telling of our myths, by Māori male informants to Pākehā male writers who lacked the understanding and significance of Māori cultural beliefs, Māori women find their mana wahine destroyed.

This re-telling of Māori cosmogony by Māori males to Pākehā ethnographers led to a shift in emphasis, away from the powerful female influence in the stories and towards the male characters. Instead of creation beginning with the womb symbolism of Te Kore and Te Pō,

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26 Grey, G Polynesian Mythology (1956) viii.
27 Buller, Forty Years In New Zealand (1878) 324-325.
29 Ethnographers such as Elsdon Best and Percy Smith.
and the female-male partnership of Papatūānuku and Ranginui, the balance was turned on its head by the introduction of a supreme male god, Io. In relegating the cosmogonic genealogies to a phase occurring after the initial creation, the balance between the male and female elements was destroyed. There was no female element in the creation of the universe. Io, the supreme male, had created and he had done so without the female taint of any form of birthing process:

...Io, the Supreme Being, had no progeny... he begat no form of being he caused the earth and heavenly bodies, and supernatural beings, to come into being by means of his willpower. 30

Both women and the human system of reproduction, which necessarily includes both male and female elements, became secondary to the all-powerful, all-male creativity of Io. The balance between the male and female elements was destroyed, male power was inflated and female energy neutralised.

Nor did the negative consequences of the Io version stop with the mere assertion of a supreme male god. The female figures in the creation stories were relegated to passive roles, their power neutralised. Let us take the relationship between Papatūānuku and Ranginui as an example. Rose Pere has described their relationship as follows:

The union of the primeval parents as one deity was one of both a spiritual and physical nature. The primeval parents embraced and clung together as one deity for aeons of time producing many children. Papa and Rangi found great fulfilment in their union as one, for them it was a natural beautiful relationship. 31

In contrast, Elsdon Best’s version of the union between Papatūānuku and Ranginui recounts how Rangi looked down on Papa as she lay facing him far below and, desiring her, descended to mate with her. 32

Percy Smith’s description of the event paints a similar picture:

The Rangi-nui [great sky], which stands above, felt a desire towards Papa-tua-nuku [the earth], whose belly was turned up [towards him]; he desired her as a wife. So Rangi came down to Papa.33

This account, in which the male acts upon his sexual desire while the female lies below, available and unresisting, makes an interesting counterpoint to Pere’s description of their union as one which is both spiritual and physical, and definitely two-sided.

Best also describes Papatūānuku’s role in the creation of Hineahuone as:

That of sheltering, nurturing, cherishing; she represents the receptive and passive element, while Tane represents the active, fertilising, creative male element.34

Now that we had a supreme male creator, how naturally it followed that the creative element rested with the male, Tāne, rather than with his own mother who created him! Predictably, these characterisations of the male and female roles reach new heights of male self-importance with the explanation of Tāne’s union with Hineahuone:

The seed of life is with the male, with the female is the passive, nurturing haven bed. The seed (or fruit) of the god is with the male, because he is the off-spring of gods. The female sprang from the earth, and with her are the nurturing waters. The blood and the vital essence emanated from the god. The female is the shelterer, the one who nurtures, and by whom all things are caused to acquire form and growth. Woman was fashioned after the image of the male, and the seed of life came from Io-matangaro.35

Before depicting Hineahuone as the embodiment of female submissiveness, Best would have done well to reflect on the Māori version of the story upon which both he and Smith based their accounts of the first act of sexual intercourse between Hineahuone and Tāne.

33 Smith, SP *The Lore of the Whare Wananga or Teachings of the Māori College* (1913) 117.
In the *Lore of the Whare Wananga* Smith sets out the Māori-language version provided by his informants, which he goes on to translate into English. Interestingly, omitted from Smith’s translation is a paragraph which describes the event as an encounter between the two sexual organs, Karihi (the female) and Tiki (the male). The general tenor of the description is, in the words of F. Allen Hanson, that “Tiki attacks bravely, but Karihi draws him further and further into herself until, spent, he succumbs”. 36 Interestingly, Best himself refers to this first act of sexual intercourse as the “slaying or overcoming of Tiki”. 37 Despite Hineahuone’s irrefutably powerful female sexual presence, Best still manages to characterise her as passive, while the male energy that she has so comprehensively neutralized is depicted as powerful.

This pattern of minimizing the significance of the female presence continued through to the Māui stories: they became focused almost solely on the exploits of this male demi-god, his kuia Mahuika and Muriranga-whenua being made nearly invisible in the process. Smith has referred to the Māori women within these stories having been turned into “distant and passive old crones whose presence in the ‘story’ was to add interest to an otherwise male adventure.” 38

The redefinition of female roles also spilt over into understandings of tapu and noa. In their efforts to understand and explain these fundamentally important concepts, Pākehā ethnographers altered their meaning beyond recognition. In so doing, they made several crucial errors. The first was their confusion of the concept of tapu as it applied to all human beings, the inherent tapu of life, with tapu as it was used in conjunction with noa as a system of social control. The second sprang from their inability to grasp the highly complicated relationship between tapu, in that second sense, and noa. They perceived the two concepts as a dichotomy of opposites, mutually exclusive of one another.

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36 Hanson, FA “Female Pollution in Polynesia?” (1982) 91 JPS 335.
38 “Māori Women: Discourse, Projects and Mana Wahine” in Middleton, S & Jones, A (eds)Women and Education in Aotearoa 2 (1992) 34. Berys Heuer provides a classic example of the damaging effects of these male-centred reinterpretations of Māori creation stories in *Māori Women* (1972) 55: “Culturally, the role of women was made clear in the account of their creation. The first woman was formed out of a mound of earth and impregnated by her male creator with a life spirit. From this, woman was regarded as being a passive receptacle for the dominant life spirit”.

Moreover, they viewed the dichotomy as a hierarchical one, tapu being privileged over noa. They translated the concepts into ones with which they were familiar, equating tapu with sacredness and noa with profanity. All that remained was to ascertain where the sexes fitted into this analysis of tapu and noa. Inevitably, men were regarded as tapu (sacred) over the top of women who were characterised as noa (profane).

And inevitable this characterisation was, if one accepted the colonised version of Māori cosmogony. As Elsdon Best observed, “is not man descended directly from the gods, while woman had to be created from earth?”

Best’s description of women and the female sexual organs could not have been more negative:

In Māori myth and belief the female sex is assigned an inferior position generally, and is spoken of as being connected with evil, misfortune, and death.

Bruce Biggs has continued with this theme, noting that the female element represents destruction, that the female sex organs are fear inspiring and that female sexual functions are regarded with distaste.

Berys Heuer also refers to the destructive female element, and draws on Best to establish that women were also considered unclean and defiling by virtue of the spiritual powers of menstrual blood.

Both Best and Jean Smith subscribe to the view that the power of women to whakanoa lay in the ability of their sexual organs to pollute or contaminate tapu by repelling the atua. What has happened to the characterisation of Māori women at the hands of these Pākehā experts? Rather than being intrinsically tapu and performing crucial roles in assisting movement between the realms of tapu and noa, women instead have become intrinsically noa (defined as profane) and are therefore associated only with whakanoa (defined as polluting or contaminating) rites.

39 Best, The Māori as He Was (1924) 93.
41 Biggs, B Māori Marriage (1960) 20.
Yet, as some writers have pointed out, the classification of women as inherently noa and the claim that their very presence nullifies tapu through the negative, polluting force of their sexual organs simply does not offer a full explanation for the many roles that women play in ritual and custom.44 In fact, such a classification leads to some curious contradictions.

For instance, it is clear that women are considered highly tapu during childbirth and menstruation. If menstruation and the sexual organs are considered so profane, one would consider these to be the least likely times for women to be considered tapu. Best attempts to explain this apparent contradiction by compounding it with the assertion that “[i]n this connection tapu may be said to be equivalent to the condition termed “unclean” in the Scriptures”.45 Yet such a meaning is surely the very antithesis of tapu, as Best himself has defined it; indeed, it is virtually indistinguishable from his definition of noa!

Women of high rank, puhi for example, were acknowledged to be tapu. This phenomenon was said to be explicable due to the fact that their rank overrode their noa status. However, the rather grudging recognition of tapu suggested by this explanation seems highly inconsistent with the extreme reverence accorded such women.

What is more, women who performed whakanoa rites were generally high-ranking, either puhi (in the case of a ceremony to lift the tapu from a new whare) or ruahine (in the case of removing the tapu from warriors who had returned from the battlefield). If the inherent pollutant qualities of women were what enabled them to perform whakanoa rites, it seems curious that such rituals were left for women whose rank had outweighed their noa status and rendered them tapu.

As suggested earlier, at the core of these contradictions is a complete misinterpretation of the relationship between tapu and noa. Tapu and noa operated side by side, often overlapping and always interconnected, to provide a spiritually sanctioned and comprehensive system of law. Early ethnographers perceived them instead as mutually exclusive, as hierarchical opposites, and translated them into the biblical notions of sacredness and profanity. But their automatic association of women

44 Hanson, FA “Female Pollution in Polynesia?” in 1982 JPS 335, 336.
45 Best, The Maori as he Was (1924) 99.
with the lower of the opposites, the profane, could not be reconciled with much of what they observed in the operation of tapu and noa. Hence the need for tortuous reasoning, such as that the meaning of tapu miraculously changed from sacredness to uncleanness in the context of menstruation and childbirth - for no other reason, apparently, than the inherent femaleness of those particular activities. 46

Why were those who sought to define and explain tapu and noa unable to see beyond an explanation which had as its base a hierarchy of genders and a revulsion of female sexuality? It is suggested that coming from a culture where power, particularly sexual power, was considered a male characteristic, the early ethnographers would have been completely at a loss to explain or make sense of the raw female sexual energy they found in the Māori cosmogonic stories and saw reinforced in the every day operation of tapu and noa. They sought to reduce the significance of the womb symbolism of Te Kore and Te Pō, and to cancel out the principle of gender balance inherent in the union of Papa and Rangi by inventing a supreme male god as the creator; they characterised Hineahuone as a passive receptacle for the male seed, rendering her sexual energy invisible and ignoring the pivotal role played by Papa in the creation of humankind; they retold the Māui stories in ways that marginalised his kuia.

But it was extraordinarily difficult to ignore or minimise the supreme strength of Hine-nui-te-pō. Faced with this irrefutable expression of female sexual power, they characterised it as evil and destructive. This fitted in nicely with biblical notions of woman being responsible for sin. The negative connotations that then attached to the female sexual organs were also entirely consistent with Old Testament notions of women being unclean because of menstruation. 47

As a result, Māori women have not merely had their spiritual role minimised, nor have they simply been rendered invisible. Their once revered role as facilitators of the movement between tapu and noa

46 It should be noted that tapu was associated with blood flow of any sort, including the blood spilt on the battlefield and the flow of blood during tattooing. This was probably a part of the respect for the intrinsic tapu of each person, and the tapu of bodily secretions and wastes.
states has been characterised in purely negative terms. They are now perceived, principally, as polluters of tapu. Perhaps the most denigrating aspect of the colonisation of the concepts of tapu and noa, however, lies in the denial of the intrinsic tapu of women. This represents a frightening devaluation of women, one which has been reinforced by the introduction into Aotearoa of the English concept of family.

Along with Christianity and the common law came a culturally specific view of social organization, a view which was fundamentally at odds with Māori notions of whānau. The building block of English society was the individual, while the smallest social grouping was the family. The term family originated in Roman slave society, where it was used to describe the social unit which consisted of a man’s wife, children and slaves. As head of the family, the man had rights of life and death over its members. 48 This, essentially, was the concept of family that was embraced by the English common law: “the husband/father was head of household and thus in control; women and children were chattels to be used and abused by the paterfamilias as he chose”. 49

The unfavourable status of women under this system of law compared with Māori law has not been lost on Māori commentators. As Rose Pere observed:

My Māori female forbears, before the introduction of Christianity, and the “original sin of Eve”, were extremely liberated as compared to my English tupuna . . . the women were never regarded as chattels or possessions; they retained their own names on marriage. Retaining their own identity and whakapapa was of the utmost importance and children could identify with the kinship group of either or both parents. 50

The notion of limiting women to the domestic roles assigned to them under the common law understanding of family has also drawn adverse comment from Māori, who have pointed out that traditionally Māori women were “child bearers, lovers, means of procreation and ensuring tribal continuity, but never the individual ‘mother of children’ as defined

Rose Pere describes how, as a child, she observed both men and women performing a range of tasks, concluding that "there were no distinct or formal boundaries for men's and women's work habits or patterns".  

The missionaries and early settlers, however, were convinced that the institutions of marriage and family formed the foundation of civilised society. They sought to remove Māori marriage from within the whānau context and to remould it into a nuclear family arrangement:

Māori marriage was the despair of the missionaries. They made it a high priority for elimination and they preached hell-fire and brimstone to the sinful pagans who continued to practise it. They refused to accommodate or tolerate Māori marriage as being an alternative to their idea of the nuclear family and its demands on the colonial wife to be subservient, lacking in initiative and obedient to her husband. She had to prize highly her role of housewife and mother and believe it to be God's will. . . . the Māori female had to be domiciled very quickly to the values of the new regime that had arrived to civilise her.

With the advent of Christianity, many Māori adopted the Christian marriage ritual with some enthusiasm, modifying it to fulfil Māori expectations. Eventually, Māori marriage came to be regulated by legislation, the Native Land Act 1909 declaring Māori customary marriages to be valid for some purposes only and requiring Māori to undergo legal marriage ceremonies. Over time, the State's determination to redefine and intrude into the whānau resulted in Māori increasingly being forced to conform with the marriage requirements applicable to non-Māori.

In truth, the whānau was under attack no sooner than the first missionaries had stepped ashore. It was clear right from the outset that Māori collectivism was philosophically at odds with the settler ethic.

of individualism. As Māori had their cultural and economic base wrested from them\textsuperscript{55} and as they were ravaged by introduced diseases\textsuperscript{56} their social structures were inevitably undermined. The disruption of Māori social organisation was no mere by-product of colonisation, but an integral part of the process. Destroying the principle of collectivism which ran through Māori society was stated to be one of the twin aims of the Native Land Act which had set up the Native Land Court in 1865, the other aim being to access Māori land for settlement.\textsuperscript{57} Not only was the very concept of individual title to land destructive of collectivism,\textsuperscript{58} but the massive land loss brought about by the workings of the Native Land Court\textsuperscript{59} meant that, as the Māori population stabilised at a low point towards the end of the century and began to grow,\textsuperscript{60} Māori found that they had insufficient land left to support themselves. Whānau were eventually forced to break into nuclear families and move to towns and cities in search of work.\textsuperscript{61} Māori migration to the urban centres was hastened by the need for labour in the factories during the second world war and, following the war, by the Māori Affairs Department policy of restricting housing loans to those people prepared to buy properties in town.\textsuperscript{62}

\textsuperscript{55} First the land was taken through confiscations carried out pursuant to the New Zealand Settlements Act 1863 and later via the operations of the Native Land Court, established by the Native Land Act 1865. Later, control over the sea and waterways was taken through successive pieces of legislation, beginning with the Oyster Fisheries Act 1866.


\textsuperscript{57} These twin aims were spoken of by the Hon. H. Sewell, NZPD Vol 9, 1870: 361.

\textsuperscript{58} For an account of how the principle of collectivism was undermined by the law, see the Report of the Commission of Inquiry into Native Land Laws (1891) AJHR, G-1, xi.


\textsuperscript{61} Pool, I Te Iwi Māori: A New Zealand Population Past, Present and Projected (1991) 153-154. Pool refers to the migration of Māori workers from rural areas to smaller centres such as Pukekohe, as having taken place throughout the first half of the twentieth century. However, the most significant urban migration took place in the decades immediately following the Second World War, being described as “perhaps the most rapid urbanward movement of a national population anywhere, at least until the end of the sixties” (at 154).

The deliberate destruction of whānau and hapū structures and the forcing of Māori women away from their whānau and into the Pākehā model of the nuclear family left them vulnerable in a host of ways. They became dependent on their husbands as breadwinners, while they became increasingly isolated as caregivers at home. Duties that would have been shared by many in the whānau context now fell heavily on individual, isolated women. Some women were expected to work both outside and in the home, as economic hardship required them to contribute financially while Christian values about what constituted a good wife and mother compelled them to maintain that role as well. Such values also meant that husbands were increasingly perceived as the head of the family, wives feeling obliged to remain with them no matter what.

As teachers, you will be well aware that the Church schools played their part in this process of social engineering, training Māori girls to become good wives in the context of a nuclear family situation. Hukarere Protestant Girls' School was established in 1875 by the Bishop of Waiapu, William Williams, “with the thought of providing good Christian wives for the boys of Te Aute”. The denominational schools were actively discouraged from becoming too academically orientated, the Director of Education arguing in 1931 that the aim of Māori education should be to turn out boys to be good farmers and girls to be good farmers' wives. In 1906 the Principal of Hukarere described the daily routine of the girls as covering all aspects of domestic work, including cooking, washing, ironing and mending clothes. Judith Simon notes:

Māori girls were thus being fitted, not only for manual labour but also to fulfil the subordinate domestic roles deemed, within European culture, as appropriate for females.

64 Strong, TB “The Problem of Educating the MŚori” in Jackson, PM MŚori and Education: Or the Education of Natives in New Zealand and its Dependencies (1931) 192. For a general discussion of how the schools were discouraged from focusing too much on academic subjects, see Barrington, JM MŚori Schools in a Changing Society (1974) chapter 7 and Simon, J “The Place of Schooling in MŚori-PŚkehŚ Relations” (Ph. D Thesis, University of Auckland, 1990) chapter 4.
Linda Smith has also noted the influence of the churches in domesticating Māori women:

Christian teachings stressed the importance of such notions as “marriage”, “home”, “motherhood” and “work”. Sexuality was, of course, confined to marriage.67

The concept of women as leaders and spokespersons for their whānau, hapū and iwi would have been beyond the comprehension of the settlers or the Crown representatives who were sent to negotiate the Treaty of Waitangi. They could only conceive of dealing with men: “Māori men were the ones with whom the colonisers negotiated, traded and treated”.68 The fact that the Treaty was signed predominantly by men, sometimes pointed to as a reflection of pre-colonised Māori society’s attitudes towards women, is more an indication of the influence of Christianity and the fact that those seeking signatories largely ignored the possibility of women signing. This approach has been recorded as having angered Māori women, thus leading the missionaries to allow some women to sign.69 There were also occasions where Crown representatives refused to give in to pressure for women to be allowed to sign, behaviour which probably cost them some potential male signatories.70 Thirteen women have so far been identified as having signed the Treaty71 whereas it was once said that only three or four had done so. There may be many more but because Māori names, like the language, are generally gender-neutral it is difficult to tell how many more women were involved. Over time, people have come to assume that they were all men. This is one area which requires a great deal more research.

70 Orange, C The Treaty of Waitangi (1987) 90, where it is noted that Major Bunbury refused to allow a Ngati Toa wahine rangatira to sign at Cloudy Bay. Her husband also refused to sign.
To summarise, the colonisation of Māori cosmogony rendered the sexual power of women secondary to the supreme creative power of a male being, Io. It marginalised the female figures within the cosmogonic accounts, characterising them as passive and subservient to the male figures. Where such strength was found to be irrefutable, it was recast in a negative light. The role of women in facilitating movement between tapu and noa states was altered beyond all recognition. These developments were reinforced by the destruction of the whānau network, a result of massive land loss and social upheaval caused by the effects of introduced diseases and the urban migration which occurred during the middle of the twentieth century. The Māori woman was increasingly pressured into fulfilling the role of housewife and mother within the context of the nuclear family model, a model under which she was regarded as her husband’s property and which compelled her to narrow her focus to the domestic sphere.

CHALLENGING THE AUTHENTICITY OF COLONISED COSMOGONY

Io has now become very much a part of Māori religious expression, and generations of Māori have accepted as normal the biblical characterisation of the females in the Māori creation stories. To cast doubt on the authenticity of a version of Māori cosmogony that is now widely accepted by claiming that it has been colonised is, therefore, to enter into perilous territory. But enter it we must, if we are to be sure that the concepts we embrace so wholeheartedly as embodying Māori spirituality are in fact our own and not some distorted version of what was once ours, remolded in the image of the coloniser’s beliefs.

Where, then, did what Te Rangihiroa refers to as the “Io cult” come from? During the early twentieth century, Smith and Best claimed to have unlocked a new dimension to Māori cosmogony through their discovery of information that was contained in the manuscript of H.T. Whatahoro. The manuscript had been based principally upon the teachings of Te Mātorohanga, a Ngāti Kahungunu tohunga, at a hui held in the Wairarapa during the late 1850s. His words at the hui were taken down by Te Whatahoro and Aporo Te Kumeroa, both young men who had been educated at a Mission school. Te Whatahoro had

72 Buck, P The Coming of the Māori (2nd ed) (1958) 526.
then spent some years getting additional information both from Te Mātorohanga and another kaumatua, Nepia Pohuhu. Te Whatahoro kept the manuscript for fifty years, before lodging a copy of it with the Dominion Museum. This was the document that formed the basis for Smith’s and Best’s unleashing of the Io concept into the public domain.

What made the release of the Io version particularly interesting was the fact that until its publication, the very notion of a supreme Māori god was unheard of. Te Rangihiroa commented that Io’s discovery was “a surprise to Maori and pakeha alike”.73 Apparently, Best was himself initially somewhat skeptical as to Whatahoro’s reliability, but he was eventually swayed by Smith to accept the information provided. Smith is said to have been “carried away... by the romance surrounding the discovery of the last Whare-wananga in New Zealand”.74 And it is highly probable that Best’s acceptance of Whatahoro’s accounts was tied up with what his biographer would later call his “theistic ideals”.75 Best had, for many years, sought out information about a Māori supreme being, but had obtained only the barest of clues from some of his Tuhoe sources:

The tohungas he had spoken to previously had shown the greatest reluctance to discuss the deity or had confessed their total ignorance. But when Best posed questions to Whatahoro, he had not only found the Maori keen to co-operate but even expansive with his answers. The information on Io certainly flowed freely, but how much of it stemmed from the original teaching of Te Matorohanga, and how much from Whatahoro’s fertile imagination, it is impossible to say.76

Best’s theory was that religion was evolutionary and that a study of Māori religion presented the opportunity to “examine an inferior cult in a very peculiar stage of development”.77 His theories were based upon an arrogant assumption that monotheism represented the pinnacle of civilized religious thought. He regarded what he termed the common versions of cosmogony (that is, the polytheistic versions) as being “of less interest... on account of their representing a much lower plane of

73 Buck, P The Coming of the Māori (2nd ed) (1958) 526.
74 Craig, WG Man of the Mist (1964) 148-149.
75 Craig, WG Man of the Mist (1964) 171.
76 Craig, WG Man of the Mist (1964) 167-168.
He found the notion of a supreme being who created the universe simply by means of his willpower to be “of deep interest, ... illustrating a high order of mentality attained by the ancestors of the Māori”. Nevertheless, the absence of Māori awareness of their own supreme god up until the time that Whatahoro’s material was published by Smith and Best presented a potential obstacle to achieving widespread acceptance of the Io version as authentic. This difficulty was explained away by Smith with the assertion that the majority of the material that was taught in the whare-wānanga, particularly that to do with Io, was simply too sacred to be made available to the common people. Io’s very name was too sacred to be repeated or heard by ordinary people, the argument went, therefore, most people did not even know of his existence. This explanation was echoed by Best:

[T]wo aspects of all the superior class of myths were taught. One of these was that taught in the tapu school of learning, a version never disclosed to the bulk of the people, but retained by the higher grade of tohunga (experts or priests) and by a few others. The other version was that imparted to the people at large, and this, as a rule, was of an inferior nature, more puerile and grotesque than the esoteric version. The former of these versions was that the universe was created by the Supreme Being, nothing being said about evolution. This, apparently, was known to but few. The other version is marked by what may be termed cosmogonic genealogies, in which everything is the result of a kind of evolutionary process.

Not all are convinced. Hirini Moko Mead has recently observed:

I have great difficulty with the concept of Io and with the very notion that Io was so exalted that the people did not know about him and were not supposed to hear his name. There was no evidence that so important a matter was kept secret or could have been kept secret. There is little or no evidence in the Bay of Plenty area that there was a supreme being organizing Ranginui and Papa-tū-ā-nuku. Nor does Io appear in genealogical tables linking to Rangi and Papa.

80 Smith, SP The Lore of the Whare Wānanga or Teachings of the Māori College (1913) vi.
... I cannot really envisage a supreme God above the primeval parents. Rather there was Te Kore, The Void, The Nothingness. 82

There have been others who expressed doubts as to the authenticity of Whatahoro’s information, particularly when faced with the striking similarities between the Io version of the beginning of the world and the first chapter of Genesis. 83 According to Buck, the doubt increased “when it was considered that both Te Matorohanga and his scribe Whatahoro had been converted to Christianity before the detailed story of Io was committed to manuscript”. 84 Certainly, the missionaries were a well-established part of the Aotearoa scene by the late 1850s, and neither Te Mātorohanga nor Nepia Pohuhu were very old at that time, both having been born around the turn of the century. The missionaries had therefore been present in Aotearoa throughout most of their lives. And Whatahoro himself could barely have been out of his teens when he began committing the material to manuscript. 85 Having been baptised a Christian and educated at a mission school, he was clearly no stranger to biblical teachings.

Best’s biographer, Elsdon Craig, identifies his relationship with Whatahoro as beginning a new phase in Best’s work, a phase which was marked by his acceptance of material that was clearly less reliable than that which he had formerly utilised. Craig notes that these later works were based largely on the information gleaned from Whatahoro, and that this “detracted substantially from the value of these later publications”. 86

Another question is the extent to which Smith and Best overlaid Whatahoro’s interpretations of material with their own. Craig has noted that they both “almost certainly embellished their renderings of the original accounts”. 87 And Smith’s methodologically dubious practice

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83 Buck, P The Coming of the Māori (2nd ed) (1958) 526.
84 Buck, P The Coming of the Māori (2nd ed) (1958) 526.
85 These age estimates are taken from Smith, SP The Lore of the Whare Wananga or Teachings of the Māori College (1913) i.
86 Craig, WG Man of the Mist (1964) 157.
87 Craig, WG Man of the Mist (1964) 156.
of submitting vast lists of questions to his informant, two hundred and eighty eight of them on one occasion, doubtless “gave Whatahoro’s fancy unlimited freedom”.88

Buck refers to the fact that the discovery of Io in Aotearoa sparked off a search throughout the rest of Polynesia for similar supreme beings. He goes on to observe, with more than a hint of sarcasm:

it is amazing what a mass of secret information was alleged to have been locked away in the minds of cautious Christians who but awaited the inquiry of sympathetic seekers to unloose the floodgates of memory.89

Following a study of the evidence discovered throughout the various Polynesian cultures, he concludes that there is no authentic proof of the existence of a supreme being in central Polynesia before dispersal to the various island groups.

Buck also observes that the Whatahoro manuscript contains the only complete account of Io, and then examines various other sources to see whether they can be said to offer support for the theory. He concludes that most of these other sources are “pseudo-evidence”.90 The only evidence he seems prepared to accept as authentic is a Ngāti Kahungunu poem, the author of which was clearly familiar with the Io version. Even this, Buck suggests, may not in fact have been an ancient Kahungunu composition, but one from a much later period with its authorship projected back to an earlier ancestor, Tuhotoariki.91

Buck concludes that the Io concept was a local development in Aotearoa, one which originated in the Ngāti Kahungunu whare wānanga “from which rumours of the cult spread to a few other tribes”.92 He also identifies various elements of the Io version, such as the original creation of the world, as post-contact additions which were made after Māori knew of the biblical story of the creation.93

88 Craig, WG Man of the Mist (1964) 149.
90 Buck, P The Coming of the Māori (2nd ed) (1958) 532.
91 Buck, P The Coming of the Māori (2nd ed) (1958) 534.
92 Buck, P The Coming of the Māori (2nd ed) (1958) 535.
93 Buck, P The Coming of the Māori (2nd ed) (1958) 536.
Johansen approaches the problem from a slightly different angle, suggesting that Io had been but one of the many gods, no higher in status than any other, until the impact of Christianity caused him to be elevated, in the Ngāti Kahungunu houses of learning, to the status of a supreme god.94

So what we have with the so-called esoteric version of Māori cosmogony, as propounded by Best and Smith, is an account developed in the whare wānanga of one iwi, Ngāti Kahungunu. How much of this account stems from Te Mātorohanga’s teachings, how much from Whatahoro’s embellishments and how much from Best’s and Smith’s interpretations of Whatahoro’s embellished version, is impossible to tell. Some elements of this version have clearly been developed as a result of exposure to Christian teachings, while other elements may have been developed before contact with Pākehā. Why, then, do Māori from all over Aotearoa continue to pray to Io? How has this localised version been elevated into a nation-wide phenomenon?

The explanation probably lies, in part, in the fact that so many Māori have desperately wanted to believe in the existence of Io. By 1913, when Smith’s The Lore of the Whare Wananga95 was published, Māori beliefs had been denigrated for over a century, the “spiritual denial of the indigenous word”96 had been entrenched, and many Māori had incorporated Christian teachings into their spiritual life. Pākehā experts such as Best asserted the inherent superiority of a monotheistic religion that recognised a supreme creator. The discovery of Io must have seemed like a gift. Māori could hold their heads high in the knowledge that their religion had not been so primitive after all. For as Best challenged his Pākehā readers:

95 Smith, SP The Lore of the Whare Wananga or Teachings of the Māori College (1913).
The Maori believed in a Supreme Being, a creator and primal origin called Io. We believe in one we call God. We say that Io is a false god. Why? There cannot be two Supreme Beings. Do we quarrel over a mere name? 

The need to reconcile their Māoriness with their Christianity continues, it would seem, to plague Māori Christians in contemporary times. In 1994 Lloyd Martin remarked that “[m]any Māori Christians have struggled with what has been presented as two sets of incompatible facts: their Christian faith and their Māori identity”, going on to note that it is a subject that “has had many sincere Māori and Pākehā Christians confused and in disagreement”. He later went on to observe:

There is a convincing argument among some Māori Christians that ‘Io’ was the name of the supreme God and Lord. If we have a common inheritance from the dawn of time then it is not surprising that we find these traces of an earlier understanding of a supreme God when we look beneath the surface.

The need to reconcile the irreconcilable constitutes a powerful incentive not to subject the Io cult to too searching a degree of scrutiny.

Another factor in the durability and universality of the Io version must surely be the authority accorded the written word. Sir Paul Reeves has noted this phenomenon. He has also spoken about the ability of the written word to give factual error the appearance of truth and, worse still, to render the correction of such material extraordinarily difficult.

A further reason is the authority that attached to the writings of such people as Best and Smith, purely by virtue of their widely-perceived status as experts. In 1922, for instance, Best was referred to as “the greatest living authority on the Maori”. As anthropologists and

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98 Martin, L. One Faith Two Peoples: Communicating Across Cultures within the Church (1994) 54.
100 Sir Paul Reeves, “His Excellency’s Address”, St Andrew’s on the Terrace, Winter Lecture Series (1989) 4.
101 McDonald, J, Acting Director of the Dominion Museum, in his Preface to the 1922 Monograph, Best, E Some Aspects of Maori Myth and Religion.
ethnographers, the endorsement and interpretation of the Whatahoror manuscript by such “authorities” gave it weight and scope far beyond that which it would otherwise have enjoyed if it had simply remained in the Dominion Museum as a written record of the teachings of the Ngāti Kahungunu whare wānanga.

This leads us to crucial questions about the power of such experts to define for the outside world the cultures of those they research. In 1954, the Director of the Dominion Museum described Best as “in a sense an interpreter of ethnology from the Maori point of view”. This is an extravagant and insupportable claim. Yet it is an important statement, for it shows that to his readers’ minds, Best spoke for Māori. From a Pākehā perspective, Best had become the authentic Māori source, indeed it almost seemed that Māori culture somehow belonged to him.

Les Back refers to the impulse that many anthropologists, particularly male anthropologists, feel “to turn fieldwork into personal folklore”. “Through this vicarious form of self-projection”, Back continues, “we possess the other... an escalation of self results from the reception of knowledge about the other”. The identification of Best with “the” Māori viewpoint referred to above is strongly suggestive of this type of relationship. The question is, if this almost parasitic relationship exists between researcher and researched, how can the research itself be regarded as valid?

And even if the researcher guards vigilantly against abusing the power that conducting research inevitably gives them, can an outsider ever have anything of value to say about a culture that is not their own? Is it not inevitable that their interpretations of the subject culture will be distorted through the lens of their own cultural understandings and beliefs? What of the anthropologists and ethnographers who seized upon the Whatahoror manuscript, translated and interpreted it to produce what were to become the definitive works on Māori belief systems? Did their own world view, rooted firmly in patriarchal laws and religious


beliefs, simply blind them to or render them incapable of dealing with the raw female energy and sexual power that they encountered in the Māori stories of creation?

Despite the fact that Te Rangihiroa was questioning the authenticity of the Io cult nearly fifty years ago, it nevertheless appears to have tightened its hold on the Māori spirit in the intervening years. It is encouraging, then, to see authors such as Mead and Ross Calman challenging its veracity in contemporary times. Of *The Lore of the Whare-wananga*, Calman notes:

> It was heavily edited by Smith to support his views on Māori origins, and doubts have been expressed about its integrity. It tends towards a more monotheistic belief – that there was one supreme God, Io – which is generally accepted today to be evidence of the influence of Christianity.

As Vine Deloria has commented, the fact that monotheism is logically pleasing does not mean that it is an accurate description of reality. In light of the enormous damage that this colonised mutation of our cosmogony has done to the principle of gender balance that once featured so clearly as a foundational principle of our tikanga, I would argue that it is crucial for Māori to reject the monotheistic approach altogether. While it is the female element that has been marginalised in the redefinition of Māori cosmogony at the hands of ethnocentric "experts", all Māori have suffered as a result. The principle of balance between male and female has been severely damaged and the lack of balance has been to the detriment of all of us. It is therefore in all of our interests to cast aside that which is inauthentic and to reclaim our spiritual base.

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CONCLUSION: THE QUEST FOR AUTHENTICITY – WHAT ARE OUR RESPONSIBILITIES?

I return now to the words of Paulo Freire. Has the process of cultural invasion ended in Aotearoa? Or, after nearly two centuries of contact with Christianity, have we come to simply mimic our invaders, thereby cementing our own cultural inauthenticity?

It must first be said that, in my view, colonization is not a finite process. There has not yet been an end to it in this country. We cannot dismiss it as part of our recent past, as something which might, at most, inform our present. Whether or not we choose to acknowledge it, the fact is that colonisation endures as a major force in our present reality.

So the question is how might you, as teachers working in an environment hemmed in on all sides by the demands of the coloniser, deal with issues surrounding Māori spirituality in a way that does not compromise the cultural authenticity of your students and instill into them harmful and false messages about the inherent inferiority of women? The first point is that, regardless of your personal view about the value of Christian principles in your own life, as a teacher you should never forget the complicity of Christianity in the violent process of colonisation. As Vine Deloria observes:

The status of native peoples around the globe was firmly cemented by the intervention of Christianity into the political affairs of exploration and colonization. They were regarded as not having ownership of their lands, but as merely existing on them at the pleasure of the Christian God who had now given them to the nations of Europe. . . .

Where the cross goes, there is never life more abundantly — only death, destruction and ultimately betrayal.109

The fact is that some of the young people you teach will bring with them a knowledge of this history. Do not expect them, therefore, to embrace Christian karakia with any degree of respect or enthusiasm.

In fact, expect some of them to find the inclusion of such karakia objectionable – and if they do, it has to be said that historical fact supports them in taking such a stance. Some of them will regard the Io cult as culturally offensive, as representing a manipulation of Māori cosmogony, designed to further the project of cultural invasion. They may not express their views using the language of Freire, but do not doubt the sincerity with which their instinct tells them to reject Io as a colonized mutation of the real thing. Mead has observed that many groups participating in education today dedicate their karakia to Io, and makes the point that “there is doubt about the authenticity of the traditions dealing with Io and . . . in the case of the Bay of Plenty tribes there is no comfortable fit in the whakapapa of the divine family for Io”.110

Most importantly, regardless of whether you are personally able to reconcile being Christian with being Māori, it is vital that you resist the urge to foist any such reconciliation process on your pupils. This is a dangerous path. By way of example, let us consider Michael Shirres’ discussion of the children of Rangi and Papa:

On another level of understanding these are distinct spiritual powers. Each one is identified with a particular area of creation and has responsibility for that area. In the English language the spiritual powers are often referred to as gods, but they are not gods. . . It would be just as wrong to refer to them as gods as it would be to refer to the angels and saints of our European Christian traditions as gods. I speak of them, therefore, as created spiritual powers. In some ways they resemble the angels of the Jewish and Christian traditions.111

With the Concise Oxford Dictionary defining “angel” as “an attendant or messenger of God” and “saint” as “a holy or a canonized person regarded as having a place in heaven”, it should be immediately apparent that this kind of explanation merges Māori and Christian versions of creation in a way that is, at best, dishonest, at worst, manipulative.112

112 One might add that the recent spectre of thousands of young Māori men being encouraged to utilise the haka in order to foist the oppressive Western model of the nuclear family upon the rest of us represents the same kind of profoundly unethical manipulation of tikanga Māori.
It would be grossly inappropriate for a person in a position of influence over young minds to misuse their power in such a manner.

Perhaps most worrying of all is the following response, given by a Māori educator to the question of how he felt about schools teaching about “the old Māori gods”:

I think it’s valid if it is taught from the point of view of creating understanding of how another group of people brought meaning to their world. When handled properly it can be used to introduce and support a Christian worldview. So I don’t have a problem with teaching about the old gods, but it must be put in a correct perspective, i.e. that this was an understanding of some people before a greater revelation came.113

For a teacher to convey such an opinion to her or his pupils is simply unacceptable. As I have been at pains to point out, it is up to the individual to choose how to deal with the tensions inherent in being a Māori Christian. However, the prospect that a view so loaded with messages about the inherent inferiority of Māori cosmogony might be expressed by a Māori teacher in the presence of Māori students is alarming. As the following observation by Freire highlights, notions of inferiority and superiority are essential ingredients in the process of cultural invasion:

For cultural invasion to succeed, it is essential that those invaded become convinced of their intrinsic inferiority. Since everything has its opposite, if those who are invaded consider themselves inferior, they must necessarily recognize the superiority of the invaders. The more invasion is accentuated and those invaded are alienated from the spirit of their own culture and from themselves, the more the latter want to be like the invaders. 114

In light of this statement, it should be abundantly clear that for teachers to buy into the inferiority/superiority dichotomy in this manner is potentially damaging to the psyche of the Māori student. As such, it is

113 Martin, L One Faith Two Peoples: Communicating Across Cultures Within the Church (1994) 60.
both irresponsible and unprofessional. It threatens the spiritual safety of the students in one’s care and as such it constitutes a serious breach of tikanga Māori.

I would like to finish by acknowledging that some of you may well have found my comments challenging. I want to make it absolutely clear that I am not engaged in some kind of personal mission to “convert” the Christians or the Io adherents amongst you to my way of thinking. Nor am I unsympathetic to your situation as Māori teachers working in a system that is deeply hostile to Māori philosophies. As someone who trained and worked for nearly twenty years in the field of Pākehā law, I am only too well aware of how difficult it can be to maintain cultural integrity as a Māori person in an academic environment that is the antithesis of being Māori. What I hope for is that you will, as indeed we all must, be prepared to question, on a daily basis, your own assumptions about what it means to be Māori and to reflect on the most important question of all: from whose traditions, do those assumptions stem? It is only when you confront these questions that you will be able to determine whether, as you continue the important work of guiding our young women and men to intellectual maturity, you are appropriately equipped to fulfill that role.
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INTRODUCTION

In New Zealand policy discourse centres on biculturalism rather than multiculturalism. Although multiculturalism for a period had some currency, biculturalism has achieved a greater purchase in policy, largely because of the importance of the Treaty of Waitangi in New Zealand. Biculturalism may be seen as a foundation for one kind of pluralist society. The attempt to make state institutions bicultural may provide lessons for those attempting to imagine a multicultural society.

Waikato Law School was established with the founding principles of professionalism, biculturalism and teaching law in context. Biculturalism is a contested term but it means at least that the Treaty of Waitangi should stand as a blueprint for structures and processes in the School. When the first Māori students graduated from the Law School Stephanie Milroy was one of the staff who conducted a survey of those students to see whether the School had lived up to its promise of biculturalism. In 1999 Leah Whiu conducted a follow-up study to see what changes had occurred at the School in order to judge progress on the bicultural journey. This paper will consider the successes and failures of the School, the barriers to further success, and what lessons may be learnt by those attempting to create bicultural and multicultural institutions.

In the first part of this chapter Stephanie Milroy discusses the interaction of the terms “multiculturalism” and “biculturalism” in education policy,

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the reasons for biculturalism being a contested term, and the founding of the Law School with the inclusion of biculturalism as one of the main goals of the School. In the second part of the paper Leah Whiu will discuss the reality of being a Māori student at Waikato, making use of the words of the students who took part in her study.

MULTICULTURALISM AND BICULTURALISM

“Biculturalism” and “bicultural” are relatively new terms. Schwimmer used the term in connection with Māori and Pākehā relations as early as 1968 but it did not come into widespread use until the 1980s. Biculturalism is the latest development in race relations policy taken up by the State (to a degree) and various institutions. It is useful to look back at the history of race relations policy, particularly in education, to give a background to biculturalism.

When Pākehā first arrived in New Zealand Māori were characterised as barbarians and savages, albeit noble ones, to be saved and civilised by the Pākehā: in other words a policy of assimilation was adopted towards Māori. As numbers of Pākehā settlers increased Māori also came to be seen as an impediment to be removed so as to provide Pākehā with access to land. As war and, later, disease took their

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2 I use the term Pākehā to refer to non-Māori New Zealanders. There is an ongoing debate in Aotearoa/New Zealand as to what non-Māori New Zealanders should be called – I can only say that whatever term is used offends somebody, so I choose to use a traditional term which is well-understood in New Zealand.
5 Garrett, H, Te Manihera: The Life and Times of the Pioneer Missionary Robert Maunsell (Auckland: Reed, 1991) for a description of how missionaries saw their task in saving and civilising Māori.
6 See Waitangi Tribunal, The Finding of the Waitangi Tribunal on the Manukau Claim (WAI 8) Government Printer (1985), which shows the lengths to which settlers would go to obtain land. Also Asher, G. and Nauls, D. Māori Land, Planning Paper No. 29 (Wellington: New Zealand Planning Council, 1987). Alienation of Māori land was accomplished through confiscations under the New Zealand Settlements Act 1863, and through the agency of the Native Land Court pursuant to the Native Land Acts of 1865 and 1909.
terrible toll on Māori population numbers, the duty of the Pākehā became to “[smooth] the pillow of a dying race.”

Once it was seen that the Māori population was not dying out and instead, from the 1920s onwards, was recovering and expanding, the dominant policy remained one of assimilation. Assimilation meant that Māori would become brown-skinned Pākehā, Māori culture being obliterated in the process. The education system was an important tool in that process, not only contributing to the loss of the language and culture, but also marginalising Māori by a deliberate policy of training for manual labour rather than for the professions. Māori were thought to be too unintelligent for a ‘refined education or high mental culture.’

The policy of assimilation was later overlaid in the 1960s by the policy of integration which was advocated for in the Hunn Report on the Department of Māori Affairs, a review which was completed in 1960. Integration involved the idea of combining Māori and Pākehā cultures, rather than Pākehā culture replacing Māori culture. The focus of the policy was the “we are one people” ideology. In fact this ideology was used by Pākehā teachers, perhaps unconsciously, to subvert the process

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7 These were the words of the Superintendent of the Wellington Province, Dr Featherston, quoted by Buller, W, “The Decrease of the Māori Race,” New Zealand Journal of Science, v.2, 55.
9 Ibid, 109-111.
10 Assimilation also formed the basis of educational policy towards Māori during the nineteenth century. See for example Native Schools Act 1867, which promoted the English language over Te Reo by compulsorily making English the language of education. See also Waitangi Tribunal, Finding of the Waitangi Tribunal on the Te Reo Claim (WAI 11) (Wellington: Government Printer, 1986) in which respected Māori leaders testified to being punished for using Māori at school.
12 See Sharples, P “Kura Kaupapa Māori” in McQueen, H (ed) Education is Change: Twenty Viewpoints (Wellington: Bridget Williams Books, 1993), 13 for the full quote of the school inspector’s report from which this excerpt was taken.
of bringing Māori culture and language into schools in the '60s and '70s.\(^{14}\) The results of the policy were similar to assimilation because there was still compulsion on Māori to learn Pākehā culture but only the “opportunity” for students to learn Māori culture.\(^{15}\)

Integration was closely related to “multi-culturalism,” which was seen by Māori as a tactic by the State to “quieten Māori demands for their language and culture to be taught in schools, as well as to placate mainstream New Zealand and encourage tolerance and restraint.”\(^{16}\)

Multiculturalism was described as a mechanism ‘for doing nothing’ and, in response to the push for multiculturalism in education, Ranginui Walker argued for biculturalism as a more appropriate social relationship for Māori and Pākehā under the Treaty of Waitangi.\(^{17}\) Biculturalism was seen as involving issues arising out of “colonisation and its impact on indigenous peoples, whereas multi-cultural issues have resulted … from immigration post-colonisation”\(^{18}\). By the 1980s the idea of multiculturalism as being an answer to Māori educational needs was being challenged by the idea of biculturalism.\(^{19}\) During this period a combination of influences, including Māori activism\(^{20}\) and the Waitangi Tribunal findings, led to heightened prominence being given to the Treaty of Waitangi. While biculturalism may have started out as a policy advocated by some Māori in response to the prevailing social conditions,

\(^{18}\) Rikys P “Multi – Cultural Educational Issues and Bi-Culturalism in Aotearoa and Australia”.
\(^{20}\) Activities such as the Land March in 1975, the occupation of Bastion Point in 1978, and the hikoi to Waitangi in 1984 helped dispel forever the myth of harmonious race relations in New Zealand, and to bring the Treaty back to the consciousness of Pākehā.
the strong linkages that can be drawn between biculturalism and the Treaty mean that the Treaty is often used as the grounds on which biculturalism is now argued.  

**Biculturalism - A Contested Term**

Biculturalism has filtered into the consciousness of a number of organisations, such as the University of Waikato, with further impetus being given to this development by the stance adopted by the Royal Commission on Social Policy. The conclusions reached by the Commission about the Treaty of Waitangi were that:

- the Treaty of Waitangi is for all New Zealanders;
- the Treaty's application encompassed all social and economic policies;
- and the Treaty is a pro-active document with implications for the future as much as for the past.

In education the Department of Education prepared briefing papers in 1987 which, "within the spirit of the Treaty of Waitangi," acknowledged Māori as tangata whenua. The papers talked of an obligation "to improve the status and achievement of Māori people through education." The Taskforce to Review Education

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21 I myself see the Treaty as being about guarantees made to Māori, particularly in respect of rangatiratanga, in exchange for the granting of kawanatanga to the Crown. A linkage that is often made is that the Treaty is the document by which Pākehā have a right to be in this country so that in that sense it is about two cultures coming together. My view of the Treaty could include biculturalism if biculturalism is conceived of as including tino rangatiratanga for Māori in every aspect of life. If biculturalism is only meant to be something like "you show me your national anthem and I'll show you my waiata" then it clearly fails to fulfill Treaty promises.


24 Idem.
Administration\textsuperscript{25} stated that the provisions of the Treaty of Waitangi would be observed in respect of policy. It was also determined that one of the basic principles of the school curriculum should be to honour the Treaty on Māori language and culture.\textsuperscript{26}

At the same time as references to the Treaty proliferated in policy a growing number of cases involving the Treaty of Waitangi were being heard in New Zealand. The influence of the courts on interpretations of what the Treaty means, and therefore what “bicultural” might mean has been considerable. Possibly the most important provision containing reference to the Treaty was s 9 of the State-Owned Enterprises Act 1986\textsuperscript{27}. That section provided that nothing in the Act permitted the Crown to act in a way which was inconsistent with the principles of the Treaty. The section opened the door for the New Zealand Māori Council to file an application for an injunction against the transfer of land by the Crown to SOEs (State-Owned Enterprises) which might be the subject of a claim to the Waitangi Tribunal.\textsuperscript{28} The Court of Appeal, in deciding the case, stated that if it had not been for the inclusion by Parliament of the principles of the Treaty in the statute the court could not have acted. The Court’s job was to interpret the statute, which involved interpreting the principles.\textsuperscript{29}

The Court’s principles included the sovereignty of the Crown, protection of Māori chieftainship and possessions, and a partnership between the races where both parties had to act reasonably and in good faith.\textsuperscript{30} These Treaty responsibilities were “analogous to fiduciary duties,” including a duty to remedy past breaches of the Treaty. However, the Crown’s duty to govern was paramount so that the Crown could deny remedies where such remedies might conflict with the duty of good

\begin{thebibliography}{99}
\bibitem{25} Taskforce to Review Education Administration \textit{Administering for Excellence} (1988).
\bibitem{27} Seuffert, N “Colonising Concepts of the Good Citizen” (1998) 4.2 LTC 69, at 91 describes the Act as providing for “the formation of quasi-private corporations from previously state-owned assets and utilities, to which close to 4 million hectares of land were to be transferred.”
\bibitem{29} Ibid, 661.
\bibitem{30} Ibid, 663-664. This is the legal foundation for arguments in favour of biculturalism.
\end{thebibliography}
government.31 While the government could make policy decisions, it should "take the Māori race into its confidence."32 This, the Court said, fell well short of an open-ended duty to consult, which would be unworkable.33 In its discussion we can see the Court moulding Treaty principles to fit into traditional legal concepts from the British-based monocultural legal system - "fiduciary" and "partnership" are concepts from that system.

The term "partnership" itself needed further interpretation by the courts,34 who later made it abundantly clear that partnership did not mean an equal partnership, especially where material resources were concerned - the Crown still had the overriding power of rule. Thus the courts' interpretations attempted to confine the guarantee of tino rangatiratanga, effectively denying Māori the full promise of the Treaty, surely in itself a breach of the Treaty. Partnership is now often used in conjunction with biculturalism, and treated as an element of biculturalism. The meanings both words take on depend on the context in which they are used. But Māori have found to date that the government has paid little more than lip service, if that, to the concept of a partnership with Māori.

**Bicultural Models**

However, some progress towards a biculturalism based on the Treaty has been made in several organisations which have set up bicultural models of operation, such as the Anglican Church, the Ministry of Women's Affairs and the Women's Refuge Movement.

The model chosen by the Anglican Church arose out of the report of a bicultural commission, comprised of three Māori and three Pākehā. The commission travelled the country listening to the submissions of Pākehā and Māori Church members on the Treaty and its implications for the life and structure of the Church. The result was that some Church land was returned to Māori and the governing body of the

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31 Thus the fiscal envelope policy, which in effect denied full redress to Māori claimants, would have been considered by the courts to be part of the duty of good government since it supposedly protected New Zealand's economy.
32 Supra n 28, 665.
33 Idem.
34 See for example *New Zealand Māori Council v Attorney-General* (1989) 2 NZLR 142, 152 (the forestry case); and *Tainui Māori Trust Board v Attorney-General* (1989) 2 NZLR 513, 527 (the coal case.)
Church, the General Synod, was restructured on the basis of three cultural streams - Pākehā, Māori and Pacific Islands. In the past the Pākehā members could outvote the Māori by sheer weight of numbers. The new structure means that can no longer happen, allowing the Māori or Pacific branches of the Church a veto on measures which might affect them adversely. Within that structure each branch of the Church is self-determining. John Paterson, the Bishop of Auckland, has stated that the synod works much harder now at achieving consensus and in developing mutual understanding and trust.35

The term used in the Church to describe the system is the tikanga system and various other Māori terms are also used. This shows the double-edged nature of biculturalism. It can be, and sometimes is, the adoption of the best in each culture to the mutual benefit of both. On the other hand it can so easily become cultural piracy, another form of colonisation, where the values and language of one culture are misappropriated, suffering deformation in the process. In determining whether such appropriation is valid one of the most important indices must be the relative positions of power of the parties involved. In New Zealand, Māori were stripped of political and economic power, so that redress must occur before any kind of cultural sharing can take place on a basis of equality. In the case of the Church I do not think it has practised cultural piracy, since it has made some redress to Māori and sought political equality for Māori. But any organisation must be very careful to avoid further colonising activity which would simply become another layer of oppression for Māori.

The model adopted by the Ministry of Women’s Affairs was to set up Te Ohu Whakatupu, a Māori policy unit, whose original purpose was to advise the Minister on issues for Māori women. The other unit in the Ministry is the Policy Unit. Te Ohu Whakatupu has almost equivalent staffing and resources as the Policy Unit.

The Ministry established a structure which supported Māori staff, not only in the traditional areas of liaison and consultation with iwi and issues specific to Māori, but also in contributing to mainstream policy development and analysis. This was an area most Māori in government

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were too busy engaged in liaison to deal with, yet which has a major impact on Māori. The Ministry also has a sufficient number of Māori to be able to give each other support in carrying out all functions. Te Ohu Whakatupu also created a plan called “The Responsiveness to Māori Plan“ by which accountability for the needs and aspirations of Māori women is systematised. The Plan proposes mechanisms and tools by which each part of the Ministry’s activities can be monitored and by which each staff member can monitor themselves for responsiveness to Māori women’s aims, not only as a response to the Treaty but also as sound business practice. The dilemma for Māori women in Te Ohu Whakatupu is that others regard the Ministry as part of government, a tool of the oppressor. This is a dilemma for all those who are trying to transform Pākehā institutions into bicultural ones, and the justification for them will be if such work actually assists in delivering on Treaty guarantees.

The Women’s Refuge Movement also developed a bicultural model based on equal sharing of resources, and shared decision-making power at national level. The Māori women’s refuges have their own controlling body, as do the Pākehā women’s refuges. Although a cloud now hangs over the operations of the national body, when it was in full operation the Māori and Pākehā refuges each sent equal numbers of representatives to the national collective to deal with national issues.

All these models share, to a greater or lesser extent, certain common characteristics: a transfer and sharing of responsibility, resources and decision-making power. In these organisations there is also growing recognition of Māori culture, needs and aspirations. All these organisations are at points where Māori and Pākehā must come into contact. What they have sought to achieve is a fair and just accommodation of the needs of both cultures while also recognising the need for redress, since Māori have suffered so much political, economic, social and spiritual damage from colonisation. In other words these organisations have recognised that it is not enough to give everyone equal opportunity if history means that some are not able to take advantage of it.


37 Ibid, at 72-73.
These organisations also recognise that the democratic ideal of "one man, one vote" has worked a tyranny of the majority on Māori: the prevailing form of our democratic system has to be challenged and changed if it entrenches oppression rather than overthrowing it.

Other Visions of Biculturalism

There are more general visions of biculturalism which show a great deal of variation in the way the term "bicultural" is interpreted. One vision is of decentralised Māori regional bodies which would "complement" public policy, provide a voice for Māori in national politics and be involved in local social and economic development. This vision takes account of scarcity of resources and practical difficulties in setting up entirely separate structures for Māori and Pākehā.

Another Māori vision focuses on the need for people to examine themselves, the social institutions they create and their philosophies to find out why they fail to serve the people who need them, the majority of whom happen to be Māori. One strategy is increased Māori representation on decision-making bodies. The goal is for Māori to have choices about education, legal service, health service and form of government. At that point the interaction between Māori and Pākehā will be more successful - that would be the point where we could have a bicultural society. Biculturalism, then, is something to work towards by restructuring to free Māori from oppression, and thus to free Pākehā as well.

In another Pākehā vision of New Zealand, however, the Māori-Pākehā relationship plays a very small part - the main concern is economic success for New Zealand in the global marketplace. It is desirable to have a harmonious society, and to achieve this Māori grievances must be addressed: this vision assumes that the government, the courts and the Tribunal are addressing them properly.

39 Ramsden, I, "Doing it for the mokopuna" in Ihimaera (ed), ibid, 259-260.
40 Fay, M, "Getting a Real Score on the Board" in Ihimaera (ed), ibid, 152 at 163.
These models and visions range along the centre of a spectrum of possibilities for New Zealand society. Governmental models go so far in allowing Māori a share in decision-making and resources, but at some point a line is drawn and what is beyond that line becomes untenable. Māori who speak up for such rights are vilified.\textsuperscript{41} This can be seen in terms of the redress offered to Māori. Such redress for the most part represents an insignificant proportion of any given resource, regardless of the fact that Māori might have a well-founded claim to the entire resource. An example arose during the fisheries negotiations.\textsuperscript{42} Māori had a strong claim to the entire fishery, but by way of compromise started negotiations at 50% of the fishery. The government’s baseline settlement was 10%\textsuperscript{43} followed by later purchasing by the Fisheries Commission. The introduction by the government of the fiscal cap on settlements of Māori grievances, which was set at $1 billion, also represented far less than 12% of the value of New Zealand resources.

When the discussion is Māori tino rangatiratanga (ultimate sovereignty), or where Māori wish to withdraw, consolidate, nurture and strengthen themselves by autonomous action,\textsuperscript{44} Pākehā reactions tend towards aggressive dismissal, with charges of separatism or apartheid being levelled as clinchers to the argument. More subtle arguments may deny that Pākehā have any obligations under the Treaty on the basis that to adopt Treaty obligations it is necessary to adopt a monocultural Māori perspective, and this is something Pākehā cannot and should not have to do.\textsuperscript{45}

Indeed, polls\textsuperscript{46} have shown that the majority of Pākehā do not believe that Māori should have “special rights,” or receive compensation for past wrongs. Education in particular comes in for a hammering from

\textsuperscript{41} The foreshore and seabed debate makes an interesting case study of how the various protagonists were portrayed by each other and by the media.


\textsuperscript{43} Ibid, 12.

\textsuperscript{44} For example by setting up kura kaupapa.


\textsuperscript{46} For example, Radio New Zealand/MRL poll, June 1995. Note also the reaction to Don Brash’s Orewa speech in 2004.
such magazines as *Metro* for taking account of cultural sensitivity.\(^{47}\) Such opinions represent one end of the spectrum, while Māori who call for Pākehā to leave our shores represent the other end. The main difference is that white middle-class supporters of *Metro* are part of the dominant power-holding culture, and far more able to influence policy-makers, if for no more reason than the power of the ballot box, let alone control of the media.

These models, visions and “anti-visions” show how far apart are the definitions of and the debate on biculturalism. They also show how dependent they can be on the parties involved, the personalities involved, the nature and activities of the organisations, the involvement of the Crown, existing arrangements which may give opportunity for change or which limit it, and the goals that are to be achieved - in short, the context in which those moving towards biculturalism find themselves.

However, none of the visions which take biculturalism seriously seem to be based on any mystical notion of what a bicultural being would be like, and which we should all become.\(^{48}\) What they seem to concentrate on are structures, processes and resources grounded in our understanding of the Treaty and the successful functioning of organisations for Māori and Pākehā.

The overall aim is freedom from oppression for Māori, and the opening up of real choices as to how we live for *everyone*. Freire refers to the proper vocation of any person as being “the pursuit of full humanity”; neither the oppressors nor the oppressed can be fully human until the oppression ceases.\(^{49}\) Biculturalism in its simplest definition could be “how we are going to live together as full human beings, in light of our history and providing for our cultural differences.”

But that definition is not enough in itself. The really hard part is the translation into working structures and processes of, in this case, a law school, or whatever the particular context might be. If we are looking

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48 Certainly Māori might claim to be bicultural already since most Māori are, perforce, engaged with both Māori and Pākehā people, values, institutions, and customs.

At education at a general level then I would argue that a proper conception of biculturalism allows a wide range of models. Māori education is in such crisis that Māori need space to themselves to heal the damage done by colonisation in terms of the loss of culture, language and those intangible things which Moana Jackson calls the Māori soul and without which we are dead as a culture. So we need, as a matter of survival, totally Māori educational institutions at all levels which are well-resourced. To some extent this is happening with the emergence of kura kaupapa and whare wananga, although resourcing is always an issue. Another necessity for those Māori who are unable to attend wholly Māori institutions are schools and universities where Māori are treated as equal partners in decision-making, with resourcing to Māori which is sufficient to deliver the education Māori need and want. This will involve real power-sharing between Māori and Pākehā, and managing such a relationship requires bicultural communication and bicultural processes.

At the level of a particular bicultural institution, such as a law school, models need to be developed in situ. The result is going to be different from other models since we are adapting to a different environment with a myriad of variables. All the same, it will have some things in common with the other models. The model must include transfer and sharing of resources and decision-making power (perhaps the hardest and most important step); acknowledgment of our history; and practices and procedures that deliver a legal education service that works for Māori as well as for Pakeha.

I would also argue that visions and models of biculturalism are going to change as our cultures change and our ideas of what is acceptable and unacceptable change. Maybe New Zealanders will come to think

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51 Kura kaupapa are total immersion schools at primary and secondary level providing tuition solely in the Māori language.

52 Whare wananga are tertiary level institutions providing tuition in Māori culture and language. Māori are also attempting to establish wananga which have a general tertiary curriculum. An example is Te Wananga o Raukawa, which offers tuition in some law topics.
differently about issues such as Māori sovereignty, so that our models of biculturalism will become old-fashioned or just wrong. Some forward-thinking and adaptability should therefore be planned for as a part of a bicultural institution.

THE FOUNDING OF WAIKATO LAW SCHOOL

The language of biculturalism was first officially used in relation to the Law School in *Te Matahauariki*, the Report of the Law School Committee. The Report was written as the proposal of the University of Waikato for siting the fifth New Zealand law school at Waikato. Amongst other things it mentioned that lawyers must be trained to respond to the “needs and concerns of people in a bicultural society” and that the University “is a place of Māori and Pākehā learning.” The University’s own charter provides that the University seeks to create and sustain an institutional environment in which … the educational needs of Māori people are appropriately catered for outside a formally constituted whare wananga; Māori customs and values are expressed in the ordinary life of the University; and the Treaty of Waitangi is clearly acknowledged in the development of programmes and initiatives based on partnership between Māori and other New Zealand people.

The Law School would provide the “opportunity to give meaning to the notion of a partnership of good faith that is central to the Treaty of Waitangi.” It would also encourage “the integration of Māori lore and English law, a confluence of two streams of thought.” What this integration consists of was not explained in the Report and its meaning remains elusive to me.

Factors which were taken into account in the Report relating to the bicultural element were the existence of a heavy concentration of Māori population in the Waikato region and its richness in Māori culture. Specific mention was made of the strength of the University in Māori

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54 Ibid, 1.
55 Note here the reference to partnership which comes from the courts’ interpretation of the principles of the Treaty. See earlier discussion.
56 Supra n 53 at 1.
studies, particularly in Māori language, but also including the Mana Tokorau Programme at the University, a programme which allowed students to take 15 courses relevant to Māori culture and administration.\textsuperscript{57}

In terms of what else might be meant by a bicultural law school the Report is of little help except to say that certain aspects of the law could not be understood without an appreciation of the Treaty, the history of Māori and Pākehā relations and Māori values in regard to land and fisheries. This recognition of the relevance of Māori issues was at least an advance on my own legal education, in which Māori issues were only raised in Māori land law, and then limited to the operation of the Māori Affairs Act and the Māori land court. The Report was written at a time when Māori issues, particularly the fisheries issue, were on the front page of the newspapers, so the Law School committee could hardly ignore them. The Report made no mention of structural or resource-allocation issues around biculturalism, but rather just made the above-mentioned very general comments, in line with the nature of the document as a general proposal. In other words, the Report said “biculturalism is a good thing and let’s have it,” but it was not clear about what biculturalism was.

Margaret Wilson,\textsuperscript{58} gave a presentation during her application for the position of foundation dean which is indicative of her thinking at the time that the Law School was being set up.\textsuperscript{59} She approved of the fundamental commitment to bicultural and societal perspectives, and recognised the need of Māori, as well as women, consumers, the commercial community and so on, to get service from the Law School. So, Māori were in there somewhere, but contesting for the legal education service along with all sorts of other groups.

Wilson saw the chief objective of legal education as being “to give students of law knowledge and an understanding of the values of our legal system, and the skills to use that knowledge for the benefit of themselves and others.”\textsuperscript{60} Such power should be “shared equally

\textsuperscript{57} Ibid, 16-17.
\textsuperscript{58} The first dean of Waikato Law School.
\textsuperscript{59} Wilson, M Presentation for Position of Foundation Dean, Waikato Law School (unpublished, 1990).
\textsuperscript{60} Ibid, 11
throughout groups in the community," recognising that, in fact, the legal system had been dominated by people of one gender and race for centuries. Women and Māori students were to be encouraged to graduate, and there would be support for study programmes which would challenge orthodox thinking on how the system could best serve our society.61 This showed a concentration by the foundation dean on the content of the Law School curriculum, but an absence of consideration given to structural issues within the Law School, except the important one of trying to get a critical mass of Māori students into the school. The focus of the goal was on what the graduates would be able to do for society, but there was a lack of consciousness that a commitment to biculturalism might require more than this of the Law School.

In terms of the specifics of making the commitment real the foundation dean referred to general principles to guide the curriculum only. These principles began with the need for a good grounding in the core law subjects and development of legal skills, particularly legal analysis. The School would then develop areas of excellence subject to being “very realistic about what we can achieve with the resources available.”62 This, no doubt, is a politic proviso to make. However, I am always wary when resort is made to defending omissions or errors for “lack of resources.” Māori experience has often been that either the resources are lacking where Māori need them, or that resources for Māori are misapplied and are therefore ineffective.63

The dean went on to say that the course of study should also be “appropriate to the needs of the students and the region,” including the Māori community. Māori legal studies could be an “area of specialisation” for the School. The dean looked to the input of the Māori community so as to avoid the “clip-on” approach to legal education.64 The vision here in terms of biculturalism was inchoate and limited, although that might be expected of such a preliminary presentation.

61 Ibid, 12.
62 Ibid, 16.
64 Wilson, supra n 59 at 24.
Even so, some discussion of bicultural structures, processes and developments within the Law School could have been possible. It is also clear that the direction taken here failed to envisage some of the most important aspects of bicultural visions, such as the sharing of resources and decision-making power with Māori, which are precursors to a substantive biculturalism. This in itself leads to the position of the Māori perspective as a “clip-on” to the rest of the curriculum. Without adequate resources Māori staff would be unable to access the Māori community, unable to engage in the necessary research, and unable to give proper attention to how best to deliver the Māori perspective throughout the curriculum.

In an article in the then newly established Waikato Law Review the foundation dean stated that the bicultural approach had proved “the most challenging aspect of the programme.” The reasons she gave for this were twofold: firstly, the ill-defined nature of the concept of biculturalism generally and by the University; and secondly the change of external environment with the election of the National government in that it gave no support for bicultural initiatives. Whatever the government we just have to live with it (at least until the next election), but the first reason needs further discussion. I have shown that for some organisations and individuals the concept of biculturalism has been given meaning in terms of structures, processes and sharing of resources and power. In fact in that article the dean herself gave a model of biculturalism of 50% staff and students being Māori with courses in Māori and English. What I think was really being said is that the University and the Law School were reluctant to face up to the full implications of biculturalism, to the point where what was really being advocated was a culturally-sensitive education at best, not biculturalism. Therefore the concentration had to be on the curriculum which was to be:

inclusive of Māori and Māori customs and values, but also to provide for students the best legal training in the English-based, but New Zealand-developed, common law system. In this way Māori students obtain understanding and knowledge of the dominant legal system, while Pākehā

66 Idem.
and other students obtain knowledge of the effects of the existing system on Māori and the fact that Māori have their own lore and values that regulate aspects of Māori life. The purpose of this approach is to enable students more effectively to challenge the existing legal system’s exclusion of Māori, while also enabling them to use the system, where possible, for the benefit of Māori. 67

These aims are worthwhile and, indeed, part of the necessary first steps towards biculturalism. But, as the foundation dean herself admitted, this is not equal partnership. Equal partnership was “the goal to be achieved”, and needed a 20-30 year development plan. 68 One student referred to this as follows:

There is a widespread lack of support (despite the rhetoric) for biculturalism in Waikato. Thirty year plan (as said by the dean) is not enough - it is an insult.

A 20-30 year time span is the never-never. No attempt was ever made to articulate this plan to the students or staff or to set intermediate goals along the way by which progress could be monitored. In my view what really happened was that the administration started out with a limited view of biculturalism, and then came into contact with staff and students imbued with ideas of biculturalism which originated in the wider societal debate. It became clear that only those facets of biculturalism which were originally contemplated by the Pākehā administration would find expression in the Law School. The results of this approach are apparent from the comments of the students who took part in the surveys and which will be discussed in part two of this chapter.

**BARRIERS TO BICULTURAL LEGAL EDUCATION**

There are a number of barriers to creating a bicultural legal education but I am going to refer to two of them: the nature of colonialist law and legal education; and continuing changes to the tertiary sector in New Zealand which are occurring as a result of the adoption by government of New Right economic policies.

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67 Idem.
68 Idem.
Colonialist Law and Legal Education

The system of law in New Zealand was developed from one based on British social and economic structures and values. As such, it may work reasonably well for Pākehā but it is not well adapted to a New Zealand society which is based on recognition of two cultures whose interactions should be shaped by the Treaty of Waitangi. This was referred to in the report Te Whainga i te Tiw: In Search of Justice at paragraph 1.3 where the writers say, “for many, especially Māori, that system embodies institutionalised racism....” That report also recommended that legal services should reflect our bicultural heritage.

The monocultural nature of the system was also referred to by Moana Jackson in his report The Māori and the Criminal Justice System, He Whaipaanga Hou: A New Perspective when he commented on the philosophical bases for the present criminal justice system and the systemic bias against Māori offenders.

Moreover, the legal system cloaks its monocultural nature under phrases such as “one law for all”, and “everyone is equal before the law.” Judges are also supposedly objective, neutral experts who base their decisions on legal principles obtained from analysis of previous legal decisions. Feminist writers have shown that the law is gendered and reflects the values of the white middle class male. Thus the rational, legal being is a white middle class male. In turn, the perspectives, the values, the culture of those who do not fit this description, the “others,” are silenced and made invisible by the law.

69 Advisory Committee on Legal Services, 1986.
70 Ibid, at para. 2.1.
71 Jackson, M The Māori and the Criminal Justice System, A New Perspective: He Whaipaanga Hou Part I (Department of Justice, 1988).
72 Ibid, at 260-269.
73 Idem.
74 For an example of this view see Lord Hailsham, The Dilemma of Democracy, (London: Collins, 1978) at Chapter XIII. For a description of judges’ decision-making processes followed by a critique of the same see the introductory paragraphs in Kairys, D (ed), The Politics of Law - A Progressive Critique (New York: Pantheon Books, 1982).
A classic example of the monocultural nature of the legal system was shown when Ken Mair, a well-known Māori activist, was imprisoned in October 1995 for contempt of court for insisting on saying a karakia (prayer). The judge was prepared to allow Mair the opportunity to say the karakia, but failed to understand that Māori culture required that all parties involved in the resolution of the case should be present. The judge refused to have the karakia said in his presence, thus undermining the basis for the karakia. Imprisonment for saying a karakia seems unbelievable to Māori, yet this result was always possible given that the judge was Pakeha, that court protocol has always reflected Pakeha ways of doing things, and that protocol has always been determined by Pakeha.76

Māori students, in being taught the fundamentals of the legal system, are coming into contact with values which may differ from traditional Māori values. It may take Māori students some time to recognise that in learning the law they are learning another language, another code, and this is all the more difficult because of the underlying assumptions by law teachers that there is a shared set of values and culture amongst students. Teachers therefore fail to signal the need for translation, and may themselves be unable to translate the law culture in such a way as to have meaning for Māori students.

However, for Māori students there is the added dimension that the legal system in New Zealand has played its part in destroying Māori culture, in imprisoning Māori, in confiscating Māori land and resources. Thus Māori students in land law are taught about the Land Transfer system, but no reference may be made to Māori systems of land tenure which were replaced by the Land Transfer system. Similarly, in law school discussions of the New Zealand constitution may be premised on the notion that the Treaty is a nullity77 or a significant historical document which still has no legal significance, except where it may be included in statutes by the New Zealand Parliament. Such a discussion would fail to take account of Māori views of the Treaty and Māori

76 Mair v District Court at Wanganui [1996] 1 NZLR 556. This incident was discussed in-depth on Kim Hill's Nine to Noon radio show on 3rd November 1995 and reported in The Waikato Times on 2nd November 1995.
77 Decided in the case Wi Parata v Bishop of Wellington (1877) 3 NZ Jur (NS) SC 72
views of the basis of sovereignty. Law may be taught with references to due process, but the abuse of Parliamentary power allowed the passage of Acts confiscating Māori land, and providing for detention without trial of Māori protesters.78

Nevertheless, Māori students know from their own oral histories and their own experiences that the law has been used to the detriment of Māori. Thus, for Māori students legal education represents an emotional, intellectual and spiritual assault made all the worse in that legal education may try:


to persuade Māori that the law has an innate fairness and justice which can compensate for, or mask, its colonial-cultural bias. It is to teach Māori to believe in the good faith and honesty of the institutions and law which have oppressed them: it is ultimately to seek from Māori an honouring of the law and Crown in whose name the whole profitable horror of colonisation was inflicted upon them.79

So the teaching and learning of law for Māori cannot be treated in the same way that one may treat a chemical experiment, or the teaching of mathematical equations. Unless carefully handled legal education may be a destructive process for students.80 Furthermore, if strict adherence to an orthodox curriculum is required, without full support being given to the inclusion of Māori perspectives of law, then Māori lecturers are being asked to participate in making their own people and their own culture invisible.81 The creation of a bicultural legal education can only proceed so far until it comes up against the need for fundamental change to the legal system. This leads to the question as to whether it

80 This paper is concerned with Maori students. However, there are other categories of students who may find themselves in a similar position. The experiences that gay and lesbian students might go through during discussions in law schools of gay marriage and the legislation regarding civil unions may have some similarities to those of Maori students.
should be part of the aims of the law school to advocate for such change and to produce students who will go on to make such change as lawyers and legislators.

**The New Right**

One cannot discount the effect on law school curriculum of National government policy in relation to tertiary education. Government funding has fallen by 6.7% between 1990 and 1995 and dropped to 75% of government-estimated costs by the year 2000. The universities lack resources to continue novel developments or to put into place new initiatives such as bicultural programmes. These must be carried by the universities until either their value becomes obvious to the general student market, who will therefore be willing to pay increased fees for them, or until a “niche” market is created for “women and Māori.” These imperatives force the Law School into offering the courses which job hungry students and the profession want taught.

There also seems to be an increasing burden of administration for academics as the University restructures the administrative operations over and over again, devolving functions to the schools, sometimes without the associated funding and causing uncertainty and upheaval in the running of the University. Restructuring may give more freedom to make policy appropriate to the Law School in some areas but one is never certain of the long term. The need for academics to respond to an ever changing environment has been a tremendous drain on Law School resources. The flow-on effects on teaching and research are obvious. In these circumstances it is all too easy to drift back in our core business to the point of lowest resistance, which is the provision of the traditional legal education, with the Māori perspective as an optional “clip-on.”

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82 Figures from the Ministry of Education as reported by Keith Dalton, Director, Financial Services Division, University of Waikato. See also Report of the Ministerial Consultative Group, “Funding Growth in Tertiary Education and Training”, Ministry of Education, May 1994. The Labour government has continued with the policy that students pay about 25% of course tuition fees, as well as providing less generous assistance for student living expenses than in the past.
Tightened budgetary conditions also make it more difficult to attract Māori with legal qualifications into the education sector. There is the potential to earn much more money in the private sector. By contrast job conditions in the tertiary sector in New Zealand are worsening and the support available to assist young Māori academics to start their careers is in jeopardy. New academics are being asked to gain further qualifications at the same time as being required to take on heavier teaching loads.

There are other barriers to a bicultural law school which are part of our daily reality as Māori and teachers. That reality will now be discussed.
PART 2: THE REALITY OF BEING MĀORI AT WAIKATO LAW SCHOOL

Leah Whiu*

INTRODUCTION

In this part I will explore more directly, through the voices of Māori students and staff, the reality of being Māori at Waikato Law School. 83 This material is based on research that I conducted which focussed on current Māori law students' experiences of the Law School's attempts to implement the founding bicultural objective. 84 In particular, it presents an analysis of:

- Māori students' expectations of the bicultural objective;
- Māori students' experiences of the bicultural objective;
- Progress made; and
- Strategies for Improvement.

This part presents some of the stories told by the Māori law students that I interviewed, and ultimately concludes with a discussion of strategies for action.

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83 This phrase is borrowed from the title of an LLM thesis completed by Makere Papuni-Ball, who was one of the foundation Māori students. In her thesis: “The Realities of Māori at Law School” (unpublished Masters Thesis, 1996), Makere examined the first Waikato Māori Law Graduates' experiences at law school and their employment choices.

84 This part has been taken from my unpublished LLM paper entitled “Bicultural Legal Education - A Tool of Liberation or Merely Education the Oppressor?”
MĀORI STUDENTS’ EXPECTATIONS OF THE BICULTURAL OBJECTIVE

Why Waikato Law School?

With the increasing numbers of Māori students applying to and graduating from the Law School with Bachelors, Masters and soon Doctoral degrees, the Law School has become the law school of choice for many Māori students. In considering why the first group of Māori students selected Waikato Law School, Makere Papuni concludes that “[w]e wanted change and we saw the School as an institution which could deliver the power to make that change”.

The significance of the Law School’s bicultural objective is also evident in the comments made by the students I interviewed. Describing her reason for choosing Waikato Law School, one student comments:

... from looking at the Law School from the outside - it was somewhere where women’s issues were a priority, somewhere where Māori issues were important ... and [I] realised that at the other Law Schools I wouldn’t have that opportunity and ... I didn’t think that I would be able to go to one of those sorts of schools, and actually put myself through a standard law degree, because that Māori side wouldn’t be there and I didn’t want to go somewhere where I would have to fight for things that I just knew somewhere else I wouldn’t have to fight for.

And another recalls reading some promotional material about the Law School, where:

... it had said that there was this Māori component to the Law School and that there was a lot of support here, there was no question - I would never have done law anywhere else ... I wouldn’t have considered any other school. And even today I would never consider any other Law School although I have had quite an experience in this Law School.

85 In 1996, 20% of the student body were Māori, and in 2005 it is now 25%.
86 This assertion is supported by research conducted by Makere Papuni-Ball, supra n 83; and Davis, G “Being Māori and Being at Law School” (Unpublished Paper, University of Waikato, 1992).
87 Supra n 83 at 30.
The Law School’s commitment to provide a bicultural legal education and its reputation as a law school that prioritised Māori issues were clearly significant factors in these students decision to go to Waikato Law School. What the students understood such a commitment to entail is developed further in the next section.

**What is biculturalism?**

In 1993 the foundation Dean commented that:

> ... the objectives of the Law School it may be argued are not entirely clear either because they are expressed in the vague language of biculturalism which can mean many different things to different people. 88

However, the research participants’ views of what biculturalism meant were extremely clear, unambiguous and unequivocal. One woman describes her understanding of biculturalism as meaning:

> ... people acknowledging both Pākehā and Māori ... [it] means going further than the lip service that is paid to Māori things and actually working at making something which really reflects both cultures. I think that New Zealand as a whole has got a very limited ability to take in Māori things and biculturalism represents something that would be 50/50, say percentage-wise.

Another participant said that biculturalism was:

> ... straight forward really because I base my understanding of it on what my Kaumatua have told me, and that is, it is an interpretation of the Treaty and how in the Treaty there is only two peoples, us and the Crown. Anyone who comes after the Treaty forms part of the tauiwi ... you can be Asian, Indian, Japanese, Chinese - you are still tauiwi which makes you part of the Crown. ... It means an acknowledgment of the sovereignty of Māori to all the things in the Treaty.

According to these participants, biculturalism denotes a model where both Pākehā (or tauiwi) and Māori are valued equally and this is reflected throughout all aspects of our society, structures, government, policies and conceptualisation of sovereignty. It also requires Pākehā (or tauiwi) and Māori to work together to develop the necessary processes,

88 Supra n 65 at 23.
structures and outcomes that will truly reflect and value both cultures equally, with neither being subservient to, or accommodated by, the other.

The Law School’s performance of the bicultural objective

In describing his overview of the Law School’s performance of the bicultural objective, one participant commented that:

... I am biased against the Law School because it teaches what has flowed from the Imperial law into New Zealand law and been adapted here, but it has been reshaped so that it’s suitable to New Zealand conditions, but more suitable to those that settled this country and very much in their favour, and very much to the detriment of Māori ... and it is [the settler] law which is being taught at this school and very little recognition is given to Māori customary law or indigenous rights ... I am always suspicious of anything the Pākehā does for me in my favour, because inevitably it never ever works that way. It works against me. So I am always suspicious, I am suspicious about what goes on here at this Law School ...

However, at the conclusion of his interview, he also suggested that:

... this law School would probably earn itself a favourable reputation if it became the first law school to really be bicultural ... I think that’s what draws a lot of students here ... I don’t know about the other law schools, but I think Waikato has something distinct and unique ...

One of the participants reveals the inappropriate self-justificatory comparison with other law schools, that usually underpins any defence of the Law School’s performance of the bicultural objective. She noted that:

... if you’ve got 10% Māori content or acknowledgment of Māori things, they think that’s being bicultural - I think people need to lift their standards a bit ... I think that’s the difference between what I see as biculturalism and what this Law School sees as biculturalism, that is, they think their input of 5, 10, 15% of something is enough because it’s more than what everyone else is doing. ... this Law School shouldn’t compare its Māori content and Māori input to the other Law Schools. They should set a new standard. If you’re going to say that you’re bicultural then you need to mean it. The excuse I keep hearing - is that this Law School is a better law school than anywhere else. But that’s not even the point. The point is it’s not good enough really. The Law School has to really keep striving to make it better and safer for me.
Inherent in these discussions are expectations that a commitment to biculturalism will necessarily mean a commitment to the provision of a legal education that is deliberately transformative of the constitutional and legal framework and the processes of oppression that maintain the relative positions of Māori and Pākehā (or tauiwi) in this country. As Patricia Monture-Angus has observed in relation to Canadian legal education systems:

> [o]ur challenge, and it must be a collective challenge, is to transform educational systems as we know them today. One reason that the challenge must be a collective one between Aboriginal Peoples and Canadians, is that it is only in this way that we can break the patronizing, parochial and colonial nature of our educational relations. We must expose and denounce the racism. Aboriginal Peoples do not need to be "helped" to attain some higher status or a greater degree of civilization. We need to be respected for who and what we are, as well as for how we have helped to shape this nation. We are not founding people. We are original people. And that is not found in our textbooks, or in Canadian history, or in our classrooms, or in our laws. Only through accepting the truth about Canadian history can education for Aboriginal people become a path to our freedom rather than a tool of our oppression. 89

The participants in this research discussed specific incidents that they identified as successful or unsuccessful attempts, by Law School staff, to implement the bicultural objective. The common themes that arise from these incidents will now be considered.

**MĀORI STUDENTS’ EXPERIENCES OF THE BICULTURAL OBJECTIVE**

**Successes**

In contrast to the difficulties, the participants did not discuss many positive experiences, although they were specifically asked about their successful experiences of the implementation of the bicultural objective. 90 The successful aspects of the Law School’s bicultural commitment that the participants discussed included: the efforts, role modelling, support and services provided by Te Whakahiapo, 91 the Māori

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90 See Appendix 1 for the interview questions.
91 Te Whakahiapo is the Māori law students association at Waikato Law School.
liaison coordinators, other Māori students and indigenous staff; and the Māori streams\textsuperscript{92} (although the participants considered that there should be Māori-only Māori streams). One participant explained how important the support networks had been:

The positives for me that have come out of the Law School is the incredible support by the Māori students - Te Whakahiapo and that has actually sustained me - it has given me the energy to keep going and it's the Māori students who are so willing to share information ... they've been really approachable.

\textbf{Difficulties}

The participants identified four major areas of difficulty with the practical manifestation of the Law School’s bicultural objective. In summary, the Law School is failing to provide an educational environment and experience in which: Māori students feel safe; Māori students and staff are free from racism generated by Pākehā (or tauiwi) students and staff; the use of te reo Māori (the Māori language) is promoted and actively supported by staff; Māori issues, values, aspirations, traditions and matauranga (knowledge) can be freely discussed without denigration from Pākehā (or tauiwi) students and staff; Māori content and a Māori presence pervades all courses and all levels of the Law School. As Patricia Monture-Angus points out in relation to Canadian legal education:

\begin{quote}
[t]he point is clear, Aboriginal Peoples now understand education for what it has been - a tool of our oppression. Education is merely a reflection of Canadian society - its version of history and its values. If our society is racist, and this is a fact that Canadians are now coming to understand, then our education systems can only reflect and further entrench that racism.\textsuperscript{93}
\end{quote}

\textsuperscript{92} In the first year of the Waikato Law degree, there are currently three compulsory papers. Those papers are taught with a combination of large lectures and small-group teaching in streams. As one of the tangible manifestations of the Law School’s bicultural objective, the Law School runs a Maori stream for each of those first year law courses. While the content is identical to the other streams, the Maori stream is taught by a Maori person and is an opportunity for students and staff to use the Maori language and also to engage in particular Maori pedagogy. It is also often a place where Maori students do not have to justify or explain anything about being Maori. These streams are not restricted to only Maori students although the majority of the class tend to be Maori.

\textsuperscript{93} Supra n 89 at 95.
The participants’ accounts illustrate these difficulties. While their accounts do not fit exclusively under any one heading, I have attempted to group various accounts under the sub-headings of safety; racism; te reo; and Māori presence, for organisational purposes only.

Safety

One woman recalled her grief at the loss of Angela Rogers, who was a Māori member of the law school staff,94 and how the Māori students had been told that all classes in the hour directly before Angela’s memorial ceremony were to be cancelled. However when she went to the first hour of a two hour class just prior to Angela’s memorial ceremony, the whole class was advised that the second hour was not cancelled, and furthermore the lecturer said he would be producing notes that would be relevant to the first assignment, and these notes would not be available from the library desk copy. Upon reflection on this experience, this woman said:

I think there’s a number of staff members who don’t say ‘I want to work at Waikato Law School because of its strong women’s issues and strong Māori issues focus. They’re just here because lecturing is a good job and its good money and good holidays. ... They’re not here for the same reasons. ... I’m still here, because I know that anywhere else would be worse, but you come here with your guard down, you think you’re going to be looked after ... 

The same woman explained what she meant by thinking that she would be looked after:

It’s that you think that you’re going to come here and you’re going to be okay. But actually, even here you have to keep fighting. I have found that the safest place for me is to withdraw completely. Just come here to do my classes, know a few people, and then that’s it - cut it off, because if you keep pushing, or you keep wanting to be involved in things, you’re not safe.

94 Angela Rogers was a lecturer at Waikato Law School and died as a result of a tragic car accident.
Racism

The following accounts by the research participants further illustrate the various forms of overt and covert racism that are perpetuated against Māori students and staff:

... there was a class we had, Public Law A or B ... I was one of two Māori women in the group that were discussing an issue, there were 10 of us altogether. And there were a lot of questions fired at us two Māori women about the Treaty - what did we think? I just said that we were hard done by and one of the women said, ‘Oh, come on, you Māoris get everything put on your plate. Why can’t you just get over it? Why can’t you just get up and get out of it? I was in a stink marriage for years and years and I got out of it.’ And I said to her, ‘That’s the difference. You were able to get out of it.’ And she said, ‘Oh come on, you’ve got to just get up and help yourselves.’ I was so angry. Fortunately after that tutorial, I ran into another Māori woman and I told her ‘I have just been in a tutorial and I’ve just been attacked as a Māori woman.’

... in year one there was a lecture given by a prominent lecturer in the Law School about racism. And as the focal point of his lecture he used the people from the Chatham Islands, the Moriori as an example of Māori invading and actually eating them. Now this was in a lecture to at least 150-200 students. He had an overhead up showing a particular Moriori person who he contended was the last of the Moriori to survive. In deference to his statement I called out rather loudly that he had been teaching a myth, and this bought on other radical views from within the student body, so the whole lecture erupted because of the arguments that were going to and fro between the lecturer and other people in the student body who were opposed to what he was teaching. As a consequence of this, I wrote a paper after consulting with members of the Māori Studies Department and having done some research [and found that that particular Moriori] person had lived in Ngati Mutunga, in Taranaki, towards the end of his life and had married into the Raumati family and that they had descendants, so it was incorrect of the lecturer to believe that he was the last survivor and that the Moriori were now extinct on his death. That is not correct, hence the reason for my challenge. But as a consequence of the letter and the research that I wrote to this lecturer, I was branded as one of the many radicals on this campus who disrupt and cause problems within the campus ...

... people come here from other courses with a strict mindset and they become very argumentative and have this ideal or ideology that I guess they have inherited from their ancestors that they are superior people and that Māori fall into a second class status. I say that without reservation because it is so evident ... within the Law School there are some lecturers who perhaps struggle to push those Māori values and Māori ideals in their lectures because it meets with opposition. ... there is definitely opposition
at times from Pākehā students who in a huff get up and walk out of lectures at times ... we have to get rid of the racist element in lectures, ... the truth is the truth and if people cannot stomach the truth as its laid out to them, well tough. And if they have to be made aware that historically their ancestors were unkind in any way toward the indigenous people that were here, then for goodness sake they have to stomach that, they have to swallow that, and live with it .. that's reality for me, I think there should be a part in the Law School, or a place in the Law School where that has to be taught openly

... one thing that happened that kind of pissed the Māori students off was the reaction that [one Māori lecturer received when lecturing about colonisation, the Treaty and the history of this legal system from] a lot of Pākehā students or tauiwi students ... caused a back lash of sorts as there was a lot of negative comments that came out in the newspaper ... they did it because the prospectus says that this law school has a commitment to biculturalism so its not as though they came here not knowing that. So I think it just showed a real bias and ignorance on their part to come up with something like that. Which goes to prove that racism is still alive and very well and kicking out there.

The presence of overt and subtle racism in the practices and teaching of this Law School is astonishing in light of its commitment to provide a bicultural legal education. In the words of Patricia Monture-Angus:

Racism, both overt and subtle, is one of the significant reasons why legal institutions have failed to meet the needs of all their students.95

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95 Supra n 89 at 108.
96 Māori Language Act 1987, s 3.
97 School of Law Undergraduate Prospectus (1999) 38.
Several of the participants shared their disturbingly negative and unsupported experiences of doing their work in te reo Māori. One participant described her experience as follows:

... there's heaps of stuff that [the Law School] could do, just to make [using te reo] easier ... for instance, they could have given the assignments in te reo ... everything has been given to me in Pākehā. Why didn't [the Law School] give me questions in my test in te reo? ... you're jumping from one train of thought to another and ... I would look at [the question] from a Māori perspective, and I couldn't hear the question in te reo ... then I got locked into the taha Māori side of it, I couldn't come out of it and then I'd look at it from a Māori perspective and over time, I have really felt bashed about by that. And I feel like they haven't respected me, they haven't respected my mahi. ... [some lecturers would say] 'oh you are doing to do it in te reo, it might not be easy, it might not be a good idea'. So I never got supported. In fact that really made me feel [like] when I was growing up, that te reo was second, a substandard language, it wasn't good enough for this Law School actually. ...

The same participant also described several incidents where her assignments written in te reo were either returned very late, often quite a long time after the other students had received their papers, or had not been returned at all. She recounted one example where one of her law one assignments had not yet been returned and as a consequence she had never had the benefit of that feedback.

Another who had been bought up with te reo and had formally studied it to Masters level explained that she had never submitted a piece of work in te reo because she had seen how difficult it was for others who did. She noted that:

... that's a perfect example of keeping yourself safe, so I don't want to have to fight, because you don't have the energy to do all your mahi and now especially as a mum, and I know heaps of Māori students here are parents and just the extra obligation that puts on you. You don't have the energy to have to come here and fight on top of doing all your work and getting all your assignments in, not for things like that.

Māori Presence

The participants also discussed the level of Māori content and presence of Māori in all courses at all levels through the Law School. One participant noted that in first and second year there's a lot of Māori content and there are also the Māori streams so the bicultural kaupapa was evident. However in third year she commented that:
Another participant considered that not enough time and respect was given to the teaching of the Treaty of Waitangi. He comments:

... in New Zealand here and even in this Law School [the Treaty] doesn’t have that element of tapu or sacredness that Māori would ordinarily give it, I think more time should be spent on it.

Intervention strategies required

These accounts of some of the participants’ experiences at the Law School profoundly illustrate the need for this Law School to develop and implement intervention strategies which achieve, at a bare minimum, a culturally safe learning environment that is free of racism. As a result of her observation and experience of the perpetration of racism by Pākehā students on Māori students and staff, Ani Mikaere98 came to the conclusion that:

for some purposes, Māori and Pākehā students would best be taught separately. For example, the material in legal systems on the usurpation of Māori law by Pākehā law should be taught to Māori students by Māori lecturers, and to Pākehā students by Pākehā lecturers. This would enable Māori staff to employ their energies where they are most needed - amongst Māori students. It would also require Pākehā lecturers to take responsibility for Pākehā students’ learning, and for helping them through the problems that they, as Pākehā, have with such material. It should not be the job of Māori staff to expose ourselves and our students to Pākehā students’ racism and guilt.99

This Law School must heed the descriptions, criticisms and research conducted or offered by its Māori students and staff. It is time to start listening and it is time for action. The next part of this chapter presents

98 Ani Mikaere of Ngati Raukawa ki te Tonga was one of the foundation Māori academic staff members at Waikato Law School and taught there until 2001.
some strategies for action to address the difficulties experienced by Māori students at the Law School, and to progress the realisation of the Law School's bicultural commitment.

PROGRESS MADE

Since the establishment of the Law School, there have been some positive starting points for a bicultural legal education and institution. There has been a steady increase in the number of Māori students and staff. In 1996, 20% of the student body were Māori, and in 2005 it is now 25%. In 1995 there were 4 Māori academic staff, 2 Māori general staff and some Māori tutoring assistance, and in 2005, there are 5.5 Māori academic staff including 3.5 senior lecturers and 2 lecturers, one Māori member of general staff, a Māori liaison position and a law school kuia.

There is a substantial amount of Māori and Treaty content in a small number of courses, and a little Māori content in others. The Law School also offers tikanga Māori workshops and teaching streams in the compulsory stage 1 law courses; these streams and workshops have attracted a majority of Māori students and seem to have worked well.\textsuperscript{100}

Māori students, with the support of Māori staff, have established Te Whakahiapo, the Māori law students association. Te Whakahiapo actively provides support to Māori students through a buddy system and various activities throughout the year; and a forum to discuss Māori students' issues and Māori issues generally. In 1995, the Law School provided a study room for the Māori students.\textsuperscript{101}

Also, in 1995 the position of Māori Liaison Officer was established through the part time employment of one of the Māori graduates\textsuperscript{102} who in this position facilitated access to resources and assistance which the Law School and University provide.\textsuperscript{103} In 2005, the position of Māori Liaison Officer was made a permanent position.

\textsuperscript{100} Infra n 107 at 94.
\textsuperscript{101} That graduate was Makere Papuni-Ball who almost single-handedly created this position.
\textsuperscript{102} Infra n 107 at 94.
Te Piringa, comprising Māori academic and general staff within the school, was formally established in 1999. Te Piringa has encouraged collaborative kaupapa Māori research and teaching, which has resulted in joint conference papers and publications. In July 1999 Te Piringa hosted the inaugural Māori legal academics conference, which was attended by Māori law staff from Otago, Victoria, Auckland and Waikato Universities.

STRATEGIES FOR IMPROVEMENT

Māori Students' Suggestions for Action

Interestingly, despite the pain, anger and annoyance that some of the participants recalled when describing their experiences at the Law School, all offered thoughtful and well considered suggestions for improving the Law School's performance of its bicultural objective with regards to Māori students. The participants' responses reflect their concern, not only for the future of Māori students, but also for the Law School and its future development of a legal education that is inclusive and meaningful for Māori. That these participants could also reflect so constructively, creatively and positively on the future development of an institution which they had simultaneously described as racist, was a humbling experience for me as the researcher, but it was also entirely consistent with the integrity, honesty and thoughtful contributions that they brought to this research project.

104 See Monture-Angus, supra n 89 at 91 where she notes that “I would argue that numerical equality may only be one of the relevant goals [for Aboriginal education]. Equality of numbers alone will not be enough. Numbers cannot act as an indicator of the meaningfulness of the educational experience. It is against this single criterion, meaningfulness, that the greatest inequality has been perpetuated against Aboriginal Peoples. ... Education is a significant gatekeeper to the opportunities we are able to access. This is the first way in which education can be defined as meaningful. ... It is in this second way of defining meaningful education, as a tool of cultural survival and as a means of reaffirming the validity of Aboriginal culture, that the worst injustices have been committed against Aboriginal Peoples and our distinct cultures.”
One participant expressed his view in these terms:

I think in all fairness to [Pākehā] they are triers, and they do make an honest effort to try and meet those requirements of biculturalism, but as I said earlier that is a difficult thing to achieve if you have been brought up in a Pākehā world, with Pākehā values. It’s not easy to appreciate other racial values unless some form of decolonisation programme is firstly used and I am a bit afraid of that term, decolonisation, because it sends shivers up people’s backs, especially Pākehā.

And later the same participant said:

... I think there is an element of good faith amongst people generally .... if we are to progress into the next century with some form of equity for Māori and Pākehā ... I think if we work in harmony together you know conciliation ought to be the guiding principle somewhere.

The participants’ ideas for future development of the Law School’s commitment to biculturalism include: developing a parallel management structure including two Deans (one Māori and one Pākehā or tauiwi); requiring staff (as a condition of their employment) to demonstrate what they can and will contribute to the aspirations of the Law School, particularly the Law School’s commitment to biculturalism and women’s issues; decolonisation training for staff to teach them about Māori values, aspirations, perspectives so that they can begin to develop a bicultural perspective; training in te reo Māori for the staff; provision of all exams and assessments in te reo Māori; provision of a dictionary of legal terms and concepts in te reo Māori; active recruitment of Māori students who speak te reo and active support of their continued use of te reo at Law School; developing a collection of Māori students essays and research to be made available in the library; continued invitations to people from outside the law who have expertise in Māori customary law to lecture; increasing the critical mass of Māori students and staff (up to at least 50%); increasing Māori content and a Māori presence across all levels of the Law School and in all courses; and establishing Māori-only Māori streams.

This list is not exhaustive, but provides some stimuli for future development of Law School structures, curriculum, staffing, policies, teaching and research practices, and outcomes. In particular, these suggestions illustrate that the legal education provided by the Law
School must engage more deeply with the tensions, the pain, the racism and Euro-centrism that Māori experience on a daily basis. This form of legal education must move beyond informal quotas of Māori students, staff and content, and confront the legacy of nearly 160 years of colonisation. This means seeing the realities described by Māori students and staff, accepting them without self-defensive justification, and committing to the liberating journey ahead. Commitment is one of the critical elements in this process. For all Pākehā or tauiwi, this will require “a profound rebirth ... [and] ... tak[ing] on a new form of existence”.\textsuperscript{105} As Friere has revealed:

... as [the oppressors] cease to be exploiters or indifferent spectators or simply the heirs of exploitation and move to the side of the exploited, they almost always bring with them the marks of their origin: their prejudices and their deformations, which include a lack of confidence in the people’s ability to think, to want, and to know. Accordingly, these adherents to the people’s cause constantly run the risk of falling into a type of generosity as harmful as that of the oppressors. The generosity of the oppressors is nourished by an unjust order, which must be maintained in order to justify that generosity. Our converts, on the other hand, truly desire to transform the unjust order; but because of their background they believe that they must be the executors of the transformation. They talk about the people, but they do not trust them; and trusting the people is the indispensable precondition for revolutionary change.... Those who authentically commit themselves to the people must re-examine themselves constantly.\textsuperscript{106}

\textbf{Stephanie Milroy’s suggestions for Action}

In 1996 Stephanie Milroy presented a number of suggestions for action to further the development of the bicultural vision of the Law School.\textsuperscript{107} The basis of those suggestions was Ranginui Walker’s notion of the:

establishment of kaupapa Māori ... [by increased numbers of Māori staff and students] to achieve genuine social transformation from monoculturalism to biculturalism.\textsuperscript{108}

\textsuperscript{105} Freire, P \textit{Pedagogy of the Oppressed} (1972) 37.
\textsuperscript{106} Ibid, 36.
Milroy suggested that this basis must be extended by: ensuring that Māori staff are appointed at higher levels, and that they obtain a "greater share of decision-making power"; significant Māori content in all courses; development of parallel teaching spaces for Pākehā and Māori students, which would facilitate the creation of culturally appropriate pedagogical space, and practices for Māori, while at the same time Pākehā (or tauiwi) lecturers could address the issues that arise for Pākehā (or tauiwi) students.

Ultimately, Milroy called for the establishment of a "kaupapa Māori programme specifically for Māori students, run by Māori staff: education by Māori for Māori". She envisaged that such a programme would be developed out of the needs and wants of the Māori students and their communities, thus culturally appropriate decision-making and accountability systems would also need to be developed. Alongside this programme, Milroy identified the need for "ongoing and intensive research into Māori law and issues which could then be incorporated into the Māori programme". She considered that such research:

should include researching ways in which the existing law can be transformed into an appropriate system for Māori ... [, and] ... the effect of Pākehā law on Māori.

**Stephanie Milroy's Action Plan**

To achieve these aims, Stephanie Milroy proposed an action plan, which is summarised as follows:

1. The Māori staff form a unit with clearly defined duties such as "admissions to the Law School, liaison with the Māori community, recruitment of Māori students, staff appointments, and the kaupapa Māori research programme";

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109 Supra n 107 at 97.
110 Ibid, 97-99. Also see Mikaere at supra n 99 and accompanying text.
111 Ibid, 99.
112 Ibid.
113 Ibid.
114 Ibid.
115 Ibid, 102.
2. Curriculum content review by the Māori unit should be conducted to “establish the levels of Māori content in the courses”\(^{116}\);

3. The Law School instigate regular data gathering on Māori students’ performance to establish “reasons for drop out or failure”\(^{117}\) where this occurs;

4. Orientation programmes for Māori students “to come to grips with the reality of the Law School as it currently is”\(^{118}\) and for Pākehā students to develop their understanding of the bicultural vision of the Law School;

5. University to provide formal training to Māori and Pākehā staff in Māori language and culture, and where necessary to provide teaching or administrative relief to encourage staff to take up this opportunity;

6. The Law School must develop a medium term plan with specific goals and timeframes by which those goals must be met. Such a plan must be developed with the Law Schools’ communities, and should address:

sharing of decision-making powers, resource allocation and the creation of the kaupapa Māori programme for both teaching and research ... [the] barriers to achieving the[se] objectives as well as the strategies for overcoming such barriers\(^{119}\)

Further Suggestions

Patricia Monture-Angus has developed an inexhaustive list of ways that Law Schools as institutions can begin to address racism. As this research project has confirmed, racism was identified by the participants and also by the foundation Dean as a significant obstacle in the Māori students’ experience of the legal education provided by this Law School. That this is so in a Law School aspiring to provide a bicultural legal education is even more alarming. However, it is a reality that both staff and students must continue to address. For as Patricia Monture-Angus contends:

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116 Ibid.
117 Ibid.
118 Ibid, 103.
119 Ibid, 104.
Law schools must begin to affirm the message that racism will not be tolerated in any circumstances or under any conditions. There are a number of ways in which this message can be sent: institutional financial support for ‘minority’ initiatives, including scholarships (rather than continuously using this type of program as a source of outside funding), immediate academic sanctions against students who engage in racist activity and clear policies which set out these sanctions, careful attention to ensure that so-called special programs do not become ghettoized but are seen as central to the law school program (that is, the formal rejection of the ‘missionary’ approach to legal education), administrative action (as opposed to the usual inaction including the apology for racist incidents) which supports the perceptions of ‘minority’ students and professors, the hiring of more ‘minority’ professors and support staff, an ombudsperson, sympathetic faculty which means a faculty educated on issues of racism, inclusive curriculum development, the reassessment of the admission criteria ... and the inclusion in the law schools of symbols to which we identify.  

Patricia Monture-Angus also provides a list of other initiatives that address participation and not racism directly. They include:

establishment of clinical programs. Existing law clinics should embrace the concerns and desires of local Aboriginal communities. This should be happening in a systematic and formalized way. Further clinical programs could be developed to address the over-representation of Aboriginal people in the criminal justice system .... Issues of self-government from a traditional Aboriginal perspective demand research now and could be incorporated in existing clinical and community programs. Programs in poverty law would also seem to bear a significant relationship to Aboriginal Peoples and the specifics of our experience should be incorporated into these programs.

Graduate studies programs in law need desperately to be developed, and Aboriginal involvement in graduate studies needs to be encouraged.  

Some of the initiatives overlap with the suggestions made by Stephanie Milroy and the research participants. Together these suggestions provide enough ideas to develop a medium-long term plan for the Law School’s fulfilment of its bicultural commitment. There are only two aspects of the strategies for liberating action that I wish to emphasise, that is: firstly, we must develop a medium-term plan for implementation of these strategies; and secondly, we must continue to act with urgency.

120 Supra n 89 at 115.
121 Ibid, 116.
CONCLUSION

In the ideal world, the Law School would attract self-reflective Māori and Pākehā (or tauiwi) who were actively engaged in the oppressed peoples’ projects of liberation from oppression. All of these people would be active practitioners of a transformative model of education. They would all be bilingual, and maybe even multi-lingual. In a utopian vision, they would be truly bicultural. The necessary pre-requisites to achieve this utopia are: people; capacity to see the existing inequalities; and commitment to struggle to transform those inequalities.

It is inevitable that Māori must and will lead such a journey in Aotearoa. For, as Friere has pointed out - it is the oppressed who can see and name the oppression, as they have lived it fully.122 Through this process of seeing the reality of our lives, we must ultimately face the source of oppression with the purpose of transforming ourselves, our lives and the fundamental basis of our inauthentic existence.

Māori students and staff, since the inception of the Law School, have critiqued its attempts to develop the bicultural objective. In doing so, we have engaged in the process of change and action, both of which are necessary for the development of an emancipatory model for education, and in particular, bicultural education. While this has been painful at times, it is also inevitable in a country such as New Zealand which is intent on suppressing its colonial roots. The bicultural objective is not just a site for struggle, it is symbolic of a much bigger project of transformation and liberation from oppression. As such, despite its many shortcomings, the bicultural commitment and its accompanying challenges provide a way forward.

122 Supra n 105 at 20-21 where Friere discusses the dehumanization of the oppressed. He states: "Because [dehumanization] is a distortion of being more fully human, sooner or later being less human leads the oppressed to struggle against those who made them so. In order for this struggle to have meaning, the oppressed must not, in seeking to regain their humanity (which is a way to create it), become in turn oppressors of the oppressors, but rather restorers of the humanity of both. This, then, is the great humanistic and historical task of the oppressed: to liberate themselves and their oppressors as well."
Appendix 1 - Questionnaire

The themes that I wish to explore are:

Introductory Warm-up Questions

1. Why did you decide to do law?
2. Why did you choose Waikato Law School?
3. What were your expectations when you applied to Waikato? Have they changed? How? Why? If so, what are your expectations now?

What is biculturalism?

4. What do you think biculturalism means?
5. What do you think about the following statement of the Law School's commitment to biculturalism:
   The School of Law provides, through its curriculum, its research activities and its own structures, both a reaffirmation and a professional extension of the University’s commitment to biculturalism.123

Application and Implementation of the Bicultural Objective

6. Think about a situation where you consider the staff or the Law School failed to apply or to implement the bicultural objective-
   6.1 what happened?
   6.2 how did this experience fail to apply or implement the bicultural objective?
   6.3 why do you think this experience was a failure?
   6.4 in retrospect, how do you think the bicultural objective could have been applied and further how could it have been promoted?

123 Supra n 97 at 5.
7. Think about a situation where you consider the staff or the Law School successfully applied or implemented the bicultural objective.

7.1 what happened?
7.2 how did this experience successfully apply or implement the bicultural objective?
7.3 why do you think this experience was successful?
7.4 in retrospect, could this successful application or implementation of the bicultural objective be utilised in other situations? If so, how? If not, why not?

8. What does the bicultural objective mean to you? How can it be more comprehensively and consistently applied and implemented?

8.1 by lecturers - teaching, course materials, assessment, degree structure;
8.2 by administration;
8.3 in the Law School’s policy-making and development;
8.4 in the Law School’s management and governance structures. Why/why not?
INTRODUCTION

Māori women have been at the forefront of Māori demands for justice in Aotearoa/Te Waipounamu. Māori demands for justice are all embracing, affecting all aspects of the New Zealand legal system - challenging issues of identity and privilege of the dominant society and affecting Māori participation in the social, economic and political life of this land.¹ For Māori it is not enough to create equality of access to the legal system - instead they have sought to have their rights and interests acknowledged and protected by the legal system - rights and interests affirmed in the Treaty of Waitangi. In this regard Māori women have been concerned about justice issues that reflect not only their place within their whānau, but also in their hapū and iwi - issues that reflect their roles as leaders of their tribal nations, as holders of property rights, as citizens with alternative realities of life based on alternative values and norms. This paper is an attempt to record the history behind demands made by Māori women and their communities for access to substantive justice.

1 MĀORI SOVEREIGNTY, LAW AND JUSTICE

A Māori Sovereignty

To be sovereign, a nation has to govern itself by its own authority and its own laws.² By 1840 Māori assumed sovereignty³ over the whole

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¹ This article was written in 1999 for the New Zealand Law Commission, for the project, Justice, The Experience of Māori Women (NZLC R 53).
² Caren Wickliffe is of Ngāti Porou, Rongowhakata descent. She holds a law degree and a Masters in Law with a specialist interest in comparative indigenous law. She has lectured and practiced law and is currently a Judge of the Māori Land Court.
of New Zealand.⁴ Best wrote of this time “[i]t may be fairly stated that, in pre-European days, there was no area of land that was not claimed by some tribe.”⁵ According to Swainson, writing in 1859, Māori territorial claims were not:⁶

... confined to the land they may have brought into actual cultivation, but they claim and exercise ownership over the whole surface of the country; and there is no part of it, however lonely, of which they do not know the owners. Forests in the wildest part of the country have their claimants. Land, apparently waste, is highly valued by them. Forests are preserved for birds; swamps and streams for eel-weirs and fisheries. Trees, rocks and stones are used to define the well known boundaries.

Māori sovereignty over the land and sea was sourced in Māori norms and values and the socio-political order of the Māori people - an order defined by whakapapa and whanaungatanga⁷ - matters inextricably linked to Māori cosmology⁸ and underpinned by a significant body of philosophical, religious and spiritual belief.⁹ Kinship was fundamental in determining social status,¹⁰ a matter recognised by the Waitangi Tribunal when it found in the Muriwhenua Land Report:¹¹

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Whanaungatanga stressed the primacy of kinship bonds in determining action and the importance of whakapapa in establishing rights and status. Whakapapa was the basis for hapū allegiance, for establishing that all Māori are related, and for demonstrating the connection of Māori to the elements of the universe.

The main social unit of Māori society was the Māori whānau - domestic kin-based groups. As whānau fused together they became communities of descent known as hapū or iwi. These polities were the most significant political units in Māori society - a view recently confirmed by the Waitangi Tribunal in the *Muriwhenua Land Report* when it found that political power and authority was vested in descent groups called hapū.

Whānau, hapū and iwi were comprised of ariki-paramount chiefs, tohunga - expert advisors/leaders, rangatira - chiefs, kaumātua - elders, pakeke - mature adults, rangatahi-young adults, tamariki-children and taurekareka-slaves. Individuals could align themselves to a number of different communities, but ultimately individual rights were contingent upon acceptance by that individual of the obligations of membership in a particular hapū or iwi.

After analysing the limited material available on pre-contact hapū and iwi a number of commentators have agreed that these communities probably began to take shape in the fifteenth century. The trading

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relationships established with Europeans from the late 1700s, accelerated the development and evolution of hapū and iwi, and the even more inclusive structure - waka. ¹⁸ All these entities became central to the selfgovernance of Māori tribal nations. ¹⁹

Rangatira occupied central roles in these communities, ²⁰ deriving their authority from the consent of other members of their whānau or hapū, their whakapapa (genealogy), mana (authority or status), or from the deeds they performed for the benefit of their hapū or iwi. ²¹ Their authority depended on the acceptance of their leadership and the chiefs rarely acted without consultation with the whole community. ²² The role of rangatira illustrates that: ²³

... Māori authority was neither centralised nor institutionalised, and power moved up from the people and not down from a central authority. Accordingly, authority was not divorced from personal power and influence. Although the necessary leadership traits were reinforced by beliefs that mana was divine delegation, it was unlike the English divine right of kings in that power was only partly inherited and mainly acquired. The society was thus basically democratic and there was room for class mobility.

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The study of Māori law requires evaluating the discourses, practices and beliefs essential to the operation and reproduction of Māori society. Durie has defined Māori law as:

... values, standards, principles or norms to which the Māori community generally subscribed for the determination of appropriate conduct.

Despite local variations, he points out that a number of generalisations may be made about pre-existing Māori law in which the words “tikanga” and “kawa” played a central role in most Māori societies. This is to be compared to the word “ture” which was later used to denote western law. Tikanga, Durie argues, described Māori law and is derived from “tika, or that which is right or just. This indicates that Māori believed that justice and truth were interchangeable terms. The opposite of tika is the word he (wrong). Tikanga could also refer to “ritual, but in the sense that ritual was also tika, customary or correct.” Tikanga was also pragmatic and open ended and Durie adds “[i]t’s lack of rule-like definition was compensated by its ability to change without institutional intervention.” It was therefore flexible. Kawa, on the other hand, described ritual and ceremony. Kawa also referred to process and procedure, of which karakia (the rites of incantation) formed part - kawa was rule-like, more rigid and applied mainly to process and procedure. These were the terms used to describe the framework, process and procedure of Māori law.

24 See N. Rouland Legal Anthropology (The Athlone Press, London, 1994) and his general discussion on the study of law.
Within this framework, Māori operated by reference to philosophical and religious principles, goals, and values which combined to regulate the conduct of individuals, of whānau, hapū and iwi. Regulators included: (a) mana - sovereignty, authority, prestige, political authority and power; (b) mana tupuna - mana from the ancestors; (c) mana whenua - mana over the land; (d) mana tangata - mana over people, (e) wairua - the spiritual dimension, (f) manakitanga - generosity; (g) aroha - respect; (h) mauri - life essence; (i) tapu and noa - sacredness and neutralisation; (j) rahui - prohibitions; (k) hau - the vitality of gift exchange and the symbolic reciprocity it acknowledges and anticipates. Henare has also emphasised the importance of tapu, mana, mauri and hau as core values and he has identified Māori cosmology, religion and the duality of Māori conceptual thought in the development of Māori philosophy and law.

Māori society was governed by these values and norms - imposed through the doctrines of tapu and noa, utu - exchange/reciprocity and muru - reparation. Noa, utu and muru were the mechanisms necessary for the restoration of balance in a legal system that valued balance and harmony above all else.

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37 See S. Moko Mead Customary Concepts of the Māori (Unpublished Notes, Māori Studies Department, Victoria University, 1984) chs 3-4 for full definitions and examples of use of utu and muru.
Although difficult to retrieve information and data on the topic of Māori women's access to justice, legal ethnology and legal anthropology may be utilized as tools for uncovering evidence of how Māori women participated in Māori self-government, how they made Māori law and how they administered and accessed justice.

It is beyond the scope of this paper to discuss in full the role Māori women played in the Māori legal system of Aotearoa before colonisation. A comprehensive study on this topic is needed. For our purposes, we have selected a handful of sources to provide a framework within which the role of Māori women in government, law, administration and access to justice may be discerned.

At least one commentator has begun the process of uncovering the role of Māori women, utilising a number of sources including the oral traditions of Māori society. In her major work entitled The Balance Destroyed: The Consequences for Māori Women of the Colonisation of Tikanga Māori (1995) Mikaere explains how the female presence and essence permeated Māori cosmology, Māori explanations of the origins of mankind, the transferral of knowledge, the mysteries surrounding life and death and the restoration of balance.
Other writers have discussed the importance of Māori women in Māori cosmology and philosophical thought. For example, Hohepa has listed some of the main female deities in Māori cosmology and has highlighted their importance in the transferral of knowledge and wisdom.

Papatuaanuku, Earth Mother or Planet Earth, is the ancestress of all things. She and her children are the guardians or the progenitors of everything on and under the earth, sea and skies. The two grandchildren of Papatuaanuku, Hineahuone ... and Hinerauwhaarangi were the first to receive human form and were empowered by the guardians and gods to be the receptacles of all knowledge which they then transferred genealogically and genetically through demigods and demigoddesses to Māori.

The Māori female presence and essence could bring balance, power, strength or spiritual renewal and female sexuality was - in times of peace - a force that was celebrated and revered. Māori women could possess and exercise power and authority - they could exercise Mana Wahine.

Māori polities were comprised of communities of descent sharing common genealogical ties to one or more eponymous ancestor/s, either female or male. Rank within the kin-group did not depend on gender and female descent lines could be as important as male.

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neutral terms and personal pronouns described social relationships and status within Māori polities.48 Descent was traced through links of either sex, permitting affiliation to any whānau, hapū and iwi associated with maternal or paternal descent categories.49 In this way the benefits and rights of membership of these alternate Māori polities were transferred. Women, subject only to tribal variation or rank, could be eponymous ancestors, rangatira, kaumaatua, pakeke, mātua, rangatahi or taurekareka.50

In these early Māori communities, individual rights were of secondary importance to the mutual security and well-being of the collective.51 In Māori societies:52

... use-rights over land and resources were “owned” or held by women as individuals as well as by men, subject only to the over-riding right of the tribal community and the mana (authority) of chief over land and people. Inheritance was bilateral; eel weirs, rat runs, bird and berry trees, cultivations and other forms of property could be handed down from either parent to specific children, male or female. Gifts of lands and resources were often made by parents to their daughters on marriage. These lands remained the property of the women, not the husbands, and they could hand them on to some or all of their children.

Māori women could govern and/or participate in decisions relating to the political, military, social, economic, spiritual and cultural directions of their polities.53 This was because Māori women lived in societies that:54

... embraced a world view determined by whakapapa; people reckoned their kinship to each other, including their seniority or inferiority, by descent from former common ancestors. Descent from bilateral senior lines conferred senior status which was, by definition, not confined to males. In a society which recognised the pre-eminent rank and status of some women, all women could not be regarded as inferior to all men.

Consequently, Māori women could participate directly in the administration of justice, either as people of rank or as one of the collective making decisions by consensus.

II BRITISH RECOGNITION OF MĀORI SOVEREIGNTY, SELFGOVERNMENT AND MĀORI LAW

A. The Early Relationship

During the years 1800-1830 the European posed no political or economic threat to Māori status and rights. Māori sovereignty, Māori law, and Māori justice continued throughout the decade 1830-1840 when the settler population increased from 300330 to approximately 2,000. Although many settlers did not like living under a Māori legal system, they accepted that for all practical purposes they had little choice for, as Alan Ward explains:

> It is clear then that Māori people received Europeans in New Zealand very much on their own uncertain terms, including their notions of dispute settlement. Those settlers who could not accept that this should be so, were frustrated, humiliated, and at times fearful of their dependence upon people whom they considered savages.

Alan Ward records that this period may be characterised as one when Māori chiefs and their communities selectively adopted and incorporated

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elements of European institutions and culture within their own traditional value systems. He also suggests that, as traditional Māori social structures and value systems were open, responsive and adaptive to change, European settlement was for the most part encouraged - primarily to facilitate trade.

After 1830 Māori began to organise on a national level and in 1835 the United Tribes of New Zealand declared their sovereignty through the Declaration of Independence. This declaration of Māori sovereignty and independence was acknowledged by the Colonial Office. This continued a pattern of Imperial recognition that had been manifest in instructions, Imperial actions, legislation and policy in place from the “discovery” of New Zealand by James Cook through to the instructions to James Busby in 1835. No rights were sought by the Colonial office or exercised by the Crown over Māori tribes or their territory before 1840. In fact, British sovereignty over New Zealand and its inhabitants was repeatedly denied in Acts of the Imperial Parliaments. But by 1839, the Colonial Office had decided to acquire territories in New Zealand and colonial officials were instructed accordingly. Boast, in examining the reasons for British intervention in New Zealand, argues that:

... many historians are deeply sceptical of a reading of the history of annexation and the Treaty that emphasises the pressures of the humanitarian lobby in Britain and the Crown’s supposedly protective and altruistic objectives regarding Māori in 1840.


63 See 1817 (UK) 57 Geo. III, c.53; 1823 (UK) 4 Geo. IV, c. 96; 1828 (UK) 9 Geo, IV, c.83.

64 R. Boast “The Law and the Māori” in Spiller, Finn & Boast A New Zealand Legal History (Brookers Ltd., Wellington, 1995) 130.
In 1839 Captain Hobson was directed to treat for sovereignty over New Zealand and he was charged with promoting the "civilisation" of Māori by providing support for missionaries who would establish missionary schools. Until Māori were "civilised" the imperial practice of leaving indigenous polities alone to govern themselves according to their own laws was reflected in the following instruction:

... until they can be brought within the pale of civilised life, and trained to the adoption of its habits, they must be carefully defended in the observance of their own customs, so far as these are compatible with the universal maxims of humanity and morals. But the savage practice of human sacrifice and cannibalism must be promptly and decisively interdicted; such atrocities, under whatever plea of religion they may take place, are not to be tolerated in any part of the dominions of the British Crown.

What had not been anticipated was the degree of resistance from Māori to assimilation and their determination to maintain their own forms of self-government, law and justice.

65 Normanby’s Dispatch to Captain Hobson, 14 August 1839 in R. McNab (ed) Historical Records of New Zealand (Government Printer, Wellington, 1908) Vol. I., 730-731.


The Treaty of Waitangi represents a compact between two races. It was fundamentally an exchange between the British Crown and two distinct classes of tribal and sub-tribal nations - those who had formed the United Tribes of New Zealand under the Declaration of Independence 1835 and those who remained autonomous. It was an international treaty and a document that recognised the preexisting sovereign status of all Māori nations.

Initially signed at Waitangi on 6 February 1840, during the period February-September 1840, the Treaty was taken to other locations around the country for Māori signatures. Before that task was completed, on 21 May 1840, Lieutenant-Governor Hobson issued two proclamations asserting the Crown’s sovereignty over the North Island of New Zealand by cession and over the South Island by discovery and annexation. Hobson later changed the nature of the British claim to sovereignty over the South Island so that it rested on cession.

68 The Treaty of Waitangi was written in Māori and English (Treaty of Waitangi Act 1975 (NZ) 1st sch) but the Māori version was given little attention in the early years of the colony, for example, in R v Symonds (1847) [1840-1932] N.Z.P.C.C. 387. However, this approach is no longer accepted by the judiciary and in contemporary times the Courts and the Waitangi Tribunal have adopted similar approaches to the interpretation of the Treaty of Waitangi. The Waitangi Tribunal is required by the Treaty of Waitangi Act 1975 (s.5 (2)) to have regard to both texts of the Treaty, and the Court of Appeal and the Privy Council have adopted a similar approach. See for example New Zealand Māori Council v Attorney-General [1987] I N.Z.L.R. 641; New Zealand Māori Council v Attorney-General [1994] I N.Z.L.R. 513.


70 The Treaty of Waitangi is fundamentally different to treaties in the Americas. In the USA and Canada colonisation commenced by friendship, trade, protection and alliance treaties. Subsequently, colonisation would proceed through treaties of cession of land. Generally the American and Canadian treaties did not deal with the sovereign status of indigenous polities.


The Māori version of the Treaty of Waitangi secured Māori assent to colonisation.\(^{74}\) It was signed by over 500 chiefs\(^{75}\) and less than 40 chiefs signed the English translations.\(^{76}\) The Māori text contains broader guarantees than are apparent from a bare reading of the English text - a matter recognised by the Waitangi Tribunal.\(^{77}\) According to Article the First of the English version, the chiefs ceded absolutely and without reservation all the rights and powers of sovereignty.\(^{78}\) The Māori version of the Treaty of Waitangi, on the other hand, conveyed only the right to govern - something less than full sovereignty.\(^{79}\) Article the Second in the English Version, confirmed and guaranteed to Māori:\(^{80}\)

... the full exclusive and undisturbed possession of their Lands, and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in possession ...


\(^{76}\) Due to the significance of the Māori version of the Treaty of Waitangi in securing Māori assent, the Waitangi Tribunal has accorded significant weight to the Māori text of the Treaty, and applies the rule that in the event of an ambiguity, provisions of the Treaty should be construed against the party which drafted or proposed its provisions. (Lord McNairs, Law of Treaties (1961) 464, as applied by the Waitangi Tribunal in the Waitangi Tribunal *Orakei Report* Wai 9 (Department of Justice, Wellington, 1987) 128; Waitangi Tribunal *Muriwhenua Fishing Report* Wai 22 (2. ed) (Department of Justice, Wellington, 1989) 188-189; Waitangi Tribunal *Ngai Tahu Report* Wai 27 (Brookers, Wellington, 1991) 223 3 WTR 415. The Tribunals approach (seemingly adopted by the Courts) to interpreting the Treaty of Waitangi has important consequences for the extent to which Māori rights in the common law may be recognised.

\(^{77}\) Waitangi Tribunal *Muriwhenua Fishing Report* Wai 22 (2. ed) (Department of Justice, Wellington, 1989) 173-188, where the Waitangi Tribunal has observed that approximately 500 chiefs or tribal representatives signed the Māori text of the Treaty of Waitangi, whereas only 39 chiefs or tribal representatives signed the English text.

\(^{78}\) Treaty of Waitangi Act (NZ) 1st sch.


\(^{80}\) Treaty of Waitangi Act (NZ) 1st sch.
The guarantee is described in the Māori version as "te tino rangatiratanga" (the full sovereignty, mana, power, authority) over their lands, villages, and their "taonga" (treasures). On the meaning of this guarantee the Waitangi Tribunal has explained:

'Te tino rangatiratanga o ō rātou taonga' tells of the exclusive control of tribal taonga for the benefit of the tribe including those living and those yet to be born. There are three main elements embodied in the guarantee of rangatiratanga. The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically and spiritually. The second is that the exercise of authority must recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. Thirdly, the exercise of authority was not only over property, but of persons within the kinship group and their access to tribal resources.

Therefore, Article the Second guaranteed the right to Māori self-government, law, and justice. In addition, Article the Second of the Treaty affirmed the Crown’s right of pre-emption and in his interpretation of this aspect of the Treaty texts Richardson J. has stated:

In relation to land - and it is land with which this case is concerned - the Crown was to be the buffer, the intermediary. The settlers were to obtain land for settlement but only by purchase from the Crown which had the sole right to buy from Māoris willing to sell.

On the other hand, by Article the Third in the English version, the Queen extended her protection to Māori and all the rights and privileges of British subjects, including access to the British justice system. The English version of the Treaty seems to be clear that Māori were being given all the rights and privileges of British subjects. However, when considering the Māori text a different result can be achieved:

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84 Treaty of Waitangi Act (NZ) 1st sch.
Hei Wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini - [Ka] tiakina e te Kuini o Ingarangi nga tangata Māori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea, ki nga tangata o Ingarangi.

Sir Hugh Kawharu translates this article as: 85

[This is] the third

For arrangement therefore this for the agreement concerning the Government of the Queen will be protected by the Queen of England the people ordinary all of New Zealand [who] will give them rights and duties all in equal measure [that apply] under her constitution to the people of England.

Reverend Māori Marsden told the Waitangi Tribunal that Article the Third could be seen as showing that “the Māori was assured the use of his own rites and customs (tikanga) in the same way as the settlers were to be assured of theirs.” 86

Through Article the Second and Third of the Treaty of Waitangi the Crown had expressly permitted the continuation of a system where individual Māori would govern themselves according to their own values and norms subject only to Imperial over-sight. It was a system whereby Māori would owe allegiance to the Crown as subjects, while continuing to owe allegiance to their hapū and iwi - they became dual citizens. 87

The continuation of Māori citizenship of their hapū/iwi was the logical

85 H. Kawharu “Translation of the Māori Text, Appendix” in H. Kawharu (ed.) Waitangi Māori and Pakeha Perspectives of the Treaty of Waitangi (Oxford University Press, Auckland, 1989) 319, 320 and note his use of the word citizenship is interesting as this was not the primary definition applied in 1840 – rather the term should be subject. 86 Waitangi Tribunal Orakei Report – Wai 9 (Department of Justice, Wellington, 1987) 135.

pre-requisite for the continuation and application of Māori law and justice.\(^{88}\) This is consistent with the view of Dr Mason Durie who has argued:\(^{89}\)

The Treaty would provide for the lawful and orderly settlement of New Zealand by British immigrants. The different roles of Government and tribal authorities would be respected. Māori people would not be unfairly disadvantaged by the colonising process and could expect to retain their own social and economic systems. Additional rights, as British subjects, would be extended to all Māori people ...

**C. Events Following The Signing Of The Treaty Of Waitangi 1840-1865**

On 2 October 1840, Hobson’s proclamations were approved by the Colonial Office and published in the London Gazette.\(^{90}\) The Crown formally constituted New Zealand as a colony separate from New South Wales late in 1840.\(^{91}\) A Charter for the colony was developed conferring on the Legislative Council power to make laws for the peace, order and good government of New Zealand.\(^{92}\) However, Māori self-government and law was to continue subject to the restrictions imposed by the Imperial Parliament.\(^{93}\)

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93 See Lord Russell to Governor Hobson 9 Dec. 1840, G.B.P.P. (I.U.P. Shannon, Ireland) [1835-1842] Vol. 3, 146, 149; see also New Zealand Government Act 1846 (UK) 9 & 10 Vict. c. 103, s.10 which continued this legislative approach.
On June 30 1852, the Imperial Parliament passed the Constitution Act 1852.\(^{94}\) The Constitution Act 1852 repealed all previous Acts, Charters and Instructions but only in so far as they were repugnant to or would prevent or interfere with the operation of the 1852 Act, the new Charter and Instructions.\(^{95}\) The new Act authorised the establishment of a General Assembly consisting of the Governor, the Legislative Council and the House of Representatives.\(^{96}\) The General Assembly was invested with the power to make laws for the peace, order and good government of New Zealand.\(^{97}\) Provincial governments were established and Māori self-government continued. In this last respect the Act provided that:\(^{98}\)

And whereas it may be expedient that the laws, customs, and usages of the aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should be so observed:

The Treaty of Waitangi set the pattern of government for the colony - adhered to in the Charters and Royal Instructions of 1840-1852, the Constitution Act 1852 and its amendment in 1857. By implementing these measures at the highest level of New Zealand's constitutional arrangements the British Crown affirmed the importance of Māori self-government, law and justice.

D. Concessions to Māori Law and Justice 1840-1865

From 1841-1846 Māori law continued to govern matters inter-se with some scope for the Office of the Protector of Aborigines to intervene in inter-tribal or settler disputes.\(^{99}\) The authorities had little choice but

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94 Constitution Act 1852 (UK) 15 & 16 Vict. c. 72.
95 Constitution Act 1852 (UK) 15 & 16 Vict. c. 72, s. 1.
96 Constitution Act 1852 (UK) 15 & 16 Vict. c. 72, s. 32.
97 Constitution Act 1852 (UK) 15 & 16 Vict. c. 72, s. 53.
98 Constitution Act 1852 (UK) 15 & 16 Vict. c. 72, s. 71.
to allow Māori law and justice to continue. Legislation passed in large measure made concessions to Māori law and included statutes such as the Native Exemption Ordinance 1844, the Unsworn Testimony Ordinance, the Juries Amendment Ordinance 1844, and the Assault - Application of Fines Amendment Ordinance 1845.

However, when Lieutenant-Governor Grey arrived in New Zealand in 1846 he disestablished the Office of the Protector of Aborigines - replacing it with the Office of the Native Secretary. He repealed the Native Exemption Ordinance 1844 and passed the Resident Magistrates Courts and Administration of Justice Ordinance 1846. These statutes were designed to impose European institutions on Māori communities. Grey's system seems to have received Māori acceptance, but only while it operated to protect the status and authority of the chiefs. If for any reason Māori became dissatisfied with the system they reverted to Māori law and justice.

E. The Impact Of The Treaty Of Waitangi and Colonisation On Māori Women and their Access To Justice 1840-1865

During this period Māori women of rank maintained powerful positions within the social and political organisations of their tribal nations. This is reflected in the fact that they expected to participate in the signing of the Treaty of Waitangi - a matter acknowledged by missionaries and described by Orange thus:

101 Native Exemption Ordinance 1844 (NZ) 7 Vict., No. 18, Preamble.
102 Unsworn Testimony Ordinance 1844 (NZ) 3 Vict., No. 16.
103 Juries Amendment Ordinance 1844 (NZ) 7 Vict., No. 11, s. 1.
104 Assault - Application of Fines Amendment Ordinance 1845 (NZ) 8 Vict., No. 7, s. 1; see A. Ward A Show of Justice, Racial Amalgamation in the Nineteenth Century, New Zealand (Oxford University Press, Auckland, 1974) 67 who argues this statute was a concession to the Māori law of utu.
105 A. Ward A Show of Justice, Racial Amalgamation in the Nineteenth Century, New Zealand (Oxford University Press, Auckland, 1974) 73.
106 Resident Magistrates Courts and Administration of Justice Ordinance 1846 (NZ) 10 Vict., No. 16.
107 A. Ward A Show of Justice, Racial Amalgamation in the Nineteenth Century, New Zealand (Oxford University Press, Auckland, 1974) 84.
A precedent was established at Waitangi when Ana Hamu, the widow of Te Koki, original patron of the Paihia mission, had been allowed to sign. Henry Williams, knowing that women of high rank in Māori society could be given fitting acknowledgement, acted accordingly elsewhere. At Port Nicholson, the accession of Te Rau o te Rangi (Kahe) was allowed; at Kapiti the Chieftainsess Rangi Topeora signed. Williams also drew Hobson’s attention to a situation at Kapiti where ‘the ladies have expressed some disapprobation in not having a more prominent part in the Treaty with Her Majesty’ in as much as the agreement was with a woman. Subsequently, Williams appears to have allowed a Wanganui woman of rank, Rere o Maki, to sign. And in the North, at Kaitaia, the missionaries Taylor and Puckey had allowed the signing of Erenora, highborn wife of Nopera, chief of Te Rarawa.

In total, thirteen Māori women have been identified as signatories to the Treaty of Waitangi and more may be identified.109

This was a period when Māori women were acknowledged as owners of Māori land held under Māori law and custom and therefore they expected to participate in land sales under the pre-emption deed system.110 For example, in 1850 Te Hapūku of Kahungungu had to obtain the permission of Hineipaketia before he could sell the Waipukurau block.111 She was the person of the “highest rank” in the Heretaunga District at the time and she “pursued a course of land selling, exercising her mana over land and people as though they were her personal property.”112 She was one of several chiefs caught up in the era of confusion over the effects of sale - a period when many chiefs confused sale (alienation) with tukuwhenua (grants of interests akin to use rights).113

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110 See H. Turton Māori Deeds of Land Purchase in the North Island of New Zealand – Ahuriri Deed 1851 (A2) signed by men and women; see also A. Ballara “Wahine Rangatira Māori Women of Rank and their Role in the Women’s Kotahitanga Movement of the 1890’s” (1993) 27 No. 2, N.Z.J.H. 127, 134 where she discusses the number of women who signed the Waipukurau Deal and the Ahuriri Deed.
However, with the exposure to a new economy, introduced disease, land alienation and Christianity, Māori women's control, authority and direct participation in Māori self-government, the development of Māori law and the administration of justice was beginning to change.

In addition, the status of Māori women was undermined as European values and norms started to influence traditional practices and beliefs. The process of change began with the marginalisation of the female essence in early Eurocentric redefinitions of Māori cosmology, customs, values and norms. It continued with the failure of some colonial officials to understand the importance of Māori women in Māori society, and their insistence on “patronymic surnames and by the emphasis placed on male dominance by the pakeha population.” One early example of this lack of understanding is highlighted by Orange who notes Major Bunbury's refusal to allow a women of rank to sign the Treaty of Waitangi. It is reflected in the fact that most negotiations regarding the sale and purchase of Māori land in the main involved only men. It continued as colonial officials assumed that only male

chiefs in Māori society governed and determined directions for Māori communities.122

II. THE LEGAL SYSTEM - A TOOL OF ASSIMILATION, COLONISATION AND SOCIAL CONTROL: ITS IMPACT UPON MĀORI ACCESS TO JUSTICE 1865-1997

Imperial control from 1840-1852 over Māori affairs was designed to act as a buffer between Māori polities and settlers. The British tried to entrench that buffer zone when the four tier pattern of government - Imperial, national, provincial and Māori - was elevated to constitutional status by the Constitution Act 1852. In remote areas, this pattern was successful and many Māori polities remained autonomous well into this century.123

But in areas where there was competition for land the British attempts to create a buffer zone failed.124 The settler Governments gradually imposed their colonial legal system on Māori. The imposition of European law as a tool of assimilation, colonisation and social control will now be considered.

A. The Undermining Of The Treaty Of Waitangi

In Wallis v Solicitor-General the Privy Council accepted that in the early years of the colony the Treaty of Waitangi determined Māori rights and interests in New Zealand.125 At a local level Fenton C.J. also acknowledged the importance of the Treaty in the founding of the colony.126 But in Wi Parata Bishop of Wellington Prendergast C.J. found that the colony was a settled territory and that Māori had no "kind of civil government, or any settled system of law."127 Although

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127 Wi Parata v Bishop of Wellington (1877) 3 NZ Jur. (NS) S.C. 72, 77.
Prendergast C.J. conceded that there was a cession of a sorts under the Treaty of Waitangi, that was not important to the acquisition of sovereignty, for in his view the Treaty was nothing more that a “simple nullity.”\textsuperscript{128} It was a nullity because Māori had no civil government and no law. This was the accepted position in New Zealand until 1941.\textsuperscript{129}

In contemporary times it has been accepted that the Treaty of Waitangi cannot restrict the Parliamentary process\textsuperscript{130} and the orthodox position remains that the Treaty of Waitangi is unenforceable in a Court of law unless and until incorporated into statute.\textsuperscript{131} The Courts have tended to marginalise the Treaty of Waitangi to a document creating nothing more than political and moral obligations on the Crown. They have perpetuated the notion that the full doctrine of Parliamentary supremacy applies in New Zealand.\textsuperscript{132} But at least one judge, Lord Cooke, has indicated that fundamental questions about the constitutional position of the Treaty of Waitangi in New Zealand are still to be determined.\textsuperscript{133} He has also found that the Treaty has been acquiring some permeating influence in New Zealand law.\textsuperscript{134}

\section*{B LAND ALIENATION}

\subsection*{1. Crown purchasing of Māori Land}

The undermining of Māori Self-government, law and justice began with the alienation of Māori land and the extinguishment of aboriginal title.

\begin{thebibliography}{99}
\bibitem{128} Wi Parata v Bishop of Wellington (1877) 3 NZ Jur. (NS) S.C. 76, 78.
\bibitem{129} Compare Hoani Te Heuheu Tukino v Aotea District Māori Land Board [1941] A.C. 308.
\bibitem{132} See for example Te Runanga o Wharekauri Rekohu Inc v Attorney-General [1992] 2 N.Z.L.R. 301.
\bibitem{133} Te Runanga o Wharekauri Rekohu Inc v Attorney-General [1992] 2 N.Z.L.R. 301, 305.
\bibitem{134} Te Runanga o te Ika Whenua & Anor v Attorney-General and Ors [1994] 2 N.Z.L.R. 20, 27; In New Zealand Māori Council v Attorney-General [1996] 3 N.Z.L.R. 140, 168 a majority of the Court of Appeal did not expressly reject such an approach. Therefore the status of the Treaty of Waitangi in municipal law and the enforceability of its terms are issues that may not be settled.
\end{thebibliography}
This was achieved through the acquisition of Māori land for nominal prices and then the on-sale to settlers at a significant increase in cost. By using the Crown’s monopoly most of the South Island had been purchased by 1852. The speed of land alienation occurred through the efficient use of the Crown’s right of pre-emption guaranteed in Article the Second of the Treaty of Waitangi - a right entrenched in the Constitution Act 1852.

A Native Land Purchase Department was established in 1856. Under pressure to accelerate Crown purchasing of Māori land agents of the Department started to buy land without securing the consent of all the Māori owners. Alternatively they promised reserves and other benefits to induce sales - many of which were never provided. As a result of these tactics tribes began to resist large block land sales and by 1860 the pre-emption system had run its course. However, by this stage two thirds of the country had passed out of Māori hands.

During the late nineteenth century the Crown continued purchasing Māori land direct from individual owners following hearings by the Native Land Court. In some cases, to protect Crown interests in a block, special legislation was passed to ensure that only the Crown could acquire shares from those Māori wishing to sell. The use of

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135 See generally Waitangi Tribunal Ngai Tahu Report Wai 27 (Brooker and Friend Ltd, Wellington, 1991) 3 WTR.
136 Constitution Act 1852 (UK) 15 & 16 Vict., c. 72, s 73.
141 R. Boast “The Law and the Māori” in Spiller, Finn & Boast A New Zealand Legal History (Brookers Ltd., Wellington, 1995) 139.
142 A policy sanctioned by legislation such as the Native Land Amendment Act 1877 (NZ) 41 Vict., No. 31, s. 6.
143 See for example the Government Native Land Purchases Act 1877 (NZ) 41 Vict., No. 30, the Thermal Springs Acts 1881 (NZ) 45 Vict., No. 20, and the Urewera District Native Reserve Act 1896 (NZ) 60 Vict., No. 27.
legislation to secure the purchase of land for the Crown reached a hiatus with the purchasing policies pursued by the Liberal Government from 1890 to 1911.  

In summary, the aggressive purchasing policies of successive governments resulted in Māori land alienation and this contributed to the decline in tribal authority and autonomy. Crown purchasing policies accelerated the imposition of Parliamentary sovereignty, law, and justice.

2. Raupatu

During the years 1850-1860 there occurred two very important developments. The first development was the establishment of settler government in 1852. The second was the rise of the Māori anti-land selling leagues. In Taranaki, the Māori movement was headed by leaders such as Wiremu Kingi. In Waikato, the leagues would hasten the formation of the Kingitanga (the King Movement). In the Hawkes Bay-Napier region, Māori would resist land sales until the introduction of the Native Land Court.

In 1859 the settler Government and the Māori land leagues clashed after Governor Gore-Brown insisted on implementing a purchase of the Waitara block in Taranaki. His insistence on the purchase reflected the general settler desire to impose European authority, law, and justice on Māori. The block was offered for sale by Te Teira - an offer opposed by Wiremu Kingi. Gore-Brown’s insistence on completing the purchase was the trigger that would lead to war.

146 The Abolition of Provinces Act 1875 (NZ) 39 Vict., No. 21.
149 A. Ward A Show of Justice, Racial Amalgamation in the Nineteenth Century, New Zealand (Oxford University Press, Auckland, 1974) ch. 7.
150 J. Belich The New Zealand Wars and the Victorian Interpretation of Racial Conflict (Auckland University Press, Auckland, 1986) 77-78.
During the wars the settler government passed the New Zealand Settlements Act 1863. The purpose of the Act (and its amendments of 1864, 1865 and 1866) was to punish those Māori who had taken up arms. In total there were five confiscations authorised by proclamations under the Act, in Taranaki, Waikato, Tauranga, Whakatane-Opotiki and Mohaka-Waikare. Between the years 1864 and 1867 the New Zealand Government confiscated approximately three and a quarter million acres of Māori tribal land. Under the 1863 Act, where the Governor in Council was satisfied that a Māori polity had been engaged in rebellion against the authority of the Crown, he could declare a rebel tribal area a district to be set apart for settlement and colonisation and within which military settlers were to have priority in land allocation.

The effect of the raupatu (confiscations) was devastating on those Māori communities caught within the Districts established under the legislation. “Loyal Māori” were as affected by the legislation as those in rebellion. They all lost their aboriginal title and, even though some loyalists recovered their interests by Crown grant, many others did not. The Royal Commission in 1928 (the Sim Commission) would have investigated the impact of the confiscations on Māori communities.

152 New Zealand Settlements Act 1863 (NZ) 27 Vict., No. 8.
154 There were also confiscations pursuant to other legislation in other areas including the East Coast of New Zealand, where land was taken from ‘rebels’ under the East Coast Land Titles Investigation Act 1866 (NZ) 30 Vict., No. 27. An analysis of these confiscations is beyond the scope of this chapter.
156 New Zealand Settlements Act 1863 (NZ) 27 Vict., No. 8, s. 2.
157 New Zealand Settlements Act 1863 (NZ) 27 Vict., No. 8, s. 3.
158 New Zealand Settlements Act 1863 (NZ) 27 Vict., No. 8, s. 16.
160 New Zealand Settlements Act 1863 (NZ) 27 Vict., No. 8, s. 5.
161 New Zealand Settlements Act 1863 (NZ) 27 Vict., No. 8, s. 5, 7.
later find that the war in Taranaki was “unjust and unholy.”163 In respect of the other confiscations under the New Zealand Settlements Act 1863, the Sim Commission’s findings are less persuasive. The Commission held: (a) that aspects of the confiscations in Waikato were justified but the amount of land taken was excessive;164 (b) in Tauranga the Commission believed that the confiscation was justified;165 and (c) in Whakatane-Opotiki the Crown’s actions were considered just but excessive.166 These findings were based on poor research and investigation and, as noted by Boast, the report “…looks somewhat amateurish and superficial.”167 Following the report of the Sim Commission, there were attempts made to settle the confiscations by the Rt. Hon. Peter Fraser and his government.168 However, these settlements failed to adequately address all issues and the legacy of grievance left by the raupatu is only now being seriously addressed.169

In summary, the raupatu policies continued the process of Māori land alienation, they directly attacked tribal authority and autonomy and they accelerated the imposition of Parliamentary sovereignty, law, and justice.

3. The Native Land Acts

In 1862 the Native Land Purchase Department was abolished, but Māori still held 21 million acres of land. A new system to extinguish Māori title to land was required - a system that would replace Māori title with a Crown grant. This system was established by the Native Lands Act 1862.170 Just three years later, the Native land legislation

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169 See for example the Waikato Raupatu Claims Settlement Act 1995 (NZ).
170 Native Land Act 1862 (NZ) 26 Vict., No. 42.
was reviewed and this led to the passage of the Native Land Act 1865 which was designed to: 171

... provide for the ascertainment of the persons who according to such [Māori] customs are the owners thereof and to encourage the extinction of such proprietary customs and to provide for the conversion of such modes of ownership into titles derived from the Crown and to provide for the regulation of descent of such lands.

During the period 1865-1900 the main function of the Court was to convert customary tenure into Crown derived titles. Although the Native land legislation allowed the imposition of restrictions on alienation thus giving the appearance of concern for Māori: 172

At no time were alienation restrictions intended by the Government in office to be permanent restrictions which would create reservations for Māori. Rather, they were seen as necessary to slow the speed of alienation and to avoid Māori becoming paupers who might become dependent upon the State. They were to remain only until such time as Māori moved away from communalism, found their place in the colony and assimilated Pakeha ways of providing for themselves. In 1909, alienation restrictions were removed by law without any Court process or consultation with owners of land still subject to them. The Crown, on the other hand, retained the right to impose restrictions in favour of Crown purchasing of land blocks.

The Court encouraged individualisation by permitting partition of individual interests - thereby contributing to the loss of Māori land. 173

In ascertaining title, the Court took into account Māori customary law but would only apply that law where it conformed with the general

171 Native Land Act 1862 (NZ) 26 Vict., No. 42 Preamble, (emphasis added).
objectives of assimilation, individualisation and alienation.\textsuperscript{174} For example, it could have applied the Māori customary law of succession,\textsuperscript{175} but chose to develop the succession in equal shares to all children rule - first laid down in the \textit{Papakura Case}.\textsuperscript{176} During the period 1865-1900 the burden of attending Court sittings would take its personal and financial toll on Māori land owners\textsuperscript{177} and Court towns became tenements for diseases.\textsuperscript{178}

After 1900, the Native Land Court assumed adjudicative and administrative functions such as supervising alienation and development. From 1900-1952, it shared these responsibilities with the Māori Land Councils initially created under the Māori Lands Administration Act 1900.\textsuperscript{179} The legislation conferred on these councils extensive powers in relation to the administration of Native lands,\textsuperscript{180} including a veto power over alienation,\textsuperscript{181} and significant land development functions.\textsuperscript{182} The establishment of the Councils (later to become Boards) did not arrest alienation, few Māori were involved with the Boards,\textsuperscript{183} and the alienation of Māori land continued. The Māori Affairs Act 1953 did not reverse the impact of the previous Māori land statutes. Succession, partitions and procedures for alienation and changing status all continued to facilitate alienation until at least 1974. In addition, two new powers to facilitate alienation were added to the legislation. Under Part 24 of the 1953 Act, titles to Māori land could be consolidated for management by the Board of Māori Affairs - regardless of the wishes of the owners.

\begin{thebibliography}{99}
\bibitem{175} Native Lands Act 1865 (NZ) 29 Vict., No. 71, s. 30.
\bibitem{176} A. Ward \textit{A Show of Justice, Racial Amalgamation in the Nineteenth Century, New Zealand} (Oxford University Press, Auckland, 1974) 187.
\bibitem{177} R. Boast "The Law and the Māori" in Spiller, Finn & Boast \textit{A New Zealand Legal History} (Brookers Ltd., Wellington, 1995).
\bibitem{178} R. Boast "The Law and the Māori" in Spiller, Finn & Boast \textit{A New Zealand Legal History} (Brookers Ltd., Wellington, 1995) 152-153.
\bibitem{179} R. Boast "The Law and the Māori" in Spiller, Finn & Boast \textit{A New Zealand Legal History} (Brookers Ltd., Wellington, 1995) 156.
\bibitem{180} Māori Lands Administration Act 1900 (NZ) 64 Vict., 55 ss. 9, 21, 22.
\bibitem{181} Māori Lands Administration Act 1900 (NZ) 64 Vict., 55 ss. 22, 29.
\bibitem{182} Māori Lands Administration Act 1900 (NZ) 64 Vict., 55 ss. 28,31.
\end{thebibliography}
In addition, the Māori Land Court could vest uneconomic Māori land interests (not exceeding 25 pounds in value) in the Māori Trustee - again regardless of the wishes of the owners.\textsuperscript{184}

In summary, the Māori land legislation continued the process of Māori land alienation and contributed to the decline in tribal authority and autonomy.

C. Concessions to Māori Autonomy

Following the signing of the Treaty of Waitangi, Māori tribes and sub-tribes believed they retained unto themselves their tino rangatiratanga (inherent sovereignty).\textsuperscript{185} Many Māori polities, those who signed the Treaty and those who did not, continued to behave as sovereign entities following the assertion of British sovereignty.\textsuperscript{186} During the period 1860-1900, on issues of national importance, Māori continued to organise collectively at both a national and local level.\textsuperscript{187} They continued to resist the assertion of colonial sovereignty. Examples of these national movements include the Land Leagues, the Kingitanga (Māori King Movement), the Hauhau and Pai Marire Movements (Religious Cults), Kauhanganui, the Repudiation Movements, and the Kotahitanga Movement (Māori Parliament).\textsuperscript{188} An example created during the twentieth century has been the Māori Congress.\textsuperscript{189}

Evidence on the European responses to these Māori movements suggest that successive Governments were forced to concede to Māori demands for more autonomy. For example, legislation recognising Māori

\begin{footnotes}
\item[185] L. Cox Kotahitanga: The Search for Māori Political Unity (Oxford University Press, Auckland, 1993) 3-4.
\item[186] L. Cox Kotahitanga: The Search for Māori Political Unity (Oxford University Press, Auckland, 1993) ch. 4.
\item[188] L. Cox Kotahitanga: The Search for Māori Political Unity (Oxford University Press, Auckland, 1993) ch. 4.
\item[189] L. Cox Kotahitanga: The Search for Māori Political Unity (Oxford University Press, Auckland, 1993) ch. 7.
\end{footnotes}
rights to exercise regulatory functions was enacted by the settler Government in 1858. This legislation was used to develop the Māori runanga system. These early runanga dealt with political and social issues, as well as legal matters. But from the beginning of the scheme, there were major problems. In all but a few Māori districts, the runanga generally lacked significant Māori support. Māori preferred to continue to determine their disputes in accordance with Māori law and justice, and they would resent any interference from the Resident Magistrates or District Runanga. Settlers criticised the system and the colonial government eventually withdrew much of its support following the outbreak of war. The system was discontinued in 1865.

Another example is the Māori Representation Act 1867 which established the four Māori seats in Parliament and was a concession to the loyalist tribes who had fought with the British. In this regard Belich has noted that:

190 L. Cox Kotahitanga: The Search for Māori Political Unity (Oxford University Press, Auckland, 1993) 80-90; Native Districts Regulation Act 1858 (NZ) 21 & 22 Vict., No. 41; Native Circuit Courts Act 1858 (NZ) 21 & 22 Vict., No. 42.
192 A. Ward A Show of Justice, Racial Amalgamation in the Nineteenth Century, New Zealand (Oxford University Press, Auckland, 1974) 142-143.
194 L. Cox Kotahitanga: The Search for Māori Political Unity (Oxford University Press, Auckland, 1993) 88-89; see also the Resident Magistrates Act 1867 (NZ) 31 Vict., No 13 repealed by the Magistrates Court Act 1893 (NZ) 57 Vict., No. 55.
195 See the Māori Representation Act 1867 (NZ) 31 Vict., No. 47; see also J. Belich Making Peoples (Allen Lane, Penguin Press, Australia, 1996).
196 J. Belich Making Peoples (Allen Lane, Penguin Press, Australia, 1996) 244; The Māori Representation Act 1867 followed the convening of the Native Commission, constituted under the Native Commission Act 1865 (NZ) 29 Vict., No. 12. The Commission’s function was to examine and report to the Governor on the most expedient mode of defining an electoral franchise for Māori pending the conversion of their aboriginal title to a Crown derived title. The Commission could also advise on any matter relating to or affecting the interests and well-being of Māori referred to them from the Governor.
The disengagement of imperial troops, completed by 1866, left the colonial government more dependent on local allies, and more willing to conclude bargains favourable to them - including the four Māori seats in Parliament.

Later in the century, and despite the continuous undermining of Māori authority through the promotion of policies designed to facilitate land alienation, the Crown was forced to respond to Māori demands for more autonomy with legislative schemes designed to recognise and affirm limited rights to administer Māori self-government, law and justice. Examples include the Māori Councils Act 1900 which was a response to demands from the Kauhanganui and Kotahitanga movements for more autonomy. The Māori Social and Economic Advancement Act 1945 followed the Māori war effort. Both these Acts authorised Māori Councils (later Tribal Committees) to make by-laws over matters such as housing and sanitation matters, nuisance, certain family matters, stock, fisheries, and minor offending within Māori villages. However, these by-law functions were not continued into the Māori Welfare Act 1962 (now the Māori Community Development Act 1962). These measures all represent attempts to address Māori demands for "rangatiratanga" (Māori sovereignty, autonomy and self-government). But these statutes were flawed because they generally vested too much supervisory power in the Crown, thereby undermining Māori autonomy, and they were never adequately resourced.\footnote{L. Cox \textit{Kotahitanga: The Search for Māori Political Unity} (Oxford University Press, Auckland, 1993) 108.}

In summary, concessions to Māori autonomy did not arrest the decline in tribal authority and they did not prevent the full imposition of Parliamentary sovereignty, law, and justice.

\section*{D. The Impact of Statute Law on Māori Law and Access to justice}

The use of statute law to suppress Māori rights, their values, customs and norms has had a major impact on Māori. For example, extreme legislation was passed in Taranaki where the Government’s raupatu policies led to resistance from the pacifist prophets, Te Whiti and
Tohu.198 These prophets and their followers attempted to prevent, through peaceful means, the implementation of surveys and the encroachment of settlers onto their lands. The Government responded to their resistance by enacting the Māori Prisoners Trials Act 1879, the Māori Prisoners Act 1880 and the West Coast Settlement (North Island) Act 1880, which together combined to permit the arrest of these Māori leaders and their followers and authorised their imprisonment for long periods without charge or trial,199 thus denying Māori access to British and Māori justice.

Another example has been the use of statute law to over-turn decisions of the Privy Council favourably recognising Māori rights to land held under their laws and customs. For example, in Tamaki v Baker the Privy Council found that mere assertion of title by Crown grant was not sufficient to extinguish Māori aboriginal title.200 The response of the colonial state to the decision of the Privy Council was swift: rather than review the Government’s previously unlawful practice, Parliament simply passed legislation over-ruling the Privy Council decision.201 In Wallis v Solicitor-General the Privy Council upheld claims based on aboriginal title.202 Upset by the criticism of the Privy Council, the colonial judges marched through the streets of Wellington in protest.203 The by now predictable response from the government was to enact legislation to overcome the effects of the Privy Council’s decision.204 The legislation would declare that aboriginal title was unenforceable as against the Crown and this remained the statutory position from 1909 until 1993 when the relevant provision was repealed by the Te Ture Whenua Māori (Māori Land) Act 1993.

199 Māori Prisoners Trials Act 1879 (NZ) 43 Vict., No. 3; Māori Prisoners Act 1880 (NZ) 44 Vict., No. 4; West Coast Settlement Act 1880 (NZ) 44 Vict., No. 39.
201 Land Titles Protection Act 1902 (NZ) 2 Edw. VII., No. 37.
204 Native Lands Act 1909 (NZ) 9 Edw VII, No 15, s. 84.
Legislation such as the Tohunga Suppression Act of 1907 made it an offence for Māori tohunga to engage in their art,\(^{205}\) attacking thereby the very foundation of Māori spiritual and religious practice. As a result of the legislation, Mikaere notes, not "only was Māori expertise in childbirth practices lost, but health practices generally, all of which embodied a major spiritual component were banned."\(^{206}\) In the areas of health and education statute law and policy resulted in the demise of Māori practices and the decline of the Māori language.\(^{207}\)

In addition, although Māori continued to exercise local self-government under the Māori Councils Act 1900 and under the Māori Social and Economic Advancement Act 1945, their authority to manage their villages and rural zones was undermined by the growth in local authorities and the extension of local authority powers under legislation such as the Town-Planning Act 1926. For example, under the 1926 Act city, borough, and county councils were vested with responsibility for preparing planning schemes. Under ss. 22 and 27 of the 1926 Act, these local authorities were vested with the power to do all that was necessary to implement the planning schemes. These powers were continued into the Town and Country Planning Act 1953. With the advent of planning schemes, it became increasingly difficult to build on Māori rural land or to use that land in a manner inconsistent with the planning schemes. It was not until the Town and Country Planning Act 1977 that the relationship between Māori and their culture and traditions with their ancestral lands had to be taken into account in the planning process.\(^{208}\) However, even that Act did not arrest the impact of the legislation on Māori. This was a matter considered in 1980 during the hearings held by the Royal Commission of Enquiry into the Māori Land Court. A number of submissions were presented detailing the difficulties of building on and utilising Māori land as a result of planning legislation.\(^{209}\)

\(^{205}\) Tohunga Suppression Act 1907 (NZ) 7 Edw VII, No 13, s. 2.


\(^{207}\) See Waitangi Tribunal Te Reo Report Wai 11 (Govt. Print, Wellington, 1986) for impacts on Māori Language.

\(^{208}\) Town and Country Planning Act 1977, s. 3 (1)(g).

The planning process, Māori land alienation, and government policies all contributed to Māori urbanisation.

Māori people went to the cities looking for jobs because government assimilation policies in the 1950s and 60s encouraged this, and because it was in accordance with an economic fact first pointed out by the economist Horace Belshaw in 1940: "... there is an unambiguous picture of a people whose land resources are inadequate, so that a great and increasing majority must find other means of livelihood."

These factors, coupled with the Māori population recovery in the 1940s-1960s, made urbanisation inevitable for the “upsurge in the Māori population was to mean that the available land was not sufficient to support the increasing numbers. Other factors contributing to urbanisation have been identified by Mikaere:

Māori migration to the urban centres was hastened by the need for labour in the factories during the second world war and, following the war, by the Māori Affairs Department policy of restricting housing loans to those people prepared to buy properties in town.

Urbanisation has occurred rapidly and has impacted on the social and political structures of Māori society. As a result of urbanisation whānau, hapū and iwi have been subject to enormous social, cultural and financial stress. This in turn has resulted in an increasing number of Māori

individuals appearing before the Family and Criminal courts. It is to
the impact of the criminal justice system and family law that we now
turn.

E. The Criminal Justice System And Family Law

The European model for the administration of criminal justice was
established very early on in the history of the colony. However, as we
have noted, there were some concessions made to Māori law and
justice. It was only in 1962 that the remnants of these legislative
concessions were repealed. The provisions repealed included the
jurisdiction of tribal committees established under the Māori Social and
Economic Advancement Act 1945 to hear minor summary offences
and breaches of tribal bylaws and the provision in the Juries Act
1908 which recognised the right of Māori defendants to have their
cases heard before Māori juries. Now all adult criminal cases are
heard in the Criminal Courts and there is no distinction drawn between
offenders.

In some District Courts the use of Māori protocol has been actively
discouraged. There is no direct participation from the Māori
community in establishing the guilt of adult offenders - consequently
Māori victims and their whānau are not able to participate in the criminal
justice process. It is therefore a process that alienates both the accused
and the victim rather than a process that restores balance to them or
their whānau. There is, however, provision for the cultural background
of the offender to be taken into account during sentencing, but rarely
will the Courts consider Māori values or norms as justification for
“criminal” behaviour. For example in R v Hawkins the Crown

216 See M. Sorrenson “Modern Māori the Young Māori Party to Mana Motuhake in
K. Sinclair (ed) Oxford Illustrated History of New Zealand (Oxford University
Press, Auckland, 1996) 321, 340-341 and discussion on the impact of urbanisation
and the increase in Māori crime rates.
217 Māori Social and Economic Advancement Act 1945 (NZ) ss. 30-47.
218 Juries Amendment Act 1962 (NZ).
220 Compare, Inside New Zealand Marae Justice-Aroha Terry (Documentary, August,
1994).
221 Criminal Justice Act 1987 (NZ), s. 17.
successfully pursued an appeal in a case where the accused had been charged with wounding with intent to cause grievous bodily harm. During sentencing the accused had argued that he had been provoked by a breach of tapu when the complainant had sat on a kitchen table. In the District Court the trial judge found that the Māori protocol relied on in this case was a “special circumstance” to be taken into account during sentencing as contemplated by section 5 of the Criminal Justice Act 1985. On appeal it was held that the breach of tapu was wrongly classified as a “special circumstance” and the sentence of 9 months periodic detention entered by the District Court was quashed and substituted with a 2 year term of imprisonment.

The Māori imprisonment rate indicates that Māori are disproportionately over-represented in the prison system. The general Māori perception of the criminal justice system is that it discriminates against Māori and there have been demands made for a parallel justice system.

In addition, common law rules applied by the New Zealand Judiciary have undermined Māori values and norms associated with the Māori whānau. For example, as early as 1888 the Courts in New Zealand declared that all customary marriages must be celebrated in the same way as English common law marriages, thus failing to recognise that Māori customary marriages were different to European marriages. This approach to Māori customary law is to be compared to that of the Privy Council which in 1919 held that the right of Māori to modify their adoption customs was not interfered with by the Adoption of Children Act 1895. However, this victory was one in form only as the

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223 Justice Department Statistics 1995 indicate the Māori male prison population at 52% and the Māori female prison population at over 60%.


225 See Rira Peti v Ngarahi te Paku (1888) 7 N.Z.L.R. 235; Rex v Wairemu Kingi (1909) G.L.R. 175; In re Wi Tamahau Mahupuku (Deceased), Thompson & Anor. v Mahupuku (1932) G.L.R.

Government by this time had enacted the Native Lands Act 1909, expressly declaring Māori customary adoption practices (entered into after the enactment of the 1909 Act) to be of no legal effect.227

The family law statutes enacted since 1950 reflect the periods assimilationist policies “largely by ignoring Māori social policies and objectives, as if they did not exist.”228 Two of the statutes directly or indirectly reject Māori approaches - namely the Adoption Act 1955 and the Marriage Act 1955. No Māori customary marriage could be considered valid for any purpose following the Māori Purposes Act 1951 and the Māori Affairs Act 1953.229 The Marriage Act 1955 was passed following the introduction of these statues and the overall effect of these three statutes has been the denial of the validity of Māori marriage practices.230 The Adoption Act 1955 deems that since the commencement of the Native Land Act 1909 no person has been capable of adopting a child in accordance with Māori custom.231

As Hall and Metge point out, recognition of Māori values and norms is conspicuously absent from the Guardianship Act 1968, the Matrimonial Property Act 1976, the Family Proceedings Act 1980 and the Domestic Violence Act 1995.232 Instead these statutes reflect European family values and norms, many of which conflict with “Māori understandings and practices regarding the family.”233

227 Native Lands Act 1909 (NZ) s. 161.
229 Māori Affairs Act 1953 (NZ) s. 79 (1).
As a result, the success of attempts to raise Māori issues in family law proceedings depends very much on the discretion of the judges. For example, attempts to rely on Article 2 of the Treaty of Waitangi in guardianship proceedings have been expressly rejected by the Courts.\footnote{234} In adoption cases the Courts will not usually decline adoption orders on the basis of Māori values and norms,\footnote{235} although some judges have been prepared to consider future access in favour of whānau members.\footnote{236} The Family Court has not been prepared to recognise special rules for any segment of the population - particularly Māori.\footnote{237} However it has accepted the importance of Māori culture to the welfare of the child in some guardianship cases.\footnote{238} In other cases the Family Court has expressly rejected Māori attempts to obtain custody of children on the basis of their blood relationships.\footnote{239}

Māori values and norms have been significantly under-utilised in the procedure of the Family Courts established by the Family Courts Act 1980. While there have been cases heard on marae, there are instances where requests for this procedure have been rejected.\footnote{240} Therefore, the extent to which Māori values and norms are used during Family Court proceedings remains an issue subject to the discretion of the judges.


\footnote{236} T v S (No 1) [1990] N.Z.F.L.R. 411.


E. The Rise Of The Treaty

Since 1975 many statutes have been enacted recognising the principles of the Treaty of Waitangi. The most important of these statutes has been the Treaty of Waitangi Act 1975 which authorised the establishment of the Waitangi Tribunal. Heralded as a new forum for Māori justice, the Waitangi Tribunal has been gradually uncovering the history of the law as a tool of colonisation and social control. During the period 1975-1997 it has reported on a significant number of the 650 or more claims before it. These reports have been used by Māori claimants to negotiate with the Crown to achieve settlements of historic grievances caused by actions and policies of the Crown. Several significant settlements have been achieved - for example the 1992 Sealords Settlement. However, the process for the resolution of claims is slow and is hindered by political and financial constraints.241 Fundamental issues regarding the need for constitutional change based on the Treaty of Waitangi are only now being debated outside Māori circles.242

In addition, while other statutes such as the State Owned Enterprises Act 1986, the Conservation Act 1987 and the Resource Management Act 1991 have been used successfully by Māori to pursue Māori claims, ultimately the resolution and settlement of these claims remain matters to be determined by negotiation between Crown and Māori - a process again subject to political and financial constraints.

F. Impact Of Colonisation On Māori Women And Their Access To Justice 1865-1997

During the 1850s and 1860s, Māori women continued to play important and active roles in their communities, particularly those involved with the Māori land leagues and the Māori wars.243 Māori women and their

families suffered from land alienation and the raupatu policies and at Parihaka it was the women and children who were at the front of the ranks with their men protecting Te Whiti and Tohu during the invasion by the Constabulary. 244

In leadership matters Māori women continued to maintain prominent positions in Māori communities. For example, Te Paea, sister of King Tawhiao, who was famous for her skills as a peace maker and mediator, 245 persuaded Ngati Kahungungu to cease their pursuit of Te Kooti into the Urewera district in the period 1868-1870. 246 Te Kooti himself was assisted in his escape in 1870-1871 into the Ureweras by his wife Makurata. 247 Later in the century Ani Kaaro, grand-daughter of Patuone, was consulted by Waikato chiefs before the signing of the Treaty of Union between Waikato and Nga Puhi in 1885. 248 Other women assumed major roles in the Māori spiritual and religious cults such as the Ringatu. 249

There were Māori women who resisted and protested against the Native land legislation. 250 They were particularly upset about the gradual erosion of their property rights by provisions which granted to their husbands the right to be a party to deeds of disposition following a Native Land Court hearing. 251 Hohepa points out that this “...meant that customary dealings in land were not only subject to assimilation practices but also to gendered views on Mana Wahine.” 252

244 D. Scott Ask that Mountain, the Story of Parihaka (Henemann/Southern Cross, Auckland, 1987) 113-114.
The influence of European culture eventually reached into the core of Māori society. When European law was applied to Māori women their status was reduced to that of their European counterparts. Examples include the discriminatory provisions in the Native Land legislation, the common law rules relating to succession to matrimonial property, the status of women following marriage, complicated divorce laws which differed to those applied following the end of a customary marriage, the common law right of a husband to discipline and/or rape his spouse and the imposition of the Christian marriage ceremony. All contributed to the declining status of Māori women. To make matters worse, and as colonisation proceeded, Māori began to internalise European patriarchal values and Māori men assimilated these views with a vengeance. For example, Binney has reproduced oral evidence from Heni Sunderland, born in 1916, a prominent woman of the Rongowhakaata tribe, who recalls her resistance to the introduction of chairs on the paepae of marae and their allocation to men only.

On national political matters, consistent with the position taken by European men, Māori men resisted the franchise for Māori women in the Māori Parliament (Te Kotahitanga). In response women such as Meri Mangakahia of Te Rarawa and Akenehi Tomoana petitioned for the right of Māori women to vote in Te Kotahitanga - a right finally granted in 1897. There were many powerful women associated

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254 P. Hohepa & D. Williams The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession (Law Commission, Wellington, July 1996) 29 where Hohepa illustrates the extent to which these views have been internalised. He quotes an example from 1981 of men challenging, on the basis of gender, the right of women to be trustees on a Māori land block.


with the Kotahitanga and some of these women have been identified by Ballara. These Māori women began the movement to organise collectively as women and Meri Mangakahia’s work would act as the “catalyst for the formation of Nga Komiti Māori - tribally based Māori women’s committees...” The committees held meetings to discuss “issues such as land, the general state of Māori people and the political issues of the day.” The committees subsequently became known as village women’s committees and they continued to operate on most marae until World War II.

After the war, the need for separate Māori women’s committees continued as so few women were appointed to tribal committees established under the Māori Social and Economic Advancement Act 1945. With the assistance of welfare officers employed under the 1945 Act, women’s welfare committees were established and by 1950 there were over 180 committees. In 1951, these committees would form the nucleus for the establishment of the Māori Women’s Welfare League (MWWL). Te Puea of Waikato was its patron and Whina Cooper its inaugural president. With this leadership the MWWL

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attacked issues such as the need for Māori language in schools and kindergartens, Māori women’s and children’s health and welfare issues, and improving Māori housing conditions. Since its inception, the MWWL has taken a keen and active interest in access to justice issues. For example, members of MWWL have either worked as welfare officers appointed under the Māori Community Development Act 1962, as social workers, matua whangai workers or as volunteers in the European justice system. These attempts to organise have been undermined by the State and by Māori men. In 1962, Māori men successfully lobbied European male politicians for the establishment of a State funded national body dominated by Māori men - this resulted in the establishment of the New Zealand Māori Council. That the MWWL has survived despite this opposition is testimony to the leadership skills of Māori women.

There have been many exceptional Māori women who have participated across the Māori social, political and cultural spectrums. For example, Iriaka Ratana (the first Māori woman Member of Parliament) and Whetu-Tirikatene Sullivan represent a generation who saw the necessity for active participation in Parliament to ensure the abolition of oppressive laws that have affected Māori. Other Māori women have led the Māori

activist movement against those same oppressive laws: figures such as Eva Rickard, Nganeko Mihinnick, Titewhai Harawira, Hilda Harawira, Donna Awatere-Huata, Ripeka Evans and Atareta Poananga immediately spring to mind. On health matters women such as Dr Paparangi Reid and Irihapeti Ramsden have worked tirelessly for health reforms that will be beneficial for Māori. Challenging institutions of law from within the legal profession are women such as Denise Henare, Annette Sykes, Gina Rudland, Moana Maniapoto, and many others. These women are assuming prominent positions in the profession and/or are using their legal skills to raise awareness about the impact of the law as a tool of assimilation, colonisation and social control.

However, and despite the achievements of these Māori women, the law as a tool of assimilation, colonisation and social control has taken its toll on the status and role of the great majority of Māori women. Māori women have generally been marginalised in the political decision making process including the settlement of Māori claims. Politicians continue to prefer to hear the Māori male voice - a matter that has resulted in the filing of the Mana Wahine claim to the Waitangi Tribunal.

III. CONCLUSIONS

Dr Mason Durie has stated that if:

... one objective of the Treaty of Waitangi was to minimise disadvantages to Māori people as a result of colonisation, then indices of well-being are particularly relevant to determine outcomes of that objective. In fact, comparisons between Māori and non-Māori reveal alarming disparities for almost every measure of well-being, including health, education, housing, employment, income, and crime.

Indices of well-being indicate that Māori have been unfairly disadvantaged by the colonising process, that tribal autonomy has not been respected and that Māori political, social and economic systems have not been able to withstand the colonising process. This in tum has lead to inequalities of treatment and opportunity. Māori inequalities are the result of:\textsuperscript{274}

- Māori land alienation;
- rural to urban migration;
- the declining authority of tribal leaders;
- poor educational attainment;
- a decline in the use of the Māori language; and
- social and economic marginality.

In its report, \textit{Taranaki Report: Kaupapa Tuatahi 1996} the Waitangi Tribunal understood the impact of these factors on Taranaki Māori development and wellbeing when it commented:\textsuperscript{275}

Social and economic destabilisation of Taranaki Māori is a major compensation heading arising from the circumvention of the traditional leadership, its disregard for Māori rights of autonomy, its levying of war, its land acquisition, and land reform ...

The Tribunal also considered that in Taranaki “current social and economic performance may be a measure of past deprivation and poverty”.\textsuperscript{276} A similar finding has been made in relation to the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{275} Waitangi Tribunal \textit{Taranaki Report: Kaupapa Tuatahi – Wai 143} (Government Print Publications, Wellington, 1996) 313.
\item \textsuperscript{276} Waitangi Tribunal \textit{Taranaki Report: Kaupapa Tuatahi – Wai 143} (Government Print Publications, Wellington, 1996) 314.
\end{enumerate}
\end{footnotesize}
Muriwhenua Tribes. These tribes have suffered from land alienation and the undermining of tribal authority leading to physical deprivation, poverty, social dislocation, and loss of status.\(^{277}\)

Therefore, the law has played an important role in undermining tribal control and authority, Māori self-government, law and Māori justice. It has made Māori subject to imposed European models of government and law. It has resulted in the subjugation of Māori women and their families and it has impacted on their overall well-being. It has also been the major instrument in denying Māori women access to justice. It has contributed to a situation where, based on the 1991 census, “approximately 40% of Māori families are sole parented, 84% by Māori women, the majority of whom have no school qualifications and are unemployed.”\(^{278}\) Māori women are on the outside looking in. It is time to open the door.

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INTRODUCTION: AN EXAMPLE OF MEDIA MAYHEM

On 13 April 1999 the front page of the Waikato Times ran an article which began with the headline: “Warning: this man kills”. The article then proceeded, in a very simplistic and crude manner, to describe the attributes and profile of the man most likely to kill you on the Waikato roads. The profile read as follows:

- **AGE:** Early 20s
- **RACE:** Māori
- **JOB:** None
- **CAR:** Older model
- **WHEN:** Friday afternoon
- **WHERE:** A State Highway

Under the headline for the article was a mug shot of a young Māori male. The article highlighted the media’s negative and racist attitude towards criminals and Māori by incorrectly presenting a simple profile of a young Māori man as being a prime offender in fatal crashes.

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1. See Appendix 1 for a copy of the article.
2. The Waikato Times ran a subsequent article, albeit on page three, admitting that their story was misleading and incorrect. This article is entitled “Single Profile of Offending driver incorrect” and is attached as Appendix 2.
The initial reaction to the report was one of disgust, coupled with a degree of amazement at such blatantly expressed media racism. However, in reviewing a sample of articles it was found that the media generally present Māori in a negative light. This served as motivation to examine and respond to this particular example of such negative media portrayal of Māori.

Further incentive for seeking to analyse Māori, mainstream media and crime, in its broadest sense, comes from attempts to obtain New Zealand and particularly Māori writing relating directly or indirectly to this topic. There is a scarcity of New Zealand scholarship in this area. In 1993, McGregor noted a paucity of academic research about the coverage of crime news in New Zealand:

Media scholarship about crime news is scant in New Zealand and it is ten years since Kelsey and Young examined gangs, the news media and the concept of "moral panic". In part, the paucity of research reflects the low level of debate and scholarship about the news media generally in this country.

Prior to European contact, the word Māori simply meant normal or usual. There was no notion of a dominant Māori hegemony. There was no concept of a Māori identity predicated around cultural or national semblance. Instead the distinguishing features, which demarcated groups, were mainly attributed to tribal affiliations and the natural environment. For further discussion refer to Meredith, P Understanding the Māori Subject (Unpublished paper, 1998) and Durie, M Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination (Auckland: Oxford University Press, 1998).

Researching and writing from this basis will obviously impact on the way in which I access and interpret the information, ask questions and write the overall chapter. It could be argued that this method is biased, emotive and not value-neutral. (For further discussion see Davies M, & Seuffert, N Situated Knowledges, Identity Politics, and Policy Making (1996). It could also be argued that this method does not follow traditional western knowledge which is built on the premise that knowledge can be objective. However, as Chen in "Discrimination in New Zealand: a personal journey" ("VULR (1993) 137) noted "using experiences as a basis for analysing the law can challenge prevailing legal ideologies; it can enlist empathy and understanding from people whose own experiences do not ordinarily lead them to challenge official views".

Reference is made here to all types of broadcasting, although the media discussed in this chapter are mainly newspapers and television. It should be noted that this chapter does not consider the impact of Māori Television. It is too early to assess whether Māori television will have a positive or negative effect in terms of reporting Māori.

While it is acknowledged by McGregor that there has been some reporting undertaken in relation to specific journalistic practices, she notes that the way in which crime, policing and law-and-order news is portrayed is seldom scrutinised. My own experience of searching for New Zealand research on the media portrayal of crime in New Zealand has shown that there remains a scarcity of such material.

While there is a dearth of New Zealand scholarship and debate on crime and the media, there is a virtual void of Māori material relating to Māori and media, let alone Māori, crime and the media. It is hoped that this chapter will contribute towards the filling of that void.

The chapter begins with a consideration of how the media portray Māori, looking in particular at New Zealand’s media within an historical context of colonisation. Attention is then focussed on the important aspect of media production and ‘news values’. The chapter then turns to crime and the media, and seeks to analyse the media’s obsession for crime. The last part of the discussion looks at how the media’s

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7 Reports such as Auckland District Law Society, Public Issues Committee *The Mass Media and the Criminal Process* (1989) which examined the implications of media reports on obtaining a fair trial. Also note Robson, J L *The News Media and Criminal Justice* (1976).


9 It must be recognised that through out this chapter I tender my views and thoughts which are my Māori perspective on matters. My Māori perspective may not be the same view and perspective as held by other Māori. My perspective and knowledge gained is through my up bringing and association with my tribal regions, within in my particular whānau, and through academic institutions. To state that there is one or a Māori view would be incorrect.
portrayal of Māori and the media’s presentation of crime are brought together by virtue of what can be termed ‘association’. Within this last section the proposition is put forward that the media’s negative portrayal of Māori and its associated negative representation of crime results in an amplification of negativity, as depicted in the Waikato Times article.

**MĀORI AND THE MEDIA.**

The news media has immense power to shape peoples thoughts, opinions, beliefs and behaviour. It is our main source of knowledge about society and the world’s events. While a critical examination of the impact of the news media is beyond the scope of this chapter, it should nevertheless be kept in mind that it exerts a powerful influence on how we define who we are and what we should be like.

The media has reported and continues to report on Māori in a predominantly negative manner. In the 1995 study entitled Balance and Fairness in Broadcasting News (1985 – 1994) it was observed:

> The paucity of Māori news stories run by traditional broadcasters is compounded by negativity, sensationalism and stereotypical depiction which accompanied stories ...

The Waikato Times article is yet another example of negative reporting of Māori. The article makes a number of statements which infer negative and destructive actions on the part of their fictional young

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Māori male. These disapproving comments are continually built upon, following a mug shot of a Māori male under a front page headline of "WARNING: THIS MAN KILLS". Statements such as:

"He's an unemployed Māori in his early 20s and he's likely to be driving an early model car..."

"... when he slams head-on into your car after he fails to take a left bend."

"There's also a good chance he will be a repeat offender with previous traffic and criminal convictions."

"... young male Māori who, according to police, have little regard for others on the road".12

serve to build up a negative image of the young Māori male as unemployed, poor, destructive, and a repeat offender.

Historical Context

Prior to any discerning examination of the present situation, it is important to obtain some understanding of the historical context of the New Zealand media in order to gain insight into the reasons why particular events and subjects are presented as they are.

The negative portrayal of Māori by the media can be contextualised within an historical background of colonisation. Ranginui Walker states:

The relationship that exists between the Māori as the tangata whenua of New Zealand and the Pākehā who settled in the country in the last 150 years is one of social, political and economic subjection. This unequal relationship is derived from the process of colonisation by an industrialised imperial nation of a tribal people isolated for a thousand years.13

12 McGehan, K "Warning this Man kills" Waikato Times, 13 April 1999, 1.
It is within this context of an unequal relationship and subjection that some understanding of the media may be gained. The media in New Zealand has been controlled by Pākehā. It is seen and experienced by Māori as a Pākehā institution.\(^{14}\)

While it is not the intention to fully scope the process of colonisation and post colonisation within New Zealand, it is intended to make brief comment on some relevant historical background.\(^{15}\)

The starting point is Te Tiriti o Waitangi/Treaty of Waitangi (Treaty) and the coloniser’s misinterpretation of the document, whether purposefully or not, as a cession of sovereignty rather than a concession to govern. Those chiefs who signed the Treaty did so in the belief that their own sovereignty and mana was protected by the Treaty.\(^{16}\) Walker considers that the chiefs were soon to be disillusioned.

From the coloniser’s initial misinterpretation further steps were taken in a planned and pre-meditated process of assuming domination and ensuring the subjection of Māori. The introduction of a land purchasing process,\(^{17}\) an influx of settlers, the establishment of a settler government, war, confiscation of lands and numerous acts of Parliament,\(^{18}\) all led to the alienation of Māori from their land and a disruption of the collectivism which bound Māori groups together. Walker contends that Māori stoutly resisted colonial despoliation.\(^{19}\) This resistance was, however, to no avail.

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14 In this chapter the term Pākehā is employed generally to mean people of European birth or descent, an indigenous expression to describe New Zealand people and expressions of culture that are not Māori. For further discussion on “Pākehā” see Pool, I Te Iwi Māori: A New Zealand Population Past, Present & Projected (Auckland: Auckland University Press, 1991) and King, M Being Pākehā now: reflections and recollections of a white native (Auckland: Penguin, 1999).


16 For further discussion see Williams, D V. Te Kooti Tango Whenua: The Native Land Court 1864-1909 (Wellington: Huia Publishers, 1999).


19 Walker, R supra n 13 at 39.
From the early 1900s to today Māori continually fought against and responded to Pākehā control of their lives. Warfare, continued petitioning of the Queen and Parliament, formation of collective groups, land marches and protest are all reflective of the constant Māori quest for justice. 20

Within this process of colonisation and subjection the media (or, as Walker prefers to refer to it, "the Fourth Estate") emerged as an integral component of the Establishment. The Fourth Estate functioned and functions to maintain the status quo and the structural relationship of Māori subordination. 21 Similarly, overseas commentators have observed, within their own particular contexts, the media maintaining colonial attitudes in the maintenance of the status quo and the perpetuation of racism. 22 Freeth's view of English television executives was that "underneath the bland exterior of most TV executives all the colonial attitudes survive." 23 Freeth then proceeded to summarise those who, in his view, perpetuated racism in society. Included in his list was the media.

While Walker contends that the "Fourth Estate" is an essential component in maintaining the status quo, Ericson, Baranek and Chan have viewed the media in hegemonic terms, as important in the support of the dominator's dominance:

Hegemony addresses how superordinates manufacture and sustain support for their dominance over subordinates through the dissemination and reproduction of knowledge that favours their interest and how subordinates alternatively accept or contest this knowledge. 24

22 Freeth, T "Racism on Television: bringing the colonies back home" in Cohen, P and Gardiner, C (eds) It ain't half racist, mum: Fighting racism in the media (1982), and Hartmann, P and Husband, C "The mass media and racial conflict" in Cohen, S and Young, J (eds) The manufacture of news. Deviance social problems & the mass media (1973).
23 Freeth, T supra 22 at 27.
24 Ericson, R. V, Baranek, P. M & Chan, J. B. L supra n 10 at 12.
**Historical Examples**

Historical examples of the media’s negative portrayal of Māori are numerous. Some prominent events that have attracted and continue to attract much media attention include the Haka incident, Maranga mai, Waitangi protest action, gangs, the Māori Loans Affair and the Waitangi Tribunal. In exploring the Haka incident Walker wrote:

At the University of Auckland a small group of activists took violent direct action to put a stop to the racist parody of the haka performed there annually by the engineering students. For years Māori had attempted to negotiate an end to the event. Nonetheless, by failing to remain passive, in their assigned subordinate position, they presented a threat the state could not tolerate, as was implicit in the media treatment of the incident.

In May 1979, the *Auckland Star* reported the haka party incident with the bold headlines 'Gang rampage at varsity' and 'Students at haka practice bashed'. The headline was sensationalist and inaccurate. Although there was not one single gang patch in evidence on any one of those involved in the raid on the university, no headline could have evoked a more emotive response from the general public. The patch-wearing gang member is the nightmare incarnation of the worst fears of the Pākehā...

It was not until the *Auckland Star* ... reported the Auckland District Māori Council’s reasons for providing 'Māori help for the haka attack group' that it was made clear that there was anything other than a Pākehā...

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25 Maranga Mai was where Māori activist dramatised Māori land grievances in a play performed at Mangere College in South Auckland in 1980. It received a lot of opposition with the negative responses of some Pākehā being given prominent treatment in the media. For a full discussion on the reporting of the play see Walker, R *Nga Pepa a Ranginui: The Walker Papers* (1996).

26 This refers directly to Māori protest action related to the refusal of the Crown to honour the Treaty of Waitangi.

27 Discussed in detail later in this chapter.


29 The Waitangi Tribunal is a Crown established body that hears grievances relating to the Treaty of Waitangi. While some Māori see the Waitangi Tribunal as a “toothless tiger” due to its recommendatory and resource constraints, some Pākehā have perceived the Tribunal as an instrument of possible injustice to Pākehā.
view of the incident. Even so, when the haka-party case went to court, it was reported as a ‘light-hearted stunt’ ... Only two writers put the issue in its correct context of racism.\(^3\)

The Māori ‘Loans Affair’ relates to the attempt by key Māori people to secure a major offshore loan. The initiative of securing overseas funds emerged from the 1984 Hui Taumata (summit conference) of Māori leaders. Although Government Officials intervened to stop the loan from eventuating, the incident nevertheless remained a hot issue in the media for over two months. Walker notes:

> Māori people were shell-shocked by the unprecedented level of Māori-bashing indulged in by the media over the so-called ‘Māori loans affair’ as headline followed headline.\(^3\)

It is interesting to note that the negative media surrounding this issue far exceeded the reports related to the share market crash that lost millions of dollars in real terms.\(^3\)

When gangs attracted the negative media coverage that they did in 1979, this had the added effect of Māori once again being presented in a negative light. Walker noted that the negative coverage of gangs seemed to be regarded as an ‘acceptable’ form of Māori bashing. He stated:

> Although there are only an estimated 2000 gang members throughout New Zealand, the continuous negative coverage of their activities by the press is felt as a discomfiture and embarrassment by the 400,00 otherwise law-abiding Māori. The long running denigration and criticism of gangs in the media functions for Pākehā as a constant reproach to Māori society, and a reminder of subordinate status, while at the same time providing sensational copy. In other words, gang-bashing by the media is a socially acceptable, oblique form of Māori bashing.\(^3\)

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30 Walker, R supra n 21 at 144-5.
31 Ibid, 151-152.
32 Pihama, L supra n 8 at 6.
33 Walker, R supra n 21 at 150-151.
The Waikato Times article is a further example of the media attempting an acceptable, oblique form of "Māori bashing". Drink driving and dangerous driving are emotive topics, which can create social resentment towards the perpetrators. The media bashing of drink driving may be seen as acceptable, due to the intolerance society has for such action. In the same way, media bashing of dangerous driving may be acceptable to society due to the seriousness of the effects of such destructive action. Within this article, matters are taken one step further and the inference is drawn that drink drivers and dangerous drivers are young Māori males. Through such an association, the media proceeds to denigrate drink drivers and dangerous drivers while at the same time denigrating Māori. It is admitted within the article that there is an intention to "give the problem more prominence and make it socially unacceptable".\(^{34}\) If further such articles are published, purportedly in order to give the problem more prominence, this will result in further "Māori bashing".

Walker views the historical context of the operation of the Fourth Estate in New Zealand as assisting the maintenance of Pākehā dominance:

The Fourth Estate is controlled by Pākehā. It selects the events it deems newsworthy, which usually centre on violence, conflict and competition. When the events involve Māori and Pākehā, it consistently represents the Pākehā status quo, helping them to maintain their power.\(^{35}\)

Further to the historical context, Walker quite rightly mentions issues such as control of the media and selection of newsworthy articles. These factors, among others, need to be understood as integral elements that contribute to the manner in which media present images of Māori. These factors are discussed in the following section of this chapter.

\(^{34}\) McGehan, K "Warning this Man kills" \textit{Waikato Times}, 13 April 1999, 1.

\(^{35}\) Walker, R supra n 13 at 45, also see Maharey, S "Understanding the Mass Media" in Spoonley, P and Hirsh, W (eds) \textit{Between the Lines: Racism and the New Zealand Media} (1990).
NEWS VALUES ARE WHOSE VALUES?

News values exercise enormous influence in the production of news. It is not the intention here to deliberate on all aspects of the media process or all aspects of news production. Nevertheless, the influential nature of news values makes some commentary on them necessary. Moreover, through understanding what is perceived to be a crucial factor in determining how the media present crime and how the media portray Māori, some insight can be gained into the reasons why events, subjects and topics are presented as they are. As Kelsey and Young recognised when examining the media coverage of gangs:

The general understanding of the functions of the media is of importance in analysing the content, images and attitudes evident in the coverage of gang activities ...

McGregor views news values as some of the most problematic concepts of journalism, in the sense that they are not formally codified or defined. Nor is there any universal agreement about what constitutes newsworthiness. Indeed, one journalist may consider an event to be a front-page story while the same event may not be considered worth reporting at all by another journalist.

Notwithstanding the problems McGregor, in quoting Teun Van Dijk, has provided a description of news values as follows:

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37 Kelsey, J and Young, W supra n 10 at 13.
News values that embody professional beliefs and attitudes about newsworthiness of events are practical, common sense evaluative criteria, which allow strategic attention, allocation to and selection of sources and selection of texts, summarisation, choice of perspectives and finally the topic and style structures of news reports. News values are derived from a complex interplay of social representations.\textsuperscript{39}

The importance of news values cannot be over stated, for it must be remembered that the media cannot and do not merely transmit events unaltered and uncensored onto our television screens and into our newspapers. There are countless events taking place every hour of every day. Not all events attract media attention. The media will selectively draw from a pool of events those items that they consider worthy. With the selected items the media creates "news" by defining for us what they consider to be "newsworthy" and what is not.\textsuperscript{40} The position has been summarised as follows:

"News" is the end product of a complex process which begins with a systematic sorting and selecting of events and topics according to a socially constructed set of categories.\textsuperscript{41}

It is interesting to ponder the news values that were considered for the Waikato Times article, for it was considered sufficiently newsworthy to demand front page status. Was it the fact that drink driving is a crime topic? Or was the article considered front-page material for other reasons? One can only assume that a combination of factors, including the crime and Māori elements, played a role in propelling this article to the front page. On the same day that the article appeared, the University of Waikato held a graduation at Te Kohinga Marama marae where several hundred Māori graduated with degrees. This positive event attracted no coverage in the Waikato Times, while the article profiling a typical drink driver obtained front page status.

\textsuperscript{39} Ibid, 3.
\textsuperscript{40} Kelsey, J and Young, W supra n 10, and Hartmann, P & Husband, C supra n 23.
\textsuperscript{41} Young, J and Walton, P (eds) supra n 36 at 52.
As McGregor observed, news values are problematic and it is therefore difficult to draw any conclusive determinations. The Waikato Times article obtained front page billing due to the sensationalism that it would generate. The article immediately catches the reader’s eye, as a result of the headline and the mug shot.

News values are, by their very nature, subjective. News values are learnt by journalists through the process of what McGregor refers to as “newsroom socialisation”. While each individual will have a different perspective of events, the criteria of newsworthiness, how news is selected and what angle a story should be reported from, are some of the issues learnt through reading newspapers, talking to more experienced colleagues and observing the procedures of editors. Therefore, notwithstanding the subjectivity of news values, there emerges a unanimity and consensus among journalists and commentators about what constitutes news values and the criteria of newsworthiness. McGregor considered the unanimity amongst journalists about newsworthiness as “surprising”. It would be “surprising” if there was not some unanimity, or what Campbell describes as sameness, given newsroom socialisation and the predominance of Pākehā journalists within the New Zealand media.

Within the newsroom socialisation process journalists learn what is perceived by other journalists as being a good or bad story. Journalists learn what their employees and editors perceive as being newsworthy. Hence, journalists learn through this process the same values and ideas possessed by senior and fellow journalists.

42 McGregor, supra n 38 at 1.
43 Ibid, 2.
44 Ibid.
45 Christopher P. Campbell in his book Race, Myth and the News (1995) noted that the most striking aspect of watching and rewatching news for nearly 40 hours from 29 American cities was the sameness of the programs, the news stories. At page 132 Campbell states that what he is interested in is “… the sameness of the racial mythology that is embedded in the broadcasts across the United States, and the sameness has very much to do with the homogeneous practices of the local television news organizations.”
46 Robson, J. L The News Media and Criminal Justice (1976), Robson refers to the homogeneity of subject content of New Zealand daily newspapers. His observations were essentially that newspapers in New Zealand tend to report the same stories in a like manner.
It would be totally incorrect to presume that all Pākehā possess exactly the same beliefs, ideas, values, perceptions and attitudes.\(^{47}\) However, in saying this it must also be recognised that Pākehā will exhibit some general conformity, uniformity and sameness of beliefs, ideas, values, perceptions and attitudes. In the same manner it would be totally incorrect to presume that all Māori possess the same beliefs, ideas, values, perceptions and attitudes. However, Māori culture can be recognised as an ethnic group of people who have some general uniformity and sameness in beliefs, practices, ideas, values and attitudes. What can be stated with some surety is that the there is definitely a difference between Pākehā and Māori culture. With the dominance of Pākehā within journalism\(^{48}\) it is therefore not “surprising” to find some homogeneity and conformity on the issue of news values given their general uniformity and sameness of general beliefs, practices, values and attitudes.

The subjective nature of news values, along with the predominance of Pākehā within the media, leads to a disparity in reporting of Māori news:

\(^{47}\) Within New Zealand there is much debate around whether there is a Pākehā culture, and if there is then what is it. See Chapter 3 of Sharp, A. Justice and the Māori: Māori Claims in the New Zealand Political Argument in the 1980’s (Auckland: University Press, 1990) and see the chapter on Ethnicity in Spoonley, P. Racism and Ethnicity: Critical issues in New Zealand society (Oxford: Oxford University Press, 1988) also see Spoonley, P “Racism, Race Relations and the Media” in Spoonley, P and Hirsh, W (eds) Between the Lines: Racism and the New Zealand Media (Auckland: Heinemann Reed, 1990).

\(^{48}\) At page 7 McGregor in News Values and Reporting of Māori News (1991) notes “In one of the few pieces of research about New Zealand journalist, Lealand (1988) stated the number of Māori, Pacific Island and other minorities working in journalism comprised less than 5 per cent of the national survey of New Zealand journalist conducted for the Journalist Training Board (compared with about 12.8% in the New Zealand population). Of the 1227 journalist in the survey who indicated their ethnicity, only 28 were Māori. A further 16 indicated they were European/Māori. The combined group represented less than half the proportion of such people in the general New Zealand population.” McGregor at page 8 of News Values and Reporting of Māori News (1991) also noted that “47% of New Zealand news executives sampled indicated no Māori journalists were employed by their organisation. About half of the news executives respondents saw a need for more Māori journalists within their organisation...”
The final product in the New Zealand mainstream media often has an emphasis on conflict, on the “bad news” and defines Māori people in “problem terms”. In essence, the news values employed by the New Zealand news media ... are Pākehā news values.49

The Waikato Times article definitely emphasises conflict and specifically defines Māori in “problem terms”. The article is extreme in its definition of drink driving and dangerous driving as a Māori problem by noting, incorrectly50, that Māori make up 27.4% of Waikato’s population but account for 28.5% of fatal crashes and 43% of the region’s drink-drivers. The supposition drawn from this information is that Māori as a minority cause more accidents per capita then others. This suggests that Māori are causing more drink drive and fatal crashes than others in society and, in particular, others in the Waikato region. The conclusion is that the fatal crash and drink drive problem is a Māori problem. Matters are sensationalised with the presentation of worrying statistics of the number of deaths and injuries suffered through fatal accidents. These statistics, viewed along side the many negative comments concerning the Māori male, infer that young Māori males are responsible for a large proportion of the deaths and injuries. The statistics infer such a situation but do not confirm who is actually responsible for the 200 deaths. Indeed it could be that no Māori males were involved in any of the fatal crashes resulting in death.

It is not “surprising” that Pākehā journalists decide what is and what is not news according to their own cultural definitions and values. They choose the angle for the story, they choose what to report on, they choose whom to speak to, and they choose what to write about. Consequently, Māori news is reported in most instances from a Pākehā perspective and cultural base. Further, the monocultural news values which largely dominate New Zealand are central to the presentation and distortion of Māori and Māori issues.

49 McGregor supra n 38 at 7, also see Kelsey, J and Young, W supra n 10 at 7 where it is viewed that decisions on news are “made on the basis of current outlook, attitudes and perspectives of those making them, and the assumptions they make of the views of the public at which they are aiming”. It is noted in this chapter that the views of the decision-makers will be predominantly Pākehā. On this basis one assumes the public that Kelsey and Young see decision-makers identify is predominantly Pākehā public.

50 Supra n 2.
News values are central to the distortions of Māori aspirations, to the lack of explanation of issues affecting Māori, to the absence of positive news about Māori and to the stereotyping of Māori people by the mainstream media.\(^{51}\)

The Waikato Times employed three Māori journalists at the time the article was printed, but it was a Pākehā who wrote this article.

It has been stated above that the importance of news values can not be overstated. This is particularly so when consideration is given to the number of times news values or news judgements that are made within the production of news. Kelsey and Young believed news values influenced the final production of news at least three different levels. The three levels are, collection, selection and presentation.\(^{52}\)

Within the collection process identified by Kelsey and Young it is apparent that, for practical reasons, it is impossible for every news event to be collected together, let alone reported. The media are therefore required to make decisions as to what is collected, how it is collected and what resources are used to collect information to be reported.

It is interesting to observe that Māori news, according to McGregor, is not reported at the same frequency as other news.\(^{53}\) Crime is reported frequently. The frequency of crime news in the media is discussed later in this chapter. What is interesting is how the frequency of the collection and reporting of Māori news and crime news are at extremes, Māori news being reported infrequently and crime news being reported frequently. Given that the collection of news must take into account the limited resources of staff and reporters based on McGregor’s statistics, that there are more resources being put towards the collection

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51 McGregor supra n 38 at 16.
52 Kelsey, J and Young, W supra n 10 at 7.
53 McGregor, J and Comrie, M supra n 11 at page 1 of the report findings are summarised as "Of the total of 915 stories sampled across four broadcasters (TVNZ, TV3, Morning Report and Mana News) 39% were political stories, 25.8% related to crime and 16% were health stories. Of the 176 Māori stories, 126 were broadcast by Mana News and coded as Māori Stories. Only 50 Māori stories were broadcast by the other three broadcasters taken together. Māori stories formed 19.2% of the sample."
of crime news than the collection of Māori news. It is proposed later that there is a definite media-incited association between Māori and crime. It appears that no such association can be made in terms of the allocation of resources to each area concerned.

The second level identified by Kelsey and Young was that of selection. Accordingly:

... news values provide the criteria in the routine practices of journalism which enable journalists, editors, and newsmen to decide routinely and regularly which stories are 'newsworthy' and which are not, which stories are major 'lead' stories and which are relatively insignificant, which stories to run and which to drop.

Given the news values held by the 'selectors' it is no wonder that Māori are reported negatively.

The final level of production is presentation. Once an event has been collected and selected it must be presented in both meaningful and credible terms. According to Kelsey and Young:

Not only must the event be described, but it must be assigned an acceptable meaning. Business sense dictates that the goods produced must be acceptable to the market consuming them, so care must be taken to ensure that the newspapers publish what they think their readers want. News is therefore framed according to a set of assumptions about the particular views and attitudes held by the public, even although the reporter may not share those attitudes.


55 Young, J and Walton, P (eds) Policing the Crisis: Mugging, the State, and Law and Order (1978) 54.

56 Kelsey, J and Young, W supra n 10 at 10-11.
While recognising that Kelsey and Young were commenting on 'gangs' and not explicitly on the topics of crime or Māori, these comments hold true for the presentation of most media pieces. In relation to Māori, the question that therefore arises is for whom is Māori news being produced? Based on the proposition forwarded by Kelsey and Young, stories (including Māori stories) are described for the public. The question that much be asked is: who is the public? Is it the Māori public or the Pākehā-dominated public?

It is clear that the Waikato times article was written for Pākehā consumption. The article does not have an acceptable meaning for me as a Māori. As Kelsey and Young suggest, an article will be presented in a particular manner for a particular public. This article tells us that the Waikato Times wished to depict Māori as criminal to a Pākehā public. This article tells nothing about why Māori are over-represented in fatal accident statistics. This article tells us nothing in terms of how to address the problem, except for the comment that this situation needs more prominence so it will be seen as unacceptable, which one reads as further Māori bashing.\textsuperscript{57} This article certainly appears to be framed for a predominantly Pākehā public.

**CRIME AND THE MEDIA**

The media is obsessed with reporting crime.\textsuperscript{58} In a 1995 study of New Zealand news, of the 915 stories sampled 236 or 25.8% related to crime. These statistics also show that between 1985 and 1994 crime stories in television news increased from 18% to 41% for TV One news and from 40.9% to 53.6% for TV3 news.\textsuperscript{59} Indeed the vast amount of crime news being reported prompted McGregor to consider such questions as:

\textsuperscript{57} Supra n 12.


\textsuperscript{59} McGregor, J & Comrie, supra 11 at 1.
Is there too much crime news? Is crime coverage, as claimed by some commentators, bad for society because it exaggerates the frequency of some crimes, distorts the reality of crime, and displaces other more meaningful content which could aid public understanding of the criminal justice system? \(^{60}\)

Since the earliest days of journalism, crime news has been central to the news media. \(^{61}\) Given its apparent preoccupation with crime, it is important to explore the broad issues of why the media retains such an obsession with reporting crime and how the media portrays crime.

Grabosky and Wilson, in discussing the Australian media in particular, noted the media as having four roles. The first of these is the role of generating income. The media is business. Secondly, the media has a role as entertainment. Thirdly, the media informs the public about affairs of the day. Crime and criminal policy have always ranked high on the public agenda and consequently consistently feature in the news. The fourth role, which Grabosky and Wilson consider may not be performed consciously, is to provide a focus for the affirmation of public morality. \(^{62}\) Crime news is clearly relevant to all four roles of the media.

Crime news, some would have us believe, is inextricably linked to the commercial rationale of the news media, the view basically being that crime sells:

Crime news is, we suspect, 'good' for the news business because people read about it, listen to it or view it. Crime news sells newspapers or pulls in radio and television audiences, and thus increases the profitability of those who own media outlets. Nearly 150 years ago Benjamin Day's New York \textit{Sun} hit the streets of New York and made Day a rich man. His success was partly based on graphic and, occasionally lurid accounts of


\(^{61}\) Ibid, 1.

the exploits of criminals and their punishment (in particular, the hanging of a 'car-hood' murderer) and his formula of entertaining rather than illuminating his readers. Some would argue that crime news is used by modern day proprietors in the same manner.63

On this basis the Waikato Times article, if viewed in purely criminal terms, can be seen as good for business: such a headline immediately attracted readers into buying the paper. However, as identified above by Grabosky and Wilson, while the media rationale for reporting crime can be seen in commercial terms, the media has other roles besides that of generating commercial profit.

The role that the media plays in informing the public about crime has implications for public perceptions, ideas and thoughts. The media is the main source of such information, as it is with most of our knowledge of the world's events.64 Of particular interest is the part that the media plays in what Grabosky and Wilson have referred to as the affirmation of public morality.65 Howitt sees the public morality more in terms of being a representation of society as it wishes to be66. In this respect crime, plays a fundamental role:

> Crime represents society as it wishes not to be, and so is crucial to our understanding of society. Not surprisingly, then, ever since improved transport and cheap newsprint in the nineteenth century led to truly mass media, crime has been an extensive feature of all mass media of entertainment.67

The Waikato Times article identifies and condemns unacceptable behaviour. Simply put, it is unacceptable to drink-drive and to drive dangerously. There is no argument that drink driving is unacceptable. The article intensifies the unacceptability of the behaviour by suggesting that to act in such a manner will result in death. Not only does the

63 Grabosky, P and Wilson, P supra n 58 at p 2.
64 Kelsey, J & Young, W supra n 10 at 5.
65 Grabosky, P and Wilson, P supra 58.
66 Howitt, D supra n 58.
67 Ibid, 1.
article represent crime in its natural negative state but it also encompasses other portrayals that receive constant negative media coverage, such as images of Māori and the unemployed.

The law defines what society judges to be illegitimate types of action. Ultimately the law provides society with a basic definition of unacceptable as opposed to acceptable actions. Criminal activity is viewed as that which is unacceptable to society. Crime informs us of what we should not do and is therefore immediately viewed by society in a negative manner. The media, in presenting crime, therefore reinforces law-abiding behaviour, and denounces negative, destructive and unacceptable behaviour.

Young and Walton have suggested that crime, by its very nature, is news because it re-affirms the consensus society has reached as to what is morality. Kelsey and Young support this proposition, noting that “crime is news because of what it represents to society”.

While crime can be seen as news, it is still the media who describe, interpret and present the crime to the public. It is the media who determine what crime society is informed about and how that crime is to be presented. Crime may be news by its very nature, defining as it does unacceptable behaviour, but it is still the media who retains the ultimate power of definition.

ASSOCIATION OF MĀORI, AND CRIME

Does the media associate and equate Māori with crime? Howitt has examined the idea of an association between black people and crime and the media’s contribution to such an association:

In some ideologically based beliefs, black people and crime are associated... Whatever the complete explanation of this, the beliefs are, in part, a socially constructed ‘fact’ to which the media contribute.72

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69 Kelsey, J and Young, W supra 10.
70 Young, J and Walton, P (eds) supra 36. For a summary on the “the consensus” see Cohen, S & Young, J (eds) The manufacture of news. Deviance social problems & the mass media (1973).
71 Kelsey, J and Young, W supra 10 at 9.
Howitt picked up on the arguments previously put forward by Hall\(^73\) when he contended that African-American and African-Caribbean youngsters in America and the United Kingdom had become identified with the media created crime of 'mugging'. The media characterised mugging as an urban, inner city, poverty-related crime that was linked to unemployment. Further media images of Black youngsters epitomised the inner-city problems of unemployment and poverty. The images of black children as structurally unstable, from broken homes, and living in one-parent families, Howitt contends, provide us with 'common-sense' notions about the risks of crime in such children.\(^74\)

In essence, what Howitt and Hall propose is that the images presented by the media of who a ‘mugger’ is are mirrored in the image the media presents as to who and what a young Black person is. Cohen concluded that the overall meaning of the media coverage of “mugging", as examined by Hall, was that black equals crime.\(^75\)

Not only does this association apply to Black youths but also to Black families, with many of the images of black families stressing many of the factors associated with crime. It is through what can be termed the ‘mirroring of images’ that an association is made. Mirroring is a subtle yet potent form of association whereby the presentation of what the media equates, redefines or defines as a black person (or, in the New Zealand context, a Māori) mirrors the media’s presentation of what equals or equates to a criminal. In the Waikato Times article the image of a criminal is mirrored as a young, unemployed, Māori male. The article equates, or mirrors, Māori with crime.

A more obvious expression of association is when the media present outright racist statements, associating blacks with crime. Howitt noted that an extreme example would be where it is stated that “there are groups of violent black criminals who rob white people and rape white women.”\(^76\) The Waikato Times article, by the newspaper’s own admission, presented a single profile of a young Māori male as being

\(^73\) Young, J and Walton, P (eds) supra 36.
\(^74\) Howitt, D supra n 58 at 143.
\(^76\) Howitt, D. supra n 58 at 143.
the prime offender in fatal accidents. The association in this article is explicit. More than simply inferring that Māori males are criminals, this article goes further by stating, incorrectly, that young, unemployed Māori men are most likely to kill on Waikato roads.

Another obvious expression of association is through race-labelling or race-tagging. Race-labelling or race-tagging is the unnecessary use of racial or ethnic references. Race-tagging occurs when the media makes references to a person’s race or ethnicity when such referencing adds nothing to the newsworthiness of the report or serves no public interest. The reference to race serves no purpose as it is surplus to the story. Race-labelling can occur in a number of media type stories, but it is in the area of crime-reporting that race-labelling of Māori is most prevalent:

The practice of race-labelling Māori crime news was widespread, unjustified, and inasmuch as the practice was virtually limited in its use to the Māori people, discriminatory.

Campbell has observed that race-labelling in America had fallen out of favour in the print media because of its racist implications. What he also observed was that television news still relied on visual imagery for storytelling, even if the images contributed to the kinds of stereotypical beliefs that advanced racism and discrimination. The Waikato Times article uses the visual imagery to advance what are racist images and comments regarding Māori.

The use of statistical information can also be seen as obvious association. In the American setting there is little doubt that crime statistics record more crime by black people relative to the black population. The crude yet frequently made assumption, based on the

77 “Single profile of offending driver was incorrect” Waikato Times, 14 April 1999, 3.
79 Ibid.
statistical information, is one of Blacks therefore being classed as criminals. It is easy to see how such a correlation can be made. However,

...crime statistics are, at best, a summary of discrete acts by individuals reporting crime; they cannot represent the realities of crime precisely. So, for example, if black people are over-represented in statistics on crimes known to police, greater activity in black areas may be responsible. Other factors which may lead to this over-representation include racial biases in reporting by victims, prosecuting black people more readily and charging black people's crimes as a more serious offence. All of these things would create a distorted impression of the extent of the criminality among black people. 81

McGregor’s concern with the use of statistics in crime news related to the substantial discrepancies between official counts of criminal activity and press reports of crime. She noted three overseas studies that found newspapers’ use of statistical information distorting impressions of the relative frequency of different types of crimes. The studies also revealed that the amount of official crime trend was not correlative to the reporting of crime, and that the distribution of crimes reported by the press was markedly dissimilar from the distribution of crimes to the police. 82 McGregor concludes that “the “facts” portrayed in news stories about crime differ from the “facts” as they appear in official criminal statistics.” 83

There are interesting statistical matters raised in the Waikato Times article. Firstly, some of the statistics are wrong. To the Waikato Times’ credit they ran a story the following night, albeit on page three, acknowledging their mistakes. Secondly, within the article it is stated that young Māori males account for 28.5% of fatal crashes. On this basis it is difficult to see how the article can claim that the person most likely to kill you on the roads is Māori, given that 71.5% of fatal crashes are not caused by young Māori males. Further, the article states young Māori males account for 43% of the region’s drink-drivers. Another

81 Howitt, D supra n 58 at 143.
82 McGregor, J supra n 60.
83 Ibid, 6.
way these statistics could have been reported would have been to state that 57% of the region's convicted drink-drivers are not young Māori males.

The above associations are more obvious to the public as they are captured in print. There are also less obvious associations that some of the media employ. Cohen made an interesting observation of association when he noted:

> The fact that it is often crime reporters who are sent out to cover riots or race stories is a comment in itself on how news editors see their significance.\(^{84}\)

This is but another example of the media associating crime with race, in most cases minorities.

During late 1978 and the whole of 1979 gang activities dominated the media. The predominance of Māori and Polynesians within the major gangs made the issue racially sensitive to both Māori and Non Māori.\(^{85}\) The perceived "gang problem" generated media, political, court and public attention to the point of the gangs being regarded as Public Enemy Number One. However, the study into the "gang problem" undertaken by Kelsey and Young\(^{86}\) found that the media had sensationalised the gang situation and, in so doing, had amplified the social panic relating to gangs. The study also noted:

> There were of course, many non-Māori members within gangs, and there were many gangs, such as the traditional South Island gangs, who were almost exclusively Pākehā. But the perception, however mistaken, that the major gangs were predominantly Māori attracted to them the label of a "Māori problem."\(^{87}\)

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\(^{84}\) Cohen, P supra n 75 at 14.

\(^{85}\) Kelsey, J and Young, W supra n 10.

\(^{86}\) Ibid.

\(^{87}\) Kelsey, J & Young, W supra n 10 at 118.
The close linkage and association made between Māori and gangs, however ill-perceived, consequently lead to the gang problem being seen as a Māori problem.

The above associations reflect what has been previously addressed with regards to the negative portrayal of Māori within the media. The associations also presented the negative image of crime. The situation can be comprehended in simple terms: that the negative Māori image is associated with the negative image of crime. This has the effect of amplifying the negative representation of Māori.

Hartmann and Husband, in discussing Blacks and crime within the media, concluded that association results in real conflict being amplified and in potential conflict being created. They stated,

Blacks come to be seen as conflict-generating per se and the chances that people will think about the situation in more productive ways – in terms of the issues involved or of social problems generally – are reduced. The result is that real conflict is amplified, and potential for conflict created. 88

The amplification in this sense is that the negative portrayal of Māori is compounded when there is an association with crime.

In the Waikato Times article young Māori males were associated with fatal accidents and drink driving, along with other factors, culminating in the image of a fictitious killer. The result was a presentation of young Māori males as dangerous drivers and drink drivers, being amplified to an image of young Māori male killers.

Through a number of methods the media makes a deliberate association between Māori and crime. This association at times leads to an out-of-proportion amplification of a situation, resulting in sensationalism and in Māori being projected in a negative manner.

CONCLUSION

This article equates Māori with crime. It uses visual imagery that contributes to the stereotypical belief that advances racism and discrimination. It continues to damage Māori-Pākehā relations.

The subject-matter covered in the article attracted media coverage ahead of a Māori university graduation. The media seems not interested in promoting Māori well qualified men who are owners of late model vehicles, in stable, two-parent relationship with children. The choice to portray such an image on the front page points strongly to what the media values.

Although some of the important statistics in the article were incorrect, how many readers would really care to have read the apologies on page three the following night? The article had already been a powerful conduit of information – incorrect information. The media confirmed the negative stereotype of young Māori males as unemployed, deprived criminals that kill on roads.
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APPENDIX 1

WAIKATO TIMES, 13 APR 1999, EDITION 2, PAGE 1.

WARNING: THIS MAN KILLS

By: McGEHAN Kris

Race: Maori
Job: None
Car: Older model
When: Friday afternoon
Where: A State Highway

Police have released a profile of the man most likely to kill you on Waikato roads. Kris McGehan reports. He’s an unemployed Maori in his early 20s and he’s likely to be driving an early model car on a Waikato state highway between midday and 6pm on a Friday.

The weather will be fine and the road conditions will be dry when he slams head-on into your car after he fails to take a left bend. There’s also a good chance he will be a repeat offender with previous traffic and criminal convictions.

Four years of police statistics have culminated in a portrait of the classic Waikato fatal crash driver. “So many people blame the roads and the highways. But there is a group of people who don’t care a damn about anyone else when they’re driving,” says Waikato traffic chief, Inspector Leo Tooman.

Just over 200 people have died in 172 fatal crashes in the Waikato since 1995. Around 136 people have been injured. Police figures throw up definite trends. Waikato’s fatal crashes are most likely to occur between midday and 6pm on a fine Friday. The drivers are likely to be unemployed (24 per cent) and aged 20 to 25 (16 per cent). Twenty-five per cent of drivers are repeat offenders.
State highways are by far the most common place for a fatal crash (59 per cent) and most of the cars involved are over 10 years old (55 per cent).

Drink-driving is no longer the biggest cause of fatal crashes. At 15 per cent it lags way behind failure to keep left (42 per cent).

While Maori make up 27.4 per cent of Waikato’s population, the figures show young male Maori are the drivers in 28.5 per cent of fatal crashes and account for 43 per cent of the region’s drink-drivers.

Mr Tooman believes fatigue is a major factor in fatal crashes that is largely ignored. Loss of control and inattention figure prominently in the crash statistics.

“It’s a bit like drinking and driving. If we can give the problem more prominence and make it socially unacceptable, then maybe people will stop driving when they are tired.”
An article published in Tuesday’s Waikato Times painted an incorrect portrait of the driver most likely to cause a fatal accident on Waikato roads.

The article claimed young, unemployed Maori men driving an early model car were the drivers most likely to cause a fatal smash.

While young, unemployed and Maori are all over-represented in fatal crash statistics, the single profile of a young Maori man as being the prime offender was incorrect.

Waikato traffic chief Leo Tooman said the statistics revealed several trends. Police now were using the information to reach groups who caused fatal smashes.

The statistics were compiled by police between January 1995-January 1999, a period in which 201 people died in 172 crashes on Waikato roads.

Police analysed information about the ‘offending drivers’ and found several groups were over-represented.

Males were responsible for 75 per cent of the crashes.

Males aged 20-26 caused 16.7 per cent of the crashes and males in the next age bracket, 25-30, were responsible for 11 per cent of the fatalities.

Unemployed people, the offending driver in 24.4 per cent of the crashes, were also over-represented. Maori, who make up about 18 per cent of the Waikato population, were the offending driver in 28.5 per cent of the crashes.
Tuesday's article incorrectly stated Maori made up 27.4 per cent of the Waikato's population.

The figures revealed more than half of the fatalities (68.7 per cent) happened on state highways and 24.4 per cent of the drivers at fault were repeat offenders.
INTRODUCTION

In Aotearoa, the settlement process for redressing breaches of the Treaty of Waitangi has seen the establishment of a number of well-resourced and structured Māori economic entities and the return of substantial assets to claimants. Accordingly more and more iwi have shifted their focus to post-treaty settlement issues of development. This brings about an increasing need to analyse the ways in which iwi assets and resources are being managed.

A number of iwi have created their own distinctive models for overall management and distribution of resources. They have nevertheless continued to use company structures for wealth creation.

Māori directors of such companies face challenges trying to balance the pursuit of the Māori company’s commercial objectives with the
maintenance of fundamental tikanga Māori. These challenges are exacerbated when consultants to whom Māori directors turn for advice are often ill-equipped to give advice that ensures accordance with tikanga Māori.

This paper explores some of the difficulties of corporate governance of a company charged with managing iwi resources. Many of these challenges arise because the principles underpinning the traditional corporate structure often conflict with essential Māori beliefs and philosophies.

An associated concern relates to knowledge and application of tikanga Māori. How can a Māori director ensure that a decision or action accords with tikanga Māori, if that director has no knowledge of those laws and values?

This paper will also raise the question of how educators can improve tertiary education opportunities for the future architects of Māori development.

PART ONE · BACKGROUND

Tikanga

For the purposes of this paper, the term tikanga is used broadly to embrace essential Māori beliefs, philosophies, values and custom. One interpretation of ‘tikanga’ is that it is derived from the base word and concept ‘tika’, meaning right or correct. Tikanga therefore embodies core values or principles that reflect doing what is right or appropriate in the circumstances. Justice Durie uses the word tikanga to describe the norms that maintained law and order in Māori customary society. As a concept, tikanga is dynamic, rather than being a codified set of rules.

While themes and concepts of tikanga are universal, the specific expression of them may vary from iwi to iwi.

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5 Māori laws and values.
7 Waitangi Tribunal Muriwhenua Land Report (Wai 45, 1997) 21, and see the discussion about koha below.
Whanaungatanga

One example of a deep-seated value from Māori customary society, still revered today is whanaungatanga. It is often said that the Māori world was primarily concerned with human and divine relationships. A fundamental purpose of Māori law was to maintain relationships of people to their environment, their history and each other.8

Mauri

Mauri is a core value and therefore a source of tikanga. Mauri can be translated as the principle of vitality, mana and fruitfulness of people, lands, forests and other natural resources.9 For example, my tribal river, the Waikato, is often addressed in prayer and oratory as something with a life and aura of its own. Recognition of the esteem in which the iwi holds this river is immortalised in the following tribal saying:

Waikato Taniwharau,

He Pika He Taniwha.

Waikato, river of a hundred taniwha,

at every bend a chief.

This proverb refers to the stretches and bends of the river that were populated with supernatural creatures called taniwha. It alludes to the centuries of occupation of the riverbanks by the chiefs and their tribes of the Waikato valley.10

The river served as a rich source of food. It provided irrigation for plantations on land and served as a highway for travel by canoe. The river is also revered as a source of spiritual sustenance. The river’s protective and healing powers have long been recognized. According to oral histories, whenever Waikato people were sick, uncertain or about to undertake a journey or a new venture, they would go to the water, invoke their ancestors and sprinkle themselves.11

9 Williams, HW Dictionary of the Māori Language
10 King, M Te Puea (1987 (rep)).
11 Ibid, p51.
Accordingly, it would be abhorrent for a Māori director to consider any course of action that might harm or degrade the mauri of the river for a commercial outcome.\textsuperscript{12}

For many corporates, to factor acting consistently with such tikanga into the decision making framework of directors might fall under the category of conservation or ‘social conscience’ whereby companies take an interest in matters of concern to the community in the formulation of policy.\textsuperscript{13}

I do not propose that tikanga is the same as or even a category of social and political objectives. Rather, I would argue that tikanga comprises the fundamental values that constitute Māori people.

MĀORI DIRECTORS - ISSUES OF IDENTITY

There is no precise measure of what constitutes Māori identity.\textsuperscript{14} The late John Rangihau argued that being Māori is about growing up in a Māori community; earning apprenticeships by participating and by learning the customs and traditions that are part of being of a particular tribal group.\textsuperscript{15} This writer subscribes to this view that Māori identity is not dictated merely by blood quantum but, rather, by the upbringing one has had and by the society in which one grew up observing all the rites of passage in a Māori way.\textsuperscript{16}

Judge Williams, Chief Judge of the Māori Land Court, is reported to have categorised Māori in four primary groups:\textsuperscript{17}

1. Some 100,000 to 150,000 who live in or near their rohe (tribal area) as part of their whānau and hapū.

\textsuperscript{12} See below for examples of such courses of action.
\textsuperscript{13} CCH Director's Handbook 4-240.
\textsuperscript{15} Rangihau, J supra n 17, cited in Moeke-Pickering Ibid.
\textsuperscript{17} New Zealand Herald Wednesday October 25 2000.
2. A similar number, increasingly well educated, who live outside their rohe but participate in whānau or tribal activities.

3. About 100,000 dispossessed, often young, people who have no Māori cultural or linguistic connection.

4. Another 170,000-odd “assimilated New Zealanders of Māori descent” who know they have Māori ancestry but mainly identify with European culture.

According to this report, the first two groups are by and large bilingual and bicultural and have a strong sense of tino rangatiratanga and “separateness from the mainstream.” The second group, in particular, drives much of the policy debate. Both groups are growing in number.

References in this paper to the dilemmas faced by Māori directors when balancing tikanga are to those directors who identify as Māori, those who would fall into groups 1 or 2 as categorized by Judge Williams: for one must understand tikanga, or at least be aware of what it is, before one can truly attempt to balance tikanga with commercial objectives.

DIFFERENT TYPES OF MĀORI BUSINESS ORGANISATIONS

There are many types of organisations, structures and legal regimes used by Māori to conduct business for community or communal purposes; or that have some significant connection with communal purposes or interests. The obvious examples include ‘iwi authorities’, usually trust boards still operating under the Māori Trust Boards Act 1955; charged with managing resources owned by and to be used for the benefit of iwi or hapū. Other common forms in and through which a lot of Māori business is conducted are Māori Incorporations, and Māori Trusts established under the Te Ture Whenua Māori Act 1993.

While this paper focuses upon companies registered under the current New Zealand Companies Act 1993, many of the observations about company directors could also apply to trustees of trusts and incorporations.
COMPANIES REGISTERED UNDER THE NEW ZEALAND COMPANIES ACT 1993

Tribal leaders and iwi authorities face a cumbersome range of expectations: from providing educational grants, to negotiating with the Crown for the settlement of further claims under the Treaty of Waitangi, to managing complex commercial enterprises. Those tribal groups who have settled claims have adopted quite complex frameworks of trusts and other corporate bodies to administer assets from the various settlements. Such frameworks invariably include companies registered under the New Zealand Companies Act 1993 as vehicles for wealth creation.  

Companies are commonly viewed as separate cells to create benefits for the tribe. The most common scenario is for a company to pass financial benefits on to a shareholding trust board. The trust board, in turn, is concerned with the distribution of that wealth in a manner that is appropriate for the tribe. In other words, the commercial activities of the tribe are not an end in themselves but a means to an end - that is the development and enhancement of its people socially, culturally, spiritually and financially.

Role of Directors

Company directors have four key functions:

- to formulate corporate policy - that includes developing the purpose, vision, and values of the business;
- to determine strategic direction;
- to supervise performance of the business and of the management, and
- to ensure accountability to shareholders.

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18 In some circumstances such companies can be eligible for the advantages of charitable status.

19 CCH Directors Handbook 4-030
Fundamentally, when exercising powers or performing duties, directors are legally required to act in good faith in what they believe to be the "best interests of the company". The test is expressly subjective.

In considering the interests of the company, it is clearly acceptable for directors to look to the future of the company and the interests of future shareholders. The company may therefore carry out acts which have no short-term benefit for the company but which will be to its benefit in the long term.

Nevertheless, directors are often advised and accept the view that acting in the best interests of the company means acting in the best short-term commercial interests of the company.

**GOVERNANCE ISSUES FOR MĀORI DIRECTORS**

Generally, there is an expectation gap that exists between what some people perceive as appropriate corporate behaviour and what corporations actually do, and, it has been argued that this is because corporations have abdicated their social responsibility.

An expectation gap exists, perhaps even more so, in relation to Māori companies. Māori have extremely high expectations of their corporations. The assets are seen as either taonga tuku iho (treasures passed down from generations of ancestors - particularly in relation to land) or crucial for the benefit of unborn generations.

There has been some discussion in recent years about Māori managers and directors (primarily male) of Māori companies who have been dubbed "corporate warriors". It has been suggested that the word warrior connotes a desire to retain a distinctive Māori element about the way in which these companies operate. However, the word

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20 Companies Act 1993, s131
22 Institute of Directors in New Zealand (Inc) Best Practice for New Zealand Directors publications 1996 and 1998
corporate marks the priority that these directors place on achieving efficiency and profitability as is required in the 'real world' of the market place.\textsuperscript{24}

A frightening notion is that these corporate warriors hide behind the veil of these corporate structures whilst mimicking the exploitative behaviour of their non-Māori counterparts. As a consequence things that were treasured in traditional Māori society such as the environment, for example, suffer.

\textit{Competing objectives - hypothetical examples.}

The following examples of how a focus on profit making can be exploitative of the environment are hypothetical.

A company is established to manage the commercial fishing quota of an iwi. A local subtribe on the shores of a harbour complains of a decrease in the availability of seafood its members traditionally gather. The subtribe believes that the decrease is caused by an increased presence of commercial fishing vessels in the harbour. The company needs the vessels in the harbour to bring in good catches to improve cashflow problems. The local subtribe has requested that the company respect a rāhui\textsuperscript{25} in the harbour. What should directors do, whether they are Māori or otherwise? Many Māori would probably say respect the rāhui.\textsuperscript{26}

Other examples abound. A company buys shares in a meat works company that employs many Māori. The works are situated near the tribe’s river into which the meat company has been discharging effluent for some time.

Directors must balance competing considerations. While pollution is a wider social consideration it also harms the mauri of the river (see

\begin{itemize}
\item \textsuperscript{24} Seuffert, N "Treaty of Waitangi Settlements and Globalisation in New Zealand: Colonisation's next wave" (Unpublished Draft Article).
\item \textsuperscript{25} A suspension of use (such as fishing) for a specified period of time, usually to allow for spiritual cleansing after a fatality in the waterway, or for rejuvenation of a species.
\item \textsuperscript{26} Indeed this was the unanimous response when I put this same question to the participants at a seminar at the World Indigenous Conference on Education in August 1999, Hilo, Hawai‘i.
\end{itemize}
above). Other pressing concerns include cost and the interests of the employees. Which should take primacy?

A company becomes the majority shareholder in a company that operates a power station. The practice of the station is to take cold water from the iwi's tribal river, process the water to create electricity and return warm water. Disturbing the temperature of the water is a form of pollution that will affect taniwha and the mauri of the river. Directors will have to balance these effects with the costs involved in seeking out alternatives.

Despite the negative effects on the environment, when faced with some of these situations, some directors take the view that the real issue is that the wealth gets to the right people at the end of the day, and not so much how the money is made. Very often, financial considerations or the best commercial interests of the company take precedence over aspects of tikanga.

There are several possible explanations for the presence of such an approach.

Firstly, this type of attitude that focuses on profit maximisation at the expense of caring for our environment is a symptom of the radical restructuring by successive governments in Aotearoa/New Zealand over the past decade. Policy and legislation have incited the application of pure neo-liberal economic theory that prioritises markets and profits over people.27

A second possible explanation as to why indigenous peoples generally (including Māori) internalise oppressive values, comes from the seminal work of Paulo Freire.28 Freire theorises about how the oppressed individuals and peoples of the world might struggle for their liberation from those that oppress and exploit by virtue of their power.29 He argues that the oppressed internalise the image and the guidelines of their oppressor. They are caught in a contradiction "in which to be is to be like, and to be like is to be like the oppressor".30

30 Idem.
Freire’s analysis may explain why some Māori, such as the corporate warriors, appear to have adopted or “internalised” exploitative colonial values at the expense of various tikanga and ways of doing things. For example the Māori negotiators attracted widespread criticism following three of the major Treaty of Waitangi Settlements. The settlements themselves have been condemned as one-sided and oppressive. The corporate warriors, it is argued, were constructed by the corporate nature of the state-initiated settlement deals.

Possible Solutions

The tendency for some Māori directors to cite their legal obligation to act in the best interests of the company as justification for disregarding tikanga has been discussed above, together with an offering of possible explanations as to why they might do so. It may also be that the motives for mimicking structures that impede tikanga Māori are not opportunistic and greedy but rather that Māori directors are ill informed as to their options within a corporate structure.

One possible solution, yet untested as far as the writer is aware, is to explicitly prescribe in the constitution of the company the tikanga Māori that must not be compromised.

The Companies Act 1993 allows for, but does not compel, a company to have its own constitution to regulate itself in a way which is not inconsistent with the Act. There is considerable latitude for a company to arrange its affairs to suit its own individual needs. The provisions of the constitution can be enforced by a shareholder or the

32 Ngai Tahu, Waikato and the pan-tribal fisheries settlement commonly referred to as the Sealord’s Deal.
34 Seuffert, supra n 13, part II.
35 Sections 26, 31.
company as a statutory right. The legislation does allow for companies to express in the constitution those customs or tikanga that must take precedence over purely commercial considerations.

A difficulty arises here because there remains a lack of professional legal and commercial expertise in terms of drafting constitutions that provide for tikanga. There is a real need for more professional advisers who are able to respond to the needs and concerns of people in a bicultural society.

Another difficulty is that on many boards of indigenous corporates, directors are appointed on the basis of business acumen, commercial expertise and so on. Sadly, many of those directors are ignorant about matters of tikanga. A possible solution is the appointment to boards of directors of an elder or kaumatua with an expertise on matters of tikanga. Such an appointment would be based on knowledge of tikanga rather than business expertise, and would carry with it the specifically defined role and responsibility to ensure that tikanga is not overlooked or undermined in any way.36

**Nominee directors of joint venture companies**

It is common for a director to be appointed as the nominee for a particular shareholder. For example, it is common practise for iwi to come together in joint ventures, for example, in the areas of forestry and fisheries. Nominee directors are appointed by each iwi on the understanding that their function is to represent and protect the interests of the appointing shareholder. As such, the nominee occupies a position of acute conflict of interest. As directors, there is a primary duty to act bona fide in the interests of the company.37

English courts have generally approved of the concept of the nominee director. But they have also imposed a strict proviso. Should any conflict arise between the interests of the company and those of the appointor, the nominee must uphold the former.38

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36 Another option is to specifically require the presence of a kaumatua advisor in the decision making process. One tribal authority has stipulated in its constitution that no decisions can be made by trustees if a representative of the Kaumatua Council is not present.
37 S131 Companies Act 1993; See also Beck and Borrowdale, *Guidebook to New Zealand Companies and Securities Law*, para 313.
38 *Scottish Co-operative Wholesale Society Ltd v Meyer* [1958] 3 All ER 66; *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1993] NZLR 513.
The New Zealand Companies Act 1993 slightly modifies the position of nominee directors of companies that have been incorporated to carry out a joint venture between the shareholders.

Section 131 sets out the powers and duties of directors:

131. Duty of directors to act in good faith and in best interests of company-

(1) Subject to this section, a director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company...

Section 131(4) sets out an exemption to this general duty:

(4) A director of a company incorporated to carry out a joint venture between the shareholders may, when exercising powers or performing duties as a director in connection with the carrying out of the joint venture, if expressly permitted to do so by the constitution of the company, act in a manner which he or she believes is in the best interests of a shareholder or shareholders, even though it may not be in the best interests of the company.

It is said that this exemption provides a balance between commercial reality and the common law by allowing directors to act in the interest of their nominating shareholders in limited circumstances. It would be naive to assume that nominee directors would disregard the interests of their appointing shareholders when acting as directors of the company. In Re Broadcasting Station 2GB Pty Ltd it was decided that nominee directors may advance the interests of their appointing shareholder, as long as this does not breach the duties owed by those directors to the joint venture company. If there is a conflict between the interests of the joint venture company, and the interests of the appointing shareholder, then the director must act in the best interests of the joint venture company.

However, to take advantage of the rule in s131(4) specific provision must be made in the constitution to permit the directors to depart from their general obligation to act in the best interests of the company as a whole.

This means that tikanga Māori that should not be compromised should be explicitly recognised in the constitution.

**State Owned Enterprises - an analogy**

If the exemption for nominee directors is not applicable (that is if Māori businesses do not choose to use a joint venture structure) the dilemma of Māori directors resembles that faced by those who are in governance positions on State Owned Enterprises (SOEs) and other types of crown corporations.

SOEs were established in the 1980s as new structures to improve the performance of the public sector. The principal objective of an SOE is to “operate as a successful business”. To achieve that objective an SOE must be:

- as profitable and efficient as comparable businesses that are not owned by the Crown;
- a good employer, and
- an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so.

These objectives were intended to clarify the role and focus of SOE managers. Much of the litigation that has arisen from the operation of the Act relates to the interpretation of section 4 of the SOE Act; and in particular the relationship between the requirement to be profitable and the requirement to exhibit a sense of social responsibility.

It is not within the scope of this paper to explore the considerable legal analysis of the tension between the “commercial” and “social” objectives enshrined within section 4 Act in any detail. However, the Courts in

41 State Owned Enterprises Act 1986, s4(1).
most instances have been consistent in determining that commercial objectives take priority over maintaining social responsibility.  

Conflicts in relation to the management of SOEs will ultimately be determined by a Court’s interpretation of the relevant statutory provision in light of the facts of the case. The requirement to exhibit a sense of social responsibility is expressly stated in the statute. The courts have consistently found that the pursuit of commercial objectives overrides the requirement about social responsibility.

The relevance of this comparison is that Māori directors, like all directors, have a statutory duty to act in the best interests of the company. In addition, as Māori directors they also have other duties by virtue of their Māori identity. But those duties to maintain tikanga are not expressed in statute. Nor have they been recognised by common law. Accordingly, if the situation arose where Māori directors acted in a manner that allowed tikanga to override their statutory duties owed to the company, a court would find that the statutory duty had been breached. In any case, if there is going to be provision made in the constitution that in some circumstances tikanga is overriding it must be made absolutely clear.

APPOINTMENT OF DIRECTORS - THE ROLE OF KAUMĀTUĀ IN THE BOARDROOM

A further difficulty that arises is the appointment of directors based on abilities other than business expertise. The appointment of a director who is not versed in commercial matters may well raise concern from consultants. For example, a kaumatua appointed on the merit of his or her expertise in tikanga is one way in which a Māori company could ensure that tikanga is not overlooked or undermined in any way.

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43 This issue also arises in relation to employees.

44 Another option is to specifically require the presence of a kaumatua advisor in the decision making process. Te Runanga o Turanganui a Kiwa is based in Gisborne and represents the iwi of Rongowhakaata, Te Aitanga a Mahaki and Ngai Tamanuhi. Its constitution states that no decisions can be made by trustees if a representative of the Kaunihera Kaumatua (Kaumatua Council) is not present.
However, financial and legal consultants have consistently provided literature for boards stressing the need to consider the requirements of an 'effective' director. These requirements include such things as 'business acumen', 'commercial expertise', 'strategic vision' and so on. This sort of advice might be understandable given the higher levels of responsibilities and stricter penalties now imposed upon directors. Nevertheless it reiterates that the commercially driven consultants do not recognise the value of tikanga Māori and accordingly the value of a kaumatua.

This highlights two issues. Firstly, the appointment of directors ought to reflect a suitable balance of persons taking account of business and industry skills as well as stakeholder awareness. Indeed, the latter point should be given as much importance in board membership as other more commercially oriented skills.  

Secondly there is the need to improve the understanding of those who provide consultancy and advisory services to boards. Such a need was recognised by Waikato University when it proposed to create a Waikato law school. The committee which examined the need for a law school at Waikato stated:

New Zealand is a society that needs not only more lawyers but lawyers who must respond to the needs and concerns of people in a bicultural society.  

Te Piringa, the Māori legal academic team of the Waikato Law School will readily admit that the School has much work to do if it really seeks to achieve the goal of biculturalism. But that is not reason to stop trying to achieve the goal. At the very least, all schools of law and management in our tertiary institutions must acknowledge the needs of this bicultural society.

In the meantime there is a need for training and development of our people as directors by people who at least understand the dilemmas of working in an iwi environment. Courses run by the Institute of Directors, and advice from consultants concentrate on legal duties, but often fail to address some of the conflicts that arise.

45 This is currently the appointment practice of the Minister for State Owned Enterprises, correspondence dated 6 August 2001.

SUMMARY

This paper serves to highlight some of the dilemmas that Māori directors face in Aotearoa/New Zealand when making decisions involving the balancing of competing commercial objectives with custom. It is suggested that some indigenous directors are tempted to disregard tikanga for a commercial outcome. Such directors need not ignore tikanga or custom when they step into the boardroom. Being both indigenous and a company director need not be mutually exclusive. That some people think they are, including professional consultants, highlights an obvious need for training and development of our people as directors by people who at least understand the dilemmas of working in an iwi environment. In addition, there must be experts on custom law or tikanga either as directors and part of the board, or in some other advisory capacity to ensure that custom or tikanga is not undermined. Furthermore, companies can prescribe in their constitutions those customs or tikanga that must take priority over purely commercial considerations.
LEGISLATIVE PROVISION FOR TINO RANGATIRATANGA: A NATIONAL PARK CASE STUDY

Jacinta Ruru*1

For more than a century, national parks have existed in New Zealand as a conservation tool to protect many of our natural landmarks. Historically, Māori have been consistently excluded from exercising control over this estate. The exclusive right to establish and manage national parks has sat firmly with the Crown. That right needs to be reconsidered. To this end the Waitangi Tribunal has recently clarified the respective rights of the Crown and Māori to manage taonga within the conservation estate. This paper attempts to apply that assessment to what many describe as the ‘jewels’2 of the conservation estate, national parks.

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The paper begins with an explanation of national parks. It then outlines how national parks should be managed using Waitangi Tribunal jurisprudence as a benchmark. How national parks are actually managed is then discussed. The difference between “how national parks are managed” and “how national parks should be managed” is then examined. Finally, based on the conclusion that there is little alignment between the “how are” and the “how should”, several options are suggested that would enable the Crown, in exercising its power to enact legislation, to better provide for Māori and their right to exercise tino rangatiratanga.

1. THE NATIONAL PARK ESTATE

National parks encompass the most scenically spectacular “… mountains, forests, sounds, seacoasts, lakes, and rivers …” in New Zealand. Fourteen national parks exist: four in the North Island, and ten in the South Island.

The specialised device of reserving land as a ‘national park’ was first implemented by legislation in New Zealand in 1894. The device is entirely premised on a Western concept of conservation: preservation and protection. For instance, the National Parks Act 1980 (NPA 1980) describes national parks as being areas that “… contain scenery of such distinctive quality, ecological systems, or natural features so beautiful, unique, or scientifically important that their preservation is in the national interest…”, and therefore must be protected in perpetuity “… for their intrinsic worth and for the benefit, use and enjoyment of the public …”. To the Crown, and to many New Zealanders, national parks represent the jewels of the conservation estate, an estate that is held and managed by the Crown on behalf of the people of New Zealand.

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3 Section 4(2)(c) of the National Parks Act 1980.
4 Egmont, Tongariro, Urewera and the Whanganui National Park.
5 Abel Tasman, Arthur’s Pass, Fiordland, Kahurangi, Mt Aspiring, Mt Cook/Aoraki, Nelson Lakes, Paparoa, Westland and the Steward Island/Rakiura National Park.
6 See Tongariro National Park Act 1894.
7 Section 4(1) of the NPA 1980.
Yet, two centuries ago the national park device for protecting land was unheard of, as was Crown control of land in New Zealand. Two centuries ago Māori were the undisputed managers of the spectacular wonders of New Zealand. The "... mountains, forests, sounds, seacoasts, lakes, and rivers ..." were considered ‘taonga’, and were managed according to tikanga Māori. For instance, Aoraki, the mountain integral to the Aoraki/Mount Cook National Park is a tupuna (ancestor) of Ngai Tahu; and Taranaki, the mountain integral to the Egmont National Park is a tupuna of the Taranaki iwi. Or, as described by a Tuhoe descendent in regard to the land within the Urewera National Park:

Te Urewera is our home, our church, our cathedral, it is our sacred shine in order to restore our mental, physiological and physical recreation sustenance,... It is our identity, it is OUR body, it is our mother.... The congregation of mountainous peaks and ridges, rivers, creeks, that stretches the boundaries of our tribe include our fisheries areas, hunting grounds, papa kāinga, marae, cultivation areas, ancient battle fields, burial places. And there is not a hill or gully, or ridge or creek, ... a stone or mighty rimu tree or small seedling that does not have a name and has been consecrated into a haka, waiata tawhito, pātere, kōrero taunahanaha which draws its sources from the philosophical, historical contemporary oral narratives of Tuhoe.

Both peoples clearly have a special affinity for national park land. One commonly describes the land as their ‘jewels’, the other as their ‘taonga’. The estate lies as a sanctuary for our flora and fauna. It is an estate that represents a time gone by, a glimpse of the natural state of how New Zealand once was. The contention concerning the national park estate lies, not with the fact that the land should be protected, but rather with the question of who should be charged with protecting it.

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8 The first country to establish a national park was the United States of America in 1872: the Yellowstone National Park.
9 An expression used in section 3 of the NPA 1980.
10 Taonga, translated in a simple form, means ‘property’ or ‘resource’. A more accurate translation may be “... any material or non-material thing having cultural or spiritual significance for a given tribal group ...” Waitangi Tribunal, Ngawha Geothermal Resource Report. (Wai 304, 1993) at 20.
11 Taiarahia Black, “Tuhoe and the Conservation Estate” a paper presented at the Environmental Conference, University of Otago, 1996, at 1 (copy obtained personally, Māori Studies Department, Massey University).
II. HOW NATIONAL PARKS SHOULD BE MANAGED

Te Tiriti o Waitangi / the Treaty of Waitangi,\textsuperscript{12} the founding document between Māori and the Crown, signed in 1840, guaranteed to Māori "... te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa....",\textsuperscript{13} or as the English version reads:\textsuperscript{14}

... full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession ...

Te Tiriti was our first national environmental policy statement,\textsuperscript{15} and provides us with a model for how our environment should be managed, including the national park estate. Te Tiriti remains relevant for the Conservation Act 1987, the companion to the NPA 1980. The Conservation Act is to be "interpreted and administered as to give effect to the principles of the Treaty of Waitangi....".\textsuperscript{16} Judicial reasoning can be applied to support the expression that "This Act" means, not simply the Conservation Act, but also those statutes listed in its schedule, such as the NPA 1980.\textsuperscript{17} This section of the paper provides an interpretation and application of te Tiriti to the management of national parks.

\textsuperscript{12} Hereinafter this document is referred to as te Tiriti o Waitangi, or simply te Tiriti. This reference is intended to be a reference to both the Māori and English texts of this document.

\textsuperscript{13} Ko te Tuarua. Translated by Professor Sir Hugh Kawharu to read: "... chieftainship over their lands, villages and all their treasures ...".

\textsuperscript{14} Article II.

\textsuperscript{15} As argued by Hirini Matunga in “Decolonising Planning: The Tiriti o Waitangi, the Environment and a Dual Planning Tradition” in Memon and Perkins (eds), \textit{Environmental Planning & Management in New Zealand.} (2000), Dunmore Press Ltd, Palmerston North, ch. 3 at 38.

\textsuperscript{16} Section 4.

\textsuperscript{17} See Ngai Tahu Māori Trust Board v Director-General of Conservation [1995] 3 NZLR 553. The NPA 1980 is of a like nature to the statute considered in this case, the Marine Mammals Protection Act 1978 in that both statutes are listed in the First Schedule of the Conservation Act, and both contain no internal references to te Tiriti or Māori.
**A. The Waitangi Tribunal benchmark**

The Waitangi Tribunal has had a number of opportunities to interpret and apply the principles of te Tiriti o Waitangi to the management of natural resources.\(^{18}\) It is also the one specialist body that has exclusive authority to investigate and apply the principles of te Tiriti.\(^{19}\) The jurisprudence of the Waitangi Tribunal is therefore adopted as the appropriate benchmark for assessing how the national park estate should be managed.\(^{20}\)

The Tribunal has stated that while te Tiriti is to be regarded as "... a living document to be interpreted in a contemporary setting...",\(^{21}\) one principle has emerged as the "... general overarching principle ...":\(^{22}\) "... the Māori gift of governance to the Crown was in exchange for the Crown’s protection of Māori rangatiratanga...".\(^{23}\) Implicit in this paramount principle are those which state that:\(^{24}\)

- te Tiriti implies a partnership, exercised with the utmost good faith;
- tino rangatiratanga includes management of resources and other taonga according to Māori cultural preferences;

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18 Section 2 “Treaty” of the Treaty of Waitangi Act 1975 means “... the Treaty of Waitangi as set out in the English and in Māori in the First Schedule to this Act...”.


20 In addition, the Tribunal has a bi-cultural membership and procedure, which is itself consistent with the principles of te Tiriti.


22 A number of Waitangi Tribunal reports use this expression: see, for example, Waitangi Tribunal, Te Whanganui-a-Orotu Report. (Wai 55, 1995), at 201; Waitangi Tribunal, Ngai Tahu Sea Fisheries Report. (Wai 27, 1992), at 269; and Ngawha Geothermal Resource Report supra n 10 at 99.


24 These principles have been taken from Hayward supra n 21 (a study based on Waitangi Tribunal reports, judicial decisions and political party interpretations of te Tiriti).
• taonga includes all valued resources and intangible cultural assets;
• the exchange of the right to make laws for the obligation to protect Māori interests;
• the Crown obligation actively to protect Māori Tiriti rights; and
• a duty to consult.

In addition, the Tribunal has established that if the taonga in question is “... highly valued, rare and irreplaceable ...”, 26 and “... of great spiritual and physical importance ...”, 27 then the Crown is under an “... affirmative obligation ...” to ensure its protection “... to the fullest extent reasonably practicable....” 28 Many of the natural landmarks and resources within the national park estate must surely meet this threshold - in many instances the resources are, after all, considered tupuna.

Hence, the Tribunal accepts that the Crown has the right and duty to make laws for the conservation of natural resources, such as establishing and managing national parks, but that this is a qualified right: 29

... the Crown does have a power and a duty to manage natural resources in the interest of conservation but ... these rights are qualified by the tribe’s te tino rangatiratanga ...

Rangatiratanga, according to the Waitangi Tribunal, “... denotes the mana of Māori not only to possess, but to control and manage ... [taonga] ... in accordance with their own cultural preferences ...”. 30 It has explained: 31

26 Ibid.
27 Waitangi Tribunal, Mohaka River Report. (Wai 119, 1992), at 75. A number of other reports have also stated this: see for example ibid; Whanganui River Report supra n 23; and Ngawha Geothermal Resource Report supra n 10 at 136.
28 Mohaka River Report , ibid.
29 Ibid at 63 and 65.
30 Ngawha Geothermal Resource Report supra n 10 at 136. See also Whanganui River Report supra n 23 at 64.
31 Ibid.
While the cession of sovereignty or kawanatanga enables the Crown to make laws for conservation control and resource protection, that right is to be exercised in the light of article 2 of the Treaty. It should not diminish the principles of article 2 or the authority of the tribes to exercise control. In short, the tribal right of self-regulation or self-management is an inherent element of tino rangatiratanga.

Moreover, the Tribunal has wholly rejected the Crown’s recent argument that te Tiriti deprives Māori of authority over natural resources. The Crown had based this on the premise that natural resources fall outside the Article II protection of tino rangatiratanga, because the management of natural resources is solely an Article I issue of kawanatanga. Rather, the Tribunal held that such an argument is "... inconsistent with the Treaty language and contemporary understanding of it ...". 32

However, the Tribunal has accepted that in "... exceptional circumstances ..." the Crown may be able to override the fundamental right of rangatiratanga, but it must be as a "... last resort ..." and be "... in the national interest....". 33 In the recent Whanganui River Report the Tribunal clarified this 'national interest' justification by stating emphatically that "... the national interest in conservation is not a reason for negating Māori rights of property....". 34

In cases of natural resource disputes which lie within the conservation estate and have met the 'taonga threshold test', inclusive management roles have been recommended by the Waitangi Tribunal. For example, shared management of the Waipoua Forest, a taonga to Te Roroa people, was recommended: 35

The claimants must appreciate that the Crown has the right to manage the land it owns. In keeping with 'the meaning and effect' of the Treaty, we believe that tangata whenua should share in the control and management of natural and cultural resources on Crown land and their traditional resource areas.

32 Whanganui River Report supra n 23 at 329.
33 Waitangi Tribunal, Turangi Township Report. (Wai 84, 1995), at 15.2.1 (3).
34 Whanganui River Report supra n 23 at 330.
35 Waitangi Tribunal, Te Roroa Report (Wai 38, 1992), at 183.
This recommendation typifies the Tribunal’s approach, being that tangata whenua continue to have rights and should be able to exercise these rights in regard to their taonga even if the land is now held by the Crown as part of the conservation estate.

Te Tiriti should be guiding the management of our national parks. This being so, what does it mean? What would a Tiriti o Waitangi model look like for national park management?

B. A TIRITI MANAGEMENT MODEL

Based on the Waitangi Tribunal’s interpretation of the principles of te Tiriti o Waitangi, a Tiriti management model would, firstly, endorse both the Crown’s right to govern, and the Māori right to exercise tino rangatiratanga. Secondly, iwi would be recognised as the tangata whenua of national park land. They would be recognised as having a spiritual, historical and cultural link with the land. It would be recognised that this land is a taonga to the tangata whenua. Likewise, it would also be recognised that national park land is special to Pakeha, and that it represents to them the jewel of the conservation estate. Thirdly, the Māori conservation ethic would be accorded equal status to the Pakeha conservation ethic. Both ethics would, for example, influence the classification of permitted activities within the national park estate. Both the Crown and Māori would have similar rights to be involved in national park management. Fourthly, both would have a right to direct the development of national park policies. Such rights would not be confined to Māori simply being regarded as a special interest group. Nor would this right to manage simply mean that Māori must be consulted whenever particular national park management issues arise. Such measures do not equate to tino rangatiratanga. However, the matter of what measures tino rangatiratanga would require could well be different for the tangata whenua of each national park. This in itself must also be recognised.

In short, a Tiriti management model would require the Crown and Māori to be respectful of one another’s values. This would mean that the Tiriti rights of both parties would be recognised and provided for in the management of national parks. If national park legislation is being guided by the principles of te Tiriti, recognition and provision for these values and rights would be evident.
Tania Ruru has adapted Arnstein’s ‘ladder of public participation’ model and conceptualised the different ways that rights to representation could be expressed in resource management legislation. Her continuum model consists of nine expressions of representation. It is presented in a progressive manner with each expression representing a more inclusive stance towards the right of Māori to be included in the management of natural resources. In adapting the model here for the national park estate, it can be stated as:

**Level One: General Interest Group only**
At this level Māori would be considered one of a number of interest groups. Their interests would be given no express mention or priority in legislation. Where considered relevant, Māori interests would be weighed against the interests of other groups in the administration and management process.

**Level Two: Special Interest Group**
Māori interests would be mentioned in legislation making it clear that they are a special group whose interests must be given due weight by national park management bodies.

**Level Three: Discretionary Consultation/Consideration**
At the third level legislation would suggest that regard be had to considering consultation with Māori in respect of activities which would affect their interests. Their viewpoint, however, would have no binding effect on decision-makers, but would be one element to be considered.

37 Because this model is management focused (rather than ownership focused) it provides a suitable way to view national park provisions within the confined management-oriented framework of this paper.
Level Four: Mandatory Consultation/Consideration

National park legislation would prescribe that consultation take place with Māori whenever their interests would be affected. Their viewpoint would have the status of mandatory consideration but would have no necessary binding effect on decisions made.

Level Five: One Māori Vote

At the fifth level national park legislation would prescribe that one Māori representative, holding the power to vote, be present on all national park management bodies.

Level Six: Fifty Percent Representation

At the sixth level national park legislation would prescribe that Māori constitute fifty percent of those sitting on national park management bodies.

Level Seven: Equal Status to national park management bodies

At the seventh level the legislation would prescribe that appointed iwi organisations be given the same status as existing national park management bodies and administer the national park estate in partnership with these bodies, in joint documents or in separate but parallel documents.

Level Eight: Māori Veto subject to Judicial Review

At the eighth level the legislation would prescribe a Māori veto on all national park management decisions affecting their interests. This veto could be subject to judicial review in the ordinary courts. This veto would operate with respect to both administrative and management functions.
At a slightly elevated level, say level 8.5, this veto could be subject to judicial review by only the Waitangi Tribunal.

**Level Nine: Māori Veto subject to Māori Review**
Lastly, at the ninth level, this veto would be the same as that prescribed at level eight, but would be subject to review by only iwi.

If national park legislation was being guided by te Tiriti o Waitangi, surely legislative measures today to provide Māori with representation would fall nearer to the end-realm of this continuum model. Recognising both governance and tino rangatiratanga rights, must mean, if we are to use the Waitangi Tribunal’s interpretation as the benchmark, more than consultation and single rights to representation: mid-realm aspirations. A right to be consulted, after all, is not the same as a right to have one’s views actioned. Perhaps the end-realm expressions would better reflect partnership aspirations. Level seven, for instance, would provide iwi with a right to be recognised and represented in the management of national parks to a standard that would clearly identify them as a Tiriti partner. However, a departure from level seven to the higher realm of veto power may prove contrary to the Waitangi Tribunal benchmark - for the Tribunal holds that the Crown has the right to govern and, although this is qualified by a right of rangatiratanga, the Crown still has the overriding power, albeit only in exceptional circumstances.

How does our current legislation provide for tino rangatiratanga in the management of national parks? And, if it does, how does it align with this espoused Tiriti model?

**III. HOW NATIONAL PARKS ARE MANAGED**

Today, the national park estate is exclusively owned and managed by the Department of Conservation, supposedly on behalf of all the people of New Zealand. The Department and its regional conservancies assume the day-to-day administration and management responsibilities for the conservation estate, including national parks. The Department is aided by independent advice from the statutorily created national New Zealand Conservation Authority (NZCA) and regional
conservation boards. The Department has recently committed itself to promoting effective partnerships with tangata whenua and is currently working towards a long term goal whereby tangata whenua will be able “... to maintain their cultural relationships with their natural and historic heritage ...”. The Department has justified this inclusive approach on the basis that partnership:\[38\]

... helps to protect and enhance the environment by providing Māori with opportunities to become involved in conservation management. It strengthens national identity by involving Māori more in the conservation of natural and historic heritage ...[and] helps to uphold the principles of the Treaty of Waitangi. It also helps to grow an inclusive, innovative society for the benefit of all. It improves New Zealanders’ skills by providing for transfer of knowledge about conservation management.

The Department’s ability to realise these goals may, however, be undermined. For instance, the Department’s mandate, given to it by the Conservation Act, is one of conservation through the means of:\[39\]

... preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations.

This mandate has little regard for the Māori conservation ethic of kinship: “... humans and nature are not separate entities but related parts of a unified whole...”\[40\]; and sustainable use: “... use is not a sacrilege but ... an honouring of wildlife ...”.\[41\]

Nonetheless, several legislative provisions do exist which attempt to include Māori in the management of national parks. The sum total of these measures are depicted below. They tend to take two forms:

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39 Section 2 ‘Conservation’.
41 Todd Taiepa et al, “Co-management of New Zealand’s conservation estate by Māori and Pakeha: a review” 24 Environmental Conservation (3) 1997, 236 at 239.
providing Māori with rights of representation, and providing recognition of Māori association and values.

A. OF GENERAL APPLICATION

Recognition measures

- national parks are to be administered and managed according to the principles of the Treaty of Waitangi (so long as the principles of the NPA 1980 are not clearly inconsistent with the principles of the Treaty of Waitangi). 42

Representation measures

- two of the thirteen positions on the NZCA are to be filled by Māori; 43 and
- the Minister of Conservation in appointing members to conservation boards must have regard to a number of interests including the interests of tangata whenua of the area. 44

B. MEASURES APPLICABLE TO PARTICULAR IWI

Recognition measures

- the Minister of Conservation must have particular regard to the advice given by Te Runanga o Ngai Tahu when he/she is considering national park management plans, other conservation management plans, and when formulating written recommendations to the NZCA; 45
- the NZCA and conservation boards must consult, and have particular regard to, Ngai Tahu values of a Topuni, 46 and any specific principles agreed to between Te Runanga o Ngai Tahu and the Crown; 47

42 Section 4 of the Conservation Act, and supra n 17.
43 Section 6D(1)(a), ibid.
44 Section 6P(2)(b), ibid.
45 Section 233 of the Ngai Tahu Claims Settlement Act 1998.
46 A Topuni is an area of land, which can include land administered under the NPA 1980, has Ngai Tahu values, and has been declared a Topuni under the Ngai Tahu Claims Settlement Act 1998.
47 Sections 241 and 242, ibid.
the Minister of Conservation must have particular regard to the views of Te Runanga o Ngai Tahu if a deed of recognition has been entered into in regard to a Statutory Acknowledgement area within a national park; 48

Te Runanga o Ngai Tahu have the right to amend or cancel ‘Department of Conservation protocols’; 49 and

Te Runanga o Ngai Tahu have a right, when the Minister of Conservation makes policy decisions concerning the protection, management or conservation of certain taonga species, to be advised, consulted with, and to have the Minister take particular regard of their views. 50

**REPRESENTATION MEASURES**

- Te Runanga o Ngai Tahu have a right to nominate one person as a member to the NZCA; 51
- a lineal descendant of Te Heuheu Tukino must be appointed to the conservation board responsible for managing the Tongariro National Park; 52
- the Taranaki Māori Trust Board have a right to recommend one person to be appointed to the conservation board responsible for managing the Egmont National Park; 53
- the Whanganui River Māori Trust Board have a right to recommend one person to be appointed to the conservation board responsible for managing the Whanganui National Park; and 54

48 See sections 212, 213, 215 and 216, ibid.
49 Department of Conservation protocols are statements in writing, issued by the Crown through the Minister of Conservation to Te Runanga o Ngai Tahu which set out how the Department of Conservation will exercise its functions, powers, and duties in relation to specified matters within the Ngai Tahu claim area, and how the Department will, on a continuing basis, interact with Te Runanga o Ngai Tahu and provide for Te Runanga o Ngai Tahu’s input into its decision-making process. See sections 281 and 282, ibid.
50 Section 293, ibid. “Taonga species” means species of birds, plants and animals described in Schedule 97 and found within the Ngai Tahu claim area: see section 287, ibid.
51 Section 6D(1)(ca), ibid.
52 Section 6P(5)(b), ibid.
53 Section 6P(6)(b), ibid.
54 Section 6P(7)(b), ibid.
Te Runanga o Ngai Tahu have a right to nominate two persons to become members of conservation boards that are responsible for managing a national park that is wholly within their takiwa, and one person to those conservation boards that are responsible for managing a national park that is partly within their takiwa.  

Further rights for Māori to be included in the management of national parks can be ascertained from companion documents, including the statements of general policy and national park management plans (NPMPs): the NPA 1980 stipulates that the Department must administrate and manage national parks in accordance with such documents. Only two statements of general policy are relevant. The first requires that "... consultative procedures with local Māori groups which have historical or spiritual ties to land in national parks will be fostered ...". The second states that NPMPs should provide for the: "Traditional uses of indigenous plants or animals by the Māori people for food or cultural purposes ... where such plant or animals are not protected under other legislation and demands are not excessive...."  

The provision for recognising Māori in NPMPs has been haphazard. For instance, as at 2002, only five of the twelve operative NPMPs expressly mention the Treaty of Waitangi. Despite the general policy statement requiring provision for traditional use, some make no mention of it, and many of those that do merely reproduce the general policy statement without further elaboration. Most operative NPMPs recognise, to some extent, the historical association Māori have had with land that is now included in the national park estate, but few recognise the spiritual association.
In comparison, quite a different picture is presented in the study of the current draft NPMPs. All five of the current draft NPMPs acknowledge, albeit to varying degrees, the importance of "the Treaty" in the management of national parks (one even directly refers in te reo Māori to "te Tiriti o Waitangi"), and all have formulated policy on traditional use and the need to consult with tangata whenua.

The major indicator that is conveyed in this assessment of legislative provisions, including companion documents, is the inconsistency of approach to including Māori in the management of national parks. The analysis also conveys a tendency to limit such inclusion to rights to be consulted, and rights to single-member representation.

I now turn to assess whether there is a gap between how national parks should be managed, using Waitangi Tribunal jurisprudence as a benchmark, as opposed to how they are in fact managed.

IV. DOES THE "HOW ARE" ALIGN WITH THE "HOW SHOULD"?

As discussed above, Tania Ruru has presented a continuum model consisting of nine levels reflecting ways in which legislation could provide for the participation of Māori in the management of natural resources:

<table>
<thead>
<tr>
<th>Level</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>One:</td>
<td>General Interest Group only</td>
</tr>
<tr>
<td>Two:</td>
<td>Special Interest Group</td>
</tr>
<tr>
<td>Three:</td>
<td>Discretionary Consultation/Consideration</td>
</tr>
<tr>
<td>Four:</td>
<td>Mandatory Consultation/Consideration</td>
</tr>
<tr>
<td>Five:</td>
<td>One Māori Vote</td>
</tr>
<tr>
<td>Six:</td>
<td>Fifty Percent Representation</td>
</tr>
<tr>
<td>Seven:</td>
<td>Equal Status to National Park Management Bodies</td>
</tr>
<tr>
<td>Eight:</td>
<td>Māori Veto subject to Judicial Review</td>
</tr>
<tr>
<td>Nine:</td>
<td>Māori Vote subject to Māori Review</td>
</tr>
</tbody>
</table>

National park legislation currently provides for Māori participation in the realm of the first five levels of this model. For instance, at level

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60 NPMPs have a life span of ten years; part of the process of introducing a new NPMP requires the publication of a draft plan to engender discussion and feedback on the proposed management direction of the respective park.
one is section 4 of the NPA 1980 which merely regards Māori as a general interest group. This section articulates the importance of national parks, stressing both preservation and public use principles in a manner that fails to expressly mention Māori interests, including the fact that many of the landmarks within the national park estate are tupuna of the tangata whenua.

Further along the continuum model, at level four, are provisions such as the Topuni device with its requirement that particular regard be had to Ngai Tahu values, and provisions relating to the Whanganui National Park requiring that the Whanganui River Māori Trust Board’s advice be sought, and had regard to, in certain circumstances. Many of the provisions contained in the NPMPs are also indicative of level four characteristics. The General Policy requirement to foster and fully consider the views of local Māori groups in formulating management policies is also typical of level four attributes. Section 4 of the Conservation Act possibly falls within this level too, as consultation is an important Treaty principle.

Representative provisions concerning some conservation boards provide apt examples of level five: the ‘One Māori Vote’ formula. Tangata whenua have a right to one of twelve seats on the Conservation Boards whose areas of jurisdiction include: the Tongariro National Park, the Egmont National Park, the Whanganui National Park. This also applies to those Boards that have part jurisdiction over a national park in the Ngai Tahu takiwa. The representative provisions concerning the NZCA, and those conservation boards whose whole jurisdiction covers one or more of the national parks in the Ngai Tahu takiwa, are better classified as falling midway between the fifth and sixth level. Their representative provisions amount to more than one seat, but less than fifty percent.

This analysis reveals numerous inconsistencies. While several provisions designed to include tangata whenua in the management of national parks exist, other provisions undermine the potential for progress (for example, section 4 of the NPA 1980). Overall, the model reinforces this paper’s principal argument that the current management of national parks falls short of the Waitangi Tribunal interpretation of te Tiriti, which is that te Tiriti o Waitangi promised to Māori “te tino rangatiratanga ... o ratou taonga katoa” for so long as it was their desire to retain them.
Many natural features which lie within the boundaries of the national park estate continue to be regarded as taonga by tangata whenua. Similarly, tangata whenua continue to express their desire to retain tino rangatiratanga over such taonga. Tino rangatiratanga must mean something more than consultation and rights to single-seat representation. Level seven aspirations align best with the common yardstick that should be aimed for: respecting and providing for one another as Tiriti partners.

Bearing this analysis in mind, I now turn to discuss possible legislative provisions for future implementation. Three action plans are proposed. The first plan relies on making better use of current national park legislation. The second plan requires several legislative amendments to the current legislation. The third plan suggests a complete overhaul of the current legislative regime.

V. HOW COULD TINO RANGATIRATANGA BE BETTER PROVIDED FOR IN NATIONAL PARK LEGISLATION?

A. Access Existing Provisions

The following are examples of how the current legislative regime could be utilised and developed to create a more inclusive national park management regime. If the Department of Conservation was truly committed to co-management, as its missions and visions suggest, then one would expect to see these suggestions outlined below actioned in the very near future.\(^6^1\)

- Introduce new statements of General Policy

Section 44(1) of the NPA 1980 allows the NZCA to adapt statements of general policy for national parks to changing circumstances or in accordance with increased knowledge. The NZCA could thus introduce a new statement that recognises the right for Māori to be accorded special status in the management process. Additionally, present policy statements could be amended to better reflect Māori aspirations. After all, providing for better inclusion of tangata whenua is supposed to be a key goal of the Departments, and supported by the NZCA.

\(^6^1\) See supra n 38.
- **Encourage a more consistent NPMP approach**
  This might be achieved by publishing all measures relating to Māori as exist in current and draft NPMPs. By making the comparative information readily available, conservation boards could be encouraged to adopt inclusive provisions practised in other conservancies. Section 46 of the NPA 1980 allows amendments or reviews of management plans to take place so that account can be taken of "... increased knowledge or changing circumstances...". Hence, streamlining inclusive provisions is possible under existing legislation. There would be no need for conservation boards to wait until respective NPMPs became due for replacement (a ten year cycle).

- **Support the appointment of Māori onto national park management bodies**
  The Minister of Conservation has an unfettered right to appoint four persons onto the NZCA; the Minister could be encouraged to favour Māori in that selection process. A similar practice could be encouraged in making appointments to conservation boards, although this may not be as successful as the Minister has less discretion - a number of interests have to be considered. Tangata whenua interests are stipulated as one of many interests.

- **Provide adequate resources and encourage further education**
  For Māori to be successful partners in managing the national park estate they should be adequately resourced. The Department of Conservation should provide such resourcing. This could be by way of finances, access to training schemes and further education, and access to Department resources such as meeting rooms, libraries, and equipment. The Department of Conservation and the NZCA could strengthen their commitment to providing education seminars, workshops, hui and retreats which focus on understanding Tiriti o Waitangi responsibilities.

To summarise this first plan: while the implementation of these measures would result in little movement along the nine-step continuum model, it would strengthen the current position of Māori to participate in national park management as a Tiriti partner. The implementation of these provisions would, at least, give some practical substance to the mission and vision statements endorsed by national park managers: the Department of Conservation, NZCA and conservation boards.
B. AMEND CURRENT LEGISLATION

The following measures are examples of how the NPA 1980 and the Conservation Act should be amended to encourage a real progression towards the co-management of our national park estate.

1. The NPA 1980

- Amend section 4 to reflect the importance of protecting national parks as a taonga to Māori.

Section 4 of the NPA 1980 currently explains the use of the national park device in terms of being able to provide people the opportunity to experience land and resources in their natural state. This section could be amended to reflect the importance of preserving land to provide for the historic, traditional, cultural, and spiritual relationship tangata whenua have with this land.

If tangata whenua interests were recognised in section 4, further opportunities could arise for tangata whenua to be included in national park management. For instance, it would be more difficult for the Minister of Conservation, the NZCA and the conservation boards to deviate from giving effect to the principles of the Treaty of Waitangi on the basis that the outcome would be inconsistent with the principles of the NPA 1980. By amending section 4, tangata whenua interests would become integral to the Act. Another example concerns the Governor-General’s ability to set aside any part of a national park as a specially protected area. The Governor can only do this if it can be shown to enhance the purpose of the NPA 1980. Once an area has special protection no person can enter the area unless they have a permit issued by the Minister of the Conservation. The device could therefore

62 In addition, it could make tangata whenua feel more content with the use of the national park label. For instance, in the mid 1980s members of the Tuhoe tribe rejected the idea of their traditional lands in the Urewera region being turned into a national park. Although there was no conflict between the Māori of Te Urewera and the Pākehā conservationists about preservation of the indigenous forests, Māori saw the forest as a place for them to live and hunt in, and they viewed “Pākehā laws” and regulations as unwarranted restrictions on their life style and traditions: see Roy Perrett, “Indigenous Rights and Environmental Justice” Environmental Ethics 20 (1998) 377 at 381.

63 Section 12(1).
be introduced to ensure the protection of special sites to Māori. It could also be used to implement tikanga Māori concepts such as rahui.

The effect of this amendment would not make the NPA 1980 comparatively unusual. Other statutes including the Hauraki Marine Gulf Park Act 2000,64 and the Historic Places Act 199365 expressly recognise the importance of Māori interests as fundamental to achieving their respective purposes.

**• Insert a new section that requires adherence to the principles of the Treaty of Waitangi**

A new section could be inserted that requires the Department of Conservation, the NZCA and conservation boards to give effect to the principles of te Tiriti o Waitangi when interpreting and administering the NPA 1980 - a reflection of section 4 of the Conservation Act. It would be advantageous to have a direct reference to te Tiriti in the NPA 1980 in order to clarify and encourage the application of this duty in the management of national parks. It would also encourage the development of our understanding of the meaning of the phrase ‘the principles of the (te Tiriti o Waitangi) Treaty of Waitangi’ in relation to national parks specifically. It would create an impetus to overcome the inconsistency that pervades current NPMP references to te Tiriti. Moreover, the insertion would follow the current trend for conservation related statutes to incorporate a Tiriti reference.66

**• Insert a new subsection requiring all Boards to seek and have regard to the advice of tangata whenua**

Section 30 could be amended by adding this subsection:

> Every Board whose area of jurisdiction includes a national park must seek and have regard to the advice of the tangata whenua of the area on any

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64 See sections 7(2)(a)(i) and 8(c).
65 See section 4(2)(c).
matter that involves the spiritual, historical, and cultural significance of the park to the tangata whenua of the area.

This wording adopts the expression currently in place for the Conservation Board that has jurisdiction in respect of the Whanganui National Park (section 30(2)(b)). This is the only Board that is currently obliged under statute to consult with the tangata whenua. Ngai Tahu have a similar right, but it is restricted to specific areas within national parks - it does not go to national parks per se. This insertion would emphasise the standing that tangata whenua should have in regard to national park management. It would create a minimum consistent right for all tangata whenua who have a national park within their rohe. It would not affect the requirement for respective conservation boards to “have regard to” the spiritual, historical, and cultural significance of the Whanganui River to the Whanganui iwi or to “have particular regard to” Topuni and Statutorily Acknowledged areas in South Island national parks. These are site specific and require a different standard of consultation. Section 30(2)(b), however, would become redundant.

2. THE CONSERVATION ACT

- **Amend section 2 “Conservation” to reflect a bicultural approach.**
  The definition of conservation in the Conservation Act should be amended to reflect both Tiriti partners’ conservation values.

Alternatively, a conservation definition unique to national parks could be inserted into the NPA 1980. The Historic Places Act 1993 is an example of where this has been done.\(^{67}\) Some conservation boards are already investigating ways in which Māori conservation values can be introduced into national park management practices (as the study of NPMPs illustrated).

An amendment to either the Conservation Act or the NPA 1980 would encourage a consistent approach between all national park managing

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\(^{67}\) Prior to 2000 the Department of Conservation was responsible for administering the Historic Places Act 1993: since 2000 the Ministry for Culture and Heritage has been responsible for administering this Act.
bodies. It would also better place Māori as partners to the Department of Conservation.

- **Amend section 6P to reflect compulsory nga iwi Māori representation on conservation boards**

A new subsection could be inserted following section 6P(1):

(2) The Minister must appoint at least one person to every Board whose area of jurisdiction includes a national park on the recommendation of the tangata whenua of the area.

Even if this insertion was made, the current statutory rights should not be affected. That is:

- the Minister must still have regard to tangata whenua interests (along with several other interests) in making all other appointments to boards;
- a person of lineal descent of Te Heuheu Tukino must still have a right to sit on the Board whose area of jurisdiction includes the Tongariro National Park; and
- the Taranaki Māori Trust Board, the Whanganui River Māori Trust Board, and Te Runanga o Ngai Tahu must still have a right to recommend the appointment of one/two person/s to Boards whose jurisdictions include the Egmont National Park, Whanganui National Park and national parks in the Ngai Tahu takiwa.

These rights should be retained because they reflect special agreements between tangata whenua and the Crown - a fundamental expression of partnership. The amendment, if made, would mean that tangata whenua would have at least one, and up to three, statutorily-protected opportunities to sit on respective boards. This would be a marked improvement on the current inconsistent legislative approach to representation.68

If these amendments were made a marked progression towards including tangata whenua in national park management would occur. Measured

68 The proposition would link with movements to secure Māori representation on health boards and regional councils.
against the continuum model, management would fall consistently within its mid-realm. Although these measures may not meet the full aspirations of tangata whenua as Tiriti partners, they would at least create a consolidated management regime that respected and included those tangata whenua who have had their taonga deemed national park land.

C. REPLACE THE CURRENT LEGISLATION

Integral to any overhaul of the current legislative regime could be the creation of a new management structure. Several management options exist including:69

- the placing of iwi Authorities, where they exist, alongside the Department of Conservation;
- establishing a Māori body to mirror the functions of the NZCA;
- establishing tangata whenua bodies to sit alongside conservation boards; and/or,
- creating a neutral Tribunal endowed with the responsibility to resolve specific conservation issues brought to it by either Māori or the Crown.

Many options are available for changing the currently monoculturally structured management regime. Which option, or combination of options, each national park management body should adopt is dependent on which model would best suit the tangata whenua of each park. Different needs and aspirations obviously concern different iwi. For instance, not all would wish to be exposed to the operational matters of managing a national park such as gorse clearing, fence erecting and stoat killing. And not all have the resources, including people, to constitute the creation of separate but equal conservation boards.

Perhaps a similar model proposed some years ago by Te Runanganui o Ngati Kahungunu could be adopted. This model, which is reproduced below, conceptualises a structure with te Tiriti o Waitangi as its foundation:

Kahungunu Model

Alternatively, or in addition, replicating the NZCA (but not conservation boards) could suffice as meeting the co-management benchmark. It would avoid the re-creation of a plethora of management bodies at the regional level at least. It would also give tangata whenua discernible power to influence the management of individual parks. For instance, a Māori body which mirrored the NZCA would be responsible for: approving NPMPs and statements of general policy; advising the

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70 W Hodges, *Māori Conservation Ethic. A Ngati Kahungunu Perspective*. (1994) Conservation Advisory Science Notes, No 93, Department of Conservation, Wellington at 28. Note that this model is directed towards the conservation estate generally, not national parks specifically, because there are no national parks within the rohe of Ngati Kahungunu.
Minister of Conservation or the Director-General on the priorities for the expenditure of money; reviewing and reporting to the Minister or the Director-General on the effectiveness of the administration of the general policies for national parks; and considering and making proposals for the addition of lands to national parks and the establishment of new national parks. It could also adopt an advocacy role by encouraging and participating in educational and publicity activities for the purposes of bringing about a better understanding of Māori conservation values. In addition, such a body could have the power to make direct recommendations to conservation boards. The recommendations could concern appropriate ways in which to: “seek and have regard to” tangata whenua interests; “give effect to” the principles of te Tiriti o Waitangi; and incorporate Māori conservation values into national park management practices. As to membership, selection and appointment would be for tangata whenua to decide. To be successful in fulfilling its functions, government would have to adequately fund this national body.

The options for structural reform, however, are for tangata whenua to assess for themselves. Ngai Tahu in particular may be perfectly happy with their placement in the management of national parks and, therefore, have no desire for an overhaul of the current management structures. Te Runanga o Ngai Tahu and the Crown have already reached agreement as to how the conservation estate should be managed, which is recorded in the Ngai Tahu Claims Settlement Act 1998. Yet tangata whenua such as Ngai Tahu, may still find value in the creation of a Māori oriented national body. Just as Ngai Tahu argued pre 1998: “The only area that Ngai Tahu has consistently sought control over in national parks is that of interpretation of our own unique heritage in myth and history in the southern parks....” 71 This same view is no doubt shared by many other tangata whenua. The creation of a national body would at least give tangata whenua a starting point to end this struggle.

If a national restructuring was to eventuate it would also be of value to implement a regime that consistently reflected the importance of “giving

effect to" Māori views and values. This would create a single standard against which the activities of management bodies could be measured. No longer would there be the inconstant obligation to either “have regard to”, “have particular regard to”, or “give effect to” depending on the circumstance. A single standard would create a consistent and consolidated approach to including tangata whenua and would make them better able to be regarded as viable partners to the Department of Conservation at all levels of management. The consequence would be to fundamentally change the purpose of protecting land as a national park. For instance, the ideals of preservation and public access currently associated with national parks would need to be adjusted to incorporate preservation for spiritual, historical, and cultural rationales.

Recognising and providing for the Māori conservation ethic must also be viewed as integral to any structural management changes. The model above conveys this point well, giving both Māori and Pakeha values and policies equal status. Perhaps some of the principles developed by the Whanganui River Māori Trust Board in respect to the Whanganui River could be adopted in such a process. After all, the basis of their Charter is tino rangatiratanga. It incorporates notions of providing for kaitiakitanga and intergenerational responsibility, and recognising interdependency and the mauri of all taonga.

An overhaul of national park legislation, including a restructuring of management bodies and recognition measures, would mark a clear progression along the continuum model to reflect the level seven characteristic of equal status. If the overhaul was coupled with the suggested amendments to the NPA 1980 and the Conservation Act, then a real sense of partnership between the two Tiriti partners might result. Better still, the partnership would equate to the Waitangi Tribunal benchmark of how te Tiriti o Waitangi should be guiding national park management.

VI. CONCLUSION

The right to express tino rangatiratanga must be given effect to in the management of national parks. Several options are available to the Crown if it wishes to bring about better provision for the co-management of national parks. The end result of any change to conservation legislation should, at the very least, lead to consistent representation and recognition of Māori in the management of national parks. While some of the suggested steps for better recognition of tino rangatiratanga may, in Hirini Matunga's words equate to little more than "idle chatter",\(^73\) attention to this legislation is urgently required.

\(^73\) Hirini Matunga has recently argued that a "... shift in power and recognition that iwi have the right to make decisions about their taonga...." is required, and: "Anything less is idle chatter...." - see Hirini Matunga, "Decolonising Planning: The Tiriti o Waitangi, the Environment and a Dual Planning Tradition" in Memon, Ali and Harvey Perkins, Environmental Planning & Management in New Zealand. (2000) Dunmore Press Ltd, Palmerston North at 46.
INTRODUCTION

At the dawn of a new century, Māori are faced with the prospect of a new threat to their cultural heritage. Spurred on by the effects of globalisation, the hunt for fresh, commercially exploitable ideas has led to a disturbing trend involving the misappropriation of traditional knowledge. Imitation, commercialisation and blatant copying of indigenous art forms, imagery and knowledge is no longer confined to a few isolated incidents overseas, but has become so popular that even industry giants such as Sony and Lego have become involved in the fracas. Even more disturbing than this, is the apparent failure of current intellectual property law to offer effective and appropriate protection for indigenous peoples from these attacks on their cultural heritage.

In New Zealand, Māori are realising that they are far from immune to this intellectual piracy. New incidents involving the questionable use of Māori words, art, and imagery are arising on an almost daily basis. From the popularity of moko-inspired tattoos amongst celebrities such as Robbie Williams, to high profile incidents such as the copyrighting of Māori names by Danish toy company Lego, Māori have been...
forced to take a hard look at our intellectual property rights ("IPR") regimes and to ask why mātauranga\textsuperscript{5} is not being protected.\textsuperscript{7}

The Waitangi Tribunal Claim no. 262 ("Wai 262") is the embodiment of such concerns. The original statement of claim, filed with the Waitangi Tribunal in 1991, focused on the Crown’s failure to protect Māori rights in respect of indigenous flora and fauna\textsuperscript{8} as guaranteed under the Treaty of Waitangi 1840\textsuperscript{9} ("Treaty"). But as Māori realisation of the threat to other areas of Māori traditional knowledge increased, these claims were amended to cover all aspects of Māori traditional knowledge.\textsuperscript{10} Māori and government alike await the Tribunal’s report, as it is likely to have wide-reaching implications for the law of intellectual property in this country.

One of the common remedies sought by the plaintiffs in the Wai 262 claim is the enactment of legislation to protect mātauranga.\textsuperscript{11} Other solutions aimed at preventing the misappropriation of traditional Māori

\textsuperscript{5} Gregory, A "Fantasy Toys Spark Legal Game Between Māori Group and Lego" New Zealand Herald, 31 May 2001, 24.

\textsuperscript{6} Mātauranga can be translated as a general term meaning knowledge, familiarity, or understanding - Williams, H. W. Dictionary of the Māori Language 7th ed, 1971, 191. In this chapter mātauranga is used interchangeably with the term Māori traditional knowledge, as a convenient label to represent the diverse range of interrelated concepts and expressions that make up Māori traditional knowledge. For further explanation see section 2.2.

\textsuperscript{7} For example see Mutu, T The Legal Protection of Mātauranga (2000); Garrity, B Conflict Between Māori and Western Concepts of Intellectual Property (1999); Mead, A Understanding Māori Intellectual Property Rights (10 October 2002); Solomon, M Intellectual Property Rights and Indigenous Peoples Rights an Obligations (12 May 2000).

\textsuperscript{8} Waitangi Tribunal Statement of Claim by Haana Murray (Ngāti Kuri) and Dell Wihongi (Tē Rarawa) and others (9 October 1991) Wai 262, 1-2.

\textsuperscript{9} Treaty of Waitangi 1840.


knowledge to date include a Maori made trade mark\textsuperscript{12}, an international declaration\textsuperscript{13}, and the reform of current IPR legislation.\textsuperscript{14} The topic of this chapter is the taking of a sui generis\textsuperscript{15} approach in the formulation of a legislative regime for the protection of Māori traditional knowledge. It will be argued that such an approach is essential to providing the effective and appropriate protection for mātauranga that Māori desire.

There are a number of formidable barriers to devising an original legislative scheme specifically designed to cater for the protection of Māori traditional knowledge. Not least of these is the innate problem of using a foreign legal system to protect the knowledge and concepts of another culture, as well as statutory and international commitments to strengthen intellectual property laws under instruments such as GATT: TRIPS.\textsuperscript{16} It will be argued that despite these and other barriers, the most effective and practical option for the protection of mātauranga is the enactment of legislation based upon traditional Māori ideology.

The approach that will be taken in creating a protection regime for Māori traditional knowledge is novel, but it is necessitated by the unique interface between European intellectual property rights concepts and traditional Māori knowledge. Firstly, a survey of local and international responses to this issue will be conducted to identify potential protection options and the required structural elements for the regime. Secondly, the ideology and concepts relating to Māori traditional knowledge will be explored in order to identify overarching principles and essential substantive elements for the regime. Finally, the results of the two investigations will be interwoven to produce a hybrid model, a Pākehā law based on Māori principles.

Constructing a modern day statute for protecting ancestral Māori knowledge that is both effective and appropriate is an almost impossible task. However, the alternatives of trying to re-mould existing laws or

\begin{footnotesize}
\begin{enumerate}
\item Toi Iho – for further discussion see section 4.3.
\item The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993) – for further discussion see section 4.2.
\item Trade Marks Act 2002 – for further discussion see section 4.4.
\item Of its own kind; peculiar; unique - The New Shorter Oxford English Dictionary (1993) 3135.
\item The General Agreement on Trade and Tariffs – On Trade Related Aspects of Intellectual Property 1993.
\end{enumerate}
\end{footnotesize}
simply doing nothing hold even less hope of a solution. In the space of a year, the instances of Maori traditional knowledge being used by non-Maori without authorisation in commercial products, branding and other media has increased exponentially. Rather than relegating this problem to the too-hard basket along with so many other problems facing Māori today, this paper proposes to accept the challenge of providing a kaitiaki for mātauranga Māori, while there is still something left to protect.

2. MĀTAURANGA AND INTELLECTUAL PROPERTY RIGHTS

In order to build a protection regime for Māori traditional knowledge, the reasons why such a regime is necessary must first be explained and understood. In essence, the crux of the problem lies in the fact that current intellectual property rights regimes are premised on European concepts of property, ownership, and individualism, while Māori traditional knowledge is based on a wholly different and contrasting ideological framework. The result of this clash of principles is that the interaction between mātauranga and IPR regimes produces a legal imbalance, whereby mātauranga is denied appropriate protection because it fails to fit within the European-defined parameters of intellectual property. This section explores the ideological clashes and the practical examples of interaction that have been causing concern for Māori. It should be noted that the very nature of intellectual property is such that traditional knowledge was never meant to fit within its confines. However, the fact remains that mātauranga is now exposed to exploitation, because laws that did not account for it are now responsible for its protection.

2.1. INTELLECTUAL PROPERTY: A DEFINITION

The term intellectual property has no standard definition, partly because it is made up of a number of separate components.17 However, an attempt will be made to summarise the main elements of the term and, more importantly, the concepts that underlie its development and usage.18

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18 A review of the different regimes that comprise New Zealand's intellectual property law will not be attempted here, as analysis is confined to the common denominators shared by the regimes rather than the specific facets of each regime.
A basic legal dictionary defines intellectual property as "[i]ntangible property that includes patents, trade marks, copyright, and registered and unregistered design rights"\textsuperscript{19}. A local text offers a more specific explanation as follows:

Intellectual property is a convenient term, now in common currency in many countries, which is used to describe the laws relating to copyright, patents, designs, trade marks and certain analogous common law and equitable rights such as passing off and trade secrets. To these may now fairly be added (so far as New Zealand is concerned) certain rights and remedies created by the Fair Trading Act 1986 which it has been said are very likely to overtake the passing off cause of action. The common thread in all these apparently disparate areas is the protection of the output of human intellectual endeavour and the goodwill and reputation which is created in names, marks, get-up and even products.\textsuperscript{20}

Another expression of the term that describes its conceptual nature, defines intellectual property as:

The bundle of rights which a person ("the creator", "the inventor", "the author", or "the designer" as the case may be) has against all other persons in relation to the product of his or her mind. The rights are to prevent others from doing specified acts which detract from the commercial or intrinsic value of that product.\textsuperscript{21}

Therefore, intellectual property may be loosely defined as a convenient label for a number of regimes that accord certain rights to individuals for the products of their intellectual endeavour. A common feature of these regimes is the need for the product to be either new or novel, solving the problem of duplication and overlapping rights. A useful summary of the thinking behind the development of intellectual property rights reveals the basic purpose of the intellectual property regimes:

\begin{center}
\end{center}
1. The principal purpose of intellectual property rights for their proprietors is control of commercial exploitation. Thus the different property rights require to be monopoly rights, for the time which they exist.

2. There is no property in an idea. The intellectual property rights which do exist flow from a particular expression, manifestation, or application of an idea.

3. The policy supporting the recognition and enforcement of national and international intellectual property rights is that the grant of monopoly rights, limited in duration, promotes the early release into the world of innovation and creative work.²²

From this explanation it is obvious that there are numerous European ideological concepts inherent in the development of IPR regimes. The most apparent of these are the concepts of property, ownership, and individualism.

Firstly, the concept of property may be described as the allocation of rights to resources. Property may exist in any legally definable thing, be it tangible or intangible, and is held by an identifiable legal person or persons as the owner of such rights.²³ Property is capable of alienation between owners and is a relation between the owner and other people in relation to things.²⁴

Ownership is a related concept that can be summarised as the "exclusive right to use, possess, and dispose of property"²⁵. A fundamental proposition in both these concepts is the compartmentalisation and distribution of rights to individuals, or to legal persons such as companies. This individualism or apportionment of rights to one person to the exclusion of others is a fundamental concept that pervades all IPR regimes.

²⁴ Cohen, R Property and Sovereignty (1927) 12.
In summary, the concept of intellectual property is essentially a group of legal rights that may be granted to an individual for the product of their intellectual endeavours. The reasons for granting such rights are essentially economical and moral, in that they allow an individual to exploit the product of their intellectual endeavours exclusively for a specified period. The recompense for allowing this monopoly is that after this specified period, the products go into the public domain where all may access them and (theoretically) this in turn encourages further innovation.

2.2. MĀTAURANGA: HE TAONGA TUKU IHO

The term mātauranga is a noun formed from the root mātau, which may be translated as “Know, be acquainted with”26 and also “understand”27. Thus mātauranga can be translated as a general term meaning knowledge, familiarity, or understanding. In this paper mātauranga is used interchangeably with the term Māori traditional knowledge, as a convenient label to represent the diverse range of interrelated concepts and expressions that make up Māori traditional knowledge.

The following is a non-definitive list of the categories that are encapsulated by the terms mātauranga and Māori traditional knowledge:

a) Environmental (including medicinal, scientific, and ecological knowledge, indigenous flora and fauna and associated traditional knowledge and practices);

b) Cultural Expressions (including all art forms, music, dance, symbols, designs, histories and associated knowledge);

c) Traditional knowledge (including protocols, ceremonies, practices, sacred sites and objects, and future developments based on such knowledge).

The reason for the use of general terms to cover all types of Māori traditional knowledge is that it is recognised as “inappropriate to subdivide the heritage of indigenous peoples”28 because “this would

27 Ibid.
imply giving different levels of protection to different elements of heritage." This approach is consistent with the holistic Māori worldview. The following general observations are consistent for all types of mātauranga.

Mātauranga is perceived as an inextricably linked part of the complex matrix of concepts, values, and beliefs that make up Te Ao Māori. Thus any discussion of mātauranga must make reference to the concepts upon which it relies for definition.

The spiritual, intellectual and physical elements of Māori culture were inseparable. Māori adopted a holistic approach to life using their tikanga to establish themselves in the world and to express their sense of who they were. It was essential that where possible the balances of this holistic existence were cared for because any upset might spell disaster for the people.

Mātauranga is the means by which all areas of Māori traditional knowledge are connected, as all areas require the teaching, dissemination, and guardianship of knowledge. There are many different types of mātauranga, each specific to the particular cultural expression to which it relates. For instance the mātauranga relating to whakairo encompasses the tikanga as well as the practical methods such as carving techniques.

30 Infra n 33 and accompanying text.
31 Williams, supra n 26 at 410, 11, 179. Translated literally Te Ao Māori means the Māori world, and is used here to describe the Māori worldview or Māori perception of the world.
32 For the purposes of this section, Māori concepts relating to property, ownership and the nature of mātauranga in general will be explored for the sake of comparative analysis with those underlying IPR regimes discussed above. For more in depth discussion of the range of concepts associated with mātauranga see section 5.
33 Dickson, M Protecting the Intellectual Property of Indigenous People of the Pacific: Te Huarahi Māori /The Māori Experience in Ridgeway Blake Lawyers (Vanuatu) and the School of Law, University of the South Pacific Legal Developments in the Pacific Island Region (2000) 112.
34 Williams, supra n 26 at 80. Translated as ornament with a pattern, used of carving, tattooing, painting, weaving.
35 Williams, supra n 26 at 416. Translations include rule, plan, method; custom, habit; anything normal or usual; reason; meaning, purport; authority; control; correct, right. For further discussion see section 5.1.
The essential nature of all types of mātauranga is that they are tapu, although some areas such as knowledge relating to karakia and ceremonial protocols are inherently more so. The tapu nature of mātauranga can extend to the physical expressions of that mātauranga, thus a carved meetinghouse will remain tapu until that tapu is removed. While the origin of that tapu is not the mātauranga itself, it may be seen as a means by which tapu can be transmitted. Restrictions were placed on certain types of mātauranga because of the strength of the tapu associated with it, and those who were selected to learn that knowledge had to accept the responsibility of protecting that knowledge from harm, because of the negative consequences that could follow in the event of it not being so protected.

Mātauranga is passed down from generation to generation and as such is a taonga tuku iho, which imbues reciprocal obligations of protection on its current holders.

Knowledge was created over time, not by a single author or inventor. It was the repository of culture and identity. The benefits were shared. It could neither be owned nor sold. Not all knowledge was available to everyone; its custodians had responsibilities for its protection and use.

Māori concepts of 'property' and 'ownership' in relation to all things, including mātauranga are based on communality, rather than individual rights. A taonga such as mātauranga cannot be 'owned' in the Western sense. The main reason for this is that Māori view themselves as only the current holders of taonga received from their ancestors, with a duty to protect and eventually pass the knowledge on to the next generation. Māori 'ownership' is better described as kaitiakitanga.

The term 'ownership' is inappropriate in Māori customary contexts, Western 'ownership vesting the several rights of use, benefit, control, transfer, reversion and identification in a single proprietor divorced from community relationships.
Thus while Maori do not have concepts of property and ownership in the Western sense of the terms, they do have a related concepts which incorporate the ideas of reciprocal obligations and guardianship. A simplified explanation of Maori ‘property’ concepts in relation to land relates the group right to sovereignty and individual rights to usage, although the concept of individual rights without the group is not possible.42

The Western-Maori distinction would not appear to be between ‘individual tenure’ and ‘communal tenure’. In varying degrees, Western and Maori societies had elements of both. Maori use rights were vested in individuals. The distinctive feature of Maori tenure was that individual tenure was conditioned by community responsibilities.43

Therefore while individuals may possess the right to use a resource such as mātauranga, the ultimate control over that resource remains with the group, usually the whānau44 or hapū.45 Individual usage also depends on the fulfilment of responsibilities to the group, such as protection of the resource.

In summary, mātauranga is an intangible segment of Māori culture that connects the practical expressions of Māori traditional knowledge. It carries sacred and spiritual responsibilities for those who use it, and its ultimate control resides in the collective. Mātauranga is a taonga that cannot be bought or sold absolutely, and is held in trust for future generations. The use of mātauranga gives rise to reciprocal obligations to ensure that the knowledge is protected from harm. Failure to ensure protection will result in negative consequences for those charged with that duty.

3. INTERACTION: IDEOLOGICAL AND PRACTICAL

It is clear that there are a number of conflicting ideas underlying the concepts of mātauranga and IPR. There is a clear commercial or economic theme underpinning IPR regimes, and a clear cultural preservation theme underpinning mātauranga. Essentially the two

42 Ibid, 64.
43 Ibid, 67.
44 Williams, supra n 26 at 487. Translated as offspring; family group.
45 Williams, supra n 26 at 36. Translated as clan; sub tribe.
concepts are like chalk and cheese, with different ideals and different objectives. The following sections will explore the practical implications caused by this ideological conflict.

3.1. TERMINOLOGICAL DIFFICULTIES

Much of the debate in this field fails to make this distinction between intellectual property and traditional knowledge. By simply appropriating the term intellectual property and applying it to traditional knowledge (by calling it for example Māori intellectual property), intellectual property jurisprudence is automatically imported into the concept.\(^\text{46}\) This is problematic because the term intellectual property itself implies a commercially focused model based on Western property concepts.\(^\text{47}\) This is not in reality what most indigenous people are talking about and this simple misunderstanding of terms only serves to further confuse what is already a complex debate.

Indigenous people do not view their heritage as property at all – that is something which has an owner and is used for the purpose of extracting economic benefits – but in terms of community and individual responsibility. Possessing a song, story, or medical knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places to which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships rather than a bundle of economic rights.\(^\text{48}\)

The simple fact is that Māori traditional knowledge and intellectual property are two distinct and disparate concepts, each based on their own distinct cultural ideologies and values. The problems that arise are brought about because of the imposition of one system onto the other through the operation of intellectual property laws, without regard for the essentially contradictory ideals and objectives of each regime.


\(^\text{47}\) See section 2.1.

3.2 IDEOLOGICAL CONFLICT: PRACTICAL CONSEQUENCES

One of the most significant problems is that IPR regimes were specifically designed to protect new, novel or original expressions of ideas and not existing knowledge such as Māori traditional knowledge. This gives rise to the current legal assumption that if an expression of knowledge is not new, novel or original as defined by IPR regimes, it must fall within the public domain. This assumption is problematic for Māori as mātauranga, by its very nature as ancestral knowledge, is not new, novel, or original. This often disqualifies Māori from asserting intellectual property rights over their traditional knowledge, while at the same time enabling third parties to gain rights over Māori traditional knowledge.

For example, copyright enables third parties to take aspects of existing traditional knowledge, incorporate them into an ‘original’ work, and thereby obtain copyright over those aspects of traditional knowledge. The traditional knowledge itself often fails to qualify for copyright protection, because it cannot fulfil copyright requirements such as the identification of an author.

A real life example of this type of problem is the copyrighting of Māori names and words by Danish toy company Lego for its Bionicle range. The game is about a group of warriors known as Toa, and includes fire warrior Tahu and stone warrior Pohatu. There are different masks called kanohi that give the toa special powers such as Kanohi

49 Jones, supra n 46 at 5.
50 See the example of a Māori business who sought a patent and plant variety right protection for indigenous mānuka and its oil, because of their traditional healing properties. The business was denied on both counts because they could not fulfil the protection criteria. World Intellectual Property Organisation Survey on existing forms of Intellectual Property Protection for traditional knowledge document WIPO/GR TKF/IC/2/5 (2001) 80.
51 For example see section 67 of the Copyright Act 1994. For an interesting discussion of this problem in relation to spiritual authors, see National Indigenous Arts Advocacy Association Inc Stopping the Rip Offs (1995) 5.
52 Williams, supra n 26 at 429. Translated as brave man, warrior. See Appendix 1 for examples of the characters.
53 Williams, supra n 26 at 360. Translated as set on fire, light, burn.
54 Williams, supra n 26 at 300. Translated as stone.
55 Williams, supra n 26 at 94. Translated as face.
huna\textsuperscript{56}, the noble mask of concealment. Del Wihongi and others around the country, including counsel for the Wai 262 claimants Maui Solomon, protested the use of these words and others.\textsuperscript{57} This is a classic example of the current problems facing Māori because of the fact that mātauranga is not protected, and IPR regimes are exposing it to exploitation.

It could be argued that individual Māori are free to do the same as companies such as Lego, and incorporate their own traditional knowledge into an original form in order to gain copyright privileges. This argument, however, is too simplistic in that it ignores the fact that Māori do not necessarily want intellectual property rights over their traditional knowledge, entrenched as they are with foreign property concepts. They also do not want to give their implied consent for their traditional knowledge to become an official part of the public domain, once the intellectual property rights have expired. Maori are looking for something that intellectual property rights were never designed to deliver, which is the right to self-determination over their traditional knowledge. In a section describing the wishes of indigenous peoples, Jones\textsuperscript{58} notes:

\begin{quote}
It is reasonably clear that something else again from intellectual property rights is intended, something more akin to rangatiratanga over taonga than to proprietorship rights limited in time applied to defined private property.\textsuperscript{59}
\end{quote}

A second area where ideological conflict translates into practical problems is the idea / expression dichotomy inherent in IPR regimes.

A fundamental element of intellectual property law is that ideas and knowledge as such do not sustain protection. Knowledge is the common heritage of humankind, and ideas are not to be confined.\textsuperscript{60}

\textsuperscript{56} Williams, supra n 26 at 69. Huna is translated as conceal. Kanohi huna may therefore be translated as concealed face.

\textsuperscript{57} BBC News "Lego Game Irks Māoris", 31 May 2001, 1. They particularly objected to the use of tohunga (Williams, supra n24 at 431 -Translated as skilled person, wizard, priest) and whenua (Williams, supra n24 at 494. Translated as land, country, afterbirth).

\textsuperscript{58} Jones, supra n 46.

\textsuperscript{59} Jones, supra n 46 at 6.

\textsuperscript{60} Jones, supra n 46 at 10.
From an intellectual property viewpoint, mātauranga is the idea behind the expression, which does not attract intellectual property protection. However, as discussed in the previous section, artificial divisions between ideas and expressions are fundamentally at odds with the holistic Māori worldview. In the Māori world, relationships are everything and the compartmentalisation of concepts into separate boxes goes against the very fabric of Māori society. Thus when the Playstation 2 game “The Mark of Kri” was released earlier this year purporting to use only the ideas from a number of cultures including Māori, the distinction was one that was predictably lost on Māori.

The central character Rau contains not only identifiable Maori elements such as a taiaha (although in the game he actually uses a broadsword), a chin moko and a top knot, but also contains elements from Chinese and Native American cultures. An interview with one of the game’s designers typifies the ignorant attitude taken by some towards traditional knowledge.

In keeping with the ambiguity of the world the game is set in, we tried to not use any traditional markings or designs so people couldn’t say, “Hey! They must be Tahitian because I’ve seen tattoos like that in Tahiti! Or “He must be a Māori girl because that’s a moko on his chin!” There are many variations of Polynesian, Celtic, Greek, etc, designs and patterns throughout the game, but we tried to not replicate anything specific. It was hard because everyone liked the Polynesian flavour the game was taking on so we tried to make things with a more contemporary or Polynesian twist where we could. Like Rau’s chin tattoo. In NZ women are the ones who traditionally wear a tattoo on their chin. But Rau isn’t Maori and he’s not from NZ, so we kind of keep our ass covered that way. We apologize for any coincidences.

63 Robson, S The Mark of Kri (2 May 2003) <www.stuff.co.nz/inl/print/o,1478,2441888a6603,00.html>
64 For a picture of Rau see Appendix 2.
65 Williams, supra n 26 at 362. Translated as a weapon of hard wood, about 5ft long, having at one end (the arero) carved in the shape of a tongue with a face on each side and adorned with feathers, the other end being a smooth, flat blade (rau) about 3 inches wide.
66 Williams, supra n 26 at 207. Translated as tattooing on the face or body.
67 Robson, supra n 63.
Naturally Māori were again angered by this blatant misappropriation of Māori traditional knowledge, even though it involved the use of the ideas behind the expressions, rather than particular expressions (in identifiable IPR terms) themselves. This distinction made by IPR regimes is not shared by Māori, and is a formidable conceptual barrier for the implementation of a protection regime for Māori traditional knowledge, as any regime for mātauranga would undoubtedly have to cater for the protection of both the ideas and the expressions. This would contradict the fundamental intellectual property concept of ideas as common property, and no doubt cause criticism that Māori are receiving preferential treatment. This basic conflict also provides further evidence that IPR forums are inappropriate for protecting Māori traditional knowledge.

Another aspect of the deeply rooted incompatibility of the two concepts involves the contextually reliant nature of mātauranga versus the compartmentalisation characterising IPR. As described above69 mātauranga in general is tapu. This means that there are certain protocols or tikanga that must be followed when dealing with the knowledge itself and with the cultural expressions flowing from it. Ignorance of these protocols may result in negative consequences for those who have been entrusted as guardians of that knowledge, as well as for those who break the tapu. When a foreign person or company takes a slice of Māori traditional knowledge and proceeds to use it without any reference to the concepts (such as tapu) that make up its contextual base, they are already in danger of causing offence to and triggering other repercussions for its traditional guardians. In essence the problem is the ignorance of the relationship-laden nature of Te Ao Māori, and the assumption that you can just take one part of Māori culture, without acknowledging the rest.

A controversial example illustrating aspects of this debate is the current popularity amongst celebrities of tattoos based on traditional moko designs. Music stars Robbie Williams70 and Ben Harper71 both have

69 Supra at n 36.
70 NZPA “Concern over ignorant use of Māori moko” New Zealand Herald, 27 February 2003, 1. See Appendix 3.
71 Mana Magazine “Dedicated by Blood” Mana, April-May 2003, 61. See Appendix 4.
moko-inspired tattoos, as does former world heavyweight boxing champion Mike Tyson.\(^{72}\)

The origins of moko are the subject of debate, but there is general agreement that the starting point is Rūaumoko, the unborn son of Ranginui and Papatumānuku,\(^{73}\) whose name has been translated as “the trembling current that scars the earth”\(^{74}\). The art itself is said to have been learnt by Mataora on his journey to Rarohenga to win back his beloved wife, Niwareka. He received his moko from his father-in-law Uetonga, and also learnt how to apply it.\(^{75}\) These origins highlight the sacred nature of the moko, linked, as are all Māori, by whakapapa to the gods.

A recent television debate (in Te Reo Māori) on the topic “Māori tattoo artists should refrain from tattooing non-Māori and leave moko as a taonga for Māori only” raised some interesting issues in this area.\(^{76}\) Arguments in the affirmative included:

(a) The tapu nature of the moko;

(b) The spiritual significance of te haehae kiri;\(^{77}\)

(c) The commodification and commercialisation of a taonga; and

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72 Herald Sun “Māoris object to Tyson Tattoo” \emph{Herald Sun}, 27 February 2003, 1. See Appendix 5.

73 In Māori history Ranginui (sky) and Papatumānuku (earth) are the primordial pair of gods from which Māori descend. Rūaumoko is their unborn son, who was still in his mother’s womb at the time the earth and sky were separated, and was hence unable to be born into the world of light. His anger at the separation of his parents is said to be felt as earthquakes.


75 Ibid.

76 Television 3 \emph{Ihumanea}, final episode, broadcast Sunday 18 May 2003. The debate was between finalists Te Kura Kaupapa Māori o Rakaumangamanga and Te Aute College.

77 Williams, supra n 26 at 29 and 119. \emph{Haehae} is translated \emph{lacerate} and \emph{kiri} as \emph{skin}. The self-laceration of the skin has special significance for Māori as an indication of the connection between the spiritual, emotional, and physical states of being. Kuia (old Māori women) would often cut themselves with kuku shells in grief at the passing of a loved one (see \emph{He tangi haehae} - Williams, supra n 26 at 24) as physical representation of the emotional and physical pain they were experiencing. In the taking of the moko, \emph{te haehae kiri} may be seen as a reciprocal physical experience connecting the wearer with the spirituality of the designs.
(d) The inability of non-Māori to understand Te Reo and consequently the kaupapa behind the moko and its designs.\(^{78}\)

Arguments in the negative asserted:

(e) That only facial moko were regarded as tapu;

(f) Some Māori who take the moko cannot speak Māori either; and

(g) That the moko has been abused by Māori themselves such as gang members.\(^{79}\)

It appears from this debate that there are arguments on both sides of this issue. Some Māori commentators, such as Dr Pita Sharples, are unhappy with a convicted rapist such as Mike Tyson wearing a moko,\(^{80}\) while others, such as tattoo artist Gordon Toi Hatfield, are happy to extend their art to some non-Māori.\(^{81}\) Some of this apparent divergence of opinion may be explained by the distinction between compartmentalisation and holistic acceptance.

Concerns about Mike Tyson's understanding of the issue appear to be well founded, as he mistakenly described his stylised koru facial design as "Mayan from New Zealand."\(^{82}\) However, other stars such as black musician Ben Harper, who "shared songs and thinking" with his Māori tattoo artist before taking the moko, may be more acceptable to Māori because of the willingness exhibited to embrace not just the physical element (expression) but also the inseparable spiritual and intellectual (idea) elements of the moko.

\(^{78}\) Ihumanea, supra n 76. Arguments by the pupils from Te Kura Kaupapa Māori o Rākaumangamanga.

\(^{79}\) Ihumanea, supra n 76. Arguments by the pupils from Te Aute College.

\(^{80}\) NZPA, supra n 70.

\(^{81}\) Mana Magazine, supra n 71. Gordon was the artist who tattooed musician Ben Harper.

\(^{82}\) An audio recording of Mike commenting on the origin of his new tattoo can be downloaded from <http://www.knbr68.com/bleepers.html>.
He was under the assumption that I was interested in, as he put it, ‘something of the silver dollar variety’. In other words something small, fast and insignificant. When I explained to him a vision of my entire back, he lit up...He did not physically draw lines until the next morning; [but] the unification of our worlds was as much a part of the moko as the pattern itself.\footnote{Ben Harper quoted in “Dedicated by Blood” \emph{Mana}, April-May 2003, 61.}

While Ben Harper may illustrate that culturally acceptable uses of Māori traditional knowledge are possible, the point is that the reverse is also possible, and the only deciding factor at the present time is the disposition of the third party using the knowledge. Harper’s willingness to accept the contextual background that came with his moko is the key difference between himself and Mike Tyson, who did not even bother to find out the correct name of the culture he was stealing from.

Keeping Tyson company at the ignorant end of the spectrum is a Dutch café named Moko. The café caused Māori outrage in response to advertisements containing images of European people with stylised moko, and using the slogan “Face Food”.\footnote{Milne, J “Māori Outrage at Dutch Café’s ‘abuse’ of moko” \emph{The Dominion}, 20 March 2002, 14. See Appendix 6.} The café owner said he had “consulted” a self-proclaimed Māori chief (whom he had met on the streets of Amsterdam) and that this chief gave him the go ahead for the café one night over dinner.\footnote{Ibid.} The café itself is in a converted church, and serves New Zealand and Australian inspired food.\footnote{Ibid.}

This café and its use of the word moko and its associated imagery are offensive to Māori on multiple levels. The association of something as tapu as a moko with food (which is noa)\footnote{Williams, supra n 26 at 222. Translated as \emph{free from tapu; of no moment, ordinary}. See section 5.2.} is reprehensible from a Māori viewpoint. The fact that the café is located in a converted church, an obviously tapu place, only adds insult to injury. The simple problem here is that the café owner did not have any idea that removing a single piece of mātauranga without understanding the interconnected ideologies that are inextricably bound to it, will always lead to trouble.
Nor did he bother to find out. For Māori, the difficulty is that legally there is nothing they can do to stop individuals like this from making a mockery of their sacred knowledge.

A final example of the issues raised by the interaction between IPR and mātauranga is that great expression of national pride, the haka Ka Mate. From Te Rauparaha to the All Blacks, the haka has become a symbol of New Zealand’s national identity. In 1997 the now defunct British pop group The Spice Girls famously attempted their own rendition of this national icon, led on by a pair of enthusiastic New Zealanders. The uproar from Māori leaders at their display was predictably disparaging, as yet another example of ignorant mockery of Māori culture was displayed to the world.

The Spice Girls are on dangerous territory by rubbingish our culture, and worse still, mocking our haka. It’s a bloody disgrace. We’re sick of people bastardising our culture, and we have a way of dealing with them.

Against this background it was interesting that when Ngāti Toa attempted to trade mark the haka apparently written by their infamous ancestor, there was a national outcry at what many New Zealanders perceived as greedy Māori trying to make money out of a national treasure. Yet when third parties use IPR to make money out of Māori treasures, the reaction from mainstream New Zealand is predictably less dramatic. So when British television station BBC One incorporated the haka into an advertising campaign, most New Zealanders didn’t bat an eyelid. For Māori, the irony is blatant.

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88 Although the details remain highly contested, it is commonly believed that Ka Mate was written by Ngāti Toa / Ngāti Raukawa chief Te Rauparaha. See the comments of Rev Muru Walters, quoted in Calder, P “War Dance Over Haka”, New Zealand Herald, 28 January 2001, 22.
90 Ibid.
91 Richardson, M The Haka, Vintage Cheese, and Buzzy Bee: Trade Mark Law the New Zealand Way [2001] EIPR 207. The current status of trade mark applications 305166, 305167, and 305168 relating to the words of Ka Mate is under ‘examination’ according to the Intellectual Property Office of New Zealand official trade marks database <http://www.iponz.govt.nz>.
92 Manson B and Quirke M “This is the BBC: ka mate ka mate!” The Dominion, 16 April 2002, 15.
It is arguable that the New Zealand concern arose from the exclusivity a trade mark would grant Ngāti Toa, and the fact that others, such as the New Zealand Rugby Football Union, would have to pay for the privilege of using what was viewed as 'public' property. There was an automatic assumption that because Māori knowledge already exists, it must be part of the public domain. This argument seems to suggest that non-Māori can use Māori traditional knowledge as a free commercial branding tool for their products, while Māori are denied the opportunity to assert their rights to their collectively held knowledge.

If the haka was a Beatles song, there is no doubt that there would a string of lawyers lining up to negotiate a deal for the rights to use it. But because the haka was created and passed down as part of the common heritage of a tribe, it is fair game in the IP world. There is an obvious injustice in this thinking.

A final mention must be made of the “haka party” incident in Auckland on 1 May 1979. The incident involved a group of engineering students who had made a capping tradition out of performing a “haka”, which involved ludicrous acts such as simulated masturbation and caricatures of penises and testicles painted on their bodies with lipstick. The continual protests by Māori students to this cultural mockery were ignored for nearly 20 years until a group of young Māori calling itself He Taua attempted to force the engineering students to stop the performance. The confrontation turned ugly and several of the engineering students were assaulted. What followed was a media frenzy, which accused He Taua of assaulting innocent students who were just having a bit of fun. The obvious frustration of the group at the inability to stop the engineering students by peaceful means was evident in a flyer encouraging supporters to picket at their subsequent Court appearances. The flyer talked about the group’s involvement in

95 Williams, supra n 26 at 397. Translated as hostile expedition, war party.
peaceful protests at Raglan, Bastion Point, and on Anzac Day, and also the violent responses and lack of successful results they achieved.\textsuperscript{98}

For years we have been non-violently fighting for justice. Struggling to retain our lands and our heritage. We have achieved nothing but defeat after defeat after defeat... How much longer must we be humiliated? We have tried to follow in the footsteps of Te Whiti — but will we only suffer the same fate that he did? Is force the only language this society understands? In 20 seconds we were able to resolve an issue that has been boiling for 20 years.\textsuperscript{99}

At first blush, this incident may seem unrelated to the current debate, when in fact it is a perfect illustration of the depth of Māori feeling when it comes to the protection of their traditional knowledge, and the stark ideological differences that still exist between Pākehā and Māori. The European saying “Sticks and stones may break my bones but words will never hurt me” is contrasted with the Māori whakataukī:

\begin{quote}
He tao huata e taea te karo, he tao kī e kore e taea.

The thrust of a spear can be parried, but not the thrust of words.\textsuperscript{100}
\end{quote}

For Māori, a spoken insult is far worse than a physical assault, and the opposite is true for European society. Thus, while the ‘haka party’ was seen as light-hearted fun by many Pākehā, it was felt by Māori as a stinging attack on their mana that warranted a severe response. The existence of an enforceable protection regime for mātauranga would have given He Taua a better option than resorting to violence.

Some will argue that every culture and sector is subject to the threat of cultural offence by another, and that the law does not provide remedies to them (other than human rights based ones) either. But this argument fails to take into account that Māori were guaranteed the right to tino rangatiratanga\textsuperscript{101} over all their taonga, including their

\textsuperscript{98} Neither the Raglan Golf Course nor Bastion Point had been returned to Māori at the time.
\textsuperscript{100} Mead, H and Grove, N \textit{Ngā Pēpeha a ngā Tipuna} (2001) 122.
\textsuperscript{101} Infra n 113 and accompanying text.
mātauranga, under Te Tiriti o Waitangi\textsuperscript{102} and that the Government, as the Crown’s representative, is under a moral and constitutional obligation to honour that guarantee.\textsuperscript{103}

\section*{3.3. CONCLUSIONS}

Some will argue that Māori have the same rights as all other New Zealanders when it comes to protecting their individual intellectual property, but that is obviously not what Māori are concerned about. Māori are concerned about their collective rights to existing taonga being subjugated, simply because their worldview is not shared by those who created IPR regimes. Māori are concerned that the current regimes are ethnocentric and ignorant of their rights to their taonga, just because they hold them collectively. They are concerned that the current regimes allow others to steal, misappropriate, and ridicule their collective knowledge. They are concerned that the current regimes deny them the expression of their tino rangatiratanga over the mātauranga that has been handed down to them.

Despite these concerns, the criticisms expressed are not aimed at the regimes per se; the regimes are perfectly satisfactory for the purpose and the subject matter for which they were designed. The problem is that they were not designed for mātauranga or for Māori, and therefore can never hope to adequately provide for Māori concerns. In order to address the issues raised here a fresh approach is needed, one that finally recognises the need for Māori to have control of what is, will be, and has always been theirs.

\section*{4. PROTECTION OPTIONS}

The above analysis has revealed serious concerns for Māori regarding the impact that IPR regimes are having on mātauranga. As well as enabling others to gain rights over Māori traditional knowledge, the current regimes are seriously lacking when it comes to the protection of mātauranga from exploitation, misappropriation, and outright abuse.

\textsuperscript{102} Ko te Tuarua, Te Tiriti o Waitangi 1840.
\textsuperscript{103} For further discussion of the Crown’s Treaty obligations see section 4.1.
These concerns are not new. Although the debate has only recently gained public currency in this country, indigenous peoples around the world and concerned Māori leaders in this country have been exploring ways of addressing these issues for some time. While a comprehensive examination of the many and varied international approaches to this problem is not possible here, a study of local responses and a general survey of international directions may provide guidance in the development of a model protection regime for mātauranga.

The following sections look at local and international initiatives that have been adopted to deal with the issue, and attempt to identify from them the necessary structural elements that will make up the proposed regime. Consideration of Māori requirements as well as the components the system will require in order to function as a comprehensive protection regime will be taken into account. Where the regimes fail to provide adequate protection, other positive aspects they may offer in the construction of the regime will be noted.

4.1. WAITANGI TRIBUNAL CLAIM NO. 262

One of the earliest local responses to the question of protecting Māori traditional knowledge was the filing of the Wai 262 claim in 1991. A group of Māori concerned over the increasing loss of native plants and animals (flora and fauna), formulated a claim based on Article 2 of the Treaty of Waitangi. The claim has since been amended a number of times by the six claimant iwi, and now covers a diverse range of Māori traditional knowledge, including but not limited to:

a) Indigenous flora, and fauna, ecosystems, habitats and genetic material;

b) Mātauranga, whakairo, rongoa Māori (traditional Māori medicine), biodiversity, genetics, wāhi tapu, pā sites, weaponry, tipuna whare, and Māori cultural images, designs, and symbols;

c) All associated indigenous, cultural and customary heritage rights in relation to such taonga.


The reference to indigenous, cultural and customary heritage rights is further defined as including “all rights (including intellectual and property rights) past, present, and future in relation to the taonga of the Māori people.”

To non-Māori, this may seem like an unrealistically broad and all encompassing claim, but it is simply characteristic of the holistic Māori worldview and the clear reciprocal bonds that Māori recognise between themselves and the world around them.

The basis of the claim is the Treaty guarantee by the Crown to Māori of the:

Full, exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties which they may collectively or individually possess

Tino rangatiratanga o ō rātou wenua, ō rātou kāinga me ō rātou taonga katoa

Unqualified exercise of their chieftainship over their lands, villages and all their treasures

Leaving aside the intricacies of Treaty jurisprudence, the doctrine of contra proferentum, gives Māori a legal basis for their reliance on the Māori version of the Treaty. The acceptance of the translation of the Māori version by the Court of Appeal, and the parties (the Crown and The New Zealand Māori Council) in the historic lands case NZ Māori Council v Attorney-General, also lends weight to the

106 Ibid.
107 Article Two, Treaty of Waitangi 1840.
108 Ko Te Tuara, Te Tiriti o Waitangi 1840.
110 A comprehensive discussion of the debate over the legal and constitutional significance of the Treaty is beyond the scope of this paper.
111 Against the party which proposes or adduces a contract or condition of a contract - The New Shorter Oxford English Dictionary (1993) 497.
112 NZ Māori Council v Attorney-General [1987] 1 NZLR 641. This translation was accepted by the Court of Appeal, and the parties (the Crown and The New Zealand Māori Council) in this historic lands case.
argument. Whatever the interpretation, it is clear that the Wai 262 claim is about the assertion of tino rangatiratanga over taonga.

Tino rangatiratanga is a much maligned and debated concept, but in the context of the Wai 262 claim it entails:

a) Decision – making authority over the conservation, control of, and proprietorial interests in natural resources including indigenous flora and fauna me o ratou taonga katoa;

b) The right to determine indigenous cultural and customary heritage rights in the knowledge and use of indigenous flora and fauna me o ratou taonga katoa;

c) The right to participate in, benefit from, and make decisions about the application of existing and future technological advances as they relate to the breeding, genetic manipulation and other processes relevant to the use of indigenous flora and fauna;

d) The right to control and make decisions about the propagation, development, transport, study or sale of indigenous flora and fauna;

e) The right to protect, enhance and transmit the cultural, medicinal and spiritual knowledge and concepts found in the life cycles of indigenous flora and fauna;

f) A right to environmental well-being dependent upon the nurturing and wise use of indigenous flora and fauna;

g) The right to participate in, benefit from make decisions about the application, development, uses and sale of [me] o ratou taonga katoa;

h) The right to protect, enhance and transmit the cultural and spiritual knowledge and concepts found in [me] o ratou taonga katoa.113

The claimants assert that the Crown (and subsequently the Government as the Crown’s representative) breached the guarantee of tino rangatiratanga over taonga by adopting the ordinances, Acts, regulations, orders, proclamations, notices, policies, practices, acts, omissions, and international instruments listed in the statements of claim.114 Some of

113 Solomon, supra n 104 at 11.
114 See for example Schedules 2(A) and 2(B) Second Amended Statement of Claim for Ngāti Porou (19 October 2001) Wai 262.
these instruments are now the main barriers to the implementation of a sui generis legislative regime to provide full legal protection and recognition for taonga Māori.

The Wai 262 claim has encountered numerous difficulties because of the consistent shortage of resources at the Waitangi Tribunal, and the lack of funding support for the claimants.\textsuperscript{115} However, once the hearings resume\textsuperscript{116}, the claim should be nearing completion after more than a decade. Although the Tribunal only has the power to make non-binding recommendations to the Government in this instance\textsuperscript{117}, the Tribunal's report will no doubt have a great influence on the future direction of the New Zealand Government's response to the question of protecting Māori traditional knowledge. The Government's cognisance of this fact has been indicated by the "snail's pace"\textsuperscript{118} of the reform of intellectual property laws in accordance with the GATT: TRIPS Agreement, and their acceptance that "no amendment of them [intellectual property laws] should be pursued until the Māori claim [Wai 262] has been resolved"\textsuperscript{119}. Assuming a successful outcome for the claimants, there is still a need to translate the Tribunal's recommendations into legally enforceable rights, and the creation of a legislative protection regime for Māori is one way of achieving this.

4.2. THE MATAATUA DECLARATION 1993

A second response by Māori (and other indigenous peoples) in relation to the protection of their traditional knowledge was the Mataatua Declaration 1993\textsuperscript{120}. The nine tribes of Mataatua convened the First

\begin{itemize}
\item\textsuperscript{115} Solomon, supra n 104 at 11.
\item\textsuperscript{116} The hearings have been stalled because of the illness of the Presiding Officer. The passing of the omnibus Māori Purpose (No. 2) Bill 2002 205-2 will preserve the legitimacy of a Tribunal during an inquiry if there is no longer a quorum constituted for that inquiry because the presiding officer or a member of the Tribunal is unable to continue holding office. This will enable the continuation of the hearings.
\item\textsuperscript{117} Waitangi Tribunal Website Frequently Asked Questions <http://www.waitangi-tribunal.govt.nz/faq/>.
\item\textsuperscript{119} Ibid.
\item\textsuperscript{120} Mataatua Declaration 1993.
\end{itemize}
International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples.\textsuperscript{121} Over 150 delegates from 14 countries attended, including representatives from Ainu (Japan), Australia, Cook Islands, Fiji, India, Panama, Peru, Philippines, Suriname, the United States and Aotearoa [New Zealand].\textsuperscript{122} The conference led to the development of an international declaration on the cultural and intellectual property rights of indigenous people – the Mataatua Declaration – that sets out collective recommendations to indigenous peoples and states, national and international agencies. The core recommendations are:

WE

Declare that indigenous peoples of the world have the right to self determination; and in exercising that right must be recognised as the exclusive owners of their cultural and intellectual property;

Acknowledge that Indigenous Peoples have a commonality of experiences relating to the exploitation of their cultural and intellectual property;

Affirm that the knowledge of the Indigenous Peoples of the world is of benefit to all humanity;

Recognise that indigenous peoples are capable of managing their traditional knowledge themselves, but are willing to offer it to all humanity provided their fundamental rights to define and control this knowledge are protected by the international community;

Insist that the first beneficiaries of indigenous knowledge (cultural and intellectual property rights) must be the direct descendants of such knowledge;

Declare that all forms of discrimination and exploitation of indigenous peoples, indigenous knowledge and indigenous cultural and intellectual property rights must cease.\textsuperscript{123}

Of particular note for the purposes of this paper is clause 2.5 of the declaration, in the section on “Recommendations to States, National and International Agencies”, which states that in the development of policies and practices these agencies must:

\textsuperscript{121} Jones, supra n 22 at 4.


\textsuperscript{123} Ibid.
Develop in full co-operation with Indigenous Peoples an additional cultural and intellectual property rights regime incorporating the following:

- collective (as well as individual) ownership and origin
- Retroactive coverage of historical as well as contemporary works
- Protection against debasement of culturally significant items
- Co-operative rather than competitive framework
- First beneficiaries to be the direct descendants of the traditional guardians of that knowledge
- Multigenerational coverage span.\textsuperscript{124}

The declaration provides a useful point of reference in the development of regimes, and also as an expression of the requirements of indigenous peoples in relation to this debate. However, as noted by the Wai 262 claimants, the New Zealand government has not adopted the declaration and, like the Treaty, it does not provide any legally enforceable rights for indigenous peoples without statutory incorporation. Thus the practical utility of the declaration as a protection mechanism for mātauranga is limited.

4.3. A MĀORI TRADE MARK - TOI IHO

A recent initiative by Te Waka Toi (the Māori Arts Board of Creative New Zealand) is the creation of a Māori made mark called ‘Toi Iho’, and two companion marks, the mainly Māori mark and the Māori co-production mark.\textsuperscript{125} These three registered trade marks are used to promote and sell authentic, quality Māori arts and crafts, and also to authenticate exhibitions and performances of Māori arts by Māori artists.\textsuperscript{126} The mark itself was designed by a team of senior Maori artists led by master carver Dr Pakaariki Harrison.\textsuperscript{127}

\textsuperscript{124} Pihama, supra n 122.
\textsuperscript{125} See Appendix 7.
\textsuperscript{126} <http://www.toiho.com/about/about.htm>.
\textsuperscript{127} Ibid.
The central portion of the mark is the iho. The iho is the essence of creation and the origin of Māori knowledge and tradition. It represents the core of Māori arts. Emanating from the core are the whakapapa or genealogy lines of past, present and future generations. The coloured multiple spirals represent the creativity, innovation and the dynamism of Māori artists. The aesthetics of the mark symbol reflect the quality embodied in the works of highly skilled Māori artists.128

The aim of Toi Iho is to provide a mark of distinction to guarantee quality products made by persons of Māori descent. The creation of the mark is a direct response to the burgeoning tourism trade incorporating cheap and often culturally offensive products ‘imitating’ Māori art, such as plastic tiki and other unsavoury objects. However, in terms of protecting mātauranga, the trade mark suffers the same problems as all IPR regimes, namely that it was not designed for the purpose of protection and is based on conflicting ideology. Thus, while Toi Iho is a suitable initiative for the promotion of authentic Māori arts and crafts, it does not offer any protection for Māori traditional knowledge.

4.4. PRIVATE CONTRACTS – TE PIRIRĀKAU

On the local front there has been a success story. Pirirākau is a hapū of Ngāti Ranginui, based in the Te Puna area in Tauranga. In 1998 Pirirākau signed a royalty agreement (“Pirirākau agreement”) with swimwear company Moontide, through a hapū-based company Kia Ora Promotions.129 The agreement gave the swimwear manufacturer the right to use a kōwhaiwhai pattern previously trade marked by Kia Ora Promotions on its swimwear designs for two years. The agreement gave the hapū a percentage of the profits, and allowed the hapū to continue using the kōwhaiwhai itself, the only restriction being the commercial manufacture of swimwear containing the design. The company’s managing director commented that:

> Not many have gone about it the right way...I have checked out every possibility to make sure we don’t offend anybody.130

130 Ibid. Comments were made by Tony Hart, managing director of Moontide swimwear.
Again while this instance proves that mutually beneficial arrangements between Māori and third parties are possible under present regimes, it depends entirely on the goodwill exhibited by the third party. Moontide could easily have procured a kōwhaiwhai pattern and used it without permission, and there would have been no legal remedy for the aggrieved Māori group unless they had some prior existing IPR, such as the trademark used by Kia Ora Promotions. Unfortunately, not all Māori traditional knowledge is as easily trade marked as a kōwhaiwhai pattern, nor do all Māori wish to trade mark their mātauranga. Thus while the Pirirākau agreement provides a practical example of how third party agreements can work, the extent of protection provided is limited.

4.5. INTELLECTUAL PROPERTY REFORM - THE TRADE MARKS ACT 2002

Although, as indicated earlier, the Government has held back on reforms to the intellectual property laws in New Zealand in anticipation of the outcome of the Wai 262 claim, it has recently given in to pressure to update the law of trade marks with the passing of the Trade Marks Act 2002 on the 22nd of November 2002. The new Act contains some interesting provisions for Māori, which may be seen as a policy response by the Government to the Wai 262 claim.

The key provisions of the Act in relation to Māori are:

a) A ‘new’ ground for refusing to register a trade mark under section 17 (1)(b)(ii). Registration may be refused if the “Commissioner considers that its use or registration would be likely to offend a significant section of the community, including Māori”;

b) The formal establishment of a Māori Advisory Committee. Sections 177 to 180 outline the establishment of an advisory committee to advise the Commissioner whether the proposed use or registration of a trade mark “is, or appears to be, derivative of a Maori sign, including text and imagery, is, or is likely to be, offensive to Maori.”

131 Hawkins, supra n 118 at 26.
132 Trade Marks Act 2002.
133 Section 17 (1)(b)(ii) Trade Marks Act 2002.
134 Section 178 Trade Marks Act 2002.
c) The provision for invalidation of a trade mark based on the application of an aggrieved person “including a person who is culturally aggrieved.”

At first these provisions may seem encouraging, as offering some protection for mātauranga, but on closer inspection it seems that they amount to only marginally more than clever political window-dressing.

In relation to the new grounds for refusal of registration, top intellectual property lawyers are of the opinion that the new provision changes little as Māori were free to bring cultural objections under the former “scandalous and contrary to morality test.”

The ground of objection based on offensiveness is a carry-over from the old act. It has always been open to groups – including ethnic groups – who would be offended by registration of a mark... there is really nothing new in these aspects of the [proposed] law.

In relation to the Māori Advisory Committee, parallels with the Waitangi Tribunal are not unrealistic. While the committee will have members knowledgeable in tikanga and Te Ao Māori, they only have the power to advise the Commissioner, who retains the final decision-making power. The Committee may play an important educational role in highlighting Māori issues that may not be apparent to the Commissioner, but in terms of practical protection for mātauranga the committee is not an answer to the problems outlined in this paper.

Finally, provision for invalidation of a trade mark based on the application of a person who is “culturally aggrieved” is also of little consequence. Some ill-informed commentators have raised the possibility of the retrospective invalidation of well-known trade marks such as the Air New Zealand koru. But this sensationalist argument fails to account

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135 Section 73 Trade Marks Act 2002.
136 Section 16 Trade Marks Act 1953 (Repealed).
138 Section 179 Trade Marks Act 2002.
139 De Boni, supra n 137. The comments were those of Act MP Steven Franks.
for the fact that the Commissioner or the Court still retains the ultimate decision-making power in this section, and the likelihood of either invalidating established trade marks is minimal.

A final mention must be made of the fact that businesses may simply opt out of the registration process altogether, effectively circumventing what little protection the new provisions may provide.

It does not provide Māori with an indefensible weapon to prevent [businesses] using Māori words or emblems, no matter how offensive.

The inadequacies of the reformed Act in relation to protecting mātauranga mirror those of intellectual property in general (as traversed in section 2). Though the Government may have made a sincere attempt to take into account Māori concerns, the result only reinforces the conclusion that current IPR regimes are inherently unsuitable for protecting traditional knowledge.

4.6. INTERNATIONAL DIRECTIONS

The international traditional knowledge discourse has been active for decades. An in depth study of the numerous international reports involved in the debate is well beyond the scope of this paper. Nonetheless the recent work of the World Intellectual Property Organisation ("WIPO") Intergovernmental Committee on Intellectual Property and Genetic Resources, traditional knowledge and Folklore ("IGC") provides a useful summary of overseas initiatives dealing with the protection of traditional knowledge.

The IGC conducted a survey of the WIPO member states on the use of existing IPR regimes to protect traditional knowledge, and also whether any sui generis laws providing protection for traditional knowledge have been implemented. Forty eight responses were

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140 Section 73 (1) Trade Marks Act 2002.
141 De Boni, supra n 137. The comment is from KPMG (now Kensington Swan) Senior Associate Sheana Wheeldon.
received in total, and the IGC then compiled the responses into a Review of Existing Intellectual Property Protection of traditional knowledge.\(^{143}\)

### 4.7. EXISTING INTELLECTUAL PROPERTY PROTECTION

Of the forty responses, thirteen members indicated that existing mechanisms of intellectual property are generally available for the protection of traditional knowledge.\(^{144}\) Of these members, five indicated that eligibility for protection depends almost exclusively on meeting previously established legal conditions.\(^{145}\) One of the problems with IPR regimes in general, identified previously,\(^{146}\) is that many types of traditional knowledge simply cannot meet such conditions and are thereby disqualified from protection under existing regimes.

Of the mechanisms mentioned, particular reference was made to the use of copyright, certification marks, collective trademarks, geographical indications, trade secret law, patents, and moral rights under copyright law.\(^{147}\) It is interesting to note that, despite these references, only eight respondents provided actual examples of how existing IP mechanisms have already been used to protect traditional knowledge. Copyright emerged as one of the most widely used mechanisms, notably in Australia\(^{148}\) and Canada, where it has been used by indigenous artists to protect against infringement of their art. While copyright may offer protection for these artists with their individual creations, the collective knowledge they draw their inspiration from remains exposed.\(^{149}\)

\(^{144}\) Ibid, 3.
\(^{145}\) Ibid, 4.
\(^{146}\) See section 3.2.
\(^{147}\) WIPO, supra n 144 at 4.
\(^{148}\) See the cases of *Milpurruru v Indofurn Pty Ltd* (1995) 30 IPR 209 and *Bulun Bulun & Milpurruru v R & T Textiles Pty Ltd* (1988) 41 IPR 513.
\(^{149}\) See *Bulun Bulun & Milpurruru v R & T Textiles Pty Ltd* (1988) 41 IPR 513 for an interesting obiter discussion about the parallel claim of Mr Bulun's tribe the Ganbilingu people to equitable ownership of the copyright based on an implied trust between Mr Bulun and the tribe. Although the Court said no trust existed, they found that the indigenous artist had a fiduciary duty to his tribe, which may from the basis of a claim if the copyright holder had failed to act, or if the copyright holder could not be identified or found.
The general lack of specific examples of protection under existing regimes and, in particular, the lack of examples pertaining to the protection of collective traditional knowledge, reinforce the conclusion stated earlier that existing IPR regimes are unsuited for the protection of traditional knowledge. Even those regimes that do offer some protection for individual expressions such as copyright are still fundamentally inadequate because of the underlying ideological conflict identified earlier. Thus protection of traditional knowledge under existing IPR regimes internationally is also limited.

4.8. SUI GENERIS PROTECTION

The second question in the survey asked members to provide information on any specific sui generis regimes that they have adopted, that are aimed at the protection of traditional knowledge.150 Eight members responded about present systems151, and ten more152 (including New Zealand) indicated plans to adopt a sui generis system in the future.153 The following is a summary of the seven legitimate responses relating to existing sui generis measures.

a) Brazil

Brazil has a comprehensive system for protecting traditional knowledge associated with biodiversity. Protection is achieved bi-laterally, firstly through contracts of access ensuring sharing of benefits arising from the use of genetic resources and associated traditional knowledge, and secondly through a proprietary regime of traditional knowledge rights recognising the right of indigenous and local communities to prevent unauthorised third parties from using traditional knowledge. The law also covers benefit sharing including compensation, access to

150 WIPO, supra n 142 at 1.
151 Brazil, Costa Rica, Guatemala, Panama, The Philippines, Samoa, Sweden and Venezuela. Sweden referred to the Reindeer Husbandry Act 1971 that deals with the constitutional right of the Sami to reindeer husbandry. However the Act only covers economic aspects, and is not related to traditional knowledge.
152 Ecuador, New Zealand, Papua New Guinea, Peru, The Philippines, Solomon Islands, Tanzania, Tonga, Trinidad and Tobago and Vietnam.
153 WIPO, supra n 143 at 6.
and transfer of technology, licensing and capacity building. There is no pre-determined term of protection for traditional knowledge. The grant of existing IPR's also depends on compliance with the regime, which means applicants must provide information on the origin of genetic resources and associated traditional knowledge whenever applicable. The law also provides for sanctions in the form of fines, seizure of unlawful material, prohibition on distribution, and invalidation of patents or registrations.\textsuperscript{154}

b) Costa Rica

Costa Rica has the Law on Biodiversity. The law establishes general criteria concerning community rights in traditional knowledge, and calls for local and indigenous communities to establish the mechanism for the protection and registration of biodiversity associated traditional knowledge, through a participatory process.\textsuperscript{155}

c) Guatemala

In Guatemala, the Cultural Heritage Protection National Law provides traditional knowledge protection using a national cultural heritage approach. Expressions of national culture, including many categories of traditional knowledge, are included in a Cultural Goods Registry. The expressions are under State protection and cannot be disposed of by contractual arrangements. They cannot be sold and there is no right for remuneration. The system is managed by the Ministry of Cultural Affairs, and appears to be based on a public good approach, in that traditional knowledge is to be identified, recorded and preserved by the State for the benefit of the entire society.\textsuperscript{156}

d) Panama

Panama has established a special intellectual property regime on "collective rights of indigenous peoples for the protection and defence of their cultural identity as their traditional knowledge."\textsuperscript{157} The regime covers indigenous peoples' creations, such as inventions, designs and innovations, cultural historical elements, music, art and traditional artistic

\textsuperscript{154} WIPO, supra n 142 at 13.
\textsuperscript{155} WIPO, supra n 142 at 22.
\textsuperscript{156} WIPO, supra n 142 at 66.
\textsuperscript{157} WIPO, supra n 142 at 92.
expressions. Traditional knowledge is protected to the extent that it provides for the identification of indigenous peoples and is susceptible to commercial use. There is a Congress of Traditional Indigenous Authorities that attributes collective exclusive rights to registered elements of traditional knowledge. Where knowledge is co-owned by various communities the benefits are jointly shared. The regime has its own enforcement measures, and provisions are available to enforce IPR’s as a subsidiary mechanism. The collective indigenous rights may also be used as a basis for opposing unauthorised third parties’ claims of IPR’s. The regime also covers biodiversity-associated traditional knowledge, and therefore constitutes the first comprehensive system of protection of traditional knowledge adopted in the world.\textsuperscript{158}

e) The Philippines

The Philippines has the Indigenous Peoples’ Rights Act 1997, which protects indigenous communities’ rights in general, and also some traditional knowledge rights. In relation to traditional knowledge it includes; rights to limit the access of researchers into ancestral domains, lands, or territories; to be designated information sources in any writings or publications resulting from research; and to receive royalties from any research and resulting publications. The enforcement of these rights will follow procedures established by customary laws of the indigenous peoples.\textsuperscript{159}

f) Samoa

Samoa has a Village Fono Act 1990, which effectively protects Samoa’s traditional form of governance (through Village Council).\textsuperscript{160}

g) Venezuela

Venezuela indicated that the Constitution of the Bolivarian Republic protects the intellectual property of indigenous peoples in their knowledge, technology and innovations.\textsuperscript{161}

\textsuperscript{158} WIPO, supra n 142 at 92.
\textsuperscript{159} WIPO, supra n 142 at 100.
\textsuperscript{160} WIPO, supra n 142 at 110.
\textsuperscript{161} WIPO, supra n 142 at 126.
h) Peru

Of the ten countries that responded that they planned to implement sui generis systems in the future, only Peru supplied details. The proposed system aims at protecting traditional knowledge relating to biodiversity. Holders of this knowledge have the right to give consent to access and use this knowledge, and where the intended use is commercial or industrial, a license agreement must be entered into. The license must provide for an equitable share of the benefits. The proposed law also provides various enforcement sanctions including injunctions, seizures, criminal sanctions, and fines. Applicants for utility patents or plant variety breeder’s certificates related to traditional knowledge products or processes must provide a copy of the relevant licensing agreement or the application will be denied. Unlike the registration system under Panama law, the Peruvian system will remain informal, with a voluntary registry.162

4.9. CONCLUSIONS

The current local responses to the protection of traditional knowledge all fail to provide the extent of protection necessary to prevent the types of incidents of abuse outlined in section two. Nonetheless the Wai 262 claim and the Mataatua Declaration provide important guidance on the wishes of Māori and other indigenous peoples, while the Māori made mark makes use of existing regimes to provide a point of difference for contemporary Maori artists and their work. The Pirirākau agreement proves that working agreements with third parties for the use of Māori traditional knowledge are possible. Contrastingly, the reformed Trade Marks Act 2002 provides a timely reminder that despite the hype, traditional mātauranga Māori still has scant protection.

International responses to this issue reveal an array of different regimes, ranging from compulsory State protection to specific protection for particular aspects of traditional knowledge. Each of these regimes places a different emphasis on the subject matter for protection, which is no doubt reflective of the areas where prior exploitation has occurred.

162 WIPO, supra n 142 at 97.
Taking guidance from these efforts and also the parameters set by the Wai 262 claims and the Mataatua declaration, it appears that there are five essential elements for a sui generis Māori protection regime:

1) Protection mechanisms (including protection criteria and terms of protection);
2) Management structure (including conflict resolution mechanisms);
3) Dissemination mechanisms (including education and benefit-sharing systems);
4) Sanctions and enforcement methods;
5) Interaction with existing IPR regimes and international instruments.

The appropriate form for these elements will depend on the guiding principles of tikanga, to be identified in the next section. Traditional Māori principles relating to the use, management, and control of mātauranga will be discussed, as well as their relevance in relation to the proposed regime. Each of these structural elements will then be considered in relation to these core principles, and an appropriate form for each element will be fashioned for the proposed regime.

5. **NGĀ POU TOHUTOHU – THE GUIDING PRINCIPLES**

As identified earlier, the central issue for Māori remains the assertion of tino rangatiratanga over taonga, which essentially entails complete control over the resource. Solomon observes:

> The claimants are still in the process of giving careful consideration to what such a system may look like, how it will be structured, and how it will operate. But one thing is absolutely certain. That such a system must be owned and controlled by Māori and not simply another Crown agency set up by statute with members appointed by the Crown.\(^{163}\)

Along with this central concept there are a complex myriad of principles underlying the use, learning and dissemination of mātauranga, each having particular applications depending on the context. The following

\(^{163}\) Solomon, supra n 104 at 13.
sections will explore the concepts that can be seen to influence the practical and spiritual practices associated with Māori traditional knowledge. These concepts will form the basis of the proposed regime, and will be used as guiding principles in the final formation of the structural elements.

5.1. **TIKANGA**

Tikanga Māori is a collective term for the body of rules, values and practices that regulate Māori society. Tikanga is derived from the root word tika, which can be translated as just, fair, right or correct.164

Tikanga indicates the obligation to do things in the “right” way: doing the right thing for no other reason than because it is the right thing to do. Tikanga draws from many seeds: it has many shades and many applications.165

Mead provides a comprehensive description of the nature of tikanga:

Tikanga embodies a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation... Tikanga are tools of thought and understanding. They are packages of ideas which help to organise and provide some predictability in how certain activities are carried out. They provide templates and frameworks to guide our actions and help steer us through some huge gatherings of people and some tense moments in our ceremonial life. They help us to differentiate between right and wrong and in this sense have built in ethical rules that must be observed. Sometimes tikanga help us survive.166

Thus tikanga may be described as a wide spectrum of protocols that provide guidance for Māori in all aspects of life, based on wisdom

164 Williams, supra n 26 at 416.
165 Bishop Manuhuia Bennet in NZLC SP9 Māori Custom and Values in New Zealand Law (2001) 16.
gained from past intergenerational experiences. In relation to the proposed regime, tikanga Māori must be the guiding principle in terms of procedure and protocol.

Mutu notes that one of the numerous practical difficulties in developing a regime based on tikanga Māori is accommodating tribal diversity. Regional variations mean that what is tika for one tribe may not be tika for another. This issue will need to be addressed in the structure.

This leads to a related issue concerning the codification of tikanga through inclusion in statute. Māori have expressed concern at the inclusion of Māori concepts (such as kaitiakitanga) into legislation because of the potential for re-definition in legal forums divorced from their cultural context. This presents a tricky problem in the construction of a protection regime, because the system will have to be based on concepts that may have to remain undefined in the statute itself. This also means that the regime will have to provide a mechanism for the resolution of disputes over interpretation of tikanga and other Māori concepts in order to prevent the interference of the Courts, and to retain control over these essential principles.

5.2. TAPU AND NOA

Tapu has many interpretations. One definition describes tapu as "the essence of sanctity, cultural protection, sacredness, set apartness." Tapu acts as a control mechanism in Māori society, delineating the sacred from the ordinary or noa, and providing sanctions to ensure that this balance is observed. While opinions differ on the origins of tapu, most agree that tapu provides a framework for acceptable conduct within Māori society.

Explanations of tapu as primarily religious in nature appeal to those who seek spiritual answers for societal conduct. The more temporal view holds sway where survival and health maintenance are seen as the main challenges

167 Mutu, supra n 61 at 32.
for tribal societies. But common to both views is the acceptance of tapu...as [a code] for social conduct and adaptation to the environment. 170

An issue raised in previous sections is the essentially tapu nature of mātauranga, which means that many Māori who have been chosen as repositories of this sacred knowledge are reluctant to have it recorded for fear that this may in some way diminish that sacred aspect. Thus the proposed regime must provide for a method of delineating the subject matter for protection without the need for formal registration, where this issue arises. Further, some particularly tapu aspects of Māori traditional knowledge such as whakapapa and karakia will simply be unsuitable for inclusion in dissemination provisions to third parties. The proposed regime must ensure that the issues surrounding mātauranga that is considered tapu are provided for.

5.3. MANA AND RANGATIRATANGA

Mana is one of the conceptual elements behind rangatiratanga and is defined as authority, control, influence, prestige, power, and psychic force. 171

- Mana described the personal and political dimensions of Māori authority and illustrated:
  - The close connection between people and authority (as compared with institutional authority)
  - The association of authority with personal power and influence; and
  - The freedom for class mobility through demonstration of mana enhancing traits. 172

171 Williams, supra n 26 at 172.
172 Durie, supra n 41 at 5.
Mana is a fluid concept that can be increased or decreased, and can be sourced from divine, ancestral, or personal origins, or a combination of all three. Mana defines the ability of a rangatira to lead, and the extent to which his or her authority is respected. The need for leadership that carries a great deal of mana within the management structure will be crucial to achieving a properly functioning regime.

Solomon identifies mandate as a crucial element to the success of a tikanga-based regime, given that Māori are fiercely proud of their individual tribal histories, and this can often cause huge problems in achieving national unity. The issue of mandate is intricately linked with the concept of mana, and recent Māori disharmony and lack of ability to gain mandate over issues such as the fisheries allocation may be symptomatic of a Māori leadership lacking in mana. To this extent, the proposed regime will have to provide for proper consultation with all Māori on the form of the regime, in order to gain the mandate crucial to the establishment and survival of the regime. The regime will also have to provide a mechanism that recognises and respects the mana of each tribe and hapū to control their own mātauranga.

Mana may also potentially cause conflicts, especially in relation to who has mana over certain areas of mātauranga. Consequently, some form of conflict resolution between Māori groups that is cognisant of these mana-related issues will be required.

5.4. UTU

Utu or tau utuutu can be described as the principle of reciprocity. Often incorrectly equated with revenge, the concept entails the returning of whatever is received, whether bad or good.

Utu pervaded both the positive and negative aspects of Māori life, governing relationships within Māori society. It was a reciprocation of

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173 Ibid.
174 Solomon, supra n 104 at 13.
both positive and negative deeds from one person to another. Utu was a means of seeking, maintaining, and restoring harmony and balance in Māori society and relationships.176

Utu is relevant in keeping the balance of reciprocal obligations of protection in return for the use of mātauranga, and also in allowing others to use mātauranga. The concept is pertinent to the dissemination element of the regime, where dissemination is to third parties for the purpose of commercial use. The Pirirākau agreement provides an example of a practical expression of utu that is consistent with tikanga and the individual rangatiratanga of a hapū to develop and utilise their mātauranga. The proposed regime must provide a similar method for the dissemination of mātauranga that allows Māori to exercise their right to choose whether to share their mātauranga with third parties, and on what terms.

The concept of utu is also relevant to any benefit sharing arrangements between tribes or hapū for mātauranga that has shared origins, and in any internal management relationships established under the regime.

5.5 WHANAUNGATANGA

While there is some debate as to whether the word whanaungatanga derives from the root whānau meaning to be born177, or from the root whanaunga translated as relative or blood relation178 the term itself has a popularly agreed meaning.179 Whanaungatanga encompasses all the relationships formed on the basis of descent from a common ancestor, and is described by Dame Joan Metge as "the web of kinship."180 Whanaungatanga has been aptly described as the most pervasive of all the values of tikanga Māori181, and can stretch from

174 Solomon, supra n 104 at 13.
177 Williams, supra n 26 at 487.
178 Ibid.
181 Ibid, 30.
nuclear family relationships, all the way back to Ranginui and Papatiianuku through whakapapa. Relationships between people, plants, animals, physical and natural resources are all based on shared whakapapa links to the gods and the Māori creation histories. These links are the essential drivers behind Māori holistic and collective philosophies, and are critical to the success of the proposed regime. A huge amount of co-operation and unity will be necessary for the regime to function effectively and the concept of whanaungatanga, along with mana and rangatiratanga, will be essential components in achieving this.

5.6. KAI TIAKITANGA

Finally there is the concept of kaitiakitanga. As explained earlier, Māori ownership of mātauranga is more accurately described as kaitiakitanga because rather than absolute owners, Māori view themselves as the current holders of the knowledge, with reciprocal obligations to protect such knowledge for future generations.

The term ‘tiaki’ whilst its basic meaning is ‘to guard’ has other closely related meanings depending on the context. Tiaki may therefore also mean to keep, to preserve, to conserve, to foster, to protect, to shelter, to keep watch over. The prefix ‘kai’ denotes the agent of the act. A ‘kaitiaki’ is a guardian, keeper, preserver, conservator, foster-parent, protector. The suffix ‘tanga’ added to the noun means guardianship, preservation, conservation, fostering, protecting.

Kaitiakitanga is imbued with relationships to mana and tapu, as mana provides the authority for the exercise of kaitiakitanga, and tapu often provides the justification and mechanism for the exercise of it.

The essence of the proposed regime is to provide a legal avenue that enables Māori to exercise their traditional role as kaitiaki over their mātauranga, in accordance with the rangatiratanga guaranteed under the Treaty. This is one of the overall purposes that must be provided for in all facets of the regime.

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182 Williams, supra n 26 at 259. Translations include genealogical table.
184 NZLC, supra n 179 at 40.
5.7. CONCLUSION

Tikanga Māori encompasses numerous interrelated values and protocols. This section has identified those values most pertinent to the proposed regime, for inclusion as guiding principles. The structural implications of including these principles in the regime have also been noted. The following section will amalgamate these principles with the required structural elements of the regime, to construct the final form of the regime.

6. TE HONONGA – HE KAITIAKI MĀTAURANGA

The purpose of the proposed regime is to provide a legal channel for Māori to exercise their kaitiakitanga over their traditional knowledge, in a manner that is consistent with the guarantee of tino rangatiratanga over all their taonga, as contained in the Treaty. The regime must be built on tikanga Māori, as investigation has shown that Pākehā laws based on Western ideology cannot cope with the complex mesh of relationships that define Māori culture. The regime must be flexible enough to cater for the differing needs of individuals, hapū, and iwi, and strong enough to command the unity of all Māori on issues of collective importance. The regime must not stifle development, and must allow groups to exercise their own rangatiratanga over their traditional knowledge. At the same time, the regime must ensure that adequate protection is provided for those taonga that do not come with a price tag.

Essentially, the Kaitiaki Mātauranga regime must find a balance between many matters: tikanga and law, protection and commercialism, tradition and development, individual rangatiratanga and unity, to name but a few. The following sections outline the proposed framework for the regime. Whether or not this balance has been achieved, it must be remembered that the utu for such a regime is the compromise of putting Māori values into the Pākehā legal system, and for the regime to work many more compromises on many levels will have to be made.
6.1. STRUCTURE

The Katiaki Matauranga regime will be established through a statute that outlines provisions for the protection, use, and development of Māori traditional knowledge. A statutory base is necessary to provide the enforceable legal rights and sanctions that will form part of the regime. The statute will provide for the establishment of national, iwi, and hapū based authorities. These authorities will be responsible for the administration of the licensing provisions of the regimes, and will also be the legal custodians of any collective rights attributed to the particular groups under the regime. Individuals will also have the right to apply for rights in their individual works created using traditional knowledge. The statute will establish a Complaints Tribunal, to be appointed by the national authority. The Tribunal will have jurisdiction to hear complaints relating to the provisions of the Act, and to impose any enforcement sanctions in relation to those complaints. The Tribunal will also have exclusive jurisdiction to decide matters of interpretation of Māori words and concepts in the Act.

The statute itself will be structured in a hierarchical manner, with the guiding principles and purpose of the Act influencing the interpretation of all other provisions in the Act. Each of the other parts of the Act are based on and subordinate to the purpose and guiding principles. Each facet of the regime is explained below.

6.2. NGĀ POU TOHUTOHU O TE KAITIAKI MATAURANGA

The main section of the statute will set out the purpose and principles of the statute and the regime. A draft of this section follows:

1. Purpose and Principles

The purpose of the statute is to provide for the legal exercise of tino rangatiratanga by Māori over Māori traditional knowledge in all its forms. In pursuit of this purpose the principles of tikanga Māori, including but

185 The structure envisioned is similar to that of the Resource Management Act 1991, which has an overall purpose (s5) and correlating considerations of varying importance (ss 6, 7 and 8).
186 This draft is intended as a guide only, in order to convey the essence of the section. Much thought and consultation will have to be undertaken on actual wording.
not limited to kaitiakitanga, mana, tapu, utu, and whanaungatanga shall be recognised and provided for. Where any conflict arises, the purpose as contained in this section shall override any other provisions in this Act.

As noted above, exclusive jurisdiction to decide the meanings of all Māori words and principles in this section will be conferred on the Complaints Tribunal, appointed by the national authority. The rest of the Act’s provisions will be subordinate to this overriding purpose.

6.3. PROTECTION MECHANISMS

The second part of the regime will provide the requisite protection mechanisms. This entails identifying what parts of mātauranga will qualify for protection. A common theme arising from the international regimes was the concentration on protecting biodiversity related traditional knowledge. Only Panama appeared to have a sui traditional knowledge. Given the holistic nature of Māori society, this is the approach that must be favoured in the construction of the proposed regime.

An exhaustive definition of what will be protected by the model regime will not be attempted in the statute, as the terms will be left open for interpretation by the relevant authorities.\(^{187}\) This approach is taken because it is recognised that “the highly diverse and dynamic nature of traditional knowledge [means] it may not be possible to develop a singular and exclusive definition of the term.”\(^{188}\)

The following non-exhaustive categories listed earlier will provide the parameters of subject matter for protection under the proposed regime:

- a) Environmental (including medicinal, scientific, and ecological knowledge, indigenous flora and fauna and associated traditional knowledge and practices);

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187 The role of defining mātauranga will be left up to the authorities that are proposed to be established under the model regime. For further discussion see the next section on management.

b) Cultural Expressions (including all art forms, music, dance, symbols, designs, histories and associated knowledge);

c) traditional knowledge (including protocols, ceremonies, practices, sacred sites and objects, and future developments based on such knowledge).\textsuperscript{189}

The next step is the determination of the scope of this subject matter that is actually to be granted legal protection. The approach of Panama is favoured here, namely that the subject matter is protected to the extent that it provides for the identification of Māori and is susceptible to commercial use. This allows for broad protection, without unreasonably restricting the flow of knowledge that has no identifiable commercial value. In addition, there will specific provision for the protection of mātauranga that is very tapu, and also blanket protection against the debasement of all mātauranga.

The next matter is deciding what form the protection should take. In the overseas examples the mechanisms range from comprehensive State-run compulsory regimes, as in Guatemala, to specific statutory protection for single aspects of traditional knowledge, as in Samoa. A bilateral protection system based on both defensive protection, preventing third parties from making unauthorised use of traditional knowledge, and positive protection, through apportioning legal rights, is the most attractive from a Māori point of view. This approach accords with the calls for protection against debasement and collective ownership contained in the Mataatua Declaration, and also the relief sought by the Wai 262 claimants.

Protection under the proposed regime will entail the statutory prohibition against using mātauranga in a commercial manner unless specifically allowed, as provided for in the dissemination methods. The use of mātauranga in a culturally offensive or inappropriate manner will be totally prohibited. Contravention of these provisions will result in liability under the enforcement provisions.

The second tier of protection will be the ability of Māori groups and individuals to register specific aspects of traditional knowledge, and to

\textsuperscript{189} See section 2.2.
have legal rights to those aspects vested in them. The relevant authorities will decide on a case-by-case basis whether the subject in question should qualify for protection as mātauranga. These rights would include the use of the enforcement provisions against third parties, and the right to exercise the dissemination methods. However, registration will not be necessary for use of the enforcement provisions, and the unauthorised use of any protected Māori traditional knowledge will trigger the enforcement provisions also. Where the question of unauthorised third party use of non-registered mātauranga arises, the Complaints Tribunal will have jurisdiction to decide whether the subject in question qualifies for protection as mātauranga.

In addition, the statute will have a special provision for the protection of mātauranga that is considered so tapu that it will never be available to third parties for dissemination. Under this provision Māori may apply to the relevant hapū or iwi authority for a protection covenant over the knowledge in question. The application will have to describe the nature of the knowledge to be protected, but only in so far as is necessary to identify the general nature and extent of the knowledge.190

Finally, there is the question of the term of protection. The Mataatua Declaration advocates a multigenerational span of protection. The concept of kaitiakitanga and Māori being merely the current holders of knowledge on trust for future generations would indicate that a perpetual term of protection is most appropriate. This does not mean that third parties will be unable to access Māori traditional knowledge, and this issue will be addressed in the dissemination provisions.

6.4 MANAGEMENT STRUCTURE

The issues of mandate and tribal differences, referred to earlier, make the matter of formulating a management structure an exercise in balancing numerous competing interests. The structure recommended here is based on the central concept of tino rangatiratanga, and the traditional societal groupings prevalent in Māori society. The

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190 For example the description may be “The whakapapa of Ngā Maihi of Te Teko”.
establishment of a national authority, iwi authorities, and hapū-based authorities charged with the administration of the regime is advocated. In addition, a Complaints Tribunal will be established to deal with the enforcement and interpretation of the statute.

The collective rights apportioned under the protection mechanism will be vested in the relevant hapū and iwi authorities, or a combination thereof, while non-distinct, general Māori traditional knowledge with no specifically identifiable tribal roots will come under the control of the national authority. The majority of rights will therefore be vested in the individual hapū and iwi authorities, leaving the national authority to play a largely advisory and conflict resolution role. Day to day administration of those rights and ultimate accountability for their management will lie with the individual organisations. The appointment of representatives to the hapū authority will be through traditional methods, as decided by each area during a consultation process. One representative from each hapū will then be appointed to the respective iwi authorities, and one iwi representative from each iwi authority will be appointed to the national authority. Appointments to the Complaints Tribunal will be by a process decided on during consultation, but a nomination and election system by the national authority is recommended.

The relationships between the hapū, iwi, and national authorities will be an inversion of the traditional “top down” management structure, with autonomy exercised at the hapū and iwi levels, and the national body exercising reserved authority when called upon, or in matters of collective Māori interest. All the authorities would be allocated legal personality, to enable them to exercise the protection mechanisms and enforcement options available.

Financially the benefits will follow the rights, and collective monies will be held in trust for the benefit of all hapū or iwi members. Application of these funds will be at the discretion of the relevant authority in accordance with a process decided on during mandate consultations. The use of a levy system based on tau utuutu may be necessary to fund the administration of the national authority, which may also include a fund to cover legal action undertaken by the national authority to enforce generic national claims.
The national body will be responsible for conflict resolution between authorities over shared rights and, if agreement cannot be reached, it will have authority to decide on the apportioning of rights.

The national body will also be responsible for appointing the Complaints Tribunal. The main role of the Complaints Tribunal will be to hear complaints under the Act, and to impose sanctions under the enforcement provisions. The Tribunal will have sole jurisdiction to decide issues concerning the interpretation of Māori words and concepts in the empowering Act. The Complaints Tribunal will also have jurisdiction to decide whether any unregistered mātauranga qualifies for protection under the Act.

6.5. DISSEMINATION METHODS

To avoid confusion, the dissemination of Māori traditional knowledge to Māori for traditional and educational purposes will be expressly allowed under the regime. There will also be provisions allowing the relevant rights holders identified under the protection mechanisms to enter into licence agreements with third parties to use mātauranga for commercial purposes. Such agreements shall have minimum requirements, including specification of what the knowledge will be used for, how benefits will be shared, and how the mātauranga may be used by the licensors during the period of the agreement. Where there is no registered right holder, a third party may apply to the national authority who will identify the appropriate iwi or hapū authorities the knowledge is likely to originate from or, in the case of generic knowledge, administer the license itself. Where the knowledge in question emanates from more than one group, the parties may elect one authority to deal with the licence, or elect the national authority to administer the licence on their behalf.

There will be a prohibition on the absolute alienation of rights (except in the case of individual works), and licences will be limited to a maximum period of twenty years, after which time they may be reapplied for or abandoned. This will reflect the transient nature of the property right from a Māori point of view, and ensure that previous generations do not bind the options of the next generation unreasonably.
Finally there will be provisions for each authority to develop a code of ethics for third parties who wish to negotiate for the use of such rights. These codes will be hapū and iwi specific, and will provide an educational baseline of what will and what will not be acceptable to the relevant authority in terms of dealing with their mātauranga. These codes will have dual roles in setting out the parameters for the development of licensing agreements, and providing education for third parties.

6.6 SANCTIONS AND ENFORCEMENT

The sanctions provided for enforcing the rights under the regime must be capable of deterring those who would contravene the regime, and ensure that protection is achievable. The sanctions recommended are injunctions, fines, seizure of illegal goods, and the revocation or rejection of IPR containing unauthorised Māori traditional knowledge. Primary jurisdiction for the imposition of these sanctions will be conferred on the Complaints Tribunal.

Liability under the enforcement provisions may be triggered by contravention of the protection mechanisms or other parts of the Act, such as the dissemination provisions. Any of the right holding authorities, individuals, or the national authority (in the case of unregistered knowledge) may apply to the Complaints Tribunal for enforcement. Primary obligation for bringing enforcement proceedings will fall on the relevant right holders, with default obligation for enforcement falling on the national authority where the initial right cannot be exercised. The Complaints Tribunal will also have jurisdiction to hear complaints about licence agreements, and to implement the enforcement sanctions in respect of those cases also.

6.7. INTERACTION WITH EXISTING IPR REGIMES

The Brazilian approach of requiring third parties to provide proof of authorisation when applying for intellectual property rights relating to traditional knowledge is advocated for implementation into the proposed regime. Provision should also be made for the use of existing IPR regimes by individuals as a subsidiary mechanism where appropriate.
Where there is conflict in the application of the proposed regime and other IPR regimes, provision should be made for the proposed statute to assume priority.

The Wai 262 claimants have identified a plethora of statutes, policies, and international instruments adopted by the Government (as the Crown’s representative), which they assert have impinged on their ability to exercise tino rangatiratanga over their taonga (including mātauranga) as guaranteed under the Treaty of Waitangi. These include the GATT: TRIPs agreement, and various local statutes that would make the operation of the proposed regime impossible. In keeping with the relief sought by the Wai 262 claimants, the regime would have to provide for the repeal or amendment of conflicting statutes, and the rescinding of any international instruments adopted by the Government that would impede the operation of the system. This is likely to be the most formidable barrier in the construction of the regime, especially in light of the free trade in exchange for intellectual property reform deal made under TRIPs. Nonetheless, the Government should be reminded that its obligations under the Treaty easily pre-date any of these obligations, and as such any excuse based on the premise of honouring international obligations is redundant.

6.8. CONCLUSION

The system proposed is not a comprehensive cure-all for the issues raised in this paper. It represents a balancing of numerous competing considerations, and an attempt to give back control to Māori over their cultural knowledge. Compromise is the main ingredient that will allow the regime to work. It must be remembered that this is a model, built within artificial confines. In a real regime the need for consultation with Māori on the form of the regime would be crucial to its success, and this model may provide a framework for such consultation.

7. CONCLUSIONS

The investigations in this paper have revealed a number of conclusions. Firstly, current intellectual property rights regimes are unsuitable and inadequate to provide protection for Māori traditional knowledge. The inherent ideological conflict between Western property concepts and
the holistic Māori worldview mean that simply tweaking the edges of current intellectual property statutes is not going to provide Māori with the tino rangatiratanga over this taonga that they are seeking. The current subjugation of Māori traditional knowledge simply because it is not recognised by intellectual property regimes is unjust, and in violation of the Treaty of Waitangi.

Local responses aimed at addressing the issue of mātauranga in the modern world have had little success. The Wai 262 claim is the best hope of forcing the Government to adopt a sui generis regime for the protection of mātauranga, but this outcome is far from assured. Internationally the birth of new laws around the world signifies the beginning of a new renaissance of indigenous peoples against the theft of their cultural history. In the face of globalisation, this struggle to hold on to identity is becoming even more critical.

The numerous contradictions and problems involved in the creation of a model regime for the protection of mātauranga make the task seem unattainable. But the realisation that compromises must be made in order to achieve the main goal is the key to the framework proposed. Obligatory consultation with Māori on the final structure of the regime means that the proposed system can only ever serve as a model for future development.

This paper has identified the many difficult issues facing Māori in their struggle to protect their traditional knowledge. Many would favour a non-statutory approach in addressing this problem, but the reality of the situation reveals that a statute based regime along the lines of the proposed model is the only option for providing the necessary protection, and tino rangatiratanga that Māori are entitled to.

Mā te ture ano te ture e aki

Only the law can be pitched against the law

(Te Kooti Arikirangi Te Turuki)
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APPENDIX 3
face food!

MOKO
APPENDIX 7