

Māori Women Confront Discrimination: Using International Human Rights Law to Challenge Discriminatory Practices

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This article discusses the Women’s Convention and, in particular, the Optional Protocol procedure, in order to examine the extent to which international human rights law may play a role in eliminating discrimination against Māori women in New Zealand. I explore the different kinds of discrimination Māori women experience in New Zealand, such as discrimination that occurs in customary contexts and state imposed discrimination, all of which has been encouraged by sexist colonial laws and practices that affect the role of Māori women in public life. Drawing on feminist Indigenous perspectives, I discuss the challenges Māori women may encounter when engaging with international human rights law and, in particular, the Women’s Committee in our attempts to overcome discrimination at home. Although I conclude that there may be some benefits for Māori women who choose to pursue a complaint under the Women’s Convention based on state imposed discrimination, we should not, at present, pursue a complaint based on discrimination experienced in customary Māori contexts. This is because international human rights fora, such as the Women’s Committee, are not the right places to remedy discriminatory cultural practices that are arguably sourced in tikanga Māori.

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 by the belly of genocide, a place where the majority of Indigenous peoples in this country reside.

Irene Watson¹

I 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 in New Zealand. The team’s first meeting with our clients took place at their ancestral meeting house in the North Island of New Zealand. Upon arrival, my team was invited into the meeting house for formal introductions, and to discuss the case. Once inside, my team was asked to sit on the floor of the meeting house as marae² protocol required, while the local men sat at tables and chairs that had been set up for the meeting. 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 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.

The above 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. For example, in 1993, a group of Māori women submitted a claim to the Waitangi Tribunal alleging that the Crown’s actions and policies have, since 1840, systematically discriminated against Māori women and deprived us of our spiritual, cultural, social and economic well-being which is protected by the *Treaty of*

1. Quoted in “One Indigenous Perspective” in Sam Garkawe, ed., *Indigenous Human Rights* (Sydney: Sydney Institute of Criminology, 2001) at 22.

2. A glossary of Māori terms is included at the end of this article.

Waitangi.³ The impetus for the claim was the removal of a respected Māori woman elder from the shortlist of appointments to the Treaty of Waitangi Fisheries Commission, and the almost exclusive control exercised over the fisheries settlement process by the Crown and Māori men.⁴ 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.⁵ The Minister's comment illustrated the Crown's unsympathetic attitude towards the position of Māori women and its unwillingness to consider its part in discriminating against Māori women. The *Mana Wahine Claim* is yet to be heard by the Waitangi Tribunal.

Similarly, in 1995, Cathy Dewes was elected as the Ngati Rangitihī 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 woman 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.⁶ This incident raised Māori women's awareness of how tikanga (Māori practices and principles) is used to justify discrimination against women in Crown-imposed structures.⁷

These challenges attracted considerable publicity, as did one particular incident involving New Zealand's 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 of New Zealand, 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 Pakeha women (and Pakeha men) to speak—but not Māori women on their own marae.⁸

More recently, Pakeha women have publicly challenged Māori cultural practices, which they believe discriminate against women. In January 2005, a Pakeha woman probation officer attending a poroporoaki (farewell

3. *Dame Mira Szaszy and Others Claim to the Waitangi Tribunal* (1993), WAI 381 [*Mana Wahine Claim*].

4. 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.

5. "Women Appeal to the Tribunal" *Waikato Times* (11 September 1993), quoted in A. Mikaere, *The Balance Destroyed: The Consequences for Māori Women of the Colonization of Tikanga Māori* (M. Jur. Thesis, University of Waikato, 1995) at 147 [Mikaere, *Balance Destroyed*].

6. C. Charters, *Protecting Hinemoa's Mana Wahine: An Assessment of the Utility of International and Constitutional Law in Resolving Tensions Between Culture and Discrimination Against Indigenous Women* (LL.M. Thesis, New York University, 2001) at 1 [unpublished] [Charters, *Protecting Hinemoa's Mana Wahine*].

7. A. Sykes, "Constitutional Reform and Mana Wahine" (1994) 3:2 *Te Pua: Journal of Māori Women's Writing*, Te Whare Wananga o Tamaki Makaurau 15.

8. N. Tomas, "Locating Human Rights in the South Pacific" in Garkawe, *supra* note 1 at 132-133 [Tomas, "Locating Human Rights"].

ceremony) for male offenders completing a non-violence course was asked to move from her front row seat to the back of the room because Māori custom requires women to sit behind the men. Following this incident she released a press statement saying that she felt “humiliated and degraded” by the request to move, and had refused to do so because she thought the “sexism” set a bad example for male offenders attending the farewell. Māori staff members who were present at the poroporoaki complained to the Corrections Department, saying that the officer’s actions were insensitive and created an uncomfortable situation, particularly for the Māori staff members involved.⁹ One month later, Dame Sylvia Cartwright, the Governor-General of New Zealand, delivered a speech on Waitangi Day advocating for greater cultural inclusiveness in New Zealand. The speech called for the end to cultural practices that exclude individuals on the basis of sex. The Governor-General’s comments followed calls by Pakeha male politicians arguing that women should play a greater role in Māori customary proceedings, such as powhiri (welcome ceremonies) and poroporoaki.¹⁰

In December 2000, the *Optional Protocol to the Convention on the Elimination of Discrimination Against Women*¹¹ 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*.¹² 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* also empowers the Committee for the Elimination of Discrimination Against Women (“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* that occurred after December 2000.¹³

9. Bridget Carter, “Culture: Probation Officer Told Job is on the Line Over Snub” *New Zealand Herald* (25 January 2005), A5.

10. See “Dame Silvia Urges Wider Role for Women in Māori Custom” *New Zealand Herald* (7 February 2005) at 3.

11. For further information about the *Optional Protocol*, see online: <<http://www.un.org/womenwatch/daw/cedaw/protocol/>> [*Optional Protocol*].

12. 1249 U.N.T.S. 13, online: UN Website, Division for the Advancement of Women <<http://www.un.org/womenwatch/daw/cedaw/>> [*Women’s Convention*].

13. 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: <<http://www.un.org/womenwatch/daw/cedaw/statesmeeting/twelfth.htm>>.

The *Optional Protocol* procedure, along with other international human rights fora and procedures, is available to women who wish to challenge discriminatory laws and practices such as those described above.¹⁴ This article discusses the *Women's Convention* and, in particular, the *Optional Protocol* procedure, in order to examine the extent to which international human rights law may play a role in eliminating discrimination against Māori women in New Zealand.

My discussion has been influenced by the growing body of work from Indigenous women who question the value of using international human rights fora, such as the Women's Committee, to challenge discrimination against Indigenous women, particularly when that discrimination stems from a number of factors—including race, gender, class, and colonial assumptions about Indigenous cultures and male and female roles.¹⁵ In particular, this work has grown out of the recognition that the application of Western feminist theories, which tend to 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.¹⁶ As Trask, an Indigenous Hawaiian woman, reminds us, to even talk using the language of universal rights is the antithesis to some Indigenous women of what it means to be Indigenous:

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 colonization. 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.¹⁷

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14. For the purposes of my discussion, I *assume* that the restriction on where women sit during poroporoaki proceedings, and the denial of women's speaking rights on marae, constitutes discrimination under the *Women's Convention*. I acknowledge, however, that this may not be the case if (as some Māori men and women argue) men and women's roles on the marae are seen as complementary and having different but equal status: see further my discussion at pages 31-38.
 15. See for example, Tomas, “Locating Human Rights”, *supra* note 8; Watson, *supra* note 1 at 21; and H. Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawaii* (Hawaii: University of Hawaii Press, 1993) at 112.
 16. See Tomas, “Locating Human Rights”, *ibid.*; and Watson, *ibid.*
 17. Trask, *supra* note 15 at 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 “captured by lawyers, reworked by political scientists, and sloganised by new age colonizers”: see M. Jackson, “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].

Many Indigenous women are naturally wary of turning to a “universal” language of rights that is foreign to us.¹⁸ Apart from the *Draft Declaration on the Rights of Indigenous Peoples*, Indigenous women have not played a major part in drafting and developing international human rights instruments. A cursory examination of human rights declarations drafted by Indigenous people shows how differently we think about and express our rights. Rights are often expressed in relation to land (and in particular a woman’s relationship with the land) as the following quote from the *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.¹⁹

Indigenous peoples also tend to emphasize the obligations we owe to each other and to our environment. 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.²⁰

This language contrasts sharply with the language of existing human rights instruments such as Article 17 of the *Universal Declaration of Human Rights*, which recognizes “the right to own property alone as well as in association with others.”²¹

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 us to justify colonial

18. Tomas, “Locating Human Rights”, *supra* note 8 at 118.

19. (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*.

20. Signed at Brazil, 30 May 1992.

21. GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) at 71.

expansion and the removal of Indigenous women from our land.²² As Irene Watson asks:

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?²³

Guided by these warnings, in this article I examine whether international human rights law should be utilized by Māori women who seek to overcome discriminatory laws and practices by focusing on the opportunities available under the *Women's Convention* to challenge discrimination. I argue that Māori women experience two different kinds of discrimination in New Zealand that could be subject to complaint to the Women's Committee. The first is internal discrimination, which is the term I use to describe allegedly discriminatory practices that occur within Māori contexts and are justified according to tikanga. In order to explain the different ways in which discrimination has manifested itself within Māori contexts, I explore gender relationships between Māori women and men in pre- and post-colonial times. In doing so, I draw some tentative conclusions in part two about the extent to which gender discrimination existed in Māori society in pre-colonial times, compared with the period following colonization in New Zealand. Regardless of whether Māori women experienced sex discrimination prior to colonization in New Zealand, it is certain that internal discrimination against Māori women has, since 1840, been encouraged by the introduction of colonial laws, practices and assumptions about the role of women in public life. These colonial laws, practices and assumptions continue to impact on the treatment of Māori women within Māori communities and, in particular, on how tikanga, as it relates to women, is interpreted and applied in our communities.

The second kind of discrimination I discuss is external discrimination, which is the term I use to describe discrimination perpetrated by the Crown against Māori women. Towards the end of part two, I provide a background to the position of Māori women in New Zealand since 1840, focusing on the discriminatory impact of 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 marginalization of Māori women has led to the marginalization of Māori women's interests generally, and contributes to the discriminatory laws and practices Māori women continue to face in New Zealand.

22. Watson, *supra* note 1 at 29-30.

23. *Ibid.*

Part three begins with an introduction to the international law fora that are available to Māori women who wish to challenge discriminatory laws and practices. In the following sections, I question whether Māori women should consider turning to international law at all in our attempts to remedy discriminatory laws and practices. This question arises because the concept of universal human rights and, in particular, the emphasis on individual rights does not always sit easily with many Indigenous women due to its failure to recognize the importance of our communities and our struggle for self-determination. I use the *Mana Wahine Claim* as an example through which to discuss the *Optional Protocol* procedure. On the one hand, I argue that Māori women are more likely to obtain an effective remedy against external discrimination using the *Optional Protocol* procedure, and that we should not rely on state and non-governmental organizations reporting to the Women's Committee to address our concerns. Māori women should, therefore, consider submitting an individual complaint to the Women's Committee based on "external" discrimination experienced in the context of the Crown–Māori relationship, and in particular on a breach of article 7 of the *Women's Convention* (the failure to eliminate discrimination against women in political and public life). On the other hand, and in contrast, I argue that international fora such as the Women's Committee are not the right places to remedy the allegedly "internal" discriminatory cultural practices discussed in this article, which are (arguably) sourced in tikanga Māori. What is needed, as Ani Mikaere argues, is a rediscovery and re-examination of Māori principles and practices as they relate to Māori women.²⁴ This process of rediscovery and re-examination is likely to be complex. It is likely to be influenced by "outside" forces, such as international human rights norms and our own changing perceptions about women's roles, as well as by the retelling and reinterpretation of our own stories and traditions from women's perspectives. It is this process that must occur if we wish to keep our culture alive and responsive to the challenges it faces.

Despite my conclusion that Māori women should not submit a complaint based on internal discrimination 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 complaint based on internal discrimination. These issues are also discussed in part three.

24. See A. Mikaere, "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 Waikato L. Rev. 149 [Mikaere, "Māori Women"].

II THE DENIAL OF MANA WAHINE

Introduction

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 colonization and the introduction of colonial laws.²⁵ 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 have been retold and recorded by officials, historians and writers to diminish the importance and contribution of Māori women.²⁶

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 hapu and iwi.²⁷ Te Rohu (Ngati Tuwharetoa—the eldest daughter of Te Heuheu Tukino II and Nohopapa) was active in Tuwharetoa's military and political campaigns. Similarly, Waitohi (Ngati Toa/Ngati Raukawa) led war campaigns in the North and South Islands. Her daughter, Rangi Topeora, signed the *Treaty of Waitangi*.²⁸

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 were recognized.²⁹ Women's sexuality was not suppressed and childbearing was considered a healthy and normal part of life.³⁰ Furthermore, the Māori language is gender neutral in a way that English is not—*ia*, for example, means he and she.

Māori society at this time was tribally based and organized around whakapapa or descent from common ancestors. Whakapapa determined an individual's membership of a group and explained an individual's role and

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25. See A. Mikaere, "Collective Rights and Gender Issues" in N. Tomas, ed., *Collective Human Rights of Pacific Peoples* (Auckland: University of Auckland Press, 2001), 92 [Mikaere, "Collective Rights"]; L. Smith, "Māori Women: Discourses, Projects and Mana Wahine" in S. Middleton & A. Jones, eds., *Women and Education in Aotearoa* (Wellington: Bridget Williams Books, 1994), 15; C. Te Kawehau Hoskins, "In the Interests of Māori Women?" (1997) 13:2 *Women's Studies Journal* 25.
26. See D. Williams, "He Aha te Tikanga?" (Wellington: New Zealand Law Commission, 10 November 1998) at 16 [unpublished]; 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, *Balance Destroyed*, *supra* note 5 at 81-83 where she explains how Māori cosmology stories have been reworked to exaggerate the importance of Māori men.
27. Mikaere, *Balance Destroyed*, *ibid.* at 69.
28. *Ibid.*
29. New Zealand Law Commission, SP9, *Māori Custom and Values in New Zealand* (Wellington: New Zealand Law Commission, 2001) at 35 [*Māori Custom*].
30. P. Buck, *The Coming of the Māori*, quoted in A. Mikaere, "Colonization and the Imposition of Patriarchy: A Ngati Raukawa Women's perspective" (1999) *Te Ukaipo* 34 at 38 [Mikaere, "Colonization"].

status within the group. Whakapapa was central to the organization of Māori society because it determined a person's rights and responsibilities in relation to others within and outside of the group, as well as to natural resources and land.³¹ Because both ambilateral and ambilineal descent were recognized, an individual's whakapapa derived from both parents. It was whakapapa, therefore, not sex, which primarily determined a person's role, rights and responsibilities in relation to others and to the environment. As Ani Mikaere explains:

The roles of men and women in traditional Māori society can be understood only in the context of the Māori world view, which acknowledged the natural order of the universe, the interrelationship or whanaungatanga of all living things to one another and to the environment, and the overarching principle of balance. Both men and women were 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 future. The very survival of the whole was absolutely dependent upon everyone who made it up, and therefore each person within the group had her or his own intrinsic value. They were all part of the collective; it was therefore a collective responsibility to see that their respective roles were valued and protected.³²

Within this context, tikanga Māori operated to regulate and manage relationships between people and the environment, and to ensure that the collective worked together smoothly.

Tikanga Māori can be explained as a flexible set of laws and practices that have been handed down by our ancestors and establish the correct way to live in harmony with one another and the environment.³³ The word "tikanga" is derived from the word "tika" which means the correct way of doing something. According to Hirini Moko Mead:

[Tikanga] involves moral judgements about appropriate ways of acting and behaving in everyday life. From this standpoint it is but a short step to seeing tikanga Māori generally as a normative system ... Tikanga Māori was an essential part of the traditional Māori normative system since it dealt with moral behaviour, with correct ways of behaving and with processes for correcting and compensating for bad behaviour.³⁴

31. "Whakapapa is the fundamental attribute and gift of birth ... [it] provides our identity within a tribal structure and later in life gives an individual the right to say, 'I am Māori'": see H. Moko Mead, *Tikanga Māori—Living by Māori Values* (Wellington: Huia Publishers, 2003) at 42.

32. Mikaere, *Balance Destroyed*, *supra* note 5 at 84.

33. As Hirini Moko Mead explains, lawyers tend to view tikanga Māori as customary law, or as "the body of rules or principles, prescribed by authority or established by custom, which as state, community, society, or the like recognizes as binding on its members": see Mead, *supra* note 31 at 6.

34. *Ibid.*

The main role of tikanga Māori, therefore, was to provide the “rules of engagement” for individuals and groups who come together either in public or in private, so that everyone knows what is expected of him or her at any given time.³⁵ The operation and application of tikanga differ according to circumstances. Tikanga differ, for instance, depending on whether the proceedings are public, involving hundreds of people on the marae (for example, a tangihanga (funeral)), whether the proceedings involve a small group, and take place in a workplace or home (for example, the blessing of a new building), or whether the proceedings take place in private and involve a few whanau (family) members, such as a birthing ceremony.

Tikanga practices are flexible because they are interpreted and applied differently in different regions, depending on local circumstances, preferences and history.³⁶ For example, in some meeting houses in New Zealand, women will be expected to sit behind the men during formal proceedings, whereas in other areas, this practice is not the norm. Similarly, in some areas people wear shoes inside the meeting house, whereas in other areas this practice is unacceptable. There are a number of other examples that illustrate the range of differences between groups, depending on locality. The reasons for the differences depend on the local people’s interpretation and application of tikanga principles, which have been developed and modified over time.

Despite the differences in regional interpretation and application, the fundamental principles that underpin tikanga do not change. In this respect, tikanga can be compared to the common law, which relies on precedents and has, over time, developed fundamental principles that apply throughout the common law world, but vary in their interpretation and application according to local circumstances. The fundamental principles underpinning the operation of tikanga in New Zealand include concepts such as tapu, noa, mana and manaakitanga.³⁷ This list is not exhaustive and it is important to point out that an article of this nature (which is essentially concerned with discussing the utility of legal tools to remedy discrimination against Indigenous women) cannot adequately explain the complex spiritual and practical aspects that lie behind these concepts. Tikanga Māori concepts, like all Indigenous concepts, are best explained and understood within the context of their own worlds, that is, in the Māori language, and by tohunga

35. *Ibid.* at 15.

36. “It is important to stress that ideas and practices relating to tikanga Māori differ from one tribal region to another. While there are some constants throughout the land, the details of performance are different and the explanations provided may differ as well. There is always a need to refer to the tikanga of the local people”: see Mead, *supra* note 31 at 8.

37. There are many other examples that are not discussed here. For a broader discussion of the range of tikanga concepts and practices that apply in a number of settings, see Mead, *ibid.*; also see M. Marsden, *The Woven Universe—Selected Writings of Rev. Māori Marsden* (The Estate of Rev. Māori Marsden, 2003).

(people with expert knowledge) who are trained in this area. However, some key tikanga Māori concepts are discussed, albeit briefly, in order to provide context for the discussion that follows.

Fundamental Tikanga Māori Concepts in Context—Some Possible Examples of Internal Discrimination

For the purposes of the discussion in this article, I want to explain the *main* tikanga principles that govern two types of customary proceedings: welcome proceedings (powhiri) and farewell proceedings (poroporoaki). These proceedings are public and can potentially involve a small group or thousands of people. They can take place anywhere—on the marae, in people’s workplaces, homes, schools and prisons. These proceedings are explained because they are often singled out as possible sites of internal discrimination, at times by Māori women, but more recently (and frequently) by Pakeha women and Pakeha male politicians.

Te Powhiri (The Welcome Ceremony)

The powhiri is a formal ceremony to welcome manuhiri (visitors) to a place. Manuhiri may be coming to that place for any number of reasons: to attend a meeting, a conference, a funeral, or a wedding; or to support the welcome of a new employee to a workplace.

The powhiri is regulated by two important principles of tikanga Māori—tapu and noa. Tapu refers to the sacredness, or separateness, of special people, places and things, relative to ordinary contact or use. High levels of tapu can be spiritually and physically dangerous to human beings. For this reason, the concept of noa (meaning ordinary or profane) is a principle, which, when paired with tapu, dictates practices for removing or reducing tapu, so that people can operate and interact with one another and with their environment “normally” again.³⁸

The powhiri is regarded as a highly tapu ceremony and, as such, it is heavily regulated by tikanga; is formal; and, at times, can be tense. Hirini Moko Mead explains:

There is a concern about being correct because there is a ritual element in the ceremony. From being very tapu the ceremony moves towards a state of balance in which human relationships are normalized so that people can meet informally. This balanced state is called noa. It is a transition from one state to another. Manuhiri are tapu and are treated as such, especially in very formal ceremonies. The actual steps in performing a powhiri can be viewed as the

38. Mead, *ibid.* at 121-123.

gradual reduction of tapu culminating in the eating of food, which ends the ceremony and brings about a state of noa.³⁹

Hirini Moko Mead has set out the main steps that occur during the powhiri to reduce and eventually normalize tapu, and are summarized below:

1. *Preparation*: The tangata whenua (welcoming people) and manuhiri (visitors) prepare themselves for entrance onto the marae (or into the workplace, or any other venue where the powhiri is held).
2. *Karanga 1*: the kaikaranga (a woman from the tangata whenua side) begins the powhiri by calling the manuhiri on to the marae.⁴⁰ The role of the kaikaranga is to acknowledge the ancestors, acknowledge the visitors and the reason for the visit, and to pave the way for the visitor's safe entry onto the marae.
3. *Whakaeke*: The manuhiri enter the marae area, and move towards the meeting house (if the powhiri is taking place on marae) or towards the tangata whenua (if the powhiri is taking place in another setting).
4. *Karanga 2*: The kaikaranga from the tangata whenua side continues the karanga, while the manuhiri continue to approach the meeting house.
5. The kaikaranga for the manuhiri (a woman) responds to the welcoming karanga.
6. *Karanga 3*: The kaikaranga from each side exchange karanga acknowledging each group and explaining the purpose of the visit.
7. *He tangi ki nga mate*: The manuhiri and tangata whenua may stop and stand apart for a short period of quiet time to acknowledge and honour the ancestors.
8. The manuhiri now sit and organize themselves, so that they have someone (or a number of people) ready to speak on their behalf. On most marae throughout New Zealand, the speaker is a man.
9. The tangata whenua sit. (At this stage, both groups are still seated apart from one another. The space between them is regarded as highly tapu. On the marae, this area is known as the marae atea.)
10. *Nga Whaikorero*: The formal speeches of welcome begin, with a man⁴¹ from the tangata whenua side speaking first. This person's role is to explain the purpose of the visit, welcome the various individuals and groups in attendance, and explain any important matters or protocols that are relevant to the visit. Once the speaker has finished, the tangata whenua group stands to support what he has said by singing waiata (songs) or haka (posture dance and song). Usually, although not always, a woman will lead the singing.
11. The whaikorero (male speaker(s)) who represent the manuhiri respond.

39. *Ibid.* at 118.

40. This is known as the karanga and is always carried out in Māori.

41. There are a few exceptions; see note 47, below, and accompanying text for further discussion. On most marae throughout New Zealand, however, men carry out the whaikorero. When powhiri take place in less formal contexts than the marae, such as in schools or workplaces, it is more common to see women carrying out the role as whaikorero.

12. *Wkakaratarata/Hohou rongō*: Once the formal speeches have come to an end, the tangata whenua stand and form a line to welcome the manuhiri. The manuhiri and tangata whenua hongī (touch noses), or kiss, in greeting.
13. *Te Hakari*: The manuhiri are called into the dining area and food is provided. In some cases, speeches of thanks are made after the meal, before everybody leaves the dining area. These speeches are much less formal in nature than those made during the whaikorero proceedings.
14. Once the hakari is finished, the purpose of the meeting begins.⁴²

Poroporoaki (Farewell Ceremonies)

The poroporoaki happens at the end of the event, visit or meeting. The purpose of a poroporoaki is to provide a farewell for people, to thank the hosts and to give everybody involved in the event the opportunity to share their thoughts about the experience.⁴⁴ Like the powhiri, poroporoaki can take place anywhere. Poroporoaki tend to be more relaxed than powhiri because the levels of tapu (between host and visitor) have already been reduced and the two groups have safely interacted with one another. In some cases, particularly if poroporoaki are held on marae, there may be rules about where people sit, and while there may be some expectations about who will speak, anyone who wants to speak (including women) can usually do so. The most important thing to remember when participating in powhiri and poroporoaki ceremonies is that the tangata whenua dictate the “rules” that govern proceedings and these rules differ depending on where the proceedings are held.

Male and Female Roles during Powhiri and Poroporoaki Proceedings

Men and women carry out different roles during powhiri and poroporoaki proceedings. Furthermore, *particular* men and women are chosen and trained to carry out certain roles. In formal proceedings, such as powhiri, it is important to remember that not everyone is entitled to, nor are they able to, participate in the same way.⁴⁵ The right to speak at a certain time, or the right to sit in a certain place, is not automatically given. Just as many of us would not assume that we are entitled to sit on the main stage beside an important dignitary during a formal event, neither should outsiders assume

42. Mead, *supra* note 31 at 122-125.

43. *Ibid.*

44. Usually the manuhiri will speak first, followed by the tangata whenua.

45. Not all women learn to karanga—in most cases, the kaikaranga is an elder from the group. Younger women generally will not karanga if there are older women present, particularly if they are related: see Hiwi Tauroa & Pat Tauroa, *Te Marae—A Guide to Customs and Protocols* (Auckland: Reed Publishers, 1986) at 53 [Tauroa & Tauroa, *Te Marae*].

they have a right to participate in Māori cultural proceedings on their own terms.

The karanga is an essential part of the powhiri, which is carried out by women. As Hiwi and Pat Tauroa explain,

[t]he karanga can only be issued by women. Without the karanga, visitors remain outside the marae at the gate. It is the women, then, among the tangata whenua, who provide the first “key” to entry. The key is a spiritual one—the karanga. Only when the karanga has been issued by the tangata whenua can the group safely move onto the marae.⁴⁶

In comparison, the whaikorero is, with a few exceptions, carried out by men.⁴⁷

The usual explanations given for why women do not whaikorero are related to the principles of tapu and noa. During the powhiri proceedings, the male speakers who sit at the front and represent the group are exposed to potential danger, particularly if the manuhiri and tangata whenua groups are meeting for the first time. In pre-colonial times, the danger was of a physical nature (if the manuhiri came with war in mind, for instance) and a spiritual nature. Today, the potential for danger is mainly spiritual. This danger exists until the high levels of tapu that are present during powhiri are normalized. Until these levels are normalized, it is considered risky to expose women to potential physical or spiritual harm. Women are protected, it is argued, primarily because of our role as child-bearers. This same reasoning is used to explain why women are required in some areas to sit behind the men during powhiri or poroporoaki proceedings.

Despite this reasoning, some women disagree with the restriction on women speaking during whaikorero, arguing that this unfairly discriminates against women. In my experience of discussing these issues with women, it has usually been Pakeha women who argue that these customary practices discriminate against women.⁴⁸ Māori women, in comparison, are more likely

46. *Ibid.* at 50.

47. In most areas of New Zealand, the women carry out the karanga, while the men whaikorero. There are exceptions—on the East Coast of the North Island, for example, high-ranking women whaikorero, and in many areas, depending on the degree of formality of the event, there are no set rules about where people sit during poroporoaki proceedings.

48. There are some notable exceptions. Mira Szaszy was a prominent Māori woman who rejected traditional explanations for the prohibition on women’s speaking rights, arguing:

I understand the customs of the people and deliberately decided that I would not argue against women being denied rights on the marae until the reinstatement of the culture was ensured ... the marae is a symbol of oppression for me because it is there I am denied my very basic right of free speech. But it’s not just the free speech. Women have been leaders in the political arena in all sorts of ways. You just have to look, open your eyes and see. It is the belief that women have their own wisdom to impart. The marae is the political arena of our people and therefore they should be given the right to express their understandings, their wisdom and their knowledge in these forums.

to defend customary practices, arguing that we carry out equally significant roles on the marae, such as the karanga or waiata, and that we exercise power and control over marae proceedings in less obvious ways than the men, and not readily understood by outsiders.⁴⁹ According to this argument, when tikanga operates effectively, everyone involved in the proceedings recognizes that each part of the proceeding, formal or otherwise, affects the whole. So, the role a woman plays in welcoming visitors to a marae (the karanga) is just as important as the role a man plays in setting out the purpose of the visit during the speech making (whaikorero), which is equally as important as the work the chefs do in marae kitchens preparing the food for the event. All of these roles must be performed well for proceedings to run smoothly and to be considered a success in Māori terms.

Unfortunately, outsiders such as Pakeha visitors to the marae have tended to place less value on invisible work, such as food preparation, or on practices that they do not readily understand, such as the karanga. The formal speech-making part of marae proceedings (whaikorero), which takes place during the powhiri proceedings, is, in comparison, relatively easy for outsiders to appreciate and understand. Even if they do not understand what is being said during the whaikorero because it is said in Māori, they appreciate that the speaker's role is to explain the purpose of the meeting or visit, and to set the tone for the day. In comparison, why women sit behind the men is difficult to understand if the people taking part in proceedings (such as the Pakeha female probation officer) do not understand the reasons and the history behind the customary practice.

Another factor that has helped to facilitate outsider's understanding of whaikorero, and that may explain why whaikorero has been valued above other aspects of marae protocol, is that whaikorero has adapted in ways that accommodate Pakeha culture and facilitate Pakeha understanding of marae proceedings in ways that the karanga has not. I have been present on marae

Quoted in N. Glasgow, *Directions: New Zealanders Explore the Meaning of Life* (Christchurch: Soal Bay Press, 1995) at 52. This view can be compared with Hiwi Tauroa and Pat Tauroa who explain in *Te Marae*, *supra* note 45:

Although some Pakeha and Māori people may see the absence of women in whaikorero as a form of oppression, other Māori women who choose not to speak in these circumstances claim emphatically that they do not consider themselves oppressed in any way. They are quite adamant that their menfolk speak on their behalf, and they insist that the man says what the womenfolk want him to say. If the topic is a very important one, it will have been discussed many times by husband, wife and family.

49. The New Zealand film *Whalerider* provides an example. In one scene, a group of boys are waiting for the powhiri to begin so they can come onto the marae and begin their schooling in the traditional history and customs of their area. However, the powhiri cannot begin until the kaikaranga, a woman, begins by welcoming the boys onto the marae. The group waits for some time, causing some distress to the male elder involved, until the kaikaranga is ready to begin. In this scene, she exercises considerable power and control over the entire process, and by doing so, achieves the outcome she hoped for.

when Māori men will break into English during their whaikorero in order to accommodate non-Māori speakers in attendance. Similarly, I have been at powhiri where Pakeha men have spoken both in English and in Māori, during the formal speeches. In some cases, I have observed Pakeha male visitors to marae simply assume the right to speak (and to speak in English not Māori) during formal proceedings, without seeking the permission of their hosts, or determining the correct marae protocol. When this has happened, the Pakeha men involved have either been unaware of the discomfort they have caused to the Māori people present, or they have ignored it. What I have not seen, however, is a Māori man standing to tell a Pakeha man to sit down because he does not have the right, according to tikanga, to speak during whaikorero proceedings, whether it is in English or Māori. I have, in comparison, observed Māori men who are willing to do this to Māori women, even when those women wish to speak on their own marae.

I do not mean to argue that any of these practices are wrong from a tikanga perspective (as each marae determines its own protocols), but simply that tikanga has adapted in ways which accommodate Pakeha males, but has not adapted to accommodate Māori women who may wish to speak during whaikorero in areas where this is not practiced. The failure of tikanga to accommodate the aspirations of some Māori women in this respect is consistent with my argument that we have been influenced by colonial ideas about the inferiority of women. This has led, in some cases, to a willingness to put Pakeha male needs before the needs and aspirations of Māori women. Because of this, it has been argued by some Māori women that in the current environment women experience discrimination on the marae, and that the marae is a symbol of oppression because “it is there I am denied my very basic right of free speech.”⁵⁰

Māori women who are concerned about this form of internal discrimination tend to argue that this discrimination stems from internalized colonial sexist attitudes, which have undermined and distorted tikanga Māori, rather than originating from tikanga Māori itself. Framing the issue in this way has implications for how we resolve internal discrimination disputes. If we accept that cultural practices determined by tikanga Māori are not *inherently* discriminatory, our tikanga now needs to be reinterpreted and applied free from colonial distortions and assumptions about the role of women. Research into comparisons between pre-colonial and post-colonial Māori society, and the roles of men and women, suggests that sex discrimination in post-contact Māori communities is a result of colonial laws, assumptions and attitudes about women.

50. Szaszy, quoted in Glasgow, *supra* note 48 at 52.

Tikanga Māori and Māori Women in Pre-Colonial Times: Did Sex Discrimination Exist?

In an attempt to understand more about the status of Māori women in pre-colonial times and, in particular, whether women were seen as inferior to men, Ani Mikaere has examined the role of Māori women in cosmology. She argues that the story of Maui-tikitiki-a-Taranga is particularly useful in highlighting the influential positions women held.⁵¹ In this story, Maui-tikitiki-a-Taranga acquires fire and a jawbone from his powerful female ancestor, Mahuika. He uses these tools to fish up Te Ika a Maui, which is now known as the North Island of New Zealand. Once Maui has accomplished this feat, he attempts to ensure his immortality by reversing the natural birth process, by crawling up the vagina of his ancestor, Hine-nui-te-po. He dies in the process.

In her interpretation, Ani Mikaere argues that this story illustrates Māori women's power and knowledge. It portrays women (Maui's female ancestors) as powerful and knowledgeable leaders who were willing to share their expertise, according to special conditions and boundaries. When those boundaries were broken, when Maui tried to reverse the natural birth and death process for instance, the women in the story took action to remedy the situation, thereby restoring balance.⁵²

Rose Pere has examined cases involving violence against Māori women in pre-colonial times, pointing out that violence against women was not seen as a gender issue, but as an affront to the whole whanau of the woman involved. As Pere explains, assault on a woman, be it sexual assault or otherwise, was regarded as extremely serious and could result in death, or in being declared dead by the community, which was worse.⁵³ Stephanie Milroy agrees; drawing a distinction between the treatment of domestic violence in pre-colonial Māori society, compared with post-colonial times, she points out: "In pre-colonial Māori society a man's home was not his castle. The community intervened to prevent and punish violence against one's partner in a very straightforward way."⁵⁴

These views support the argument that whakapapa, not gender, was the most important factor in organizing Māori pre-colonial society, and that a

51. Mikaere, *Balance Destroyed*, *supra* note 5 at 85.

52. *Ibid.*

53. R. Pere, "To Us the Dreamers Are Important" in S. Cox, ed., *Public and Private Worlds* (Wellington: Allen & Unwin, 1987) at 53, referred to in Mikaere, *Balance Destroyed*, *supra* note 5 at 86.

54. S. Milroy, "Domestic Violence: Legal Representation of Māori Women" (1994) at 12 [unpublished], referred to in Mikaere, *Balance Destroyed*, *ibid.*; also see Mead, *supra* note 31 at 243, where he explores Māori origin stories and argues that these stories support his view that domestic violence was unacceptable in pre-colonial Māori society, and decisions about how to deal with domestic violence rested with the families (the collective) of the people involved.

person's value and role in Māori society were primarily determined by whakapapa and by his or her place in the whanau. This view is shared by Apirana Mahuika, who has examined women's leadership roles in the Ngati Porou (East Coast) area of the North Island of New Zealand. Since colonization, he argues, anthropologists have tended to portray whakapapa as being male-centred. This does not apply in Ngati Porou however, where leadership ability is determined by a person's seniority in society, regardless of gender. Apirana Mahuika notes: "[P]rimogeniture is the absolute determinant of seniority, regardless of the sex of the first-born child. In other words, the longer the unbroken line one can trace through first born children, male or female, the greater one's seniority in society."⁵⁵

Examples of female leadership drawn from other areas in New Zealand, in the pre- and post-colonial era, illustrate that Māori women held important leadership positions, which were determined primarily according to their whakapapa, not their sex. As Leonie Pihama has pointed out, Dame Te Arikinui Te Atairangi Kahu is the current head of the King Movement in New Zealand. Since the establishment of the King Movement in 1854, this position has been determined by whakapapa.⁵⁶ In Taranaki, Te Miringa Hohaia explains that the naming of significant sites in the area has always been associated with important male *and* female leaders.⁵⁷ In other areas of New Zealand, such as Northland, tribal groups such as Ngati Hine rely on the actions of important female ancestors, such as Hineamaru, who probably lived sometime in the 16th century, and her descendents, to illustrate their continual land occupation since that time.⁵⁸ Similarly, Hirini Moko Mead has provided numerous examples of important Māori women leaders, explaining their role in negotiating peace agreements between warring neighbouring tribes.⁵⁹

Clearly none of these examples prove conclusively that Māori communities were free from patriarchal assumptions and sex discrimination in the pre-colonial period.⁶⁰ They do, however, illustrate that Māori women

55. A. Mahuika, *Nga Wahine Kai-hautu o Ngati Porou: Female Leaders of Ngati Porou* (M.A. Thesis, University of Sydney, 1973) [unpublished], quoted in L. Pihama, *Tihei Mauri Ora: Honouring Our Voices: Mana Wahine as a Kaupapa Māori Theoretical Framework* (Ph.D. Thesis, University of Auckland, 2001) at 268.

56. Pihama, *ibid.* at 269.

57. T. Hohaia, "The Foundation Story: An Account Interpreted from Manuscripts held by Taranaki Iwi" in S. Goldsmith, ed., *Te Maunga Taranaki: Views of a Mountain* (New Plymouth: Govett-Brewster Art Gallery, 2001), quoted in Pihama, *ibid.* at 270.

58. C. Macdonald, M. Penfold & B. Williams, eds., *The Book of New Zealand Women, Ko Kui Ma Te Kaupapa* (Wellington: Bridget Williams Books, 1991) at 294, 295.

59. Mead, *supra* note 31 at 173.

60. There are some conflicting views from writers such as Clea Te Kawehau Hoskins, who has argued that although matrilineality (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 with patriarchy, particularly if it simply channels the power held by males through female descent (see Te Kawehau Hoskins, *supra* note 25 at 33; also see early

held important roles in pre-colonial Māori communities, and that our status depended primarily on whakapapa and ability, not sex. This suggests that colonial attitudes about the role of women may have created gender inequalities and discrimination within Māori communities, rather than simply exacerbating it. It also suggests that tikanga Māori did not operate in a sexist way to discriminate against women.

The Experience of Māori Women in Post-Colonial New Zealand

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)

The New Zealand Law Commission, in a recent report examining tikanga Māori, chose the above quote from Shakespeare's *The Taming of the Shrew* to begin its discussion about the impact of colonial law and values on Māori women from 1840 onwards.⁶¹ The verse illustrates the attitude of Pakeha men, who from 1840 onwards dominated the development of New Zealand's law and the state, towards women. Women were considered male property and did not enjoy legal personality in the same way as men; a married woman could not, for example, initiate legal action without her husband's consent.⁶² Furthermore, colonial law legitimized violence against women and until recently, the law in New Zealand did not recognize rape as a crime against a woman if her husband committed it.⁶³ 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.⁶⁴

Pakeha 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 Pakeha men from

Pakeha writers such as Eldson Best, who argued that men have greater status than women, discussed in detail in Pihama, *supra* note 55 at 181). Despite these opposing views, I am not convinced that sex discrimination existed in pre-colonial society (if it existed at all) to the same extent that it existed in colonial society. This is an area requiring more research—and when undertaking that research, we must take care not to fall into the trap of assuming that sex discrimination existed in Māori society, in the pre-colonial period, simply because it existed in colonial society.

61. New Zealand Law Commission, R53, *Justice: The Experiences of Māori Women* (Wellington: New Zealand Law Commission, 1999) at 35 [*Justice*].

62. W. Blackstone, *Commentaries on the Laws of England*, Book 1 (1809) at 442-445.

63. In New Zealand, a man could not be charged with raping his wife until an amendment to the *Crimes Act* was made in 1985.

64. Blackstone, *supra* note 62; also see Mikaere, *Balance Destroyed*, *supra* note 5, 107-110.

recognizing Māori women as political leaders and representatives of their tribal groups, and led ultimately to the state's denial of Mana Wahine.

Mana Wahine and Te Tiriti o Waitangi

In New Zealand the state's active denial of Mana Wahine began with the signing of *Te Tiriti o Waitangi* in 1840.⁶⁵ Between February and October 1840, over 500 Māori leaders signed the *Treaty* on behalf of hapu and iwi. These Māori leaders possessed the requisite mana (authority) to enable them to enter into such an important contract.

At least 13 Māori women signed the *Treaty*, including Ana Hamu (the original patron of Pahia Mission), Te Rau o Te Rangi (Te Whanau Wharekauri/Ngati Toa) and Rangi Topeora (Ngati Toa/Raukawa). It is possible that more Māori women signed the *Treaty*.⁶⁶ Many Māori names at that time were gender neutral—the unknown signatories could therefore be male or female.⁶⁷

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.⁶⁸

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.⁶⁹ In some areas, Crown agents refused to negotiate the *Treaty* with Māori women and would not allow them to sign. In the Ngati Toa region, for example, Major Bunbury refused to allow a high-ranking Ngati Toa woman to sign the *Treaty*. As a result of the insult her husband refused to sign.⁷⁰ This incident was an early sign that the

65. The *Treaty of Waitangi* was signed by Māori and the British Crown in 1840 [*Treaty*]. The Māori text of the *Treaty* authorizes the Crown to fulfil 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 recognizes and protects Māori property rights: for further discussion, see C. Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin, 1987).

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

67. See Mikaere, *Balance Destroyed*, *supra* note 5 at 71, where she says that more research is needed to identify the women who signed the *Treaty*. Māori families in particular should examine the signatures in order to identify their ancestors.

68. See Williams, *supra* note 26 at 16.

69. See Sykes, *supra* note 7 and Mikaere, *Balance Destroyed*, *supra* note 5.

70. See Orange, *supra* note 65 at 90.

relationship between Māori women and the Crown would be problematic.⁷¹ 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 Pakeha men imposing their mono-cultural based decisions and restrictions on Māori women.⁷²

The Impact of Colonial Laws and Values on Mana Wahine and the Growth of External Discrimination

In 2001, the New Zealand Law Commission released its report entitled *Māori Custom and Values in New Zealand Law* which followed an earlier report entitled *Justice: The Experiences of Māori Women*.⁷³ Both reports discuss the impact of colonization on Māori women in detail. My intention in this part is to provide a brief background to the impact of colonization 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 external discrimination Māori women experience. This background is provided in order to inform the discussion that follows, 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 colonization has had on Māori women and on Māori generally. Colonial law and values intruded upon every aspect of Māori women's lives, dramatically changing our position and status within whanau, hapu and iwi structures. The progress of colonization in New Zealand after 1840 was rapid and aggressive. By 1856, the settler population outnumbered the Māori population and this created an urgent settler demand for land and autonomy.⁷⁴ This joined 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 Pakeha incursions into autonomous Māori areas.⁷⁵ The war continued throughout the 1860s and, although there was never a decisive British

71. T. Rei, "Te Tiriti o Waitangi: Māori Women and the State" in R. Du Plessis & L. Alice, eds., *Feminist Thought in Aotearoa/New Zealand: Connections and Differences* (Auckland: Oxford University Press, 1998) at 198.

72. Sykes, *supra* note 7.

73. *Supra* note 29; *Supra* note 61.

74. E. Olssen & M. Stenson, eds., *A Century of Change* (Auckland: Longman Paul, 1989) at 131.

75. At the height of the war in New Zealand, 18,000 British troops were employed (along with colonial and some Māori troops) at a cost to the British government of 500,000 pounds per year.

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.⁷⁶

As is the case with most wars, women and children suffered considerable hardship.⁷⁷ Māori 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 and 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 that followed.⁷⁸

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.⁷⁹ This led to the forced removal of Māori women and their families from their land. In areas such as Taranaki on the west coast of the North Island of New Zealand, Māori men were imprisoned, without trial, and separated from their families and communities for long periods of time.⁸⁰ 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.⁸¹

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 whanau, hapu 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 per cent of land in New Zealand was held according to Māori customary law.⁸² According to Ballara, from 1865 onwards, “Māori land tenure with respect

76. Waitangi Tribunal, *The Taranaki Report, Kaupapa Tuatahi*, WAI 143 (Wellington: GP Publications, 1996) at 236-241 [*Taranaki Report*].

77. *Ibid.*

78. *Ibid.*; also see Dick Scott, *Ask that Mountain* (Auckland: Reed Books, 1975) at 125-130.

79. Land was also confiscated from hapu 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 hapu and iwi in the region: See Scott, *ibid.* at 12.

80. 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.

81. *Taranaki Report*, *supra* note 76 at 10, 108, 113-114.

82. P. Macklem, “The Māori Experiment” (2002) 52 U.T.L.J. 1.

to women was progressively undermined.”⁸³ This was partly because the Native Land Court consisted entirely of Pakeha men. They controlled the process of individualization of Māori land and were more likely to list Māori men as landowners of communal hapu land, rather than the guardians of the land on behalf of the hapu.⁸⁴

The effect of land alienation on Māori women was severe. Māori were forced to move away from their hapu and iwi areas in search of employment. This led to the breakdown of whanau, hapu 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 hapu and iwi base in search of work, the benefits of caring for their whanau 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 fulfil the role of the good Christian wife. The state education of Māori girls reinforced the view that the woman’s role was to fulfil 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.”⁸⁵

Since the signing of the *Treaty*, the Crown had never seriously considered Māori women as political leaders, and now the ideological forces of colonization 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.⁸⁶ 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, travelled to Parliament for the express purpose of walking out in protest

83. P. Hohepa & D. Williams, eds., *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession: A Working Paper* (Wellington: New Zealand Law Commission, 1996) at para. 98; quoted in *Justice*, *supra* note 61 at 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 woman, although Māori men were free to dispose of the land interests of their wives without their consent.

84. *Justice*, *ibid.* at 21-22.

85. J.M. Barrington, *Māori Schools in a Changing Society*, quoted in Mikaere, *Balance Destroyed*, *supra* note 5 at 43. Te Aute is a Māori boy’s boarding school located in Hawkes Bay, North Island of New Zealand.

86. T. Rei, G. McDonald & N. Te Awakotuku, “Māori Women’s Organizations” in A. Else, ed., *Women Together* (Wellington: Daphne Brasell Associate Press, 1993) at 313.

when Elizabeth McCombs, the first woman Member of Parliament, rose to give her maiden speech.⁸⁷

By the early 20th century, the opportunities for Māori women to participate in political life and engage with the Crown were limited. Māori women continued, however, to be politically active to the extent that was possible within colonial society.⁸⁸ In 1951, Māori women established the Māori Women's Welfare League ("MWWL") in an attempt to influence and implement government policy that affected Māori.⁸⁹ As Mira Szaszy, a former president of the MWWL recalled, it was established "to set up a structure which was not dominated by men, that is, on non-Māori lines."⁹⁰

The MWWL 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.⁹¹ 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 organizations,"⁹² the MWWL enjoyed considerable support from Māori women and, throughout the 1950s, its membership grew steadily. The MWWL provided a forum where Māori women could express themselves and coordinate, irrespective of tribal differences and the restrictions that may have prevented them from participating formally in the tribal context.⁹³

Unfortunately, not all Māori men supported the MWWL. A letter to the Minister of Māori Affairs in 1953 complained that the MWWL had usurped the authority of men and that Māori women had taken over control of the pa.⁹⁴ 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

87. See Te Kawehau Hoskins, *supra* note 25 at 25.

88. Mikaere, *Balance Destroyed*, *supra* note 5 at 162; also see Rei, McDonald & Te Awekotuku, *supra* note 86.

89. For example, one of the main concerns at the first meeting of the MWWL was the survival and development of Te Reo Māori (the Māori language).

90. M. Szaszy, "Me Aroha Koe ki te Ha o Hineahuone" in Witi Ihimaera, ed., *Te Ao Marama 2, Regaining Aotearoa: Māori Writers Speak Out* (Auckland: Reed Books, 1993) at 289.

91. Nga Komiti Wahine (tribally based Māori women's committees) formed the nucleus of the MWWL; see Rei, McDonald & Te Awekotuku, *supra* note 86 for more detail about Māori women's organizations from the 1880s onwards.

92. N. Baird & K. Gover, "Identifying the Māori Treaty Partner" (2002) 52 U.T.L.J. 44.

93. A. Koopu, quoted in H. Melbourne, ed., *Māori Sovereignty: The Māori Perspective* (Auckland: Hodder Moa Beckett, 1995) at 42.

94. 15 January 1953, Māori Affairs Files, 36/26, Box 40, National Archives, quoted in Rei, McDonald & Te Awekotuku, *supra* note 86 at 9.

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.”⁹⁵

Fortunately, the MWWL did not, as Rei points out, confine its activities to the house.⁹⁶ It continued to assert itself as a pan-tribal political organization, which sought to influence Māori policy generally, as well as policy that 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 MWWL’s administrative support in 1962.⁹⁷ This coincided with the national government’s enactment of the *Māori Welfare Act, 1962*, which established the New Zealand Māori Council (“NZ Māori Council”). Dominated by Māori men, the NZ Māori Council modelled itself on Pakeha 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 MWWL as a central political voice on Māori affairs. Until the 1980s, the NZ Māori Council maintained a strong and viable male leadership, and 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.⁹⁸

The national government’s decision to establish the NZ Māori Council in preference to developing its relationship with Māori women and the MWWL 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 “is 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.”⁹⁹

95. Department of Māori Affairs, Internal Memorandum, 22 March 1952, Māori Affairs Files, MA 36/26, Box 39, National Archives, quoted in Rei, McDonald & Te Awekotuku, *ibid.* at 10.

96. Rei, McDonald & Te Awekotuku, *ibid.* at 9.

97. *Ibid.* at 11.

98. See Te Puni Kokiri, “Discussion Paper on the Review of the *Māori Community Development Act 1962*” (Wellington: Te Puni Kokiri, Ministry of Māori Development, 1999) at 16.

99. See Mikaere, “Collective Rights”, *supra* note 25 at 97.

Throughout the 1980s and 1990s, successive New Zealand governments embarked on neo-liberal reform of the market, introducing trade liberalization and restructuring state activities.¹⁰⁰ Job losses, as a result of economic restructuring and state sector reform during this period increased for Māori women employed in state-owned industries.¹⁰¹ The decline in job opportunities, combined with the increase in single-parent families, limited Māori women's employment and economic opportunities.¹⁰²

Today, there are about 256,000 Māori women in New Zealand making up seven per cent of New Zealand's total population of approximately 4,000,000 people.¹⁰³ Māori women hold only 2.1 per cent of senior management positions (although the number of women in senior positions is increasing very gradually).¹⁰⁴ Māori women have the highest rate of unemployment and generally receive lower incomes than men.¹⁰⁵ The health of Māori women with low incomes is poor; many women suffer from high rates of vitamin deficiency and anemia. Basic food runs out for at least a third of all Māori women and their families who are in the lowest income group and cannot afford to eat properly all the time.¹⁰⁶

The trend towards privatization and the process of economic globalization has had a negative impact on Māori women's communities,

100. See Macklem, *supra* note 82; also see J. Kelsey, *At the Crossroads* (Wellington: Bridget Williams Books, 2002).

101. 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>> [*Māori Women in Focus*].

102. *Ibid.*

103. The Māori population in New Zealand is approximately 500,000, amounting to 15 per cent of the population; see *ibid.* 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 Māori population comprised 526,281 of New Zealand's population. This figure is forecast to reach 750,000 (16.6 per cent of the total population) by 2021: see online: <<http://www.teara.govt.nz/NewZealandInBrief/Maori/en>>.

104. Aotearoa/New Zealand Non-Governmental Organisations Non-Māori Status of Women, *Comments to the UN CEDAW Monitoring Committee on New Zealand's Progress in Implementing the Convention on the Elimination of All Forms of Discrimination Against Women* (September 2002) at 17 [*Comments to the UN*].

105. Māori women are the highest proportion of New Zealand's population to have an income below \$20,000: *Māori Women in Focus, supra* note 101 at 60. In 2001, the median income for Māori men per annum was \$18,600 compared with \$13,200 for Māori women: see online: <<http://www.tpk.govt.nz/news/archive.asp?action+news&id=85>>.

106. The experience of Māori women in New Zealand should not be seen in isolation. The majority of the world's 1.3 billion 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 five per cent of the world's heads of state: United Nations, *The World's Women 1970-1990: Trends and Statistics* (Sales No. E.90.XVII.3), online: <<http://www.unhchr.ch/html/menu6/2/fs22.htm#n>>; also see *Comments to the UN, supra* note 104 at 34.

lands and our ability to participate in public and political life.¹⁰⁷ Economic marginalization and political marginalization go hand in hand, so it is not surprising that the economic reforms failed to both improve the social, economic and political position of Māori women, and to create 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 marginalization 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 recognize 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.¹⁰⁸ As Ngahua 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.¹⁰⁹

Conclusion

Since the advent of colonization in New Zealand, discrimination against Māori women, within Māori contexts and in the context of the Crown–Māori relationship, has been perpetuated as a result of unfair laws and policies. 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 Pakeha 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.¹¹⁰ The extent to which sex discrimination existed in pre-colonial Māori society, however, is less clear. I have argued that because Māori society was primarily organized on the basis of whakapapa, it was

107. *Māori Women in Focus*, *supra* note 101 at 2.

108. L. Pihama, "Editorial Comments" (1994) 3:2 *Te Pua: Journal of Māori Women's Writing*, Te Whare Wananga o Tamaki Makaurau 6.

109. Quoted in A. Brown, ed., *Mana Wahine: Women Who Show the Way* (Auckland: Reed Books, 1994) at 29.

110. Mikaere, "Colonization", *supra* note 30 at 34.

whakapapa, not sex, that determined a person's role and status in pre-colonial Māori communities. Māori women featured in cosmological stories, held important leadership positions and significant places, and tribal groups were named after women, all of which suggests that sex discrimination either did not exist in pre-colonial Māori society, or it existed to a much lesser extent than it does today.

The preceding discussion was provided to give some context to assist in understanding the different kinds of discrimination Māori women face in New Zealand today. My remaining discussion focuses on the most comprehensive legally binding treaty on women's rights available to Māori women who wish to address discriminatory practices using international law, whether these practices arise in the customary or state context: the *Convention for the Elimination of All Forms of Discrimination Against Women*.

III MANA WAHINE AND INTERNATIONAL LAW

Introduction

Although there are myriad international human rights instruments that are relevant to women's rights, the *Women's Convention* is the only international instrument that, when combined with the *Optional Protocol*, has the power to protect women from many different kinds of discrimination—ranging from discrimination that occurs in customary contexts, such as in women's homes and communities, to discrimination which impacts upon the more traditional civil and political rights.¹¹¹

The *Women's Convention* was adopted by the United Nations in 1979 and entered into force in 1981.¹¹² New Zealand ratified the *Women's Convention* in January 1985.¹¹³ By March 2005, 180 countries (over 90 per

111. New Zealand is a party to many international agreements that are relevant to women's rights, which are not discussed here. They include the *Universal Declaration on Human Rights* (1948), *Convention on the Political Rights of Women* (1952), *International Covenant on Economic, Social and Cultural Rights* (1966), the *International Covenant on Civil and Political Rights* (1976) and the *Beijing Platform for Action* (adopted at the 4th World Conference on Women 1995).

112. *Supra* note 12.

113. New Zealand has reserved the right not to apply the provisions of the *Convention* in so far as they are inconsistent with policies relating to recruitment into, or service in, (a) the Armed Forces (which reflects either directly or indirectly the fact that members of such forces are required to serve on armed forces aircraft or vessels and in situations involving armed combat); or (b) the law enforcement forces (which reflects either directly or indirectly the fact that members of such forces are required to serve in situations involving violence or threat of violence).

cent of the UN) had ratified the *Women's Convention*.¹¹⁴ In comparison, only 71 states are parties to the *Optional Protocol*, and in New Zealand, the *Optional Protocol* has been in force since December 2000. The *Optional Protocol* empowers the Women's Committee to consider individual complaints about discrimination submitted by a woman (or a group of women) complaining of state party violations of the *Women's Convention* and the *Optional Protocol*.¹¹⁵

Discriminatory state practices, such as failing to ensure Māori women are represented on public bodies, are prohibited by article 7 (political and public representation) of the *Women's Convention*. Article 5 of the *Women's Convention* refers to the social and cultural life of women, and requires states to take all appropriate measures

[t]o 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.

Both article 5 and article 7 provide an avenue through which Māori women could pursue a complaint against New Zealand in an international forum, based on the examples of internal or external discrimination discussed in part two. The *Optional Protocol* procedure is potentially very valuable to Māori women because it empowers the Women's Committee to make specific recommendations on individual complaints, and to request New Zealand to take immediate action to remedy violations, regardless of whether they occur in the public or private sphere. The expansion of international human rights law to encompass the private sphere is a positive step forward for women. This is because the traditional focus of international law on the public life of individuals has had serious consequences for women as the worst abuses of our human rights, such as murder, rape and assault take place in the so called "private" sphere—in our homes and communities. Until now, it has been difficult for women to call the state to account for human rights abuses that take place in private contexts, particularly when they occur in customary settings where the state has not played an overt role.

There are other benefits to the *Optional Protocol* procedure as well, including the level of publicity the complaint could attract internationally and in New Zealand, compared with the Women's Committee's country

114. See *Women's Convention*, *supra* note 12. It should be noted that while the *Women's Convention* has been ratified by over 90 per cent of UN members, it has the most reservations of any international treaty.

115. The *Optional Protocol* also entitles the Women's Committee of its own accord to investigate grave or systematic violations of the *Women's Convention* in those states, which have accepted this procedure.

reports, which receive little attention.¹¹⁶ This publicity, along with a recommendation from the Women's Committee that action must be taken to remedy external discrimination against Māori women, could bring considerable political pressure to bear on the state 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 among Māori women about our role in state life, and the effect that external discrimination has had on Māori women and Māori communities generally.

Although Māori women may see immediate results from submitting a complaint to the Women's Committee, whether there is any long-term benefit to Māori women and our communities, particularly when the complaint involves internal discrimination, is questionable. This is because the international human rights system poses many challenges to Indigenous women seeking to remedy discriminatory laws and practices. These challenges are discussed below.

The Universal Value of Human Rights?

Indigenous women have criticized the value of universal human rights because of the emphasis that is placed on individual rights as opposed to communal or group rights.¹¹⁷ The assumption that rights attach to all human beings and must therefore be applied universally irrespective of the cultural context raises complex issues for Indigenous women.¹¹⁸ 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

116. The Women's Committee is required to monitor the progress of the implementation of the *Women's Convention* by states, by examining state reports (submitted in accordance with article 18 of the *Women's Convention*). 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 the *Women's Convention* and thereafter every four years, or at the request of the Women's Committee. New Zealand last reported to the Women's Committee in 2003. Unfortunately, state reports and the Women's Committee's views on the reports receive very little publicity and, in New Zealand, shadow reports rarely accompany or contradict the state's report of events (although a shadow report was submitted for the first time in 2003).

117. See Watson, *supra* note 1 at 30, for a discussion of how Western philosophy and rights are separated from Indigenous peoples' understandings of the natural world; also see P. Hunt, "Reflections on International Human Rights Law and Cultural Rights" in M. Wilson & P. Hunt, eds., *Culture, Rights and Culture Rights* (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 recognize Indigenous peoples' rights; also see J. Kenyatta, "Facing Mount Kenya: The Tribal Life of the Gikuyu" (United States: Vintage Books, 1965) at 109, where he explains that Kenyan social and economic organization depends on family and tribal obligations, and in Kenya an individualist is looked upon with suspicion.

118. C. MacKinnon, *Sex Equality* (New York: Foundation Press, 2001) at 471.

of rights is culturally partial, and that practices that are valid according to a particular culture should not be overridden by “outsiders.”¹¹⁹

Cultural relativists argue that human rights should be applied in context and 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 assumes everyone in the world wants to be treated the same.¹²⁰ Some Indigenous critics go further, arguing that the imposition of universal human rights on Indigenous cultures is another form of colonialism, and that the universalization of norms risks destroying the diversity of cultures.¹²¹

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. They argue that to think otherwise challenges the validity of human rights (and the belief that all human beings are equal and, therefore, 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.¹²²

This cursory explanation of the debate between universalism and cultural relativism is, in reality, not all that helpful for Indigenous women who are trying to improve their immediate situation. As Rosalind Higgins points out,

it 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.¹²³

119. *Ibid.*

120. See H. Charlesworth & C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Huntington: Juris Publishing, 2000) at 225.

121. *Ibid.* at 223; also see P. Alston, ed., *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992) at 193.

122. Section 1, para. 5 of the *Vienna Declaration* (adopted at the 2d World Conference on Human Rights) reinforces this view. It states:

All 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.

Quoted in P. Alston & H.J. Steiner, eds., *International Human Rights in Context, Law Politics Morals* (Oxford: Clarendon Press, 1996) at 235.

123. R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 96, quoted in Alston & Steiner, *ibid.* at 219.

This statement is no doubt true for Indigenous women who face serious and imminent threats to their lives.¹²⁴

Cultural relativist arguments are difficult for many to accept when they are used to justify dangerous and life threatening practices, such as genital mutilation, or when men rely on them to maintain traditional practices that worsen the position of women. In situations involving discriminatory practices that are not life threatening, or do not present any immediate physical harm to women, such as the examples discussed in this article, the cultural relativist/universalism debate is more evenly divided. It is not clear how and when the state should intervene to address potentially discriminatory practices even when Indigenous women ask for this to be done, or how such intervention could be balanced with the Indigenous group's right of self-determination. The issue becomes even more complicated when "outsiders" (such as the Pakeha women probation officer) challenge customary practices.

Ayelet Shachar has explored these issues in detail. She rejects the argument that either the state or the non-dominant minority group has the absolute authority to determine the rights and responsibilities of individuals within their sphere. She argues that the cultural relativist's "hands off" approach to matters involving internal discrimination is unacceptable because this can cement the group's licence to perpetuate pre-existing power hierarchies at the expense of more vulnerable group members, such as women. Similarly, she argues we must reject the "hierarchical enforcement of state law" because this fails to preserve collective cultural identity alongside individual citizenship rights.¹²⁵ Shachar instead finds an alternative, one which attempts to overcome a "your culture or your rights" ultimatum, which Indigenous women are often confronted with when challenging discriminatory cultural practices.

Shachar's approach involves a model of joint governance called *transformative accommodation*, which requires the state and the group to become more responsive to all constituents, and particularly their most vulnerable members, by requiring the state and the group to bid for the continued adherence of individuals to its sphere of authority, rather than take it for granted. This model recognizes that group members living within a larger political community represent the intersection of a number of identity-creating affiliations. The model considers how an individual's multiple

124. For example, Muslim women in Northern India (Gujarat) have been the targets 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>>.

125. A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001) at 146-147.

affiliations intersect, while recognizing the potential rivalries between jurisdictions (the state and the group) over disputed matters. Accordingly,

neither the group, nor the state can ever acquire *exclusive control* over a contested social arena that affects individuals both as group members and as citizens. Since neither can fully override the other's jurisdictional mandate, the "no monopoly" rule re-defines the relationship between the state and its minority groups by structurally positioning them as complementary power holders.¹²⁶

While this aspect of the model works well when applied to social arenas such as family law and education, it is less clear how it applies to the examples of internal discrimination discussed in this article. Although the aspect of the model that seeks to accommodate the different identities and affiliations of Māori women is attractive, Māori women are likely to be extremely resistant to any "outside" interference in marae or tikanga protocols, arguing that the marae is one of the few places where Māori can exercise "exclusive control" over tikanga proceedings.¹²⁷ A Tuhoe elder affirms this view: "Tuhoe will make no concessions whatsoever in things that happen on their marae because we have given way in every other area of Māoriness."¹²⁸ For these reasons, Ani Mikaere has argued that a complaint about discriminatory practices *within* Māori society can only be resolved by Māori. She suggests that what is needed is a re-examination and rediscovery of Māori principles and practices as they relate to women, by Māori, and on Māori terms, not by recourse to an external body such as the Women's Committee.¹²⁹

The second aspect of transformative accommodation promoted by Shachar (the establishment of clearly delineated options) assumes that an individual has the power to influence either the group or the state because both of these entities depend on the individual's membership for its survival and "since these group leaders depend on their constituents support for their survival, they will be that much more motivated to attune themselves to the needs of their members."¹³⁰ This aspect of the model is only successful

126. *Ibid.* at 121 [emphasis added].

127. Of course, the New Zealand government is likely to argue that Māori do not exercise exclusive control over what happens on the marae and it has a legally justifiable interest in shaping the rules that govern behavior on the marae (this is consistent with one of Shachar's key assumptions). A recent case involving well-known Māori activist Tame Iti illustrates this point. Iti was charged with possessing a firearm in a public place without lawful purpose. However, the public place in question was outside a Tuhoe Marae and occurred as part of powhiri to Waitangi Tribunal members attending a Tribunal hearing: see "Iti Before Magistrates in Shotgun Hearing" *The Whakatane Beacon* (17 May 2005), A1.

128. Quoted in Mikaere, *Balance Destroyed*, *supra* note 5 at 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).

129. Mikaere, "Collective Rights", *supra* note 25.

130. Shachar, *supra* note 125 at 123.

however, if *significant numbers* of the group disagree with certain customary practices and threaten to exit the group. The threat to the group's survival must, after all, be real. A few individuals disagreeing with a particular cultural practice is unlikely to threaten the survival of the group in the long-term. In New Zealand, the numbers of Māori women objecting to the kind of internal discrimination discussed in this article do not appear to be significant enough to pose a threat to the survival of Māori. Group leaders are, therefore, unlikely to be motivated to change customary practice that only upsets a few individuals. Similarly, the state is unlikely to intervene when so few appear to be affected.¹³¹ Furthermore, the New Zealand government is unlikely to be willing to take steps to modify discriminatory practices on the marae, even if the Women's Committee recommends that it do so. Although the Women's Committee's determinations will be persuasive, they are not legally enforceable. 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.¹³² This leaves the way open to the government to argue, for example, that it cannot intervene in customary practices because its *Treaty of Waitangi* obligations require the state to protect and recognize rangatiratanga.

Pursuing a Complaint Based on External Discrimination

Good Reasons for Pursuing an External Discrimination Complaint

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 external discrimination, such as the *Mana Wahine Claim*. A complaint of this nature concerns the relationship between Māori women and the Crown, and an examination of how Crown actions and structures have discriminated

131. See Shachar's discussion, *ibid.* at 124-125, where she acknowledges that one individual can reject one aspect of the group's practices without threatening to leave the group entirely. It is not open to Indigenous women, however, to "pick and choose" in quite the same way when participating in customary proceedings, which require the participation of individuals according to specified roles—but ultimately as part of the larger collective (see my discussion above at pages 31-38).

132. 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.

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.

The Mana Wahine Claim

The *Mana Wahine Claim*, referred to in my introduction, provides an example of the kind of external discrimination claim Māori women could bring before the Women's Committee, provided admissibility barriers are overcome.¹³³ The claim was submitted to the Waitangi Tribunal in 1993 by a group of Māori women who argued that the Crown's actions and policies since 1840 have systematically discriminated against Māori women, depriving us of our spiritual, cultural and economic well-being, which is protected by the *Treaty of Waitangi*.¹³⁴ The claim, as it is formulated at present focuses on post-colonial external discrimination and, in particular, the Crown's role in perpetuating discrimination against Māori women through unfair laws, policies and practices.

The impetus for the *Mana Wahine Claim* was the removal of a respected Māori woman elder from the shortlist of appointments to the Treaty of Waitangi Fisheries Commission ("TWFC"). The TWFC had recently been established to allocate assets to iwi arising from a controversial financial settlement reached in 1992, which extinguished Māori commercial fishing and treaty rights. As well as referring to the TWFC's appointment process and the Crown's failure to involve Māori women adequately in the process, the statement of claim referred to a long history of Māori women's exclusion from public life by the Crown, beginning with the signing of the *Treaty*. The *Mana Wahine Claim* has yet to be heard by the Waitangi Tribunal and due to the Tribunal's lack of resources and backlog of historical claims, it is unlikely the claim will be heard before 2010.

The Mana Wahine Claim and the Optional Protocol Procedure

Under the *Optional Protocol* procedure, all domestic remedies must be exhausted before the Women's Committee will consider a complaint. This

133. See the discussion in the following section.

134. Established by the Crown in 1975, the Waitangi Tribunal is an expert advisory body consisting of Māori and Pakeha members. It is authorized to consider alleged breaches of the principles of the *Treaty of Waitangi* and make recommendations to the Crown based on the outcome of its inquiry. The Waitangi Tribunal is similar to the Women's Committee in that it depends on the political goodwill of the government of the day as to whether or not its recommendations will be accepted.

requirement of the *Optional Protocol* procedure may create difficulty for the *Mana Wahine* claimants. The claimants will need to persuade the Women's Committee that because the Waitangi Tribunal is unlikely to hear the *Mana Wahine Claim* in the near future, domestic remedies in New Zealand have effectively been exhausted. The *Mana Wahine* claimants could also argue that the Waitangi Tribunal's prioritization of other claims before the *Mana Wahine Claim* is further evidence of continuing state discrimination against Māori women.¹³⁵

Under the *Optional Protocol*, the Women's Committee has broad remedial power and it can request the state party concerned to take specific measures to remedy violations of the *Women's Convention*. These specific measures could include the amendment of legislation, or temporary measures, such as affirmative action measures and quotas to advance women's integration into politics or employment.¹³⁶ This aspect of the *Optional Protocol* is potentially very valuable for Māori women seeking to improve representation on public bodies and institutions. For example, *Mana Wahine* claimants 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 TWFC or Māori Trust Boards), or under article 2(f), which requires states "to take all appropriate measures, including legislation, to abolish ... customs and practices which constitute discrimination against women." Considering this aspect of the complaint, the Women's Committee's recommendations could include implementing temporary measures such as affirmative action programs or

135. Articles 6 and 7 of the *Optional Protocol*, *supra* note 11, establish the communications procedure (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.) 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. This may require the state to maintain the anonymity of women making a complaint while the Women's Committee considers the complaint. This may encourage more women to make a complaint, if they know that they will be protected from possible harm or intimidation.

136. See Article 4 of the *Women's Convention* and General Recommendation No. 5 (Women's Committee, 7th Sess.) (1988).

quotas to ensure the equal participation of Māori women on public decision-making bodies such as the TWFC.¹³⁷

There are, therefore, many good practical reasons for submitting an external discrimination complaint to the Women's Committee. 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.¹³⁸ Provided the claim is amended to refer to incidents of discrimination that occurred after December 2000 (and once it is shown that all domestic remedies have effectively been exhausted), it can be submitted to the Women's Committee for determination.

Potential Drawbacks of Pursuing an External Discrimination Complaint

As well as the general drawbacks associated with pursuing a discrimination-based complaint using international law that are discussed elsewhere in this article, there are some specific drawbacks Māori women should consider when pursuing an external discrimination complaint. Even if the Women's Committee makes positive and useful recommendations with respect to the *Mana Wahine Claim*, there is no guarantee the New Zealand government will accept the recommendations in the current political climate.

The government has a poor record of recognizing and protecting Māori rights and interests generally. In light of this, it is unlikely to be motivated to take steps to protect Māori women in particular from state-imposed discrimination, even though adverse attention from the Women's Committee is likely to cause embarrassment. Furthermore, in recent times, Māori have experienced a backlash in New Zealand against existing legislation and policy that recognizes Māori and *Treaty of Waitangi* rights. In particular, opposition members of Parliament have been critical of affirmative action policies, such as preferential entry for Māori into law and medical schools, arguing simplistically that these programs breach human rights norms such as equality and fairness. In response, the government has announced a review of what it calls "race-based" laws and policies, with a view to abolishing those laws and policies that target groups on the basis of race. In

137. Aiming for equal representation on public bodies will not necessarily eliminate discrimination against women. As Denese Henare, Counsel for the *Mana Wahine* claimants has pointed out, the *Mana Wahine Claim* is not just about challenging discriminatory practices towards Māori women; the claim is also about protecting those aspects that Māori women bring to decision-making processes—such as humanity, care and "the quality of aroha [love], not only for whanau, but for hapu and iwi as well": see D. Henare, "He Whakataki", in Brown, *supra* note 109 at 21. 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.

138. E-mail received from Areta Koopu, *Mana Wahine* claimant, 8 October 2002.

this current climate, it may be futile to continue with the *Mana Wahine Claim* if the Women's Committee's recommendations are ignored.

Pursuing an Internal Discrimination Complaint

Some Disadvantages

The *Mana Wahine Claim* provides one example of the kind of claim Māori women could pursue using the *Women's Convention*. Because the *Mana Wahine Claim* is based on breaches of the *Treaty*, which are primarily about the relationship between Māori and the Crown, not Māori women and Māori men, the claim's focus is on external discrimination resulting from discriminatory laws, policies and practices of the Crown since the signing of the *Treaty* in 1840. Another approach Indigenous women in New Zealand could take is to submit an internally-based discrimination complaint under the *Optional Protocol* procedure, using article 5 of the *Women's Convention*.¹³⁹ As Māori academic Claire Charters has argued, Māori women may submit a complaint arguing that the state has failed to take an active role to modify the customary practice that in some areas of New Zealand prevents Māori women from speaking during powhiri proceedings.¹⁴⁰ Alternatively, article 5 could be used to argue that the state has failed to modify other allegedly discriminatory customary practices that are justified according to tikanga, such as the practice that requires women to sit behind the men during poroporoaki.¹⁴¹

Formulating a claim under the *Women's Convention* based on customary practices of this nature requires women to argue that these practices are discriminatory because they are based on the idea of the inferiority or superiority of women and men, or because they are based on stereotyped roles for men and women, which, on most marae throughout New Zealand, restrict women from speaking, or require the women to sit behind the men during formal proceedings. Māori women might consider making such a complaint to the Women's Committee, based on article 5 of the *Women's Convention*, as well as the other articles discussed, because it allows for a broader claim encompassing discrimination as it arises in the external and internal sphere. This course of action is, however, fraught with many dangers for Māori women. Although Māori women may see immediate results from submitting a complaint to the Women's Committee (such as receiving a positive recommendation, gaining publicity, and promoting

139. Charters, *Protecting Hinemoa's Mana Wahine*, *supra* note 6 at 13.

140. Claire Charters, "Address" (Paper presented to the World Indigenous Peoples' Day Conference, Victoria University of Wellington, Faculty of Law, New Zealand, 8-9 August 2002) [unpublished].

141. See my previous discussion above at pages 31-38.

discussion and debate about Mana Wahine), whether there is any long-term benefit to Māori women and our communities when the complaint involves tikanga Māori is questionable.

The adverse impact of colonization on so many aspects of Māori life since 1840 has important implications for Māori women who are seeking to resolve internal discrimination complaints. This is because colonization has not only adversely affected how Māori men and women relate to one another, but has also undermined Māori structures and mechanisms for resolving conflict. Unfortunately, this makes recourse to external bodies such as the domestic courts, the Waitangi Tribunal, or treaty-based committees such as Women's Committee, more likely when we want to resolve disputes within Māori communities.¹⁴² I do not mean to suggest that we are *unable* to resolve our disputes without recourse to external bodies. Many disputes are resolved internally through group discussion and a willingness to reach consensus. This article is concerned, however, with what happens when disputes arise and are left unresolved, either in the customary context or in the Crown–Māori context. In some cases, these disputes involve individuals from outside the group, such as the Pakeha female probation officer, who believe they have experienced discrimination. These individuals may not fully understand the process they are a part of and the reasons behind customary practices, but nevertheless they feel aggrieved.¹⁴³ In other cases, the disputes involve “insiders” such as Māori women who feel silenced or alienated because of their sex, and who are also left with an unresolved grievance. Disputes of this nature left unresolved can impact adversely upon the group in a number of ways. It can affect the individual's on-going participation within the group—a Māori women may decide it is simply too hard to continue to participate in marae affairs, for instance, if she feels her opinion is not heard, or her role is not valued. Pakeha with a poor understanding of customary practices may refuse to participate in customary proceedings, thereby exacerbating their ignorance,

142. As a lawyer working with Māori groups concerned with land and resource management issues, I have observed that Māori groups often prefer to submit to an external body such as the Waitangi Tribunal to determine, for example, a boundary dispute between neighboring tribes, rather than decide the issue amongst themselves and according to tikanga in a Māori context such as the marae. The reasons for this are complex and each group has different reasons for preferring to settle disputes using external remedies. In some cases, the group may lack effective leadership and guidance (there may be very few elders still alive, for instance, with the required knowledge and authority to facilitate internal dispute resolution procedures); the group itself may suffer from internalized racism, perhaps believing that they do not have the tools to resolve a dispute effectively; alternatively, they might seek the determination of an external body because they believe it will provide a long term and robust formal solution to the dispute, which will not be (easily) challenged by people within the group.

143. Perhaps if she had understood and accepted that women are seated behind men during poroporoaki proceedings because we believe this protects us from harmful spiritual and physical influences, and recognizes our important role as child-bearers, she would have felt affirmed and nurtured as a woman, rather than degraded and humiliated.

leading to increased intolerance of expressions of Māori culture, and contributing in the longer term to poor race relations in New Zealand.¹⁴⁴

Although recourse to external bodies may be desirable in the short term because it provides an immediate solution to a pressing problem, the long-term benefits are not as clear. This is because the role of external bodies, and particularly the courts, is not to provide long-term, robust solutions for Māori communities that promote and develop Māori self-determination. In the longer term, constant recourse to external dispute resolution bodies does little to revitalize and develop Māori methods and structures for resolving conflicts. It also does not assist with the examination, learning and development of our own tikanga and how it impacts upon men and women. For these reasons, I believe that the *Optional Protocol* procedure is not the appropriate mechanism at present for Māori women who are seeking to remedy allegedly discriminatory practices on the marae. Even if the Women's Committee is prepared to make a recommendation that the state take steps to modify discriminatory cultural practices on the marae with a view to eliminating them, the New Zealand government is unlikely to be willing to take action to implement the recommendation, probably on the grounds that it is not politically or constitutionally appropriate for it to do so in New Zealand's present political circumstances. Furthermore, Māori are unlikely to accept any state intrusion into marae affairs. Ultimately a Māori woman trying to enforce a recommendation of the Women's Committee could find herself excluded from her group or the subject of extreme criticism and ridicule; this is hardly the desired result. Similarly, it is difficult to see what benefit a Pakeha woman (such as the female probation officer) would achieve by making a complaint against Māori customary practices.

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, in turn, may contribute in some way towards recognizing and restoring Mana Wahine. Recourse to an external body such as the Women's Committee on matters dealing with internal discrimination might, in the short term, provide an impetus for debate amongst Māori communities about the role and status of Māori women. In the longer term, this may lead to the revitalization and development of self-determined Māori mechanisms that satisfactorily resolve disputes within Māori communities, without recourse to external bodies.

144. This is already happening to some extent, with some politicians publicly criticizing powhiri for their length and the exclusion of women in speaking roles: See for example, "Mallard Hits at Sexist Ritual" *New Zealand Herald* (25 September 2004), online: <<http://www.nzherald.co.nz/index.cfm?ObjectID+3594702>>.

Practical Concerns: What Outcomes Can Māori Women Expect When Utilizing International Human Rights Law?

Lessons Learned from Cases Involving Indigenous Women

There are good reasons for Māori women to question the usefulness of international law and its enforcement bodies, such as the Women's Committee, given the experiences of other Indigenous women who have sought to overcome discriminatory laws and practices using external mechanisms. One such example is that of *Lovelace v. Canada*,¹⁴⁵ which is a case concerning an individual complaint against Canada brought under the *Optional Protocol to the International Covenant of Civil and Political Rights* ("ICCPR"). Sandra Lovelace, an Aboriginal woman, 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.¹⁴⁶

In *Lovelace*, the enforcement of the right to enjoy one's culture created resentment within Sandra Lovelace's group. This was partly because the *Lovelace* decision was perceived as placing an additional burden on the group's already scarce resources. Although resource constraints will not be at issue in a case concerning gender roles on the marae, Māori women are still equally vulnerable to criticism and exclusion from the rest of the group. Regardless of what the Women's Committee says 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 hapu fora, and Māori society generally) depends on the support and consent of 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.¹⁴⁷

The Indian Supreme Court case *Khan v. Shah Bano Begum*¹⁴⁸ provides another example of what can happen when women challenge discriminatory practices using external mechanisms. After 43 years of marriage Shah Bano's husband divorced her according to the rules of a Muslim talaq

145. *Lovelace v. Canada*, Communication No. R/6/24 (29 December 1977), UN Doc. Supp. No. 40 A/36/40 (1981) [*Lovelace*].

146. Charters, *Protecting Hinemoa's Mana Wahine*, *supra* note 6 at 45.

147. But see Tomas, "Locating Human Rights", *supra* note 8 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.

148. AIR 1985 SC 945 [*Shah Bano*].

divorce. This meant she was only entitled to maintenance payments for the first three months following the divorce. Shah Bano applied to the Magistrate's Court to obtain relief under state laws, which entitled her to monthly maintenance, provided she did not remarry and could not support herself. On appeal the Supreme Court held that Shah Bano was entitled to maintenance under state law, regardless of the customary divorce laws that applied to the parties.

The *Shah Bano* decision caused an uproar in the Muslim minority community and was portrayed by some Muslim leaders as proof that the Hindu majority was trying to weaken Muslim custom.¹⁴⁹ Following the decision, the Muslim community lobbied the Indian Parliament to legislate to prevent Muslim women obtaining state relief in matters pertaining to Muslim divorce law. As a result, the Indian Parliament passed the *Muslim Women's (Protection of Rights of Divorce) Act* in 1986. The *Act* attempted to overrule the Supreme Court's decision, removing Muslim women's rights to appeal to state courts to obtain maintenance payments. It effectively excused Indian Muslim ex-husbands from their post-divorce obligations.¹⁵⁰ One of the more unfortunate outcomes of the case was the impact it had on Shah Bano. Presumably bowing to pressure from her own people, she eventually contacted the media and publicly rejected the Supreme Court decision that she had fought so hard for. As Shachar points out, "after her long and ultimately futile struggle, she was faced with a tragic 'your culture or your rights' choice; frail and tired, she found herself forced to assert her loyalty to the *nomos* at the expense of her citizenship rights."¹⁵¹

Too often Māori women also face this same "your culture or your rights" dilemma, recognizing that our aspirations for gender equity can become subsumed by our aspirations for self-determination. Clea Te Kawehau Hoskins acknowledges that a reason for this is that the primary (but not exclusive) site of struggle for Māori women is within a struggle for Māori independence.¹⁵² Māori women's status as tangata whenua along with Māori men, and our shared culture and experiences of colonization, place

149. Although many Muslim individuals and organizations supported the Supreme Court decision and later demonstrated against subsequent legislation that was enacted in an attempt to override the decision: See S. Mullally, "Feminism and Multicultural Dilemmas in India: Revisiting the *Shah Bano* Case" (2004) 24:4 Oxford J. Legal Stud. 671 at 679.

150. *Latifi v. India* (2001), AIR SC 3958 [*Latifi*] was one of a number of cases following *Shah Bano* that challenged the decision and the *Muslim Women (Protection of Rights of Divorce) Act, 1986*. In *Latifi*, the Supreme Court refused to accept that the 1986 *Act* denied Muslim women the remedy achieved in *Shah Bano*, as this would be contrary to constitutional guarantees of equality and non-discrimination.

151. Shachar, *supra* note 125 at 83.

152. See Te Kawehau Hoskins, *supra* note 25 at 38-39, who argues that the struggle for self-determination necessarily includes the struggle for gender equality both within Māori culture and the wider society.

Māori women in a much larger reality than that of women's rights.¹⁵³ This explains why some Māori women will not openly challenge discriminatory practices from within the group when interacting with the state or the dominant Pakeha culture. We 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.¹⁵⁴

Another factor 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. The rules of tikanga Māori have developed over a long period of time in connection with different territorial areas and environments in New Zealand. These tikanga rules 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 misunderstood and misapplied if considered out of context by Committee members with no (or a limited) understanding of Māori culture.

Lessons Learned from Māori Participating in International Human Rights Fora

Despite the risks involved, Māori have shown a willingness to turn to international human rights fora in our attempts to challenge external discrimination. In 2004, for instance, a Māori delegation attended the third session of the United Nations Permanent Forum on Indigenous Issues to protest against government treaty breaches and human rights abuses in New Zealand. Māori have also submitted a complaint to the Human Rights Committee dealing with Māori representation issues generally in relation to the *Treaty of Waitangi* Fisheries settlement process.

153. *Ibid.*

154. Unfortunately, Māori men are not always as concerned about protecting Māori women and will sometimes side with the dominant Pakeha 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!" Tomas explains that although many Māori women will not tolerate this type of behavior, a significant number still do because of the whakama (shame) it attaches to the whanau when male elders are publicly disgraced: See Tomas, "Locating Human Rights", *supra* note 8 at 133.

*Mahuika v. New Zealand*¹⁵⁵ was a case taken to the Human Rights Committee by 19 Māori claimants on behalf of a number of iwi and hapu.¹⁵⁶ The complaint concerned the *Treaty of Waitangi (Fisheries Claims) Act, 1992* (“*Settlement Act*”) and the process that led to its enactment. The claimants argued that the deal¹⁵⁷ Māori negotiators made with the Crown to extinguish Māori commercial fishing rights and to abolish the right of *all* Māori to explore the extent of those rights in the courts or Waitangi Tribunal was done without their knowledge or agreement. One hundred and ten signatories claiming to represent about half of the Māori population signed the deed that led to the *Settlement Act*. This included eight Māori negotiators (the four representatives and their alternates), 31 plaintiffs in proceedings against the Crown involving fishing rights, and 71 signatories representing about 26 iwi. The claimants’ main argument focused on the problem of determining the precise number of iwi represented by the signatories. They argued that it was not clear if all of the signatories had the authority to sign on behalf of others—clearly some did not. Importantly, those iwi claiming the major fishing resources in New Zealand were not represented by any of the signatories.

Relying on the *ICCPR*, the claimants argued that their right of self-determination had been interfered with, along with their right to culture (article 27), which protected their way of life as it related to fishing practices. The claimants also argued that because a number of claims were pending before the courts about fishing rights, and because these claims had been discontinued by the *Settlement Act* without their consent, article 14(1) which guarantees the right of access to the courts, had also been breached. 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.”¹⁵⁸ The Human Rights Committee found on the facts that wide-ranging and effective consultation had taken place, and noted that the settlement legislation was enacted only after the Māori representatives’ report was released, a report that stated that substantial Māori support for the settlement deal existed. In making this finding, the Human Rights Committee relied almost entirely on the report to find that Māori support for the proposal

155. Communication No. 547/1993 (views adopted on 27 October 2000), CCPR/C/70/D/547/1993, 2 [*Mahuika*].

156. The claimants belonged to seven iwi in New Zealand, which included two of the largest—in total comprising more than 140,000 Māori.

157. The controversial deal was enshrined in the *Treaty of Waitangi (Fisheries Claims) Act, 1992* and is known as the “Sealord deal”: See my discussion above at page 58.

158. *Mahuika*, *supra* note 155 at 13.

existed, despite the fact that almost half of the Māori population was unrepresented by the deed's signatories and not all of the signatories had the authority to sign on behalf of those they claimed to represent. Instead of considering this to be a fatal flaw in the settlement process, the Human Rights Committee accepted New Zealand's argument that there should be no inquiry into the (Māori) internal decision-making process.¹⁵⁹ The Human Rights Committee also did not agree that the claimants' minority rights had been interfered with, concluding that

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.¹⁶⁰

It is difficult to predict accurately whether the Women's Committee would reach a similar conclusion with respect to the *Mana Wahine Claim* as the Human Rights Committee did in the case of *Mahuika*. The result in *Mahuika* does, however, provide some guidance for Māori women considering taking a claim to a treaty-based body such as the Women's Committee. While *Mahuika* involved a dispute about Māori levels of participation and agreement in the fisheries settlement process generally (rather than women's participation in particular), it illustrates the Human Rights Committee's unwillingness to inquire into internal decision-making processes where the issue of race-based mandates and representation is involved. This may suggest a general uncertainty on the part of the treaty-based committee bodies about how to determine cases involving Indigenous Peoples' competing rights, and internal conflicts within Indigenous groups.

IV CONCLUDING THOUGHTS AND SUGGESTED WAYS FORWARD

In this article, I have argued that while it is appropriate for Māori women to utilize external bodies such as the Women's Committee to address external discrimination, it is not appropriate that we do so when seeking to challenge internal discrimination. At present, the only benefit I can see of pursuing a complaint based on internal discrimination is that it *may* stimulate discussion and debate about the role of women within our communities. But how do we

159. The government relied on the case of *Marshall v. Canada*, Communication No. 205/1986, (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.

160. *Mahuika*, *supra* note 155 at 13.

encourage this discussion? First, this discussion must involve everyone in our communities, including Māori men. The issues discussed here are not just “women’s issues” because they involve the long-term viability and workability of Māori culture. As such, Māori men have as much of an interest as Māori women in resolving these issues and disputes as they arise.

Another reason why it is important for Māori men to engage with these issues is that past experience illustrates that customary practices that harm women have only been eradicated with the support of the majority of men within our cultures. In societies where harmful customary practices have been eradicated, men have either supported women seeking change, or they have been at the forefront advocating for change. For example, in China the practice of foot-binding came to an end after years of advocacy by a number of groups, some of which were led by men, including the influential Unbound Foot Association established by K’Ang Kuang-jen in 1894.¹⁶¹ Similarly, in some areas of Africa, cultural practices such as facial scarification have been eradicated with relative ease—once the *majority* of the group has supported the end of the practice. African feminist Halim explains:

I have seen traditions change during my lifetime. The change was so easy and smooth when the men took the initiative. Change, however, requires a lot of pain and hard work when it is initiated by women. A clear example of this, in my own country, the Sudan, is the quick disappearance of face marks (a mutilation some women endured because it is a sign of beauty to cut longitudinal or horizontal marks on the face of women; it was also a tribal identification for both women and men). When men decided that it was a tradition with no value and that they preferred women without face marks, there was a whole new attitude that affected the change. Suddenly, love songs were describing a woman with a smooth face and women without face marks as having a better chance of getting married. Whether women understand the change in attitude or whether they saw themselves as prettier without the marks did not seem to have any weight in getting rid of the tradition—it was the change in the attitude of the men.¹⁶²

While this view may be disheartening to some feminists because it renders women relatively powerless in our efforts to effect social change, I think it is consistent with Indigenous concepts of collectivity because it positions men as our allies and connects the realization of group self-determination with the recognition of Indigenous women’s rights.

161. C. Packer, *Using Human Rights to Change Tradition: Traditional Practices Harmful to Women’s Reproductive Health in Sub-Saharan Africa* (Antwerpen: Intersentia, 2002) at 158-159.

162. A.M.A. Halim, “Tools of Suppression” in Center for Women’s Global Leadership, *Gender Violence and Women’s Human Rights in Africa* (New York: Centre for Women’s Global Leadership, 1994) at 22, discussed in Packer, *ibid.* at 192-193.

Many of the issues I have raised in this article have been discussed by Māori women elsewhere—in books and articles, on our marae and in our homes. I have attempted to bring together their ideas and experiences, 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 by the belly of genocide, the place where the majority of Indigenous people reside.” Although there may be some benefits for Māori women who seek to overcome external discrimination using the *Optional Protocol* procedure, I do not think the *Optional Protocol* procedure, or international law and its processes generally, provide the best way of addressing internal discrimination at present. The solution lies within Māori society to resolve complaints about allegedly discriminatory practices and to determine the extent to which those practices are inherent in Māori culture. Ultimately, Māori women, Māori men and the state (as the *Treaty* partner and consistent with its international obligations) must face the challenge of recognizing 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

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| Aroha | Love, support. |
| Hapu | Sub-tribe (economic, social and political group consisting of extended families or whanau who are related by blood and shared customary practices). |
| Iwi | Tribe (larger economic, social and political group related by blood and shared customary practices). |
| Mana Wahine | The power and strength of Māori women. |
| Marae Atea | The area directly in front of the meeting house, usually where speakers stand to welcome visitors to the marae. |
| Marae | The meeting place. This term refers to a collection of land and buildings that includes the meeting house, dining areas and ablution blocks. The marae is usually (although not always) situated on ancestral Māori land belonging to the whanau, hapu and iwi groups who are responsible for the marae. |
| Mana | Power, prestige and personal status. |
| Manaakitanga | To care for and look after (the concept of hospitality). |
| Ngati Toa | Lower North Island Māori tribe. |
| Ngati Raukawa | Lower North Island Māori tribe. |
| Noa | Ordinary/profane. |
| Pa | An alternative term to describe the marae. |
| Pakeha | Person of European (usually British) descent; white. |
| Paepae | 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. |
| Powhiri | Welcome ceremony. |
| Poroporoaki | Farewell ceremony. |
| Tangata Whenua | Literally meaning people of the land (refers to the local Māori people from a particular area). |

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| Tapu | Sacred, special, set apart from ordinary use. |
| Tikanga Māori | Māori custom law—the right way of doing things according to Māori law and custom. |
| Tino Rangatiratanga | Māori authority or sovereignty; this term can also be translated as Māori self-determination. |
| Tuhoe | Māori Tribe located in the central eastern area of the North Island of New Zealand. |
| Tuwharetoa | Central North Island Māori tribe. |
| Whanau | Extended family. |
| Wharenui | Ancestral meeting house. |