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A Mana Wahine Inquiry into Indigenous Governance

A thesis
submitted in partial fulfilment
of the requirements for the degree
of
Doctor of Philosophy in Law
at
The University of Waikato
by
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2019

Abstract

This thesis investigates the question “How can indigenous women reinvigorate their role in tribal governance structures when many such structures continue to reinforce gendered colonial constructs within which women are marginalised?” It is noted that contemporary tribal governance structures are often considered a site within which indigenous peoples can express cultural identity however, when indigenous women are clearly under-represented in positions of power within those structures, this thesis questions why this situation continues.

First, the thesis seeks to address the broad historical context within which indigenous women were subjected to colonial constructs of legislation, paternalistic government policies and the mechanisms of a euro-western court system policy. It is against this backdrop that comparisons are drawn that take into account the historical relationships between Māori, First Nations, Aboriginal, and Native American women and their respective colonising governments which bear alarming similarities in terms of the subjugation of these populations of women through colonisation. The significance of this historical comparative lens is to illustrate how the status of women became seriously eroded within indigenous societies from traditional through to modern times. Consequently, this thesis goes on to explore the contemporary socio-political status of indigenous women as a result of their colonised history.

From this broad historical context the thesis narrows its view to examine commonalities and differences in relation to Māori and Native American women's experiences of tribal governance as tribal leaders and women of cultural significance and influence. The thesis changes tack to reflect the specific research intent of my Fulbright scholar experience to the University of Arizona, Tucson Arizona. Narrowing the focus of the research allowed me to analyse in more detail, beneficial comparisons of what was working for women tribal leaders under the auspices of the largely successful Native Nations Institute, Indigenous Governance Programme, in comparison to Māori women in tribal governance in Aotearoa, New Zealand. Importantly, this research synergises indigenous women's shared knowledge in the reinvigoration of traditional tribal governance structures. The objective being to establish a body of knowledge that gives strength to a collective

indigenous women's experience of governance from which normative propositions of indigenous governance based on western concepts can be examined, challenged and potentially transformed.

It is noted that indigenous women have been included as essential decision-makers and leaders in traditional tribal governance systems; however, contemporary indigenous governance models do little to reflect this. The impact is that for indigenous women, tribal institutions and structures can themselves embed and reflect western colonial and patriarchal ideologies. Through our colonial experiences, indigenous peoples have inherited an oppressive gender legacy entrenched in policy and legislation that is socially constructed and instructed. To survive, indigenous women have to engage, challenge, resist and mitigate gendered spaces. This research highlights the extent to which indigenous women's ways of leading or governing continue to be circumscribed in the on-going process of colonisation. Colonialism was a gendered process, and consequently this thesis draws upon indigenous Feminist, Kaupapa Maori and Mana Wahine (Māori women's) theoretical frameworks to analyse the complex ways that intersecting discourses of colonialism, race, gender and power continue to marginalise indigenous women within tribal governance. Indigenous Feminist theory also provides a framework for contextualising how First Nations, Aboriginal and Native American/American Indian women speak to these issues. Importantly, how indigenous women are engaging in decolonising methodologies that impact the colonised practices, ways and attitudes they have or are currently experiencing in tribal governance, are also revealed.

Lastly, this thesis contributes to legal scholarship by contextualising the specific challenges of tribal governance for indigenous women. It addresses this by situating women's experiences and ways of 'being and doing' within the micro tribal governance context while taking account of the macro realities of tribal governance politically, socially and more importantly, culturally.

Preface

Karanga Hokianga,
ki ō tamariki, he uri rātou, he mōrehu
Kohikohia rā,
ki ngā hau e wha;
Kōrerotia,
ko wai rātou.

Te Riu o Hokianga e takoto nei
Ko te Kōhanga o Ngāpuhi nui
I ū mai ngā waka, a Mamari
Ngātokimatawhaorua, ki uta e
Ko Nukutawhiti, ko Ruanui
Ngā tāngata o ngā waka nei
I ū ki Tairutu, Waiarohia
Ka puta ko ngā iwi me ngā hapū.

Niwa, Ārai-te-uru,
Ko te reo tēnei, o ngā ngaru nui
Ngā ngaru hurihanga, hoariri
Ka tū mai Niniwa, Ārai-te-uru,
Kia tō te marino ki roto rā
Tū mai ngā maunga, kei uta e
Iringa kōrero, o ngā tūpuna
I noho te mauri, ki runga rā

He rārangi maunga, tu tonu ra
Tere tai tapu, roto Hoianga,
I awahi rā koe, te whakapono
I pepehatia, I mua ra
Hokianga Whakapau Karakia

Hokianga, call together your
children
They are descendants, remnants of
a great people
Gather them, they are scattered
Tell them who they are.

The valley of Hokianga
The cradle of Ngāpuhi
Here the canoes landed Māmari
and Ngātokimatawhaoroa
Nukutawhiti and Ruanui were the
leaders of these canoes
They landed at Tairutu and
Waiarohia, to give birth to many
Listen to the call of the waves that
put an end to enemies.

Beware of Niniwa and Ārai-te -
uru,
They ensure peace within
The mighty mountains stand aloft
on which were vested
the oratory and prestige of the
ancestors

Mountains never pass away
Ever flows the sacred tides of
Hokianga
You embraced the faith and so of
you the words were spoken

Hokianga so strong in prayer

Kia ora Ngāpuhi Ngāti Whātua
Te Aupouri, Te Rarawa
Me Ngāti Kahu, e rima ngā iwi
Ka huri te rohe o Tai Tokerau

We salute Ngāpuhi, Ngāti Whātua,
Te Aupouri, Te Rarawa and Ngāti
Kahu
The five tribes of the North

Karanga Hokianga
Karanga Hokianga,
ki ō tamariki, he uri rātou, he mōrehu
Kohikohia rā,
ki ngā hau e whā;
Kōrerotia,
ko wai rātou.

Hokianga call out –
to your children, they are
descendants, survivors.
Go collect them, they are dispersed
by the four winds;
Tell them who they are.¹

Ngā kupu: Pa Henare Tate

My tribal links are to Te Mahurehure, Ngāti Pakau, Te Pouka, Ngāti Korokoro, Ngāti Wharara and Te Roroa hapū (sub-tribes) of Ngāpuhi. They are links that are founded on the intimate and ancestral relationships of Ngāpuhi people to the land and the sea, which is the Hokianga. The waiata (song) I have quoted affirms my Ngāpuhi identity and provides context to the formation of my worldview. This waiata acknowledges the dispersal of our people and provides the stipulation for descendants to seek a way of returning home to the Hokianga. Hohepa acknowledges that this waiata originates from an older Ngāpuhi proverb that expresses a similar sentiment.

Takahia te ao, ka kitea te iwi
E tū tangata mai tātou,
Ngā uri o rātou, Kua mene ki te pō.
Walk the universe, and
You will find our people,
Let us stand proudly

¹ Patu Wahanga Hohepa “Karanga Hokianga (Hokianga Calls)” [2010] 2 MAI Rev 1.

Descendants of those
Who have gone to te pō.

For Ngāpuhi, the waiata resonates with the enduring belief and cultural practice of returning the descendants of Ngāpuhi to the place of our origins upon death.² Patu Hohepa describes Ngāpuhi as being karanga maha (multi-related) stating that individuals have the freedom to self-identify as provided by the well-known Ngāpuhi saying ‘Ngāpuhi – kōwhao-rau’ (Ngāpuhi of the hundred holes).³ Hohepa states that these multi-kin relationships and bilateral descent provide Ngāpuhi with wide choices for travel and for living abroad, Hokianga will always be waiting.⁴ My links through whakapapa (genealogy) and whanaungatanga (kinship) assert my ties to my Hokianga communities regardless that my parents navigated pathways that took them away to live and yet brought them back again, often. As a woman of Ngāpuhi descent, a Ngāpuhi woman, I remain grounded in the present while inextricably connected to the past.⁵ Thus, I write this thesis from a Ngāpuhi Woman’s perspective, imbued as it is with a Ngāpuhi world view. It is but one woman’s perspective that seeks to connect with other indigenous women’s views on the positioning of women in tribal governance.

An Expression of Indigeneity

I also write from an indigenous woman’s perspective though I have only recently begun to understand what it means to be or to identify as indigenous. In 2014 I was privileged to receive the Fulbright-Ngā Pae o te Māramatanga Graduate Award which gave me the opportunity to research my PhD in the US for one year. My research objective as a Fulbright scholar was to undertake a comparative study of the participation of Māori and Native American women as tribal leaders and decision-makers. I was particularly interested in interviewing a sample of Native American women of the South-western tribes who have a well-researched history

² At 1.

³ At 1.

⁴ Patu Hohepa “Kerikeri, Tapu, Wahi Tapu” in Judith Binney *Te Kerikeri 1770-1850: The meeting pool* (Bridget Williams Books, Wellington, 2007) at 85.

⁵ At 1.

of grassroots activism, political and tribal leadership.⁶ I was welcomed to Tucson, by the Indigenous Peoples Law and Policy Programme at the University of Arizona, James E. Rogers College of Law where I encountered Native Americans with similar deep connections to their lands, seas and skies and their ancestors. While this resonated with me, moving into another indigenous context was difficult, mainly as my knowledge of Native American issues and Indian law both Federal and traditional, was non-existent. I can recall sitting in my first Federal Indian Law class thinking that the only view I had was borne out of the Sunday matinee movies that I had watched with my father and the Louis L'Amour novels that he loved to read.⁷ Intuitively, I knew that I had to situate myself from my unique place. As Linda T. Smith has commented, I had to find a place to speak from, to connect in an indigenous context concerning our place of origin.⁸ In Tucson Arizona, I realised that my place of origin was/is both spatial and temporal and that whakapapa is the indelible source.

As a city-born Ngāpuhi Māori, I was raised to recognise my parent's rural community in the North as our place of origin or home. In her portrayal of active urban immigrants such as my parents, Metge concludes that they had developed a distinctive and highly abstract sense of home. That, having exercised their 'right of choice' by moving to the city, my parents along with a multitude of Māori from all over Aotearoa (New Zealand), continued to seek participation in gatherings with a Māori 'flavour', even to the extent of paying frequent visits home.⁹ City-based Māori had to evolve their cultural and social practices to suit their changed circumstances as their traditional based Māori communities had been turned on

⁶ See generally: Diane-Michele Prindeville and Teresa Braley Gomez "American Indian women leaders, public policy, and the importance of gender and ethnic identity" (1999) 20 *Women & Politics* 17; Diane-Michele Prindeville "Feminist Nations? A Study of Native American Women in Southwestern Tribal Politics" (2004) 57 *Polit Res Q* 101.

⁷ John D Nesbitt "Change of Purpose in the Novels of Louis L'Amour" (1978) 13 *West Am Lit* 65. An American storyteller at <http://www.louislamour.com/>.

⁸ Linda T. Smith "Researching Across Indigenous Contexts" (International Indigenous Development Research Conference, Auckland, November 2014).

⁹ Joan Metge *A new Maori migration: rural and urban relations in Northern New Zealand* (University of London, Athlone Press ; Melbourne University Press, London: Parkville, Vic, 1964) at 131.

their axes post-WWII.¹⁰ For my parents, the move to Auckland was borne of the need to escape poverty and to find work. As a result, my parents became part of the diaspora, the internal urban migrants. Regardless of this internal exodus from the North, whānau (family) and kinship ties endured and tikanga (custom) evolved out of necessity. Their Ngāpuhi worldview remained intact. By contrast, with Metge, Hone Sadler reminds us that the Ngāpuhi world view is reflected in the construct of the House of Puhi:

Ko te te tirohanga o Ngāpuhi ki tōna ao, koia tēnei e kōpani mai i Te whare o Puhi. Ko te toka tapu o Puhi kei Tamaki. Ko te toka Tamahaere kei te raki. E mea ana te korero a ō tupuna: ko Te Rohe Pōtae o Ngāpuhi-nui-tonu mai i Tamaki ki te Rerenga Wairu, me ōna iwi katoa ko Ngāpuhi-nui-tonu. E rima ngā iwi i puta i a Waimirirangi ko Ngāpuhi, ko Te Rarawa, ko Ngati Whātua, ko Ngāti Kahu, ko Te Aupouri. Koia tēnei ko Te Whare o Puhi.¹¹

The worldview of Ngāpuhi is encapsulated in the construct of the House of Puhi. The sacred rock of Puhi lies in Auckland, and the rock of Tamahaere is in the north. According to our ancestors, the Enclosing Boundary of Ngāpuhi-nui-tonu is from Auckland to Te Rerenga Wairua inclusive of its iwi making up Ngāpuhi-nui-tonu. Five iwi came from Waimirirangi: Ngāpuhi, Te Rarawa, Ngāti Whatua, Ngati Kahu and Te Aupouri. This is the House of Puhi.

For some Ngāpuhi migrants like my parents, moving to Auckland only meant moving to the outer boundaries of their ancestral land. The social and cultural contexts did change for them but not to the extent that they became bereft and

¹⁰ See Ranginui Walker *Struggle without end. Ka whawhai tonu matou* (Penguin, Auckland, NZ, 1990). In the decade before the second World War, 90 per cent of the Māori population was rural. The war acted as a catalyst by stimulating people to abandon rural poverty, and sell their labour for wages in the factories of the urban mileu. At the next census it had risen by 24 per cent. The rural tribal hinterlands were being depopulated at a rate of 1 per cent, or 1,600 people per annum. See also Joan Metge “The Maori Population of Northern New Zealand” (1952) 8 *New Zealand Geographer* 104. The pursuit of economic posterity resulted in a manufacturing boom in the chief towns and cities. Coupled with Land development policies which promoted the dispersal of rural settlements, Māori movement into urban centres grew substantially as they exchanged labour for wages.

¹¹ Hone Sadler *Ko tautoro, te pito o tōku ao: a Ngāpuhi narrative* (Auckland University Press, Auckland, 2014).

disconnected as some have suggested.¹²

In recent times, the term ‘Urban Māori’ has become synonymous with disconnection from tribal homelands and the loss of cultural identity. It forms a dominant contemporary narrative that has been generalised to include my parent’s generation who never ‘lost’ their language or culture. Furthermore, as discussed above, these internal migrants never left their tribal lands. On the contrary, they worked hard to sustain their home marae (community complex) and communities with frequent fundraising efforts and the provision of financial support for whānau that remained at home, the haukāinga (home people). At the same time, they also sought to re-establish their kinship-based communities in the towns and cities. As a city born Māori, my identity with home was strongly instilled as it was with the other children of the Eastern suburbs of Auckland. I grew up in a state housing development of mixed-race, working-class people, Māori, Pacific Islands and Pākehā. The Māori families were mostly from the North. We knew the families, could also name their home marae and moved easily within each other’s homes. Our homes were open in the sense that whānau members often came to stay, some in transit, others arriving from the north and looking for work. I never witnessed real poverty, although one or two of my friend’s homes were noticeably bare of furniture and their parents were often at the pub. Our state house was a huge improvement on the rural and overcrowded living conditions that my parents and their siblings had left.¹³ To this day, I have never been able to identify with any certainty where either of them had grown up. My Mother would only ever say that their upbringing was hard. From conversations that I have had with my Father’s first cousins, I can only ascertain that he and his siblings were whangai (adopted) from a very early age as their Mother had died and their father remarried. My father never spoke of his childhood and when once as a twelve-year-old I had pushed him to tell me where he grew up; he mentioned a little shack in Te Karae, North Hokianga but would not be drawn on any further details. Notwithstanding that, my

¹² See generally: Waitangi Tribunal *Te Whanau o Waipereira Report, Wai 414* (414 Waitangi Tribunal 1998); Metge, above n 9; Paul Meredith “Urban Māori as ‘New Citizens’: The quest for Recognition and Resources” (paper presented to Revisioning Citizenship in New Zealand Conference, University of Waikato, 22 February 2000).

¹³ In Walker, above n 10, at 38, Walker refers to those who were ‘city born’ children of those first internal migrants that grew up in a world different from their parents who he describes as “culturally cut-off and disorganised.”

recollection of these stories is sketchy, history can attest to the dire economic, social and cultural conditions that would have contributed to the seemingly abysmal social conditions that my parents would have endured as children.

Tikanga Māori

I experienced a hybrid of Tikanga Māori (custom and practice) that was adapted to suit modern urban life. Metge & Walker comment on the freedom that opened up for Māori internal migrants like my parents and their extended families - “Freedom from poverty, insecurity and economic hardship Also, from the authority of parents, elders and traditional ways of doing things. Freedom for self-determination.”¹⁴

This connection was strikingly evident in the way rituals around death and mourning were observed, according to Tikanga Māori. I have vivid memories of the many tangihanga (funeral) that I attended with my parents. The practice was to transport the deceased person back to their birthplace in the North, Te Tai Tokerau. Old yellow buses, filled with cigarette smoke and often crates of beer, would transport us through the night to return a deceased relative to their final resting place. In those days the practice was to have the body prepared in Auckland and to spend the first night at their house while preparations were made at their home marae to receive them. Tikanga Ngāpuhi (customary practices of Ngāpuhi) were always observed on these occasions. Te reo Māori was spoken, and whānau would converge on the home of the deceased. Mattresses would replace lounge room furniture, and a marquee would invariably be erected in the back yard to provide outdoor cooking and dining facilities. Kai (food) was prepared in kerosene cans on open fires and a makeshift lean-to hastily erected in suburban backyards.

In keeping with the waiata at the beginning of this chapter, my hapū of Te Mahurehure in Waima, hold to a tradition of returning our deceased relatives to our kainga tūturu (original home) for burial. It was often a costly exercise that required a great financial commitment from all the relatives of the deceased, but travel we did. It was my father’s and my uncle’s role to fulfil this expectation as required of

¹⁴ Metge, above n 9, at 128.

our customs. On arrival at our marae, after a 6-hour journey, we would observe the formalities of welcome. For Ngāpuhi, that meant arrival in the nighttime hours still warranted a welcome if not a full-blown pōwhiri (traditional welcome). It was left to the men to lead the ope (group) on while the kuia (elder women) would wail, an expected reflection of the groups collective grieving. Gathered behind the tūpāpaku (deceased person), we would all crowd into the wharenuī (meeting house), the children travel-weary and bleary-eyed. Speeches would follow, and as children, we learned to sleep at the foot of our mothers and grandmothers mattresses, lights blazing, hungry, listening to the korero (discussions) long into the night.

Whānau

My parents worked in the same factories all of their lives. Socially they were pub-goers, the local becoming the gathering place for whānau and friends. There was a division of sorts that saw the Māori returned servicemen socialising at the RSA while the Ngāpuhi lot drank at the pub on the other side of town. It meant that you would have two lots of kids sitting in the carpark waiting for their parents to drink that ‘one last jug’ and having the occasional rumble at the takeaway bar in the middle of town. They had moved to Auckland in the 1950s and would have been in their early twenties and already had a young son, my brother Te Whata whom they had left in Pakanae, Hokianga with our grandfather. I do not know much about their early life on arrival in Mt. Wellington, Auckland but can recall that in February 1997, a Chinese whānau visiting my Mother in hospital shortly before her passing. I was shocked to hear this Chinese gentleman whom I had never met, speak Māori gently to my Mother as he embraced her. I was even more shocked when she responded with a flicker of recognition and tears welled up in her eyes. My mother had told me that at the time of their arrival in Auckland there was already a thriving Chinese community with established businesses, including market gardens. My parents and many other Māori whānau had sought work and accommodation on these gardens. They had lived in a makeshift hut and worked on his family gardens in Mt Wellington while my father sought work. That would explain my Mother’s preference for always buying fresh vegetables from the ‘Hainamana’ (Chinese person). It is a disturbing illustration however of how Māori had become so thoroughly dispossessed of their economic base, lands, and social institutions that they were reliant on other ethnic immigrants to New Zealand for work.

While the economic and social realities of home had driven my parents to seek a better life in Auckland city, a life that improved significantly with long-term factory employment and good wages, they willingly became part of the potpourri of the working class. The Post WWII global economic boom resulted in the expansion of the manufacturing sector and the creation of jobs for which Māori abandoned their poverty-stricken rural lifestyles for work, money and pleasure.¹⁵ Auckland was the primary destination for Northern Māori. It was close enough to home and offered a wide range of both skilled and unskilled occupations. The factories, freezing works and Port were prime destinations. For many whānau, it was also attractive as a neutral ground with less social constraints and accountability as Metge comments: “Enjoyment of goods both material and immaterial of modern life. There were attractive social aspects of both the legal and illegal variety.”¹⁶

Growing up, I was blissfully unaware of the struggle out of poverty experienced by my parents and members of my extended Ngāpuhi whānau as we took on the trappings of a modern yet working-class urban life. We would have huge whānau gatherings for weddings birthdays and tangihanga (funerals). Trips to the beach and large picnics were commonplace. My whānau, like many others, continued to live as communally as they possibly could. Urban marae like gathering places sprang up, the local pubs were well patronised, and whānau committees kept the fundraising efforts for the haukāinga going. Theirs was an inherited hardship insidiously generated by the onslaught of colonial vehicles of power and domination. We grew up away from our Northland roots, like many of our generations, but we always knew our connections, especially to our hapū. It was a given that we would often travel to fundraising events, whānau gatherings and hapū committee meetings with our parents. As the youngest, I was always at my Mother’s side, so from an early age, I understood that the journey home to the Hokianga was part of our make-up, more often than not for tangihanga. It was a vibrant and exciting time for Māori in the 1960s as I recall. Work was abundant, in the factories like the Woollen Mills, the freezing works or on the wharf. Auckland city in the late 60s and into the 70s was animated with a Māori community that was active,

¹⁵ Walker, above n 10 at 198.

¹⁶ Metge, above n 9, at 198.

vibrant and optimistic. Those were better times for my parent's generation.

'Not One More Acre'¹⁷

My parents were the residue of intergenerational trauma that had its origins in the events surrounding the 1840 signing of Te Tiriti o Waitangi. They were left culturally, socially and economically bereft. Three generations before them had suffered the dispossession of land, by the imposition of government legislation that sought to assimilate them into a western-based society that undervalued their social, cultural, religious and economic institutions.¹⁸ Significantly, my parents and their generation still had their language although it was hugely undervalued and relegated mostly to domestic use. As a result, many Māori children failed to learn their ancestral language, and generations of non-reo speaking Māori emerged.

I had become increasingly politicised when as a fifteen year-old, I joined the Matakite Māori Land March led by Whina Cooper. The cost of Māori land ownership had become a significant issue for city-based Māori who sought to lessen the burden of unpaid rates by selling land or walking away from communally owned blocks that were mostly unproductive. My parents often argued about their land interests back in the Hokianga. The arguments were about whether they should sell or gift my Dad's land to whānau members who remained at home and wanted to farm some of it. I can recall seeing demands for rates payments on our kitchen table and the raised voices indicating the difficulties my parents were experiencing in meeting the payments. By 1975 the situation with my father's land had become dire, and he had either sold or gifted a good amount of it. My father gifted some of his lands to his northern-based relatives in the belief that he had no use for it living and working in the city. Other portions remain to this day, unproductive because of their size, inaccessibility and the burden of multiple owners. I became interested in land and governance issues when I realised that very little support was available to

¹⁷ See Aroha Harris *Hikoi: Forty Years of Maori Protest* (University of Hawaii Press, Wellington, 2006) at 31.

¹⁸Hon H Sewell, NZPD Vol 9, 1870: 361 cited in: Anne Mikaere "Maori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 Waikato L Rev 125 at 133, discusses the twin aims of the Native Land Court under the Native Land Act of 1865 were to (i) destroy the principle of Māori collectivism and (ii) provide access to Māori land for settlement.

them to effectively deal with the ownership obligations that had been thrust upon them through those original machinations of the Native Land Court and ensuing Māori land regulations and policies.

Why this topic

My PhD topic grew out of a desire to understand the extent to which Māori women have been able to influence Māori aspirations for self-determination. I chose tribal governance as the vehicle for my research because Māori women have traditionally been active influencers and decision-makers in the private and domestic spheres. In my lifetime, very few Māori women have been visibly at the forefront of Māori development as Māori political or tribal leaders. My interest in Māori women's role in governance and leadership stem from my experience of seeing strong Māori women in the home, on the marae and in the classroom, shaping the lives of a generation of Māori children in subtle yet indelible ways. In my experience, men like my father and uncles had very little to do with raising children.

Summary

My father rests in Pakanae urupā (cemetery), at the foot of Whiria maunga (ancestral mountain), the ancient home of the eponymous ancestor of Ngāpuhi, Rāhiri. My mother lies in Whaengenge urupā, next to Moehau marae in her beloved Waima valley. During the writing of this, I have laid my sister to rest next to my father, and more recently, my brother now lies with my mother. I too will return to the Hokianga that has been arranged. My sister draws me home; my sister would want me to finish this thesis. My sister is the catalyst for this kaupapa. We took for granted our tātai(ancestry line) to the North. We have no Pākehā heritage. No direct lineage to an English ancestor. No other waka (allied kinship group). We hail from Kupe and Toi (original ancestors). A simple and yet complicated whakapapa (genealogy) that situates us squarely in our Hokianga homeland. Our birthright no less.

Karanga Hokianga...

Acknowledgements

Me mihi ka tika ki ngā ringa ohaoha i tautokona mai ki te rau o te pūtea. Ko Te Mata Hautu Taketake tēnā mō te karahipi o te Māori and Indigenous Governance Centre PhD, ko Ngā Pae o te Māramatanga tēnā mō te whakawhiwhinga Fulbright nō te tau e rua mano tekau mā whā, ko Te Rūnanga o Ngāpuhi hoki tēnā mō ngā karahipi tohu paerua me te karahipi tohu kairangi. Tēnei au e whakamānawa atu ana ki a koutou katoa. ‘Mā ngā huruhuru ka rere te manu’.

Ki aku amo tītoki o te matauranga o MAI ki Waikato, ki aku kaiārahi, ki aku hoataura o te tohu kairangi me aku hoamahi. Tēnā koutou i ō koutou taupua kiriūka mai i runga i tēnei hīkoi.

Ki taku pae whakahaere, ko Dr Leonie Pihama kourua ko Dr Robert Joseph tēnā kourua mō tō kourua whakapono mai ki ahau.

E hiahia hoki ana ahau ki te mihi ki a Dr Melissa Tatum o te Whare Wānanga o Arizona me te James E. Rogers College of Law. Nā rātou i whakamana taku karahipi Fulbright i a au e manaakihia ana e te rōpū Indigenous Peoples Law and Policy me tā rātou pōwhiri mai kia whai wāhi atu au i te hui taumata mō te rangahautanga o te ao e pā ana ki te kaupapa o ‘Spaces of Indigenous Justice’. E whakawhetai tonu ana ki a Melissa hāunga i tana karahipi engari mō tana tohutohu mai ki ahau ki te whakauru atu i te NNI Mana Whakahaere Putu Raraunga mō ngā kōrero a ngā rangatira wāhine o ngā iwi taketake. Ka homai ō rātou māramatanga e pā ana ki te mana whakahaere o te iwi me te rangatiratanga a ngā iwi taketake he tirohanga whakahāngai kāmehameha ki te whakawhanaketanga o te ariā ‘Mana Wahine’ hei kohinga Iwi Taketake o te mātauranga wāhine me te ariā. Ka mihi hoki ki a Miriam Jorgensen rāua ko Stephen Cornell o te Native Nations Institute (NNI) kei te Whare Wānanga o Arizona mō tā rāua taunaki mai. Tēnā hoki kourua, oti rā ki a koutou katoa.

Aku mihi maioha ki ngā māreikura Māori me ngā māreikura o ngā iwi taketake o Amerika i takoha mai ō koutou ngākau me ō koutou whakaaro ki tēnei kaupapa o tātou. ‘He aroaro wahine, he ara mahana’.

Me toro atu te ngākau o aku mihi ki a Dr Joeliee Seed-Pihama nāna ahau i āta tautāwhi mai, i whakamau kia ita hoki i runga i tēnei haerenga tae noa atu ki ēnei rangi tonu nei. Tēnā rawa atu koe e te hoa ki te mate.

Me whai wā anō ki te whakanui i tētahi o ngā tino toki o tēnei kaupapa. Taea kē te rahi o tēnei huarahi kua parangia e ia. Ko ia tonu e whati ana i ngā ngaru hukahuka o te poautinitini. Ko Te Āti Awa o runga o te rangi. E te uua parāoa, te kahurangi Dr Leonie Pihama mā te aha i te mihi i tō manawa kai roke ki tēnei kaupapa o te Mana Wahine.

Ka huri ōku whakaaro ki a koutou ko Sue, ko Mick, ko Ginny, ko Whata. He rite tonu tā koutou taupuhipuhi ki to koutou kōtiro me tō koutou manawanui mai ki ōna pūmanawa. Tae noa atu ki aku tamariki me aku mokopuna, mēnā ka mōhio, ka mōhio. Mā te ao tēnei kōrero, engari mō koutou kē te take. Mā Puhimoanariki hei mau i a tātou.

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Chapter 1 - Introduction

Our people will not heal and rise toward becoming self-governing and strong people both in spirit and in vision until the women rise and give direction and support to our leaders. That time is now; the women are actively participating in ensuring the empowerment of their people.¹⁹

NONOGOM IKKWE (Native Women of Canada of South East Region, Manitoba)

This research investigates the question “How can indigenous women reinvigorate their role in tribal governance structures when many such structures continue to reinforce gendered colonial constructs within which women are marginalised?” Modern tribal governance structures are a site of cultural identity, but when few women are represented in positions of power within those structures, one questions why this situation continues.

Chapter one begins with a quote from a group of First Nations aboriginal women who sought, before the 2000 Royal Commission on Aboriginal Peoples, to present their concerns at the on-going paucity of women in self-government. These words succinctly articulate the collective experience of indigenous women and their desire for active participation in self-government. The report from the Commission commences with the statement:²⁰

With the onset of colonisation, the position and role of Aboriginal women were undermined by imported ideas and values that displaced and devalued them: Before colonisation, Aboriginal peoples had social and political organisations with distinct social classes, which ranged from simpler structures to highly complex systems of social order, social control in governments. Every individual filled a particular role and held a specific purpose within the community; life unfolded with much harmony. Since

¹⁹ Royal Commission on Aboriginal Peoples *Report of the Royal Commission on Aboriginal Peoples: Volume 4-Perspectives and Realities* (Indian and Northern Affairs Canada, 2000) at 8.

²⁰ At 8.

European contact, our traditions, dignity and self-respect have been systematically taken away from us.

In Aotearoa (New Zealand) before the signing of the Treaty of Waitangi in 1840, Māori women were considered politically influential and essential tribal leaders. Many of these women are identified in the publication *The People of Many Peaks* (1991) that contains the biographies of Māori women from many different iwi (tribes).²¹

In contrast, the 2015 Te Puni Kōkiri directory and database of Māori organisations, *Te Kāhui Māngai*, names a mere 28 Māori women as Chairpersons from a total of 150 organisations.²² *Te Kāhui Māngai*, as a directory, specifically identifies individuals and organisations from iwi/hapū that are or have engaged in the treaty settlement process of negotiating historical Treaty of Waitangi claims in relation to the Māori Fisheries Act 2004. Given that the database appears to require updating, the number is only indicative of the participation of Māori women at that level of Māori governance and tribal leadership. There is no indication of the number of Māori women who are CEOs or in senior executive leadership roles within these organisations. Additionally, the Ministry of Women's Affairs collects data for a governance database through their Nominations service. However, that information is not disaggregated by ethnicity or organisation.²³

In a 2013 study of Māori women CEO's, Reynolds highlighted the lack of modern literature focussed on Māori women in executive leadership such as the role of CEO.²⁴ Her research examined the experiences of five Māori women CEOs from Māori organisations and identified that Māori women are disproportionately represented at that level. Furthermore, Reynolds argued that the lack of context-

²¹ Claudia Orange *The People of Many Peaks 1769-1869* (Bridget Williams Books and Department of Internal Affairs, Wellington, 1991) cited in Annabel Mikaere *The Balance Destroyed* (Ōtaki Aotearoa: Te Tākupu, Te Wananga o Raukawa, 2017) at 68.

²² Te Puni Kōkiri, Ministry of Māori Development, <http://www.tkm.govt.nz/>.

²³ Similalry, statistics for Native American women illustrate a paucity of women in tribal leadership. The National Congress of American Indians' (NCAI) website lists 598 tribes with approximately 120 elected female tribal leaders women leaders or 20 per cent. See NCAI Policy Research Center "A Spotlight on Native Women & Girls" (May 2015) < www.ncai.org >.

²⁴ Awhimai Reynolds *Māori Women CEOs A glimpse of the future?* (University of Waikato, Major Research Project 2013).

specific empirical research examining the CEO role has resulted in knowledge gaps about the barriers that exist for women in attaining senior leadership roles in Māori tribal governance.

While these are not the only areas within which Māori women are known to have influence, the numbers remain small and as this thesis contends, traditional tribal practices concerning Māori women's positioning in leadership have been greatly diminished.

The traditional status of Māori women has been negatively impacted by the process of colonisation. The marginalisation of indigenous women has been central to the colonisation process through the imposition of discursively destructive western and Christian values.²⁵ Through the powerful influence of regulatory and policy regimes of western law, religion and education, indigenous women have been deemed non-legal and invisible. In Aotearoa (New Zealand), the machinations of the Native Land Court set up by the Native Lands Acts of 1862 and 1865 engineered the individualisation of land title and ultimately, the dispossession of Māori women from land ownership.²⁶ According to Johnston, the Native Land Court was established by and consisted exclusively of European men with little consideration for the fact that Māori customary land had always been communally (whanau, hapū

²⁵ Judith Binney and Gillian Chaplin *The survivors - Ngā Mōrehu* (Auckland University Press, Auckland, 1996) at 26. For a discussion on changing gender roles in other Indigenous contexts see Mona Etienne and Eleanor Burke Leacock *Women and colonization* (Praeger, New York, 1980); Laura F Klein and Lillian A Ackerman *Women and Power in Native North America* (University of Oklahoma Press, 2000); Eleanor Burke Leacock *Myths of male dominance* (Monthly Review Press, New York, 1981); Bruce G Miller "Contemporary Tribal Codes and Gender Issues" (1994) 18(2) *Am Indian Cult Res J* 43 at 43; Patricia Monture-Angus "Standing against Canadian law: Naming omissions of race, culture and gender" (1998) 2 *Yearbook of New Zealand Jurisprudence* at 7; Patricia Monture-Angus and Mary Ellen Turpel *Thunder in my soul* (Fernwood Publishing, Halifax, Nova Scotia, 1995); Karen Vieira Powers *Women in the Crucible of Conquest: The Gendered Genesis of Spanish American Society, 1500-1600* (UNM Press, 2005); Rina Swentzell "Testimony of a Santa Clara Woman" (2004) 14 *Kan J.L. & Pub. Pol'y* 97; Renée Jacobs "Iroquois Great Law of Peace and the United States Constitution: How the Founding Fathers Ignored the Clan Mothers" (1991) 16 *Am Indian Law Rev* 497.

²⁶ Native Lands Act of 1862-1873. For example, in 1873 the Native Land Act was amended to require husbands to be 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.

and iwi) owned by both men and women.²⁷ The Native Land Court sought to individualise title of land, a mechanism which guaranteed the wholesale sale of Māori land.²⁸ Ballara states that from 1865 onwards, “Māori land tenure with respect to women was progressively undermined.” By 1900, Māori owned less than 10% of land under customary title.²⁹

Similarly, in 1951, the Canadian Government amended the Indian Act 1876, section 12(1)(b) stating that, “a woman who married a person who is not an Indian... [is] not entitled to be registered” and therefore acquired the status of non-status.³⁰ Aboriginal women therefore were subjected to having to identify with the status of either their father or their spouse and, as such, lost legal status in their own right. Without status they were unable to receive Treaty benefits, they lost rights to land ownership and development, and were unable to take part in traditional ceremonies. Indian men however, who married non-Indian women were not subjected to these conditions. Section 12 was removed in 1985 through the introduction of Bill C-31, but the damage had already been done.³¹ By the same token, Native American women experienced the denial of their property rights through the implementation of the Dawes Allotment Act 1887 whereby collectively owned land was allotted to the male heads of families which, by implication, cast women as inferior and domestic.³² It was through these legislative mechanisms that gendered western views were imposed on indigenous women – mechanisms which negatively impacted their authority and political influence. While the examples illustrated here are brief and specific to particular countries, land legislation was the principle

²⁷ Kerensa Johnston “Māori women confront discrimination: using international human rights law to challenge discriminatory practices” (2005) *Indigenous L.J* 19 at 42.

²⁸ Patu Hohepa and David Williams *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession: A Working Paper* (Wellington: New Zealand Law Commission, 1996) at 98.

²⁹ Angela Ballara “Wahine Rangatira – Māori women of rank and their role in the Women’s Kotahitanga Movement of the 1890s” (1993) 27(2) *NZ.Jnl. Hist* 127 at 134.

³⁰ Indian Act R.S.C 1951, s 12 (1) (b).

³¹ Megan Furi and Jill Wherrett “Indian status and band membership issues” (2003)

< www.lop.parl.ca >

³² See Allison M Dussias “Sqaw Drudges, Farm Wives, and the Dann Sisters’ Last Stand: American Indian Women’s Resistance to Domestication and the Denial of their Property Rights” (1999) 77(2) *N C Law Rev* 638.

colonial instrument for both taking land for settlement and pursuing the assimilation agenda.

Research Aim

I situate this research at the intersection of indigenous development and self-determination where the potential lies for Treaty settlements that would enable indigenous peoples to pursue their own development agendas. Importantly, this research aims to synergise indigenous women's shared knowledge with the reinvigoration of traditional tribal governance structures. The goal is to establish a body of knowledge that gives strength to indigenous women's collective experience of governance from which normative propositions of indigenous governance based on western concepts can be examined, challenged and potentially transformed.

I argue that Kaupapa Māori theory and practice has the potential to decolonise indigenous tribal governance by reasserting the self-determination of indigenous women who hold aspirations for self-determination and justice for their peoples, tribe, whānau, hapū and iwi.

Increasingly social scientists, academics and researchers, both indigenous and non-indigenous, are examining the leadership of women in grassroots organisations to learn their motives, goals and strategies for tribal and political leadership.³³ This work integrates the issues of gender, race and class with research on and about women's politics. Additionally, there is a growing body of research in this field that is being conducted on Native American and Hispanic women.³⁴

In the field of Māori women's leadership and governance, there is also a growing body of literature and research that acknowledges indigenous women's diverse practices as well as their commonalities. "*Karanga mai ra, te piringa ki te hapai*

³³ Diane-Michele Prindeville "Feminist Nations? A Study of Native American Women in Southwestern Tribal Politics" (2004) 57(1) Polit Res Quart at 101; Diane-Michele Prindeville "Identity and the Politics of American Indian and Hispanic Women Leaders" (2003) 17(4) Gend Soc at 591; Carenlee Barkdull "Exploring Intersections of Identity With Native American Women Leaders" (2009) 24(2) Affilia J Wom Soc Wo at 120.

³⁴ Diane-Michele Prindeville "A comparative study of Native American and Hispanic women in grassroots and electoral politics" (2002) 23 Frontiers 67.

ake i te mana wahine e!”, translates as “Heed our call to join together and acknowledge the power and authority of Māori women”.³⁵ Through the methodology of pūrākau (storytelling), Forster and others examine Māori women’s experiences of both individual and collective leadership. Derived from a diverse range of sectors including environmental sustainability, sports and employment law, the often silenced realities of women in positions of influence are promoted in the form of a challenge to dominant leadership discourses. Fundamental to this research is the notion of well-being (*mauri ora*) within an ethic of care framework:³⁶

Together people create *mauri ora* which is the wellspring of unfolding well-being. In such a world, a person liberates not only himself or herself, or someone else, but people ‘in communion liberate each other’³⁷ from the hegemonic, ossified and habituated spaces of industrial *Flatlands* by transforming them, in a relationship of belonging to each other and the world. It is a journey of unfolding interconnectedness and unity, a journey toward multi-dimensional well-being and a sustainable world. For Māori, this is *Te Ao Mārama*, the world of enlightenment.

While the research discussed above focussed on Māori business, the study illustrates how Māori values can “take an expansive and holistic view... creating multi-dimensional well-being and health”.³⁸ The revitalisation of wealth for whānau, hapū and iwi has become central to contemporary tribal Māori leadership, especially in the Treaty settlement era. Alongside leadership, governance is viewed increasingly as being essential for Māori and iwi organisations. Penehira and others identified in a 2003 review of governance literature, the important elements of Kaupapa Māori governance in both its indigenous and non-indigenous application.³⁹ The report remarks that “First Nation models are closer to the

³⁵ Margaret Edith Forster, Farah Palmer, Shirley Barnett, Rachel Wolfgramm, Chellie Spiller and Cora Voyageur “Karanga mai ra: Stories of Māori women as leaders” (2016) 12 (3) Leadership at 324.

³⁶ At 166.

³⁷ Paolo Friere *Pedagogy of the Oppressed* (Herder and Herder, New York, 1970) at 130.

³⁸ At 166.

³⁹ Mera Penehira, Fiona Cram and Katarina Pipi *Kaupapa Māori governance: Literature review and key informant interviews* (Katoa Ltd, Wellington, 2003) at 4.

Kaupapa Māori principle of *tino rangatiratanga*.⁴⁰ Notably, the 1996 Canadian *Report of the Royal Commission on Aboriginal Peoples* describes a number of attributes of traditional aboriginal governance regarding the importance of aboriginal women to traditional governance:⁴¹

The role of women: In many Aboriginal societies, women's roles were significantly different from those of men in governance. According to the commission, women must play a central role in the development of self-governing entities.

Moreover, literature sourced from the Institute on Governance (IOG), Ottawa Canada, and the Harvard Project on American Indian Economic Development highlighted significant developments in Canadian constitutional reform and American Indian (re)establishment of tribal self-governance.⁴² Penehira and others concur with the significant observation that Kaupapa Māori governance must be understood within the context in which Māori do not exercise sovereignty. This thesis discusses sovereignty in relation to the Kaupapa Māori project of decolonisation and the assumption of the principle of *tino rangatiratanga* in relation to the pursuit of self-determination.

Furthermore, researchers tend to focus their studies on skills and attributes of women and Māori women in leadership roles in society, rather than on exploring the underlying reasons why Māori women are no longer at the forefront of iwi decision-making. In her thesis 'The balance destroyed' Mikaere provides a critical examination and analysis of the dominant thinking in engagement with Māori in general, and with Māori women in particular.⁴³ She argues that colonial ideologies have constructed discourses around Māori women that have contributed significantly to the denial of certain roles and status. Pre-colonial values, beliefs and practices (tikanga Māori), were corrupted by ideologies of race, class and gender that marginalised Māori women and redefined their roles and statuses in line with

⁴⁰ At 9.

⁴¹ At 13, n 58 as cited in Timothy Plumptre and John Graham *Governance and Good Governance: International and Aboriginal Perspectives* (1999) Ottawa, Canada: Institute on Governance. (downloaded from <http://www.iog.ca/view>).

⁴² At 14.

⁴³ Mikaere above at n 21.

colonial thinking, thus devastating a complex yet balanced social system. While I agree wholeheartedly with Mikaere, I am cautious in pursuing an idealistic conception of what that balance may or may not have looked like. Not only do I risk being viewed as essentialist but also romantic notions of pre-European times are not useful in dealing with the immediate issues confronting Māori.

Comparative Intent

Comparative indigenous rights studies illustrate that the contemporary socio-political condition of indigenous peoples of the principal common law jurisdictions of Aotearoa (New Zealand), Canada, the United States and Australia attest to a shared legacy of colonialism underscored by Euro-centric value systems and the European derived social and cultural practices of colonising governments.⁴⁴ The comparative intent of this research is to consider the similarities and differences of indigenous women's experiences of colonialism and colonisation, and how these experiences have impacted their status as tribal decision-makers and leaders. The value of this thesis lies in its comparative approach and an undertaking to find synergy's from which indigenous women can develop a collective perspective about indigenous governance and their positioning within it. By undertaking this research, it is hoped that further collective dialogue can occur to find practical ways to address the destructive effects that colonialism and colonisation has had on indigenous gender relations.

Firstly, the thesis will account for the historical relationships between Māori, First Nations peoples, aboriginal peoples, Native American/American Indians and their respective colonising governments, which bear striking similarities in terms of the subjugation of indigenous women through colonisation. Moreover, the

⁴⁴ See generally Paul Havemann *Indigenous peoples' rights in Australia, Canada and New Zealand* (Oxford University Press, Auckland, 1999); Richardson Benjamin, Shin Imai and Kent McNeil *Indigenous peoples and the law: comparative and critical perspectives* (Hart Publishing, Portland Oregon, 2009); Augie Fleras and Jean Leonard Elliott *The "nations within": aboriginal-state relations in Canada, the United States, and New Zealand* (Oxford University Press, Toronto, 1992); Ruth Thompson *The Rights of Indigenous peoples in international law: selected essays on self-determination* (University of Saskatchewan, Saskatoon, 1987); Louis Knafla and Haijo Westra *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (UBC Press, Vancouver, 2011); Siegfried Wiessner "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis" (1999) 12 Harv. Hum. Rts. J., at 57.

contemporary socio-political condition of indigenous peoples with respect to the principal common law jurisdictions of Aotearoa (New Zealand), Canada, the United States and Australia attest are considered in terms of the shared legacy of colonialism, which is underscored by Euro-centric value systems, and European derived social and cultural practices of colonising governments.

From this broad historical context, the thesis narrows its view to examine commonalities and differences in relation to Māori and Native American women's experiences of tribal governance as tribal leaders and women of cultural significance and influence. In Chapter Six the thesis changes tack to examine common themes arising from the interviews of Native American women and Māori women in tribal governance roles undertaken during my Fulbright scholar experience to the University of Arizona, Tucson Arizona. Narrowing the focus of the research allowed me to analyse in more detail beneficial comparisons of what worked for women tribal leaders under the auspices of the largely successful Native Nations Institute, the Indigenous Governance Programme, in comparison to Māori women in tribal governance in Aotearoa (New Zealand). Importantly, this research aims to synergise indigenous women's shared knowledge with the reinvigoration of traditional tribal governance structures. The goal being to establish a body of knowledge that gives strength to indigenous women's collective experience of governance from which normative propositions of indigenous governance, based on western concepts, can be examined, challenged and potentially transformed.

Mana Wahine Theory

I use a Mana Wahine (Māori women's) theoretical framework to analyse the complex ways that intersecting discourses of colonialism, race, gender and power continue to marginalise indigenous women within tribal governance.⁴⁵ Mana

⁴⁵ Leonie Pihama "Tīhei mauri ora : honouring our voices : mana wahine as a kaupapa Māori : theoretical framework" (Doctoral Dissertation – Education, University of Auckland, 2001); See also Ngahua Te Awekotuku *Mana wahine Maori* (New Women's Press, Auckland, 1991); Linda Tuhiwai Smith "Māori Women: Discourses, projects and Mana Wahine" in *Women and education in Aotearoa* (2nd ed, Bridget Williams Books, Wellington, NZ, 1992) and Naomi Simmonds "Tū te turuturu nō Hine-te-iwaiwa: Mana wahine geographies of birth in Aotearoa New Zealand" (Doctoral Dissertation, University of Waikato, 2014).

Wahine theory is derived from Kaupapa Māori methodology, a Māori theoretical approach to research.⁴⁶ Pihama describes Mana Wahine theory as a “theoretical framework that provides for a Kaupapa Māori analysis that focuses on issues that directly impact Māori women”.⁴⁷ Pihama’s critical analysis of the marginalisation of Māori women through gendered colonial processes and ideology provides the bedrock from which further research has developed.⁴⁸ Hutchings takes a Mana Wahine approach to address the theft of indigenous knowledge through genetic modification and other disempowering technologies.⁴⁹ Simmonds examines Mana Wahine subjectivities in relation to Māori women’s geographies and childbirth.⁵⁰ The development of Mana Wahine theory is on-going as other scholars interrogate western theories that fail to understand or explain Māori women’s subjectivities. This exploration includes how fundamental beliefs and values held about the roles and importance of indigenous women in traditional and contemporary tribal societies are deliberately manipulated to marginalise women.⁵¹ In addition, the process of neoliberalism that gave birth to patriarchal capitalism is held responsible for continuing the oppression of indigenous women.⁵² Both these levels of inquiry are explored in relation to a third contradiction, which refers to the worsening status of indigenous women in the context of the conflict between indigenous legal traditions and the role of colonial law, and at a time when conciliatory indigenous principles have been incorporated into the legal systems of settler nation states.⁵³

⁴⁶ Pihama, above n 45; Simmonds, above n 45; Te Awekotuku above n 45. See also Huia Tomlins Jahnke “Towards a theory of mana wahine” (2013) 3 He Pukenga Korero and Jessica Hutchings “Te whakaruruhau, te ukaipo” (Doctoral Dissertation, Victoria University of Wellington, 2002).

⁴⁷ At 230.

⁴⁸ At 230.

⁴⁹ Hutchings, above n 46, at 2.

⁵⁰ Simmonds, above n 45, at 1.

⁵¹ Pihama, above n 45, at 18.

⁵² Rauna Kuokkanen, “From Indigenous economies to market-based self-governance: A feminist political economy analysis” (2011) 44(2) Canadian Journal of Political Science/Revue canadienne de science politique 275-297.

⁵³ Noel Cox “The Treaty of Waitangi and the Relationship Between Crown and Māori in New Zealand”(2002) 28 Brooklyn Journal of International Law; Augie Fleras and Jean Elliott *The “nations within”: aboriginal-state relations in Canada, the United States, and New Zealand* (Vol 22, Oxford University Press, Toronto, 1992); Kayleen M Hazlehurst *Legal pluralism and the colonial legacy: Indigenous experiences of justice in Canada, Australia and New Zealand* (Avebury, Aldershot, 1995); Paerau Warbrick “Indigenous Legal Traditions: Looking at ways to reconcile aboriginal law and common law. A practical

As a direct result of gendered colonial policies and practices two contradictions arise for the pursuit of tribal self-determination. The first contradiction is between the discernible lack of indigenous women in positions of tribal leadership and power when women have proven to be highly effective leaders and entrepreneurs.⁵⁴ Some literature suggests that within te ao Māori (the Māori world) leadership is primarily the domain of men.⁵⁵ However, as Mahuika and Sadler point out, many Māori tribes are named after rangatira (chiefly) women suggesting that Māori women were considered powerful and influential leaders in traditional pre-European times.⁵⁶ So while some women may occupy leadership roles and positions of power, tribal governance structures and systems are inherently patriarchal reflecting a colonial legacy that is male-dominated, male-identified, and male centred.⁵⁷ Women, including indigenous women, are not only confined by the ‘glass ceiling’, but are also restricted, and to a greater extent, by the legacy of patriarchy that has replaced indigenous notions of gender complementarity.⁵⁸

The second contradiction, according to Kuokkanen, has to do with the modern trend

and principled approach” (paper presented to Aboriginal Law Week Series, Edmonton, Canada, March 2008); Hadley Friedland “Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws” (2012) 11 *Indig Law J Univ Tor Fac Law* at 1; Federico Lenzerini *Reparations for Indigenous peoples* (Oxford University Press, Oxford; New York, 2008); Siegfried Wiessner “Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis” (1999) 12 *Harv Hum Rights J* at 57; Raymond Darrel Austin *Navajo courts and Navajo common law: a tradition of tribal self-governance* (University of Minnesota Press, 2009); Rebecca Tsosie “Conceptualizing Tribal Rights: Can Self-Determination be actualised within the U.S. Constitutional Structure (2011) 15 at 923.

⁵⁴ Mikaere, above n 21; Kerensa Johnston “Maori Women Confront Discrimination: Using International Human Rights Law to Challenge Discriminatory Practices” (2005) 4 *Indig Law J* 19; Rebecca Wirihana “Nga Purakau o nga wahine Rangatira Maori o Aotearoa. The stories of Māori women leaders in New Zealand” (Doctoral Dissertation, Massey University, 2012); Rebecca Tsosie “Native women and leadership: An ethics of culture and relationship” (2010) *Indig Women Fem Polit Act Cult* at 29; Mary Jo Tippeconnic Fox, Eileen M Luna-Firebaugh and Caroline Williams “American Indian Female Leadership” (2015) 30 *Wicazo Sa Rev* at 82.

⁵⁵ Maharaia Winiata *The changing role of the leader in Māori society: a study in social change and race relations* (Blackwood and Janet Paul, Auckland, 1967).

⁵⁶ Apirana Mahuika “Nga Wahine Kai-hautu o Ngati Porou: The female leaders of Ngati Porou” (Unpublished Master of Arts Dissertation, University of Sydney, 1973); Sadler, above n 11.

⁵⁷ See generally Allan G Johnson *The Gender Knot* (Temple University Press, 2005) at 5. Johnson states that we are trapped inside a legacy whose core is patriarchal and that a society is patriarchal to the degree that it promotes male privilege.

⁵⁸ Mikaere, above n 21, at 70.

for indigenous nations to, on the one hand, embrace the capitalist economic model for self-governance while, on the other, overlooking the impact that neoliberalism has had in recent decades on indigenous societies.⁵⁹ I question how colonisation and the internalisation of the neoliberal capitalist ideology by some indigenous tribes impacts upon traditional customary practices where indigenous women are essential decision-makers and leaders? The cultural-political positioning of indigenous women in contemporary tribal governance reflects their/our oppression. Importantly, these contradictions should not be considered in isolation from the other.

For indigenous women, colonisation has been responsible for replacing traditional gender roles with western patriarchal practices redefining traditional indigenous leadership.⁶⁰ While recognising the diversity of experience of indigenous women, the approach taken in this research is to focus on common themes and experiences that are illustrative but not exhaustive. Throughout this thesis, I have attempted to show how indigenous women's experiences intersect in ways that reflect multiple forms of oppression, discrimination and marginalisation.

Māori women writers, academics and activists like Ani Mikaere and others, echo the sentiments of aboriginal women expressed in the opening to this thesis. They emphasise that changes in the perception of the role of women have come about as a direct result of colonisation.⁶¹ For example, Mikaere has noted that Māori women

⁵⁹ Kuokkanen above n 37, at 276.

⁶⁰ Mikaere above n 18; Mikaere, above n 21; Ani Mikaere "Colonization and the destruction of gender balance in Aotearoa" (1999) 12 *Native Stud Rev* 1; Annette Sykes "Constitutional Reform and Mana Wahine" (1994) *Te Pua J Maori Womens Writ* 3 at 15; Donna Awatere Huata *Maori sovereignty* (Broadsheet, Auckland, 1984).

⁶¹ Kirsten Gabel "Poipoiā te tamaiti ki te ūkaipō" (Doctoral Dissertation, University of Waikato, 2013); Kuni Jenkins "Reflections on the Status of Māori Women" (1992) 1 *Te Pua* at 37 ; Kuni Jenkins and Leonie Pihama "Matauranga Wahine: Teaching Maori Women's Knowledge Alongside Feminism" (2001) 11 *Fem Psychol* at 293; Kuni Jenkins *Working paper on Māori women and social policy* (Report of the Royal Commission on Social Policy Vol III, 1988) at 161; Apirana Mahuika "Leadership: Inherited and Achieved" in Michael King (ed) *Te Ao Hurihuri: Aspects of Māoritanga* (Reed Books, Auckland, 1992) at 42; Aroha Mead "Māori Leadership: The Waka Traditions, The Crews were the Real Heroes" (paper presented to Hui Whakapumau: Māori Development Conference, Massey University, 10 August 1994); Ani Mikaere "Patriarchy as the ultimate divide and rule tactic: The assault on tikanga Māori by Pākehā Law" (paper presented to Mai I te Ata Hāpara", a conference on the principles, influence and relevance of tikanga Māori, Te Wananga o Raukawa, 2000); Ani Mikaere "Tikanga as the first law of Aotearoa"

were perceived either in family terms as wives and children or in sexual terms as easy partners.⁶² Linda T. Smith contends that women who had “chiefly” roles were considered the exception to the rule, not the norm. For example, as the notable Māori academic Maharaia Winiata commented in his significant work on Māori leadership, “pre-European Māori women managed to come to the fore occasionally through the strength of superior kinship and personal ability, although the status of aristocratic women in the political system differed from tribe to tribe.”⁶³ Winiata further states that women, in general, had essential roles on ceremonial occasions and in domestic administration. Ngahua Te Awekotuku comments that Winiata takes a firmly patriarchal view in these observations.⁶⁴ Patriarchy, a dominating ideology of colonialism, has reinforced the binary forms of power employed in tribal institutions. The pre-colonial cultural practices and beliefs that strengthened gender ‘balance’ have been irreversibly impacted. However, it is proposed that Mana Wahine theory provides a decolonising tool of gender analysis to correct the imbalance.⁶⁵ Indigenous gender analysis is an anti-colonial, anti-hegemonic methodology employed that has been employed during the last ten years in Canada for the purpose of investigating indigenous women’s roles in governance.⁶⁶ This methodology provides a standard form with which to further investigate the potential for developing indigenous decolonising gender analysis tools. That is a future-focussed project that will require determining the extent to which indigenous women’s ways of leading or governing continue to be circumscribed in the on-going

2007 10 Yearbook of New Zealand Jurisprudence 24; Ani Mikaere “The Balance Destroyed: The Consequences for Maori women of the Colonisation of Tikanga Maori” (Unpublished Master of Jurisprudence Dissertation, University of Waikato, 1995); Simmonds, above n 45; Linda Tuhiwai Smith *Decolonizing methodologies: research and Indigenous peoples* (2nd ed, Zed Books, London, 2012) at 48, GR Aroha Yates-Smith “Hine! e Hine!: Rediscovering the feminine in Maori spirituality” Masters Dissertation, University of Waikato, 1998).

⁶² Linda T. Smith, above n 45 at 47.

⁶³ Winiata, above n 27 at 178.

⁶⁴ At 9.

⁶⁵ Kirsten Gabel “Poipoia te tamaiti ki te ūkaipō” (Thesis, University of Waikato, 2013); Pihama, above n 30; Naomi Simmonds “Mana wahine: Decolonising politics” (2011) 25 *Womens Stud J* 11; Simmonds, above n 30.

⁶⁶ Erin Wolski “Culturally Relevant Gender-based Analysis: A tool to promote equity” (2008) 11 *Can Womens Health Netw*; Bonita Lawrence “Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview” (2003) 18 *Hypatia* at 3; Cynthia D Stirbys “Gender-Based Analysis and Differing Worldviews” (2008) 26 *Can Woman Stud* at 138.

process of colonisation. Colonialism is a gendered process.

Indigenous Legal Traditions

Indigenous legal traditions are fundamentally about indigenous communities, self-determination and governance. The challenge then is in reconciling these legal orders with existing constitutions and competing sovereignties. Māori legal academic Carwyn Jones has explored the tension between reinvigorating Māori legal traditions and setting them aside as irrelevant in a modern tribal governance context.⁶⁷ The tension becomes more evident as iwi establish post-Treaty settlement governance entities. On the one hand, post-settlement structures are Crown determined and established as a result of legislation. On the other hand, to gain legitimacy with its constituency, iwi must consult their communities to ensure that their legal traditions are adequately reflected in that constitution. Jones further observes:⁶⁸

In some instances, Māori legal traditions are reasserted and perhaps adapted to ensure their relevance for the challenges that will be faced by the governance entity in the 21st century. Sometimes a deliberate choice will be made to discard a particular legal tradition because it is seen to be no longer relevant, or perhaps that other options are perceived to be better in the current circumstances of the settling community.

Indigenous peoples who are the descendants of the original occupants of their lands, have always sought to uphold their own systems of law and governance as is the case in the Nation settler states of Australia, Canada and Aotearoa (New Zealand),⁶⁹

⁶⁷ Carwyn Jones “The Treaty of Waitangi Settlement Process in Maori Legal History” (Doctoral Dissertation, University of Victoria, 2013) at 14.

⁶⁸ At 14.

⁶⁹ For a discussion on the impact of treaties as an instrument of colonialism between on Indigenous Peoples see Miranda Johnson “Making History Public: Indigenous Claims to Settler States” (2008) 20 *Public Cult* 97 at 102; Miranda Johnson “Burdens of Belonging: Indigeneity and the Re-founding of Aotearoa New Zealand (2011) 45 *N Z J Hist* 102 at 104; Miranda Johnson “Reconciliation, indigeneity, and postcolonial nationhood in settler states” (2011) 14 *Postcolonial Stud* 187 at 192. See generally John Borrows “Indigenous Legal Traditions in Canada Contemporary and Comparative Perspectives on the Rights of Indigenous Peoples” (2005) 19 *Wash Univ J Law Policy* 167; Law Commission of Canada and Law Commission of Canada *Indigenous legal traditions* (UBC Press, Vancouver,

and with the federally recognised Indian tribes of the United States.⁷⁰ The basis for this has been the existence of treaties which under international law provide limited support for indigenous sovereign rights.

Some authors view indigenous law or more specifically, tribal societies, as typified by their adherence to a chthonic or traditional worldview that situates people within the ecological or natural order of the world in which they live.⁷¹ Chthonic legal and traditional customs and practices emerge from internal experiential norms that are transferred through the practice of oral traditions, i.e. through the spoken word and memory.⁷² H. Patrick Glenn, a professor of Comparative Law from the United States, seeks to advance our understanding of ‘tradition’ in law or legal traditions. Glenn’s work distinguishes indigenous legal traditions as one of the seven most important and complex legal traditions of the world, including Talmudic, civil law, Islamic, common law, Hindu and Asian chthonic legal traditions. These legal traditions are notable because they have survived the onslaught of colonisation. I introduce the concept of chthonic law for its conceptualisation of the natural world that underpins the indigenous legal tradition. For me, this resonates with the Māori world view based as it is on matauranga Māori, which derives from the natural order.⁷³ Other indigenous legal scholars have argued for better engagement with

2007) vol 6; Gordon Christie “Culture, self-determination and colonialism: Issues around the revitalization of Indigenous legal traditions” (2007) 6 *Indigenous LJ* 13; Friedland, above n 53; Hadley Friedland and Val Napoleon “Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions” (2015) 1(1) *Lakehead Law J* 16; H. Patrick Glenn “Are Legal Traditions Incommensurable” (2001) 49 *Am J Comp Law* 133; Val Napoleon and Hadley Friedland “An Inside Job: Engaging with Indigenous Legal Traditions through Stories Special Issue - Indigenous Law and Legal Pluralism” (2015) 61 *McGill Law J* 725; Warbrick, above n 53.

⁷⁰ For a discussion on the legal status of Indian Tribes see Chapter 14 David Getches, Robert Williams, Charles Wilkinson and Mathew Fletcher (eds) *Cases and materials on Federal Indian law* (6th ed, West, St Paul, MN, 2011) at 952.

⁷¹ Christine Zuni Cruz “Self-Determination and Indigenous Nations in the United States International human right, federal policy and Indigenous nationhood” in *Dialogue Land Justice Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) at 163; H. Patrick Glenn “A Concept of Legal Tradition” (2008) 34 *Queens Law J* 427; Gregory Gagnon “American Indian Law: A Discourse on Chthonic Law” (2013) 89(1) *N.D.L. Rev.* 29.

⁷² H. Patrick Glenn *Legal traditions of the world: sustainable diversity in law* (Oxford University Press, USA, 2014).

⁷³ Te Ahukaramu Royal “Politics and Knowledge: Kaupapa Māori and Matauranga Māori” (2012) 47 (2) *New Zealand Journal of Educational Studies* 35.

indigenous laws and their application in modern legal systems. For example, Christina Cruz Zuni states that: ⁷⁴

It is through this legal tradition that we, as Indigenous peoples, know that we have the right to self-determination. It is the chthonic legal tradition that gives us our identity as peoples separate and distinct from other peoples in the world. It is critical to us. Yet, it is, in part, why we experience/have experienced the attacks we have endured on so many levels. The suppression of our religion,⁷⁵ our language,⁷⁶ the removal from and destruction and taking of our traditional lands,⁷⁷ the imposition of political organisation, the physical removal of our children,⁷⁸ Western education,⁷⁹ all these impact and continue to impact our legal tradition, our identity, and it is this that I address when I speak of self-determination from the inside out. Assimilation has been a goal of United States federal policy toward its Indigenous population.⁸⁰ If we do not begin to see how our legal tradition is of utmost importance in our internal self-determination, we risk assimilating ourselves in the belief we are exercising self-determination.

The notion of a chthonic legal tradition in this thesis has relevance for recognising that Māori governance and tikanga Māori derives from “a set of customary values

⁷⁴ Christine Zuni Cruz “Self-Determination and Indigenous Nations in the United States” in *Dialogue Land Justice Pap Natl Native Title Conf* (Aboriginal Studies Press, 2010) at 163.

⁷⁵ Francis Paul Prucha *The great father: the United States government and the American Indians* (U of Nebraska Press, 1995) at 647.

⁷⁶ Felix S Cohen (ed) *Handbook of Federal Indian law* (US Govt Print Office, Washington, 1982) at 139.

⁷⁷ See, for example, Laurence French *The winds of injustice* (Garland New York, NY, 1994) at 45.

⁷⁸ Cohen above n 76, at 140. “Off-reservation federal boarding schools were founded in 1879. Reformists thought them an ideal method of assimilation. Since Indian youth were completely removed from the family and from the barbarism of tribal life.” See also Indian Child Welfare Act 1978 (25 U.S.C. §§ 1901, 4 “Congress finds that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institution.”

⁷⁹ At 139.

⁸⁰ At 128.

and ways of organising social life that is distinctively Māori.”⁸¹ Ani Mikaere has referred to tikanga Māori as the ‘First Law’ of Aotearoa (New Zealand):⁸²

In 1840 we had been here for a thousand years. We had a highly workable and adaptable system of law in operation, and Te Tiriti o Waitangi guaranteed that it would remain as the first law of Aotearoa. Te Tiriti o Waitangi (and perhaps I should clarify here that in my view Te Tiriti – the Māori text – is the only document of any relevance to us) also stated that, subject to our tino rangatiratanga, we granted kawanantanga (delegated authority) to the Crown. That was to allow the Crown to pass law, thereby enabling it to regulate the conduct of it’s own people. This meant that the Crown’s kāwanantanga was subject to our tino rangatiratanga and that the Crown’s laws were subject to our tikanga. That is how I see it.

However, the extent to which indigenous laws are recognised within colonial legal systems can best be described as measured separatism. It is separatism that provides for a symbolic form of nationhood holding significance for how the State accounts for its colonial past while providing for an on-going relationship with its indigenous peoples. It extends from the exercise of the powers of self-government, on the one hand, to the advancement of reconciliation and revitalisation of indigenous cultures on the other. The question remains, however, to what extent does the recognition of indigenous laws in some measured way give rise to the recognition of indigenous people’s rights? Joseph has highlighted the extent to which tikanga Māori customary law should be correctly referred to as the ‘first law’ of Aotearoa (New Zealand), while continuing to be integrated with English common law to form a hybrid polyphyletic jurisprudence.⁸³ Notably in the 2003 case of *Attorney-General*

⁸¹ Robert Joseph “The government of themselves: Indigenous peoples’ internal self-determination effective self-governance and authentic representation: Waikato-Tainui, Ngāi Tahu and Nisga’a” (Doctoral Dissertation, University of Waikato, 2005) at 287.

⁸² Ani Mikaere “Tikanga as the first law of Aotearoa” (2007) 10 *Yearbook of New Zealand Jurisprudence* at 25; Ani Mikaere “The Treaty of Waitangi and Recognition of Tikanga Māori” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, South Melbourne, Victoria, 2004) at 330.

⁸³ Robert Joseph “Re-Creating Legal Space for the First Law of Aotearoa – New Zealand” (2009) 17 *Waikato Law Rev* 74.

v Ngati Apa,⁸⁴ a dispute regarding Māori rights to the foreshore and seabed, leading Chief Justice Sian Elias to state the proposition that “[b]ut from the beginning of the common law of New Zealand as applied in the Courts, differed from the common law of England because it reflected local circumstances.”⁸⁵ She goes on to state:⁸⁶

Any prerogative of the Crown as to property in the foreshore or seabed as a matter of English common law in 1840 cannot apply in New Zealand if displaced by local circumstances. Māori custom and usage recognising property in the foreshore and seabed lands displaces any English Crown Prerogative and is effective as a matter of New Zealand law unless such property interests have been lawfully extinguished. The existence and extent of any such property interest is determined by application of tikanga.

The acknowledgement of local circumstances provides for assertions of Māori custom law in many areas of law. Joseph notes the occurrence of tikanga Māori in civil law statutes,⁸⁷ as well as an array of statutes that refer to the Treaty of Waitangi.⁸⁸

The United States, Canada, Aotearoa (New Zealand) and Australia are colonial states with identifiable legal traditions that continue to have legal status and which provide for a unique situation of legal plurality.⁸⁹ For example, in the United States, the legacy of colonialism has denoted Indian tribes as ‘domestic dependent nations’

⁸⁴ Attorney-General *v Ngati Apa* [2003] 3 NZLR 643.

⁸⁵ At 653 per Elias CJ.

⁸⁶ At 660 per Elias CJ.

⁸⁷ See for example the Treaty of Waitangi Act 1975, Resource Management Act 1991, Te Ture Whenua Māori Act 1993, Māori Fisheries Act 2004 and the Foreshore and Seabed Act 2004.

⁸⁸ For example, the Treaty of Waitangi Act 1975, ss 1 and 2; Resource Management Act 1991, ss 8, 45 and 141B; Te Ture Whenua Māori Act 1993, ss 7, 18 and 339; the Māori Fisheries Act 2004, ss 4, 5, 19, 15, 31, 32, 34, 45, and 188-211; Foreshore and Seabed Act 2004, ss 10, 34, 49, 73 and 101; the Waikato-Tainui Raupatu Claims Settlement Act 1995, ss 6, 8, 10, 14, 26, 30, 38 and Schedule 1; the Ngāi Tahu Claims Settlement Act 1998, ss 10, 34, 35, 48, 103, 274, 304 and 305; Te Rūnanga o Ngāti Awa Act 2005, ss 3 and 11; and the Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003, s 3.

⁸⁹ See generally Kayleen Hazlehurst (ed) *Legal pluralism and the colonial legacy: Indigenous experiences of justice in Canada, Australia, and New Zealand*. (Avebury, Sydney, 1995); Napoleon and Friedland, above n 69; Bruce Duthu *Shadow Nations Tribal Sovereignty and the Limits of Legal Pluralism* (Oxford University Press, New York, 2013) at 46.

which exercise limited jurisdictional powers of self-government within ‘Indian country’.⁹⁰ The application of sovereign immunity by Indian tribes represents the notion that tribes have the inherent power to govern themselves and predates the formation of the United States. This power is not derived from Congress but can be limited by Congressional Acts. Another limiting factor is the exercise by the United States Government of its ‘trust responsibility’ whereby Indian tribes are deemed to be in a ward-guardian relationship.⁹¹ As a model of self-determination, Indian tribes can express their self-governance through legislative, judicial and executive action with the ability to ‘freely’ constitute these functions. The federal government, however, controls the process of political recognition, i.e. political sovereignty as well as the ability to determine which tribal lands can be considered “Indian Country”.⁹² In contrast and with varying degrees of effectiveness Canada, Australia and Aotearoa (New Zealand) are jurisdictions that espouse policies of reconciliation with and the revitalisation of indigenous legal traditions on both philosophical and political levels.⁹³

In Canada, the Crown has sought to “achieve a reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown” by allowing for constitutionally entrenched aboriginal and Treaty rights through s35(1) of the Constitution Act 1982.⁹⁴ Ladner, Borrows, Napoleon and Friedland are among the

⁹⁰ *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832). See also Matthew LM Fletcher “The Iron Cold of the Marshall Trilogy” (2006) 82 NDL Rev 627 at 640. See generally Getches above n 70; Robert A Williams “Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence,” (1986) Wis. L. Rev. at 256.

⁹¹ See *Cherokee Nation v Georgia* 30 U.S. 1 (1831) at 190 in which Chief Justice Marshall articulates the guardian-ward relationship as the source of the “trust doctrine” in Indian Law.

⁹² Indian country is defined at 18 U.S.C. § 1151 as:

- all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
- all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and
- all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

⁹³ See John Borrows *Recovering Canada : the resurgence of Indigenous law* (University of Toronto Press, Toronto, 2002); Napoleon and Friedland, above n 50.

⁹⁴ See *R v Van der Peet*, [1996] 2 S.C.R 507 at 539.

indigenous Canadian scholars who acknowledge the creation of this legal and epistemic pluralism as a means to pursue reconciliation and to realise indigenous people's goals of self-determination, cultural revival and economic independence.⁹⁵ The pursuit of reconciliation, however, is not without its challenges. Ladner, for example, points out that indigenous peoples should be pursuing a decolonised future through the recognition of the aboriginal sovereignty of the nation-to-nation status that is implicit in their Treaties. She states that “[i]t is easily argued that the treaties achieved a reconciliation of aboriginal and Crown sovereignties (or claims thereof). This manner of understanding the treaties is commonly referred to as “treaty federalism” or “treaty constitutionalism.”⁹⁶ Ladner's argument is in contrast to the post-colonised vision of reconciliation espoused by Borrows of indigenising the existing legal order via a co-mingling of legal knowledge's that would have the effect of creating a *sui generis* or unique legal order.⁹⁷ Simpson on the other hand, argues for the recovery and maintenance of indigenous worldviews, philosophies and ways of knowing as strategies for liberation.⁹⁸

The Indian Act in its various forms through the 1950s represented the criminalization of Indigenous Knowledge systems as Indigenous governing structures were rendered illegal and virtually destroyed by the imposed colonial system of administration. Indigenous methods of teaching and transmitting Indigenous Knowledge were also criminalized when ceremonies were rendered illegal. The political and legal system of the settlers removed Indigenous sovereignty and jurisdiction over the land; Indigenous peoples lost the ability to protect Indigenous Knowledge from desecration because they lost the ability to protect their lands from environmental destruction. It is because of the resistance and persistence of Indigenous Knowledge holders men and women who have worked in opposition to these forces that our

⁹⁵ At 93; John Borrows *Canada's Indigenous constitution* (University of Toronto Press, Toronto, 2010); Napoleon and Friedland, above n 50.

⁹⁶ Kiera Ladner “Treaty Federalism: An Indigenous Vision of Canadian Federalisms” in François Rocher and Miriam Smith (eds) *New Trends in Canadian Federalism*, (Broadview Press, Peterborough, 2003) at 167.

⁹⁷ At 93.

⁹⁸ Leanne R Simpson “Anticolonial strategies for the recovery and maintenance of Indigenous knowledge” (2004) *American Indian Quarterly* 373 at 378, refer to chapter 3 for discussion.

dynamic, powerful, and beautiful knowledge systems have been passed on to our generation.

Canada's Truth and Reconciliation Commission is an example of how the Canadian Government is attempting to address the sad legacy of the Indian Residential Schools system through a process of reconciliation built around Ninety-four *Calls To Action*.⁹⁹ However, as noted by Ladner and Simpson, there is little meaningful systemic change being made.¹⁰⁰

For Australian and Torres Strait Islands people, the climate for change in indigenous affairs was signalled with the 1967 referendum which removed the references to *race* from the Australian Constitution.¹⁰¹ Until the referendum, aboriginal peoples were not even counted, included or acknowledged as citizens of Australia, a land they have inhabited for 60,000 years. Unlike Aotearoa (New Zealand), and Canada and the United States, treaties were never signed with aboriginal peoples who were deemed insufficiently human to warrant title to their lands.¹⁰² Consequently, the whole continent was appropriated under the doctrine of terra nullius – a legal principle applied for the taking of 'so-called' uninhabited

⁹⁹ Established on June 2 2008, the Truth and Reconciliation Commission (TRC) of Canada was organised by the parties of the Indian Residential Schools Settlement Agreement. Intended as a holistic and comprehensive response to the abuse inflicted on Indigenous families through the residential school system and the residual impact on Indigenous culture, heritage and language. The Commission was completed in December 2015. For a review of the TRC legal agreement see Kim Stanton "Canada's Truth and Reconciliation Commission: Settling the Past?" (2011) 2 Int Indig Policy J Lond 1.

¹⁰⁰ Kiera Ladner Indigenous governance: questioning the status and the possibilities for reconciliation with Canada's commitment to Aboriginal and Treaty Rights (National Centre for First Nations Governance, 2006).

¹⁰¹ On 27 May 1967 a Federal referendum was held. The second question of the referendum was to determine whether two references in the Australian Constitution, which discriminated against Aboriginal people, should be removed. Sections 51 and 127 stated: s51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:- (xxvi) The people of any race, other than the aboriginal people in any State, for whom it is necessary to make special laws.

s127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives should not be counted.

The vote to remove the words '*... other than the aboriginal people in any State ...*' in section 51(xxvi) and the whole of section 127 signalled an inaugural moment for a political change in Australian Indigenous affairs.

¹⁰² Kent McNeil and University of Saskatchewan Native Law Centre *Emerging justice?* (Native Law Centre, University of Saskatchewan, Saskatoon, 2001).

lands which equated the indigenous inhabitants with flora and fauna.¹⁰³ Even though the Whitlam government had adopted a policy of self-determination in 1972, which was supported by ensuing Hawke and Keating administrations, Prime Minister Howard resoundingly repudiated any notions of self-determination for Aboriginal and Torres Strait Island peoples.¹⁰⁴ It wasn't until 1991 however and the declaration of the Keating government which established the Council for Aboriginal Reconciliation that formal recognition for indigenous rights was established. The watershed Mabo Decision 1992,¹⁰⁵ which resulted in the passing of the Native Title Act 1993¹⁰⁶ and the recognition of 'Native Title' were strong indications of the existence of the political will to finally recognise indigenous rights. Just six months later, Prime Minister John Keating delivered his Redfern Speech to launch the *International Year for the World's Indigenous People*.¹⁰⁷

It begins, I think, with the act of recognition. Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the disasters. The alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion.

While this statement marked the formal commencement of the so-called decade of reconciliation, culminating in the 2008 Apology to the Stolen Generations, indigenous commentators say that it is not enough and call for a working indigenous

¹⁰³ See generally, Larissa Behrendt *Achieving Social Justice* (Federation Press, 2003) at 36; Larissa Behrendt, Chris Cunneen and Terri Libesman *Indigenous Legal Relations in Australia* (Oxford University Press, Melbourne, VIC, Australia, 2008) at 175; Michael Dodson and Lisa - Strelein "Australia's Nation-Building: Renegotiating the Relationship between Indigenous Peoples and the State Reconciliation and Indigenous Self-Determination" (2001) 24 U.N.S.W.L.J at 827; Lisa Ford *Settler sovereignty: jurisdiction and Indigenous people in America and Australia, 1788-1836* (Harvard University Press, Cambridge, Mass, 2010) at 27; Havemann, above note 144 at 25; Elliott Johnston, Martin G Hinton and Daryle Rigney *Indigenous Australians and the law* (Cavendish, Sydney, NSW, 1997); Louis A Knafla and Haijo Westra *Aboriginal Title and Indigenous Peoples: Canada, Australia and New Zealand* (UBC Press, Vancouver, Canada, 2011) at 2.

¹⁰⁴ Will Sanders "Towards an Indigenous order of Australian government: Rethinking self-determination as Indigenous affairs policy" (2004) 34 Seattle.U.L.Rev 2 at 512.

¹⁰⁵ Mabo v Queensland [No 2] (1992) 175 CLR 1..

¹⁰⁶ The Native Title Act 1993 (Cth).

¹⁰⁷ Prime Minister Paul Keating "The Redfern Speech -Year of the World's Indigenous People"(Redfern Par, Redfern, NSW,10 December 1992).

rights framework.¹⁰⁸ Despite the potential of this process, aboriginal leaders were gravely disappointed as the government used it as an exercise in Australian nation-building that refused to deal with what is defined as the ‘politics of symbolism,’ i.e. sovereignty, self-determination and the reluctance on the part of the Australian Government to contemplate Treaty-making. That is to say; reconciliation was used not to achieve a mutually agreeable political reconciliation on the primary issues resulting from colonialism (land rights, sovereignty and self-determination) but to “sustain and legitimate existing inequalities between indigenous and non-indigenous peoples in Australia.”¹⁰⁹

Contribution to Legal Scholarship

This thesis contributes to legal scholarship by first, contextualising challenges of tribal governance for indigenous women. It addresses this by situating women’s experiences and ways of ‘being and doing’ within the micro-tribal governance context while taking political, social and more importantly, cultural account of the macro realities of tribal government,. It will identify using comparative analysis, both inhibiting and facilitating practices within the institutional and normative interfaces of State and tribe, tribe-to-tribe, and indigenous men to indigenous women. It is at the intersection of these relationships that the substantive issues can be identified and addressed. This requires testing notions of traditional indigenous leadership and the examination of how indigenous governance models are embedded within changing historical, local, international cultural, social and political contexts. Ultimately, the comparative analysis will contribute to the further development of theory to facilitate the application of transformative practices for the positioning of indigenous women’s decision-making and tribal leadership practices.

I view indigenous women’s governance as being positioned at the intersection of the colonial/historical and neoliberal/contemporary narratives. While there have been obvious contradictory gender relations between the colonisers and indigenous

¹⁰⁸ At 103.

¹⁰⁹ Martha Augoustinos, Amanda Lecouteur and John Soyland “Self-sufficient Arguments in Political Rhetoric: Constructing Reconciliation and Apologizing to the Stolen Generations” (2016) 13 *Discourse Soc* 1 at 105.

peoples, it is clear that indigenous women were disempowered by design and by treaties that failed to recognise their pre-eminence as natural born leaders who emanate from Mother Earth ideology.¹¹⁰ This was done by legislation and policies intended to strip them of their status and identity, and by patriarchal domination served up as indigenous tradition which was heavily influenced by western sexist attitudes. This historical overview illustrates how indigenous women have been impacted as a consequence of the colonial agenda and the birth of exploitative forms of capitalism that have taken hold of indigenous moves toward self-determination.

Colonialism

While the means and language of colonialism may have differed according to the nation involved, there were striking similarities in treaty-making, legislation and policy implementation that have succeeded in marginalising indigenous peoples in Aotearoa (New Zealand), Canada, and the United States. Conversely, the experience of the Aboriginal and Torres Strait island peoples of Australia has been diabolical in contrast.¹¹¹

Few would deny that indigenous peoples present socio-economic and cultural realities are a dominating outcome in the narratives of imperialism and colonialism.¹¹² Embedded in these accounts are western ideas, imagery and language that have effectively ‘Othered’ indigenous men and women. As indigenous women and as Māori, we understand what it means to be othered as our

¹¹⁰ Monique Gemmill “A History of Marginalisation: Maori Women” (Masters Thesis, Victoria University, 2013).

¹¹¹ See Wiessner, above n 53 at 72 “Aboriginal lands were acquired on the basis of an enlarged terra nullius doctrine, maintaining that the acquisition of new South Wales and other areas of Australia since the first settlements in 1788 was undertaken by occupation, by the very act of British subject’ taking possession of the territories in the name of the Crown.

¹¹² I use the term colonialism to refer to the project of British political domination during the nineteenth and twentieth centuries of what I refer to as the colonial or ‘settler’ states of America, Canada, Australia and New Zealand. Post colonialism will be used to describe the political and transition of those nations from political dependence to ‘sovereignty’ or at least, political independence. Imperialism on the other hand refers to the economic, military and political domination that preceded colonialism. See Linda T. Smith, Above n 61 At 24, who refers to “Colonialism became Imperialism’s outpost, the fort and port of the colonial outreach reach”.

experiences of colonisation have become part of historical records.¹¹³ Noted theorist Edward Said, who was the first to name this postcolonial problematic, has maintained that these notions of ‘Other’ have become universal truths which have then been represented back to indigenous peoples as the truth about themselves.¹¹⁴ These narratives have shaped contemporary indigenous world views, challenged as they are by western values of land acquisition, resource exploitation and conquest. The indigenous mind has been shaped or misshaped to denote the indigenous peoples as ‘other’, ‘primitive’ or ‘savage’ and indigenous women stereotypically as ‘squaw’ therefore wanton, available and disposable. Said contends that colonisation is the outcome of the mythos of western racial superiority.

The hegemonic practices of colonisation include the conquest of indigenous peoples, the transportation of patriarchy that relegates women to the private sphere, ethnographic theorising that ignores the very existence of women and misinterprets their stories, as well as the seduction of indigenous men to European values and systems of governing that marginalise women.¹¹⁵ The problem with a postcolonial view is that colonialism is on-going. It has manifested in other forms which are just as oppressive, such as globalisation and neoliberalism. Linda T. Smith writes: “[w]hile being on the margins of the world has had dire consequences, being incorporated within the world’s marketplace has different implications and in turn requires the mounting of new forms of resistance.”¹¹⁶

It is in the context of resistance that decolonising research and methodologies come to the fore.¹¹⁷ Comparative indigenous research acknowledges that there are collectively pressing issues for indigenous peoples.¹¹⁸ For this thesis, the value of a

¹¹³ See Jenkins, above n 61. Jenkins argues that Māori women gained minimal recognition in the retelling of the cosmological history recorded by early missionaries and ethnographers. She states that this course of action was intended to reshape, retell and ultimately destroy mana wahine. See also Elsdon Best *Some Aspects of Maori Myth and religion* (Government Printer, Wellington, 1954) at 47 where Best records the Māori creation story as associated with misfortune and inferiority in reference to Papatuanuku.

¹¹⁴ Edward W Said *Culture And Imperialism* (1st ed, Knopf, New York, 1993) at 53.

¹¹⁵ At 53.

¹¹⁶ Linda T. Smith, above n 61, at 25.

¹¹⁷ Bagele Chilisa *Indigenous Research Methodologies* (SAGE Publications, USA, 2011); Linda T. Smith, above n 61.

¹¹⁸ See generally Mere Berryman, Ann Nevin and Suzanne SooHoo *Culturally responsive methodologies* (Emerald, Bingley UK, 2013); Taiarahia Black *Enhancing Mātauranga*

comparative analysis lies in establishing and maintaining a dialogue that enables a better understanding of indigenous legal traditions from that time before now, *colonised time*, and from the time before that, *pre-colonised time*.¹¹⁹ An indigenous dialogue on the issues provides a fresh perspective that enables us to move beyond a fixed colonial binary and to realise the potential of decolonising research. As Miller and Ruru note, while little comparative work exists between the United States and South Pacific countries, such as Aotearoa (New Zealand), by taking a comparative approach we are able to illustrate the extent to which an indigenous lens is able to ‘disrupt’ the colonial binary.¹²⁰ In as much as former British colonies, Canada, the United States, Australia and Aotearoa (New Zealand) have been interconnected in the development, divergent intellectual and legal systems simultaneously reinforce and challenge existing historical perspectives on colonialism. Notwithstanding this situation, indigenous resistance is palpable and growing.¹²¹ This resistance appears in the form of on-going challenges to colonial

Māori and global indigenous knowledge (NZQA, Wellington, 2014); Chilisa, above n 116; Glenn H Patrick *Legal traditions of the world: sustainable diversity in law* (Oxford University Press, USA, 2014); Lester-Irabinna Rigney “Indigenist Research and Aboriginal Australia” in *Indigenous peoples’ wisdom and power: affirming our knowledge through narratives* (Ashgate Publishing, Aldershot, 2006); Linda T. Smith, above n 8; Thomas Hall and James Fenelon *Indigenous Peoples: Globalization, Resistance, and Revitalization* (Paradigm Publishers, Boulder, 2009); Maria Bargh “Re-colonisation and Indigenous Resistance” (Doctoral Dissertation, Australian National University, 2002); Makere Stewart-Harawira “Practicing Indigenous feminism: Resistance to imperialism” (2007) Making space for Aboriginal feminism, at 124; Makere Stewart-Harawira *The new imperial order* (Huia Publishers, Wellington, NZ, 2005).

¹¹⁹ Linda T. Smith, above n 61, at 25.

¹²⁰ Robert Miller and Jacinta Ruru “An indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand” (2008) *W. Va. L. Rev.* 111 at 852.

¹²¹ Barbara Hocking. *Unfinished Constitutional Business?: rethinking indigenous self-determination*. (Aboriginal Studies Press, Canberra, ACT, 2005); Rauna Kuokkanen “Self-Determination and Indigenous Women’s Rights at the Intersection of International Human Rights” (2012) 34 *Hum. Rts. Q.* at 225; Laura Parisi and Jeff Corntassel “In pursuit of self-determination: Indigenous women’s challenges to traditional diplomatic spaces” (2007) 13 *Canadian Foreign Policy Journal* at 81; Mililani B Trask “Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective” (1991) 8 *Ariz. J. Int’l & Comp. L.* at 77; Louis A Knafla and Haijo Jan Westra *Aboriginal title and Indigenous peoples* (UBC Press, Vancouver, 2010); Marie Ann Battiste *Reclaiming Indigenous voice and vision* (UBC Press, Vancouver, 2000); Christine Zuni Cruz “Self-Determination and Indigenous Nations in the United States” in *Dialogue About Land Justice Papers from the National Native Title Conferences* (Aboriginal Studies Press, 2010); Michael Yellow Bird and Angela Cavender Wilson *For Indigenous minds only* (School of American Research Press, Santa Fe, 2012); Kagendo Mutua and Beth Blue Swadener *Decolonizing research in*

constructs of legislation and policies that continue to abrogate indigenous sovereignty, self-determination and development agendas. We cannot ignore their genesis in the historical context of the doctrine of discovery and the imperialist attitudes that led to colonialism and the destruction of traditional indigenous societies. Linda Smith talks about the need to understand imperialism from the perspective of our local contexts and the complex ways that imperialism has reached into the minds of colonised communities.¹²² Fanon proposes the need for new ‘intellectuals’ to produce and reproduce culture that can help shape a new consciousness.¹²³ Michael Yellowbird also confirms that the denial of our histories has resulted in the development of altered psychological and sociological frameworks. Furthermore, Yellowbird states that decolonisation is:¹²⁴

The intelligent, calculated, and active resistance to the forces of colonialism that perpetuate the subjugation and/or exploitation of our minds, bodies and lands and it is engaged for the ultimate purpose of overturning the colonial structure and realising of Indigenous liberation.

He Wakaputanga o Te Rangatiratanga o Niu Tereni 1835

Recognition, reconciliation and restitution are concepts attributable to the Crown’s acceptance of wrong-doing in terms of the promises and agreements that were forged with Māori, and then broken. It is important to remember that He Wakaputanga – the Declaration of Independence, preceded Te Tiriti o Waitangi. For Māori and the northern iwi of Ngāpuhi in particular, it was He Wakaputanga that affirmed Māori rangatiratanga (sovereignty) to the world.¹²⁵ According to Hone

cross-cultural contexts (State University of New York Press, Albany, 2004); Leonie Pihama, Fiona Cram and Sheila Walker “Creating methodological space: A literature review of Kaupapa Maori research” (2002) 26 *Canadian Journal of Native Education* 1 at 30.

¹²² Linda T. Smith, above n 61, at 24.

¹²³ Frantz Fanon, Jean-Paul Sartre and Constance Farrington *The wretched of the earth* (Grove Press New York, 1963) vol 36 at 34.

¹²⁴ Angela Wilson and Michael Yellow Bird *For indigenous eyes only: a decolonisation handbook* (School of American Research, Santa Fe, 2005) at 1.

¹²⁵ Susan Healey, Ingrid Huygens and Takawai Murphy (eds) *Ngāpuhi speaks: He Wakaputanga o te rangatiratanga o Nu Tirenī and Te Tiriti o Waitangi Independent report, Ngāpuhi Nui Tonu claim* (Te Kawariki & Network Waitangi, Whangarei, 2012) at ix.

Mihaka, this declaration was intended to be an internationally recognised instrument.¹²⁶ Specifically, Hone Mihaka claims the following:

In the period leading up to the signing of He Whakaputanga, our Tupuna were already beginning to reap the benefits of their efforts, and were thriving, trade was booming and our Rangatira were able to take advantage of the need for food and other provisions visiting vessels. In light of this context, the most compelling reason for my tupuna to enter into He Whakaputanga was to secure international trade interests.

In addition, He Wakaputanga was also an expression of united hapū authority which came to be known as Te Wakaminenga o ngā Hapū o Nu Tereni (General Assembly of the Hapū of New Zealand). Having chosen a flag that was formally recognised by the British Government, the Northern Rangatira (Chiefs) believed that flag symbolised their international status as a Māori trading nation.

Te Tiriti o Waitangi 1840

He Wakaputanga represented an assertion of mana (authority) and identity as a nation. Furthermore, Ngāpuhi stipulate that Te Tiriti was borne out of an existing rangatira (Chief) to rangatira relationship developed with the British Crown over a number of years. Conversely, the Crown claims that it views He Wakaputanga as a “unilateral assertion of sovereignty and independence.”¹²⁷ Notwithstanding, the King’s acknowledgement of the declaration, imparted to Māori at the time, was taken as a commitment to uphold the declaration. Given the Crown’s imperial history however, it is plausible that the Crown did not intend to give a commitment to the recognition of a mutual relationship that recognised the independence of Māori. The debate around these issues however have become a moot point, as Te Tiriti, signed by both Māori and the Crown, has taken precedence.

Te Tiriti o Waitangi was signed between Crown representatives and Northern Māori

¹²⁶ At 57.

¹²⁷ See Crown counsel closing submissions in Waitangi Tribunal He Whakaputanga me te Tiriti The Declaration and the Treaty. The Report on Stage 1 of the Te Papanahi o Te Raki Inquiry (Wai 1040, 2014) at 198.

Chiefs in February 1840. The inadequacies of the colonial accounts of the signing came before the Waitangi Tribunal: Te Paparahi o Te Raki Inquiry (Wai 1040) in 2017 and are worth reiterating.¹²⁸ Firstly, the discussion preceding the signing was in Māori and the rangatira subsequently signed Te Tiriti o Waitangi, which was written in Māori, was supported by the verbal assurances given by Hobson and his agents.¹²⁹ The northern iwi of Ngāpuhi have always maintained that their rangatira did not cede sovereignty based on this fact. Secondly, the English version(s), known as the Treaty of Waitangi, was written subsequent to the events at Waitangi in 1840, and differs considerably in its translation from the Māori text.¹³⁰ The reconstruction of the Māori text by Sir Hugh Kāwharu has been widely acknowledged and accepted:¹³¹

Article 1:

The Chiefs of the Confederation.... Give absolutely to the Queen of England forever the complete government over their land.

Kāwharu states that the Rangatira had no understanding of the English notion of government as no translation of ‘kawanatanga’ is given.

Article 2:

The Queen of England agrees to protect the chiefs... in the unqualified exercise of their chieftanship over their lands, villages and all their treasures,

Article 3:

¹²⁸ At 519.

¹²⁹ At 527.

¹³⁰ Hugh Kawharu *Waitangi: Māori & Pākeha perspectives of the treaty of Waitangi* (Oxford University Press, Auckland, NZ, 1989); Paul McHugh *The Maori Magna Carta NZ Law and the Treaty of Waitangi* (Oxford University Press, Oxford, 1991); Claudia Orange *An illustrated history of the Treaty of Waitangi* (Bridget Williams Books, 2015); Michael Belgrave, Merata Kawharu and David V Williams *Waitangi revisited: perspectives on the Treaty of Waitangi* (2nd ed, Oxford University, South Melbourne, Victoria, 2005).

¹³¹ At 389.

The Queen of England will protect all of the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.

Article 2 is generally accepted as confirming and guaranteeing to Māori the full, exclusive and undisturbed possession of their lands, estates, forests, fisheries and other treasures. Article 3 is noted as providing to Māori rights of equality or citizenship.

The discrepancies between the English and Māori texts centre around whether or not Māori ceded sovereignty when they signed the Treaty of Waitangi. The Independent Report commissioned by Kuia and Kaumātua o Ngāpuhi asserted the following:¹³²

In assenting to te Tiriti o Waitangi, the Ngāpuhi rangatira acting on behalf of their hapū:

- did not agree to cede sovereignty;
- did not agree that the treaty would replace He Wakaputanga with its declaration of their mana and ultimate authority in the land;
- did not agree that the queen's governor would have jurisdiction over hapū or individual members of hapū;
- did not agree that a British system of law and government would be instituted;
- did not agree that the British Crown would establish sovereignty in any part of New Zealand, or that the Crown would exercise unilateral and unaccountable power over the whole of New Zealand;
- did not agree that New Zealand would become a British colony;
- did not agree to give away their mana in the land;
- did not agree to a system of land individualisation that would work to take land from hapū and deny the mana of hapū in their lands;
- did not agree to any system that would undermine the customary establishing of relationships of reciprocity between groups, whether hapū to hapū, or hapū to tauwi (outsiders);
- did not agree to the flooding of their lands with foreign settlers;

¹³² Above n 124, at 242.

- did not agree to anything that would bring harm to the status and well being of their hapū;
- did not agree to surrender their independence or jurisdiction over their lands.

Notably, the Waitangi Tribunal found that an agreement had been reached and concluded that the rangatira who signed Te Tiriti o *Waitangi* *did not cede their sovereignty*.¹³³

In contemplation of the current Treaty settlement context and the decision of the Waitangi Tribunal, I refer to Moana Jackson who has commented that Treaties are made to be honoured not settled.¹³⁴

For the same reason I think that the current so-called Treaty settlements cannot be ‘full and final’ as the Crown says. I understand why our people are ‘settling’ because we have had too little for too long but the settlements do not even begin to address the power that was taken from us through colonisation. As well, treaties are not made to be ‘settled’, they are made to be honoured, and that honouring will only occur when there is a new political/constitutional order in place based on Te Tiriti.

The honouring of the Treaty of Waitangi in regard to the rights of Māori women, children and whānau formed the basis of the Mana Wahine 1993 claim which is analysed at length in Chapter 7 of the thesis.

Treaty of Waitangi Settlements

Treaty settlement of historic grievances has provided iwi with the ability to engage in self-development. However, those expectations were prescribed by the Crown under the policy of the *Fiscal Envelope*. There are some commentators who argue that the parameters of the fiscal cap have not changed, and that the Crown is moving forward to meet settlement on this basis.¹³⁵ While much of the Treaty settlement process is prescribed by the Crown, Māori expectations post-settlement are diverse

¹³³ Above n 126, at 529.

¹³⁴ “Interview with Moana Jackson, “We have come too far not to go further” (Dylan Taylor and Amanda Thomas” in *Counterfutures*, Vol 4 2017 at 45.

¹³⁵ Jason De Santolo “Exploring the treaty settlement process in Aotearoa/New Zealand” (2005) 7 *Balayi: Culture, Law and Colonialism* at 71.

and limited only by their vision. Thus it is no surprise that Māori view Treaty settlements differently to the Crown and have different expectations. According to Bargh, these expectations include structural change in the way governance operates and that political power should be shared more in Aotearoa (New Zealand) through constitutional change.¹³⁶ While the Crown ostensibly seeks to improve the economic position of Māori through economic development, the Crown continues to assert sovereignty and in some spheres, it continues behaving in a way that continues to contravene Te Tiriti o Waitangi. The adoption of generic post-settlement governance structures, however, means that iwi can and in some cases have become abridged versions of their former selves.

The Treaty of Waitangi Act 1975 resulted from decades of increasing Māori political agitation. Introduced as a means to investigate contemporary Māori grievances against the Crown, the Act established the Waitangi Tribunal, a permanent commission of inquiry mandated to investigate claims of breaches of the Treaty of Waitangi 1840. Based on the principles of distributive justice and historical redress, in 1980 the Act was amended retrospectively to allow for historical claims to be brought dating back to 1840 and the signing of the Treaty of Waitangi. Historical restitution through the Treaty settlements process has seen an unprecedented number of claims brought before the Waitangi Tribunal. The Treaty settlement process is a unique but practicable means for achieving reconciliation between the Crown and Māori that has not been without its pitfalls.¹³⁷ An examination of the jurisprudential history and its colonial origins in the tenets of the doctrine of discovery lays bare the depth of conflict and tension inherent in the project of colonisation for which Māori and other indigenous peoples continue to resist.

The execution of post-settlement governance arrangements required under the

¹³⁶ Maria Bargh “Chapter 12: The Post-settlement world (so far)” in *Treaty of Waitangi settlements* (Bridget Williams Books, Wellington, 2012) at 166.

¹³⁷ See generally Janine Hayward and Nicola Wheen (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2015), Mathew Palmer *the Treaty of Waitangi in New Zealand's Law and constitution* (Victoria University Press, Wellington, 2008); Veronica Tawhai and Katarina Gray-Sharp (eds) *Always speaking: the Treaty of Waitangi and public policy* (Huia Publishers, Wellington, NZ, 2011).

deeds of settlement and settlement legislation has proved challenging to date for many settled iwi.¹³⁸ For many iwi, ensuring the implementation of completed settlement agreements continues to be a crucial challenge post settlement. Currently, the Crown imposes a one-size fits all governance structure. i.e. the Post Settlement Governance Entity, to meet the needs of the Government settlement policy. The question arises, can it be shown to meet the needs of Māori? As Professor Hirini Mead of Ngati Awa commented:¹³⁹

So that's an issue the fact that this new governance body that the Crown wants us to set up is not really the kind of body that we want. We want one that does have good legal standing, firm legal standing, is Māori friendly, that meets the needs of our people, that meets concerns of tino rangatiratanga and that is also supported by an Act of Parliament, rather than relying on present laws dealing with Trusts.

In our case, an issue is this, we've spent months and months designing the governance structure that we want, and setting up a charter which will be its governing charter, only to find that, while the people can mandate the charter by voting on it, the Crown may not accept it. The Crown's new governance structure can be set, namely, the people vote for it and therefore mandate it, but it's really not the most suitable kind of organisation that the people need.

For Professor Mead, the Government's insistence on a PSGE diminished Ngati Awa's tino rangatiratanga. Similarly, it is a matter that remains unresolved for Ngāpuhi who will be the last iwi to settle should the mandate issues be resolved, and hapū representation be sufficiently addressed.¹⁴⁰

For Māori who hope to progressively assume greater control and autonomy over their futures, the concept of the Crown-Māori partnership needs re-examining. Even though a substantive constitutional review of the Treaty of Waitangi was

¹³⁸ Dion Tuuta (ed) *Māori Experiences of the Direct Negotiations Process* (Crown Forestry Rental Trust, Wellington, 2003).

¹³⁹ Hirini Moko Mead, above n 138, at 9.

¹⁴⁰ See Te Kotahitanga o Ngā Hapū Ngāpuhi Taiwhenua (Kotahitanga) and Tūhoronuku Independent Mandated Authority (Tūhoronuku IMA) *Maranga Mai: The Ngāpuhi-Engagement-Draft Report* April 2016).

undertaken, no tangible progress has been made between Māori and the Crown to address the significant issues raised and recommendations made.¹⁴¹ Historically however, Māori aspirations for constitutional review have always existed at a national level, as Māori aspired for political unity without reference to the Crown. The Kingitanga and Kotahitanga movements are both examples of historical models for Māori self-government. A modern example has been the Māori Congress which sought to facilitate tribal development. However, the modern Treaty settlement process is allowing for autonomous ‘settled’ iwi to garner independent relationships with the Crown on terms of their own choosing; a remarkable examples being the 2013 Tūhoe settlement with the Crown and the ground-breaking Te Urewera Act 2014 in which the Tūhoe homeland was declared a legal entity in its own right.¹⁴²

Embedded in Treaty settlement discourse, the partnership principle derives from the judgement of Sir Robin Cooke in the Court of Appeal.¹⁴³ As the Tūhoe settlement illustrates, future partnerships may take different shapes as Māori explore indigenous frameworks for self-development and self-determination in our current context. For example, there is value in further exploring the potential of partnerships with other indigenous nations, particularly in the areas of social justice, climate change, education and research. Indigenous peoples have established collaborative relationships in these fields already.

Significantly, this research seeks to determine how tribal governance will continue to interface with the Crown in a changing post-settlement context. The potential for change, for constitutional review and for innovative partnership frameworks offer possibilities in relation to the emerging issue of Māori women’s representation in tribal governance structures. The progressing of the Waitangi Tribunal Kaupapa themed inquiries will allow for more contemporary and significant issues to finally be addressed, such as the Mana Wahine claim due to be heard in 2019. So who should be the face of tribal governance in the future of Māori representation and

¹⁴¹ Margaret Mutu and Moana Jackson “He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa-The Independent Working Group on Constitutional Transformation” (National Iwi Chairs Forum and Te Wānanga o Waipapa, University of Auckland, 2016).

¹⁴² Tāmati Kruger “We are not who we should be as Tūhoe people” (Bruce Jesson Memorial Lecture, University of Auckland, October 2017).

¹⁴³ *New Zealand Māori Council v. Attorney-General* [1987] 1 NZLR at [64]1.

decision-making? Consequently, the Crown will face challenges as Māori seek more control and autonomy over their own affairs.

Contemporary models of indigenous tribal governance have evolved out of the desire of indigenous peoples to assert sovereignty through self-determination and self-development.¹⁴⁴ Indigenous international partnerships are offering Māori the opportunity to share and model best practice in governance.¹⁴⁵ While neoliberal legislative and policy agendas have influenced some indigenous tribes toward pursuing purely capitalist pursuits, which for many indigenous feminist advocates, activists and scholars ignores the pressing need for tribes to engage in social justice issues impacting indigenous families, women and children.¹⁴⁶ As noted previously, traditionally indigenous peoples have employed systems of governance that have supported balance, harmony and the importance of complementary gender roles to

¹⁴⁴ Stephen Cornell and Joseph P Kalt “American Indian Self-Determination: The Political Economy of a Policy that Works” (2010) at 3; Stephen Cornell and Joseph P Kalt “Where’s the glue? Institutional and cultural foundations of American Indian economic development” (2000) 29 J Socio-Econ at 453; Stephen Cornell and Joseph P Kalt “Two Approaches to the Development of native Nations” in Miriam Jorgensen (ed) *Rebuilding Native Nations: Strategies for Governance and Development* (The University of Arizona Press, Tucson, 2007) at 11; Tipene O’Regan “The Economics of Indigenous Survival and the Development of Culturally Relevant Governance” (Vincent Lingiari Memorial Address, Charles Darwin University, Darwin NT, August 2014); Tipene O’Regan, Lisa Palmer and Marcia Langton “Keeping the Fires Burning: Grievance and Aspiration in the Ngai Tahu Settlement” in Marcia Langton (ed) *Settling with Indigenous People: Modern Treaty and Agreement-Making* (Federation Press, Annandale, NSW, 2006) at 44.

¹⁴⁵ Two examples of International collaborations are 1. The Native Nations Institute, University Arizona, Tucson, Arizona <https://nnigovernance.arizona.edu/> and 2. The Australian Indigenous Governance Institute <http://www.aigi.com.au/>.

¹⁴⁶ Andrea Smith “American Studies without America: Native Feminisms and the Nation-State” (2008) 60 Am Q at 309; Cheryl Suzack, Shari M. Huhndorf, Jeanne Perreault, and Jean Barman (eds) *Indigenous women and feminism* (UBC Press, Vancouver, 2010); Joyce Green (ed) *Making space for Indigenous feminism*: (Winnipeg, Fernwood, 2017); Andrea Smith and J Kēhaulani Kauanui “Native Feminisms Engage American Studies” (2008) 60 Am Q at 241; Patricia Monture-Angus *Thunder in my soul: A Mohawk woman speaks* (Fernwood Publishing, Halifax, 1995) at 4; Mikaere, above n 21; Nereda White “Indigenous Australian women’s leadership: stayin’ strong against the post-colonial tide” (2010) 13 Int J Leadership in Education at 7; Kathie Irwin “Towards theories of Māori feminism” (Oxford University Press, Auckland, 1992); Linda T. Smith, above n 61; Makere Stewart-Harawira *The new imperial order* (Huia Publishers, Wellington, , 2005) at 188; Naomi Simmonds “Mana wahine: Decolonising politics” (2011) 25 Womens Stud J at 11; Joyce Green “Decolonizing in the era of globalization” *Canadian Dimension* (Winnipeg, 31-33 March at 31; Joyce Green *Making Space for Indigenous Feminism* (2nd ed, Fernwood, Winnipeg, 2017) at 20.

guaranteeing social cohesion and survival.¹⁴⁷ Arising out of this context are mounting calls from indigenous women for gender-balanced leadership and freedom from gender biased decision-making.¹⁴⁸

Development Discourse

Bargh has described development discourse as an integral part of a process akin to re-colonisation.¹⁴⁹ Indigenous women lost political and economic autonomy through colonisation, and the importation of colonial values and ideals that perceived indigenous traditions of governance as impediments to development.¹⁵⁰

Indigenous development theories were first promulgated in the 1960s and 1970s to address under-development and State interventionism. Early theorists sought to address problems associated with poverty and low standards of living in poorer

¹⁴⁷ Gail Guthrie Valaskakis, Madeleine Dion Stout and Éric Guimond (eds) *Restoring the balance: First Nations women, community, and culture* (University of Manitoba Press, Winnipeg, 2009); Ani Mikaere “Maori Women: Caught in the Contradictions of a Colonised Reality” (1994) 2 Waikato Law Rev at 125; Mikaere, above n 21.

¹⁴⁸ Jennifer Denetdale “Chairmen, Presidents, and Princesses: The Navajo Nation, Gender, and the Politics of Tradition” (2006) 21 Wicazo Sa Review at 9; Cynthia D Stirbys “Gender-Based Analysis and Differing Worldviews” (2008) 26 Canadian Woman Studies at 140; Mary Ellen Turpel “Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women” (1993) 6 Can J Women & L at 174; Rauna Kuokkanen “Self-Determination and Indigenous Women’s Rights at the Intersection of International Human Rights” (2012) 34 Human Rights Quarterly 1 at 225; Jo-Anne Fiske “The Womb is to the Nation as the Heart is to the Body: Ethnopolitical Discourses of the Canadian Indigenous Women’s Movement” (1996) 51 Studies in Political Economy at 65; Catharine A MacKinnon *Women’s lives, men’s laws* (Belknap Press of Harvard University Press, Cambridge, Mass, 2005); Erin Wolski “Culturally Relevant Gender-based Analysis: A tool to promote equity” (2008) 11(1) Canadian Women’s Health Network at 1; Nan Seuffert “Nation as Partnership: Law, “Race” and Gender in Aotearoa New Zealand’s Treaty Settlements” (2005) 39 (3) Law & society review at 485; Green above n 146; Johnston above n 27 at 19.

¹⁴⁹ Bargh above n 117 at 92.

¹⁵⁰ Kim Anderson *A Recognition of Being: Reconstructing native womanhood* (Canadian Scholars’ Press, Toronto, 2000) at 173; Karen Anderson “A Gendered World: Women, men and the political economy of the seventeenth-century Huron” (1987) *Feminism and Political Economy: Women’s Work, Women’s Struggles* at 121; Rauna Kuokkanen “Indigenous Economies, Theories of Subsistence, and Women: Exploring the Social Economy Model for Indigenous Governance” (2011) 35(2) *American Indian Quarterly* at 215; Denetdale, above n 148 at 9; Jo-Anne Fiske, Melonie Newell and Evelyn George “First Nations women and governance: A study of custom and innovation among Lake Babine Nation women” (2001) *First Nations Women Governance and the Indian Act: A Collection of Policy Research Reports* at 55; Green, above n 146.

nations.¹⁵¹ Linda T. Smith has noted that during these decades the notion of development assumed that societal progress was unilinear moving forward in stages which saw them become less primitive, more civilised, more rational and with social structures becoming more complex and bureaucratic.¹⁵² Thus societies were expected to pass through phases of development associated with the benefits of modernisation and capitalism. Associated with theories of development were simultaneous critiques of underdevelopment and dependency that illuminated the stark contrast between the countries of the developed North or ‘First World’,¹⁵³ and the so called ‘Third World’ countries of the undeveloped South.¹⁵⁴ In 1974, the term ‘Fourth World’ was introduced to describe the experiences of indigenous peoples situated within European states. Shuswap (First Nations) Chief George Manuel argues for the acknowledgement of a Fourth World of Indigenous peoples descended from a country’s aboriginal population that are either totally or partially deprived of the right to their own territories and riches.¹⁵⁵ The term was used to describe the oppressive conditions faced by the First Nations’ peoples of Canada but was intended to encompass nations of indigenous peoples everywhere. The notion of the Fourth World has grown to underpin contemporary indigenous development theory. As Hall explains, it contains a vision for “a very different future from the monocultural organisation of the world’s resources as an American empire of private property under a regime of transnational corporate rule.”¹⁵⁶

Slowey contends that while Hall envisages “a pluralistic global village without the tyranny of a universal and homogenous state” and in theory, the notion of the Fourth World is symbolic of the indigenous struggle for recognition and emancipation, in her view, indigenous development is best understood as a process influenced by

¹⁵¹ Fernando Cardoso “The Consumption of Dependency theory in the United States” (1977) 12(3) *Latin American Research Review* at 7; Walter Rostow “The Stages of Economic Growth” in *Development and Society: The Dynamics of Economic Change* (St Martins Press, New York, 1964).

¹⁵² Linda T. Smith, above n 61 at 30.

¹⁵³ For example the modernised capitalist and industrialised countries like Canada, the United States and Great Britain.

¹⁵⁴ Those developing countries of Africa, Asia and Latin America.

¹⁵⁵ George Manuel and Micheal Posluns *The Fourth World: An Indian Reality* (Collier-Macmillan, Toronto, 1974) at 40.

¹⁵⁶ Tony Hall, *The American empire and the fourth world* (McGill-Queen’s University Press, Montreal, 2003).

globalisation and neoliberalism.¹⁵⁷ Neoliberalism, she argues, invokes the rhetoric of progress and growth to legitimate systems of power and domination thereby insinuating that increased market freedoms and decreased government intervention will improve the lives of indigenous peoples. Slowey further argues that where neoliberalism was once viewed as a force for disempowerment, many indigenous peoples now view it as providing avenues for liberation with the State supporting them through devolution and the promotion of partnerships and joint ventures.

Conway and Heynen, however, critique this view arguing that these so-called partnerships fail to reduce inequality as they are instead working to perpetuate the State's ability to exert political power over indigenous peoples and reinforce unequal power relations.¹⁵⁸ At the heart of any development discourse for indigenous peoples is the relationship they have with the land and sea, and other resources, including intellectual and cultural property. Neoliberals and indigenous peoples have different perspectives on how to exploit/develop these resources – leading to different views on development. I argue that the fundamental tenet that remains central to the development discourse, however, is indigenous self-determination. To what extent neoliberal policies and agendas have become institutionalised and normalised within indigenous governance structures is a pressing issue for indigenous women.

Neoliberalism

Neoliberalism has become the most powerful and pervasive economic ideology of our times, recreating the world in terms of economic, corporate market spaces rather than nation states.¹⁵⁹ Neoliberalism, as a discourse, takes account of a broader set

¹⁵⁷ Gabrielle A Slowey “Globalisation and Development in the Fourth World: Indigenous Experiences in Canada and New Zealand compared” (paper presented to 4th International Critical Management Studies conference, Judge Institute of Management, University of Cambridge, Toronto, July 2005) at 2.

¹⁵⁸ Dennis Conway and Nikolas Heynen in Andre Gunder Frank “Classical dependency theories: from ECLA to Andre Gunder Frank” *The Companion to Development Studies* (Oxford University Press, London, 2002) at 97.

¹⁵⁹ Jane Kelsey *The New Zealand experiment: A world model or structural adjustment?* (Bridget Williams Books, Auckland, NZ, 2015); Jane Kelsey “The Denationalisation of Money: Embedded Neo-Liberalism and the Risks of Implosion” (2003) 12(2) *Social and Legal Studies* at 155; Marcus Power “Working the spaces of neoliberalism” (2005) 37(3) *Antipode* at 605.

of ideologies that engender the unequal power relations inherited from colonialism in respect of race, gender and class. Narrowly perceived ideas of self-determination through development would have us subscribe wholeheartedly to the economic logic of neoliberalism at the expense of indigenous political, social and cultural imperatives. Indigenous resistance seeks to question, challenge, deconstruct and decolonise structural impediments to indigenous development pathways to self-determination.¹⁶⁰

Since the 1990s, neoliberalism and the free market ideology have become the driving force behind government practice and policy. Neoliberalism is in fact traditional economic orthodoxy comprised of three core elements:¹⁶¹

Market liberalisation (the removal of price controls, financial liberalisation and less intervention in the labour market);

Trade liberalisation (removing import quotas, reducing tariffs and floating exchange rates), and

Reducing the role of the State in the economy by privatising and cutting government expenditure on the public sector.

Neoliberalism is yet another civilizing project impacting indigenous peoples and reconstituting many older colonial beliefs in the form of legitimate legal, social, political and cultural constructs. Neoliberalism's practical manifestation is globalisation. Globalisation is a term rarely used these days as modern day capitalist economies and transnational actors have moved increasingly towards globalising regimes of political, economic, financial and cultural power. Globalisation typically involves the intensification in the global movement of goods, services, capital and people. Kelsey is unquestionably at the forefront of critique when it comes to understanding the influence of globalisation and specifically, the New Zealand Government's economic liberalisation agenda since 1984. Kelsey compares the ideological notions of neoliberal free trade with the reality of increased corporate

¹⁶⁰ Maria Bargh *Resistance an Indigenous Response to neoliberalism* (Huia Publishers, Wellington, 2007) at 1.

¹⁶¹ Larissa Behrendt "Globalisation and self-determination: The challenges for sovereignty and governance" (paper presented to *Indigenous Governance Conference* (2002) at 3.

control of the world and the potential threat to democracy. In doing so, Kelsey differentiates *globalisation as ideology* from *globalisation in practice*. The first refers to the overarching doctrine – “...that imagines an interdependent and self-regulating global economy where goods, capital and ideas flow freely, irrespective of national borders, social formations, cultures or politics.”¹⁶² Globalisation in practice describes a highly contested process where the competing interests of people, companies, tribes, governments and other groupings overlap and collide; alliances form; accommodations and more drastic revisions are made; and new contradictions arise.”¹⁶³

Global economic integration has been promoted as not only desirable but inevitable through policy directives emanating from the G8 and G20 global governance meetings. Regionally, this program is expressed through the Pacific Agreement on Closer Economic Relations meetings.¹⁶⁴ The neoliberal agenda is cast as a commitment to ‘free’ trade in goods and services, the free mobility of capital, a reduction in the size of the State through privatisation and corporatisation and structural adjustment.¹⁶⁵ It is justified on the grounds of providing for market efficiency and that economic growth equals human improvement.¹⁶⁶ Critics such as Shiva¹⁶⁷ and Monbiot¹⁶⁸ decry the effects of neoliberal economic ideology and call

¹⁶² Jane Kelsey *Reclaiming the future* (Bridget Williams Books, 2015) at 2.

¹⁶³ At 2.

¹⁶⁴ The [Pacific Agreement on Closer Economic Relations](http://www.bilaterals.org/spip.php?rubrique86) or PACER is a framework agreement to deepen trade and investment liberalisation in the broader Pacific on a step by step basis. It was signed in 2001 and came into force in 2002. PACER includes Australia and New Zealand, who are excluded from PICTA and commits all members to begin negotiations towards a free trade agreement by 2011 at the latest. In August 2008, Simon Crean, Australia’s Trade Minister at the time, started advocating a “PACER-plus” agreement, in lieu of the originally envisaged FTA, which signals the aggressiveness of Australia’s stance to achieve an agreement, particularly given the EU’s pending EPA with the Pacific Island states. A number of officials and civil society critiques from the Pacific Islands have stated that the PACER deal is of little benefit to them, some pushing for greater labour mobility for Pacific Island workers to Australia and New Zealand. In June 2011, Fiji’s Attorney-General charged that PACER is only really benefitting the economically powerful in the region – Australia and New Zealand. See <http://www.bilaterals.org/spip.php?rubrique86>.

¹⁶⁵ Bargh, above n 160, at 1.

¹⁶⁶ At 8.

¹⁶⁷ Vandana Shiva *Earth democracy* (Zed, London, 2006).

¹⁶⁸ George Monbiot *The age of consent: a manifesto for a new world order* (Flamingo, London, 2003); George Monbiot *Bring on the apocalypse* (Atlantic Books, London, 2008).

for the radical revisiting of capitalist ideals as the central organising principle through which to drive all human enterprise. Giddens, on the other hand, is well known for promoting a more ethical focus on the effects of economic doctrine in his articulation of the ‘Third Way’, which promotes notions of self-realisation, social solidarity, democracy and social justice.¹⁶⁹ Giddens’s theory is beneficial because it sheds insight on the problem of mitigating *laissez-faire* capitalism with indigenous development. Similarly, Amartya Sen more easily reconciles his theory of ‘development as freedom’ as a mix of democratic capitalist economies with welfare systems that support human life.¹⁷⁰

For indigenous peoples, neoliberalism is a continuance of the civilising project that reconstitutes many earlier colonial beliefs as legitimate legal, social, political and cultural constructs. It is within such a framework that the Treaty of Waitangi is being co-opted to the neoliberal agenda through the settlements process; with an articulation of the new Māori economic development model offering globalisation as liberation. Concerns about the effects of neoliberal economic policy on Māori governance and decision-making are growing. Some critics, such as Bargh¹⁷¹ and Sykes¹⁷² are acerbic in their condemnation of the rise of a new ‘iwi elite’, and their capitalist agenda. Others argue for alternative models of capitalism and a more distributive focus on the deleterious effects associated with a market-driven doctrine.¹⁷³

Understanding the external forces that globalization and neoliberalism exert, leads to a discussion of the indigenous aspirations that are impacted upon such as sovereignty and self-determination. There is a view that sovereignty is constitutionally backward looking. Self-determination on the other hand, is

¹⁶⁹ Anthony Giddens *The third way and its critics* (Polity Press, Malden, Mass, 2000).

¹⁷⁰ Amartya Sen *Development as Freedom* (Anchor Books, New York, 1999).

¹⁷¹ Bargh above n 160.

¹⁷² Annette Sykes, “The Politics of the Brown Table” (Bruce Jesson Memorial lecture, Maidment Theatre, University of Auckland, 27 October 2010).

¹⁷³ Toon van Meijl “Ownership and Distribution in the settlement of Māori Grievance: Balancing Historical and Social Justice Between Classes” in Fiona McCormack and Kate Barclay (eds) *Engaging with Capitalism: Cases from Oceania* (Bingley, UK: Emerald, 2013) 27 at 47; George N. Curry and Gina Koczberski “Development implications of the engagement with capitalism: improving the social returns of development” in Fiona McCormack and Kate Barclay (eds) *Engaging with Capitalism: Cases from Oceania* (Bingley, UK: Emerald, 2013).

necessarily future focused. Both are necessarily about determining a vision for the future.

Despite the growing awareness of the on-going and heavily detrimental impacts for Māori, few analyses have been concluded to effectively deal with its effects. Such an analysis is fundamental to this thesis as development discourse and theory is still driving post-settlement Māori aspirations.. I contend that the significance of indigenous economic development extends beyond purely capitalist pursuits to matters such as the maintenance of social organisations and kinship structures based on traditional values and knowledge. I think that to address both of these contradictions requires a process of decolonisation in terms of the development of indigenous theories and practices that inform indigenous governance.

The Age of Globalisation

The terms globalisation and neoliberalism have become indiscernible in the literature to the extent that both refer primarily to a particular form of corporatisation based upon a narrowly defined view of neoliberal economic ideology and the advancement of capitalist interests at the expense of other values.¹⁷⁴ The core of neoliberal ideology is the minimisation of State responsibility to allow private business through the mechanics of the ‘free-market’ to trade in goods, capital and human labour across national borders, with the net effect of placing global entities outside of the gambit of state-level legislative frameworks.

Viewed in a broader socio-economic context, globalisation is held to have caused wage stagnation, increasingly high unemployment and greater insecurity in terms of undermining democratic processes.¹⁷⁵ Alternatively, some critics of neoliberal globalisation argue that it is based on an ideology centred around a narrowly defined view of ‘worth’ that is based entirely on economic terms.¹⁷⁶ McMurtry states:

¹⁷⁴ Joseph E Stiglitz *Globalization and its discontents* (WW Norton, New York, 2003).

¹⁷⁵ James DeFilippis *Unmaking Goliath* (Routledge, New York, 2004); Roger Keil “Common–Sense’ Neoliberalism: Progressive Conservative Urbanism in Toronto, Canada” (2002) 34 *Antipode* at 578; Mark Purcell “Urban Democracy and the Local Trap” (2006) 43(11) *Urban Studies* at 1921.

¹⁷⁶ John McMurtry “Life-Value Economics vs the Neo-Classical Paradigm: Reply to Hodgson” (2001) 33(1) *Journal of Business Ethics* at 79; John McMurtry “Why the

Notwithstanding neo-classical doctrine's systematic inversion of the normal meaning of terms, we should be exactly aware of the false equivalents, which are thus instituted. For 'utility' is not the same as the price someone is willing and able to pay for a commodity. Nor is 'efficiency' the same as the ratio between the internal capitalist cost inputs and units of revenue-bearing outputs. ...to suppose as given that the neo-classical meaning of 'utility' is equivalent to 'happiness' (which is what the classical concept of utility means)... is delusional.¹⁷⁷

Aligned to this argument is Shiva's view that 'common knowledge' is commodified into economic terms resulting in the apportionment of intellectual property rights thus undervaluing important notions of '*heritage*' and '*well-being*'.¹⁷⁸

Some writers dispute the very existence of globalisation by claiming that globalisation in and of itself would be beneficial. Stiglitz supports a managed market economy, which is in opposition to the pervading free market ideology associated with debates about economic globalisation.¹⁷⁹ He holds the view that markets are at the centre of a prosperous economy; however, governments have an active role to play in both promoting development and protecting the poor. Government's role, therefore, is to create a climate that allows business to thrive and create jobs. Stiglitz sees development as a process involving every aspect of society engaging the efforts of markets, governments, NGOs, co-operatives and not-for-profits. As such, successful development means sustainable, equitable and democratic development that provides improved living standards and the transformation of society.¹⁸⁰

Monbiot expresses a slight deviation on the same theme. He demonstrates that it is, in fact, the lack of globalisation that has resulted in economic and social disparities

Protestors Are against Corporate Globalization" (2002) 40(3) Journal of Business Ethics at 201.

¹⁷⁷ At 80.

¹⁷⁸ Shiva, above n 167 at 7.

¹⁷⁹ Joseph Stiglitz "Globalization and growth in emerging markets and the new economy" (2003)25(5) Journal of Policy Modelling 505 at 521.

¹⁸⁰ Joseph E Stiglitz *Making globalization work* (1sted, WW Norton, New York; London, 2006) at 25.

and community separation. Monbiot suggests that true globalisation would connect all of the world's population in an equitable and just manner if the interests of corporates and global institutions were not elevated above those of ordinary people.¹⁸¹ Zientara cautions us against conceptualising globalisation in black and white terms and suggests that its sheer complexity and multi-dimensionality related issues require a more nuanced and less biased interpretation.¹⁸²

In the Aotearoa (New Zealand) context, neoliberalism is understood both as policy and discourse. Neoliberalism as policy underpins the capture by neoliberal ideology of key international institutions such as the IMF, World Bank and Organisation for Economic Co-operation and Development (OECD).¹⁸³ These institutions are linked to a trans-national network of private interest lobby groups supported by multinational capital. The influence exerted on the Aotearoa (New Zealand) State and economy came from the Chicago school of economics, and a powerful nucleus of neoliberal politicians and Treasury bureaucrats whose decisions led to crucial policy changes and ultimately, the implementation of a programme of structural adjustment in 1984.¹⁸⁴ While a deeper analysis of all the complex factors associated with neoliberal reform in Aotearoa (New Zealand) is outside of the scope of this thesis, the key issue is that government policy changed dramatically, taking Aotearoa (New Zealand) from a welfare state to a “unique market driven economy.”

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Summary

This introduction sets a broader context within which I locate the discussion and analysis of colonisation. Neoliberal ideology is introduced as the vehicle which has worked to undermine traditional knowledge systems and to implant the global meta-

¹⁸¹ Monbiot, above n 168.

¹⁸² Piotr Zientara “A Few Critical Remarks on Globalisation, Democracy and Spatiality” (2009) 29 *Economic Affairs* 56 at 60.

¹⁸³ Jane Kelsey *At the crossroads* (Bridget Williams Books, Wellington, NZ, 2002); Jane Kelsey *The New Zealand experiment* (New ed ed, Auckland University Press: Bridget Williams Books, Auckland, NZ, 1997); Bruce Jesson *Only their purpose is mad* (Dunmore Press, Palmerston North, NZ, 1999); Shaun Goldfinch *Remaking New Zealand and Australian economic policy* (Victoria University Press, Wellington, [NZ], 2000).

¹⁸⁴ Jane Kelsey *Rolling back the state* (Paul & Co Pub Consortium, 1993); Kelsey, above n 119.

¹⁸⁵ Goldfinch, above n 92 at 178-179.

narrative of self-determination achieved through economic development into the indigenous consciousness. In the countries that are under consideration in this thesis, I argue that while reconciliation, recognition and settlement might, for the State, symbolise a form of ‘postcolonial’ nationhood, for indigenous peoples there has been no break from the settler colonial past and an insufficient shift in indigenous people’s access to legitimate power-sharing.

So far, I have made limited reference in this section to contemporary western critiques of neoliberalism and globalisation. Indigenous perspectives of neoliberalism provide a key viewpoint for this thesis in relation to the positioning of indigenous women in governance structures that advance neoliberal values and ideals borne of gendered colonialism.

Indigenous resistance has included economic opposition to neoliberal policies ranging from natural resource extraction to international controls, monetary policies and development held to be counterproductive to indigenous communities.¹⁸⁶ Resistance to neoliberalism is key to Māori self-determination. Bargh explores examples of resistance but first takes great pains to define neoliberal practices and policies. Resistance takes the shape of attempts to decolonise by dismantling colonial structures and purifying indigenous culture and practises.¹⁸⁷ Decolonisation in this context is considered to be ongoing resistance through the production of cultural identity; the teaching and preservation of indigenous languages, philosophy, science, dances, artistic and ceremonial practices.¹⁸⁸ Linda T. Smith contends that resistance to western ideas about what constitutes valid knowledge is available through the development of counter-practices of research, which Smith terms ‘writing back’.¹⁸⁹ Thus disrupting the accepted research rules and engendering practices that are respectful, ethical, sympathetic and useful vs. racist practices and attitudes, ethnocentric assumptions and exploitative research.¹⁹⁰

¹⁸⁶ Jerry Mander and Victoria Tauli-Corpuz, *International Forum on Globalization Paradigm wars* (Sierra Club Books; Distributed by University of California Press, San Francisco; Los Angeles, Calif, 2006).

¹⁸⁷ Bargh above n 160, at 15.

¹⁸⁸ Linda T. Smith, above n 61, at 120.

¹⁸⁹ At 38.

¹⁹⁰ At 4.

Chapter 2 outlines the philosophical and methodological foundations of this research. The intention of this thesis is to legitimate indigenous worldviews and their potential to compete with the oppositional ideologies of colonialism and neoliberal capitalism. Thus I draw on Mātauranga Māori as the underpinning philosophy. It is Mātauranga Māori that provides the impetus for the use of Kaupapa Māori, a localised critical theory that is borne of resistance and its anti-hegemonic potential.¹⁹¹ As a qualitative approach to research, Kaupapa Māori allows anti-colonial and indigenous narratives to be analysed. I draw primarily on the work of Linda T. Smith *Decolonising Methodologies: Research and indigenous peoples* for its applicability to the indigenous standpoint.¹⁹²

Chapter 3 explores indigenous women's colonised and gendered realities revealed in the dominating narrative of colonialism. It provides a historical overview of colonisation and examines the political and legal imperatives for indigenous self-determination and self-government. Attention is paid to the common colonising mechanism of Treaty, making with indigenous peoples and how the resultant Treaty relationships between governments and indigenous tribes operate today, revealing of the negative systemic issues facing indigenous women in modern times.

Chapter 4 provides a comparative analysis of the legal and political context within which indigenous governance is situated. It necessitates displaying a comparative understanding of the legal context within which indigenous governance is situated to clarify the positioning of indigenous women within it. I compare and contrast the Federal Indian Trust relationship with the Treaty of Waitangi relationship. The Treaty based relationships are important for understanding the self-determination agenda for indigenous tribes, which give rise to contemporary governance structures.

This discussion is followed in Chapter 5 by a gendered comparative approach to examining indigenous governance. This approach is intended to illustrate the scale of the problem of gender balance in contemporary indigenous governance as reflections of the wider society within which they exist. It is hoped that by

¹⁹¹ Graham Hingangaroa Smith "The Development of Kaupapa Maori Theory and Praxis" (Doctoral Dissertation, University of Auckland, 1997).

¹⁹² Linda T. Smith, above n 61.

comparatively examining the intersections between law, policies, State practices and the resultant consequences for indigenous governance, the gendered legal-political realities of indigenous women can be more definitively acknowledged and potentially addressed.

Chapter 6 provides a comparative analysis of indigenous women's narratives. This chapter utilises the key elements of Kaupapa Māori theory as developed by Graham H. Smith as a framework for analysing the narratives of several indigenous women collected throughout this research.¹⁹³ The key elements of analysis are:

1. Tino Rangatiratanga (the self-determination principle)
2. Taonga tuku iho (the cultural aspirations principle)
3. Ako Māori (the culturally preferred pedagogy principle)
4. Ka piki ake I nga raruraru o te kainga (the socio-economic mediation principle)
5. Whānau (the extended family structure principle)
6. Kaupapa (the collective philosophy principle)

The utility of a Kaupapa Māori analysis is in its ability to enable the indigenous researcher to frame the research in a manner that centres indigenous voices, values and traditions.

In Chapter 7 of this thesis, I employ a case study research method to analyse the Mana Wahine submissions for the Wai 2700 claim to the Waitangi Tribunal which is due to be heard in 2019 as one of the Kaupapa Inquiries. The inclusion of the Mana Wahine claim is important because it gives voice to the concerns of Māori women regarding the diminished role and status of Māori women since the signing of the Treaty of Waitangi.

The conclusion of this thesis is provided in Chapter 8. This chapter provides a summary of the main themes of the thesis and seeks to highlight the areas requiring further research and investigation. There is much to be done in the context of

¹⁹³ Graham H. Smith, above n 191; Graham Hingangaroa Smith and International Research Institute for Māori and Indigenous Education *The development of kaupapa Maori* (University of Auckland, Auckland, NZ, 2002); Graham Smith, Te Kawehau Hoskins and Alison Jones "Interview: Kaupapa Māori: the dangers of domestication" (2012) 47(2) NZ Journal of Education Studies at 1.

indigenous tribal governance for indigenous women such that this work would contribute to both the self-determination agenda and sustainability of their tribes.¹⁹⁴

¹⁹⁴ Throughout this thesis and for consistency, I have used the terminology Native American when referring to Indigenous peoples of the United States. There are some references made to American Indian or Indian, particularly within my footnotes or where Native Americans refer to themselves or each other as Indian. I have made reference to both Indian law and Indian country in circumstances where the discussion is being led and the term introduced by a person that is Native American.

Chapter 2 – Kaupapa Māori Methodology

Indigenous theories have emerged as an affirmation of indigenous ways of knowing and worldviews.¹⁹⁵ Indigenous research is part of a larger project that holds emancipatory ideals and transformation as the goal of the research, of which Kaupapa Māori theory is an example of the interconnectedness of indigenous theory and research. It is this notion of connectedness that makes indigenous research meaningful and indigenous theories vital. Research is ultimately for and with the people; the collective rather than just about the individual. Related to the concept of connectedness is the requirement of ‘giving back’ – reciprocity. While reciprocity can take many forms, it is essential for the researcher’s accountability to the community within which and about whom the research was conducted. Linda T. Smith poses the following set of questions that indigenous peoples must ask themselves:¹⁹⁶

Who defined the research problem? For whom is this study worthy and relevant? Who says so? What knowledge will the community gain from this study? What knowledge will the researcher gain from this study? What are some likely positive outcomes from this study? What are some of the possible negative outcomes? How can negative outcomes be eliminated? To whom is the researcher accountable? What processes are in place to support the research, the researched and the researcher?

It is within this context that I frame this thesis. On an international level, I seek to take account of indigenous people’s experiences of the neoliberal logic of treaty-making and Treaty settlements. In particular, I intend to analyse the governance structures inherent in contemporary tribal societies and the place of indigenous

¹⁹⁵ See for example Bryan McKinley and Jones Brayboy “Toward a Tribal Critical Race Theory in Education.” (2005) 37(5) *Urban Review* at 425; Aileen Moreton-Robinson “Towards an Australian Indigenous Women’s Standpoint Theory” (2013) 28(78) *Australian Feminist Studies* at 331; Linda Tuhiwai Smith *Decolonising Methodologies research and Indigenous peoples* (2nd ed, Zed Books, London, 2012); Leonie Pihama “Mana wahine theory: Creating space for Māori women’s theories” (2005) *Cultural studies: From theory to action*, Malden, MA:Blackwell; Hadley Friedland and Val Napoleon “Gathering Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions” (2015) 1(1) *Lakehead Law Journal* at 17.

¹⁹⁶ Linda T. Smith above n 61 at 175.

women in those structures.

At a local level, I seek to reinforce the advancement and applicability of Mana Wahine theory as a theoretical framework that allows for Kaupapa Māori analysis of issues relevant to Māori and indigenous women. Both Kaupapa Māori and Mana Wahine are conceptually based on Māori cultural and philosophical traditions, i.e. Mātauranga Māori and Tikanga Māori.

Indigenous Feminism

The focus on indigenous women in this thesis reflects the anti-colonial movement of indigenous feminism.¹⁹⁷ There is a growing body of literature that recognises the importance of critical engagement with indigenous women's shared experience of colonialism and patriarchy in ways that western feminism fails to do so. While the development of feminist theory since the 1970s has enabled the examination of gendered discrimination, indigenous feminism is presumed to fall within the normative definitions of women of postcolonial feminism and women of colour. According to Moreton-Robinson, white feminists can't get past their whiteness. White feminists speak, write and act from a subject position of dominance that is inherent within their own positions of white middle-class privilege.¹⁹⁸

I consider my research to be an activist indigenous women's project that draws from anti-colonial feminist theories which emphasise the gendered legacies of colonialism such as globalisation, capitalism and neoliberalism. I interrogate the impacts of race, class and gender that continue to shape the social, economic and political oppression of women. It has been well asserted, however, that western feminist discourse alone cannot account for the positioning of indigenous women

¹⁹⁷ Haunani-Kay Trask "Feminism and Indigenous Hawaiian Nationalism" (1996) 21(4) *Signs* at 906; Makere Stewart-Harawira "Practicing Indigenous feminism: Resistance to Imperialism" (2007) *Making space for Indigenous feminism* at 124; Andrea Smith and J Kēhaulani Kauanui "Native Feminisms Engage American Studies" (2008) 60(2) *American Quarterly* at 241; Val Napoleon "Aboriginal Feminism in a Wider Frame" (2007) 41(3) *Canadian Dimension* at 44; Tracey Lindberg "Not My Sister: What Feminists Can Learn about Sisterhood from Indigenous Women" (2004) 16 *Can J Women & L.* at 342; Joyce Green(ed) *Making Space for Indigenous Feminism* (2nd ed, Fernwood Publishing; Winnipeg, 2017).

¹⁹⁸ Aileen Moreton-Robinson *Talkin' up to the white woman: aboriginal women and white feminism* (University of Queensland Press, St Lucia, Qld, 2000) at xvii.

in western or even indigenous societies.¹⁹⁹ Issues of race, class and gender are compounded for indigenous women in colonised cultural contexts influenced by white patriarchy and power that create reflected hierarchies of brown patriarchy and power. I seek to identify the point at which western feminism and indigenous women's knowledge converge. This point of convergence is where indigenous women's decolonising methodologies are focused. It is also the space within which indigenous women's knowledge exists.

The Māori lens that I view feminist theory through enables me to peel back enough layers of indigenous women's experience such that I can clearly articulate my theoretical positioning. In actuality, my theoretical lens is more like a prism and necessarily so. Indigenous women have layers upon layers of experiences that need to be read, thrashed out and in some cases discarded before we can truly understand what is at the hub of our experience and therefore identify ourselves as indigenous women. Western feminist theory cannot successfully illustrate the notion that Māori women theorise their experiences with a focus on both being Māori and female and that these experiences can only be successfully analysed through Māori frameworks that also incorporate Māori women's worldviews. More specifically, in this thesis, I take the position that there are fundamental differences between the life worlds of Pākehā and Māori women in Aotearoa (New Zealand). Irwin,²⁰⁰ Mikaere,²⁰¹ Johnston²⁰² and Pihama,²⁰³ among others, would argue that feminist discussions of gender and difference can include Māori women and on one level, it is accepted that universal issues do exist. However, Pākehā feminism cannot account for Māori women's multiplicity of practices, cultural symbols and differences because Pākehā feminism ignores our different colonial histories. In this thesis, I will develop this notion further with the introduction of Kaupapa Māori and Mana Wahine theory

¹⁹⁹ Linda T Smith above n 61 at 168.

²⁰⁰ Kathie Irwin *Towards theories of Māori feminism* (Oxford University Press, Auckland, NZ, 1992).

²⁰¹ Ani Mikaere "The Balanced Destroyed: The Consequences for Maori women of the Colonisation of Tikanga Maori" (Unpublished Master of Jurisprudence thesis, Waikato, 1995).

²⁰² Patricia Johnston "He Aro rereke: Education Policy and Maori Underachievement: Mechanisms of Power and Difference" (Doctoral Dissertation, University of Auckland, 1998).

²⁰³ Leonie Pihama "Tihei Mauri Ora: Honouring Our Voices Mana Wahine as a Kaupapa Maori Theoretical Framework" (Doctoral Dissertation, University of Auckland, 2001).

into this paradigm.

It is clear that if indigenous peoples are serious about transformation through decolonising the institutions and structures that subjugate and marginalise them, then the voices of indigenous women must be part of the decolonising agenda. Tribal governance is a contested site of struggle, and it is within this site that the power of indigenous women's voices should be heard in the collective pursuit of self-determination.

Kaupapa Māori Theory

I frame my approach to this thesis as Kaupapa Māori research because it affirms and legitimates being Māori. Contextually, at the core of Kaupapa Māori research is Kaupapa Māori theory, which encompasses both the ontological and epistemological elements of Tikanga Māori. In essence, Kaupapa Māori articulates the writer's own epistemological paradigm, which Guba and Lincoln have defined as "the basic belief system or worldview that guides the investigator".²⁰⁴ Being a Ngāpuhi woman, I am privileged with 'insider' knowledge, which allows me access to Māori participants within my own 'Māori' networks and community. Hence Kaupapa Māori is essential for informing the process of research. It is important to remember, that having gained access, as a Māori researcher, to these networks and my community, I have been careful to conduct this research in a manner that is culturally appropriate.

The co-option of the term 'theory' is as an attempt to challenge dominant western notions of theory and thus provide "counter-hegemonic practice and understandings" of how theory is constructed, defined, selected, interpreted and applied.²⁰⁵ The growing body of literature about Kaupapa Māori theory by authors

²⁰⁴ Egon Guba and Yvonna Lincoln "Competing Paradigms in Qualitative Research" in *Handbook of Qualitative Research* (Sage Publications, Thousand Oaks, 1994) at 195.

²⁰⁵ Graham H. Smith above n 191, at 455.

such as Graham H. Smith,²⁰⁶ Linda T. Smith,²⁰⁷ Pihama and others,²⁰⁸ Henry and Pene,²⁰⁹ and others, recognises that theories are socially constructed and informed by the worldviews and philosophies of those who participate in their construction. Given the historical infliction of Pākehā structures, language law and knowledge onto Māori people, there is undeniably a political as well as a cultural drive that is essential to current theoretical expressions of Kaupapa Māori. Graham H. Smith contends that theory is central to the development of that liberatory processes that he refers to as “transformative action in the interests of subordinated groups”.²¹⁰ Smith views theory as a site of struggle between interest groups and the struggle for theoretical space. To support Māori critical analysis of our own experiences is a struggle that is worthwhile. This critical analysis is also about Māori constituting theory in our own terms and in response to the perceived dominance of western theories.

‘Kaupapa’ can be defined as both a philosophy and a process requiring strategic thought and purposive forward planning. Therefore, it is imbued with the potential to re-imagine, re-frame or re-focus. Linda T. Smith defines Kaupapa Māori as a term used by Māori to describe the practice and philosophy of living a Māori culturally informed life.²¹¹ Situated within the anti-positivist debate raised by critical theory, Kaupapa Māori has, as its central theme, the goal of emancipation. Espoused initially as a form of social analysis, critical theory is often equated with the twentieth century Frankfurt School of critical sociology.²¹² Linda T. Smith argues that critical theory holds the possibility, that through emancipation, Māori could take greater control over their own lives.²¹³ Critical theory encapsulates concepts of justice and the way in which structural principles may favour one group

²⁰⁶ At 455.

²⁰⁷ Linda T. Smith, above n 61 at 185.

²⁰⁸ Leonie Pihama, Fiona Cram and Sheila Walker “Creating methodological space: A literature review of Kaupapa Maori research” (2002) 26 (1) Canadian Journal of Native Education at 30.

²⁰⁹ Ella Henry and Hone Pene “Kaupapa Maori: Locating Indigenous Ontology, Epistemology and Methodology in the Academy” (2001) 8(2) Organization at 234.

²¹⁰ Graham H. Smith above n 191 at 131.

²¹¹ At 186.

²¹² Bernhard Forchtner “Critique, the discourse-historical approach, and the Frankfurt School” (2011) 8(1) Critical Discourse Studies at 1.

²¹³ Linda T. Smith ,above n 61 at 187.

within society at the expense of others; which is to say, it is accommodating of Kaupapa Māori theorising. While the original critical assumptions were developed from Marxist theory, these assumptions have developed to include critiques of patriarchal structures, colonisation, racism and environmental concerns.²¹⁴ The premise of critical theory is that overarching structures impose a degree of societal control in such a way as to reinforce the position of the privileged in society. However, through rigorous examination, critique and action, change can be affected.²¹⁵

In the local theoretical context, Kaupapa Māori takes account of the specific historical, political and social contexts for Māori. Pihama proposes that the alignment between critical theory and Kaupapa Māori comes from exposing hidden assumptions and debunking the dominant group's claims to authority with the purpose of uncovering inequalities and enhancing the emancipation of Māori within society.²¹⁶ Ultimately, both critical theory and Kaupapa Māori envisage the potential for the oppressed, marginalised and silenced to be engaged in emancipatory struggles. Pihama views critical theory and Kaupapa Māori theory as two separate entities:²¹⁷

Kaupapa Māori theory does not depend on Critical Theory for its existence just as Critical Theory does not depend on Kaupapa Māori theory for its existence. Kaupapa Māori theory is founded in this land, Aotearoa. Critical Theory is founded in Europe. Kaupapa Māori theory is driven by whānau, hapū, iwi, Māori understandings. Critical Theory is driven by European sourced philosophies and understandings. They are without doubt distinct theoretical forms. However, they are able to inform and support each other, and this as clearly been the case.

This research will aid the development of Mana Wahine tools for iwi governance in the meeting of both the requirements of good directorship and management of

²¹⁴ Nan Seuffert *Jurisprudence of National Identity. Kalaeidescopes of Imperialism and Globalisation from Aotearoa New Zealand* (Ashgate Publishing, England, 2006) at 2.

²¹⁵ A Carr "Critical Theory and the Management of Change in Organisations" (2000) 13(3) at 208.

²¹⁶ Pihama above n 203, at 90.

²¹⁷ At 104.

resources, as well as in incorporating the fundamental values of Tikanga Māori (Māori custom law).

Contextually, the core of Kaupapa Māori research is Kaupapa Māori theory which encompasses both the ontological and epistemological elements. Mana wahine theory has developed out of Kaupapa Māori theory.²¹⁸ Had colonisation not been our experience as Māori women, the development of Māori women's theories to respond to colonial constructs of race, class and gender, may not have been necessary. As Linda T. Smith notes:²¹⁹

Māori women belong to a group of women in the world who have been historically constructed as 'Other' by white patriarchies and white feminisms. As women, we have been defined in terms of our differences to men. As Māori, we have been defined in terms of our differences to our colonisers. As both, we have been defined by our difference to Māori men, Pākehā men and Pākehā women. The socioeconomic class in which most Māori women are located makes the category of 'Other' an even more complex problematic.

In essence, Kaupapa Māori articulates the writer's own epistemological paradigm which Guba and Lincoln have defined as "the basic belief system or worldview that guides the investigator".²²⁰ As a Ngāpuhi woman, I am privileged with 'insider' knowledge, which allows me access to Māori participants within my own 'Māori' networks and community, hence Kaupapa Māori is essential for informing the process of research. It is important to remember, that having gained access, as a Māori researcher I am careful to conduct this research in a manner that is culturally appropriate.

Abbot and Wallace argue that where theories seek to describe, classify and summarise what is happening around us, theoretical perspectives acknowledge how we position ourselves within a particular theoretical framework.²²¹ They go on to

²¹⁸ Pihama, above n 203.

²¹⁹ Linda T. Smith above n 45, at 33.

²²⁰ Guba and Lincoln, above n 202 at 105.

²²¹ P Abbott and C Wallace *Introduction to Sociology - Feminist Perspectives* (Routledge, London, 1997) cited in Leonie E Pihama "Tīhei mauri ora : Honouring our voices : mana wahine as a kaupapa Māori : theoretical framework" University of Auckland, 2001.

identify five important elements that make up a *theoretical perspective*. To Abbot and Wallace, a theoretical framework:

1. Provides us with concepts to use in our analysis and accounts;
2. Suggests what questions to ask and informs our directions to certain aspects;
3. Provides ways of answering through orienting certain assumptions;
4. Informs how we interpret our perceptions;
5. Involves judgements about the use and application of knowledge,

Pihama takes this a step further and asserts that theories are not solely descriptive, predictive, or explanatory. They are all these simultaneously but must be also rooted in practice.²²² Pihama looks to Paulo Freire, who describes the need for theory and practice to exist in ‘dialectical unity’.²²³ Dialectical unity recognises the interdependence of theory to practice and acknowledges a process of constant reflection where one continually reshapes and informs the other. Consequently, Pihama surmises that theory is inextricably related and is therefore informed by the politics and social realities within which the practice is located.

This is important for the application of Kaupapa Māori as theory. Without the duality of theory with practice, theory has little to offer Māori. Moreover, this process of constant reflection, which allows for the reshaping and informing of theory and practice, opens the door to possibilities of transformations. It is therefore in the *hybrid space*, or the interface between theoretical perspectives that the real possibilities can be generated. That is not to say that western theories do not hold value for this discussion. Indeed, the development of a theory of Māori women’s governance necessitates an understanding of the relevant theories. Western theories have a role to play in providing an analysis that can affirm the theoretical thrust of this thesis. Furthermore, these theories may require a Māori critique. Other

²²² Pihama, above n 203 at 86.

²²³ Paulo Freire *Pedagogy of the oppressed* (new rev. ed, Penguin, London, 1996) cited in Pihama above n 201 at 86.

academic writers, for example Hohepa,²²⁴ Jenkins,²²⁵ Johnston,²²⁶ Mead,²²⁷ and Graham H. Smith²²⁸ have argued that theories of Western origin can be used for and by oppressed groups to explain, describe, analyse or contest their own theoretical positioning.

Consequently, transformation is one of the driving forces of Kaupapa Māori theory. The transformative intent requires practical intervention to be developed and undertaken. Importantly for this research, Graham H. Smith strenuously advocates the requirement that Kaupapa Māori developments be both culturalist and structuralist in form.²²⁹ What he means is that engagement needs to happen at both the level of culture and human agency as well as at the level of analysis of structures and the power relations that exist.²³⁰

The roots of Kaupapa Māori in critical theory is more important than many realise. Critical theory is a set of ideas that foreground both action and theory: the (political) action of social transformation, and the theory, or idea, of structural analysis that informs the action. The politics of social change, the basis of critical theory, mean giving close attention to *action* focussed on Māori self-development as well as to a theoretical *analysis* of the social order, including the forces of capitalism and colonisation both of which have had negative impacts on our people.

By employing Kaupapa Māori theory within a Kaupapa Māori approach, I intend to work towards the articulation of Mana Wahine as a means of theoretical analysis in relation to Māori women's decision-making. I propose that for insights into Māori women's experiences to occur there must be explicit statements for and by Māori

²²⁴ Margie Hohepa “Hei Tautoko I Te Reo: Maori Language Regeneration and Whanau Bookreading Practices” (Doctoral Dissertation, University Auckland, 1999).

²²⁵ Kuni Jenkins “Haere Tahī Taua” (Doctoral Dissertation, University of Auckland, 2000).

²²⁶ Patricia Johnston “He Aro Rereke: Education Policy and Maori Underachievement” (Doctoral Dissertation, University of Auckland, 1998).

²²⁷ Linda Tuhiwai Mead “Nga Aho o Te Kakahu Matauranga” (Doctoral Dissertation, University of Auckland, 1996).

²²⁸ Graham Hingangaroa Smith “The Development of Kaupapa Maori Theory and Praxis” (Doctoral Dissertation, University of Auckland, 1997).

²²⁹ Graham Smith, Te Kawehau Hoskins and Alison Jones “Interview: Kaupapa Māori: the dangers of domestication” (2012) 47(2) New Zealand Journal of Educational Studies at 13.

²³⁰ At 11.

women.

Kaupapa Māori Intervention Elements. A Method of Analysis

In this thesis I employ Graham H. Smith's six key intervention elements as my framework of analysis of the interviews and commentaries gathered from indigenous women.²³¹

The elements are:

Tino Rangatiratanga – the self-determination principle

The self-determination principle is universally understood by indigenous peoples to encompass principles of 'autonomy', 'self-development', 'economic independence' and 'sovereignty'. For Māori, sovereignty translates as tino rangatiratanga under Te Tiriti o Waitangi, the Māori version of the Treaty of Waitangi 1840.²³²

Tino Rangatiratanga is the fundamental political principle inherent in the agreement between the Māori Chiefs and the Crown. The principle of self-determination carries the force of international law and means that indigenous peoples have an absolute and inherent right to decide how and by whom they will be governed.²³³ Chartrand states that the implication of self-determination "can range from complete, happy, voluntary assimilation to, at the other extreme, a declaration of complete political independence".²³⁴ Therefore, this factor acknowledges the many contradictions that arise out of indigenous struggles for self-determination. These can range from calls for complete political independence on the one hand to relative autonomy within existing State structures on the other. Graham H. Smith states that a key issue is whether or not 'tino rangatiratanga' as a vital component of the intervention elements can be attained within a Pākehā (western) dominant

²³¹ Graham H. Smith, above n 228 at 464.

²³² Waitangi Tribunal above n 127, at 14.

²³³ United Nations Publications *United Nations Documents Index, January-March 2005* (United Nations Publications, 2006).

²³⁴ Paul Chartrand "Aboriginal Peoples in Canada: Aspirations for Distributive Justice as Distinct Peoples" in Paul Havemann above n 44 at 94.

structure?²³⁵

By assuming ‘tino rangatiratanga’, Māori communities are able to exercise more control over the transformation process and outcomes. A critical distinction which has to be made with respect to transformation, is the notion of simply ‘transforming a ‘white’ structure into a ‘brown’ structure and thereby merely creating a brown version of the status quo or building completely new and alternative structures which respond fully to Māori needs and aspirations.²³⁶

Indigenous women have mobilised an explicit discourse of rights at the intersection of human and civil rights, and feminism and indigenous sovereignty politics. Debates about the rights, roles and status of indigenous women in relation to indigenous men call attention to the applicability of the self-determination principle in relation to indigenous gender politics.

Taonga Tuku Iho – the cultural aspirations principle

In the struggle for cultural and language revival, the cultural aspirations principle acknowledges that our traditions were handed down to us by our ancestors along with the responsibility to nurture, grow and legitimate their worth.

For Māori, to be Māori is taken for granted in the Kaupapa Māori framework. This principle takes account of and legitimates our language, culture, traditions and our ways of being. Graham H. Smith notes that the incorporation of these elements involves a strong emotional and spiritual commitment to one’s cultural practices and traditions.²³⁷

Ako Māori – the culturally preferred pedagogy principle

Developed in response to Māori educational crises, the Ako Māori principle reinforces intergenerational learning that is culturally appropriate. Therefore the ways in which learning and teaching happens illustrates for indigenous peoples the ways in which we want to ensure that knowledge is passed on to the generations

²³⁵ Graham H. Smith, above n 228, at 467.

²³⁶ At 467.

²³⁷ At 467.

that follow. The principle of culturally preferred pedagogies doesn't negate the potential of other cross-culturally *borrowed* pedagogies to be of benefit in terms of teaching and learning. For Māori, Māori knowledge, language and cultural values are not diluted when they are supported by other pedagogies. Consider, for example, the significant language loss that has occurred and the circumstances in which this took place. Learning transmittal may necessitate language instruction in a bilingual educational setting, with the key point being that borrowed pedagogies are chosen to enhance learning.

Kia Piki ake i ngā Raruraru o te Kainga – the socio-economic mediation principle

This principle speaks to the ways in which indigenous peoples have been and continue to be negatively impacted by their socio-economic positioning in society. It recognises that the State has no intention of intervening in a meaningful way which places the collective onus on us to mediate the burden for others. In the Māori educational context, this principle encouraged parents to re-commit to a schooling system far removed from their own experience of a Pākehā /western dominated context which had failed to legitimate their culture, language or traditions. The transformative potential of Kura Kaupapa Māori schooling arises from the validity of the Māori cultural pedagogical experience. The principle doesn't lay claim to rescuing whānau from the despair of poverty, ill-health or violence for example. However, the collective principles allow individuals to feel supported by the group in pursuit of a common agenda. The group takes on the responsibility to uplift those that need the support. Collectively the group decides how to mediate the issues.

Conceptualising this principle in a governance organisational context means that everyone takes collective responsibility for functioning to the benefits of meeting the common goal. This can be transformative in itself as it requires a move away from hierarchical organisational design to something more closely resembling a whānau/family. The organisation is supported by cultural imperatives and values providing mechanisms for mediating the debilitating socio-economic circumstances of the people. Developing effective cultural strategies is a significant requirement of a Kaupapa Māori approach.

Whānau – the extended family structure principle

Given its collective nature, the extended family social structure is intrinsic to Kaupapa Māori intervention. This principle asks “What is the role of whānau or family”? While people may not be directly related, the extended family concept relates to providing for a culturally oriented support structure to alleviate and mediate social and economic difficulties and issues creating barriers to group coherence. From a cultural perspective, ‘a problem shared is a problem halved’ in that the whole whānau takes responsibility for intervening. Underpinning the principle is the notion of reciprocity. In the Māori schooling intervention of Kura Kaupapa Māori, parents are culturally obligated to support all of the children in the whānau. In urban environments, this approach plays an important role in building community around a collective and common agenda.

In a tribal governance context, the whānau principle supports the indigenous notion that we are all related. Consequently, as relations we have an obligation to work towards the common good of our tribes, peoples and constituencies.

Kaupapa – the collective philosophy principle

Closely related to the previous two principles, Kaupapa requires the sharing of a collective vision held together by a collective commitment to a philosophy or as Graham H. Smith has argued: to a *utopian vision*.²³⁸ Smith elaborates further, stating that such a vision usually embraces elements of *conscientisation, resistance and praxis*.²³⁹ The power of the principle is in its ability to articulate and connect with Māori aspirations, politically, socially, economically and culturally.

The collective aspirations of an organisation informs all of its function towards the common good. Mechanisms to aid in the achievement of this common good can and should include gender parity and gender balance. Once past the resistance to perceived politics of gender, governance as a site of struggle for women enhances the overall desire for expressions of sovereignty and ultimately self-determination.

²³⁸ At 472.

²³⁹ At 472.

Mana Wahine Theory Development

My goal is to contribute to the development of Mana Wahine theory to progress the process referred to by Irwin as one that involves moving towards the application of Māori women's theories, and in so doing engage issues from Māori women's perspectives.²⁴⁰ Te Awekotuku defines Mana Wahine as an umbrella term under which Māori women's theories can be located. Mana Wahine, she states, is also broadly used to describe Māori women who display a multitude of characteristics from leadership, business acumen, strength, agility, skill and talent in a variety of spheres of life. Mana Wahine is intrinsically understood as meaning *a woman of strength* and also potentially refers to the spiritual, cultural, academic, or even political character of Māori women. Te Awekotuku states that the term is not reactionary: that it is more than just a label and furthermore, it is a process by which Māori women rediscover the strengths of Māori relationships i.e. whanaungatanga. It is by engaging in this rediscovery that the pro-active work that is necessary for Māori can be progressed. This work involves the reclamation of Māori women's knowledge, which presents a powerful challenge to dominant and prevailing beliefs about Māori women. Women have always held status and central roles in Māori society (whānau, hapū and iwi) and it is the stories of tupuna Wahine which, when told, remind us that Māori women are integral to the mana of Māori.²⁴¹

I contend that, given the prevailing political, economic, social and cultural context within which we find ourselves as Māori, a theory is needed that can engage the complexities of Māori women's experiences. This is because the experiences of Māori women are influenced by our experiences of oppression, suppression and the colonisation of our language and culture – *te reo me ona tikanga Māori*. Theories of governance, business management or entrepreneurship cannot successfully demonstrate the concept that Māori women theorise their own experiences with a focus on both being Māori and being female. These experiences can only be examined through Māori frameworks that validate and incorporate a Māori (woman's) worldview. Colonial ideologies of race, gender and class have constructed discourses about Māori women that have served to negate the role and

²⁴⁰ Irwin above n 200.

²⁴¹ Ngahuia Te Awekotuku *Mana wahine Maori* (New Women's Press, Auckland, 1991).

status of Māori women in western and Māori societies. The infliction of colonial belief systems and practices, arising from colonisation, has served to marginalise, ignore and redefine Māori women, their values, beliefs, practices and stories. Linda T. Smith clarifies this point when she says:²⁴²

Māori women belong to a group of women in the world who have been historically constructed as ‘Other’ by white patriarchies and white feminisms. As women, we have been defined in terms of our differences to men. As Māori, we have been defined in terms of our difference to our colonisers. As both, we have been defined by our difference to Māori men, Pākehā men and Pākehā women. The socioeconomic class in which most Māori women are located makes the category of ‘Other’ an even more complex problematic.

In this thesis, I will argue that Mana Wahine theory is a Kaupapa Māori theoretical framework which addresses the issues that are faced by present-day Māori women. There is still much research and discussion to be undertaken by many more Māori women to determine what the essential elements of Mana Wahine theory are and how best they can be used to address Māori women's issues. Linda T. Smith refers to these issues in terms of the different *intersections* that Māori women occupy. She surmises that, at one level, there exists the intersection between Māori and gender and the issues associated with Māori women working with and between whānau and community (hapū). Māori women live in this intersection and have to make sense of it in order to live. At another level, there are the intersections between *past* (being traditional and pre-colonial) and the ways that Māori women choose to work today. Linda T. Smith refers to the whānau as a significant site of struggle for Māori women. It is at this intersection that social relations are struggled over and rules of practice are established.²⁴³ I have taken this concept further to mean that Māori women *navigate* these spaces so as to more readily occupy a particular intersection for an indeterminate time or kaupapa, thus providing the *glue* required for that space and time.

While the elements that I proffer here are neither definitive or prescriptive, they offer a purposeful starting point for the further articulation of Mana Wahine theory.

²⁴² Linda T. Smith, above n 45 at 33.

²⁴³ Linda T Smith, above n 61 at 202.

As a theoretical perspective, it is an on-going project for Māori women and one that requires being grown, nurtured and critiqued in response to the multiple issues facing Māori women.²⁴⁴ Notwithstanding this, the definition of these essential elements is desirable as more and more women elucidate their perspectives in a variety of forms ranging from academic writing and research to film, art, performance and business.

I have included a brief review of a few Māori academic women writers who have worked to advance Mana Wahine theorising. Kathie Irwin, for example, writes from the position of a Māori feminist who identifies the need to continue in the process of moving towards the formation of Māori women's theories with the intention of engaging Kaupapa Māori from a Mana Wahine standpoint.²⁴⁵

The development of theories of Māori feminism is not an ostrich approach to Māori development, where Māori feminists have their heads buried in the sand, not aware of or interested in the world around them concentrating only on the role or status of Māori women, in isolation of the world they live in. This kind of posture is self-defeating if development is the aim. It is especially so because you can't even see who is kicking you in the bum, let alone catch them at it! A more appropriate analogy is perhaps that of a bird flying high in the sky, with full view of the horizons around it, moving in directions and at a speed that it cannot control. This is the power offered by Māori feminisms.

Irwin argues that by designing new tools – Māori feminist theories – Māori women can make sense of our world and our future. “Real power lies with those who design the tools – it always has. The power is ours.”²⁴⁶ Mana Wahine, as theory, is a progression of Māori feminist thinking that seeks to contribute to our empowerment as Māori women in the struggle for land, self-development and self determination.

Linda T. Smith takes a discursive approach to how Mana Wahine has and is being articulated. Each of these discourses Smith says contributes to an understanding of the essential elements of Mana Wahine theory. They are a) the *whānau discourse*,

²⁴⁴ Pihama, above n 203 at 230.

²⁴⁵ Irwin above, n 200 at 5.

²⁴⁶ At 5.

which acknowledges the centrality of whānau, hapū and iwi. This discourse recognises the crucial relationships that interweave Māori women through whanaungatanga and whakapapa; b) *spiritual discourse*, which places wairua at the centre of an analysis acknowledging the sacred dimensions beyond the physical world; c) *state discourse* that locates the role of the state in the struggles of Māori women; d) *indigenous women's discourse*, which places Māori women within an international context of indigenous peoples.²⁴⁷

In her 2001 Doctoral thesis, Pihama outlined what she considers to be the essential elements for Mana Wahine theory, which are: te reo Māori me ona Tikanga, whakapapa, whānau, recognising diverse realities; wairua; Te Tiriti o Waitangi, decolonisation, matauranga Wahine and the reclamation of cultural space.²⁴⁸ Each of these concepts also resides within the framework of Kaupapa Māori theory. Pihama states that theory developed by Māori women from a Kaupapa Māori foundation is a theory that can contribute to the transformation of the lived realities of Māori women. Consequently, there cannot be just one generic theory. Māori women's theories necessarily take account of the wider social, cultural and historical contexts within which women live. Mana Wahine theory is therefore organic, giving voice to multiple expressions that reflect women's centrality i.e. "is organic, driven by Māori communities and initiatives, therefore, can be nothing other than multiple in expression".²⁴⁹

This research will also be of interest on a theoretical level to those concerned with the impact of global forms of organisation in relation to notions of indigenous self-determination. One of the critical areas of theoretical significance is the examination of the importance of governance from an indigenous woman's perspective, which must acknowledge that tribal governance largely determines the scope of tribal self-development and self-determination. What are the issues? A secondary area of crucial significance is the critical review of the theoretical developments about the benefits or otherwise of intensifying globalisation and proposed alternatives to global neoliberalism. Mana Wahine theory can contribute

²⁴⁷ Linda T. Smith above n 227, at 291.

²⁴⁸ Pihama above n 203, at 230.

²⁴⁹ Pihama above n 203, at 239.

to theory used to inform indigenous development discourses by analysing real-world examples and imagining what an indigenous governance framework could look like.

I contend that an indigenous comparative research lens, regardless of whether the interrogation is focused on legal, political, social or cultural issues, must necessarily be decolonising to be able to give meaningful effect to modes of resistance to colonial domination such as the projects of sovereignty, self-determination or self-development which make up the indigenous agenda. This discussion must then attend to those universal issues that actually impede decolonisation while prima facie, steering indigenous peoples toward ‘development’. Significantly, the hegemonic nature of neoliberalism and its impact on the indigenous development context is of particular importance as indigenous tribes that strive towards economic autonomy through nation-building activities.²⁵⁰

Indigenous Feminist Theory

Mana Wahine theory is an expression of feminist theory within Kaupapa Māori. Further, developments in indigenous feminist theory have enabled indigenous scholars to critique, write, resist and question indigenous patriarchal practices as gender has begun to reform/inform indigenous politics. The increasing legal recognition of the rights of indigenous peoples to cultural and political redress has seen the parallel development of indigenous women’s questioning of their status in relation to indigenous men.²⁵¹ This research seeks to give collective voice to women’s experiences, the broader goal being to illuminate the extent to which Māori women are empowered to make social, cultural, political and legal decisions within the contexts of tribal governance. While the focus of this research has been on Native American and Māori women, knowledge of other indigenous women is also drawn upon.

Mana Wahine Application

In applying Mana Wahine, I explore how contemporary tribal governance has

²⁵⁰ The term neoliberalism is used interchangeably with globalisation in this thesis.

²⁵¹ See Johnston, above n 27 at 22.

become a significant site of struggle for indigenous women. Secondly, I seek to understand and perhaps elevate the strategies, which indigenous women employ to influence tribal decision-making in ways that support and maintain traditional understandings of social organisations and kinship, based on traditional values and knowledge systems. Comparative indigenous research acknowledges that there are universally pressing political realities for indigenous peoples. With globalisation has come the hegemonic ideology of neoliberalism that has promulgated rampant capitalism. Hard fought recognition in terms of treaty settlements, the acknowledgement of past grievances, the return of assets, land and in some cases payments cash, has seduced many tribes to the logic of neoliberalism. There are lessons to be learned from how other indigenous nations are pursuing their economic development agenda while retaining their tribal identity culture and traditions. Other benefits include the option to collaborate on matters of international significance such as indigenous human rights and representation of common issues at international fora. The availability of the United Declaration on the Rights of Indigenous Peoples is evidence of this.²⁵² The potential to learn from each other's attempts, failures and successes at nation-building and how to be a self-determining nation within our own political paradigms is, in my opinion, first and foremost the most urgent matter. Within this morass of issues is the pressing need for the voices of women to be heard and listened to. Strong women are more than just resilient. Women have been doing resilience for aeons. What I am talking about is rectifying the power imbalance in systematic ways, and ways that will account for indigenous men as well.

The comparative nature of this research seeks to recognise that indigenous women are now *theorising common global issues* that traverse geographic, linguistic and cultural domains. Therefore, rather than just comparing similarities and differences, I seek to identify a *collective agenda for change* that provides an account of the negative impacts of colonialism and neo-colonialism on indigenous people, overall, and on indigenous women, specifically. Since the political activism of the 1970s,

²⁵² James Anaya Report of the Special Rapporteur on the rights of Indigenous peoples - the situation of Indigenous peoples in the United States of America (A/HRC/21/47/Add1 2012); PH McHugh "Indigenous Peoples in International Law By S James Anaya [2nd edn OUP Oxford 2004).

our shared experience of colonisation has involved indigenous peoples in similar struggles for self-determination and sovereignty. The research undertaken in this context is both comparative and interdisciplinary. Jacinta Ruru has remarked that the international legal principle recognised as the Doctrine of Discovery, under which England colonised both the United States and New Zealand, is still being applied today in both countries.²⁵³

Not surprisingly, our common colonial histories provide a large source of historical, cultural and political material from which to garner an understanding of indigenous women's perspectives and subjectivities. The advantage of this, as Cornell argues, is to learn and share the intricacies associated with our critical commonalities, not only as developing nations but also in terms of governance implementation in a meaningful and practical way.²⁵⁴ Also, it needs to be asked, what does this mean for improving the lives of indigenous women? Indigenous peoples are on a common political and economic development trajectory which is providing lessons for Māori women in the same way or to the same extent as this trajectory is for Native American women.

This method is necessarily comparative across common law jurisdictions and not just so that we can recognise the 'similarities' and 'differences' between and among indigenous women. The comparison is not an end in itself. The comparative nature of this research is to enable the collective to speak or as I have mentioned above, to give voice to indigenous women's experiences and shared realities. The advantages are that indigenous women have a common agenda arising from our shared experience of colonisation and the need to decolonise our spaces whatever political and legal jurisdiction we occupy. My argument is that for indigenous women, women's complicity with colonialism and patriarchy in the removal of women from positions of leadership and the replacement of traditional gender roles with western practices of patriarchy have stymied the advancement of their self-determination

²⁵³ Robert J Miller and Jacinta Ruru "An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand" (2008) 111 W Va Law Rev 849 at 1.

²⁵⁴ Stephen Cornell "Justice as Position, Justice as Practice: Indigenous Governance at the Boundary" in *Indig Justice* (Springer, 2018) 11; Stephen Cornell and Joseph P Kalt "Where's the glue? Institutional and cultural foundations of Native American economic development" (2000) 29 J Socio-Econ 443.

goals.

It is envisaged that this thesis will contribute further to the development of a Mana Wahine theory. The need for indigenous women to develop their own ‘theory’(ies) is implicit in a Kaupapa Māori approach, the point of which is to achieve meaningful change and transformation.

Methodological Significance

This thesis provides a comparative analysis of indigenous women’s positioning within contemporary tribal governance structures. The analysis is intentionally gendered as it begins with examining the historic impacts of colonialism on the roles, status and positioning of indigenous women within the settler nation-states of Aotearoa (New Zealand), Canada, the United States and to a limited degree, Australia. I posit that the threads of indigenous women’s experience are common in consideration of the legacy of colonialism and colonised according to a similar Eurocentric value system, indigenous women ‘share’ similar socio-political circumstances which are manifested in their diminished status as tribal decision-makers, even though their individual histories with their respective colonisers are different. The embedded structure in terms of European-derived values and traditions have remained constant even though colonisation was imposed idiosyncratically by the British, American or French colonisers. Linda T. Smith states:²⁵⁵

The whole process of colonisation can be viewed as stripping away of *mana* (our standing in the eyes of others and therefore in our own eyes), and an undermining of *rangatiratanga* (our ability and right to determine our destinies). Research is an important part of the colonisation process because it is concerned with defining legitimate knowledge.

The methodological significance of this research is in the applicability of Kaupapa Māori methods to an overarching decolonising research agenda that legitimates Mātauranga Māori. Decolonising research is not an exact science. It does not fit

²⁵⁵ Linda T. Smith, above n 61 at 175.

nicley into existing research paradigms or disciplines. Therein lies both its biggest challenge and value-add for the researcher.

Kaupapa Māori Methods

The empowerment of indigenous people and culture is an important component of Kaupapa Māori theory and requires careful consideration when choosing appropriate research methods. Qualitative methods for data collection are considered more appropriate to Kaupapa Māori research because they are considered more empowering to the research participants.²⁵⁶ The narrative interview is considered a form of unstructured, in-depth interview with special features and therefore has appeal as a research method in that it is more conducive to research conducted in indigenous contexts and particularly in qualitative research that supports an interpretive focus with the aim of generating holistic descriptions and/or explanations. Qualitative methods such as the narrative enquiry give primacy to an indigenous Māori paradigm and the development of Kaupapa Māori research. According to Bishop:²⁵⁷

Narrative inquiry addresses Maori concerns about research into their lives in an holistic, culturally appropriate manner because storytelling allows the research participants to select, recollect and reflect on stories within their own cultural context and language rather than in the cultural context and language chosen by the researcher.

Method 1: Interviews and Informal dialogue

For this study I have chosen to use a qualitative approach in undertaking my research and gathering relevant data.²⁵⁸ I have employed two qualitative methods of research. The first, as discussed above, is a narrative approach where Māori women were invited to provide their thoughts about governance from their experience and perspectives. These were unstructured in-depth interviews that

²⁵⁶ At 144 – 163.

²⁵⁷ Russell Bishop “Initiating empowering research?” (1994) 29(1) *New Zealand Journal of Education Studies* at 175.

²⁵⁸ Norman Denzin and Yvonna Lincoln *The Landscape of Qualitative Research* (3rd ed, Sage Publications, California, 2007).

allowed for the free-flow of information. It was my intention to position this thesis as a theoretical exploration of indigenous women's experiences of governance and therefore to consider also, the positioning of indigenous women in society.

In keeping with the values of a Kaupapa Māori method approach, I employed the process of *whakawhanaungatanga* in my face-to-face in-depth interviews with Wahine Māori. This approach required establishing whānau relationships by identifying, through culturally appropriate means, my linkages to each of these women. Having described the research project and its objectives, Wahine Māori from within my own networks were invited to participate throughout the period of my research i.e. from 2012 to 2019. Overall nine Māori women were interviewed while five of those respondents became key informants during the period of my thesis research and writing. Informal dialogue with these women over the years contributed markedly to my knowledge and my writing. In acknowledgement of their individual knowledge and experience of tribal governance, I have chosen to quote directly from their korero (interviews). In addition, I also utilised recorded and publicly available interviews of Wahine Māori speaking and presenting at various events on indigenous and tribal governance. The potential limitation of only having five key informants is justified as a polyvocal approach in order to elevate the status of their often marginalised voices that have typically been subsumed by dominant groups, in these cases, often Māori men.²⁵⁹

In addition, I have accessed a database of Tribal Leader Interviews made available through the Native Nations Institute, University of Arizona.²⁶⁰ I am grateful to the Native Nations Institute for their support. I conduct a comparative analysis of both of these sources, utilising the Kaupapa Māori elements discussed earlier in this chapter.

Method 2: Case Study

A case study is not in itself a research method but rather a general term used to

²⁵⁹ Susan Mann and Douglas Huffmann "The Decentering of Second Wave Feminism and the Rise of the Third Wave" (2005) 69(1), *Science & Society* at 56.

²⁶⁰ <https://nni.arizona.edu/>.

describe a research strategy that is focused on the theoretical underpinnings and interest in a specific phenomenon. The question of interest within the case is one of understanding how people construct the meaning of an event, activity, or phenomenon.²⁶¹ This case study employs a Kaupapa Māori analytical approach through the application of some of the fundamental intervention elements developed by Graham H. Smith in the context of Māori educational and schooling crises in Aotearoa, New Zealand.²⁶² I take the view, supported as it is by the literature and research, that the status of indigenous women is at a crisis point and that the analysis in this Chapter clarifies that Māori women and whānau are also at crisis point. The extent to which struggle has come to exemplify Māori women, and other indigenous women's colonised realities is a significant cause for concern. The Mana Wahine claims will initiate what promises to be strong challenges to inherent disadvantage as the hearings proceed.

I have taken a case study approach utilising Kaupapa Māori to analyse the submissions to the Mana Wahine Claim Wai 2700 which come before the Waitangi Tribunal in 2019. My motivation for including a case study approach is because it is a kaupapa or umbrell claim, under which Māori women are voicing their concerns regarding their diminished roles and status as a direct result of the Crown's imposition of gendered and racist legislation and policies. Drawing from interpretive and constructivist notions of reality, the issues raised in the submissions are multifarious drawing on legal, political, social, cultural and gendered perspectives. Linda T. Smith notes that indigenous peoples have been reduced to *claiming* as a means of asserting rights owed and that as a result, our claims become *testimony* through the presentation of oral evidence.²⁶³

Indigenous testimonies are a way of talking about an extremely painful event or series of events. The formality of testimony provides a structure within which events can be related and feelings expressed. A testimony is also a form through which the voice of a 'witness' is accorded space and protection. It can be constructed as a monologue and as a public performance. The structure

²⁶¹ Sharan Merriam "Qualitative Case Studies" in Penelope Peterson, Eva Baker and Barry McGaw (eds) *International Encyclopedia of Education* (3rd ed, Elsevier, 2010) at 456.

²⁶² Graham H. Smith, above n 228, at 465–473.

²⁶³ Linda T. Smith above n 61, at 144.

of testimony – its formality, context and sense of immediacy – appeals to many indigenous participants, particularly elders. It is an approach that translates well to a formal written document. While the listener may ask questions testimonies structure the responses, silencing certain types of questions and formalizing others. *Testimonio* is more familiar to Latin American contexts as a narrative of collective memory: it has become one of a number of literary methods for making sense of histories, of voices and representation, and of the political narrative of oppression.

The case study approach to the Mana Wahine inquiry, signals my intent to continue to research, as a phenomenon, the journey of Māori women's testimony through the adjudicative process of the Waitangi Tribunal with the view to exploring the potential impacts for indigenous women globally. Will the Mana Wahine claim provide the catalyst for other indigenous women to rise with collective intent? This thesis illustrates the potential of Kaupapa Māori to facilitate an indigenous women's collective agenda for decolonising *action* in indigenous governance.

Summary

I have used a Kaupapa Māori approach for the following reasons. Firstly, it is a tool to identify practical ways that tribal organisations can change to meet the aspirations of indigenous women leaders. Kaupapa Māori praxis is a proven viable organic theory of transformation in response to Māori educational and cultural crises. I have argued that Kaupapa Māori therefore has applicability because it is a Māori/–indigenous people who have developed the intervention strategies for whom Kaupapa Māori is intended to be transformative. It is a way of theorising our own experiences, struggles, ideas and debates within and for our own communities. Kaupapa Māori also has the ability to respond to both culturalist and structuralist contexts. The culturalist context of tribal governance is set within a western colonial and patriarchal tradition. The structuralist elements are those ideological features that have shaped the political and societal nature of tribal governments and includes the State's economic development agenda; the granting of relative autonomy coupled with the retention of the power to the State. Kaupapa Māori is an approach that is borne of our own traditional knowledge. Kaupapa Māori is intended to address the unequal power relations between Māori and the State, Māori and the

Crown, and the oppressed and the oppressors. It is inherently political and anti-colonial. In the form of a vehicle of decolonisation, Kaupapa Māori supports us in building up new indigenous institutions with the colonisers tools.

Taking a Kaupapa Māori approach, this research seeks to decolonise important spaces within particular sites of struggle for indigenous women. Indigenous women readily engage in a community driven vision of leadership that is connected to land, culture, language and sovereignty. It is a collective experience of identity. Tribal governance is just one of those sites because, for indigenous women, contemporary tribal governance is more often than not, a space of internalised oppression. It is a space where women's presence is not the norm, it is taken for granted that men will lead and decide. It is a space where women, if present, are regularly silenced, talked down to, shut down or ignored. It is the culture of these organisations borne from colonialism that is at fault although it needs to be said that by and large the men are complicit in this oppression.

Chapter 3– A Colonised Reality

How indigenous women experience colonisation is complex and multi-faceted. There is no one way to tell this history and its impacts on our collective or individual indigenous identities. At this point, it is necessary to address the weightiness of the task and the seemingly ambitious mission of attempting to discern a ‘single’ colonised reality to describe a hundred years of oppression.

The title of this chapter is intended to reflect a collective consciousness and a common agenda towards which indigenous women can and do collaborate to solve serious problems arising out of our similar experiences of colonisation. The objective is to honour indigenous women’s resilience, struggle and resistance to colonialism as seen through the lenses of indigenous feminist, Kaupapa Māori and Mana Wahine theories.

Indigenous feminists argue that settler colonialism is an intentionally gendered process giving rise to dominating patriarchal narratives that served to disempower and domesticate indigenous women.²⁶⁴ This chapter describes ways in which colonial institutions interrupted traditional indigenous gender relations by disordering indigenous family organisation, child rearing, political and spiritual life, work and social activities.²⁶⁵ Linda T. Smith argues that a key challenge for

²⁶⁴ Leonie Pihama, above n 203, Simmonds above n 46; Jahnke above n 46, Hutchings above n 46, Irwin above n 200; Te Awekotuku above n 45; Donna Awatere Huata Maori sovereignty (Broadsheet, Auckland, N.Z, 1984) Farah R Palmer and Tina M Masters “Māori feminism and sport leadership: Exploring Māori women’s experiences” (2010) 13 Sport Management Review 331; See also Kim Anderson “Leading by Action: Female Chiefs and the Political Landscape” in Gail G. Valaskakis (eds) Restoring Balance First Nations Women Community Cult (University of Manitoba Press, Canada, 2009) at 99. Anderson analyses how the Indian Act intended to replace traditional systems of governance with an electoral structure that prohibited women from seeking office. See also, Yvonne Boyer, Anita Olsen Harper, Cynthia C. Wesley-Esquimaux (‘First Nations women’s contributions to culture and community through Canadian law’), (‘Sisters in spirit’); (‘Trauma to Resilience: Notes on Decolonisation’); Joyce A Green Making Space for Indigenous Feminism. (2nd ed, Fernwood Publishing Co. Ltd., Winnipeg, 2017); Cheryl Suzack Indigenous women and feminism (UBC Press, c2010, Vancouver); Andrea Smith “American Studies without America: Native Feminisms and the Nation-State” (2008) 60 American Quarterly 309; Val Napoleon “Aboriginal Feminism in a Wider Frame” (2007) 41 Canadian Dimension 44; Haunani-Kay Trask “Feminism and Indigenous Hawaiian Nationalism” (1996) 21 Signs 906.

²⁶⁵ Linda T. Smith *Decolonizing methodologies* (2nd ed, Palgrave Macmillan, London, 2012) at 152.

contemporary indigenous politics is the restoration of women to what was considered their traditional roles and responsibilities.²⁶⁶ Furthermore, by gendering contemporary indigenous debates, the relationship between indigenous men and women and the destructive impacts of colonisation can be addressed.²⁶⁷ Smith's argument is supported by a significant body of indigenous feminist writing legitimating gendered analysis of the politics of self-determination.²⁶⁸

This chapter is an attempt to view indigenous women's historical and contemporary contexts of oppression in a way that is both decolonising and disruptive of existing gendered and race-based power relations within both settler and indigenous communities.

First, this chapter provides a brief historical overview of the European colonising agenda experienced in the Aotearoa (New Zealand), Canadian, United States, and to a limited extent, in Australian settler contexts.²⁶⁹ Attention is paid to the common

²⁶⁶ At 153.

²⁶⁷ At 153.

²⁶⁸ For example see, Joyce A Green *Making Space for Indigenous Feminism* (Fernwood Publishing Co Ltd, 2017); Cheryl Suzack and others *Indigenous women and feminism: Politics, activism, culture* (UBC Press, 2011); Grace Josephine Mildred Wuttunee Ouellette *The fourth world* (Fernwood Pub, Halifax, NS, 2002); Maile Arvin, Eve Tuck and Angie Morrill "Decolonizing Feminism: Challenging Connections between Settler Colonialism and Heteropatriarchy" (2013) 25 *Fem Form* 8; Moreton-Robinson, above n 155.

²⁶⁹ Indigenous peoples experienced settler colonialism in similar ways. According to Monchalin, Settler colonialism happens when "foreign family units move into a place and reproduce and "an imperial power oversees the immigration of these settlers". Eventually settlers take over lands and attempt to destroy the people who live there. This form of colonialism involves master narratives framing the settlers as "superior" and as representative of so-called progress and civilisation. It also involves ignoring or stripping away the identity of the land's first inhabitants, as was done to Indigenous people through the attempted and forced removal of unique identities, histories (including traditions), cultures and voices. See Lisa Monchalin *The Colonial Problem An Indigenous Perspective on Crime and Injustice in Canada* (University of Toronto Press, Canada, 2016) at 71. See also, Arvin, Tuck and Morrill, above n 205; W Hixson *American Settler Colonialism* (Springer, 2013); Alison Jones and Te Kawehau Hoskins "A Mark on Paper: The Matter of Indigenous-Settler History" in *Posthuman Res Pract Educ* (Palgrave Macmillan, London, 2016) 75; Sarah Maddison "Indigenous identity, 'authenticity' and the structural violence of settler colonialism" (2013) 20 *Identities* 288; A Dirk Moses *Genocide and settler society* (Berghahn Books, 2004) vol 6; Katherine Fiona Macintyre "Restitution as justice: Historical redress and distributive justice in New Zealand and other settler economies" (University of Cape Town, 2013); Andrea Smith "Indigeneity, settler colonialism, white supremacy" [2012] *Racial Form Twenty-First Century* 66; Catherine Lane West-Newman "Anger in Legacies of Empire: Indigenous Peoples and Settler States" (2004) 7 *Eur J Soc Theory* 189; Patricia Grimshaw "Settler Anxieties, Indigenous Peoples,

colonising mechanism of treaty-making through which tribal expectations for authentic expressions of sovereignty and continuing entitlement to lands and territories are contrasted with European expectations of imperial expansion and settlement. The period of British expansion from the early 18th century is notable for the importation of euro-centric values supporting capitalism and practices of patriarchy. I argue that a dominating western hegemonic ideology has survived our colonial histories to become our contemporary reality. It is an ideology which underscores the modern State – indigenous relations influencing political and legal imperatives for indigenous self-determination and self-government that serve to dilute indigenous narratives of sovereignty.²⁷⁰ The following sections also demonstrate how colonising nations historically used the Doctrine of Discovery to substantiate claims over indigenous people to their lands and resources. The pervasive effects of this doctrine are discernible in the stereotypical attitudes and language of colonialism.

I realise the importance of contributing to the development of decolonising theories that disrupt practices of colonial and gender oppression. To achieve this, the thesis casts an indigenous feminist lens over some competing colonial and postcolonial narratives. Such narratives are problematic for continuing to sustain western forms of governance that conflict with traditional forms of indigenous governance within which women were essential decision-makers as well as signatories to treaties.²⁷¹ Colonial narratives have sought to categorise indigenous peoples in ways that served their purposes. Stereotyped and misrepresented as savage, uncivilised, primitive and inferior, it is Indigenous people's traditional holistic knowledge and

and Women's Suffrage in the Colonies of Australia, New Zealand, and Hawai'i, 1888 to 1902" (2000) 69 *Pac Hist Rev* 553; L Veracini *Settler Colonialism* (Springer, 2010); Scott Lauria Morgensen "The biopolitics of settler colonialism: Right here, right now" (2011) 1 *Settl Colon Stud* 52.

²⁷⁰ Ani Mikaere *Colonising myths-Maori realities* (Huia Publishers, 2011); Ranginui Walker *Struggle without end* (Penguin, Auckland, NZ, 1990); Maria Bargh *Resistance* (Huia, Wellington, NZ, 2007).

²⁷¹ See Tania Rei *Maori women and the vote* (Huia Publishers, Wellington, NZ, 1993) at 8–9. At least thirteen Māori women were known to have signed the Treaty of Waitangi in 1840. Many more may have signed but due to the Māori language being gender neutral, other names are assumed to be male. For further discussion see generally, Miria Simpson *Nga tohu o te tiriti: Making a mark* (National Library of New Zealand, Wellington, 1990); Claudia Orange *An illustrated history of the Treaty of Waitangi* (Bridget William Books, Wellington, 2015).

practices that provide their distinctive identity.²⁷²

Indigenous Identity

Indigenous governance is indelibly linked to notions of indigenous identity. For many thousands of years prior to European domination, indigenous populations defined themselves in ways that reflected their knowledge of the natural world. Conceptualised as the “Other” through western imperialist discourse, Edward Said refers to an indigenous collective identity generated by the various ways in which indigenous people came to be negatively classified by the West and in turn represented back to them as the colonised ‘Other’.²⁷³

Indigenous peoples have been identified and in turn, continue to define themselves in contradistinction to the Europeans that invaded and colonised them. European designations such as ‘Aboriginal’, ‘Native’, ‘Indian’, ‘Maori’ and even ‘Indigenous’ are at the very least, inaccurate descriptors for peoples who had lived as one with their own lands since time immemorial.

What is even more difficult to comprehend is that while European domination was extensive throughout the non-European world, these definitions have literally ‘stuck’ in the North American (Canada and the United States) and Australasian (Aotearoa (New Zealand) and Australia) contexts. In contrast, even though Africa, India and China underwent extensive exploitation and European domination for centuries longer, European colonialism has not resulted in the redefinition of those peoples. The only explanation may be that North America, Australia and Aotearoa (New Zealand) were the most recent to be colonised by the British.

In a determination to survive indigenous peoples are regrouping, and are expressing a collective consciousness regarding their shared legacy of oppression, struggle and resistance. Indeed, while globalisation has undoubtedly had a negative impact on indigenous nations, indigenous peoples have also been actively engaged in sharing indigenous critique through academic scholarship that has seen the growth of critical anti-colonial, anti-hegemonic and anti-neoliberal discourse.

²⁷² Devon Abbott Mihesuah *American Indians* (SCB Distributors, 2013).

²⁷³ Edward W Said *Orientalism* (Vintage Books, New York, 1994).

Thus indigenous nations are at various stages of exercising sovereignty through self-governance. In Aotearoa (New Zealand), successful self-governance can be achieved but must be reconciled with the competing agendas of Crown sovereignty with traditionally-based forms of governance through the Crown mechanism of a Treaty settlement and reconciliation process.²⁷⁴ Similarly, the National Congress of American Indians actively seeks the assistance of the federal government to work with them to strengthen and modernise their endeavours to self-govern.²⁷⁵ First Nations peoples of Canada have also engaged in a process of negotiating self-government agreements, an acknowledgement that they are nations that did not cede their sovereignty by treaty.²⁷⁶ Conversely, the Aboriginal peoples of Australia cannot draw on a treaty relationship as a vehicle in their struggles for self-determination. However, there have been on-going challenges made to the Australian Government that signal a legitimate demand to recognise their sovereignty as a people.

Historical Overview

This chapter provides a historical overview of the European colonising agenda experienced in the Canadian, the United States, Aotearoa (New Zealand) and to a limited extent, the Australian contexts. While the means and language of colonialism may have differed according to the nation involved, there were striking

²⁷⁴ In Aotearoa New Zealand, the Crown Treaty settlement process is predicated on the assumption of Crown sovereignty asserted in the signing of the Treaty of Waitangi 1840 which purports to convey the sovereignty of the Māori chiefs to the British Crown. In the English version, the first clause states that the chiefs ‘cede to Her Majesty the Queen of England, absolutely and without reservation, all the rights and powers of sovereignty’. The Māori translation however states ‘[Nga Rangatira] ka tuku rawa atu ki te Kuini o Ingarangi ake tonu atu te Kawanatanga katoa o ratou wenua [sic]. The English translation of this phrase states that the chiefs ceded governance of their lands. However, the second clause of the Treaty is definitive when it states: ‘te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.’ Translated in English, ‘tino rangatiratanga’ is in effect a guarantee of chiefly sovereignty. Ranginui Walker has commented that:

The chiefs were not to know that nation-building in the new world during the era of European expansionism was predicated on the destruction of first nations. By their acquiescence in the Treaty, the chiefs opened the way to replicate among their own people the colonial experience of African tribes and the Indians of the American continent. See Ranginui Walker *Struggle without end* (Penguin, Auckland, NZ, 1990) at 96.

²⁷⁵ National Congress of American Indians *Tribal Nations and the United States* an introduction (2015).

²⁷⁶ Mary C Hurley and Jill Wherrett *Aboriginal Self-Government* (PRB 99-19E Library Parliament 1999).

similarities in treaty-making, legislation and policy implementation that have succeeded in marginalising indigenous peoples in Canada, the United States and Aotearoa (New Zealand).

An important consideration in this chapter is to convey an understanding of the key legal principles central to the background of the overall argument of the thesis that would be comparable in terms of their origins with those of the common law. These legal principles have their germination in the Medieval and Renaissance periods of imperialist expansion and evolved alongside the so-called discovery of the Americas in 1492 by Christopher Columbus. These same legal principles continue to define contemporary indigenous – nation-state relationships in the four common law jurisdictions of Canada, the United States, Aotearoa (New Zealand) and to a limited extent, Australia. These former British colonies have interconnected and analogous legal and intellectual traditions, and in addition to the judicial systems, they also have developed alternative claims fora to address historical indigenous grievances.

Aboriginal Title

In this section, I propose that a legal-historical discussion ought to begin with the doctrine of *Aboriginal Title*²⁷⁷ thus privileging the legal status of the original *Occupiers* of native territories in relation to those *Conquerors* or more accurately those *Invaders*.²⁷⁸ Aboriginal title, as a modern-day doctrine, has received legal recognition in the courts of the United States, Canada, Aotearoa (New Zealand) and Australia although with varying degrees of effectiveness. At its heart the title refers to the notion of ‘continuity’, the definition of which has proved problematic for indigenous peoples within their jurisdictional contexts. The common law doctrine recognises ‘continuity’ where the Aboriginal claimants can establish whether their ancestors’ lands have been communally or individually controlled and customarily regulated. However, the doctrinal framework has diverged from its original basis

²⁷⁷ Aboriginal title is also referred to as Indigenous title, native title in Australia, original Indian title in the United States and customary title in New Zealand.

²⁷⁸ See Maria Lane “Indigenous Australians and the Legacy of European Conquest: Invasion and Resurgence” in Elliott Johnston, Martin G Hinton and Daryle Rigney *Indigenous Australians and the law* (Cavendish, Sydney, NSW, 1997) 3 at 6.

making it contextual (i.e. case-by-case) and jurisdiction-specific.²⁷⁹ The greatest disputable issue has been how the courts have read (or been prepared to read) the principle of continuity. Does it mean that traditional or customary practices must be shown to have continued as they have been practiced since pre-colonial contact? Some courts seem to think so. However, there is a growing consensus that Aboriginal title is not limited to traditional use and traditional practices:

Chief Justice Lamer describes the source of Aboriginal title in the leading opinion of the Canadian Supreme Court in *Delgamuukw v. British Columbia*:²⁸⁰

Aboriginal title arises from the prior occupation... [b]y Aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because Aboriginal title originates from pre-existing systems of Aboriginal law. The law of Aboriginal title does not, however, only seek to determine the historic rights of Aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day.

Developing indigenous international rights law would suggest that such rights include the modern right to development.²⁸¹ The practical implementation of the right to development is proving to be difficult in cases where the right has been acknowledged. Further, interpretations differ between jurisdictions with regards to the methods of extinguishment, how or if compensation is warranted and whether compensation will be paid. Furthermore, there is also the issue of whether there should be recognition of any trust obligation or fiduciary duty owed to the indigenous peoples concerned.²⁸²

How Aboriginal title is understood in relation to the Doctrine of Discovery is

²⁷⁹ Within the body of common law doctrine, Aboriginal rights exist by virtue of historic patterns of occupancy. Such rights may give rise to a legal entitlement to exclusive ownership. See *US v. Shoshone Tribe of Indians*, 304 U.S. 111, 116-18 (1937); *Mabo v Queensland [No.2.]* 175 C.L.R.1, 69 (Aust); *R v Van der Peet* [1996] 137 D.L.R (4th) 289, 309 (Can).

²⁸⁰ [1997] 153 D.L.R. (4th) 193, 258 (Can).

²⁸¹ In *The Mayan Leaders Alliance v. The Attorney General of Belize* [2015] CCJ 15 (April 19, 2014)

²⁸² *FM Brookfield Waitangi and Indigenous rights* (Auckland University Press, Auckland, NZ, 1999) at 52.

noteworthy for the basic proposition that, upon acquisition of sovereignty, by whatever means be that discovery or conquest, the property rights of the inhabitants were preserved, except in circumstances where sovereignty is simultaneously appropriated...“except where at the time the Crown acquired sovereignty it simultaneously seized property by act of state or where it had already done so”.

The doctrine of Aboriginal Title (customary title) dates back to the sixteenth-century canons of European law. The doctrine features two key points: firstly, that indigenous peoples have some form of property rights, according to their laws and customs; and secondly, that these property rights are not affected by a transfer or acquisition of sovereignty. The first is a matter of fact at the time in which an area is acquired. The second is a long-standing precedent in English common law. According to this precedent, local property rights survive until they are relinquished or explicitly extinguished through purchase or statute. The common law also recognises that customary conceptions of property may not map to English conceptions, and therefore recognises lesser usage rights (such as hunting or fishing rights) as well as full ownership.

Flowing on from the principle of Aboriginal title, and keeping with the theme of privileging the indigenous discourse, there are the expectations that native tribes had of willingly entering into solemn covenants and treaties with the colonisers and the illusion that these agreements unquestionably formed sound and future focussed treaty relationships. The treaties were imbued with the sacred notions of inherent sovereignty that symbolized a willingness to share lands, territories and governance, particularly when they pertained to settlers. Ultimately, inherent sovereignty also includes an agreement to continuing cultural distinctiveness.²⁸³

²⁸³ Sovereignty is a contested term with multiple meanings and implications for Indigenous peoples. While an abundance of scholarship exists concerning the definitions, conceptualisations and interpretations of the term, ‘inherent sovereignty’ in the context of Aboriginal title implies pre-existing rights and responsibilities associated with occupation prior to colonial settlement. See generally Fleras and Elliott, above n 44; Havemann, above n 44; Knafla and Westra above n.44, Richardson, Imai and McNeil above n 44; Amanda J Cobb “Understanding Tribal Sovereignty: Definitions, Conceptualizations, and Interpretations” (2005) 46 Am Stud 115; Siegfried Wiessner “Indigenous Sovereignty: A

In a comparison of similarities and differences between the United States and Aotearoa (New Zealand), Miller and Ruru draw upon the legal principle of the Doctrine of Discovery as their starting point.²⁸⁴ I argue that the standard way of thinking about colonialism often opens with the premise of journeying, arrival and discovery. Never mind that, for Columbus, the discovery of the ‘America’ was little more than fortuitous happenstance, and that there were indigenous peoples (although not yet Americans) already there to greet him. James Cook fared moderately better and managed to chronicle much of his journey around the South Pacific before being dispatched by native Hawaiians.²⁸⁵

Origins of the Doctrine of Discovery

According to Newcombe, the Doctrine of Discovery had its roots in early Christianity when the European imperial nations began to “discover” indigenous nations and their lands. Under the Christian principles of civilising indigenous peoples, the ‘discoverers’ believed that they had the moral and legal right to take possession of indigenous lands.²⁸⁶

The tenets of the Doctrine of Discovery ascribed little value to indigenous legal traditions borne of the indigenous world-view. The first white ‘discoverers’ simply declared the original peoples to be uncivilised and with everything to gain from indoctrination into western religious thought. When the first contact occurred, colonists ascribed little value to indigenous ways. Indigenous peoples were viewed as uncivilised, unlearned, with everything to gain from the civilising influence of the colonist.²⁸⁷ So unfamiliar were their legal traditions that by convenience and ignorance they were declared non-existent.

The legal principles which applied to the European colonisation of indigenous

Reassessment in Light of the UN Declaration on the Rights of Indigenous People” (2008) 41 Vanderbilt J Transnatl Law 1141.

²⁸⁴ Robert J Miller and Jacinta Ruru “Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand, An” (2008) 111 W Va Law Rev 849.

²⁸⁵ At note 214.

²⁸⁶ Steven Newcomb Pagans in the promised land: Decoding the doctrine of Christian discovery (Fulcrum Publishing, Golden, Colorado, 2008) at 89.

²⁸⁷ At 94.

people's trace back to medieval origins of racial superiority and the birth of what we now know of as, modern capitalism. Modern capitalism and its neoliberal manifestations have its origins in Renaissance Europe. For centuries before capitalism, European society was caught in what Thomas Malthus observed as the Malthusian trap.²⁸⁸ The increasing desire for more resources to support economic growth and to expand the wealth of the Spanish throne led eventually to the 1492 exploits of Columbus and the so called 'discovery' of the New World of the Americas. The unfettered pursuit of imperialist expansion was justified by western legal and religious principles enabling the exploitation of these new lands which had been occupied for many thousands of years.

Consequently, the dominant political and legal institution of the medieval Roman Catholic Church endorsed the legality of the medieval crusading traditions ostensibly for converting the 'heathens' of the new world while at the same time accumulating great wealth for the Papacy in Rome. In theory, at least, the Papacy claimed universal authority over non-Christians under the norms of natural law which upheld European racial superiority over and the deviation of natives from the sanctified path of Christianity. Natural law principles were fundamental to the colonising theory of the European law of nations which provided for the two-step process of discovery consummated by possession and legalisation by the *Doctrine of Discovery* which justified property claims over new found lands and their indigenous inhabitants.

However, it is within these natural law principles that the potential legal application of the principle of aboriginal title is found, in the works of Spanish legal theorists

²⁸⁸ Adam Smith *Wealth of Nations* (Electric Book Company, London, United Kingdom, 2000). In 1798 the British economist and scholar, Thomas Malthus developed a theory known as the Malthusian stasis which states that sooner or later, the growth in population would exceed its resource growth leading to the catastrophic decline in population from events such as famine or disease. Civilisations would rise and fall, seemingly mirroring a pattern found in the natural world. He noted that human beings for almost 100 centuries after the invention of agriculture were repeatedly unable to increase their ability to extract resources from their environment. He argued that the population multiplied geometrically and food arithmetically so that population growth would always outpace agricultural production leading inevitably to a return to subsistence living.

such as Francisco de Vitoria (1480-1546).²⁸⁹ Vitoria argued convincingly that in the interest of fundamental justice, the Indians had not given any cause for war with Spain and therefore, retained rights of ownership concerning land and resources (including hunting and fishing rights), which the invaders could not lawfully abrogate. They were, he argued, the real owners of their lands and were capable of rational thought and reason thus possessing natural legal rights. He based this thinking on his recognition that all men were created equal, and equality did not just apply to Europeans and Christians.

While history attests to the fact that the Spanish ignored Vitoria's doctrine, it is possible to discern an enduring basis for the common law incorporation of pre-existing indigenous customary law, the substance of which could be held to lie in British colonial encroachment upon the lands that later became the United States, Canada, Australia and Aotearoa (New Zealand) after the mid-18th century.²⁹⁰

British Expectations of Expansion

Just as the British Empire expanded throughout the globe, so too did its Eurocentric ideology encompassing preconceived notions of racial, social, patriarchal and cultural superiority. Indigenous peoples were enslaved, their traditions and beliefs outlawed, their societies dismantled and their descendants subjected to exhaustive regulation. Furthermore, Hobbesian philosophy justified the subjugation of women

²⁸⁹ A Dominican priest and scholar who taught at the University of Salamanca, Vitoria's lectures on Indian rights are widely recognized as a primary source of the basic principles of post- sixteenth century Spanish colonial legal theory as well as of the treatment of Indigenous colonized peoples under modern international and United States law. See Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 *Geo. L.J.* 1 (1942); Getches, David, Wilkinson, Charles, Williams, Robert, Fletcher, Matthew. Getches, Wilkinson, Williams and Fletcher's *Cases and Materials on Federal Indian Law*, 6th, 6th Edition. West Academic Publishing, 03/2011 footnote.

²⁹⁰ See Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 *Geo. L.J.* 1 (1942); Getches, David, Wilkinson, Charles, Williams, Robert, Fletcher, Matthew. Getches, Wilkinson, Williams and Fletcher's *Cases and Materials on Federal Indian Law*, 6th, 6th Edition. West Academic Publishing, 03/2011 footnote. "Vitoria developed 3 arguments for the European Law of Nations: The inhabitants of the America's possessed natural legal rights as free and rational people; Any Spanish claims to title to the Americas on the basis of 'Discovery' or papal grant were illegitimate and could not affect the inherent rights of the Indian inhabitants; Transgressions of the universally binding norms of the Law of Nations by the Indians might serve to justify a Christian nation's conquest and colonial empire in the Americas".

and children as well as the wholesale taking of lands and resources. In putting forward the case for colonialism in the 1890s, Cecil Rhodes is quoted as saying:²⁹¹

“We must find new lands from which we can easily obtain raw materials and at the same time exploit the cheap slave labour that is available from the natives of the colonies. The colonies [will] also provide a dumping ground for the surplus goods produced by our faculties.

The colonisation of the four common law nation states of Canada, the United States, Aotearoa (New Zealand) and Australia was marked by very similar colonialist interests, and ultimately underpinned by a desire for expansion, the exploitation of new resources for export and new lands for settlement. But these things were not achieved in a uniform way or even as the primary motivating factor for the mass migrations that followed their initial ‘discovery’. Following in the first footsteps of traders, explorers, whalers and sealers were the poor, the disenfranchised, the persecuted and the imprisoned who were transported to the first colonies.

The project of empire that enabled by white supremacy and, as such, settler colonialism is theoretically, politically, and geographically distinct from imperialism. Rather than emphasizing imperial expansion driven primarily by militaristic or economic purposes, which involves the departure of the colonizer, settler colonialism focuses on the permanent occupation of a territory and removal of indigenous peoples with the express purpose of building an ethnically distinct national community.²⁹² Because of the permanence of settler societies, settler colonization is theorized not as an event or moment in history, but as an enduring structure requiring constant maintenance in an effort to make disappear indigenous populations.²⁹³ Settler colonialism is therefore premised on the *logic of extermination* as the building of new settlements necessitates the eradication of

²⁹¹ Wayne Ellwood *The No-nonsense Guide to Globalization* (New Internationalist, 2010) at 16.

²⁹² See generally Caroline Elkins and Susan Pedersen *Settler colonialism in the twentieth century: Projects, practices, legacies* (Routledge, 2005); W Hixson *American Settler Colonialism* (Springer, 2013); Audrey Kobayashi and Sarah de Leeuw *Colonialism and the tensioned landscapes of Indigeneity* (Sage London, 2010); Eve Tuck and K Wayne Yang “Decolonization is not a metaphor” (2012) 1 *Decolonization: Indigeneity, education & society*; L Veracini *Settler Colonialism* (Springer, 2010).

²⁹³ Patrick Wolfe “Settler colonialism and the elimination of the native” (2006) 8 *J Genocide Res* 387.

indigenous populations, the seizure and privatization of their lands, and the exploitation of marginalized peoples in a system of capitalism established by and reinforced through racism. Key examples of settler societies include the United States, Canada, Israel, Australia, Aotearoa (New Zealand), South Africa, Argentina, and Brazil.

Settlement was predicated upon the imperialist doctrine of discoverers' rights, which gave colonising European nations 'title' and exclusive authority to deal with indigenous peoples and their lands. Except in Australia, this assertion was mollified by a limited theoretical respect for existing indigenous rights and recognition of the necessity of treaties to formalise relationships and facilitate the orderly acquisition of indigenous lands and the imposition of governance arrangements over them.²⁹⁴

The European societal vision of the new world was based on a new industrialised culture as opposed to the feudal system which valued individual property rights, the economic exploitation, acquisition and development of land. The existence of an 'uncivilised' hunter gatherer society was merely an impediment to progress. The alignment of these capitalist values to patriarchal Judeo-Christian traditions meant that a) the natural world was intended for exploitation for human benefit and b) because Indigenous peoples lived in veneration of Mother Earth engendered by primitive practices and traditions, they too were vulnerable to exploitation or Christian redemption.

Not surprisingly, the indigenous worldview encompassing a tradition of equitable gender relations based on the view of the Earth as the original mother, the Creator, failed to impress the colonisers. The idea that indigenous divisions of labour depended upon 'gender balance' flew in the face of the European model of economic development based exclusively on economies of male modes of production. That some Indigenous societies were matrilineal, matrilocal and more often gynocratic meant that women held economic and political power as landowners and decision-makers, which was an untenable state of affairs for the

²⁹⁴ Benjamin J Richardson, Shin Imai and Kent McNeil *Indigenous peoples and the law* (Hart, Oxford ; Portland, Oregon, 2009) at 9.

coloniser.²⁹⁵

In pre-contact Indigenous societies the positive link between nature and women resulted in unprejudiced sexual divisions of labour. Because of the supreme character of nature and women's connection to it, women's work often dealt with the land and was immensely appreciated. Moreover, working tasks were not hierarchical, but balanced and designed to work in harmony, in order to make survival and life manageable.

Critical indigenous scholarship requires an examination of the legitimate position that women held within indigenous societies at the time of European contact. Colonial narratives would have us believe that indigenous women's roles in the management of food production, agriculture, farming and childcare were inconsequential because they were incompatible with western capitalist based policies of economic production. The writings of natural law and social contract theorists John Locke and Thomas Hobbes were deeply influential on the thinking behind the development of the British colonies. Locke theorised that property rights arose when people invested their labour in land.²⁹⁶ Hobbes proposed that human beings that lived in a 'natural state' were primitive and lacked the social order required for the law (western) to recognise their rights to possess land or resources.²⁹⁷ Both theories underpinned the moral justification assumed by the colonists that only they could put the land to more intensive and productive use for the purpose of creating economic value. More importantly, it is these theories that gave effect to the philosophical underpinnings of not only the Doctrine of Discovery but also the ensuing of Aboriginal title litigation. To illustrate this point, the Canadian decision by Chief Justice Mc Earchan of British Columbia in the *Delgamuukw* case, which forms part of his rationale for denying the land title of the

²⁹⁵ See Anderson, above n 150, at 59. Matrilineal is defined as inheriting or determining descent through the female line. Matriarchal denotes societies where women are respected leaders within a family or an organisation. A gynocratic society however is one in which women ruled or governed.

²⁹⁶ Barbara Arneil *John Locke and America* (1st ed, Clarendon Press, Oxford, England : New York, 1996).

²⁹⁷ Thomas Hobbes *Leviathan* (CreateSpace Independent Publishing Platform, 2017).

Gitxsan-Wet'suet'en, states:²⁹⁸

[I]t would not be accurate to assume that... [the] pre-contact existence [of the Gitxsan and Wet'suet'en peoples] in the territory was in the least bit idyllic. The plaintiffs' ancestors had no written language, no horses or wheeled vehicles, slavery and starvation was [sic] not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbes, that Aboriginal life in the territory was, at best, "nasty, brutish and short".

So what could indigenous tribes legitimately expect at the time of colonial settlement? Sovereignty issues are clearly at the heart of this comparison. Tribes sought to retain their tribal lands, to ensure their on-going entitlement to land and resources, something that they were willing to share but above all, they sought to retain authentic sovereignty. While the means and language of colonialism may have differed according to the nation involved, there were striking similarities in treaty-making, legislation and policy implementation that have succeeded in marginalising indigenous peoples in Canada, the United States and Aotearoa (New Zealand). Conversely, the experience of the Aboriginal and Torres Strait island peoples of Australia is, by contrast, diabolical. This section considers the historical context to indigenous rights with a view to understanding the expectations of tribes at the time of conquest and the corresponding European expectations.

Treaty-Making

Attention is paid to the common colonising mechanism of treaty-making. Within the treaty-making framework, tribal expectations for authentic expressions of sovereignty and continuing entitlement disputes over lands and territories are contrasted with European expectations of imperial expansion and settlement. In addition, this period of British expansion from the early 18th century onwards, is notable for its paternalistic governmental policies and the importation of euro-centric values supporting capitalism and practices of patriarchy. Whereas some tribes expressed, through the formation of treaties, their expectations to share land and resources in return for access to trading, tradeable goods, and the trappings of

²⁹⁸ *Delgamuukw et al v the Queen*, Reasons for Judgement. Smithers Registry No. 0843. The Honourable Chief Justice Allan McEachern. 8 March 1991. p.13.

wealth and prosperity, others suffered greatly at the hands of the conqueror. While it is no longer acceptable to propose doctrines such as *terra nullius*, fatal impact, or manifest destiny to deal with the issue of the 'white man's burden', it is indisputable in the contemporary context that indigenous peoples suffered immeasurably as a consequence of the impact of British imperialism and the ensuing colonial agenda, which ironically both eliminated and assimilated indigenous peoples in the process. We must therefore be attentive to the causal links that connect the persistent detrimental impact of colonial policies and practices. Contemporary indigenous jurisprudence evolved from these rights and duty-based discourses around nations, personhood, possession, property, the social contract, citizenship and sovereignty.

Behind all treaties are indigenous traditions of diplomacy that are drawn from an indigenous legal and political perspective. Treaties embed on-going relationships and it is the relationship that is paramount. The treaty relationship requires a commitment to ongoing and meaningful negotiations. While the relationships are political, there are expectations that parties will recognise and respect nation-hoods, legal traditions and sovereignties. Leanne Simpson reminds us that:²⁹⁹

Treaties, from this perspective, are alliances with a commitment to continual renewal. Our politics are embedded within our spirituality, making treaties a shared, sacred bond between peoples. They are a commitment to stand with each other, a responsibility to take care of shared lands, and an appreciation of each other's well-being. They are based on a profound mutual respect, and they are meant to be transformative. They transform conflict into peace by holding parties accountable for past injustices. They transform hardship into sustenance. They transform abuse of power into balanced relations. Treaties and other Indigenous diplomatic traditions transform differing perspectives into, as the Haudenosaunee say, *one mind*.

Aotearoa

Stripped of their cultural identity and denied full participation in society and the

²⁹⁹ Leanne Simpson “ Politics based on justice, diplomacy based on love” in *Briarpatch Magazine* (1 May, 2013). <briarpatchmagazine.com>.

economy, it is a startling fact that indigenous women are included in the most marginal of the marginalised.³⁰⁰ The experience of Māori women in Aotearoa (New Zealand) is unnervingly analogous. Divested of the resources that should have guaranteed them economic, spiritual and cultural well-being, Māori became the social underclass within their own land. In today's society, Māori women and children are at such a critical level of disadvantage, that it is sometimes difficult to comprehend the enormity of the problem. In brief, Māori women are disproportionately represented in deficit statistics of violence and escalating social problems that are indicative of their poor socio-economic positioning. It is indeed a crisis of significant proportion in that Māori women's statistics contribute to the globally worsening status of indigenous women.³⁰¹

The root cause for this state of affairs stems from the impact of colonisation and the manner in which Māori women's roles became degraded while simultaneously diminishing the value of their roles, over time, in Māori social organisations. That Māori women held positions of power and influence at the time of the signing of Te Tiriti o Waitangi 1840 and the fact that their roles were complementary to those of Māori men is well established.³⁰² For the most part, the colonial institutions of Christianity, law and education, enforced the subordination of women and their relegation to the domestic sphere. British colonising attitudes towards women were incompatible with the Māori worldview that afforded Māori women a status unheard of for British women. Māori women were valued leaders, decision-makers, and property holders. In addition, the disruption to balanced gender relations also resulted from the importation of capitalist patriarchal ideals to which the entrepreneurial nature of the Māori and Māori Chiefs in particular, eagerly responded.³⁰³

³⁰⁰ UN Special Rapporteur's Report: Indigenous women face endemic violence from all quarters of the globe. Retrieved from <http://unsr.vtaulicorpuz.org/site/index.php/press-releases/88-report-Indigenous-women> 22/2/2019

³⁰¹ Victoria Tauli Corpuz Report of the Special Rapporteur on the rights of indigenous peoples (A/HRC/30/41 United Nations 2015) at 11.

³⁰² Annie Mikaere "Colonization and the destruction of gender balance in Aotearoa" (1999) 12 Native Studies Review 1. Mikaere, above n 21; Linda T. Smith, above n 45, Pihama above n 203.

³⁰³ Walker, above n 10, at 79.

Like other indigenous societies, deeply embedded into the Māori worldview was the spiritual significance of women to the land and the universe that sought to maintain balance in all things.³⁰⁴ Mikaere celebrates the fact that:³⁰⁵

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

Balance, Mikaere argues, was generated through the maintenance of tikanga Māori and through:³⁰⁶

...a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures, as established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do...

Yet, the involvement of Māori women in the execution of tikanga Māori has not been researched in great depth, mainly due to historical accounts being written by European ethnographers and historians from a male euro-centric perspective.³⁰⁷ With respect to the origins of what may now be determined as tikanga Māori, Berys Heur provides a compilation of notable insights into the pre-colonial positioning of women in traditional tribal life through a collation of the many references to Māori women made throughout the ethnographic literature of the period 1769-1840.³⁰⁸

Heur writes that Māori attitudes toward women in pre-colonial society were strongly influenced by beliefs pertaining to sex. However, her view is grounded in

³⁰⁴ Mikaere, above n 18, at 125.

³⁰⁵ At 125.

³⁰⁶ At 125.

³⁰⁷ Hirini Moko Mead *The Nature of Tikanga* (New Zealand Law Commission August 11-13) at 16.

³⁰⁸ Berys Heur *Maori Women* (Reed, Wellington, 1974) at 9.

the same colonised gender assumptions seen in the writings of ethnographers such as Elsdon Best. According to Heur, sex was manifested in symbolic mythology, in carving motifs and in the mythological origins of men and women. In fact sex, permeated all aspects of Māori life. Houses were adorned with representations of men and women featuring exaggerated genitalia. Numerous narratives, waiata and oral traditions speak to the sexual prowess of women and men as well as the many famous love stories that are embodied in mountain peaks and other features of our physical landscape. Women had special roles, which Heuer states could only be understood in relation to their mythological origins.

Tane, eldest son of Rangi-nui (Sky father) and Papa-tua-nuku (Earth-mother), sought to create a race of mortals to dwell on earth and this necessitated his finding a non-supernatural woman.³⁰⁹ Legend tells of his search for the female element (*uha*) in all realms and regions. Trees, plants, birds, insects and streams were derived from Tane's continued mating with supernatural objects.³¹⁰ After his many unsuccessful attempts, Tane journeyed to the twelfth heaven to seek assistance from Io, the supreme god. Tane was sent by Io's supernatural female attendants to form a woman from the earth at Kurawaka, the pubic region of his mother, Papa.³¹¹ Tane returned and created woman from the mud and earth, breathing on the completed inanimate figure until it came to life. In some versions, Tane did this with his brothers, in others alone.³¹²

In these accounts, based as they were on the writings of white male ethnographers, Heuer re-emphasises what she calls the “culturally all-pervasive conception of man as provider of the creative fertilising elements, the life spirit; concomitant woman is seen as the passive shelterer and nurturer, the receptacle, or *whare moenga* of the life principle implanted by man.”³¹³

In stark contrast, I draw the readers attention to a different version of the same story, but in this account, the writer frames Tane's exploits within the creation story of

³⁰⁹ Elsdon Best *Māori personifications* (1923) at 60.

³¹⁰ At 58.

³¹¹ At 110.

³¹² At 111.

³¹³ Heuer, above n 308, at 10.

Hine-ahu-one, ‘the first woman’. This quote is taken from Gabel’s PhD thesis entitled *Poipoia te tamaiti ki te ūkaipō*:³¹⁴

Within the story of Hineahuone, we are able to draw many aspects of maternal prominence. Tane, one of Papa and Rangi’s sons, embarked on a quest to create humankind. Within this he sought the advice of his father, who in turn advised him to return to his mother. Tane then sought advice from his mother, who sent him in various directions to seek the uha, the female element. As his journey progressed Tane created many other species in nature, but the human female element eluded him. Each time Tane would return to his mother who would send him to another part of her body to search for the uha. Finally, after Tane had created a number of species across the world, Papatūānuku sent him to Kurawaka, her genital area, with the advice to mould a human form from the red ochre earth that existed there. Upon Tane forming the female figure and breathing life into her, Hineahuone (Earth maiden) was born with the sneeze of life – Tiheimauriora!

In contradistinction to Heuer, Gabel depicts the sanctity of the maternal body of Papatuanuku where the power of life existed. She highlights the maternal/female role which is not framed as passive as Best has documented and Heuer has described. Gabel and others provide vital analysis of our cosmological stories and the significant role that Māori women played in the development of tikanga Māori.³¹⁵

The imposition of British colonial law facilitated the alienation of collectively owned land destroying the balance upon which Māori social organisation depended. Women and families were especially impacted as the basic social unit of the whānau disintegrated. Customary practices around marriage, succession to land, property ownership and even child rearing were seriously undermined by policies and legislation having detrimental consequences for women.

³¹⁴ Gabel, above n 65, at 61.

³¹⁵ At 311; Mikaere, above n 21; Simmonds, above n 45; Mikaere, above n 61.

Trade and Colonisation

According to Walker, barter and trade are universal human pursuits, which have their own dynamic for the achievement of equivalence and satisfaction between trading partners.³¹⁶ Māori chiefs went to great lengths to cement trading relationships with Europeans, even to the extent of encouraging ship-jumpers and ex-convicts to settle amongst them. Land and wives were given to bind them to the tribe on whose behalf they acted as intermediaries in trade with visiting ships. These new settlers provided the first infusion of European genes into the Māori population. The children of these mixed unions were much admired for their fair skin and generally handsome appearance:³¹⁷

It is clear that the Māori people received Europeans in New Zealand very much on their own uncertain terms, including their notions of dispute settlement. Those settlers who could not accept that this should be so, were frustrated, humiliated and at times fearful of their dependence upon people whom they considered savages.

Following this advanced guard of mercenaries and traders were European missionaries who sought economic independence through commercial gain while ostensibly seeking to convert Māori to Christianity, civilising them in the process. Underlying their mission however were ethnocentric attitudes of racial and cultural superiority.³¹⁸ The advance party of missionaries arrived in 1814 with the arrival of Samuel Marsden. An example of the venal motivations of the missionaries was the involvement of missionary Kendall in the musket trade. His alliance with the chief Hongi Hika saw Hongi travelling to Cambridge to work on a Māori dictionary, during which time Hongi also sought to buy muskets. The missionaries' goal was to replace the spiritual beliefs of the Māori with their own. Paulo Friere reminds us of the colonising forces at work here:³¹⁹

³¹⁶ Walker, above n 10, at 79.

³¹⁷ At 79.

³¹⁸ At 85.

³¹⁹ Paulo Freire *Pedagogy of the oppressed* (new rev ed ed, Penguin, London, 1996) at 129.

...this view was based on “a parochial view of reality, a static perception of the world, and the imposition of one world view upon another. It implies the superiority of the invader and the inferiority of those who are invaded.

In his book *Ka Whawhai tonu matou*, Dr Ranginui Walker dedicates a chapter to ‘Tuiwi’ – The Coming of the Pākehā.³²⁰ Walker states that Māori had occupied Aotearoa (New Zealand) for approximately 800 years when the first Europeans arrived with the Dutch explorer Abel Tasman in 1642. It would be another one hundred years before James Cook arrived closely followed, first by sealers and then by whalers who, in 1807, were arriving from France, Norway, Spain and the United States. Māori tribes traded extensively with the visiting ships in produce, including pork, fish flax and timber. The Māori also established a financial system based mostly on barter but also also involved cash transactions. Tribes also readily entered into land transactions with Europeans to take advantage of their knowledge, skills and trading connections. Walker notes that ...“in accordance with the customary practices of cementing alliances of this nature, women of high status were married to sea captains and station managers to confirm the deals”.³²¹ Walker concludes that while there may have been some conflict arising from the contravention of customary law (tikanga) by Europeans, this period of early contact was characterised by mutual economic benefit and unlimited free trade.³²²

Early Contact

Thus at the time of contact, Pākehā initially intended to protect Māori interests as a means of ensuring their own survival because of their reliance on local Māori knowledge, hospitality and trade. Questions of Māori sovereignty, law and justice remained unhampered, and for a while, the European presence was at the behest of the Māori Rangatira (Chiefs) who oversaw indigenous legal order, which operated according to a Māori worldview, values and customary law (tikanga). The authority of Māori women at the time of European contact and prior to the signing of the Te Tiriti o Waitangi is documented in the Papatupu Hearing records and other Native

³²⁰ Tuiwi is defined as Pākehā or White Man.

³²¹ Walker, above n 10 at 78.

³²² At 78.

Land Court Hearing Minutes.³²³ Nin Tomas in her PhD thesis, makes numerous reference to Rangatira Ngapuhi women.³²⁴

There is no specific gender distinction in the status or roles accorded to men and women in the Papatupu and Land Court writings. Mana appears to be gender neutral as far as it applies to authority on the land, and men and women work alongside each other. Men were dominant in the role of protecting land and people from invasion by other groups, and, therefore more men acquired mana from being strong warriors. Women could also derive mana from taking part in battles, as the participation of Te Ruakuru, at the battle of Oneroa in Ahipara, illustrates. There is no evidence to suggest that Te Ruakuru's example is a single instance. There is also evidence that men and women combined to garden and fish, irrespective of status. Whakapapa lineage is the primary determiner of inherent mana, and physical ability its main enhancer.

Tomas's thesis provides numerous accounts of women enforcing their property rights before the early Native Land courts as dictated by tikanga and customary practice. Women with senior whakapapa lines were also rangatira and accorded great mana. Within the Hokianga region, women appear to have been as influential as men in exercising administrative roles and looking after people on the land. Women are often stated as founding ancestors.³²⁵

Accordingly, Mikaere emphatically states that tikanga Māori can be viewed as the first law of Aotearoa (New Zealand).³²⁶ Joseph, in his account of early Aotearoa (New Zealand) law and its interface with tikanga Māori, states that, for a brief period following the signing of the Treaty of Waitangi, a hybrid law developed whereby the settler population were subjected to a mix of British and Māori law

³²³ See generally Jane Mcrae "Participation: Native Committees (1883) and Papatupu Block Committees (1900) in Tai Tokerau" (Master of Arts in Māori Studies, Auckland, 1981) at 69.

³²⁴ Nin Tomas "Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present" (Univeristy of Auckland, 2006).

³²⁵ At 177.

³²⁶ Mikaere, above n 61 at 24.

(tikanga).³²⁷ The British settler residents had little choice as a consequence of initially being outnumbered by the native population. Examples of this hybridity are evident in formalised legislation such as the Native Exemption Ordinance of 1844 that continued to apply *Muru* to Māori on Māori crime. Also, the Resident Magistrates Courts Ordinance 1846, on which Chiefs also resided, and ultimately section 71 of the New Zealand Constitution Act 1852, whereby districts were set aside, in which tikanga Māori was formally recognised as the applicable law.³²⁸ Underpinning the desire to ensure law and order in the settler colony for both Māori and Pākehā was the civilising discourse for which the Native Land Court judges fervently pursued ‘enclosure of the commons’ as applicable to Māori land.

Fenton and Martin shared the common belief that if Māori were to progress in civilisation and adopt a settled, efficient form of agriculture (that would also make room for European colonists), they too would have to go through an enclosure movement. Another who shared this view was Manning, who was an early Native Land Court judge and a pioneer settler, whose *Old New Zealand* (1863) was to become a classic. He claimed that the court was bringing about “a revolution which must of necessity displace barbarism and bring civilization in its stead, for the difference between a people holding their country as a commonage and holding it as individualized real property is, in effect, the difference between civilization and barbarism”.³²⁹

³²⁷ Joseph, above n 83, at 77. For a discussion on the definition of *Tikanga* see specifically Richard Benton and others *Te Mātāpunenga : A compendium of references to the concepts and institutions of Maori customary law* (revised text ed, Victoria University Press, Wellington, 2013) at 429–433. *Tikanga* is defined as the normalised form of *tika* which has an outer meaning of ‘straight, direct, keeping a direct course’ or when considered in terms of justice and fairness means ‘right or correct’. It has connotations such as ‘rule, plan or method’, that give rise to the legal connotations similar to the common law denoting legal conditions arising out of custom, and authority and control from long accepted practice. See also Hirini Mead *Tikanga Māori* (Huia, Wellington, NZ, 2003); Poia Rewi *Whaikōrero* (Auckland University Press, Auckland, NZ, 2010); ET Durie “Custom Law: Address to the New Zealand Society for Legal and Social Philosophy” (1994) 24 Vic Univ Wellingt Law Rev 325; Justice Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Waikato Law Rev 1.

³²⁸ Benton, above n 327, provides a comprehensive explanation of the meaning and usage of the term ‘Muru’ as it applied in pre and post-contact Māori society.

³²⁹ Keith Sorrenson “Folkland to Bookland: F.D Fenton and the Enclosure of the Māori Commons” (2011) 45(2) NZJH 149 at 154.

The acknowledgement that at least thirteen Māori women of mana were known to have signed Te Tiriti o Waitangi has been largely overlooked in historical accounts, which continue to refer to the Chiefs as; ‘Male’ Rangatira.³³⁰ Mikaere states that there may have been more women but because Māori names were gender neutral, like the language, it is difficult to tell how many more women may have signed the treaty. Over time, Mikaere concludes that people have come to assume that they were all men.³³¹ According to Binney and Metge, seniority of rank was determined by lines of descent and birthright that could be traced through either men or women.³³² A woman could be of higher rank and thus the children could increase their rank by tracing lineage through the mother.³³³ In addition, women also had mana and personal prestige. They were considered sacred (tapu) because of their connection to the divine or celestial realms.³³⁴ The knowledge that Māori women held rank as leaders, organisers, experts and the heads of families challenged the patriarchal colonial view of the role of women. The evidence presented shows that women were also recognised as exercising authority over the land and its people, while also being active participants in decision-making affecting the entitlements of others. This could reflect a developing, public/private, post-contact role distinction between males and females. Men had always been the principal protectors of a group’s physical welfare through their warrior ability. After European contact, that protective role was expanded to include a growing number of matters requiring external group representation. Consequently, women, as protectors of the group’s internal welfare through the establishment of large gardens to feed the group, were quickly relegated to the domestic role of looking after the family’s immediate needs.³³⁵

Conversion to Christianity

Māori conversion to Christianity began to occur in earnest between 1830 and 1850,

³³⁰ Angela Ballara “Wahine Rangatira - Māori Women of rank and their role in the Women’s Kotahitanga Movement of the 1890’s” (1993) 27 N Z J Hist 127 at 133–134.

³³¹ Mikaere, above n 2670, at 133.

³³² Judith Binney “Some observations on the status of Maori women” (1989) 23 N Z J Hist 22; Joan Metge *New growth from old* (Victoria University Press, Wellington, NZ, 1995).

³³³ Binney and Chaplin, above n 25, at 25; Metge, above n 332, at 97.

³³⁴ Binney and Chaplin, above n 25, at 26.

³³⁵ Tomas, above n 324, at 177.

as Christian Missions became more established and Māori became increasingly desirous of the material goods of the missionaries such as metal tools.³³⁶ Interest in Christian religion gained momentum as the Māori naturally ascribed the advanced technology to the power of the new god of whom they were becoming more and more knowledgeable, as a result of the translation of the Bible into Māori.

Henare states that Māori already had an observable religiously grounded worldview and belief system when Cook and the missionaries first arrived in Aotearoa (New Zealand) in the 18th century. Early commentators were highly intrigued at the level of sophistication evident in Māori epistemology.³³⁷ The founding Polynesian ancestral explorers had brought with them a religion based on a philosophy of vitalism, which Henare describes as the idea that in all things in creation, whether material or non-material, life itself emanates from an original source.³³⁸ Māori religion began in the time before creation progressed to the birth of the mythical and original homeland of Māori called Hawaiki, a place distant in time and space, which is the Māori link with the spirit world. It was a religion founded on rituals, ceremonies, religious objects, sacred places and sites, in art forms and carvings, in songs and dances, proverbs, wise sayings, and riddles, in the naming of people and places, in myths and legends, and in customs, beliefs, and practices.³³⁹ Having developed over time in relation to the metaphysical world and philosophical understandings, Māori religion became embedded in the material, oral and psychological aspects of Māori culture. Unlike other religions, it had no known founder and no sacred text, and it was passed down through oral traditions and the observance of certain practices.

According to Salmond, Māori religion upheld a:³⁴⁰

³³⁶ Bronwyn Elsmore *Mana from heaven* (Reed, Auckland [NZ], 1999) at 7.

³³⁷ Manuka Henare “Tapu, mana, mauri, hau, wairua A Maori philosophy of vitalism and cosmos” [2001] *Indigenous traditions and ecology: The interbeing of cosmology and community* 197.

³³⁸ Manuka Henare “Tapu, mana, mauri, hau, wairua A Maori philosophy of vitalism and cosmos” [2001] *Indig Tradit Ecol Interbeing Cosmol Community* 197 at 197.

³³⁹ At 286.

³⁴⁰ Anne Salmond. “Ontological Quarrels: Indigeneity, Exclusion and Citizenship in a Relational World.” (2012) *Anthropological Theory* 12, no. 2 115 at 121.

..cosmology founded on the generation of complementary dualisms – Te Ao and Te Pō (the everyday realm and the dark realm of ancestors); Rangi and Papa (male sky and female earth); tāne and wāhine (male and female); tapu and noa (ancestral presence and absence); ora and mate (good fortune and wellbeing, and illness, misfortune or death), āngata whenua and manuhiri (local people and visitors). The pae, that perilous border zone, the place of encounter, lies at the heart of these pairings, transforming relations.

These dualisms existed as the essential elements of Māori society. Salmond explains that:³⁴¹

The concept of ‘ao’ in Māori refers to a dimension of reality, often translated as ‘world’ but without the implication of a bounded whole that underpins that term in English. In contemporary Māori, Te Ao Maori is paired with Te Ao Pākehā (roughly, a modernist or Western way of being); and Te Ao Hou (the new world, contemporary life) with Te Ao Tawhito (the ancient world, ancestral ways). In early Maori texts as well as contemporary discourse, te ao marama (the everyday ‘world of light’) stands in relation to te po (the dark, invisible ancestral realm) as paired dimensions of reality, with ritual mediating the relations between them.

The relational was important. How one stood in relation to different parts of the whole, like points on a compass, facilitated the ‘locating’ of oneself both temporally and spatially. Māori women were the embodiment of the female essence, an essential element of creation which unlike binary oppositions evident in Judeo-Christian religious philosophy characterised by mutual exclusion, the relational style was a binary expression of pairs split from the whole and yet still fundamentally linked across a liminal zone. However, early ethnographers could not accept this dualism as valid. Rationality had long been the basis of western knowledge articulated as scientific knowledge and was regarded in every way as being superior to primitive forms of knowledge. As Linda T. Smith states, research into Māori knowledge has left a foundation of ideologically laden data about Māori

³⁴¹ Anne Salmond. “Ontological Quarrels: Indigeneity, Exclusion and Citizenship in a Relational World.” (2012) *Anthropological Theory* 12(2) 115 at 121.

society, which has distorted notions of what it is to be Maori.³⁴²

Western rationality had also distorted what it meant to be a Māori woman. Eurocentric views, expressed in the written accounts of white male travellers, writers and ethnographers failed to account for the duality, fluidity and complementarity aspects of women's position within Māori religion. The traditional roles of women were made redundant in the retelling of our creation stories that reduced Māori women to gendered binary opposites reflected in the Judeo-Christian style that created women as subservient to men in a system that viewed men as descended from the heavens and women borne of the land.³⁴³

The Erosion of Mana Wahine

For aeons before colonisation, leadership was based on the needs of the people in their traditional territories. Rangatira women were women who exercised significant political power as leaders within hapū. They established whakakapapa lineage and stature, and their role was to ensure the welfare and wellbeing of the 'kainga'.³⁴⁴ Mahuika and Rei document Ngāti Porou women as being political leaders, 'tohunga' and having the authority to initiate both peace and war.³⁴⁵

The legalised erosion of mana wahine began with the signing of the Treaty of Waitangi in 1840.³⁴⁶ Regardless that thirteen-rangatira wahine also signed the treaty, their mana has been ignored and historically marginalised.³⁴⁷

Mikaere considers the reason for this has more to do with the influence of Christianity than it has to do with illustrating the positioning of Māori women in Māori society at the time. Māori women, by their attendance at many of the negotiations, clearly expressed their desire to retain their authority in their signing

³⁴² Linda T. Smith, above n 265, at 170.

³⁴³ Mikaere, above n 146 at 125.

³⁴⁴ Rei, above n 271, above n 208; Johnston, above n 26 and Mikaere, above n 21.

³⁴⁵ Apirana Mahuika "Nga Wahine Kai-hautu o Ngati Porou" (Unpublished Masters thesis, Sydney, 1973) Rei, above n 271.

³⁴⁶ See The Treaty of Waitangi Act 1975 (NZ) 1st schedule.

³⁴⁷ Maori women understood that Queen Victoria was the other party to the Treaty and insisted on being allowed to sign. Where they were prevented from doing so, others were known to have refused, some male and possibly of lower rank. Orange, above n 90; Rei, above n 271; Mikaere, above n 21.

of the treaty. Māori women's participation in pre-Treaty tribal activities was recorded by the merchant Polack³⁴⁸:

In New Zealand they eat with the men, accompany their lovers, husbands and relatives, and friends, to a feast or war expedition, influencing the several tribes by taking an active concern in all business of life. They are consulted alike in public and domestic affairs... and even join the war council, which they at periods aid by their deliberations.

That some women were able to have influence on other Rangatira is significant evidence, in my view, of the seniority that enabled their inclusion in tribal matters and decision-making.³⁴⁹ While eurocentric views were expressed by Christian missionaries of the time, British colonial aspirations were essentially patriarchal and stemmed from a long history of imperialism. Mana wahine was distorted to support the biased view of officials and writers with the purpose of lessening the importance of Māori women.

For Māori, the Treaty of Waitangi 1840 is key to an understanding of *all* relationships between Māori and the Crown. In the English version, the Crown assumed it was acquiring sovereignty in exchange for the guarantee to Māori of their full exclusive and undisturbed possession of their properties.³⁵⁰ Māori on the other hand, assented only to a grant of governorship.³⁵¹ Thus Māori women were

³⁴⁸ Joel Polack *Manners and customs of the New Zealanders* (Capper Press, Christchurch, 1976) at 95.

³⁴⁹ For example Ereonora, the wife of Nopera Panakareao an influential rangatira from Kaiataia, Northland. Orange, above n 21, at 38.

³⁵⁰ Article I of the Treaty of Waitangi states that the "Chiefs....cede to....the Queen of England... all the rights and powers of Sovereignty". The cessation of sovereignty was translated as the "tuku rawa atu" o "Kawanatanga". Article 2 states that " the Queen... confirms and guarantees to the Chiefs and Tribes... the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession". Also, the Chiefs.... Yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon". In Richard Dawson and Victoria University of Wellington Institute of Policy Studies *The Treaty of Waitangi and the control of language* (Institute of Policy Studies, Victoria University of Wellington, Wellington, NZ, 2001) at 59.

³⁵¹ The Maori translation states that the Queen confirms to the Chiefs "te tino rangatiratanga o ratou wenua o ratou kainga me o ratou taonga katoa", subject to their agreeing to the sale ("hokonga") of these taonga to the Queen. Article 3 "imparts" to all Maori "all the Rights

afforded individual as well as collective rights under Article 2 of the Treaty. When these terms are considered within the context of women's traditional political and social roles, as heads of whānau and owners of 'use-rights' over land and resources, women legitimately had the authority and mana over their whānau, hapū and iwi to make political, social, economic, spiritual and cultural decisions. The extent to which Māori women contributed to the Māori legal order of the day has yet to be properly determined, however much of the legislation that disempowered Māori women, following the signing, was directed at extinguishing their relationship to the land, which was at the very heart of the Treaty agreement and colonial desires. This was a time when Māori women were acknowledged as landowners under Māori law and custom, meaning they were readily participating in land sales both privately as well as under the Crown imposed pre-emption deed system.³⁵² According to Hohepa and Williams, Māori law recognised ambi-lateral descent and ambi-lineal succession to land; a system of ownership that conflicted with the western notion of male seniority or primogeniture.³⁵³ However, allowing Māori women the freedom to exercise their power and authority went against the colonial agenda of civilising the natives, assimilating them as contributors to colonial productivity and ultimately, freeing up the land for settlement.

Land alienation and the imposition of patriarchal laws following the signing of the Treaty of Waitangi irreparably damaged the status of Māori women and displaced Māori whānau. The rapid increase in European immigration, combined with dissatisfaction at the rate of Crown land purchasing, led to a push by settler politicians to land speculation in Māori lands. While the Native Land Act 1862 sought to establish a 'legal' mechanism for colonists to acquire rights to Māori land, the establishment of the Native Land Court in 1865 had the objective that the concept of *ownership of such lands* would be assimilated, as nearly as possible, into

and Privileges of British Subjects". In the translation, this reads "ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata on Ingarangi". In At 59.

³⁵² Mikaere, above n 201, at 48–73; Metge, above n 332, at 131; Ballara, above n 29, at 130.

³⁵³ Professor Patu Hohepa and Dr David V Williams *The Taking into Account of Te Ao Maori Relation to Reform of the Law of Succession* (Law commission) at 29.

how the ownership of land was understood according to British Law”.³⁵⁴ The court established a land tenure system whereby Māori women became subject to the authority of their husbands for transactions involving their own land.³⁵⁵ This was in keeping with the British doctrine of the enclosure of the commons, which sought to move land from communal, seemingly unproductive ownership, to individualised title. The prevailing notion that much of the land in Māori title was ‘waste land’ or unproductive land initiated a good deal of the land speculation and alienation through Māori Land court proceedings. The court was authorised to issue certificates of title in the name of persons deemed to be the owners who then had the power to alienate the land from Māori. A system of ‘winner-takes-all’ took hold as tribal members fought to establish rights in respect of access to and use of the land and associated resources. Many Māori women pursued legal claims before the Native Land Court as individuals and iwi representatives, some seeking the return of previously confiscated lands.³⁵⁶ While individual Māori were clamouring to acquire rights, liberties, powers and immunities pertaining to individualised land title, the rights of Māori women were abrogated by an 1873 amendment to the Act that required husbands to be a party to any deed executed by a married Māori woman.³⁵⁷ Up until the 1873 amendment, Māori women were recognised as having property rights. This legislation, coupled with the Matrimonial Causes Act 1857, further invalidated Māori customary marriage and gave a Māori woman’s property rights over to her husband, upon marriage, who was then capable of disposing of those interests without consent.³⁵⁸ The massive land loss which resulted from the operation of the Native Land Court destabilised the Māori population to such an extent that Māori whānau were left with little land to be self-sufficient and were

³⁵⁴ Dawson and Victoria University of Wellington Institute of Policy Studies, above n 297, at 86.

³⁵⁵ Native Land Act 1873, s 86.

³⁵⁶ Lachy Paterson and Angela Wanhalla *He Reo Wahine* (Auckland University Press, 2017).

³⁵⁷ Law Commission *Justice: the Experiences of Māori Women. Te Tikanga o te Ture: te matauranga o nga Wāhine Māori e pa ana ki tēnei* (Law Commission, Wellington, 1999) at 21.

³⁵⁸ Rei, above n 271, at 43.

forced to enter the town and cities in search of work.³⁵⁹

Legislation pertaining to the disempowerment of Māori women was deliberate and intended to dismantle Māori society, destabilise whānau and enable the distribution of communally held property. Patriarchal values inherent in British law, a system that did not value women, were introduced as mechanisms to achieve this. By undermining the value of Māori women, patriarchal values were instilled into colonial society. These were deliberate strategies were employed across the indigenous nations of the world.

*Canada*³⁶⁰

Colonial domination of the Aboriginal peoples of Canada occurred between 1763 and 1876. From 1878 to 1906, the Crown entered into treaties with the First Nations that incorporated the territory of Manitoba.³⁶¹ In the beginning, there were often cases of fraudulent land acquisitions which motivated Britain to establish a formal process of land acquisition.³⁶² The assumption was that the British Crown had gained sovereignty by virtue of the right of conquest by discovery and/or through occupation that guaranteed the dispossession of indigenous lands. Of particular interest to this discussion is the location of women in the treaty-making/signing context. Evidence provided at the time of the signing of Treaty 6 states that it was the women who owned land and that women could pass authority of its use to the men, but not the 'life of the earth'. Thus, the chiefs did not have unlimited authority to negotiate treaties with the Crown. In this way, the women were able to protect

³⁵⁹ Ian Pool *Colonization and development in New Zealand between 1769 and 1900* (Springer, Cham, 2015) at 153–154.

³⁶⁰ The northern territories were previously part of the British Empire in mainland North America before becoming Canada.

³⁶¹ These became known as the numbered treaties. Treaty 1 was entered into in 1871, Treaty 2 in 1872, Treaty 3 in 1873, Treaty 4 in 1874, treaty 5 in 1875, Treaty 6 in 1876 and Treaty 10 in 1906.

³⁶² The Royal Proclamation 1763 importantly recognised Aboriginal Title in the lands that were reserved for the exclusive use and possession of the Aboriginal peoples. The preemptive clause ensured that only the Crown could purchase (or surrender) lands on a formal nation-to-nation basis with consent. This process recognised Aboriginal groups as autonomous and self-governing, however, the Crown viewed the relationship as one of Trusteeship with the Aboriginal living under Crown protection within British dominion. The Crown formally acknowledges this as a fiduciary obligation. See the Report of the Royal Commission on Aboriginal Peoples, 1996.

their possessory rights and the chiefs could only share but not sell. Sharon Venne stresses that the written version of Treaty 6 between the Cree Nation and the Crown for example, does not accurately reflect the terms of agreement between the parties because women did not sign, nor did they see the need to.³⁶³ This reflects the consequence of applying a euro-centric perspective that assumed the inferiority of indigenous women, as was also the case with non-indigenous women, when in fact, the land was never sold, because women never signed.

Colonial conflict saw a number of treaties signed between the aboriginal and non-aboriginal peoples over a timeframe of approximately 300 years. These treaty-based relationships that would shape the North of America into what was to become known as Canada. According to Miller, the first phase of the settlement of Canada, then known as British North America, was characterised by reciprocal relations that recognised Native authority, practices and customs.³⁶⁴ While commercial exchange and military alliances dominated these early relationships, the treaties between the indigenous nations and the British Crown were philosophically aimed at bringing the indigenous nations into *civil society*, a move that was therefore in keeping with Locke's theory of treaty commonwealth or federalism.³⁶⁵ Consensual treaties established constitutional relationships between sovereign nations that were significantly imbued with rights and obligations capable of being upheld under both international and civil law ... "*for as long as the Sun shines, the Grass grows, and the Waters flow.*" Even though it can be argued that Locke expressed disdain toward customary indigenous institutions and systems of government, he nevertheless viewed them as sovereign nations, worthy of protection and quite distinct from other European colonies of the time. His was on a civilising mission. For example,

³⁶³ Sharon Venne "Understanding treaty 6: an Indigenous perspective" in *Aboriginal and Treaty Rights in Canada* (1997) 173 at xiii.

³⁶⁴ Robert Miller *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto University Press, Toronto, 1991).

³⁶⁵ James Youngblood Henderson "The Context of the State of Nature" in Marie Battiste (ed) *Reclaiming Indig Voice Vis* (UBC Press, Toronto, 2000) at 26–28. Henderson articulates Locke's theory of the treaty commonwealth which became the underpinning principles of the first Canadian treaties. Locke's instructions were clearly incorporated into the treaties at the insistence of King Charles II who sought to bring them under Crown protection with the clear intent however, to terminate competing agendas from the settlers and colonists in terms of exemption from Crown dominion and taxation.

the 1701 Treaty of Albany was the first formal alliance between aboriginal peoples and the Crown; an agreement that largely developed because the Iroquois nation was more powerful and outnumbered the resident British.³⁶⁶ Indigenous law and oral traditions are resplendent with illustrations of the consensual nature of the treaties entered into. Take, for example, the Two Row Wampum (*gus-wen-quah*) which depicted the Iroquois understanding of the undertaking of the Treaty of Albany. It is the Two Row Wampum that Patricia Monture-Angus reminds us stores the cultural and political principles of self-determination as understood by aboriginal peoples. She offers this explanation as an exemplar of how indigenous peoples viewed law and the ‘foreignness’ of Canadian law today. She explains the underlying philosophy³⁶⁷:

The *gus-wen-qah* is vastly complex but is visually quite simple. It is two rows of purple shell imbedded in a sea of white. One of the two purple paths signifies the European sailing ship that came here. In that ship are all the European things – their laws, languages, institutions and forms of government. The other path is the Mohawk canoe and in it are all the Mohawk things – our laws, institutions and forms of government. For the entire length of that wampum, these two paths are separated by three white beads. Never do the two paths become one. They remain an equal distance apart. And those three white beads represent "friendship, good minds, and everlasting peace" [citing Chief Jacob E. Thomas]. It is by these three things that Aboriginal Peoples and the settler nations agreed to govern all of their future relationships. It is very easy to see how this treaty has been disrespected by all of us, Indian and settlers alike.

Notably, Patricia Monture-Angus recounts that the only way you can destroy a wampum, is wilfully. It cannot happen by accident. The existence of these treaties were noted in *R.v. Sioui*³⁶⁸ by Justice Lamer, who stated that the Royal Proclamation of 1763 had acknowledged the nation-to-nation agreement between

³⁶⁶ Borrows, p.14. the treaty of Albany also established a much needed alliance against the French with whom Britain was fighting for political and economic dominance in North America.

³⁶⁷ Monture – Angus, above n 146 at 37.

³⁶⁸ *R.v. Sioui* [1990] 1. S.C.R. 1025

the Crown and First Nations: "...[Both] Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations."

The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations, which occupied North America, as independent nations.³⁶⁹

In keeping with the Doctrine of Discovery, the Empire sought to civilise and otherwise subjugate the indigenous populations but none were more impacted than the women. Also, by the Royal Proclamation of 1763, indigenous women were disempowered by the decree, such that only appropriate (male) native leaders could take part in the band councils that had replaced traditional indigenous governments.³⁷⁰ Lawrence and Anderson note that the absence of aboriginal women in politics is entrenched in colonial history:³⁷¹

"Where are your women?", is the question posed by Cherokee Chief Attakullakulla upon meeting with a colonial United States (US) delegation in 1757. As Marilou Awiakta reports, Chief Attakullakulla's party included women "as famous in war, as powerful in the council," while the US party included only men.

According to Anderson, the implied meaning of the question "*Where are your*

³⁶⁹ The Royal Proclamation 1763 recognised 'reserved lands' which were unceded lands in Indian possession intended for their use exclusively. The agreement also gave expression to the principles of the 'fiduciary' relationship between the Crown and First Nations that had fundamental constitutional significance in ensuing case law.

³⁷⁰ The proclamation specified the Crown's pre-emptive right to acquire Aboriginal title to land. By doing so, the proclamation placed severe constraints on colonial settlement which eventually led to the revolution and the creation of the United States. See Arthur J Ray *Aboriginal rights claims and the making and remaking of history* (2016) at 6.

³⁷¹ Cited in Bonita Lawrence and Kim Anderson "Introduction to 'Indigenous Women: The State of Our Nations'" (2005) 29 *Atlantis Crit Stud Gend Cult Soc Justice* 1 at 1.

women”? was “*Where is your balance*”? or “*Where is your intent*”?³⁷² This example of the historical exclusion of women from negotiations with the colonial government highlights the gender bias characteristic of treaty negotiations and is also indicative of how women’s perspectives were not incorporated into the ensuing treaty relationships.

The most outstanding piece of evidence of indigenous women’s role and positioning in tribal governance at the time of colonial contact is of course the Great Law of Peace of the Iroquois Confederacy.³⁷³ Of the 117 clauses of the Great Law of Peace, 23 clauses pertained to the authority of women in egalitarian and communal societies where women controlled the economics, property, government and the structure of society.³⁷⁴ Clause 44 states:³⁷⁵

The lineal descent of the people of the Five Nations shall run in the female line. Women shall be considered the progenitors of the Nation. They shall own the land and the soil. Men and women shall follow the status of the mother.

The clan mothers controlled the matrilineal clans, which were a system composed of the women’s female descendants. The existence of a complete transcription of the oral constitution into English in about 1880 cannot be denied although many subsequent revisionist histories have been written.³⁷⁶ The Great Law encompassed

³⁷² Anderson, above n 150 at 65. See also Barbara Alice Mann “Where are your women? Missing in action” [2006] *Unlearning Lang Conqu Sch Expo Anti-Indianism* Am 120.

³⁷³ The Iroquois Confederacy is also known as the League of Haudenosaunee which comprises the Seneca, Onondaga, Oneida, Mohawk and Cayuga tribes of New York State at around 1000-1450.

³⁷⁴ See generally Renée Jacobs “Iroquois Great Law of Peace and the United States Constitution: How the Founding Fathers Ignored the Clan Mothers” (1991) 16 *Am Indian Law Rev* 497; Arthur Caswell Parker and Seth Newhouse *The constitution of the five nations* (University of the State of New York, 1916); Gregory Schaaf “From the Great Law of Peace to the Constitution of the United States: A Revision of America’s Democratic Roots” (1988) 14 *Am Indian Law Rev* 323.

³⁷⁵ Jacobs, above n 374, at 508.

³⁷⁶ Varying accounts exist in the languages of the original five nations, and while there are conflicting versions of the constitution, harmonisation across the narratives illustrates the consistency of meaning and intent. See Barbara Mann Barbara Alice Mann “The Second Epoch of Time: ‘The Great Law Keeping’” in Bruce Elliott Johansen and Barbara Alice Mann (Eds) *Encyclopaedia of the Haudenosaunee (Iroquois Confederacy)* (Greenwood Publishing Group, London, 2000) 265.

the traditional status of women and safeguarded the natural rights of all of the people which lead to unanimous decision-making.

Nevertheless, while there is a good deal of literature that supports that the fact that the Iroquois provided for the background and intellectual underpinnings of American democracy, the status of women evidenced in Iroquois society was ultimately disregarded.³⁷⁷ The acknowledgement of women in the building, leadership and governance of tribal first nations, is imperative to an understanding of their positioning in pre-colonial society, which was reflected in the establishment, if not the signing of treaties. In aboriginal societies like the Iroquois, the clan mother customarily played a key role as an essential decision-maker. In contrast, European culture did not afford women the same or similar status.

The Indian Act 1867 – Framing Native Identity

Canada has been legally defining who and what is an ‘Indian’ since 1850 when it began legislating for the governance of Indian Affairs.³⁷⁸ The passage of the Indian Act 1867 was and continues to be imbued with preconceived notions of racial, social and cultural superiority.³⁷⁹ It is also a shocking example of how indigenous

³⁷⁷ See specifically for discussions on how the Iroquois constitution is perceived by some writers to have influenced the American Constitution: Ed White “The Challenge of Iroquois Influence” (2000) 52 Am Q 179; Charles Radlauer “The League of the Iroquois: From Constitution to Sovereignty” (2000) 13 St Thomas Law Rev 341; Francis Jennings *The Creation of America* (Cambridge University Press, 2000); Samuel B Payne “The Iroquois League, the Articles of Confederation, and the Constitution” (1996) 53 William Mary Q 605; Allan S Mohl “The Rise and Fall of the Iroquois Confederacy: Its Influence on Early American History” (2007) 34 J Psychohistory N Y 347. I have found these general sources helpful for discussions of gender roles and the gendered distribution of power within the Iroquois confederacy: Bruce Elliott Johansen and Barbara Alice Mann *Encyclopedia of the Haudenosaunee (Iroquois Confederacy)* (Greenwood Publishing Group, 2000); Barbara Alice Mann *Iroquoian Women* (Peter Lang, 2000); Valaskakis, Stout and Guimond, above n 107; White; Mann, above n 323.

³⁷⁸ While many writers critique the use of the term Indian as derogatory preferring terms such as Aboriginal or First Nations to describe the Indigenous peoples of Canada, I continue its use in this section as it illustrates the colonial discourses of race, gender and class that are embedded within this and other pieces of legislations that sought to reframe Native identity within an oppressive and patriarchal regime.

³⁷⁹ The Indian Act 1876 has undergone many amendments since its inception. However, the intent of the Act has remained largely intact which is ostensibly to govern the legal relationship that the Indians have with the Federal government (by the terms of Section 91(24) of the Constitution Act, 1867), as a consequence of the Royal Proclamation of 1763, and as a result of the many subsequent nation-to-nation treaties that were signed with the 614 First Nation Bands.

women were dispossessed, disenfranchised and subjugated by and as a result of British colonialism and paternalism. Many commentators share the view that the Act was created to fulfil three key functions:

- i. To define who was and was not an Indian i.e. status,³⁸⁰
- ii. To civilise the Indian, and
- iii. To manage the Indian people on their lands i.e. reserve lands.³⁸¹

Between 1867 and 1950, the Act was amended several times to strengthen the underlying philosophy of civilising and assimilating the Indian.³⁸² Furthermore, the amendments to the Act sought to grant the Government increasing powers to expropriate Indian lands for non-Indian use. Notably, the regulation of native identity has been central to the colonisation process in both Canada and the United States.

For indigenous women the most controversial and damaging sections of the Act dealt with the issue of membership, in particular the concept of ‘enfranchisement’ or “admission to citizenship”. A loss of status meant that Indians could become Canadian citizens, which ironically was perceived as a positive thing. Enfranchisement however was borne of colonial ideology that was both discriminatory and oppressive.³⁸³ The 1876 definition asserted the exclusivity of male lineage, therefore meaning an Indian was defined as any male person of Indian blood belonging to a particular band; any child of such a person and any woman lawfully married to such a person.³⁸⁴ Consequently, a woman’s status and band

³⁸⁰ Status is a legal definition, used to refer to native peoples who are under federal jurisdiction as defined by the Constitution Act 1867.

³⁸¹ See Cora Voyageur “Female First Nations Chiefs and the Colonial Legacy in Canada” (2011) 35 *Am Indian Cult Res J* 59; Mary Ellen Turpel “Discrimination and the 1985 amendments to the Indian Act: Full of snares for women” [1987] *Rights Freedom*; Judith F Sayers and others *First Nations women, governance and the Indian Act* (Status of Women Canada, [Ottawa], 2001); Lawrence, above n 46; Sharon Venne *Indian Acts and Amendments 1868-1975 An Indexed Collection* (University of Saskatchewan Native Law Centre, Canada, 1981); Furi and Wherrett, above n 24; Turpel, above n 108.

³⁸² See Venne, above n 328.

³⁸³ Government of Canada, Department of the Interior, “An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs and to Extend the Provisions of the Act 31st Victoria Chapter 42,” *Statutes of Canada* 6 (Ottawa, ON: Queen’s, 1869).

³⁸⁴ Furi and Wherrett, above n 31, at 2.

membership became dependent on their father or husband's status. It discriminated against Indian women by stripping them and their descendants of their Indian status if they married a non-Indian (without status).³⁸⁵ Conversely, non-Indian women who married Indian men with status gained status. It is a strange contradiction that this gave effect to a legal fiction whereby Indian women became legally white, and white women became legally Indian. Shin Imai states that, "because of the dual policy of paternalism and assimilation, the Indian Act status provisions were a mismatch of nonsensical, ethnocentric and sexist rules".³⁸⁶ Subsequent amendments continued the policy of enfranchisement also making it compulsory for those who became a doctor, lawyer, Christian minister or gained a university degree.

While race and gender discrimination is inherent within the framework of the Act, the 1951 amendments and modifications were decidedly more targeted and overt. Through these provisions of the Act, a staggering number of women and their children were struck off the Indian register and denied access to their communities and cultures. Notably, Section 12 sets out a regime of dispossession that is unsurpassed in the common law for its blatant disregard of the rights of indigenous women. Most Indian women were 'de-registered' as a result of this provision introduced in 1951. As a result, they lost the right to live on-reserve, to vote in band elections, to share in band benefits and to own or inherit property on-reserve.³⁸⁷

In 1985, arguably the most significant amendment to the Indian Act, Bill C-31 was introduced by the Canadian Government in response to changes to the constitutional framework. The introduction of the Canadian Charter of Rights and Freedoms in 1982 heralded the prohibition of discrimination based on race, ethnicity, religion, sex, age, or mental or physical disability.³⁸⁸ Consequently, the Indian Act 1985

³⁸⁵ Section 12, 1 (b)

³⁸⁶ Shin Imai, Katherine Logan and Gary Stein *Imai Aboriginal Law Handbook* (Carswell, Toronto, Canada, 1995) at 123.

³⁸⁷ At 5.

³⁸⁸ Charter of Rights and Freedoms, s 15, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. Section 15(1) states: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination

removed the discriminatory provisions that had asserted that women could gain or lose Indian status as a result of marriage. Several groups that had previously been compulsorily disenfranchised were permitted to seek restoration of their status. This included the children of women that had been disenfranchised as a result of their mothers; marriage to a non-Indian, persons enfranchised as a result of the ‘double mother’ provisions, and illegitimate children who lost status due to non-Indian paternity.³⁸⁹

The United States

In its formative years, the United States had a practice of dealing with Indian nations as sovereign governments through diplomacy and treaty-making. Peacekeeping, persuasion and negotiation were key to the original colonists gaining a foothold in the new world due to the sheer imbalance in the Indian versus European populations of the mid- to late-18th century. Accordingly, some 800 treaties were eventually negotiated while only 370 were ever ratified.³⁹⁰ The policy, as previously stated, was to only acknowledge Indian males in treaty negotiations while ignoring the many cases in which matrilineal clans owned tribal lands, thus establishing a gendered misconception about the political power inherent within Indian tribal society. Ironically, the very instruments that acknowledged Indian political autonomy were to become the tools for large scale land cessions.

American Indian treaty rights are based on the inherent moral obligation that the United States Government has to honour its promises in respect of Indian sovereignty over tribal land and the protection of cultural rights.³⁹¹ Predating the formation of the United States, the treaties were intended as mutual agreements

based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

³⁸⁹ Indian Act, R.S.C. 1985, c. 1-5, as am. R.S.C. 1985, c. 32 (1st Supp.), c. 27 (2d Supp.), s. 10 (Sched. item 13), c. 17 (4th Supp.), c. 43 (4th Supp.), c. 48 (4th Supp.).

³⁹⁰ Duane Champagne “Rethinking native relations with contemporary nation-states” [2005] *Indigenous Peoples Mod State* 3 at 12.

³⁹¹ Rebecca A Tsosie *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights* (ID 1401596 Social Science Research Network 2000).

between sovereign nations and are acknowledged as such in international law. According to Tsosie: “[t]hey are negotiated accords between separate political sovereigns designed to secure the mutual advantage of both parties”.³⁹²

The implementation of the rule of *Johnson v. McIntosh* (1823) is proof of this political relationship which recognises that the American Indian people have distinct cultures, languages, identities and spiritual beliefs that predate the formation of the United States. It is therefore fitting to acknowledge that American Indian political theories and tribal governance systems in all likelihood helped shape the political thinking of Thomas Jefferson and Benjamin Franklin in the drafting of several provisions of the United States Constitution and the Declaration of Independence.³⁹³

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness – that to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government.³⁹⁴

Notwithstanding that universal acceptance of this proposition is disputed, Miller et al. make the case that the United States founding fathers could not help but be influenced by the indigenous worldviews and theories that shaped the tribal

³⁹² At 1620.

³⁹³ Bruce E Johansen *Forgotten founders* (Gambit Inc Publishers, 1982).

³⁹⁴ Some scholars provide persuasive evidence that the founding fathers were influenced by their close diplomatic relationships with Iroquois Chiefs in and around 1776, enough so that they took whole provisions from the Iroquois Confederacy’s Great law of Peace and wrote them into both the Declaration of Independence and the US Constitution. See generally Johansen, above n 340; Robert J Miller “American Indian Constitutions and Their Influence on the United States Constitution 1” (2015) 159 Proc Am Philos Soc Phila 32; Wiessner, above n 37, at 60. Compare with the dissenting view of J Bosveld “Forgotten founders” (1992) 14 Omni 33; Erik M Jensen “The Imaginary Connection Between the Great Law of Peace and the United States Constitution: A Reply to Professor Schaaf” (1990) 15 Am Indian Law Rev 295; Philip A Levy “Exemplars of Taking Liberties: The Iroquois Influence Thesis and the Problem of Evidence” (1996) 53 William Mary Q 588; Elisabeth Tooker “The United States Constitution and the Iroquois League” (1988) 35 Ethnohistory 305.

governments with whom they were dealing.³⁹⁵ As a result, they developed democratic political theories in contradistinction to the model of British and European monarchies against which they had vigorously rebelled.

It bears repeating however, that American Indian tribes shared the devastating consequences of European colonisation that other indigenous peoples experienced globally. Historically manifested in vastly diminished populations, forced removals, racially-based and gender-biased government policies, land loss, language loss and destroyed cultural and religious practices, colonisation has resulted in a unique system of law that paradoxically recognises the inherent sovereignty of federally recognised tribes.³⁹⁶ However, federal Indian common law has functioned to define the nature of tribal political sovereignty relative to the United States and to appropriate to the settler states and their citizens, most of the traditional lands and resources of the Indian people.

The Marshall Trilogy

European expectations in the Americas and what came to be known as the United States of America post-revolution are soundly expressed in the Marshall Trilogy of cases.³⁹⁷ The Marshall Trilogy posited the guiding principles upon which the relationship of that time between the United States and Indian tribes is based. The opinions delivered by Chief Justice John Marshall in the United States Supreme Court still resonate today as laying the foundational principles upon which federal Indian common law is based. By doing so, Marshall incorporated the Doctrine of Discovery into American constitutional law, thus laying the groundwork for the ongoing legal dispossession of indigenous peoples from their lands in order to provide land for the settlement of European settlers.

³⁹⁵ Miller, above n 341, at 33.

³⁹⁶ Indian rights were formulated from a 19th Century context of nation to nation diplomacy and treaty making. A unique outcome is the doctrine of ‘inherent tribal sovereignty’ of *Worcester v. Georgia* (1832) which provides a protectorate framework for Indian nations as ‘domestic dependent nations’.

³⁹⁷ *Johnston v. McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832). The cases were first described as a Trilogy by Professor Charles Wilkinson in Charles F. Wilkinson, *American Indians, Time, and the Law: Native societies in a Modern Constitutional Democracy* 24 (1987).

This principle was, that discovery gave title to the Government by whose subjects, or by whose authority, it was made against all other European governments, which title might be consummated by possession”.³⁹⁸

The exclusion of all other Europeans, necessarily gave the nation making the discovery the sole right of acquiring soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by all others assented.

Marshall reasoned that Indians retained rights to their lands but that those rights were circumscribed post-Discovery:³⁹⁹

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

The United States Government therefore held title to Indian lands. They also held the pre-emptive right to extinguish Indian title via purchase or conquest:⁴⁰⁰

The United States, then, have unequivocally acceded to that great and broad rule by which its civilised inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave

³⁹⁸ Johnson, 21 U.S. at 573

³⁹⁹ At 574

⁴⁰⁰ At 587

also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

The justification Marshall held, was racially based on the notion that as a lesser race, Indians, unlike whites, had lesser rights to land and would eventually assimilate.⁴⁰¹

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established as a general rule, that the conquered should not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and the old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and untied by force to strangers.

Similarly, Indian title in the United States was based on prior occupation with many land transfers being made between tribes and early settlers.⁴⁰² While *Johnson v. McIntosh* highlights the proposition that Indian rights had necessarily been abrogated by the ‘fact’ of discovery, more importantly for this discussion, it is also noteworthy for the limited but favourable position Marshall took of recognising original Indian title through prior occupation. On one hand, Marshall asserted that Indian nations were ... “*the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion....*”⁴⁰³ Conversely, Marshall proclaims and then continues throughout

⁴⁰¹ Johnson, 21 U.S. at 589

⁴⁰² Aboriginal title is also referred to as Indigenous title, native title (particularly in Australia), original Indian title (particularly in the United States), and customary title (particularly in New Zealand).

⁴⁰³ *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823).

the decision to reinforce the European Doctrine of Discovery. The decision of *Johnson v. McIntosh* has influenced indigenous rights in Australia, Aotearoa (New Zealand) and Canada. The courts have used Johnson to restrict the land rights of the original occupants while at the same time acknowledging that the Aborigines, Māori and First Nations peoples of Canada retain certain possessory rights in land that are worthy of judicial protection.

The Johnson decision was also the first indication that Indian women's property rights were to be ignored. Indian women's agricultural production provided the basis for these rights and it has been argued that the Johnson decision intentionally ignored women's property rights.⁴⁰⁴ Dussias further states that Marshall's intention could have been to align Indian women with the position of white women inasmuch as married white women could not exercise rights over real property without the authority of their husbands. Later decisions regarding this would appear to support Dussias' assertion. In *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, Marshall stated "that the federal government assumed the paternalistic, guardianship role with respect to the Indians and their lands."⁴⁰⁵ Marshall went further by stating: Like married women, who were treated as under the "wing, protection, and cover" of their husbands, the Indians were under the protection of the United States".⁴⁰⁶ According to Dussias:⁴⁰⁷

Thus, in *Johnson v. McIntosh*, the Supreme Court, while ignoring the agricultural activities and property rights of Indian women, subjected Indian tribes and Indian property rights to a system of paternalistic restrictions resembling the restrictions that American law had placed on married women and their property rights. Although the restrictions on married women's property rights have been abandoned, the restrictions imposed on Indian property rights in Johnson continue to affect Indian tribes and their land.

⁴⁰⁴ Dussias, above n 32, at 655.

⁴⁰⁵ Kermit L Hall, William M Wiecek and Paul Finkelman *American legal history* (Oxford University Press New York, 1996) at 96.

⁴⁰⁶ At 98.

⁴⁰⁷ Dussias, above n 32, at 656.

The Political Power of Native American Women

For Native American women there have been many ways in which they have traditionally exercised political power, both prior to and after European contact.⁴⁰⁸ The following quote by a former United States Commissioner of Indian Affairs in 1947 illustrates that officials were aware of the scope of the Iroquois constitution when addressing indigenous women's decision-making roles:⁴⁰⁹

The Iroquois wrought out a social institution, a system for evoking maximum genius and for socialising it, and a role of women in society which may well stand today as the most brilliant creation in the record of man. Then from a world unknown, a ravenous race swept in a dark age for the native life which was hurled into the pit by canon, by rum, by money, by unconscionable intrigue.

Similarly, the Cherokee nation exemplifies the leadership role that American Indian women exercised within the traditional Cherokee government because of their status within the matrilineal clan system. The most powerful role open to Cherokee women was the status of 'War Woman' who became 'Beloved Woman' following menopause.⁴¹⁰ However, by 1825, Cherokee women's political power was

⁴⁰⁸ For accounts by women scholars of the wide ranging topic of the position of women in traditional tribal societies see generally Anderson, above n 203; Bethany Berger *Indian Policy and the Imagined Indian Woman* (ID 679003 Social Science Research Network 2005); Dussias, above n 32; Wilma Mankiller "Rebuilding the Cherokee Nation" [1993] Speech Sweet Briar Coll Sweet Briar VA; Devon Abbott Mihesuah *American Indians* (SCB Distributors, 2013); Mary Annette Pember "Changing Roles in Indian Country" (2008) 25 *Diverse Issues High Educ* 11; Theda Perdue "Cherokee Women" (1984) 23 *Tar Heel Jr Hist* 2; Prindeville and Gomez, above n 6; Smith, above n 265; Swentzell, above n 23; Rebecca Tsosie "Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination" (2010) 15 *UCLA J Int Law Foreign Aff* 187; Tsosie, above n 338; Gloria Valencia-Weber "Santa Clara Pueblo v Martinez: Twenty-Five Years of Disparate Cultural Visions - An Essay Introducing the Case for Re-Argument before the American Indian Nations Supreme Court" (2004) 14 *Kans J Law Public Policy* 49; Voyageur, above n 328; Bethany Ruth Berger "After Pocahontas: Indian women and the law, 1830 to 1934" (1997) 21 *Am Indian Law Rev* 1; Battiste, above n 224; Gretchen M Bataille and Kathleen M Sands *American Indian women* (U of Nebraska Press, 1987).

⁴⁰⁹ John Collier *Indians of the Americas* (New American Library, New York, 1947) at 120. As cited in Jacobs, above n 321, at 503.

⁴¹⁰ Carolyn Ross Johnston *Cherokee Women In Crisis* (2nd ed. edition ed, University Alabama Press, Tuscaloosa, 2003) at 195. Notably, the last known War Woman, Nancy Ward is known to have died in 1824. See also, Tarrell Awe Agahe Portman and Michael

diminishing and it is well documented that by 1839 the constitution of the Cherokee Nation had altered to limit voting rights to all free male citizens. Section 5 states that “[n]o person shall be eligible to a seat in the National Council but a free Cherokee **male citizen** who shall have attained to the age of twenty-five years.”⁴¹¹ The Cherokee constitution document clearly excluded Indian women, which Perdue has surmised as a way of preventing Cherokee women from exercising their traditional decision-making power.⁴¹²

Native American men and women were similarly impacted by an American expansion period that pushed them off tribal lands systematically confining them to small federally controlled areas. Federal Indian policy was created with a view however to altering the traditional view of complementary gender roles under an assimilatory agenda that would domesticate Native American women and civilise Indian men. However, colonisation and the imposition of American Law has impacted on Native American women’s status and rights in very specific ways.⁴¹³ The complex topic of the position of women in traditional communities has triggered critical scholarship where once it was undervalued, or ignored. Berger asserts that women were viewed as ‘vectors for assimilation’, thus the impact has been twofold.⁴¹⁴ Berger, Tsosie, Dussais and Williams, among others, speak to the issues of gender, property and power that Indian law and policy sought to redefine.⁴¹⁵ First, federal Indian policies and legislation intentionally marginalised women. Legal doctrines concerning Native American women have developed from treaties, case law legislation and policy that clearly illustrate the extent to which law sought to control the status of women. By divesting them of their standing and rights to act as heads of families and by extinguishing their rights to own and control

Tlanusta Garrett “Beloved Women: Nurturing the Sacred Fire of Leadership From an American Indian Perspective” (2005) 83 J Couns Dev 284.

⁴¹¹ Cherokee Nation The Constitution and Laws of the Cherokee Nation (Cherokee Nation, 1852).

⁴¹² Theda Perdue “Cherokee women and the trail of tears” (1989) 1 J Womens Hist 14 at 21.

⁴¹³ Bataille and Sands address American Indian womens own stories. Whereas the scholarly literature about American Indian womens lives has ignored the power of women within tribal structures as property owners and heads of families. Gretchen M Bataille and Kathleen M Sands *American Indian Women* (University of Nebraska Press, 1987).

⁴¹⁴ Berger, above n 355, at 60.

⁴¹⁵ Berger, above n 355. Berger, above n 355; Tsosie, above n 338; Dussias, above n 32.

land, the purpose of which was to free up Indian controlled land for settlement.⁴¹⁶

Native American women were denied through colonial processes treaty rights afforded their male equivalents, rights of descent and the power within the family to transmit their culture and language. Second, Indian women were vilified by an American Protestant social movement which sought to redefine their true womanhood through domesticity in the same way that European women had been typically viewed.⁴¹⁷

This thesis does not intend to provide a complete historical overview of the legal issues impacting Indian tribes at the time of the so-called ‘conquest’. My intent is to provide an overview of the significant ways in which federal law and policy converged to negatively impact Native American tribes and as a result, American Indian women. Federal removal, reservation, allotment and boarding school policies aligned with a moral agenda which intended to destroy traditional gender roles in tribal society. The political, legal and marital autonomy of Indian women had rapidly been replaced to a new far more submissive role reflective of the subservient role of white women in European society of the time.

Forced Removal

The period spanning the 1830s through to the 1930s is noteworthy for the expansion of federal control over tribes. More importantly, it is notable in history for the unprecedented level of dispossession and genocide exercised by the Government against Indian tribes. The 1830s was a period of re-invigorated treaty –making under President Andrew Jackson who instituted an Indian Policy aimed at massive Indian land cessions from treaties.⁴¹⁸ Commencing with the Indian Removal Act 1830, the Removal Period of the 1830s saw some tribes relocating by agreement.⁴¹⁹

⁴¹⁶ Berger, above n 355, at 200.

⁴¹⁷ Bethany Ruth Berger. “After Pocahontas: Indian Women and the Law, 1830 to 1934.” (1997) 21 *American Indian Law Review* 1at 2.

⁴¹⁸ Charles J Kappler *Indian Affairs* (Ams Pr Inc, New York, 1996).

⁴¹⁹ The Removal Act 1835 was initiated to act in tandem with Treaties to facilitate the displacement of Indian tribes from their tribal lands. White settlers intent on westward expansion had petitioned the government to remove the tribes to free up land for settlement. Seventy removal treaties were ultimately signed resulting in the relocation of

However, the forced removal of tribes from their traditional homelands soon followed as pressure for land for white settlers mounted, culminating with the removal of the Cherokee, Chickasaw, Choctaw, Creek and Seminole tribes and the forced march known as the Trail of Tears.⁴²⁰ Perdue examines the role that Indian women may have had in the decision-making around removal. It was known that Cherokee women had protested collectively against removal in 1817 and 1819.⁴²¹

Our beloved children and head men of the Cherokee nation we address you warriors in council. [W]e have raised all of you on the land which we now have, which God gave us to inhabit and raise provisions. [W]e know that our country has once been extensive but by repeated sales has become circumscribed to a small tract and never have thought it our duty to interfere in the disposition of it till now, if a father or mother was to sell all their lands which they had to depend on [L] which their children had to raise their living on [L] which would be bad indeed and to be removed to another country [L] We do not wish to go to an unknown country which we have understood some of our children wish to go over the Mississippi but this act of our children would be like destroying your mothers. Your mother and sisters ask and beg of you not to part with any more of our lands.

We have heard with painful feelings that the bounds of the land we now possess are to be drawn into very narrow limits. The land was given to us by the Great Spirit above as our common right, to raise our children upon, & to make support for our rising generations. We therefore humbly petition our beloved children, the head men and warriors, to hold out to the last in support of our common rights, as the Cherokee nation have been the first settlers of this land; we therefore claim the right of the soil We therefore unanimously

approximately 50,000 Indians. See Grant Foreman *Indian removal* (University of Oklahoma Press, 1972) vol 2.

⁴²⁰ Under the Treaty of New Echota 1837, the Cherokee Nation is known to have relinquished its territory in the Southeast for land in the west. While it is evidence of an agreement for removal, the historical account of the approximately 4,000 people who died is testament to the trauma and misery suffered and which resulted in the decimation of the Cherokee people. See Kappler, above n 365, at 439–449.

⁴²¹ Quoted in Perdue, above n 359, at 18–19.

join in our meeting to hold our country in common as hitherto.⁴²²

Whereas Cherokee women had traditionally held positions of authority within Cherokee governance, by the time of removal, their influence had waned and the tribal structure that had supported women's political empowerment had begun to break down. Impacted by the coherence of a national Cherokee government that elevated the role of leading men, Cherokee women's mobility, agricultural importance and political voice was effectively removed by the 1827 Cherokee constitution.

Forced Relocation and Reservation Policies

The reservation policy further embedded the destabilisation of Indian women and families. The policy created dependency on federal agencies through the loss of traditional hunting and cultivation practices that compelled tribes to resort to agricultural labour or starve.⁴²³ Federal agents replaced tribal governments and governance shifted to emulate white institutions further entrenching dependency on the federal government. Assimilation ensued unabated. The Dawes Act 1887 according to Perdue was the first step in the process of 'Americanisation', the process of which sought the removal of lands from communal ownership.⁴²⁴ The Act negatively impacted American Indian women by moving land into the individual ownership of Indian males who were deemed the heads of families. Tribal land holdings went from 138,000,000 million acres to only 48,000,000 by 1934 of which 50% was desert. Through gender specific language, Berger proposes that women were intentionally excluded from treaties so that they could not be allotted land. The allotment of just 320 acres of land to heads of families caused some women to challenge the policy in the courts. The resulting decisions merely accelerated the erosion of women's power as the courts were not attuned to supporting the power that Indian women espoused.

⁴²² At 21.

⁴²³ See generally Bethany R Berger "Power over This Unfortunate Race: Race, Politics and Indian Law in United States v Rogers" (2003) 45 William Mary Law Rev 1957; Perdue, above n 359.

⁴²⁴ The Dawes Act divided and parcelled out tribal lands in efforts to civilise the Indians through the ownership of private property

The loss of power was embedded with the change in the status of Indian women that occurred as an additional civilising objective of the Dawes Act. Through the passing of a statute making Indian women who married white men American citizens, Indian women were effectively dispossessed of their legal status and economic independence.⁴²⁵ They lost their legal recognition and economic independence, which under the treaty, held that white men were now deemed the heads of families. Tsosie has commented that by controlling who Indian women could marry, the federal government was able to gain control over their lives and intervene in the societal context in which women were responsible for the transmission of language and culture.⁴²⁶ Berger recognises that the federal government saw women as the “vectors for assimilation” encouraging women into intermarriage as a way of diminishing tribal customs.⁴²⁷

The Ladiga trilogy of cases exemplifies the persistence with which one Indian woman sought to remain on her ancestral land.⁴²⁸ The facts of the case were that Sally Ladiga brought an action against a white man who had purchased her land through a federal agent who refused to acknowledge that the three people she cohabitated with were her family. The issue at the heart of the case was whether she could be considered the head of the family in respect of the distribution of land, given that there was no record of the others being her relatives. The court held that as she had no husband of record, she was not entitled to the land when in 1834 a white man entered it and took over possession. She persisted in returning to her land and was noted as having been removed by soldiers twice in 1837 and 1838. She also continued to pursue a remedy through the courts, but was ultimately forced to emigrate during which time it was assumed that she died. In 1844, the United States

⁴²⁵ Ch. 818, 25 Stat. 392 (1888). The act was titled, "An act in relation to marriage between white men and Indian women."

⁴²⁶ Rebecca Tsosie “Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination” (2010) 15 UCLA . Int’l L. Foreign Aff. 187 at 200.

⁴²⁷ Bethany Berger “After Pocahontas: Indian women and the Law, 1830 to 1934” (1997)21 (1) Am.Ind.L.R. at 60.

⁴²⁸ Cited in Berger, above n 355, at 12. The case was first reported by the Alabama Supreme Court as *Rowland v. Ladiga*, 9 Port. 488 (Ala. 1839) (*Ladiga I*). It was reversed and remanded by the United States Supreme Court as *Ladiga v. Rowland*, 43 U.S. (2 How.) 581 (1844) (*Ladiga II*). It was finally disposed of as *Rowland v. Ladiga's Heirs*, 21 Ala. 9 (1852) (*Ladiga III*).

Supreme court reversed the decision, Justice Baldwin noting that: “[w]e cannot seriously discuss the question, whether a grandmother and her grandchildren compose a family, in the meaning of that word in the treaty, it must shock the common sense of all mankind to even doubt it”.⁴²⁹

The court held that she had never abandoned her claim, but had continuously insisted on her rights under the treaty. It took twenty years for the United States Supreme Court to conclusively decide that she was indeed the Head of the Family. However in a final irony, the Alabama Supreme Court ruled that her heirs could not continue the action in her name. The opinions highlight the extent to which Indian women were intentionally devalued by state and federal law.

Forced Assimilation – Residential Schools

Enforced assimilation was also exercised with the introduction of residential boarding schools that were established to ensure the destruction of Indian families through the medium of a white education. The forced removal of Indian children coupled with the sheer brutality of the school experience was intended to purge any remnants of culture, language and religious beliefs from Indian children. Prucha states:⁴³⁰

With an ethnocentrism of frightening intensity, they resolved to do away with Indianness and to preserve only the manhood of the individual Indian. There would then be no more Indian problem because there would be no more persons identifiable as Indians.

The so-called education of Indian girls revolved around the training for eventual positions as domestic servants. Couched as preparation for homemaking, the practice of ‘outing’ whereby girls were placed with families as domestics during vacation periods, belied the underpinning motivation of the schooling system. Years later, the 1928 Meriam Report provided an in-depth critique of the economic and social conditions of American Indians.⁴³¹ The report illustrates the project of civilisation and assimilation that underpinned the failure of the United States Indian

⁴²⁹ At 13.

⁴³⁰ Francis Paul Prucha *Americanizing the American Indians* (Harvard Univ Pr, 1973).

policy. The report was particularly damning of the boarding school policy but for many, generations of Indian children, the damage wrought will revisit them in adulthood as intergenerational trauma.

Summary

The impact of colonialism upon Indigenous women and families is fundamental to an understanding of the status of indigenous women in today's society. In this Chapter I wanted to address the projects of imperialism and colonialism, and their impact upon indigenous women of Aotearoa (New Zealand), Canada and the United States. I use a kaupapa Māori lens to tease out the comparative whilst acknowledging that we as indigenous peoples are all relations. It is therefore important to acknowledge that Kaupapa Māori seeks to challenge dominant western thought, theory and practice. As Pihama states, Kaupapa Māori takes a local theorising position that takes account of the specific historical, political and social contexts for Māori and by definition, other indigenous peoples.⁴³² Ultimately, kaupapa Māori envisages the potential for the oppressed, marginalised and silenced to be engaged in emancipatory struggles.

The European project of expansion that created the Doctrine of Discovery wreaked havoc on the indigenous cultures and peoples that Europeans encountered, enslaved and then enveloped. The suppression of indigenous cultures through the spread of western imperialist ideology followed by Christianity, effectively dismantled the indigenous legal traditions which had upheld the gender balance and complementarity of men and women's roles for thousands of years. Indigenous societies can also attest to the fact that women assumed leadership roles as military, political and economic decision-makers. In contrast to European women, indigenous women also owned property and managed the means of economic production for their tribes. In addition, the social and political power of women was known to sustain tribal religious traditions founded on the belief in the feminine principle of creation. Indigenous creation stories attest to the centrality of Papatuanuku (Earth Mother) and to the practice of religious traditions based on a ubiquitous spiritual belief system. This was in stark contrast to the Judeo-Christian

⁴³² Pihama, above n 203 at 301.

religion that reified a god in the image of a white male.

As this chapter has highlighted, indigenous women have experienced colonialism in significantly similar ways, in that there is a shared history of dispossession beginning with the Doctrine of Discovery and the ideation of conquest. The imposition of treaty-making treated indigenous tribes as nation states only to become weapons of destruction. The introduction of paternalistic legislation and policies intent on disenfranchisement and ultimately, the legalised theft of tribal lands was followed closely by the influx of white settlers and the facilitation of wholesale land sales to accommodate their migration. And when the indigenous populations became blatantly problematic through various means of resistance, we witnessed the forced removal and subjugation of men, women and children under the auspices of civilising, Christianising and assimilatory policies that sought to redefine the indigenous person as what would essentially result in the appropriation of the status of a second class citizen. The objectives of colonialism were the same, only the scale and methods differed, although only slightly in reality. The plight of indigenous women as a result of colonialism, is inextricably connected to their current status. The next chapter examines the gendering of tribal governance, and the resultant displacement of the feminine from essential tribal positions of leadership and decision-making.

Chapter 4 – Indigenous Governance

While there is no single definition or model for governance, the accepted theory suggests that governance has to do with decision-making, power, relationships and accountability.⁴³³ Māori jurist, Eddie Durie defines governance as “the process by which a group of people or a group exercise control over their affairs and destiny”.⁴³⁴ Durie’s definition of governance imparts the notion of reconciliation, which he relates as ‘peace’ or ideally, the autonomy to control one’s affairs thus creating an environment that is conducive for – reconciliation. Durie also contends that ‘rangatiratanga’ which was recognised under Te Tiriti o Waitangi, did not create a right but acknowledged a ‘reality’.⁴³⁵ Equating rangatiratanga with autonomy rather than with sovereignty which he states is an ‘outmoded concept for it denotes absolute power’ is debatable considering how the Treaty settlement process has progressed since 1997.⁴³⁶ Durie’s definition resonates with the kaupapa (theme) of this thesis because in my view it has universal application. It also provides a tūāpapa (foundation) from which indigenous women’s perspectives of governance are relevant because, as Plumtree points out, it is difficult to define good governance without reference to desired social and economic outcomes as well as cultural norms and values.⁴³⁷ Māori legal academic, Dr Valmaine Toki stipulates

⁴³³ Tim Plumtree and John Graham *Governance and good Governance: International and Aboriginal Perspectives* (Institute of Governance, Ottawa, 1991) at 3.

⁴³⁴ Eddie Durie “Strategies for the Next Decade: Sovereignty in Action” (Unpublished, 1997) at 111.

⁴³⁵ At 112.

⁴³⁶ I refer to finding of the Waitangi tribunal on stage 1 of the Wai 1040 Te Paparahi o te Raki inquiry. The Tribunal's essential conclusion is that:

In February 1840 the rangatira who signed te Tiriti did not cede their sovereignty. That is, they did not cede their authority to make and enforce law over their people or their territories. Rather, they agreed to share power and authority with the Governor. They agreed to a relationship: one in which they and Hobson were to be equal - equal while having different roles and different spheres of influence. In essence, rangatira retained their authority over their hapu and territories, while Hobson was given authority to control Pākehā.

In reaching this conclusion, the Tribunal does not make any findings in respect of claims or make any recommendations to the Crown. It makes no conclusions about the sovereignty that the Crown exercises today or about how the Treaty relationship should operate in a modern context. These are all matters which may be addressed in stage 2 of the Tribunal's inquiry. author New Zealand Waitangi Tribunal *He Whakaputanga me te Tiriti = The Declaration and the Treaty* (Legislation Direct, Lower Hutt, New Zealand, 2014).

⁴³⁷ Plumtree and Graham above n 433 at 12.

that for Māori and indigenous peoples, the point of difference when defining governance, is the importance of culture and cultural values.⁴³⁸ Toki clarifies the following unique characteristics of Māori governance :⁴³⁹

Due to the cultural dynamic, Māori organisations have unique considerations. First, future considerations are a central focus. Māori organisations are often established to provide a resource for future generations (Taonga tuku iho), so the long term vision for that organisation and strategies to ensure its continuing success are critical.

Secondly, cultural considerations, such as kawa (protocol), are also a central focus for Māori organisations. The inclusion of these two unique considerations complicates the issue of governance for Māori entities, particularly when the inclusion of these principles are implemented alongside general governance principles.

For Māori, tino rangatiratanga (sovereignty) remains at the heart of the indigenous rights and freedoms conversation constitutionally if not juridically, as Durie seems to suggest. Notwithstanding that the Crown in the Aotearoa (New Zealand) context remains steadfast in its claim to sovereign status as a nation-state, Māori assertions of rangatiratanga will continue, if only as a reminder of what the historical context means for Māori and by implication, their inherent indigenous rights.⁴⁴⁰ McNeil, Borrows and others continue to maintain the existence, although diminished, of the inherent rights of indigenous governance and self-government.⁴⁴¹

⁴³⁸ Valmaine Toki “Culture – The Foundation of Māori Governance” (2013) NZLawyer 201 at 2.

⁴³⁹ At 3.

⁴⁴⁰ New Zealand achieved full statehood in 1947 with the passing of the Statute of Westminster Adoption Act, thus 1947 marks the date of New Zealand’s legal independence.

⁴⁴¹ Kent McNeil *the Inherent Right of Indigenous Governance, Transitional Governance Project* (Osgoode Hall Law School of York University Osgoode Digital Commons, 2017); John Borrows “Unextinguished: Rights and the Indian Act Part I: UNB Lecture Series” (2016) 67 Univ NB Law J 3; Gordon Christie “Obligations, Decolonization and Indigenous Rights to Governance Discourse and Negotiations across the Indigenous/Non-Indigenous Divide” (2014) 27 Can J Law Jurisprud 259; Brenda L Gunn and others “UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws” [2017] Cent Int Gov Innov.

Maintaining, resisting and reframing the connection between past government policies and the current predicament of indigenous peoples is in my view the ‘point’ of indigenous governance. This puts the issue of indigenous sovereignty, status and identity at the heart of tribal governance discourse. In Aotearoa (New Zealand), the Treaty settlement process gives rise to a different and unique governance conversation for Māori, and one that shares some vital aspects with other indigenous peoples. First Nations people’s governance and laws preceded the *Indian Act system* of Canadian Law.⁴⁴² In the United States, the inherent right of self-government has been acknowledged since the 1830s.⁴⁴³ In Australia, the *1992 Mabo Case* formally overturned the doctrine of *terra nullius*, providing for the recognition of “native title” and the existence of a pre-colonial indigenous law.⁴⁴⁴

Colonisation has not extinguished indigenous law. Firstly, as a collective, indigenous peoples continue to resist and question the moral legitimacy of the doctrines of discovery and conquest under which the common law nation-states were formed.⁴⁴⁵ Second, current social and economic disparities are situated in relation to historical injustices arising from the brutality of colonising processes.⁴⁴⁶ Third, liberal democratic governance has subjugated indigenous social orders within which legal traditions affirmed consensus decision-making and gender balance.⁴⁴⁷ Common issues to each of these jurisdictions are the desire of indigenous peoples to assert power and control over their affairs. The question is

⁴⁴² The Indian Act system is the principal legislative system through which the Canadian government administers Indian status and the First Nations governance structures.

⁴⁴³ In the US, the inherent right to sovereignty is not provided for the US Constitution. Consequently, it can be limited by the plenary powers of the US Congress.

⁴⁴⁴ Zsofia Korosy “Native Title, Sovereignty and the Fragmented Recognition of Indigenous Law and Custom Commentary” (2008) 12 *Aust Indig Law Rev* 81 at 81.

⁴⁴⁵ Robert J Miller *Discovering Indigenous lands* (Oxford University Press, Oxford, 2010); Miller and Ruru, above n 199; Steven T Newcomb *Pagans in the promised land* (Fulcrum Pub, Golden, Colo, 2008); Williams, above n 71; Havemann, above n 44; Lindsay Gordon Robertson *Conquest by law* (Oxford University Press, Oxford ; New York, 2005).

⁴⁴⁶ Indian and Northern Affairs Canada *A History of Treaty Making in Canada* (2010); Stephen Greymorning *A will to survive* (McGraw-Hill, Boston, 2004); Ani Mikaere “Cultural invasion continued: The ongoing colonisation of Tikanga Maori” [2005]; Val Napoleon “Extinction by Number: Colonialism Made Easy” (2001) 16 *Can J Law Soc* 113; Wolfe, above n 243; Mikaere, above n 41; Behrendt, above n 80.

⁴⁴⁷ Glenn, above n 69; Napoleon and Friedland, above n 69; John Borrows “Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation”(1994)” (2014) 28 *UBCL Rev* 1; Austin, above n 53; Awatere Huata, above n 60; Mikaere, above n 61.

how to define that governance framework within current state-oriented mechanisms.

Government v. Governance

Most people think of ‘government’ as the most influential and powerful decision-making body in their lives, and this is of course correct. However, governments do not generally act in isolation from each other (when they do, it is usually in times of conflict). Liberal democratic governments, such as those of the CANZUS⁴⁴⁸ nations, are cognisant of the need in modern times to collaborate particularly around trade but also with regard to human and indigenous rights.

Governance also describes the global, national and local ways by which decision-making processes are managed and by whom. Accordingly, globally made decisions are devolved through government policies at national level. Ashworth describes five levels of governance including household, community, local and national governance, as well as that pertaining to global institutions.⁴⁴⁹ The United Nations, the World Bank and the International Criminal Court are examples of global organisations that have limited power to make decisions in the global context which in turn, influence the decisions made by national governments. Such decisions can also impact us either directly or indirectly as citizens, members of communities or as peoples.⁴⁵⁰

I propose that the relational aspect of governance is the most salient for this thesis. Political cooperation across and between nations is leading the world more toward global governance, as world leaders attempt to resolve problems impacting more than one region. As a result of globalisation, the modern world is becoming increasingly one without borders. For example, global decisions impacting indigenous peoples are progressively more salient as states, and their policies are

⁴⁴⁸ Canada, Australia, New Zealand and the United States are viewed as settler nations, See Kirsty Gover *Tribal constitutionalism* (OUP Oxford, 2010).

⁴⁴⁹ Georgina Ashworth “Gendered governance: An agenda for change” [Gender in Development Programme, UNDP, 1996].

⁴⁵⁰ GA Res 61/295, Declaration on the Rights of Indigenous Peoples, adopted 13 Sept 2007, UN GAOR, 61st Sess, 107th plen mtg, UN Doc A/RES/61/295 [hereinafter UNDRIP].

pressured to address international directions in relation to human rights, such as, for example, the *United Nations (UN) Declaration on the Rights of Indigenous Peoples 2007* and the *International Labour Organisation's (ILO) Convention No 169*.⁴⁵¹ On the other hand, it would be ingenuous to think that governments subscribe easily to indigenous political demands without furthering their own agendas. However, opportunities to influence are increased when one considers sovereignty as a relational construct having the potential to evolve to something other than an outright challenge for exclusive sovereignty, which must in the scheme of things, fail. Tribal self-government, as practised by Indian tribes in the United States, provides a useful example of “inclusive sovereignty” (nations within nations) expressed through tribal structures and institutions, and in the form of a commitment to sustain indigenous cultures and culturally distinctive communities.⁴⁵²

Thus, within the governance theory literature, definitions vary depending on who is discussing it and the context in which it is used. Contemporary western governance theory draws heavily on theories of the free market economy. These theories have developed and have been promulgated since the time of imperial expansion and the rise of modern capitalism. *Wealth of Nations*, written by Adam Smith (1776), is considered to be the founding document of modern economic thought, initiating the development of organisational theory from which western governance knowledge derives.

Hegemonic in nature, western governance knowledge has grown out of organisational development theory initiated by Adam Smith, and further developed by Berle and Means, thereby providing the theoretical foundations of corporate governance.⁴⁵³ These foundations include (i) agency theory, (ii) transaction cost economics, (iii) resource dependence theory, and (iv) stakeholder theory.

⁴⁵¹ UN Doc A/61/L 67, 7 September 2007; S James Anaya *Indigenous Peoples in International Law* (Oxford University Press, 2004).

⁴⁵² Cornell, above n 144, at 19.

⁴⁵³ Adolph Berle and Gardiner Means “Private property and the modern corporation” [1932] N Y Mac-Millan; Adam Smith *Wealth of Nations* (Electric Book Company, London, UNITED KINGDOM, 2000).

In contrast, indigenous theories of tribal governance are underpinned by the self-determination and development discourses, and to some extent by sovereignty discourse. A relational definition, and one I find more beneficial to this discussion, holds that governance refers to the achievement of decision-making by a collective of interested people (stakeholders) including ordinary ‘citizens’ as well as those in positions of power.⁴⁵⁴ Governance therefore encompasses both formal and informal structures through which a community regulates its internal affairs as well as its relations with others. The defining concept of governance is decision-making in the context of a representative organisation of interested parties or stakeholders. The decisions once made, impact men, women, children, families and communities in various ways, providing structures and rules about how people should live their lives. Ideally, decision-makers will be guided by the input of the stakeholders that they represent and to whom they are accountable with the understanding that stakeholders are capable of exercising some sort of leverage to be able to influence decisions and to hold decision-makers to account.

Framing governance as inclusive and participatory allows for those with varying degrees of power, the ability to influence decisions. What is of value to this discussion is not so much the definition of governance, or description of governance, but determining what is the point of governance? There is in fact no one way to govern our experience as indigenous peoples exemplify how monocultural and hegemonic the concept of governance has become. Governance scholars use ‘governance’ to examine issues pertaining to a variety of fields such as development studies, economics, geography, international relations, planning, political science, public administration, institutional and neoclassical economics, company law, political science, and economic sociology and sociology. Underlying theories of governance are assumptions drawn from westernised hegemonic thought, taking the position that governance principles are universally applicable as are the anticipated goals of governance. As Larmour and others have stated, to make sense of ‘good governance’ requires an appreciation of the fluid association between governance as theory, governance as policy and governance as practice.⁴⁵⁵

⁴⁵⁴ Alyson Brody *Gender and Governance* (Institute of Development Studies 2009) at 9.

⁴⁵⁵ Peter Larmour “Making sense of good governance” [1998]; Rod AW Rhodes *Understanding governance* (Open university press, 1997).

While *good governance* may be considered a worthwhile endeavour and some would also add an imperative, the extent to which the view of good governance can be considered normative is arguable. Universalising governance principles, good governance doctrine and the degree of governance convergence is ultimately a universalising discourse which fails to account for indigenous and non-western intellectual perspectives of governance.

Contemporary Māori Governance

For indigenous tribes, Māori included, contemporary governance reflects the modern day circumstances that characterise tribal decision-making in both form and substance. Many indigenous tribes have assumed a western or corporate form of governance. Thus they have adopted commercial priorities alongside cultural ones. Mason Durie observes that:⁴⁵⁶

Different concerns about modern tribal structures have.... been raised in connection with the emphasis on business models, which appear to corporatise iwi. Tribal members are aware of the corporations in Alaska which have all but ousted traditional structures and are keen to avoid creating economically orientated organisations which fail to capture the essential cultural basis of the tribe.

Conversely, Dr Eruera Prendergast-Tarena found in a study of three distinct indigenous organisations i.e Māori, Hawaiian and native Alaskan, that each group endure as distinct indigenous entities with economic foundations geared toward indigenous emancipation and cultural revival.⁴⁵⁷ Prendergast states that: “[w]hilst each has its struggles, they have committed to preserving and advancing their collective cultural identity both inside and outside the organisation.”⁴⁵⁸

Dichotomous tensions are evident between the traditional and the modern; and can be seen to exist between indigenous cultural values and colonised views, and also

⁴⁵⁶ Mason Durie *Te mana, te kawanatanga: the politics of Māori self-determination* (Oxford University Press, Auckland, 1998) at 226.

⁴⁵⁷ Eruera Prendergast-Tarena “ ‘Indigenising the Corporation’ Indigenous Organisation Design: An Analysis of Their Design, features, and the Influence of Indigenous Cultural Values” (Doctoral Dissertation, University of Canterbury, 2015) at 185.

⁴⁵⁸ At 186.

between economic imperatives, collective tribal rights and responsibilities of tribal leaders. Contemporary indigenous organisations exist within indigenous contexts that are multi-faceted and diverse. There is clearly no one way to do governance, however as Predergast-Tarena and others illustrate, in indigenous settings measures are often adopted to indigenise structural features in order to create new and culturally indexed norms that are ‘fit for purpose’ in their own cultural context. Predergast-Tarena states:⁴⁵⁹

The three cases are each undergoing this transformation, which have their own obstacles but also their own champions and sites of progress. They have become sites of collectivised indigenous voice and power for their communities. They attract impassioned individuals and leaders seeking to be part of a movement for indigenous advancement and change. They aspire to balance collective wealth creation with collective advancement and change. They aspire to balance collective wealth creation with collective advancement in perpetuity; making them unique, fascinating and worthy of further study.

An important dynamic for Māori governance is the nature of the changing patterns of relationships between Māori and the State, between Māori and Māori, between Māori and other indigenous peoples and finally, between Māori men and Māori women. A kaupapa Māori approach allows this discussion to be framed from a relational perspective. I utilise the concept of ‘kaupapa’ as the centrepiece from which to engage with governance in terms of and with reference to these important relationships. In so doing, I acknowledge Nepe’s view that kaupapa Māori is a ‘conceptualisation of Māori knowledge’.⁴⁶⁰

Linda T. Smith elaborates further:

It is a way of abstracting that knowledge, reflecting on it, engaging with it, taking it for granted sometimes, making assumptions based upon it, and at times critically engaging in the way it has been and is being constructed.⁴⁶¹

⁴⁵⁹ At 186.

⁴⁶⁰ Linda T. Smith, above n 265, at 190.

⁴⁶¹ At 190.

The nature of the modern-day relationship of iwi Māori with the State assumes that the supreme governing authority resides with the Crown exercising authority over iwi Māori as a tribally-based people.⁴⁶² The inherent tension is that the Crown assumes sovereignty while notions of Māori sovereignty have been deemed illusory and in deference to the Crown's set agenda that iwi development is arising out of Māori desires for self-determination.

Moana Jackson reminds us to look to “*The Wellspring of Our Uniqueness*” and to reclaim the relationships that we have across hapū and iwi through whakapapa. The wellspring of uniqueness which Jackson refers to is the pre-1840 inherent right of Māori hapū and iwi to exercise government which is different to the exercise of governance.⁴⁶³ “They were the rights that came with the rights of birth that with your whakapapa and the values inherent in being a mokopuna of the iwi, came your rights, your responsibilities, and authority. They were born rights.”⁴⁶⁴ Jackson and other indigenous scholars attribute the rights ‘to govern’ as opposed to ‘of governance’ to simply be an indigenous birthright.⁴⁶⁵

Jackson views governance as a post-1840 construct married to the practice of the decentralisation of State controlled power. Construed as *relational rights* distinct from *inherent rights*, Jackson bemoans the fact that relational rights are now invested in the Crown-Māori relationship instead of one with another, as in which mokopuna of the iwi. In other words, pre-1840 Māori hapū and iwi acted as the sovereign and independent nations that they were. “The mana of the iwi or hapū, their right to make decisions, their right to exercise government was an obligation handed down in trust for those yet to come”... and ... “[i]t was not part of that

⁴⁶² The distinction between the ‘State’ and the ‘Crown’ recognises that while the State refers to the New Zealand government, the Treaty of Waitangi was signed between Māori iwi Chiefs and Crown representatives.

⁴⁶³ Moana Jackson “Separating the Powers of Māori Governance - Political, Judicial onto the Marae” (The Foundation for Indigenous Research in Society and Technology, paper presented to Ngai Tatou 2020 - Indigenous Governance & Accountability: Whakahaere a Iwi Whakamarama a Iwi, Sept 19999) at 198.

⁴⁶⁴ At 199.

⁴⁶⁵ Richardson, Imai and McNeil, above n 244; Knafla and Westra, above n 224; Roger Maaka and Augie Fleras *The politics of indigeneity* (University of Otago Press, Dunedin, NZ, 2005); Johnston, Hinton and Rigney, above n 80; Steven Henry Martin “The Basis of First Nations Sovereignty within the Canadian State”; Tooker, above n 341.

wellspring of uniqueness for an authority figure to give away the very authority of the people they represented”.⁴⁶⁶ It is politically inconceivable that such a fundamental principle of accountability would be ceded or given away. With regard to tribal governance, Jackson holds that it is simply the responsibility of Māori to make good, proper and accountable decisions in the management of assets that are returned in recognition of Māori relational rights.

Contemporary Māori tribal organisations grew out of the 1870s model of committees initiated by Māori to resemble the traditional 1860 runanga institutions. They were constructed as forums of resistance to state paternalism and an expression of tribally-based authority. However, these committees were viewed as a means of placating the chiefs, as they were required to meet state regulations and were merely tolerated.⁴⁶⁷

1984-1994: A Decade of Māori Development

In 1984, the Hui Taumata (Māori Economic Development Conference) sought to promote a particular economic development framework for Māori couched around the new Labour Government’s agenda for Māori development. Convened by the then Minister of Māori Affairs, Koro Wetere, the summit was held to epitomise Māori hapū and iwi aspirations for access to resources and potential economic autonomy.⁴⁶⁸ A decade of Māori development from 1984 to 1994 coincided with a resurgence in tribal and cultural identity and featured calls for self-determination, thanks to a number of key factors including the rise of Māori activism; increased Māori politicisation; and the entrenchment of the Waitangi Tribunal.⁴⁶⁹ In 1994, the contentious “full and final settlement” policy was announced by the New Zealand Government setting a capped settlement fund or fiscal envelope of \$1billion. The relationship between Māori and the Crown kicked into high gear with the settlement of two major claims thanks to the option of direct negotiation for Treaty

⁴⁶⁶ Jackson, above n 479, at 200.

⁴⁶⁷ Lindsay Cox *Kotahitanga* (Oxford University Press, USA, 1993) at 80–89.

⁴⁶⁸ Hui Taumata Maori Economic Development Summit Conference (1984).

⁴⁶⁹ In 1986 the Treaty of Waitangi Act 1975 was amended to allow for grievances to be heard retrospectively back to 1840 (Reprinted Statute of NZ, S33, p.940).

settlement.⁴⁷⁰

According to Jackson, colonisation has distorted the relationship and henceforth the relational rights that Māori have with the Crown.⁴⁷¹ Increasingly, this relationship framework and the resulting Māori models of governance have been constructed by the Crown to meet the Crown's models of democracy, models that are necessarily subordinate and inferior to the over-arching sovereignty of the Crown. Jackson argues:⁴⁷²

.... colonisation was imposed on Maori though the Crown's might and right. If Maori were to have any political power, it was to be on terms, and within institutions established by Pakeha might. If they were to have justice, it was to be defined by the Pakeha sense of right. Rangatiratanga and the means by which Maori could pursue their own dread of self-determination and sovereign nationhood were to be no more.

Throughout the first half of the 20th century, Māori efforts to maximise aspirations of autonomy conflicted with State intrusion as it pursued its policy of assimilation. Hill differentiates Māori autonomous goals in terms of the management of a hugely diminished Māori land base from a growing move toward state recognition of Māori political and cultural autonomy un-connected with Māori property rights.⁴⁷³ Māori autonomy was reactively played out in various iterations of *rangatiratanga* and according to Hill as: “tribal control of internal affairs, self-determination, *mana Māori motuhake*, Māori sovereignty, governance, independence, devolved control by the State, self-management and Māori nationalism”.⁴⁷⁴

⁴⁷⁰ In 1995 the Crown signed a Deed of Settlement with Waikato-Tainui which included a formal apology for the raupatu and the return of 314,364 acres of confiscated lands. In 1998 Ngai Tahu followed with a Deed of Settlement providing for a \$170 million compensation quantum, an apology and the ownership of Ngāi Tahu's pounamu resource amongst other things.

⁴⁷¹ Moana Jackson “Changing realities: unchanging truths” (1994) 10 *Austl. J.L. & Soc'y* 115 at 119.

⁴⁷² At 119.

⁴⁷³ Richard S Hill *State Authority, Indigenous Autonomy* (Victoria University Press, 2004).

⁴⁷⁴ At 13.

It is important to recognise that for the purposes of this work that Māori contemporary notions of autonomy have become overlaid with the idea of economic development through Treaty settlements as a means of meeting collective tribal aspirations. Hill noted that this has not always been the case. Māori aspirations for autonomy arose out of a genuine expectation for rangatiratanga arising from the guarantee of Article Two in the Treaty, which the Chiefs viewed as affirmation of co-existence or a ‘declaration of interdependence’.⁴⁷⁵ With respect of iwi governance arrangements, these evolved out of the pre-1840 tribally-based descent units such as whānau through hapū and iwi to what can be considered in more modern times as pan-tribal groupings. While Māori retain the aspirations of interdependence, the evolution of state policies that pursued the full assimilation of Māori into Pākehā society and the co-option of whānau, hapū and iwi-based decision-making fora has actively impeded and altered Māori collective organisational structures. The introduction of Native Districts legislation in the 1850s was just one means by which this control over localised Māori governance was pursued.

During the 1850s and 1860s, the Crown developed district rūnanga to assuage Māori desire for a say in Crown affairs in relation to their own districts. Henry Sewell, the first colonial secretary moved that,

“In order to give practical operation to The Native Districts Regulation Act 1858, it is expedient that the natives should be convened in public meetings in districts to be brought under the operation of such Act in such a manner as the Governor may think fit; and that these meetings should be constituted in such manner as the Governor may think fit, and should have the power of recommending to the Governor such regulations for the management of the local affairs of the district as to them may seem meet; and the House will be ready, by Act of the assembly, to vest in the Governor the requisite powers of convening and constituting such meetings.”⁴⁷⁶

Sewell acknowledged in this parliamentary debate that the ‘natives’ were already organising institutions of this kind for themselves and could become hostile if the

⁴⁷⁵ At 14.

⁴⁷⁶ NZPD (1886) at 347–349.

Government did not support them to deliberate upon their own affairs but within strictly prescribed limits. It is noteworthy to this discussion, that Sewell goes on to state that “... the House recognises to the fullest extent the territorial rights of the Natives, whether chiefs or people, as guaranteed by the Treaty of Waitangi”.⁴⁷⁷ In setting Native policy, Sewell urged parliament to declare ... “in clear and unmistakable terms their adherence to the engagements contracted by the Treaty of Waitangi”.⁴⁷⁸ According to Jackson, the Native District concept was a move to indigenise a Crown created structure which set in place a series of assimilationist western-based institutions and committees. Jackson states that these institutions and committees shared four essential characteristics:⁴⁷⁹

1. They entrenched colonising power while pretending to acknowledge that of our people;
2. Membership, roles, jurisdiction and tenure were defined by the Crown. Having declared itself ultimate owner of lands and resources, jurisdiction only extended as far as management over the asset base;
3. They co-opted the façade of being Māori;
4. The denial of whakapapa and redefinition of Indigenous identity. Crown then sought to define who was Māori through the utilisation of race-based blood quantum. ... “[T]he pseudo-scientific and race-base concept of the blood quantum, which purported to define people according to the degree of racialised blood they had coursing through their veins...”

Rūnanga Iwi Bill

The Rūnanga Iwi Bill 1989 was introduced when the Crown first sought to establish a legislative structure of general application to iwi governance. The Bill was intended to devolve Māori-centred services to iwi but was repealed after 6 months.

⁴⁷⁷ At 349.

⁴⁷⁸ At 349.

⁴⁷⁹ Moana Jackson “The Symmetry of Felled Trees - History Rangatiratanga and Te Waka Umanga” (paper presented to the Proceedings of a hui to examine the Waka Umanga (Māori Corporations Bill), Otaki, November 2006) at 15.

The essential elements of the Rūnanga Iwi Bill were to:

1. Institute a Crown prescribed model of tribal governance;
2. To incorporate tikanga Māori aspects to the governance model thereby indigenising what was in effect a western governance model legitimated in law.

Iwi were induced into accepting the Bill to gain accessing funding pursuant to the Crown's policy of devolution. Commentators decried the Bill as a continuation of what the Crown had done throughout the 20th century by appropriating Māori organisational forms for its own purposes through a devolution policy that would see institutions offering governance at the iwi level.⁴⁸⁰ Central government control still held sway.⁴⁸¹

Although there was little historical analysis, some commentators implicitly suggested that the Crown was doing what it had done throughout the twentieth century, appropriating Māori organisational forms for its own purposes without any really meaningful concessions. Nine decades on from the Māori councils, and despite the now limited utility of the official committee concept introduced in 1945, for some critics little seemed to have changed. The only real difference they could see was that the Crown was now resourcing institutions deemed to offer governance at iwi level (although very few would note that this had been the case with the official runanga of the 1860s). Whatever the details of the proposals, the central government could, in the final analysis, cancel any or all devolved powers; full rangatiratanga still seemed far away.

While guarded about the implications of the proposed Bill for Māori decision-making, some optimism existed as a result of the Crown's expressed preparedness to 'acknowledge' Treaty of Waitangi breaches. The passing of the Runanga Iwi Act 1990 saw the establishment of foundation runanga throughout the country. However, the fundamental premise for iwi governance remained heavily prescribed

⁴⁸⁰ (5 December 1989) NZPD, 14229

⁴⁸¹ Richard S Hill *Maori and the State* (Victoria University Press, Wellington, [NZ], 2009) at 241.

by central government.

On the other hand, the Government saw the move as providing some semblance of self-determination while in fact, it was a move to set iwi on a pathway of social devolution and corporatisation of iwi governance mechanisms to ensure accountability of iwi administration of resources and assets. It is Hill's contention that the policies and principles underpinning the 1989-1990 iwi authorities framework, was the closest that Māori would get to the embodiment of partnership with the Crown.⁴⁸²

The evolution of Māori organisations into contemporary tribal corporate entities, illustrates the great lengths that Māori went to in the pursuit of the guarantee of *rangatiratanga* entrenched in the Treaty of Waitangi 1840. While the over-arching story is one of struggle, it is also a story of resistance, resilience and truth. Jackson reminds us that "[t]here is no notion of inequality in a treaty".⁴⁸³ For the purpose of making a treaty, the parties are necessarily regarded as equally sovereign. Hill has argued that the notion of Māori retaining or exhibiting sovereignty post-1840 is in fact incomprehensible within the current constitutional context, although the movement for Māori autonomy has been oriented towards the creation of Iwi Corporates with the capability of being competitive within a far more globalised world.⁴⁸⁴

Māori have politically defined themselves as distinct from the colonial state. Having been intermittently incorporated into its hegemonic design, Māori political resistance gathered momentum in the 1970's and 1980's around Treaty of Waitangi grievances and the revitalisation of the Māori language. During this period, Treaty law and policy grew to reflect a new and strident treaty-based discourse. The Crown's response to Māori resistance and activism were policies couched around biculturalism and partnership that aligned *rangatiratanga* with its refashioned economic imperatives, i.e the consolidation of the structural adjustment programme through the internalisation of the Aotearoa (New Zealand) economy.⁴⁸⁵

⁴⁸² At 243.

⁴⁸³ Jackson, above n 479, at 201.

⁴⁸⁴ Hill, above n 481.

⁴⁸⁵ Kelsey, above n 159, at 318.

The Labour Party's agenda to corporatise and privatise disputed Māori resources meant that Māori resources could not be returned to Māori control. Following the SOE Case, the Crown aligned rangatiratanga with the neoliberal right of self-management and retained the “right to govern”.⁴⁸⁶ The State initiated a project of decentralising to Māori and the delivery of Māori services through the tribes. While Māori demands focussed on *te tino rangatiratanga*, the constitutional status of tribes, while their exercise of independent, political, legal and economic as well as cultural power was devolved further with the resurrection of tribal rūnanga.

Following the defeat of the Labour Government in 1996, Winston Peters held the balance of power with New Zealand First, and a National-led coalition government came into power. The Runanga Iwi Act did not survive the change of government.

Indigenous Governance Discourse

Underpinning indigenous governance theory and ‘practice’ are indigenous worldviews and the narratives inherited as historical traditions that provide the explanations for these practices.⁴⁸⁷ To avoid universalising the concept of ‘indigenous’, this thesis subscribes to Royal’s definition of indigenous as follows:⁴⁸⁸

...‘Indigenous’ is taken to mean those cultures whose worldviews place special significance or weight behind the idea of the unification of the human community with the natural world. I believe that whilst colonisation is a reality for so-called ‘Indigenous’ peoples, the ontological and epistemological concern of unification with the world is a better place for us to meet. There seems to be a general agreement among ‘Indigenous’ peoples the world over, Māori, Hawaiian, African, Native American and so on, that unification with the world is the primary concern of the worldviews contained within their traditional knowledge.

⁴⁸⁶ New Zealand Maori Council v Attorney-General 1 NZLR 641, (1987) 6 NZAR 353

⁴⁸⁷ Charles Royal and others *Indigenous worldviews* (Winston Churchill Memorial Trust, Wellington, NZ, 2002).

⁴⁸⁸ At 3.

In addition, and taking Royal's lead, I too adopt the definition of 'worldview' given by the tohunga, philosopher, scholar, writer, healer and minister, the late Rev Māori Marsden".⁴⁸⁹

Cultures pattern perceptions of reality into conceptualisations of what they perceive reality to be; of what is to be regarded as actual, probable, possible or impossible. These conceptualisations form what is termed the 'worldview' of a culture. The worldview is the central systemisation of conceptions of reality to which members of its culture ascend and from which stems their value system. The worldview lies at the very heart of the culture, touching, interacting with and strongly influencing every aspect of culture.

For Marsden, cultural narratives are:⁴⁹⁰

...neither fables embodying primitive faith in the supernatural, nor marvellous fireside stories of ancient times. They were deliberate constructs employed by the ancient seers and sages to encapsulate and condense into easily asimilable forms their view of the World, of ultimate reality and of the relationship between the creator, the universe and man.

Furthermore, Marsden critiques Western culture's reliance on scientific methodology to understand and describe cause and effect in the natural world. He compares this positivist logic to that of other cultures whose assumptions or hypotheses may be just as valid but cognisant of data that western cultures may ignore. Marsden's view of the interface of Māori traditional knowledge with the natural world is edifying in its application to ancient tradition based cultures.

In the Australian Aboriginal context, Langton points out that indigenous governance is based upon the existence of vast indigenous knowledge systems spanning thousands of years and pre-dating western contact. In relation to the 'tenuous' marriage between western biodiversity practices and Aboriginal traditional practices, she advocates for the development of relationships between

⁴⁸⁹ Maori Marsden and Te Ahukaramū Charles Royal *The woven universe* (Estate of Rev Māori Marsden, Otaki, NZ, 2003) at 56.

⁴⁹⁰ At 56.

indigenous and non-indigenous peoples in land, sea and resource management based upon traditional knowledge.⁴⁹¹ For Aboriginal peoples globalisation has ramifications for the potential commodification of their traditional environmental knowledge, in particular, the commodification of biodiversity which Langton cautions will negatively impact indigenous subsistence ways of life. The risk is that global biodiversity preservation goals will take precedence over the needs of local communities resulting in the suppression of indigenous economic activity in favour of global commercialisation.

In contrast, Taiaiake Alfred argues that indigenous governance should be guided by traditional indigenous values rather than traditional knowledge requiring the engagement of traditional practices.⁴⁹² What I take from Alfred's view is that indigenous practices are under threat as natural resources, land and territories are misappropriated for profit and corporate gain. Alfred challenges us to re-envision a relationship with indigenous peoples external to the contemporary colonial context. "As human beings in equal and respectful relation to other human beings and the natural environment".⁴⁹³

Radical imagination...? In today's North America this would mean rejecting the image of this land and everything on and in it as mere resources for capitalist enterprise. Would it be possible for people cultured in the North American mainstream to reimagine themselves in relation to the land and others and start to see this place as a real, sacred homeland, instead of an encountered commodity destined to be used and abused to satisfy impulses and desires implanted in their heads by European imperial texts? I am not the one to answer this question.⁴⁹⁴

The common experience of being conquered, marginalised and dispossessed creates obligations for the intergenerational transfer of cultural values, knowledge and

⁴⁹¹ Marcia Langton "The 'wild', the market and the native: Indigenous people face new forms of global colonization" (2003) 79 *Decolonizing Nat Strateg Conserv Post-Colon Era* at 83.

⁴⁹² Dale Antony Turner *This is not a peace pipe* (University of Toronto Press, 2006) at 106.

⁴⁹³ Taiaiake Alfred "What is radical imagination? Indigenous struggles in Canada" [2010] *Affin J Radic Theory Cult Action* at 3.

⁴⁹⁴ At 1.

understanding. The effects of settler colonialism have supplanted traditional indigenous government structures and legal orders with institutions modelled on western systems of governance that endorse gender hierarchies and colonial systems of oppression.

Indigenous and traditional peoples worldwide are facing a crisis, one that supersedes that inflicted on Indigenous peoples during the imperial age. Just as, during the last 500 years, imperialism caused the encapsulation of Indigenous societies within the new settler nation states, their subjection to colonial political formations and their loss of territory and jurisdiction, so have the globalizing market and the post-industrial/technological complex brought about another phase of profound change for these societies. The further encapsulation of Indigenous societies by the global complex, to which nation state formations are themselves subservient, has resulted in continuing loss of territory as a result of large-scale developments, urban post-colonial population expansion, and ongoing colonization of the natural world by the market.⁴⁹⁵

Additionally, neoliberalism has become the most powerful and pervasive ideology of our times recreating the world in terms of economic spaces rather than nation states. Global economic integration has been promoted as not only desirable but inevitable through policy directives emanating from the G8⁴⁹⁶ and G20⁴⁹⁷ global governance meetings. Regionally this program is expressed through the Pacific Agreement on Closer Economic Relations (PACER) meetings and the now revised PACER Plus trade and development agreement.⁴⁹⁸ The neoliberal agenda is cast as a commitment to free trade, the free mobility of capital and a reduction in the size

⁴⁹⁵ Langton, above n 426, at 80.

⁴⁹⁶ Council of Foreign Relations “The Group of Eight (G8) Industrialized Nations” (2014) <<https://www.cfr.org/backgrounder/group-eight-g8-industrialized-nations>.> Accessed 20/07/2019.

⁴⁹⁷ World Economic Forum “What you need to know about the G20” (2016) <<https://www.weforum.org/agenda/2016/09/what-you-need-to-know-about-the-g20/>.> Accessed 20/07/2019.

⁴⁹⁸ New Zealand Foreign Affairs and Trade “PACER Plus” (2019) <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/pacer/>.> Accessed 20/07/2019.

of the State. This is justified on the grounds of providing for access to foreign markets, market efficiency and that economic growth equals human improvement. Critics, such as Shiva⁴⁹⁹ and Monbiot,⁵⁰⁰ decry the effects of neoliberal economic ideology and call for the radical revisiting of capitalist ideals as the main organizing principle through which to drive all human enterprise. Giddens, on the other hand, is well known for promoting a more ethical focus on the effects of economic doctrine in his articulation of the ‘Third Way’, which promotes notions of self-realization, social solidarity, democracy and social justice.⁵⁰¹ My own view is that Giddens’s theory is useful because it sheds insight on the difficult problem of mitigating *laissez-faire* capitalism with indigenous development. Similarly, Amartya Sen more easily reconciles his theory of ‘development as freedom’ as a mix of democratic capitalist economies with welfare systems that support human life.⁵⁰² Others argue for alternative models of capitalism and a more distributive focus on the deleterious effects associated with a market driven doctrine.⁵⁰³

Land and Territories

Fundamental to the colonial narrative was the desire for territory and the elimination of the native. Deborah Bird Rose has stated that “to get in the way of settler colonization, all the native has to do is stay home”, which supports Wolfe’s contention that the primary motive for elimination is not race (or religion, ethnicity, grade of civilization) but access to territory.⁵⁰⁴ The concept of territory contains a wide array of connotations that are at the very heart of the current debates regarding issues of Indigenous self-determination, autonomy, self-government and sovereignty that, for indigenous peoples, emanate from their inviolable territorial

⁴⁹⁹ Vandana Shiva *Earth democracy* (Zed, London, 2006).

⁵⁰⁰ George Monbiot *The age of consent* (Flamingo, London, 2003).

⁵⁰¹ Anthony Giddens “Globalization” in *Sociol Glob* (Routledge, 2018) 19.

⁵⁰² Amartya K Sen *Development as freedom* (Oxford University Press, 2001).

⁵⁰³ Toon Van Meijl “Ownership and distribution in the settlement of Maori grievances: Balancing historical and social justice between classes” in *Engag Capital Cases Ocean* (Emerald Group Publishing Limited, 2013) 29; George N Curry and Gina Koczberski “Development implications of the engagement with capitalism: Improving the social returns of development” in *Engag Capital Cases Ocean* (Emerald Group Publishing Limited, 2013) at 335.

⁵⁰⁴ Deborah Bird Rose *Hidden Histories* (Aboriginal Studies Press, 1991) at 46; Wolfe, above n 243, at 388.

rights. For nation states, however this is not so clear cut, as evidenced by the twenty-two years that it took to ratify the United Nations Declaration on the Rights of Indigenous Peoples. In 2007, the United Nations General Assembly (UNGA) voted to adopt the *Declaration on the Rights of Indigenous Peoples (UNDRIP)* with four states i.e Australia, Canada, Aotearoa (New Zealand) and the United States (CANZUS) initially casting negative votes. Having subsequently endorsed the UNDRIP, it bears noting that their acceptances were qualified based on their prior objections, which seem to many observers to be diametrically opposed to the advances made within each jurisdiction, in terms of Indigenous rights, institutions, territories, jurisdictions and law in their domestic legal systems.⁵⁰⁵ Gover argues that these four states rejected the UNDRIP as a result of a ‘Western settler-state’ view of the relationship between liberal principles of equality and historical indigenous rights to self-governance and property.⁵⁰⁶

Race became the organising language whereby indigenous peoples were classified in relation to the colonial state. According to De Oliveria , “the category of Indian is actually a supra-ethnic category that does not denote any specific content of the groups [it encompasses] but a particular relationship between them and other sectors of the global social system of which the Indians are a part. The category of Indian denotes the condition of colonized and refers necessarily to the colonial relation”.⁵⁰⁷ Paradoxically, the category of indigenous, while lacking substantive context, defines a certain form of relationship with the national state providing a ‘universalising’ idea of indigenous membership gleaned from a number of ‘colonised’ supra-ethnic categories.⁵⁰⁸ He contends that the modern day universality of indigenous politics is the achievement of a ‘dialogical’ approach, both practically and metaphorically, of indigenous people’s relationships with nation states.

Indigenous Development

The discourse of development emanates from the assumption that western society

⁵⁰⁵ Kirsty Gover “Settler–State Political Theory, ‘CANZUS’ and the UN Declaration on the Rights of Indigenous Peoples” (2015) 26 Eur J Int Law 345 at 346.

⁵⁰⁶ At 346.

⁵⁰⁷ Adolfo de Oliveira *Decolonising Indigenous rights* (Routledge, 2008) at 15–16.

⁵⁰⁸ At 4.

(first world countries) have evolved to a level of modernity involving industrialization, increased production and population shifts from rural areas to industrialized towns.

Durie states that Māori development is synonymous with advancement and self-determination.⁵⁰⁹ However, while both are concerned with social, cultural and economic development, the aims of self-determination emphasise Māori control over resources and independence from the State. Durie reminds us that the aims of development are not inconsistent with Government policy and have in many instances been initiated by the Government. For example, the Hui Taumata 1984 heralded new conciliatory policy initiatives intended to address the ever increasing disparities between Māori and non-Māori through an examination of the Māori economy.⁵¹⁰ The Hui Taumata reinvigorated Māori tribal, community and policy representatives to explore innovative approaches to resource utilisation; improve commercial awareness and to actively participate in education and the economy. The Hon. Koro Wetere enthused that “[t]here was an expectation that Māori people could realise greater levels of economic self-sufficiency, improved social well-being and less dependency on the state if they took advantage of their own distinctive social institutions such as iwi and hapū and actively developed their own tribal resources”.⁵¹¹

Consequently, Durie comments that devolution became confused with partnership, iwi authorities too often resembled agencies of the state and the development aspirations of iwi became obscured by New Right ideology led by a new National Government.⁵¹²

Concerns about the effects of neoliberal economic policy on Māori governance and decision-making are growing. Some critics, such as Māori Activist Annette Sykes are acerbic in her condemnation of the Iwi Chairs Forum capitalist agenda who she

⁵⁰⁹ Mason Durie *Te mana, te kāwanatanga* (Oxford University Press, Auckland, NZ, 1998) at 6.

⁵¹⁰ Conference Steering Committee *A Briefing on Maori Economic Affairs* (1984).

⁵¹¹ Hon K Wetere “Hui Whakapumau Ten Years of Maori Development” (Kia Pūmāu Tōnu, 1994) at 11-13.

⁵¹² Durie, above n 113 at 12.

dubs as 'iwi elite'.⁵¹³ It was Ranginui Walker who first drew our attention to the rise of the new Māori elites that accepted 'subaltern' roles within the ruling class of metropolitan society at a time when traditional Māori leadership structures were subsumed into the administration of Pākehā civil structures.⁵¹⁴ Walker states:

The structural relationship of dominance and subjection between the power elite of metropolitan society and Māori subalterns became entrenched and carried over into this century. Today, some of these subaltern leaders, through training, or association with the power elite have been infected with an appetite for bourgeois success. They seize an opportunity to achieve economic power by championing Māori rights under the Treaty of Waitangi in the alien fora of courts and the Beehive. In pursuit of this agenda they unwittingly maintain the hegemony of the ruling class by responding to the latter's definition of how Māori cultural and economic aspirations should be achieved. Other leaders operating with a tribal mandate have been forced to resort to litigation to assert their mana against the alien mana of the subalterns of the ruling class.⁵¹⁵

Traditional indigenous governments were distinguishable by personal relations that recognised that each individual is necessary to the formation of a society. In contrast, a State is founded upon territory and property. The new governing elites have singled out indigenous populations for 'development' based upon western assumptions of what civilization is, while simultaneously seeking to ensure that arbitrarily acquired indigenous lands and natural resources could be deemed to be economically productive.⁵¹⁶ Bodley argues that the most critical government policies to be implemented with previously self-sufficient tribes were those relating to their possession of land. The colonisers then soon turned their attention to

⁵¹³ Annette Sykes "Maori Elite and Neo Liberalism" (December 2010) Maui Street <<http://mauistreet.blogspot.co.nz/2010/12/annette-sykes-maori-elite-and-neo.html>>.

⁵¹⁴ Antonio Gramsci "Selections from the prison books" [1982] Trans Q Hoare G Nowell-Smith Lond Lawrence Wishart at 12.

⁵¹⁵ Ranginui Walker *Tradition and change in Maori leadership* (Research Unit for Maori Education, University of Auckland, Auckland, NZ, 1993) at 139.

⁵¹⁶ See generally Michael G Mason and Mike Mason *Development and disorder* (Upne, 1997); Franke Wilmer *The Indigenous voice in world politics* (Sage, Newbury Park, Calif, 1993).

defining tribal land rights in order to maximize productivity. The result was an extensive reduction of indigenous territories and a modification of their traditional systems of tenure in favour of State control.⁵¹⁷

Today development remains a process that impinges on indigenous people's ability to sustain their own cultures and their own ways of knowing and doing.⁵¹⁸ Even in 'post-colonial' contexts, such as those of the United States, Australia and Aotearoa (New Zealand), the development discourse is sustained within hegemonic policies of modernisation and neoliberalism.⁵¹⁹ According to Scott and Blaser however, indigenous peoples have improved in their capacity, since the 1970s, to resist colonization using the coloniser's legal frameworks and international law.⁵²⁰ Blaser identifies four mutually reinforcing processes that have improved indigenous capacity for resistance:⁵²¹

The emergence of an international movement of Indigenous people; the increasing recognition of Indigenous peoples' rights to self-determination; the emergence of a loosely connected anti-modernist alliance fuelled by what is perceived as the failures of contradictions of the "modern project"; and the tendency towards the development of new systems of governance below and above the state.

Indigenous Women and Governance

Colonisation continues to contribute to the disadvantaged experience of indigenous women within their own communities and society in general. Green and others points to the gender and power imbalance in First Nations governance and positions

⁵¹⁷ John H Bodley *Victims of Progress* (Rowman & Littlefield Publishers, Blue Ridge Summit, United States, 2014) at 99.

⁵¹⁸ Frédérique Apffel-Marglin and Stephen A Marglin *Decolonizing knowledge* (Clarendon Press, 1996) at 1.

⁵¹⁹ The post-colonial problematic is that while the colonisers may or may not have left, the institutions and legacy of colonialism remains. Refer to Smith, above n 45, at 101.

⁵²⁰ See generally Mario Blaser "Indigenous peoples, civil society, and the environment: the struggle for sustainability" in Adolfo de Oliveira (ed) *Decolonising Indig Rights* (Routledge, New York, 2009); James C Scott *Weapons of the weak* (Yale University Press, Haven, Connecticut, 1985).

⁵²¹ Blaser, above n 466, at 192–193.

of tribal authority.⁵²² Ladner specifically addresses the marginalisation of indigenous women through and examination of legislation and government policy.⁵²³ Additionally, Herbert and Seuffert contribute to the understanding of the omission of the current realities of indigenous women from the self-government debate and continuing unaddressed social issues impacting mostly women and children but tribes as well. Seuffert specifically addresses the colonially constructed systems that seek to disenfranchise indigenous women.⁵²⁴ Māori academic Mikaere reminds us that the balance between Māori men and women was destroyed through colonialism. Mikaere refers to the ‘baffling inconsistencies’ encountered by Māori women, their roles in Māori society being contradictory and confusing. Women in her experience, held vital leadership roles within whānau, hapū and iwi, and yet some of the practises on the marae have suggested that women have been cast in a secondary role. If Māori institutions were sexist then how was it that the language, te reo Māori was completely gender neutral? Mikaere’s thesis presents a Māori woman's perspective on the roles of women within their whānau hapū and iwi prior to colonisation. The major theme of Mikaere's thesis is the extent to which Māori women and men have been redefined by the process of colonisation.⁵²⁵ Finally, Kuokkanen critiques the market driven basis for self-governance providing a feminist political economic analysis of contemporary self-governing indigenous structures.⁵²⁶ At the heart of these writers’ arguments are the fundamental tensions between contemporary models of indigenous governance borne of tribally-based desires for economic development captured by the importation of neoliberal capitalist ideals, and tribal social structures and cultural traditions within which men and women held complementary political and decision-making statuses.

⁵²² Joyce Green “Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government” (1992) 4 Const Forum 110; Green, above n 196; Napoleon, above n 154; Suzack and others, above n 205; Monture-Angus and others, above n 23; Monture-Angus and Turpel, above n 23.

⁵²³ Kiera L Ladner “Gendering Decolonisation, Decolonising Gender Commentary” (2009) 13 - Aust Indig Law Rev; Kiera L. Ladner “Women and Blackfoot Nationalism.” (2000) 35 *Journal of Canadian Studies* 35.

⁵²⁴ Elaine Herbert and Kathryn Mccannell “Talking Back: six First Nations Women’s Stories of Recovery From Childhood Sexual Abuse and Addictions” (1997) 16 Can J Commun Ment Health 51; Seuffert, above n 108.

⁵²⁵ Mikaere, above n 41.

⁵²⁶ Kuokkanen, above n 109.

Indigenous women do not either espouse a longing for a return to pre-colonial notions of gender balance or yearn for an imagined future where indigenous communities have achieved a return to culture and tradition, spirituality and the restoration of pre-contact balance. In modern times, and as a component to developing indigenous theories of decolonisation, it is important to recognise that indigenous women are an essential component of the ‘self’ in self-determination and self-government.⁵²⁷ It is also just as important to restore women’s narratives to their rightful place in the indigenous self-determination and self-government discourse. There is an abundance of literature supporting that the history that women held political power in pre-colonial times.⁵²⁸ From the traditional Cherokee matrilineal clan system that supported an egalitarian society to the Iroquois First Nations matriarchal system. Indigenous nations practiced an inclusive model of governance such as negotiating treaties, making political decisions and convening women’s councils.⁵²⁹ In her contribution to aboriginal discourse in the area of gender, identity and community, Val Napoleon refers to this notion of harmony ideology as the belief that internal conflict is bad or potentially dysfunctional, and

⁵²⁷ In this thesis, I follow Napoleon’s differentiation of meaning between the closely related concepts of self-determination and self-government. “Self-determination” is the right of an aboriginal nation to determine how it will be governed. Thus. Self-determination refers to the collective power of choice; self-government t is one possible result of that choice”. From Canadian Government *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship* (Vol2, Part 1 Canadian Governmnet 1996).cited in Val Napoleon “Aboriginal self determination: Individual self and collective selves” (2005) 29 *Atlantis Crit Stud Gend Cult Soc Justice* 31 at 44.

⁵²⁸ See generally Kim Anderson “The Powerful History of Native Women” (2000) 14 *Herizons* 15; Anderson, above n 203; Green, above n 196; Kiera L Ladner “Women and Blackfoot nationalism” (2000) 35 *J Can Stud Tor* 35; Mikaere, above n 38; Mikaere, above n 38; Val Napoleon “Aboriginal discourse: Gender, identity, and community” in *Indig Peoples Law Comp Crit Perspect* (2009) 233; Napoleon, above n 473; Denetdale, above n 108; Mihesuah Devon *Indigenous American Women*; Maureen O’ Dea Caragliano “Beyond princess and squaw : Wilma Mankiller and the Cherokee gynocentric system” (Masters Thesis, San Jose State University, 1997); Voyageur, above n 328; Joanne Barker “Gender, Sovereignty, and the Discourse of Rights in Native Women’s Activism” (2006) 7 *Meridians Fem Race Transnationalism* 127; Anderson, above n 203; Denise K Lajimodiere “Ogimah Ikwe: Native Women and Their Path to Leadership” (2011) 26 *Wicazo Sa Rev* 57; Monture-Angus and Turpel, above n 23; Klein and Ackerman, above n 23; Robert A Jr Williams “Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context” (1989) 24 *Ga Law Rev* 1019; Haunani-Kay Trask *From a native daughter* (rev ed ed, University of Hawai’i Press, Honolulu, 1999); Lisa D Brush *Gender and Governance* (Rowman Altamira, 2003).

⁵²⁹ Portman and Garrett, above n 357, at 284.

that to achieve a healthy society, conflict and confrontation must be minimised.⁵³⁰ Essentially, the discourse of harmony is used to suppress challenges to the *status quo* and to stifle conflict. To challenge indigenous leadership about sexism, patriarchy or the power imbalances evident in indigenous governance structures can be construed as a challenge to cultural traditions and traditional practices that are deemed to be immutable.⁵³¹

Napoleon and Green both note that criticism concerning sexism and the power imbalance between men and women in indigenous tribal governance, is often pushed aside for the rhetoric that states, once self-government is established, all will be well. Napoleon goes on to state that similar exhortations occur about sovereignty and self-determination.⁵³²

Given this imagined future, there is no need to address aboriginal women's issues of oppression, because sexism and violence against women are simply the result of colonisation, residential schools, and loss of culture. If, with the return of self-government, sexism and its attendant violence effortlessly disappear, why worry about sexual discrimination or gender at all? In fact, raising the spectre of sexism within aboriginal groups is often considered a betrayal of aboriginal people. To suggest that sexism and power imbalances are problems is to actually hinder the achievement of a self-determining and self-governing world. Worse, to worry about sexism in contemporary aboriginal societies is to have been foolishly duped by white women's feminism, which is seen as another form of colonisation.⁵³³

Therefore, the argument suggests that aboriginal people need to survive first and to deal with sexism later, if it in fact exists as well as other forms of oppression. The question is, "how can indigenous peoples survive if indigenous women do not survive? Indigenous feminist writers are adamant in their stance that indigenous self-determination or self-government cannot be achieved while indigenous women

⁵³⁰ Napoleon, above n 474, at 234.

⁵³¹ Mead, above n 41; Trask, above n 474; Johnston, above n 26; Seuffert, above n 108.

⁵³² Napoleon, above n 474, at 234.

⁵³³ At 234.

are subjected to internal indigenous systems of oppression.⁵³⁴

This thesis examines the empowerment potential of Treaty settlements for Māori women in terms of their capacity to influence iwi development decision-making. With the progress of treaty settlements, neoliberal models of governance have become dominant, and have increasingly been justified through the employment of development discourse. A change in the prevailing New Zealand political paradigm from a State-centred model to a global neoliberal model has resulted in this change to a focus on global development.

Māori Women and Governance

Literature on Māori women in governance is limited and mainly arises in relation to women in public and professional life i.e. business practice or representation on corporate boards.⁵³⁵ In fact, the 2008 census was the first time that data on Māori women's participation was reported. This was done at the instigation of the co-leader of the Māori Party Tariana Turia and the Ministry of Women's Affairs. What is thoroughly discussed however is that pre-colonisation Māori women held positions of political leadership.⁵³⁶ In fact, the role, rights and responsibilities of an individual were determined according to whakapapa and lines of descent rather than according to gender.⁵³⁷ The concepts of whakapapa (genealogy) and whanaungatanga (kinship) are so closely interrelated as to be indiscernible as individual notions. Māori anthropologists will only go so far as to discern between descent being from a common ancestor and kin-based familial ties existing within

⁵³⁴ Green, above n 196. It is worth noting that the prevalence of violence against Indigenous women is a clear indicator of sexism within Indigenous society. See generally Denise Grenier and Rachel Locker *Maze of Injustice The failure to protect Indigenous women from sexual violence in the USA: (569262010-* (American Psychological Association, New York, 2007).

⁵³⁵ Human Rights Commission New Zealand Census of Women's Participation (2008).

⁵³⁶ Mikaere, University of Auckland, above n 21. Pihama, above n 24; Robyn Kamira "Kaitiakitanga: Introducing useful Indigenous concepts of governance" in *Proceedings of the government information system managers' forum (GOVIS) 2003 conference Wellington, New Zealand* (2003); Tess Moeke-Maxwell "Bi/Multiracial Maori Women's Hybridity in Aotearoa/New Zealand" (2005) 26 *Discourse: Studies in the Cultural Politics of Education* 497; Smith, above n 33 .

⁵³⁷ Mikaere, University of Auckland, above n 21.

social groupings.⁵³⁸ However, the distinction is slight. In Barlow's view, whakapapa is broad enough to encompass all kinship links commonly associated with the principle of whanaungatanga.⁵³⁹ The principle of whanaungatanga is important to this thesis as a means of promoting social inclusion amongst members of a kin group. It promotes the idea of 'belonging' and 'inclusiveness' thus by definition, membership and participation.⁵⁴⁰

It is these concepts of whakapapa and whanaungatanga (tikanga Māori) that I wish to explore further in this research and the knowledge that 'inclusiveness' for whatever reasons has led Māori men to a position of 'exclusivity' in terms of tribal leadership and decision-making. Johnston,⁵⁴¹ Corrin Care,⁵⁴² and Charters⁵⁴³ all argue for the recognition of gender equality in relation to customary practices that privilege men. Johnston views this situation as discrimination and examines the applicability of international human rights law to address the elimination of discriminatory cultural practices against Māori women. Johnston argues that as these practices are sourced within tikanga Māori, then a re-examination of tikanga Māori is required.⁵⁴⁴

What is needed, as Ani Mikaere argues, is a rediscovery and re-examination of Māori principles and practices as they relate to Māori women. 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

⁵³⁸ Kawharu, above n 131; SM Mead *Tikanga Māori* (Huia, Wellington, NZ, 2003); Cleve Barlow *Tikanga whakaaro* (Oxford University Press, Auckland, NZ, 1991).

⁵³⁹ Barlow, above n 136.

⁵⁴⁰ Nin Tomas "Indigenous Peoples and the Maori: The Right to Self Determination in International Law - From Woe to Go" (2008) 2008 NZ L Rev 639.

⁵⁴¹ Kerensa Johnston "Maori Women Confront Discrimination: Using International Human Rights Law to Challenge Discriminatory Practices" (2005) 4 Indigenous LJ 19.

⁵⁴² Jennifer Corrin Care "Negotiating the Constitutional Conundrum: Balancing Cultural Identity with Principles of Gender Equality in Post-Colonial South Pacific Societies" [2006].

⁵⁴³ Claire Charters "Universalism and cultural relativism in the context of Indigenous women's rights" [2003] Human rights research.

⁵⁴⁴ Above n 536, at 27.

perspectives. It is this process that must occur if we wish to keep our culture alive and responsive to the challenges it faces.

This discussion is influenced by a growing body of indigenous women writers that challenge the discrimination of indigenous women stemming from colonial assumptions about indigenous cultures and male and female roles.⁵⁴⁵ A further perusal of the international literature highlights the commonalities that exist between First Nations women, Native American women and Māori women. Shared experiences of colonisation have highlighted the patriarchal positioning of men over women so that today, women are not assured of a role in governance. Nor are women present at the negotiation table of treaties and self-government arrangements. While the literature on indigenous governance is extensive, most lack any form of gender analysis. First Nations authors Sayers and MacDonald,⁵⁴⁶ in an examination of First Nations women in governance, highlight the fact that not only had their traditional roles been strongly impacted by colonisation and the actions of the state, but also that both men and women had internalised the white male devaluation of First Nations' women leading to the denigration of roles for First Nations' women and the exclusion of women from tribal governance arrangements. Their gendered analysis was based on international and domestic legal instruments, domestic treaties and self-government arrangements, policy documents and the experiences of First Nations' women. Of note in this discussion are their findings that currently, the governance of First Nations' communities are heavily dominated by men with few women holding leadership positions. Anderson,⁵⁴⁷ Borrows,⁵⁴⁸ Green⁵⁴⁹ and others,⁵⁵⁰ agree that First Nations' men must

⁵⁴⁵ Charters, above n 141; Johnston, above n 139; Seuffert, above n 108; Nin Tomas "Locating Human Rights in the South Pacific" in *Indigenous Human Rights* (Sydney Institute of Criminology, Sydney, 2001) 132; Irene Watson "One Indigenous Perspective" in *Indigenous Human Rights* (Sydney Institute of Criminology, Sydney, 2001).

⁵⁴⁶ Judith F Sayers, Canada, Status of Women Canada, and Policy Research *First Nations women, governance and the Indian Act* (Status of Women Canada, [Ottawa], 2001).

⁵⁴⁷ K Anderson "Community and Nation" in *A Recognition of Being: Reconstructing Native Womenhood* (Second Story Press, Toronto, 2000).

⁵⁴⁸ John Borrows "Contemporary Traditional Equality: The Effect of the Charter on First Nation Politics" (1994) 43 UNBLJ 19.

⁵⁴⁹ Joyce Green "Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government" (1992) 4 Const F 110.

⁵⁵⁰ Madeleine Dion Stout and Gregory D Kipling, Canada and Status of Women Canada *Aboriginal women in Canada* (Status of Women Canada, Ottawa, 1998).

take responsibility for the exclusion of First Nations' women from the discourse of self-government.

Despite this, some writers contend that resistance comes not only from First Nations' men but other First Nations' women as well. One explanation is that women's experiences of oppression have become depoliticised in First Nations' communities by the notion of collectivism. According to Sayers and MacDonald raise this important issue as the contradictory struggle between two different and yet complicit ideologies. On the one hand, women who generally support the *status quo* of male-led tribal organisations, conflicting with contemporary women (and others) who seek to challenge neo-colonial ideology that upholds patriarchal so-called 'cultural' practises.⁵⁵¹ This is important for this research to develop an understanding of how Māori society has assimilated patriarchy into cultural practices that inform post-settlement iwi governance and decision-making.

Indigenous Justice

In the CANZUS countries – Canada, Australia, Aotearoa (New Zealand) and the United States, indigenous peoples are at the forefront of self-governance enterprises to take back power and control of their indigenous territories, natural resources, intellectual property and governance mechanisms. Additionally, they generally seek to achieve this by adopting models that align with their traditional knowledge bases in ways that affirm their cultural traditions, and native language. Falling within the rubric of indigenous justice, there are both domestic and international features to consider as each nation and therefore each nation within a nation, determines for themselves the optimal way forward. Consequently, while a comparative analysis of the success or not, of these contemporary ventures can provide generally accepted principles applicable across nations, it is in reality the point of difference for each group that will provide meaning to each form of indigenous governance if it is to deliver the collective aspirations of the peoples, communities, tribes and nations.

Stephen Cornell of the Native Nations Institute, University of Arizona, provides a

⁵⁵¹ Sayers, Canada, Status of Women Canada, and Policy Research, above n 144.

useful framework for examining comparatively two dimensions of indigenous justice that he terms, ‘justice as position or justice as practice’.⁵⁵² Cornell makes the very important point that for society in general, justice is served when the socioeconomic disparities suffered by indigenous peoples are addressed through government policies that support tribal economic activity, the devolution of service delivery from the State to indigenous communities, and the mainstreaming of education, health and other social services. It is the ‘closing of these gaps’, which the State and society in general assume will deliver the collective aspirational outcomes for indigenous peoples. As Cornell contends:

It is not that equality or socioeconomic disparities do not matter to Indigenous peoples. They do, and often urgently.... Indeed, Indigenous politics – at least the politics that I most often encounter – is not a *distributional* politics, organised around obtaining equal access to socioeconomic opportunities and benefits. It is first of all, a *positional* politics that has to do with the position of collectives – peoples, nations, communities – within the encompassing political system and secondarily, within the encompassing economy. It is not a politics about Indigenous peoples and their access, as individuals, to opportunities and benefits; it is instead a politics about Indigenous peoples and their access to the freedom and power to shape their own futures according to their own designs.⁵⁵³

Thus, according to Cornell, indigenous justice is less about ‘equality’ than it is about ‘difference’. While I agree with Cornell and find his analysis illuminating, in the broader context of indigenous justice, the most controversial issue has been about sovereignty and the inherent freedoms that pre-date Treaty relationships. According to Cornell, ‘justice of position’ refers to the position that indigenous peoples occupy within encompassing states or political systems.

The key issues in justice as position are recognition (are indigenous peoples recognised as formal political actors – governments – with whom central government should interact with on a government to-government basis?),

⁵⁵² Cornell, above n 200.

⁵⁵³ At 13–14.

jurisdiction (what is the nature and scope of indigenous jurisdiction over space, persons, relationships, and activities?), power (regardless of the *de jure* nature of jurisdiction, what is the *de facto* nature?), and organisational freedom (to what extent are those nations free to organise as they see fit in pursuit of collectively determined goals, including the freedom not only to determine how they will govern but to decide who they are – to define the nation, community, tribe, or other collective entity in their own terms?).⁵⁵⁴

The problem with this view is that the ‘issues’, i.e. recognition, jurisdiction and power and organisational freedom remain unsettled and therefore, open to dissent. In the experience of indigenous peoples, opposing views, which are more often than not those of the governing states, lead to adjudication resulting in restrictions upon both inherent freedoms and rights flowing from treaties. My view is that for many, justice of position is illusory. For others, it is a compromise that provides a vehicle on the journey out of colonialism toward self-determination. The Nisga’a Nation’s experience that Cornell and Joseph refer to is but one example of this.⁵⁵⁵ Yet for others, justice as position is untenable. One such example is that of the Assembly of Manitoba Chiefs Grand Chief Derek Nepinak who, in 2016, refused to re-stand for election stating that he did not support running under an Indian Act system.

I do believe that our traditional forms of governance that are led by our matriarchs across the country are being withheld and denied and in that way we are less than self-determining. We are not self-governing but we are actually playing to the tune of federal governments and the funding they provide through the Indian Act political system, he said.⁵⁵⁶

⁵⁵⁴ At 15.

⁵⁵⁵ At 12. Robert Joseph “The government of themselves: Indigenous peoples’ internal self-determination, effective self-governance and authentic representation: Waikato-Tainui, Ngāi Tahu and Nisga’a” (Doctoral Dissertation, University of Waikato, 2005).

⁵⁵⁶ CBC News “Assembly of Manitoba Chiefs Grand Chief Derek Nepinak not seeking re-election” *CBC News Website* (28 November 2016) <<https://www.cbc.ca/news/canada/manitoba/assembly-of-manitoba-chiefs-grand-chief-derek-nepinak-not-seeking-re-election-1.3872137>>. Accessed 17/07/2018. It is noteworthy that Nepinak acknowledges the role of the Matriarch (Clan Mother / female Leaders) that still exist in the Iroquoian nation of which the Mohawk are a part at a time when the erosion of First Nations women’s traditional roles has gone hand in hand with their contemporary devaluation.

It is with these words in mind that I explore the concept of sovereignty as it applies to the indigenous governance context.

Sovereign Nations – “What is not taken away remains...”

Sovereignty is a contested term with multiple meanings and implications for indigenous peoples. The Sovereignty discourse dovetails into indigenous governance given that indigenous peoples had pre-existing and self-governing polities or nations within nation states that were destroyed by colonialism but paradoxically also recognised in law. Sovereign rights and freedoms were inherent based on prior occupation, therefore establishing the ethical basis for later formal constitutional or legislative recognition. Modern tribally based indigenous governance structures, institutions, rules and practices need to recognise that ‘sovereignty’ prevails in some shape or form within. Cobb observes that only in the last forty or so years has the term come into common usage to convey concepts like ‘freedom’ and ‘liberty’.⁵⁵⁷ Historically, the classical notion of sovereignty has its origins in feudal Europe describing the existence of a single ‘divine ruler’. According to legal scholar Charles Wilkinson, the 16th century philosopher Jean Bodin defines sovereignty as “equal parts theology (the sovereign – the Crown derives power from God) and metaphysics (sovereignty is both supreme and absolute; it cannot be divided up).⁵⁵⁸

In considering a comparative view of sovereignty across the CANZUS states, I refer to Duffié who draws upon a historical, comparative and contextual framework to define contemporary machinations of sovereignty as being composed of three parts: legislative and political and economic.⁵⁵⁹ Legislative and political sovereignty, she states, are periodically enhanced or limited by government paternalism which continually, and sometimes simultaneously determines national indigenous policy in ways that tribal authority is deemed imperfect but relevant within government policies. Economic sovereignty, on the other hand, is the mechanism by which

⁵⁵⁷ Amanda J Cobb “Understanding Tribal Sovereignty: Definitions, Conceptualizations, and Interpretations” (2005) 46 Am Stud 115 at 115.

⁵⁵⁸ Charles F Wilkinson *Blood struggle* (WW Norton & Company, 2005) at 248.

⁵⁵⁹ Mary Katharine Duffié “The Treaty of Waitangi and Its Relationship to Contemporary American Indian Sovereignty Issues” (1999) 14 Wicazo Sa Rev 45 at 45.

indigenous tribes and communities are permitted to exert limited control and authority. Duffié goes on to maintain that economic sovereignty is “the mechanism by which a human community successfully commands its own history”.⁵⁶⁰ Indigenous communities continue to suffer the deleterious effects of colonisation that have now been found to be intergenerationally harmful.⁵⁶¹ Limited economic sovereignty in the way Duffié frames it, is in my view, incapable of meeting these expectations. Regardless, indigenous tribes retain a degree of sovereignty that is cognisable in law although only to varying degrees and depending on the nation state.⁵⁶²

Professor Rob Williams continually reminds his Federal Indian Law classes, "What is not taken away, remains." Williams emphatically states that under Federal Indian Law, Indian tribes have rights to a degree of measured separatism recognised in international law as ‘sovereign immunity’.⁵⁶³ The notion of inherent tribal immunity is derived from Indian sovereignty, which pre-dates the American revolution and therefore the United States Constitution. It is through the Marshall trilogy of cases that Indian tribes can make claim to being – “a distinct political society, separated from others, capable of managing [their] own affairs and

⁵⁶⁰ At 45.

⁵⁶¹ Judy Atkinson *Trauma trails, recreating song lines* (Spinifex Press, 2002); Maria Yellow Horse Brave Heart and others “Historical trauma among Indigenous peoples of the Americas: Concepts, research, and clinical considerations” (2011) 43 *J Psychoactive Drugs* 282; Brenda Elias and others “Trauma and suicide behaviour histories among a Canadian Indigenous population: An empirical exploration of the potential role of Canada’s residential school system” (2012) 74 *Soc Sci Med* 1560; Teresa Evans-Campbell “Historical trauma in American Indian/Native Alaska communities: A multilevel framework for exploring impacts on individuals, families, and communities” (2008) 23 *J Interpers Violence* 316; Anthea Krieg “The experience of collective trauma in Australian Indigenous communities” (2009) 17 *Australas Psychiatry* S28; Leonie Pihama and others “Positioning historical trauma theory within Aotearoa New Zealand” (2014) 10 *Altern Int J Indig Peoples* 248; Rawiri Waretini-Karena “Transforming Maori experiences of historical intergenerational trauma” [Presentation, 2013]; Wesley-Esquimaux, above n 203; Rebecca Wirihana and Cheryl Smith “Historical Trauma, Healing and well-being in Maori Communities” (2014) 3 at 14.

⁵⁶² Julie Cassidy “Sovereignty of aboriginal peoples” (1998) 9 *Ind Intl Comp Rev* 65; Federico Lenzerini “Sovereignty revisited: International law and parallel sovereignty of Indigenous peoples” (2006) 42 *Tex Intl LJ* 155.

⁵⁶³ Williams, above n 71, at 160. Jessie D Green and Susan Work “Inherent Indian Sovereignty” (1976) 4 *Am Indian Rev* 311.

governing [themselves].⁵⁶⁴ In *Cherokee Nation v. Georgia*, tribes were held not to be sovereign in the sense that foreign nations are sovereign: “[y]et it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations”.⁵⁶⁵ In *Worcester v. Georgia*, the Court early on recognised tribes as “independent political communities, retaining their original natural rights”, ... “and possessed of the power to make treaties”.⁵⁶⁶

In Aotearoa (New Zealand) both He Whakaputanga o te Rangatiratanga o Nu Tireni (the Declaration of Independence)(4) and Te Tiriti o Waitangi (The Treaty of Waitangi) clearly affirm the supreme authority of the Māori signatories.⁵⁶⁷ Iwi governance was based on tikanga which had served the needs of the tangata whenua prior to colonial settlement. Tikanga draws upon principles such as whakapapa, whanaungatanga, mana, manaakitanga, aroha, wairua and utu.⁵⁶⁸

Mikaere calls upon the Crown to fully implement Te Tiriti o Waitangi noting in her view, the consistency with which agents of Crown law have broken the promises of 1840. In fact, the entire Treaty settlement process is testament to the number and extent of the breaches both historical and contemporary.

Crown policy has had the effect of reducing tikanga to a near-empty shell: where once it operated as the first law of the land, regulating the conduct of all who came here, it now hovers at the margins of ‘mainstream’ society, coming into its own within tightly prescribed contexts (most commonly the marae) but otherwise accorded significance only insofar as Crown law is prepared to humour us by incorporating carefully chosen and defined aspects of tikanga into its legislative framework.⁵⁶⁹

This analysis highlights the importance for Māori of establishing an on-going legal

⁵⁶⁴ *Cherokee Nation v. Georgia* 30 US (5 Pet) 1, 17 (1831). See also, *Johnson v. M’Intosh* 21 US (8 Wheat) (1823) and *Worcester v. Georgia* 31 US (6 Pet) 515 (1832).

⁵⁶⁵ *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-17 (1831).

⁵⁶⁶ *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L.Ed. 483 (1832).

⁵⁶⁷ Mikaere, above n 266.

⁵⁶⁸ At 11.

⁵⁶⁹ At 18.

and political relationship with the Crown postgrievance and post-Treaty settlement, that is geared towards ‘putting the treaty to work’ and not as popular discourse would have it, putting the treaty to bed. According to the Waitangi Tribunal, the Treaty is an ‘on-going social contract’ thus, the Treaty and its principles will remain and should form part of the on-going conversation regarding a constitution for Aotearoa (New Zealand). Notwithstanding that constitutional issues remain an important topic for another project discussion, what this research can take from this, is that recourse to international, Māori customary and common law continues to remain.

The capability of post-settlement iwi governance arrangements to meet the aspirations of Māori have gained prominence in Treaty settlement discourse as the National Government (the government of the day) doggedly pursued its policy of settling all historical Treaty of Waitangi claims by 2020. In the form of a precursor to an on-going partner relationship between claimant groups and the Crown, iwi post-settlement governance arrangements have been structured as economic entities shaped by generic legislation that do not adequately reflect Māori social frameworks based on whakapapa, kinship and collective cultural practices that traditionally adhered to a Māori legal order, i.e. tikanga Māori.⁵⁷⁰ Much has been written about the application of tikanga Māori to Māori governance arrangements and to how these laws and values conflict with principles underpinning traditional corporate structures. This research will examine what I propose to be the disconnect between traditional Māori social frameworks within which Māori women were considered essential decision-makers and the current pre-occupation with distilling essential Māori law, i.e. tikanga Māori, down to a set of principles that can be applied to an extraneous body politic loosely defined by tribal descent.

Māori also focuses on critical inquiry of the power relations that exist within society, creating an opportunity to examine the establishment and positioning of post-settlement iwi corporates within a broader frame of the colonizing and assimilation processes that have defined Māori-Crown relationships. Such critical

⁵⁷⁰ The post-settlement governance entity (PSGE) is determined by the iwi but within strict parameters set by the Crown. Settlement legislation is required to give effect to the agreed Deed of Settlement. OTS *A Guide to Treaty of Waitangi Claims and Negotiations with the Crown: Summary Edition* (2004) at 71-72

modes of enquiry support building an understanding of the extent iwi corporates can effect positive change for Māori and contribute to the emancipatory pursuit of self-determination.

The proposed settlement of historic grievances by 2020 hails a new relationship era between Māori and the Crown, whether or not Māori are ready for this. To date, although Māori have increasingly pushed to define the relationship on their terms, i.e. iwi-specific and tikanga-based, the settlements process brings home the fact that the Crown, through the mechanism of a neoliberal legislation and policy, continues to set the relationship parameters. While the Crown works on the premise of providing a full and equitable resolution case by case, Māori or rather iwi, also have an obligation to get their houses in order. The adoption of generic post-settlement governance structures however means that iwi can and in some cases have become expurgated versions of their former selves.

Summary

The post-settlement era will bring challenges for Māori governance arrangements in terms of meeting a long list of competing demands including: ensuring the successful implementation of completed settlement agreements, providing a mechanism for interfacing with the Crown, realising commercial returns on commercial investments, establishing an on-going relationship between Māori and the Crown beyond settlement, and all the while safeguarding tikanga Māori in the process. Significantly, this research seeks to determine which Māori leaders or organisations will interface with the Crown and how that membership will be comprised? What will be the face in the future of Māori representation and decision-making? How visible will Māori women become?

Similarly, the Crown will face challenges as Māori seek more control and autonomy over their own affairs. Therein lies a further dichotomy of 'balance' between treaty partners collectively and singularly; between Māori and non-Māori and between Māori men and women with respect to the assumption of governance roles. Indigenous treaty settlements are perceived as paving a development pathway for indigenous peoples, ostensibly offering the means to economic and sustainable

futures through self-reliance.⁵⁷¹ While Māori are at the forefront of this indigenous global movement for change, concern is mounting about the effects of the global neoliberal economic ideology on indigenous people's rights to self-determination.⁵⁷² The dialectical tensions that emerge from this state of affairs have the potential to dissuade indigenous peoples from their own development agenda, and no less so for indigenous Māori of Aotearoa (New Zealand). In this thesis, I address two fundamental contradictions inherent within Māori (iwi and hapū) post-settlement governance arrangements.

The settlement of historical injustices has given rise to corporate non-traditional governance structures implemented to 'manage' settlement resources and assets, and to commodify land and taonga which, for Māori, is not the goal of Treaty settlements.⁵⁷³ I argue that neoliberal capitalism serves to undermine indigenous agency and self-determination based on traditional values and practices. Also, the context of colonisation, globalisation and the settlement of historical Treaty of Waitangi grievances are essential to this thesis in terms of identifying the context for an investigation into Māori governance and decision-making today. This thesis argues that the patriarchal governance models that Māori adhere to today have been informed and shaped by their experiences of the past.

⁵⁷¹ Te Puni Kōkiri Ministry of Māori Development: Māori Economic Development Panel: Discussion Document (2009)

⁵⁷² Jane Kelsey "NZ Intellectuals" in Laurence Simmons (ed) *Speaking truth to power: Public intellectuals rethink New Zealand* (Auckland University Press, Auckland, 2007) at 157

⁵⁷³ Carwyn Jones "The Treaty of Waitangi Settlement Process in Maori Legal History" (PhD, Victoria University of Wellington, 2013) at iii. Jones argues that the key goal of treaty settlements for Māori is reconciliation and self-determination.

Chapter 5 – Gendered Indigenous Governance

In this Chapter I draw the discussion from the broad comparative analysis of gendered colonial constructs explored in the previous chapter and the significance of the historical marginalisation of indigenous women, for the purpose of focusing on the collective voice of indigenous women that can be discerned in their similar experiences of colonialism and colonisation.

Indigenous women's realities are converging in the 21st century such that we now commune, conference and share our own and each other's truths about our grandmothers' lands.⁵⁷⁴ Women's talk has become increasingly disruptive and potentially transformative.⁵⁷⁵ The unequal power relations that have existed since colonisation between indigenous peoples and Eurocentric governments, have revealed the initiation of a powerful commitment to self-determination. Indigenous governance is an integral part of that commitment and encompasses the struggle for recognition of indigenous rights, for recognition of tribal sovereignty, for the protection of indigenous people's rights to land, and for the survival of indigenous

⁵⁷⁴ Te Kotahi Research Institute *He Manawa Whenua Indigenous Research Conference* (Conference Proceedings, University of Waikato, June, 2013). For example, He Manawa Whenua Indigenous Conference is held biannually in New Zealand and is hosted by Te Kotahi Research Institute of the University of Waikato. Professor Linda Tuhiwai Smith described the purpose of the conference in the 2013 inaugural programme. "A place to discuss, to share, and to laugh from the universal bottomless pool of knowledge." The Conference Committee Chair, Dr Leonie Pihama elaborated: "The conference is inspired by a belief that Indigenous knowledge's, sourced within our culture, language, protocols and practices are essential to our wellbeing as Indigenous Peoples. 'He Manawa Whenua' provides us with an understanding of the significance of the source of our knowledge, of flowing from our lands, our mountains, our rivers, our seas."

⁵⁷⁵ Indigenous feminist discourse extends the analysis of gendered power relations to include the impact of colonisation and on-going state oppression. See for example, Joyce Green *Making Space for Indigenous Feminism* (Fernwood Publishing, Winnipeg, 2017). Green compiles further commentary of important issues impacting Indigenous women in an updated series of scholarly and activist writing. Self-determination and decolonisation remain as key themes of resistance and struggle from the 2007 collection. This 2017 edition to take into account extends the discussion to include violence against women and murdered and missing women. Similar anthologies by Indigenous women include Paula Gunn Allen *The Sacred Hoop* (2nd ed, Beacon Press, Boston, 1992), in which Allen explores the disruptive potential in the retelling and reclaiming of traditional female roles. See also: Cheryl Suzack, shari Huhndorf, Jeanne Perreault and Jean Barman *Indigenous women and feminism: Politics, activism, culture* (UBC Press, Vancouver 2011) and Devon Abbott Mihesuah *Indigenous American Women: Decolonization, Empowerment, Activism* (University of Nebraska Press, 2003), for powerful contributions on decolonisation, self-determination and Indigenous women's resistance.

language and culture. I propose that these elements of indigenous governance should be collectively upheld. Winona LaDuke, environmental and political activist, states:⁵⁷⁶

We, collectively find that we are often in the role of the prey, to a predator society, whether for sexual discrimination, exploitation, sterilisation, the absence of control over our bodies, or being the subjects of repressive laws and legislation in which we have no voice. This occurs on an individual level, but equally, and more significantly on a societal level. It is also critical to point out at this time, that most matrilineal societies, in which women primarily control governance and decision-making, have been obliterated from the face of the Earth by colonialism, and subsequently industrialism. The only matrilineal societies, which exist in the world today, are those of Indigenous nations. We are the remaining matrilineal societies, yet we also face obliteration.

I hasten to add that my use of LaDuke's quote is not intended as supporting a proposition that all Native American or First Nations' tribes are matrilineal or matrifocal. That some tribes were matrilineal or matrifocal is significant when acknowledging the powerful positioning of indigenous women within some traditional tribes. However, this thesis acknowledges that there was never one singular experience or tradition that ran across all matrilineal indigenous societies.

This chapter provides a gendered analysis of the broader indigenous issues of self-determination, self-government and indigenous rights. The discussion will privilege women's experiences of colonisation and examines the political and legal imperatives for realising indigenous women's calls for self-determination and participation in self-governance. Furthermore, this chapter examines indigenous women's experiences of discriminatory policies and practices in relation to indigenous governance. To this effect, the focus of this comparative analysis is on the tribal governance institutions of American Indians, Canadian First Nations peoples, and Aotearoa (New Zealand) Māori and to a limited extent, Australian Aboriginal and Torres Strait peoples. I submit that the status of indigenous women

⁵⁷⁶ Winona LaDuke *The Winona LaDuke Reader: A Collection of Essential Writings* (Voyageur Press, Minnesota, 2002) at 213.

in today's society is perilously low as indigenous women continue to be marginalised in all spheres of life and in all sectors of society.

Growing recognition of the rights of indigenous peoples to cultural and political autonomy since the 1970s has exposed the problem of gender imbalance in contemporary tribal leadership. Indigenous women, as previously discussed, share a common colonial reality that has evolved into a dichotomous political identity. For indigenous women, indigeneity or indigenous identity carries with it both a level of inclusion and exclusion. Joyce Green describes indigeneity or indigenous identity as a discourse that constructs gender and sovereignty as political opposites:⁵⁷⁷ colonialism is closely tied to racism and sexism. These twin phenomena exist in the context of colonial society, and have been directed at indigenous people and also internalised by some indigenous political cultures in ways that are oppressive to indigenous women. Some frame liberation as a decolonisation discourse, which draws on traditional culture and political mechanisms. Liberation is conceptualised as entirely indigenous, while also honouring women in their gendered and acculturated contexts. However, indigenous liberation theory, like so many other movements and theories, has not been fully attentive to the gendered way in which colonial oppression and racism function for men and women, or to the inherent and adopted sexism that some communities manifest.

Despite the rapid growth in the literature on indigenous self-determination, indigenous sovereignty and nation-building, research into a gendered perspective of the effects of colonisation on indigenous women and governance has been noticeably absent from the self-determination discourse. How then can indigenous women build on the scholarship of indigenous writers who are united in their views that indigenous justice can only be achieved once the marginalised status of indigenous women is adequately addressed?⁵⁷⁸

⁵⁷⁷ Green above n 570 at 22.

⁵⁷⁸ Michelle Dominy "Maori sovereignty: A feminist invention of tradition" (1990) *Cult Identity Ethn Pac* 237; Ripeka Evans "The negation of powerlessness: Maori feminism, a perspective" (1994) 20(2) *Hecate* 53; Ingrid Huygens "Feminist Attempts at Power Sharing in Aotearoa: Embarrassing Herstory or Significant Learning Towards Treaty-Based

Linda T. Smith has stated that there is an immediate need to understand the complex ways in which people were brought within the imperial system because its impact is still being felt.⁵⁷⁹ Smith speaks of the reach of imperialism into ‘our heads’ and challenges those of us who belong to colonised communities to understand how this has occurred so that we may lay claim to space, to decolonise our minds and recover ourselves.

While there is a limited but growing literature that speaks from an indigenous-gendered or feminist perspective on broader indigenous issues of governance, self-government, self-determination or indigenous rights arising out of indigenous jurisprudence and law, the work of Monture-Angus, Turpel, Napoleon, Lajoie, Green and Sayers amongst others, provide compelling evidence for in-depth research.⁵⁸⁰ Indigenous feminist writer Green and others, ask whether there can be indigenous self-determination or self-government without addressing the internal oppression of indigenous women and how it is maintained in indigenous systems.⁵⁸¹ Furthermore, aboriginal legal scholar Val Napoleon has commented on the idealistic rhetoric that advocates for a return to tradition and the restoration of pre-contact balance once self-government has been established.⁵⁸² Napoleon argues that addressing the marginalisation of aboriginal women is just as important as the

Structures?” (2001) 11(3) *Fem Psychol* 393; Radhika Mohanram “The construction of place: Maori feminism and nationalism in Aotearoa/New Zealand” (1996) 8 *NWSA J* 50; Annette Sykes “Constitutional Reform and Mana Wahine” (1994) 3(2) *RUME* 15.

⁵⁷⁹ Linda T. Smith, above n 265, at 23.

⁵⁸⁰ Patricia Monture-Angus and Mary Ellen Turpel *Thunder in my soul: a Mohawk woman speaks* (Fenwood Publishing, Nova Scotia, 1995); Patricia Monture-Angus “Standing against Canadian Law: Naming omissions of race culture and gender (1998) 2 *Yearbook of New Zealand Jurisprudence* 7; Val Napoleon “Aboriginal self-determination: individual self and collective selves” (2005) 29(2) *Atlantis: Critical Studies in Gender, Culture & Social Justice*; Val Napoleon “Aboriginal discourse: Gender, identity, and community” in Benjamin Richardson, Shin Imai and Kent McNeil (eds) *Indigenous peoples and the law: Comparative and critical perspectives* (Oxford, Portland, 2009) at 233; Law Commission of Canada, Dawnis Kennedy; Andree Lajoie; Ghislain Otis; Ted Palys; Wenona Victor; Paulette Regan and Perry Shawana *Indigenous Legal Traditions* (UBC Press, Vancouver, 2008) ; Joyce Green “Aboriginal Rights in a Neoliberal World” (2008) 42 (2) *Can Dimens* at 22; Judith Sayers; Kelly MacDonald, Jo-Anne Fisk; Melonie Newell; Evelyn George and Wendy Comet *First Nations Women and Governance and the Indian Act: A Collection of Policy Research Reports* (November, 2001).

⁵⁸¹ Green, above n 570 at 20; Cheryl Suzack; Shari Huhndorf; Jeanne Perreault and Jean Barman *Indigenous women and feminism: Politics, activism, culture* (UBC Press, Vancouver, 2010) at 85.

⁵⁸² Napoleon above n 557 at 233.

pursuit of self-determination.⁵⁸³

I submit that while many indigenous women, myself included, can articulate a certain unease about their own experiences of sexism and male chauvinism; few are in a position of sufficient power to effectively counter the inevitable rebukes that suggest, to raise such issues is to hinder progress toward self-determination. Alternatively, it raises the spectre of white feminism, which in its inauthenticity, can be held up as evidence of having ‘sold out’ and of not being ‘traditional’. Activist scholar Andrea Smith states that within the aboriginal discourse in Canada, some argue that it is more important to deal with survival first and that sexism can be addressed later if it still exists. Smith queries this proposition stating that:⁵⁸⁴

Before Native peoples fight for the future of their nations, they must ask themselves who is included in the nation? It is often the case that gender justice is often articulated as being a separate issue from issues of survival for Indigenous peoples. Such an understanding presupposes that we could actually decolonise without addressing sexism, which ignores the fact that it has been precisely through gender violence that we have lost our lands in the first place.

Smith’s point is pivotal to this thesis in that it speaks simply and yet eloquently to all indigenous women if we ask the simple questions: “*How can indigenous people survive if indigenous women do not survive? Who is the self in self-determining if not inclusive of indigenous women?*” We too are the self. Therefore we are entitled, by birthright, to privilege our perspective of indigeneity. Also, I refer here to the whole self as well as to the internal and external self. A self that is free from violence, both discursive and actual. A self that is free from racism, sexism and the excesses of patriarchy and privilege. A self that is free from the violence of others, even when those others are one’s own people, one’s own relatives. Self-determination requires freedom from all of these things including intellectual freedom. The freedom to critique and the freedom to practice indigenous women’s scholarship whether or not you are a woman that identifies as feminist, aboriginal,

⁵⁸³ At 559.

⁵⁸⁴ Andrea Smith “Native American Feminism, Sovereignty, and Social Change” (2005) 31(1) *Feminist Stud* 116 at 121.

indigenous or otherwise. This is what I mean when I talk about the multiple oppressions, i.e. the lived and colonised realities, of indigenous women.

It is apparent that the self-determination discourse has largely pushed indigenous women's issues to the side. Consequently, the resultant need for social justice requires a dual 'decolonising' approach that encompasses both a gendered or feminist analysis of the broader political issues and the contextualisation of 'indigenous women's issues' in a broader analytical political frame. In other words, at both practical and theoretical levels, the work of each approach must inform the other. Without such a dual political strategy, the appalling disconnect between the political rhetoric and the lives of indigenous women will persist.

The issue is how to validate the experience of oppression that women have while at the same time appreciating the agency of indigenous women, as demonstrated by the many ways in which they have survived and continue to survive? In other words, if we focus solely on colonisation, then we dishonour all the ways in which indigenous people have survived – including the lifetimes of decisions and actions that represent agency and resilience.

Untangling the web of complexity that surrounds the experience of Māori and indigenous women is no easy task. Colonisation did not happen overnight. It was not something done 'to us' and nor were we entirely complicit in its doing. The mish-mash of law, policy, culture and tradition is unnerving, and its intricacy and disentanglement can cause as much damage as entanglement did. Linda (Smith) Mead has named indigenous reassertions of sovereignty and self-determination as 'recentering', and as involving a "bringing back into the centre of our reality our world views and using these views as a platform for determining our own lives."⁵⁸⁵

The concept of centre is an important one for indigenous people to claim because of its conceptual significance to the imperial world. Imperial order emanated from a central authority. Culture, intellectual thought and literature all assumed that there was a place from which intellectual and moral

⁵⁸⁵ Linda Tuhiwai Mead "Nga Aho o Te Kakahu Matauranga: the Multiple Layers of Struggle by Maori in Education" (Doctoral Dissertation, University of Auckland, 1996) at 65.

superiority sprang and to which it constantly returned. Recentring is a process which not only claims back what has been appropriated but reconnects, reconstructs, repositions and reorders Maori language, knowledge and culture. This can be framed as a reclaiming of authenticity which does not, in my view, mean a return to the traditional world, nor is it a complete rejection of everything gained under colonialism. Rather, authenticity is about emancipation, it is about being able to define who we are, what we are and being able to live as we choose.

In my view, Māori and indigenous women occupy a number of important intersections that are analogous to Mead's concept of centring. At one level, there exists the intersection between Māori men and women, and the issues associated with Māori women working with and between whānau and community (hapū). Māori women live in this intersection and have to make sense of it in order to live. At another level, there is the intersection between 'past' (being traditional and pre-colonial) and the ways that Māori women choose to work today. Linda T. Smith refers to the whānau as a significant site of struggle for Māori women. It is at this intersection that social relations are struggled over and rules of practice established. I have taken this concept further to mean that Māori women 'navigate' these spaces so as to more readily occupy a particular intersection for an indeterminate time or kaupapa, thus providing the 'glue' required for that space and time. In my view, if we as women place ourselves at these intersections, then it is because we have a clear line of sight in all directions. This is not to say that indigenous women are utterly powerless or lack agency. Kimberlé Crenshaw, a critical race theorist, coined the term 'intersectionality' to explain how the category of 'Woman' denotes a universal and homogenising experience. Conversely, intersectional identities, that acknowledge the multiple systems of oppression based on race, class and gender, negatively impact women of colour.⁵⁸⁶ Extended to indigenous women, intersectionality provides a way of framing their circumstances in the struggle against oppression.

Within a liberal democracy, liberal means equal and implies non-violence. In a just

⁵⁸⁶ Kimberle Williams Crenshaw "Twenty Years of Critical Race Theory: Looking Back To Move Forward" (2011) 43 Connecticut Law Review 1253.

society, it requires a conversation of power and power sharing. It raises the issues that are important to indigenous peoples and women such as the right to cultural and political autonomy; sovereignty and self-determination. It also includes the inherent legal and moral right to self-government. These are rights that should in their contemporary form progress the elimination of sexism and endorse gender equality. Put simply: there is a need to decolonise and transform governance structures if they are to include indigenous women in the legitimate struggle for self-determination. This approach is intended to illustrate the scale of the problem of the lack of a gender balance in contemporary indigenous governance as a reflection of the societies within which we live. In the same way, I compare and contrast the perspective of other indigenous women and men that honour their struggle in their writings. Collectively the themes cause me to reflect on how the intersections of race, gender and class position us in conflicted spaces that require us to be vigilant. First among these themes is the rejection of white feminism. Andrea Smith contends that white feminism limits indigenous women to a politics of inclusion that presumes that white women define feminism.⁵⁸⁷

The indigenous literature is emphatic that white feminism cannot articulate an indigenous agenda which is simultaneously collective and individual, colonial and anti-colonial, colonised and decolonised. Linda T. Smith reminds us that colonialism is a gendered process:⁵⁸⁸

The process of en-gendering descriptions of the other has had very real consequences for Indigenous women in that the ways in which Indigenous women were described, objectified and represented by Europeans in the nineteenth century has left a legacy of marginalisation within Indigenous societies as much as within the colonising society.

Indigenous feminism challenges the effects of colonialism, patriarchy and inequality. Wesley-Esquimaux clarifies how patriarchal values were instilled through Christian missionisation that became internalised within native

⁵⁸⁷ Smith, above n 561.

⁵⁸⁸ See Linda T. Smith, above n 265, at 48.

communities, through white and then indigenous religious functionaries.⁵⁸⁹ Also, Kim Anderson explains how the Indian Act supplanted traditional roles for women in tribal governance with electoral systems that prevented women from seeking to vote or seeking to stand as a representative.⁵⁹⁰ Haunani-Kay Trask describes the impact of colonialism and the military overthrow of indigenous Hawaiians, stating that American feminism is out of place in Hawaii geographically, culturally and historically. Self-determination has therefore never been the goal of feminism. In contrast, the native Hawaiian feminist movement is based wholly on ameliorating their historical subjugation and loss of sovereignty.⁵⁹¹

For indigenous women the discourse and language of decolonisation is about social justice, healing and reclamation. Indigenous feminist scholarship is expanding the critical importance of the indigenous justice debate. Indigenous women's oral histories, narratives and experiences of colonialism are inherent in the gendering of issues arising from the contemporary gender relations between indigenous men and women. As Makere Stewart Harawira has stated, in today's post-colonial society indigenous women's roles are frequently presented as being secondary to those of indigenous men, despite the knowledge that indigenous women held powerful leadership roles in traditional tribal societies.⁵⁹² Examining the intersection of domination between indigenous men and women reveals the destructive impact that colonisation has had and continues to have on contemporary indigenous gender relations. In short, struggle is synonymous with indigenous reclamations of space in traditional and contemporary political, social and legal contexts. '*Ka whawhai tonu mātou, ake ake ake*' literally means 'The struggle without end' and is attributed

⁵⁸⁹ Cynthia Wesley-Esquimaux "Trauma to Resilience: Notes on Decolonisation" in Gail Guthrie Valaskakis, Madelieine Dion Stout, and Eric Guimond (eds) *Restoring the Balance: First Nations Women, Community and Culture* (University of Manitoba Press, Manitoba, 2009) at 72.

⁵⁹⁰ Kim Anderson "Leading by Action: Female Chiefs and the Political Landscape" in Gail Guthrie Valaskakis, Madelieine Dion Stout, and Eric Guimond (eds) *Restoring the Balance: First Nations Women, Community and Culture* (University of Manitoba Press, Manitoba, 2009) at 100.

⁵⁹¹ Haunani-Kay Trask *From a native daughter colonialism and sovereignty in Hawai'i* (Rev ed, University of Hawai'i Press, Honolulu, 1999) at 910.

⁵⁹² Makere Stewart-Harawira "Practicing indigenous feminism: Resistance to imperialism" in Joyce Green (ed) *Making Space for Aboriginal Feminism* (Zed Books, London, 2007) at 24.

to the 19th century Māori Leader, Rewi Maniapoto who prophesized that Māori people would struggle forever against colonialism.⁵⁹³ In this day and age his words have a different meaning and are viewed as a challenge to Māori to strive for social justice.

In Aotearoa (New Zealand), Canada, and the United States and to some extent Australia, a range of iwi/nation/tribes have established governance arrangements to administer resources from treaty settlements, reparations, economic development projects and devolution of government services for the benefit of their tribal members. In an era of increasing self-governance and self-determination, there is a growing demand for tribal entities to address gender inequality by ensuring that indigenous women enjoy full participation in tribal leadership and decision-making. Having said this, some serious jurisdictional hurdles remain to be addressed, overcome or at the very least acknowledged. This is not to suggest that responsibility lies with indigenous peoples alone. Nevertheless, assuming responsibility for the self-determination of their peoples in my view makes tribes accountable to all of their individual and collective constituents. I reiterate the point that colonisation was a brutal process of dispossession. What is impossible to ignore is the on-going dispossession of indigenous women's rights and freedom including the right to self-determination as a result. We simply cannot address one without addressing the other.

Māori Women Speak

In 2017, Paterson and Wanhalla released a compilation of first person writings written by Māori women during early colonial times.⁵⁹⁴ *He Reo Wahine – Māori Women's Voices from the Nineteenth Century* portrays the writings of Māori women whose primary focus was on how mana wahine publicly manifested, or how women lived their lives within the constraints and opportunities of colonialism.

⁵⁹³ Ranginui Walker *Struggle without end. Ka whawhai tonu matou* (Rev ed, Penguin Books, Auckland, 1990).

⁵⁹⁴ Lachy Paterson and Angela Wanhalla *He Reo Wahine: Maori Women's Voices from the Nineteenth Century* (Auckland University Press, Auckland, 2017). This collection includes 52 examples from Maori women, ranging from waiata to letters, reminiscences and testimony before government enquiries in te reo Maori with English translations.

Māori women wrote about their lives and the matters that impacted them and their whānau. They appeared before commissions of enquiry, gave evidence in court cases, asserted their land rights before the Native Land Court and sought the ear of the Governor in disputes of importance. They also exercised political power and mana, with some individual women operating on an equal footing with men.⁵⁹⁵ An example of the political involvement of Māori women can be seen in 1869 when a runanga of Ngati Maru women wrote to Governor Bowen regarding a dispute over the foreshore:⁵⁹⁶

[newspaper translation]

Waiotaha, August 5, 1869.

Friend the Govenor, good man or bad man, greeting. It was supposed that you would be kindly towards the people of Hauraki (Thames), that is to say, your kindness to consist in this to leave with ourselves the arrangements about our own pieces of land that you should not grasp without cause both the land and the sea. Let there be no interference on your part with our lands on the sea (beach). ‘Thou shalt not steal.’ Do not you Europeans steal our land, but honour your children, because you said that our interests should be one. I, the child, consented to this but you, with your many thoughts, you the father, are moving backward [i.e. breaking your pledges]. There is a fish in the sea, the lobster: when it comes out of its cave it crawls backwards. This is a question. Is it your Queen, or does this purpose emanate from you [i.e., taking possession of the beaches on the sea shore at the Thames]? It was imagined that you would kill men only, but you are killing both the men and the land. Alas, my lands are divided, whilst I still live, and the solitary ones of the land have not been destroyed! Alas, the affliction! Sufficient. From the council of women at Hauraki (Thames). – (Signed) MARAEA PUREWA, MIRIAMA KONEHU, MATA PARAONE, HERA APERAHAMA, MATA TE KURA, HERA PAREMATAITI, and the whole of us.

Expressed eloquently in this letter was the women’s frustration with what they saw

⁵⁹⁵ At 4.

⁵⁹⁶ At 159.

as a clear infringement on their rights. Traditionally, Māori women were known to have championed the rights of the tribe and to have their say in tribal affairs. These occasions were not well documented, however women's runanga were known to operate.⁵⁹⁷ Perhaps this lack of documentation occurred because Pākehā officials were more inclined to documenting the affairs pertaining to the men whom they assumed were the decision-makers. Also in this example, the women appear highly politicised and able to discern the relationship between the Queen and her representative the Governor. They appear to refer to the Treaty of Waitangi "*you said that our interest should be one...*" the implication being, that the Governor is going back on the agreement that these women had struck with the Queen.

Historian Vincent O'Malley notes that Māori women's komiti (committees) flourished in the last decade of the nineteenth century in response to a changing geopolitical landscape.⁵⁹⁸ The old mechanisms of tribal governance – rūnanga, or tribal assemblies – were reinvented in ways that made them more appropriate to the altered geopolitical landscape, and entirely new institutions, committee, derived from European society, were adopted, adapted, and realigned to suit Māori priorities. Throughout the 19th century, Māori thus responded to colonisation in creative, flexible, and dynamic ways. Colonial officials, in turn, responded by periodically seeking to harness these evolving political institutions as instruments of indirect rule, but in many instances, the government-sanctioned bodies established for these purposes were reappropriated by the Māori for their own ends. The resulting system was one in which Māori exercised considerable agency yet were ultimately (and undeniably) victims in certain respects, following a process of cultural fusion, entwinement, and engagement in which indigenous and exotic influences were constantly in evidence.

Unsurprisingly men continued to dominate in these new governance structures however, women exercised a level of influence. Women of rank actively petitioned

⁵⁹⁷ See: At 159. It is known that a male runanga from the same tribe also wrote to government to assert that they have never given up the foreshore. Patterson and Wanhalla state that it would appear that the groups had taken a dual approach in their submissions to the Governor.

⁵⁹⁸ Vincent O'Malley "Reinventing Tribal Mechanisms of Governance: The Emergence of Maori Runanga and Komiti in New Zealand before 1900" (2009) 56 *Ethnohistory* 69 at 70.

the Government on land rights and advocated for women's suffrage achieving this in 1893.⁵⁹⁹ Ironically, Māori women only achieved the right to stand in their own parliament, the Kotahitanga movement, in 1897, four years after they had achieved the vote in Aotearoa (New Zealand's) parliament alongside Pākehā women.⁶⁰⁰ This achievement is attributed to Meri Te Tai Mangakākāhia, and to Akenihi Tomoana who supported her stand before the Chiefs at Te Waipatu, Hawke's Bay in 1893. Angela Ballara notes that Māori women were attempting to contribute to the unity that the tribes were seeking under Kotahitanga. Māori women had signed the Treaty of Waitangi in 1840 and were just as concerned as their male counterparts of the growing Pākehā dominance over their lands and in the face diminishing Māori authority. Meri Mangakahia makes it evident that she and others were concerned for what they saw as the men's ongoing failure.⁶⁰¹

There are many male chiefs of the country who have appealed to the Queen about the ills afflicting us, but we have not been relieved on account of their appeals. Therefore I ask this house that women may stand.

It may be best to do the following, that the women members appeal to the Queen about the ills afflicting us and our lands, and perhaps the Queen will agree to the appeal of her Māori women friends because she herself is a woman.

A large body of work exists that provides evidence of Māori women's political leadership during the nineteenth century.⁶⁰² Ballara suggests that the invisibility of

⁵⁹⁹ At 71. These women included Meri Mangakākāhia of Te Rarawa, Niniwa-i-te-rangi of Ngāti Kahungunum Takarea Te Heu heu of Ngāti Tuūwharetoa and Sophia Hērangi of Tūhourangi. Within the King movement, Te Peua Herangi emerged as one of the great Māori leaders of the first half of the 20th century.

⁶⁰⁰ See generally Tania Rei *Maori women and the vote* (Huia Publishers, Wellington, 1993).

⁶⁰¹ Paterson and Wanhalla, above n 571, at 173.

⁶⁰² See for example Judith Binney "Some observations on the status of Maori women" (1989) 23 *New Zealand Journal of History* 22; Judith F Binney and Gillian Chaplin *The survivors - Ngā Mōrehu* (Auckland University Press, Auckland, NZ, 1996); Barbara Brookes *A History of New Zealand Women* (Bridget Williams Books, 2016); Angela Ballara "Wahine Rangatira - Māori Women of rank and their role in the Women's Kotahitanga Movement of the 1890's" (1993) 27(2) *New Zealand Journal of History* 127; Patricia Grimshaw "Settler Anxieties, Indigenous Peoples, and Women's Suffrage in the Colonies of Australia, New Zealand, and Hawai'i, 1888 to 1902" (2000) 69(4) *Pacific*

Māori women's representation in early Māori governance can be explained due to the lack of research in this area. Māori political activity was isolated from Pākehā colonial society and functioned entirely in te reo Māori thus Māori sources for women's activities were limited to publications in their own Māori language newspapers. Few Pākehā had either the inclination or knowledge of te reo Māori such that they would read these publications or comment on Māori women's contributions to tribal political activity. Where collections of Māori women's writings did exist, Ballara states they were often deposited in institutions, regarded as tapu or were burnt or buried as part of funeral customs on the death of the writer.⁶⁰³ Few of these historical accounts have reached the history books in a manner that provides a meaningful account of traditional Māori women's governance. It was mainly Māori men who assumed traditional roles of leadership, therefore, it was they who were sought after by Pākehā colonial officials to seek their engagement with the colonial government. Thus it is the men's voices that dominate in the archives. What historical records do exist however supports the fact that Māori women were just as concerned as their male counterparts about the issues confronting their whānau, hapū and iwi including the colonising realities of settler encroachment, land loss and political marginalisation.

Māori engagement with the colonial world privileged the status of men over women as reflected by white patriarchal settler society. It was not just that Māori men were apparently seduced by a political system that privileged men over women, but that the patriarchal power structure inherent within colonialism was overlaid and integrated with Māori society destroying the fabric of traditional gender complementary roles.⁶⁰⁴

In 2005, Māori legal academic Kerensa Johnston broached the use of international human rights instruments to address discriminatory practices in Aotearoa (New

Historical Review 553; Patricia Grimshaw *Women's suffrage in New Zealand* (Auckland University Press, 2013).

⁶⁰³ Ballara, above n 579, at 128.

⁶⁰⁴ See generally Linda T. Smith "Maori Women: Discourses, projects and Mana Wahine" in *Women and education in Aotearoa* (2nd ed, Bridget Williams Books, Wellington, NZ, 1992); Kathie Irwin "Towards theories of Maori feminism" in *Feminist Voices: Womens Studies Texts for Aotearoa* (Oxford University Press, Auckland, NZ, 1992); Ngahuia Te Awekotuku *Mana wahine Maori* (New Women's Press, Auckland, 1991).

Zealand).⁶⁰⁵ Johnston examined the situation of Māori women who she states experience both internal and external discrimination, and the denial of ‘mana wahine’. Citing individual cases of discrimination in State appointment processes, Johnston pointed out how tikanga (Māori customary practices and principles) were used as justification to discriminate against Māori women in State institutions. Johnston states:⁶⁰⁶

... 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.

Furthermore, Johnston contends that external discrimination is perpetuated against Māori women by the State:⁶⁰⁷

The political marginalisation of Māori women has led to the marginalisation of Māori women's interests generally and contributes to the discriminatory laws and practices Māori women continue to face in New Zealand.

Māori women’s resistance to discriminatory policies and practice whether internal or external continues. An example of external discrimination was the 1993 Mana Wahine Claim made to the Waitangi Tribunal. Leaders within the Māori Women’s Welfare League who brought the claim argued that since the signing of the Treaty of Waitangi in 1840, Māori women have been deprived of their spiritual, cultural and economic well-being which should have been protected by the Treaty. They sought redress for 150 years of systematic discrimination against Māori women through Crown actions and policies. In 2019, the Mana Wahine Claim 2700 is due to be heard before the Waitangi Tribunal, almost thirty years after it was first brought to the Waitangi Tribunal. I provide an analysis of the Mana Wahine

⁶⁰⁵ Kerensa Johnston “Discrimination, the state and Maori women: An analysis of international human rights law and the convention on the elimination of all forms of discrimination against women” (2005) 8(2) Yearb N Z Jurisprud 31 at 26.

⁶⁰⁶ At 26.

⁶⁰⁷ At 26.

submissions as a case study and contribution facet of the analysis of this research.⁶⁰⁸

The reconciliation of historical grievances through Treaty settlements is the one avenue through which iwi are pursuing self-governance opportunities to achieve self-determination. While previous research has concentrated on the settlement negotiation processes and the form that settlement takes, little attention has been given to the issue of gender bias at all stages of the process.

In Aotearoa (New Zealand), the Treaty settlement process is undeniably, gendered.⁶⁰⁹ Seuffert asserts:⁶¹⁰

In Aotearoa New Zealand, claims by Indigenous Māori activists for self-determination and redress of historical injustices spurred the emergence of alternative imagined communities with the potential to transform the nation. These alternative visions for the nation were shaped and limited by the economic law and policy reform of structural adjustment, producing a new official nationalism of partnership, implemented in settlements of breaches of the Treaty of Waitangi 1840. These partnerships resulted in a new individual identity of Māori men as entrepreneurs in a competitive nation. It produced a symbolic alliance of men across race that silenced and erased Māori activists' demands, and the leadership of Māori women, at the national level. The high profile partnerships, the erasure of Māori women, and relentless media attention to claims of sexism in Māori culture reproduced colonial tropes with images of the "progress" of the partnerships "saving" brown women from the sexism of brown men and "traditional" cultures. In this complex process, the settlements were rational exercises of agency by the new Māori entrepreneurs with the goal of achieving economic autonomy, and worked to silence and

⁶⁰⁸ In 2015 the Waitangi Tribunal introduced a programme for hearing kaupapa (thematic) inquiries which were to deal with nationally significant issues affecting Māori as a whole. Set down as part of the programme is the new Mana Wahine and Mana Tane claim. As yet,
⁶⁰⁹ See generally Ani Mikaere "Settlement of Treaty Claims: Full and Final or Fatally Flawed?" (1997) 17 NZULR 425; Stephanie Milroy "The Maori Fishing Settlement and the Loss of Rangatiratanga" (2000) 8 Waikato L Rev 63; Nan Seuffert "Nation as Partnership: Law, 'Race,' and Gender in Aotearoa New Zealand's Treaty Settlements" (2005) 39 Law & society review 485.

⁶¹⁰ Seuffert, above n 586, at 485.

erase the leadership of Māori women at the national level, even while women continued to be recognised as leaders at the local and regional levels.

In the same way, aboriginal women in Canada have been legally discriminated against, for well over a century by the sexist tradition of hereditary chiefs, and that was enshrined in the Indian Act of 1876.⁶¹¹ Until the passage of Bill C-31 in 1985, section 12(1)(b) of the Indian Act deprived women of their Indian status upon marriage to a non-Indian man. Conversely, Indian men were entitled to bestow status on their non-Indian wives. According to Suzack, machinations of the Indian Act and especially the discriminatory gender, sections have had far-reaching social, political, cultural and political effects on aboriginal women. Suzack states that:⁶¹²

Its dehumanising outcomes are visible in its gendered and racialized status categories and in its continuing disempowerment of Aboriginal women. This disempowerment has taken the form of ongoing political distress and obstructed political possibility.

However, identity confusion for aboriginal women from the repeal of section 12 (1) (b) has not been remedied by the introduction of Bill C-3.⁶¹³ The amendments have failed to rectify the discriminatory provisions of the Act, which now requires women to negotiate the legal meanings of ‘status’, as defined by the federal government and ‘membership’, as defined by the Band.⁶¹⁴

The challenge of this situation has further entrenched systemic discrimination and internal oppression creating a culture of instability, vulnerability and the dehumanisation of native women. As a result, a raft of legal challenges have been brought by aboriginal women forced to prove their identity, kinship ties and their

⁶¹¹ Indian Act RSC 1985 c1-5, s12(1)(b) repealed by Bill C-31.

⁶¹² Cheryl Suzack “Emotion before the Law” [2010] Indig Women Fem Polit Act Cult 126 at 129.

⁶¹³ Introduced in 1985, Bill C-31 intended to bring the Indian Act in line with the gender equality requirements of the Canadian Charter of Rights and Freedoms. It is an Act to promote gender equity in Indian registration as a response to the Court of Appeal for British Columbia decision in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*.

⁶¹⁴ See *Sanderson v. the Queen* (Registrar, Indian and Northern Affairs), 2002 MBQB 239 (CanL11).

aboriginal rights as First Peoples.⁶¹⁵ Furthermore, the need for a comprehensive response to the endemic issue of discrimination and violence perpetrated by indigenous and non-indigenous men on indigenous women in Canada had gone unheeded by the Canadian Government prompting an international response from Amnesty International.

In 2004, Amnesty International released the report *Stolen sisters: A human rights response to discrimination and violence against indigenous women in Canada*.⁶¹⁶ The report detailed not only the level of violence experienced by indigenous women but also the magnitude of discrimination directed toward them. The report highlighted that according to a 1996 Canadian government statistic, indigenous women between the ages of 25 and 44 with status under the Federal Indian Act were five times more likely than all other women of the same age to die as the result of violence.⁶¹⁷ The Canadian government has continued to report on these tragic circumstances as the incidents of missing and murdered women and girls continues to rise, seemingly unabated. In May 2014, the RCMP (Royal Canadian Mounted Police) released its report: *Missing and Murdered Aboriginal Women: A National Operational Overview* that draws on data from all police jurisdictions across Canada.⁶¹⁸ While Amnesty International has welcomed the report it also highlights a growing disproportional level of violence against First Nations, Inuit and Métis women and girls.⁶¹⁹ Beginning in September 2016, a national inquiry was called into missing and murdered indigenous women and girls. The inquiry reported in June 2019 and brings a fundamental understanding of the dire truths impacting the

⁶¹⁵ See generally Bonita Lawrence *“Real” Indians and others: mixed-blood urban Native peoples and indigenous nationhood* (University of Nebraska Press, 2004); Joan Holmes *Bill C-31, equality or disparity? The effect of the new Indian Act on native women* (Canadian Advisory Council on the Status of Women 1987); Sharon Venne *Indian Acts and Amendments 1868-1975 An Indexed Collection* (University of Saskatchewan Native Law Centre, Canada, 1981).

⁶¹⁶ Amnesty International *Stolen Sisters* (Amnesty International, 2004).

⁶¹⁷ At 14.

⁶¹⁸ Royal Canadian Mounted Police “Missing and Murdered Aboriginal Women: 2015 Update to the National Operational Overview” (May, 2015) Royal Canadian Mounted Police <rcmp-grc-gc.ca/en>.

⁶¹⁹ Jackie Hansen “Beyond the National Inquiry: the need for concrete action to end violence against Indigenous women, girls, and two-spirit people in Canada. (21 June 2019) No More Stolen Sisters <amnesty.ca>.

lives of indigeneous women.⁶²⁰ In summary, the report examines the systematic causes of all forms of violence against indigenous women and girls, including sexual violence. The two volume report calls for transformative legal and social changes to resolve the crisis of violence toward women girls and 2SLGBTQQIA people. Of significance is the reports call to adress and end “deliberate race, identity and gender-based genocide”⁶²¹. Chief Commissioner Marion Buller proclaims:⁶²²

The violence against indigenous women, girls, and 2SLGBTQQIA people is a national tragedy of epic proportion.... As a nation, we fae a crisis: regardless of which number of missing and murdered Indigenous women and girls is cited the number is too great. The continuing murders, disappearances and violence prove that this crisis has escalated to a national emergency that calls for timely and effective responses.

Similar deleterious historical experiences have resulted in issues of growing violence against Native American women and girls. In the United States, Native American women continue to be constrained by the patriarchal gender norms of the Indian Reorganisation Act (IRA) 1934. In stark contrast to past American Indian policy, the Act allowed a partial restoration of tribal integrity enabling tribal governments to reorganise in anticipation of eventual self-governance. However, according to Tom Holm, tribal structures and traditional leaders were ignored and were replaced by majority rule at the insistence of the federal government and the instigation of the Bureau of Indian Affairs under the IRA. Holm explains:⁶²³

In the United States, most Indian governments have written constitutions based on the American ideals of representative democracy. The powers and duties of elected tribal officers correspond to the functions of national, state, and local administrators, managers and legislators. Under the constitutions tribal authority is vested in legislative, executive, and oftentimes, judicial

⁶²⁰ National Inquiry into Missing and Murdered Indigenous Women and Girls “Reclaiming Power and Place” the Final Report of the National Inquiry into Missing an Murdered Indigenous women and Girls ” (June 2019)

⁶²¹ At 5.

⁶²² At 5.

⁶²³ Tom Holm “The crisis in tribal government” in Vine Deloria Jnr (ed) *Am Indian Policy 20th Century 1985* (University of Oklahoma Press, Oklahoma, 1985) 135 at 135.

branches of government. To many non-Indians steeped in the European tradition this system, while not perfect, is at least equitable because it places political power in the hands of individuals who have received the approval of the majority of the electorate. To many Indian people, especially those who know their traditional tribal value systems, democratic elections more often than not create artificial elites who then rule more or less in an arbitrary manner.

Holm adds that authority in modern tribal governments is vested in certain positions within the tribal political system. The people elected to those positions then assume the power of the office within the context of the tribal constitution.⁶²⁴ Indigenous feminist scholars, however, challenge the eurocentric basis for this form of government. They assert that it ignores traditional values that, prior to colonisation, ascribed complementary gender roles of leadership to women. Tribal governments merely replicate the amalgamation of white male power into tribal councils. For Indian men, white male power is the exemplar derived from the native experience of colonialism. It is inextricably linked to federal government policy and law that instituted amongst other things Indian boarding schools in both Canada and the United States. As traumatic as the boarding school experience was for Indian children, their sole purpose was to socialise children to believe in patriarchal gender norms.

In her work on tribal nationalism and gender, indigenous academic Renya Ramirez consolidates the critique of indigenous feminists, amongst others, of the need for tribal nations to... “develop a Native feminist consciousness based on the assumption that struggles for social autonomy will no longer include the denial of Native women’s gendered concerns and rights”.⁶²⁵ Ultimately, Ramirez concludes that there is an assumption that liberation from colonialism can come from tribal nationalism and that issues of gender are secondary. Ramirez and others challenge this stating that the consolidation of male power in tribal councils can encourage tribal governments to ignore gendered violence by not developing tribal laws that

⁶²⁴ At 136.

⁶²⁵ Renya K Ramirez “Race, tribal nation, and gender: A native feminist approach to belonging” (2007) 7(2) *Meridians Fem Race Transnationalism* 22 at 26.

protect indigenous women from violence.

When describing the multiple oppressions experienced by indigenous women, a level of cognitive dissonance is discernible. There is a tendency to focus on indigenous women as victims, examples of which are evident in the deficit-based literature and the disturbing statistics. Nevertheless, indigenous women are nothing if not resilient, exercising both collective and individual agency while simultaneously negotiating the demands of a dominant white culture with indigenous cultures. Each culture has different values and priorities, and involves a juggling act between the desire to uphold collective traditional values versus individualism, and competitiveness and the accumulation of property and prestige.

The challenge for us is to validate the oppression experienced while at the same time, acknowledging the agency of indigenous women in which they have survived and continue to thrive. Professor Mason Durie, a Māori scholar, has termed this ‘indigenous resilience’, which he defines as:⁶²⁶

Superimposed on adversity and historic marginalisation, Indigenous resilience is a reflection of an innate determination by Indigenous peoples to succeed. Resilience is the polar opposite of rigidity. It provides an alternate perspective to the more usual scenarios that emphasise Indigenous disadvantage and allows the Indigenous challenge to be reconfigured as a search for success rather than an explanation for failure.

The gendered legal and political context within which indigenous governance operates, gives rise to culturally hegemonic practices that are equal to the on-going operation of colonisation and the oppression of indigenous women.

Despite the many barriers to inclusion however, significant strides have been made to adjust, decolonise and disrupt discrimination and violence against women in both indigenous and non-indigenous spaces. Indigenous women continue to empower themselves with the establishment of their own networks and organisations in

⁶²⁶ Mason Durie, “Indigenous Resilience: from disease to disadvantage to the realisation of potential” (unpublished conference paper, Pacific Region Indigenous Doctors Congress, Rotorua, New Zealand, 7 December 2006) at 4.

addition to making inroads into male-oriented and male-dominated contexts.⁶²⁷

In this thesis, I argue that colonisation has reshaped indigenous politics and governance derived from dominant colonial ideologies of race, class and gender. Where once indigenous peoples' lives were characterised by culture and traditions drawn from a close connection with the natural world, more and more these days their lives are determined by political regimes that reshape and manipulate their own lives. In reality, much of this reshaping continues to be done by our own people under the guise of traditional practices that have imbibed western patriarchal values. The importation of a western belief system that upheld gender hierarchies of supremacy and oppression have served to validate the same oppressive structures within indigenous governance where once traditional gender-complementary kinship values held sway. Consequently, modern Māori indigenous governance structures reflect a gender binary derived from western patriarchal practices that are disempowering of indigenous women, as demonstrated in their positioning within tribal structures.

For Māori women, Ani Mikaere, amongst others, sought to make sense of the everyday lives of Māori women and while indigenous women's scholarship has grown substantially since the 1990s, the everyday status of indigenous women has not vastly improved.⁶²⁸ Mikaere challenges us with the knowledge of the destructive force of colonisation on our understandings of balance in the traditional way. Tikanga Māori or Māori law include spiritual beliefs, cultural traditions, and practices derived from a unique indigenous knowledge system that presupposed the existence of balance within whānau, hapū and iwi as well as between men and women. This notion of balance was sourced from Māori cosmogony, which was underpinned by the relationality between the different realms, and the different gods

⁶²⁷ See generally Gail Guthrie Valaskakis, Madeleine Dion Stout and Éric Guimond *Restoring the balance* (University of Manitoba Press, Winnipeg, 2009); Rauna Kuokkanen "Indigenous Economies, Theories of Subsistence, and Women: Exploring the Social Economy Model for Indigenous Governance" (2011) 35 *American Indian Quarterly* 215; Joyce Green "Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government" (1992) 4 *Const F* 110; Cheryl Suzack and others *Indigenous women and feminism: Politics, activism, culture* (UBC Press, 2011).

⁶²⁸ Annabell Mikaere *The Balance Destroyed* (Ōtaki Aotearoa: Te Tāupu, Te Wananga o Raukawa, 2017).

(atua) that inhabited the spiritual realm through to the realm of the living, of men and women. Ani Mikaere states that “[t]he charter for Māori life was laid down in Māori cosmogony, which established the centrality of female sexuality and reproductive capabilities in the creation of the world”.⁶²⁹

In Māori tradition, we look backward in order to move towards the future, using the lessons of the past to inform our journey. The process of revealing the role of Māori women requires stripping back the layers of colonisation to reveal a single point of truth. While it is beyond the scope of this thesis to discuss fully the traditional role that Māori women played prior to colonisation, the ways in which Māori women participated in tribal governance and law is discernible from a variety of sources including Māori oral, spiritual and legal traditions that are reflected in tikanga Māori.

Mikaere describes the essence of cosmological representations of Māori women as a starting point for articulating the role of Māori women in pre-contact government, law, administration and justice. In her unprecedented work, Mikaere discusses the centrality of balance whereby men and women’s roles were viewed as complementary and essential in the practice of cultural norms and values. Emanating from the cosmological order which revered the female presence, Māori philosophical thought highlights women’s importance in the transmission of knowledge and wisdom. In a review of the female deities, Mikaere exemplified the powerful positioning of the feminine ethic positing that mankind derives from Papatuanuku earth mother.

The diminishing feminine ethic in Māori leadership is mirrored around the indigenous world. Indigenous women have struggled to retain sovereignty and preserve their land, language and cultures. Māori women, as tribal leaders, have continually challenged governments and tribal authorities to articulate and reform policies for the benefit of their communities. The works of Paula Allen Gunn and others, have examined the traditional gender roles and responsibilities of the native woman in the form that these responsibilities were “firmly rooted in her spirituality,

⁶²⁹ At 226.

extended family and tribe”.⁶³⁰

The principle of ‘balance’ was fundamental to these systems and ensured the survival of ancient indigenous societies. Balance pertained equally to the maintenance of the relationship between people and the ecological order, as well as to the balance between men and women.

For example, Powers argues that prior to Spanish arrival, gender parallelism and gender complementarity were the central organising principles of ancient Mesoamerican and Andean societies that pre-dated the Aztecs and Incas.⁶³¹ Gender parallelism was the practice of women and men operating in two separate but equivalent sectors, each gender entirely autonomous within in its own sphere. Gender complementarity required that gender roles, whether performed by men or women, ensured the successful operation and ultimate survival of society. Furthermore women’s roles were never deemed subordinate to those of men. Instead, both women’s and men’s contributions were equally valued, considered essential to one another and to the whole of society.

With gender complementarity came the understanding of the female and male principles. Gunn Allen explains that in American Indian culture, traditions pertaining to the ‘sacred hoop’ required balance between the two elements. Women’s traditions are centred on continuance while mens traditions are centred on transitoriness. He is what comes and goes while she is what endures.⁶³² The Cheyenne speak of this as the redemptive and enduring power of women when they say that the people are not broken until the heart of its women is on the ground. Then they are broken. Then they will die.⁶³³ Allen’s offering prophetically aligns itself with an indigenous understanding of the role, significance and status of all indigenous women, which is, while our women continue to survive, indigenous people are also fated to continue. According to Allen, traditional tribal lifestyles are

⁶³⁰ Paula Gunn Allen *The Sacred Hoop* (2nd ed, Beacon Press, Boston, 1992); Gail Guthrie Valaskakis, Madeleine Dion Stout and Éric Guimond *Restoring the balance* (University of Manitoba Press, Winnipeg, 2009); Mikaere above n 599.

⁶³¹ Karen Vieira Powers *Women in the Crucible of Conquest: The Gendered Genesis of Spanish American Society, 1500-1600* (UNM Press, Albuquerque, 2005) at 187.

⁶³² Allen above n 601 at 167.

⁶³³ At 167.

more often gynocratic than not, and they are never patriarchal. These features make understanding tribal cultures essential to all responsible activists who seek life-affirming social change that can result in a real decrease in human and planetary destruction, and in a real increase in the quality of life.

Traditional indigenous governance systems have been seriously undermined as a result of colonisation, and today the prospects of practising those systems of governance, based as they were on traditional concepts of law, economies and governance are seriously limited. It is within traditional concepts of law, such as tikanga Māori, that Māori women have an expectation of participating in tribal governance, just as other indigenous women do.

Summary

What this thesis espouses is the notion that contemporary indigenous governance models do little to reflect traditional systems in which women were included as essential decision-makers and /or leaders. While it is true that contemporary indigenous governance models differ widely, there is enough evidence to suggest that the premise stands and that indigenous women have been and continue to be ‘grayscaled’ from modern tribal institutions of leadership. I introduce this theme of grayscaling or invisibility to reflect the idea that while indigenous women are present and active within their nations, tribes and communities, fewer women than men can be observed in senior leadership roles as tribal chairpersons or tribal chiefs. Thus the issue is one of ‘positioning’ or indeed, the lack thereof.

Finally, this chapter draws attention to the need to reassess indigenous governance with a view to addressing the indigenous collective and individual rights of indigenous women. The issue of indigenous rights, sovereignty and self-determination impact the lives and lived experiences of so many indigenous women around the world. At a time when indigenous people’s rights have gained greater recognition and a voice in international forums that indigenous women continue to face a crisis of violence, abuse and discrimination in violation of their human and indigenous rights.

Chapter 6 – Indigenous Women and Contemporary Governance

This thesis, as previously stated, seeks to address the broad historical context within which indigenous women were subjected to colonial constructs of legislation, paternalistic government policies and the mechanisms of a euro-western court system policy. It is against this backdrop that comparisons were drawn that take into account the historical relationships between Māori, First Nations, Aboriginal, and Native American women and their respective colonising governments. The historical examination is introduced to emphasise the subjugation of these populations of women through colonisation. The significance of this historical lens is to illustrate how the status of women became seriously eroded within indigenous societies from traditional through to modern times. Consequently, this thesis goes on to explore the contemporary socio-political status of indigenous women as a result of their colonised history.

In this chapter, the focus moves from the broad historical context to a narrow comparison of commonalities and differences in specific relation to Māori and Native American women leaders' experiences of tribal governance. The thesis changes tack to reflect the comparative research intent of my Fulbright scholarship experience at the University of Arizona, Tucson Arizona.⁶³⁴ Narrowing the focus of the research allows me to analyse in more detail and make beneficial comparisons of what works for Native American women tribal leaders in the past in comparison to Māori women actively engaged with in tribal governance in Aotearoa (New Zealand). Drawing these findings together to gain collective insight is intended to establish a body of knowledge from which normative propositions on indigenous governance, based on western concepts, can be examined, challenged and potentially transformed.

This chapter grew out of conversations, commentaries and a review of the literature conducted with, and about Māori and Native American womens' experiences and expectations of tribal governance. It examines the role of two distinct groups of indigenous women within the context of contemporary tribal governance.

⁶³⁴ In 2014 I was awarded the Fulbright-Ngā Pae o Te Māramatanga Graduate Award to the Indigenous People's Law and Policy Program at the University of Arizona, Arizona Law (James E. Rogers College of Law).

Underpinning the issues discussed in this chapter are the imperatives for indigenous women to strengthen their capacity for self-determination to ensure sustainable communities through social change and economic development. The previous chapters highlight that there is a dearth of literature and significant gaps in our collective knowledge of tribal governance and decision-making as it pertains to indigenous women. These gaps can be partly attributed to the literature depicting tribal institutions as representative of all constituents, both men and women. Consequently, there is a tendency to view governance as gender neutral. Governance, as the previous chapter illustrates, is indeed gendered. Indigenous women are regularly excluded and marginalised from decision-making roles, positions and forums.

This thesis argues that women continue to lead, resist and adapt in pragmatic ways. For women, indigenous sovereignty and self-determination discourse is gendered and, as such, this thesis seeks also acknowledge the fracturing of indigenous gender relations as a consequence of colonialism. Linda T. Smith writes:⁶³⁵

Indigenous women would argue that their traditional roles included full participation in many aspects of political decision making and marked gender separations which were complementary in order to maintain harmony and stability. Gendering contemporary Indigenous debates occur inside Indigenous communities, and while it is debated in other contexts, such as in Western feminist debates, Indigenous women hold an analysis of colonialism as a central tenet of an Indigenous feminism.⁶³⁶

For indigenous women, tribal institutions and structures continue to reflect western colonial and patriarchal ideologies. Tribes have inherited an oppressive gender legacy entrenched in policy; legislation that is socially constructed and instructed. To survive, women have to engage, challenge, resist and mitigate gendered spaces. We are all faced with knowledge that this legacy is linked to a good deal of

⁶³⁵ Linda Tuhiwai Smith *Decolonizing methodologies* (2nd ed, Zed Books : Distributed in the USA exclusively by Palgrave Macmillan, London ; New York, 2012).

⁶³⁶ At 153.

unresolved suffering and injustice that continues to manifest as on-going violence against indigenous women and girls:⁶³⁷

The roles women played in their homes and communities were increasingly altered by external influences and demands. Contact and colonisation had an equally destructive impact on men, but the most immediate and least discussed damage radiated from the heart and centre of the family– the women – and temporarily shattered the hoop that ensured balance in life. Separated from traditional social structures and First Nations’ governance norms, stripped of defined roles and responsibilities, the people lost their inner balance as women struggled to maintain social equilibrium. In defeat of these efforts, the collective turned outward to the colonizer in an effort to survive.

This quote from Cynthia C. Wesley-Esquimaux comes from her Chapter entitled ‘Trauma to Resilience: Notes on Decolonisation’ in the book, *Restoring the balance: First Nations women, community and culture*.⁶³⁸ This chapter is significant for setting up the context of this chapter. In her brief introduction, Wesley-Esquimaux portrays the total dismembering of indigenous women's lives and their struggle for survivance from the margins.

This chapter is principally a comparative analysis of the women’s context in Native American and First Nations’ tribal governance, the data for which has been accessed from the Native Nations Institute governance database⁶³⁹ and from interviews, discussions and conversations conducted with Māori women during the

⁶³⁷ Wesley-Esquimaux, above n 203, at 13.

⁶³⁸ Valaskakis, Stout and Guimond, above n 107, at 13.

⁶³⁹ The Native Nations Institute has a focus on ‘Strengthening Indigenous Governance.’ The interviews were accessed through the free Indigenous Governance Database (IGD) which provides online educational and informational resources on tribal self-governance and tribal policy reform:

- Foster Native nation building
- Promote tribal sovereignty
- Disseminate Indigenous data
- Encourage tribal leadership development
- Support the development of capable governing institutions
- Highlight sustainable economic and community development in Indian country

The Indigenous Governance Database is an exceptional resource for researchers, tribal leaders and Indigenous academics. Retrieved 13/2/2019 from <https://nni.arizona.edu>.

journey of this PhD kaupapa.

There are 573 federally recognised Native American tribes, and dozens of state-recognised tribes that make up Native Nations across the United States and Alaska. Of these, Native American women lead approximately 120 tribes which are as culturally and linguistically diverse as they are numerous, comprising more than 2.3 million people spread over North America and up into Canada.⁶⁴⁰

This chapter reflects on the importance of having indigenous women leaders included in governance as essential decision-makers; the literature telling us that they always have been but not in formalised westernised institutional structures. Subsequently, this thesis argues that the absence of Māori and Native American women from roles as tribal leaders reflects the diminished role and status of these women; an outcomes which has its roots in colonial ideologies of race, class and gender.

A 2015 study of Native American female leadership stated that “leadership is not synonymous with governance.”⁶⁴¹ The authors sought to differentiate the eurocentric colonial model of governance from traditional notions of indigenous leadership, and while I agree with their differentiation, I agree for different reasons. I support Fox’s contention that governance is a euroamerican tradition imposed on Native American tribes as part of a colonial process of assimilation and control. I also endorse endeavours to decolonise a concept which is rooted in European political philosophy and tradition such as the notion of tribal governments. Typically, tribes were kinship systems that were able to self-govern, maintain peace, stability and harmony because the members were known to each other and they remained close geographically.⁶⁴² Nevertheless, Indian tribes have accepted European terms with definitions that derive from the classical European origins of ‘sovereignty’; the notion of ‘inherent sovereignty’ being but one example. For tribes, sovereignty is the fundamental principle that underpins Native American

⁶⁴⁰ NCAI *A Spotlight on Native Women - Girls* (NCAI Policy Research Centre, 2015).

⁶⁴¹ Mary Jo Tippeconnic Fox, Eileen M Luna-Firebaugh and Caroline Williams “Native American Female Leadership” (2015) 30 *Wicazo Sa Rev* 82 at 85. Mary Jo Tippeconnic Fox, Eileen M Luna-Firebaugh and Caroline Williams “Native American Female Leadership” (2015) 30 *Wicazo Sa Rev* 82 at 85.

⁶⁴² Interview with David Wilkins (8 June 2008).

leadership and governance today. Tribal governance is interwoven with western political and legal theory to such an extent that the concepts of leadership and governance are inextricably linked.

Of the Native Nations Institute interviews analysed in this chapter, the leadership narratives of women are central to the understanding of how tribes have endured. Many modern indigenous women leaders refer to their cultural traditions and spirituality as inspiration for their roles as tribal leaders. It is one way they argue, to recover the status, power and prestige that their female forebears once held.⁶⁴³

The late Wilma Mankiller, former Chief of the Cherokee Nation and one of the great woman leaders of modern times shares her views of tribal governance in the following presentation. She states: ⁶⁴⁴

Many tribal governments are robust and educational attainment levels are improving, and there is a cultural renaissance occurring in many tribal communities. Within some Indigenous communities, there are conversations about what it means to be a traditional Indigenous person now and what it will mean in the future. I am an Indigenous woman of the 21st century, and I am so glad I was born Cherokee and that my life has indeed played itself out within a set of reciprocal relationships in my family and community. To me, being an Indigenous person in the 21st century means being part of a group of people with the most valuable and ancient knowledge on the planet, a people who still have a direct relationship with and sense of responsibility to the land and to other people.

Spirituality is a cornerstone of Native American life, with spiritual ceremonies having particular significance for providing guidance and knowledge in women leaders' decision-making.

⁶⁴³ See generally Rebecca Tsosie "Changing Women: The Cross-Currents of Native American Feminine Identity" (1988) 12(1) *Am Indian Cult Res J*.

⁶⁴⁴ Wilma Mankiller "What it Means to be an Indigenous Person in the 21st Century: A Cherokee Woman's Perspective" (Vine Deloria, Jr Indigenous Scholars Lecture Series, University of Arizona Tucson, Arizona, 30 September 2008) transcript provided by the Native Nations Institute for Leadership, Management and Policy, the University of Arizona. (Tucson Arizona).

Gay Kingman, Tribal Collebe President (Cheyenne River Sioux Tribe) 2004 shares:⁶⁴⁵

Well, first of all, I think it's only been one world and that's my spiritual world that's kept me strong. The way I was born and raised my parents brought me up to be very spiritual and whether it's the Catholic religion, which I was raised in but also the traditional religion. And so that's been what's kept me strong through everything. Everything else just fell in line with the spiritual way whether it's been the politics or advocacy or working in the non-Indian world, that's all tied in with the spiritualism.

Reconciling traditional tribal definitions of women with non-Indian definitions is an on-going struggle that Paula Gunn Allen suggests modern Native American women must harmonise and integrate into their lives.⁶⁴⁶ Non-indigenous definitions of women's identity are an extension of colonial attitudes about gender that permeate modern day society and the institutions within which we work. It is in this way that tribal governance beomes a site of struggle for women, especially leaders who seek to be defined by their tribal identity and their cultural practices and traditions that conflict with western cultural images of women. "In her eyes, her destiny is necessarily that of her people, and her sense of herself as a woman is first and foremost prescribed by her tribe".⁶⁴⁷

Kathryn Harrison, Former Chairwoman (Confederated Tribes of Grand Ronde) 2004 shares.⁶⁴⁸

So by the time I went in, went in to the ceremony in the sweat lodge and asked for the help that I wanted and then came home. But there was something that

⁶⁴⁵ Interview with Gay Kingman, Member of Cheyenne River Sioux Tribe of South Dakota (Interview series. Institute for Tribal Government, Portland State University, Portland, Oregon, 2004) transcript provided by the Native Nations Institute for Leadership, Management and Policy, the University of Arizona. (Tucson Arizona). .

⁶⁴⁶ Allen, above n 522, at 43.

⁶⁴⁷ At 43.

⁶⁴⁸ Interview with Kathryn Harrison, Former Chairwoman of the Confederated Tribes of Grand Ronde (Interview series, Institute for Tribal Government, Portland State University, Portland, Oregon, 2004) transcript provided by the Native Nations Institute for Leadership, Management and Policy, the University of Arizona. (Tucson Arizona).

happened when I came out and they put the water over you and I guess I must have had this certain look because one of the spiritual leaders said, “Well, we didn't say it was going to happen right away, but it will happen”.

From the spiritual gathering Harrison gained a clarity about her life that served her well as she developed into a leader.

Traditional governance was organised around a cosmological order that acknowledged dualism and connected people to a higher order, the natural order of the universe. Hepsi Barnett notes how the traditional forms of tribal governance eventually gave way to western ways of governing as a result of colonisation and the imposition of federal law. Hepsi Barnett, former Osage Government Reform Commission member (Osage Nation) 2011 shares:⁶⁴⁹

In terms of traditional governance; Osages had a traditional what they called Osage cosmology. I think our ancestors studied the universe and our relationship to the universe. They spent a lot of time looking at the night sky and the day sky. It was a highly complex political, social, and religious order, and it really reflected the natural order of the universe. We had an ancient clan system with 24 clans and those were divided between two moieties. The Osage's traditional form of governance really was based a lot on dualism, the dualism between the sun and the moon, day and night, sky and earth and our two ancient moieties were based on the earth and the sky. Similarly, men and women had very distinct roles. They weren't lesser roles; they were just different roles. So we had a war chief, we had a peace chief, there were lots of examples of how they used dualism as a way to structure themselves. So we existed under that system as it evolved for thousands and thousands of years.

A reading of the work of Paula Gunn Allen, Karen Powers and Kim Anderson,

⁶⁴⁹ Hepsi Barnett “How Did We Go About Remaking Our Constitution?” Remaking Indigenous Governance Systems seminar” (Archibald Bush Foundation and the Native Nations Institute for Leadership Management, and Policy, the University of Arizona, Prior Lake, Minnesota, 5 February 2011) transcript provided by the Native Nations Institute for Leadership, Management and Policy, the University of Arizona. (Tucson Arizona). .

offers a sense that Native American women leaders possess an ethic of responsibility as their identity is firmly ingrained in their traditional culture, spirituality, extended family and tribe.⁶⁵⁰ The women interviewed readily identify with their tribe and with their tribe's cultural traditions. Also, each of them came into leadership roles after being involved in various ways in the community as social workers, teachers, administrators or having been in service of their tribe in some way. For some, leadership was thrust upon them, for others, it seemed a natural progression as they became more experienced in tribal matters. For all of these women leaders, a strong sense of responsibility tied to the belief in the inherent sovereignty of their tribe, and the need to take ownership and drive their futures was a common theme.

Tino Rangatiratanga – Self-Determination Principle

For Māori women tino rangatiratanga is also inherent and can best be articulated in relation to their whakapapa (tribal identity).

Kararaina Rangihau, Former Tuhoe Trust Board member states:⁶⁵¹

Self Determination for me is asserting my Tuhoetanga that can mean ... as an individual Tuhoe and tribes woman. ... But also as an individual hapū and asserting my Tuhoetanga as a Tuhoe iwi member – that's what Self Determination is but doing it in a way that we all benefit ... te katoa. I mean that temporally as well so when I speak of Tuhoe ... benefitting Tuhoe. ... I am really going into succeeding generations. It goes way beyond my death.

⁶⁵⁰ Allen, above n 23; Kim Anderson *A Recognition of Being* (Canadian Scholars' Press, 2000); Kim Anderson and Bonita Lawrence *STRONG WOMEN STORIES* (Sumach Press, 2003); Bonita Lawrence and Kim Anderson "Introduction to 'Indigenous Women: The State of Our Nations'" (2005) 29 *Atlantis Crit Stud Gend Cult Soc Justice* 1; Kim Anderson "Leading by Action: Female Chiefs and the Political Landscape" in *Restoring Balance First Nations Women Community Cult* (University of Manitoba Press, Canada, 2009) 98; Karen Vieira Powers *Women in the Crucible of Conquest: The Gendered Genesis of Spanish American Society, 1500-1600* (UNM Press, 2005); Teresa D LaFromboise, Anneliese M Heyle and Emily J Ozer "Changing and diverse roles of women in Native American cultures" (1990) 22 *Sex Roles* 455.

⁶⁵¹ Interview with Kararaina Rangihau, Former Trustee and Board member, Tuhoe Trust Board (the author, 2017 & 2019).

So the sustainability, the continuation of Tuhoe values, lands, people, matauranga. ...That's what tino rangatiratanga means to me.

Legal Academic and Doctoral Candidate Rangimarie Mahuika argues:⁶⁵²

Even without the Crowns current schizophrenic or bipolar interpretations of sovereignty, it is a loaded term with too much baggage and history to be overly useful for us. No matter how we choose to define it or interpret it, its history is so strong it binds it in place, and that place is not a Māori one. Having said that I have similar issues with what is commonly referred to as the Māori translation of sovereignty – tino rangatiratanga. Although the term was possibly the closest Māori may have had to a similar concept, over time and through the discourse that have developed around the Treaty and Settlements I believe the term has been hijacked, co-opted and corrupted by the Crown. The combined effect has been that whatever tino rangatiratanga once meant, it now has a statutory definition, and its constant inclusion, accommodation, interpretation and assimilation into Crown policy and official documents has watered down the meaning and power of the word to the point where it doesn't really mean anything today.

I think for me personally I prefer the term *tino Rangiwewehitanga*. In an earlier research project based within my iwi, we were discussing the concept of tino rangatiratanga and our tribal identity, which we term Rangiwewehitanga. One of my Aunties said that from her perspective Rangiwewehitanga was a more appropriate word than tino rangatiratanga as our iwi identity is our tribal articulation of tino rangatiratanga. From this I came to frame my conception of 'sovereignty' and 'self-determination' around my tino Rangiwewehitanga, because it is those things that we are seeking to give expression too, seeking to maintain the mauri of and seeking to expand and empower. Although 'those things' that we are referring to when we use the label Rangiwewehitanga are diverse and unique, specific to our places, our people, our governance structures and protocols, our language,

⁶⁵² Interview with Rangimarie Mahuika, Legal Academic and Doctoral Candidate, University of Waikato. (the author, 2017).

and our values, they are also common to all tribal peoples albeit with their own personal label. Our Rangiwewehitanga has a whakapapa, and that whakapapa informs our tikanga, or the protocols and practices that are most appropriate to support the assertion and articulation of our Rangiwewehitanga. However each tribe will have their own articulation of that, their Poroutanga or Tuhoetanga or Ngapuhitanga, however they seek to describe or define it.

On the subject of sovereignty and following on from the Waitangi Tribunal's decision in the Te Raki claim⁶⁵³, Moana Tuwhare, Ngapuhi Lawyer had this to say with regard to Ngāpuhi sovereignty. Moana states:⁶⁵⁴

Talking about sovereignty the ability to make to reinforce our own law. We already have that through our tikanga. As long as we are currently developing it and adhering to it ... then we are sovereign ... and that's the thing that people need to get their head around. The rest of NZ acknowledging that will come eventually ... but we need to make sure that we are true to ourselves. ... When I see us operating independently ... we never ceded sovereignty ... [as Ngāpuhi].

Analogous to the Treaty of Waitangi 1840 guarantee of 'tino rangatiratanga', inherent sovereignty predates 'discovery' and is the fundamental principle underpinning all Native American Law. Indigenous populations in the United States, Australia, Aotearoa (New Zealand) and Canada have separate and identifiable chthonic legal traditions which have limited legal status within the larger nation-states. Similarly, the current legal position of Native Americans and Māori, with their respective colonising governments, derives from historical treaty-based relationships and similar policy trajectories. Suzan Shown Harjo, longtime Native American rights advocate (Cheyenne & Hodulgee Muscogee) 2008 states:⁶⁵⁵

⁶⁵³ Waitangi Tribunal He Whakaputanga me te Tiriti The Declaration and the Treaty The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry (Wai 1040) (1040 Department of Justice 2014).

⁶⁵⁴ Interview with Moana Tuwhare, Ngapuhi Treaty Lawyer (the author, 2019).

⁶⁵⁵ Interview with Suzan Shown Harjo "Five Decades of Fighting for Tribal Sovereignty and Self-Determination" (Ian Record, Leading Native Nations interview series, 11

Sovereignty is the act of sovereignty. We as Native nations are inherently sovereign and whatever we do to act sovereign is the definition of sovereignty.

Well, when something's inherent, it's inherent. You are who you are from the inside out and it's not something that's over layered either in law or in policy and it's not something that the Europeans brought from Europe. It is your language. Speaking your language is an act of sovereignty. Reclaiming your language is an act of sovereignty. So the way it's used by many people is simply as jurisdiction or simply as gaming operations and that's so limiting. That's really myopic, but for some Native nations that's all they have. They don't have their language anymore or they don't have other vestiges of sovereignty but we have those things that define us. We have our rights of selecting citizens, setting citizenship criteria, saying who we are and who we aren't, who is not part of us. That is an act of sovereignty. Citizenship is an act of sovereignty.

In the US the tribal-federal relationship continues to determine the extent to which tribes exercise sovereignty. Jace Weaver noted that “[a]side from his or her relation to family, clan or tribal nation, an Indian’s most significant relationship is with the federal government”.⁶⁵⁶ Consequently, the relationship that Native American tribes have with the United States Government is different for the fact that Indian tribes preceded the United States Constitution and are ‘sovereign’ states in international law based on treaties that were entered into with foreign powers before the American Revolution. This is highlighted by Wilma Mankiller, Former Chief (Cherokee Nation):⁶⁵⁷

I think that the sovereign rights of tribes are inherent. And I think that when thinking about that sovereignty it's important to remind everyday Americans

September 2008) transcript provided by the Native Nations Institute for Leadership, Management and Policy, the University of Arizona. (Tucson Arizona).

⁶⁵⁶ Jace Weaver *Other words* (University of Oklahoma Press, 2001) vol 39 at 120.

⁶⁵⁷ Interview with the late Wilma Mankiller, former Chief of the Cherokee Nation “Governance, Leadership, and the Cherokee Nation” (Ian Record, Leading Native Nations interview series, 29 September 2008) transcript provided by the Native Nations Institute for Leadership, Management and Policy, the University of Arizona. (Tucson Arizona).

that tribal governments existed before there was a United States government and that many tribes, including the Cherokee Nation, had treaties with other governments before they had a treaty with the first U.S. colony. So the definition of sovereignty is to have control over your own lands and resources and assets, and to have control over your own vision for the future, and to be able to have absolute, to absolutely determine your own destiny.

The inherent nature of Native American legal sovereignty is derived from the recognition of pre-occupation but is not 'defined' in law as conditional on that notion and could not be under the colonial presumption of the Doctrine of Discovery.⁶⁵⁸ Further, the Marshall trilogy of cases sought to define the nature of the United States and Indian tribes through a series of myth-making cases engineered to reserve as much exclusive power over land as possible to the newly established United States of America,⁶⁵⁹ with knowledge that they had already entered into international treaties before the American revolution. Thus, before the emergence of native nations, as understood today, tribes were instead hugely diverse kinship societies. Wilkins explains:⁶⁶⁰

... the concept that is most really applicable to describe tribal peoples historically was the notion of tribes as kinship systems because you basically had Native communities who realized that they couldn't govern themselves if they got too large demographically, so they intentionally kept a lid on their population and tried to maintain a relatively small community because they realized that as long as the kinship system was in place and that only worked when you could remember who your neighbours and your relatives were, that's when you're able to govern yourselves and maintain peace and stability and relative harmony.

⁶⁵⁸ See generally Robert J Miller and others *Discovering Indigenous Lands* (OUP Oxford, 2010); Blake A Watson "The impact of the American doctrine of discovery on native land rights in Australia, Canada, and New Zealand" (2011) 34 *Seattle Univ Law Rev* 507; Robert J Miller "The Doctrine of Discovery, Manifest Destiny, and Native Americans" [2015].

⁶⁵⁹ *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (18, 31); *Worcester v. Georgia*, 31 U.S. 515 (1832).

⁶⁶⁰ Wilkins, above n 586.

This quote from Wilkins provides an insight into the dichotomous nature of the principle of inherent sovereignty. In a modern political-legal context, inherent sovereignty assumes traditional kinship ties, but the powers of inherent sovereignty are incorporated into the current body of American (Federal) Indian law. Its legal and political effects are therefore dependent on their recognition by the United States as a feature of the tribal-federal relationship which to date, has been indeterminate and fraught with inconsistency.⁶⁶¹ Cobb endorses the ancient and inherent nature of native nations' sovereignty but concedes that it is diminished in the political-legal context.⁶⁶² She goes on to clarify the context within which inherent tribal sovereignty is understood and practised by native nations:⁶⁶³

Native nations do not have the luxury of ignoring the nuances of sovereign discourses that the United States enjoys or of assuming the universal acceptance of tribal independence. Because we are paracolonial nations, the foreign or colonizing powers' recognition of our sovereignty is fragile and tenuous, and tribal powers are therefore constantly buffeted by outside forces. As a result, our consciousness of sovereignty is heightened; Native people filter our daily actions through this lens and are constantly reminded that it is indeed a lens in need of vigilant protection and careful maintenance. So, unlike the United States, which does not need to use the term sovereignty to know that others recognize it, we focus on it with laser-beam intensity.

While it is true that the United States Government has the power to revoke tribal sovereignty as it did during the termination era of the 1950s, it is more than just a legal or political concept. For native nations, sovereignty is integral to their cultural identity, and as Cobb states, it is also potentially transformative. Lyon's clarifies:⁶⁶⁴

Sovereignty is the guiding story in our pursuit of self-determination, the general strategy by which we aim to best recover our losses from the ravages of colonization: our lands, our languages, our cultures, our self-respect. For Indigenous people everywhere, sovereignty is an ideal principle, the beacon by which we seek the paths to agency and power and community renewal.

⁶⁶¹ David Eugene Wilkins and K Tsianina Lomawaima *Uneven ground* (University of Oklahoma Press, 2001) at 119.

⁶⁶² Cobb, above n 503, at 119.

⁶⁶³ At 120.

⁶⁶⁴ Scott Richard Lyons "Rhetorical sovereignty: What do Native Americans want from writing?" [2000] *Coll Compos Commun* 447 at 449–450.

Attacks on sovereignty are attacks on what it enables us to pursue; the pursuit of sovereignty is an attempt to revive not our past, but our possibilities.

Lyons poses sovereignty as a guiding story or a narrative that native peoples can write themselves. Similarly, for Māori, tino rangatiratanga is effectively our story to write and to self – determine. “Sovereignty is both the story or journey itself and what we journey toward, which is our flourishing as self-determining peoples”.⁶⁶⁵ Modern native nations imbue their sovereign status with foundational values that derive from tribal traditions and an indigenous cultural worldview. Contemporary native American governance therefore reflects these values which are adopted constitutionally to ensure a shared vision and shared leadership. Angela Wesley, Chair of the Huu-ay-aht Constitution Committee (First Nations) 2013 states:⁶⁶⁶

So our ‘Made in Huu-ay-aht’ constitution at the very base of it, we’ve talked about a lot of the different components and the legalities of constitutions, but at the very base of it, the Huu-ay-aht constitution recognizes and affirms who we are. In our preamble, it talks about who we are and where we come from. It recognizes our hereditary system, where we come from and that system that governed us for thousands of years before any kind of contact. We did govern ourselves through our hereditary system. It provides for the protection of our lands and our resources including financial resources, which is a huge concern of our people. It establishes a trustworthy, accountable, transparent government system that people can understand, our own citizens as well as others who will do business in our territories. And it sets out rules and responsibilities at every level of our government. It also guarantees the individual rights of citizens, and one of the last pieces that we put into our constitution, it also talks about what the responsibilities of our citizens are back to our nation and I think that was the one thing we were trying to figure out what was missing in our constitution and that was the very last thing that we added where we felt, ‘Okay, we’ve arrived’.

⁶⁶⁵ Cobb, above n 503, at 125.

⁶⁶⁶ Angela Wesley “A ‘Made in Huu-ay-aht’ Constitution” (Tribal Constitutions seminar, Native Nations Institute for Leadership, Management, and Policy, University of Arizona Tucson, Arizona, April 4, 2013) transcript provided by the Native Nations Institute for Leadership, Management and Policy, the University of Arizona. (Tucson Arizona).

Traditional Roles of Women

The women interviewed were all involved from the grassroots of tribal activity. They speak about being daughters, wives, and mothers when they took political office. All of the women are tribal members, and each possesses a strong cultural ethic which they say underpins their leadership. Mahuika shares:⁶⁶⁷

I don't know whether I believe that Māori women leaders were positioned any differently within our traditional society than Māori male leaders. Perhaps even more so in our traditional society than now in contemporary times, leadership was about having certain characteristics and abilities, gender was less of a concern than the chosen leaders ability to unite the people and achieve their goals (the goals of the people, not those of the leader). In the same regard then, I also don't believe there were necessarily tikanga applied specifically in cases of Māori women leaders. There were skills and attributes that our people looked for, and if they happened to appear in a male then great, and if they happened to appear in a female then that was fine too. Whakapapa was important, but alone it was insufficient to create a great leader.

Moe Milne, a well respected female leader of both Ngāti Hine and Ngāpuhi descent, examines at the traditional roles of women from the perspective of traditional leadership and the impact that colonisation had on Māori women.⁶⁶⁸

It was not until colonisation really took hold that things began to change in terms of women's leadership and status in our Māori world, and I believe we must examine and understand what shifts have occurred and why.

There is a lot of korero in our history which validates and reinforces for me that our wahine had a much higher status in te ao Māori (the Māori world), and that their mana (prestige) was protected and revered in more meaningful ways than we see today. Not only does this korero exist in our own Ngāti Hine history, but it is engrained in our whole system of cultural beliefs and

⁶⁶⁷ Mahuika above n 647.

⁶⁶⁸ Interview with Ngāpuhi leader Moe Milne (the author, 2017 & 2019).

ways of being. It comes from the knowledge that the survival of hapū (sub-tribe) and whānau depended on the health and wellbeing of women. In fact, the womb was referred to as ‘te whare tangata’ (house of humanity), which really illustrates the significant role that women played within society. Papatuanuku (Earth Mother) is our whaea and part of our whakapapa.

In my view, the British came here with the notion that women were chattels of men, which was actually based on Christian beliefs that were widely entrenched in English society. That notion, combined with the fact that they thought their culture was completely superior to ours, meant that our women were completely disempowered through the colonisation process.

The Western-derived idea that women were subservient to men was a foreign concept to our people, and through its dominance, the status of women shifted from having the responsibility of keeping the hapū alive and well, to maintaining the status of the men. For us, everything was about balance and there was a male and female component to every aspect of life.

Colonisation created an imbalance, which has had devastating impacts on our people, both wahine and tane. For women, this imbalance has meant that we went from a position of being revered and on equal footing with men, to one where we are considered inferior.

In a presentation on strong Native American women, Brenda Child (Red Lake Indian, Ojibwe) talks about women’s freedom and women’s sovereignty from a historical perspective.⁶⁶⁹ She shares that Ojibwe treaty negotiators employed the following phrase to describe an Ojibwe worldview: “*Wenji – bimaadziyaang – from what or where we get our living, our life*.” This saying acknowledges the human dependence on all the necessities of life through describing the rights and obligations that Ojibwe women have. Child adds that a female elder is known as ‘*Mindi Muyan*’ – *One who holds things together*. This is a category of distinction that honours the pivotal role occupied by fully mature women in the social order.

⁶⁶⁹ Brenda Child “Naynaabeak’s Fishing Net: Illuminating the History of Native American Women” (Strong women / Strong nations: Native American Women & Leadership symposium, National Museum of the Native American, 19 April 2016).

Women's power she adds is an expression of how the Anishinaabe understood the world they inhabited. Through their labour and management of, essential resources to reservation life such as wild rice, fish and water, women continuously renewed their relationships with their relatives and the human and spiritual world.

In another story that Child shared was of women's sovereignty expressed through the healing tradition of the jingle dress dance. The dance is said to have emerged in the early 20th century which coincided with Spanish influenza that wreaked havoc on the Great Lakes Indian population. The narrative of how the dance came into being, describes how a man dreamed of the dress as a way to heal his dying daughter. He was given the instructions of how to make the dress and conduct the dance, and it was from his actions that the dance emerged and was passed on as a women's tradition of healing. Traditionally, dance was an expression of Indian religious and spiritual practice but was suppressed by the Government to encourage assimilation.⁶⁷⁰ Women embraced the revival of the jingle dress dance which evokes a sense of a woman's ethics. Through unique songs and movement in Ojibwe tradition, spiritual power moves through the air, the dance ensures health and well-being of individuals and community. The healing tradition can be viewed as an anti-colonial expression of women's sovereignty. It helped shape how women mitigated the effects of European colonialism and the harsh realities of life on the reservation while retaining their cultural and spiritual identity as Ojibwe women.

These narratives attest to the history of Native American cultural genocide and the resilience of the women. Native American women demonstrate distinct political and cultural dimensions through the reclamation of 'traditional ways' ceremonies and practices. Women are both a political force in the tribal context as leaders, influencers and decision-makers, and they also have a strong cultural dimension because they are in positions to 'reactivate' cultural practices that reclaim the status of women according to their cosmological origins and their distinct tribal traditions. In my view, it is that agency that precludes criticism of romanticising, simplifying or essentialising indigenous women's ways of being. These are inspiring narratives

⁶⁷⁰ The Native American Religious Freedom Act 1978 provides for the protection of traditional religious rights and cultural practices which had been prohibited since the early 20th century.

of multifaceted and dynamic leadership that require women to evolve their leadership and practices of governance in ways that address the complexities of reclaiming indigenous ways of being while simultaneously leading in ‘captured’ non-static spaces.

Gender Equity

The study and analysis of indigenous gender relations and governance form the basis of this thesis. In seeking an emancipatory vision of indigenous womanhood, I have proffered an indigenous feminist approach to decolonising and deconstructing gendered-governance. In Māori, it is known as Mana Wahine, an umbrella term that relates to the essence and prestigious status of Māori women.

Kararaina Rangihau is of Tuhoe and Te Arawa descent. She has had considerable experience in marae, trust and tribal governance. Often she states, the gender equity debate comes down to whether or not women can speak on the marae. She considers that is a westernised concept:⁶⁷¹

The only place in Tuhoe that women cannot speak is on the marae – but there is a whole tradition behind that – not only do I uphold that tradition – I believe in it. Not just because that is the way it has been done for centuries.

I believe in it because of the korero behind it. The marae atea is guarded by Timatauenga – that’s part of my belief system. The marae atea is the realm where anyone could be attacked, and that’s not just verbally. ... So the Spiritual world counts.

Milne provides her view on the matter of women’s speaking rights:⁶⁷²

People do not like to talk about the speaking rights of women on the marae. However, we need to understand the complementary and equitable roles that men and women had; the mana of each was equal. On the marae, the two primary roles of women were karanga and tangi korero. The men’s role was to do the poroporoaki and the mihi – kia hono te tangata ki te rangi me te

⁶⁷¹ Above n 646.

⁶⁷² Milne above n. 663.

whenua. In the mihimihi, when the tauparapara was completed, you were connected to the people and the spiritual connection was also established, then the whaikorero was carried out. Until recent years, we did not have a taumata korero and people could speak from anywhere in the whare. The kuia would normally start the korero, and it was the kuia's job to take care of the marae. There is always one kuia who looks after everything and tells everyone what is going on. They recite whakapapa and they are the knowledge banks. You could be either the rangatira, or the tutua (least important person), depending on what the kuia said. It was not because the kuia was old, it is because it was her role to take care of everyone and guide the hui. Women's speaking abilities on the marae have shifted for a range of reasons, including Christianity. Again, what Christianity did was introduce a structure into our society that preferred men to be higher in the hierarchy. When that happened, our men started saying that these new practices and values were the tikanga.

Mahuika comments on the role of women within her hapū of Ngāti Rangiwewehi:⁶⁷³

Being from Te Arawa, there is this perception of us from outside as being very particular about the role of women within the Te Arawa confederation of tribes. But people often forget that Te Arawa is not an iwi, it is a confederation of tribes and the position of women within that political grouping, and the ability to discuss and engage in those issues varies significantly within the tribes that make up the confederation of Te Arawa.

Being more specifically from Ngāti Rangiwewehi, and having more lived experience within that particular historical and political context, I can confidently say that women have always played a strong role in our leadership. Our whakapapa and korero tuku iho, like those of almost every other iwi in the country, are full of examples of strong courageous tupuna kuia who were just as staunch in their assertions of their iwitanga and self-determination as any of our menfolk. We know our women fought alongside our men, actively participated in political decision-making in our

⁶⁷³ Mahuika above n 647.

communities, and although our roles were not always the same, they were equally valued and respected. I have been told time and time again by many of my elders, that despite there being a view amongst the wider Te Arawa collective that whakapapa is for men not women, that in Rangiwewehi women can learn whakapapa too. I personally believe that there were no major differences in the way traditional Māori society treated leaders who were male or female, until colonization began to undermine our social structures, corrupting and disrupting the knowledge and beliefs which provided the foundation for our society.

Moana has had extensive experience in tribal governance and as a Treaty lawyer. This is her perspective on Māori women's representation at Trust Board level:⁶⁷⁴

There is an assumption that having women at the table will strike the right balance. ... In my experience, I felt that the women at the table were often struggling to have their views considered valid. We were generally able to voice opinions or views but that very rarely translated into action. I think that there is definitely a hangover from our experience of colonisation with our men still behaving in dominant positions and dominant roles in which they ... whether consciously or unconsciously don't recognise the value that women are bringing to the table.

Paula Gunn Allen describes the feminine in Native American traditions as referring to when “[t]he tribes see women variously, but they do not question the power of the femininity. Sometimes they see women as fearful, sometimes peaceful, sometimes omnipotent, and omniscient, but they never portray women a mindless, helpless, simple or oppressed”.⁶⁷⁵

Hepsi Barnett (Osage Nation) describes traditional governance as deriving from Osage cosmology within which men and women were depicted as having complementary roles. She states:⁶⁷⁶

⁶⁷⁴ Above n 649.

⁶⁷⁵ Paula Gunn Allen *The Sacred Hoop: Recovering the Feminine in American Indian Traditions* (Beacon Press, Boston, 1992) at 45.

⁶⁷⁶ Above n 644.

The Osage's traditional form of governance really was based a lot on dualism, the dualism between the sun and the moon, day and night, sky and earth and our two ancient moieties were based on the earth and the sky. Similarly, men and women had very distinct roles. They weren't lesser roles; they were just different roles. So we had a war chief. . . . So we existed under that system as it evolved for thousands and thousands of years.

However, colonialism has substantially impacted indigenous women's leadership and nowhere is this more evident than in imported western attitudes about the role and status of indigenous women. Steiner comments that colonisation led to the breakdown of women's status in tribal communities resulting in migration into the cities.⁶⁷⁷ By necessity, women had to become self-sufficient in order to regain their positions of influence. Steiner writes, "[i]n the cities, the power of women has been recognised by the extra-tribal communities. Election of tribal women to the leadership of these urban Indian centres has been a phenomenon in modern Indian life".⁶⁷⁸

On the subject of women leaders, Chief Oren Lyons (Iroquois Confederacy, Onondaga Nation) shared this exchange:⁶⁷⁹

Oh, you're a chief". "Well, yeah, one of the leaders". The first question they ask, "Can a woman be a chief?" I said, "No". I said, "No more than I could be a clan mother".

Lyons goes on to explain that the question is derived from western notions of gender equality which in his view, is yet to be achieved. He goes on to say: "But we knew long ago, our people knew long ago that women were the centre of our nation. We're partners. We've always been partners, full and equal, with duties of the woman and duties of the man".⁶⁸⁰

⁶⁷⁷ Stan Steiner *The new Indians* (1st ed, Harper & Row, New York, 1967) at 224.

⁶⁷⁸ At 224.

⁶⁷⁹ Oren Lyons "Governing Our Way to A Brighter Future" (Presentation, Honoring Nations symposium Harvard Project on Native American Economic Development, John F Kennedy School of Government, Harvard University Sante Fe, New Mexico, 7 February 2002) .

⁶⁸⁰ Above n 675.

Arguably, in a pre-colonial context, that may well have been true, but framing gendered traditions in a contemporary context is detrimental while empowering gendered traditions can be problematic. Gender issues are reshaping indigenous politics as the rights of indigenous women to equality in terms of civil, human and sovereignty rights, and therefore that they come to the fore. Developments in Indigenous feminist theory and women's activism that focus on decolonisation and a gendered perspective of indigenous sovereignty are an important site of struggle that engages issues of cultural identity and definitions of nationalism.⁶⁸¹ The emerging scholarship in this field is engaging serious issues in relation to the diminishing status of indigenous women with a lens on entrenched and legalised racism and sexism.⁶⁸²

Former councilwoman Verna Bailey (Standing Rock Sioux Tribe) 2015 proffers:⁶⁸³

Sometimes the men resisted what recommendations women brought forth on the tribal council. A long time ago, the roles and responsibilities were divided among men and women, boys and girls. You know, expectations were different for men and women. I'm not saying all of that was brought forward into the present setting but still, it was hard for the men, I think, to accept the good of what a woman was saying to make things better in the way of laws, programs and that kind of thing. I know that there are men out there who will disagree with what I just said.

⁶⁸¹ Cheryl Suzack, Shari Huhndorf, Jeanne Perreault and Jean Barman *Indigenous women and feminism: Politics, activism, culture* (UBC Press, Vancouver, 2010) at 1.

⁶⁸² See generally Christopher Alcantara "Indian Women and the Division of Matrimonial Real Property on Canadian Indian Reserves" (2006) 18 Can J Women Law 513; Barker, above n 474; Joanne Barker *Critically sovereign* (2017); Cora Voyageur *Firekeepers of the Twenty-First Century* (McGill-Queen's Press - MQUP, 2008); Voyageur, above n 328; Green, above n 544; Green, above n 146; Joyce Green "Balancing strategies: Aboriginal women and constitutional rights in Canada" [2003] Women Mak Const New Polit Comp Perspect 36; Smith and Kauanui, above n 106; Smith, above n 530; Cheryl Suzack *Indigenous women's writing and the cultural study of law* (University of Toronto Press, 2017); Suzack and others, above n 677.

⁶⁸³ Interview with Verna Bailey, Former Councilwoman "Making Self-Governance Work for Standing Rock" (Danielle Hiraldo, Leading Native Nations interview series, Native Nations Institute, University of Arizona, Tucson, AZ, December 09, 2015.) transcript provided by the Native Nations Institute for Leadership, Management and Policy, the University of Arizona. (Tucson Arizona).

Rebecca Miles, Chairwoman (Nez Perce) 2011 also comments on gender issues confronting indigenous women leaders:⁶⁸⁴

The hardest thing I had in my job was being a young woman. And I like to say this whenever I can. The rude awakening I had on council was not being treated different by men, but being treated terrible by our own Indian women. And so I work very hard in my young career. I coach young women. I was selected as a visionary delegate to help shape American politics for the future of women and that, I watched very closely how Hillary Clinton was treated in her election. And so I care very much that women keep each other uplifted. Ethics and integrity and attitude are very key.

Herminia Frias, Former Chairwoman (Pascua Yaqui) 2011 talks about being the much younger and first female chairperson:⁶⁸⁵

I ran for council at a younger age and I was elected to be on tribal council as the first woman, the first chairwoman and also the youngest chair of the Pascua Yaqui Tribe.

As the chairwoman of the Pascua Yaqui Tribe, I was doing the talking. Sure, I'd have my attorney there for all the technical stuff, but you needed to tell me. I read so much and said, "Teach me what I need to know because I'm going to do the talking. This is why the people elected me". And the same with the rest of the council members; we went up and we represented the tribe. It wasn't about someone else. But that's just a little bit about the Pascua Yaqui Tribe and my background and how I got involved in politics as a community.

Herminia's tribal leadership of the Pascua Yaqui Tribe of Arizona is notable for her experience of conflict and intense scrutiny that resulted in her removal from the

⁶⁸⁴ Rebecca Miles "What I Wish I Knew Before I Took Office" Emerging Leaders seminar (Native Nations Institute for Leadership, Management, and Policy, University of Arizona Tucson, Arizona, 23 March 2011) transcript provided by the Native Nations Institute for Leadership, Management and Policy, the University of Arizona. (Tucson Arizona).

⁶⁸⁵ Herminia Frias "'Engaging the Nation's Citizens and Effecting Change' Emerging Leaders seminar" (Native Nations Institute for Leadership, Management, and Policy, University of Arizona Tucson, Arizona, 24 March 2011) transcript provided by the Native Nations Institute for Leadership, Management and Policy, the University of Arizona. (Tucson Arizona).

tribal council as chairwoman. In 2007, Frias faced twenty-two counts of ethical misconduct lodged in the Pascua Yaqui trial court brought by six tribal council members and the vice-chairman Peter YuuYucupicio whom Frias had displaced in elections as the chair. A majority of the tribal council found that chairwoman Frias had committed six of the twenty-two claimed violations. Frias was reprimanded for two of the violations and suspended for three months apiece for the each of the remaining four. The suspensions totalled twelve months which cumulatively had the effect of removing Frias from office for the balance of her term. Frias failed in her appeal to the Pascua Yaqui Court of Appeals, which upheld the sovereign immunity status of the tribe.⁶⁸⁶ According to Frias, the turmoil arose over her questions about spending in the tribe's casino and the lack of transparency. The 22-count ethics complaint was brought as the council members claimed she had overstepped her authority by initiating an ethics code which was not contemplated in the tribe's constitution. Frias claimed that sexism and greed were at the heart of the moves to shut her and her supporters down.⁶⁸⁷

Self-Determination

In our interview, Rangihau spoke about self-determination and tino rangatiratanga interchangeably. Tino rangatiratanga was something more personal:⁶⁸⁸

Self Determination for me is asserting my Tuhoetanga that can mean .. as an individual Tuhoe and tribes woman ...

But also as an individual hapū and asserting my Tuhoetanga as a Tuhoe iwi member – that's what Self Determination is ... Doing it in a way that we benefit ... te katoa.

I mean that temporally as well so when I speak of tuhoe ... benefitting Tuhoe ... I am really going into succeeding generations. It goes way beyond my death.

⁶⁸⁶ Frias v. Yucupicio CA-08-006 (2009) at 4.

⁶⁸⁷ As a postscript, Ms. Frias was voted back on to the Pacua Yaqui Tribal Council in June 2016.

⁶⁸⁸ Rangihau, above n 646.

So the sustainability, the continuation of Tuhoe values, lands, people, matauranga.

That's what tino rangatiratanga means to me

And it is incumbent on the leadership ... those who are given the mana ...

Mahuika reiterated a collective notion of self-determination in relation to a gender balance within Ngāti Rangiwewehi:⁶⁸⁹

Our whakapapa and korero tuku iho, like those of almost every other iwi in the country, are full of examples of strong courageous tupuna kuia who were just as staunch in their assertions of their iwitanga and self-determination as any of our menfolk. We know our women fought alongside our men, actively participated in political decision-making in our communities, and although our roles were not always the same, they were equally valued and respected.

As a respected Māori Treaty lawyer and advocate for an inclusive hapū collective approach to settlement, Moana provides a view on the legal structure that iwi must adhere to which is Crown prescribed:⁶⁹⁰

The problem is that when we get into these governance roles that the tensions become ... there's more conflict because the structures are basically patriarchal in their creation. So you always look for a man to be a Chairman ... and a woman might be able to be the secretary ... and that's about it. It is almost assumed that a man will take a lead ... and it's assumed that the women's role is to support what the men to decide.

That's partly to do with the way in which these governance structures actually operate ... and the legal framework that we have to operate within even though what we are trying to achieve has actually got nothing to do with the framework.

That has been established in a very male dominated legal system. We operate as Charitable Trusts under the Charitable Trust Act 1957. Charitable Trusts

⁶⁸⁹ Mahuika, above note 647.

⁶⁹⁰ Tuwhare, above note 649.

were borne out of the 19th century English concept of the rich giving to the poor and needy. Immediately you've got an assumption being made that the people in those governance roles get to determine what can and can't happen for everyone else, who is immediately labelled as a beneficiary. So you are immediately putting our iwi into the category of ... more than needy actually ... the definition was was poor and destitute which is the terminology from the charitable trust structure. That's not ... in iwi governance terms ... what we would expect ... in iwi governance terms what we would expect of people leading and doing things. We would not expect them to be considering our people that we're there for beneficiaries of anything ... It's the categorisation really, that's a real problem.

And then there is the power structure ... the rest of the iwi becomes completely subservient and the governance group becomes all dominant. They have the ultimate ability at law and as legal owners of any asset that they control. As legal owners to do whatever they see fit within the realms of the charitable trust law.

It is kind specific and deifying on one level and quite open on another level.

In terms of what we would expect of our leadership on a tikanga basis as a member of the hapū or the iwi? The leadership can get away with things that we would never believe they should [get away with]. So that's where the real tension exists ...

That's the battle between getting back to our mode of operating and what we're forced to work within in the current legal system ... and that includes the gender biases ... but that runs a bit deeper as well ...

Native nations are heavily invested in building sustainable tribal governments as a means to realising self-determination and the preservation of their remaining lands and resources. Sophie Pierre, longtime Chief (Ktunaxa Nation) 2006 couches self-

determination in relation to indigenous rights of self-government:⁶⁹¹

I think we're in this point in history in which tribes and First Nations in Canada are struggling to assert their rights of self-determination and self-government. They turn out to be like other nations in the world. You can assert those rights, you can get those rights but if you can't exercise them effectively, you're going to fall flat on your face like any other nation in the world. And so the tribes and First Nations in North America are struggling right now to rebuild institutions of their own design, and they do it by starting with the basic structure of the way they're going to govern themselves, their constitution.

Pierre comments that modern treaty-making in British Columbia provided an avenue for First Nations to rebuild from a position of strength. The treaty process has allowed them to put the self back into self-government ... “cause we're looking at self-government but through a constitutional reform, the constitutional process, you identify that self and I think that that's why it's so important”.⁶⁹²

Land

The impact of colonialism on Māori and Native American lands and peoples throughout history is a narrative of dispossession, trauma and genocide. This history informs the present to the extent that the preservation of tribal lands and resources as mentioned above, is of paramount importance to tribal governments.

Milne speaks about the significance of land to Ngāti Hine and the descendants of their eponymous ancestor, Hineamaru:⁶⁹³

⁶⁹¹ Chief Sophie Pierre and Dr Joseph Kalt “Constitutions and Constitutional Reform” (Episode 2) Native Nation Building television/ radio series. Native Nations Institute for Leadership, Management, and Policy and the UA Channel, The University of Arizona Tucson, Arizona 2006 Television program. Transcript provided by the Native Nations Institute for Leadership, Management and Policy, the University of Arizona. (Tucson Arizona).

⁶⁹² Above n 686.

⁶⁹³ Milne, above note 663.

Certainly, when I was a child and up until 40 or so years ago, I was acutely aware that we were not allowed to sell Ngati Hine land. We always knew that we were so many generations down from Kawiti and that he signed Te Tiriti, and that therefore we had to look after Te Tiriti. I used to proudly tell everyone that we were from Ngati Hine, that we were descendants of Hineamaru and that we do not sell our land to the Pākehā.

To Māori, land is Papatūānuku (Earth Mother). The loss and commodification of land is felt keenly, as Milne explains:⁶⁹⁴

The same thing has happened in terms of our relationship with Papatuanuku. She is our whaea, but she is increasingly being referred to as a commodity, rather than as part of our whakapapa and as a life source. We hear less often our relational links to Papatuanuku and how she is a critical part of our wellbeing. For example, if we do not have land, we cannot nurture and sustain the person; without the person, you cannot have tangata whenua and we would lose our existence.

When I am talking with women nowadays, we discuss the abuse that is occurring towards Papatuanuku, and look at how Papatuanuku and her strength is healing and rebuilding the earth to sustain people. In this way Papatuanuku is not figurative or mythological, she is a part of who we are.

Native American tribes were dispossessed of vast tracts of land through legislation and government policy. Politically, the United States Government has vacillated between conservative policies, such as the Dawes Act and the Termination Act to devastating effect, and the liberal Acts, such as the Reorganisation Act and the Indian Self-Determination Act, and rectification. The late Wilma Mankiller (Cherokee Nation) 2001 retraces the history that led to the removal of the Cherokee Nation from their ancestral lands:⁶⁹⁵

⁶⁹⁴ Milne, above note 663.

⁶⁹⁵ Interview with Wilma Mankiller, Former Chief Cherokee Nation “Great Tribal Leaders of Modern Times” interview series, 7 January 2001. Institute for Tribal Government, Portland State University. Tahlequah, Oklahoma. Transcript provided by the Native Nations Institute for Leadership, Management and Policy, the University of Arizona. (Tucson Arizona).

... one of the very first acts was to try to convince the Legislature to pass the Removal Act, which eventually resulted in the Cherokees being dispossessed of their land in the southeast. Most people refer to the Cherokee removal as the Trail of Tears or the Trail Where They Cried because of the large loss of land and large loss of lives but actually all the tribes in the southeast went through the same sort of removal process. The Choctaws and the Creeks and the Chickasaws, the Seminoles, many other tribes went through the same situation. Our story I think is just the one that's more familiar. Our land where we had lived forever was given away in lotteries to White Georgians after the Cherokees were removed and this land's very different in Indian territory than the land in the southeast. The political system, the cultural system, the medicines, the life ways, everything we'd ever known was left behind so our people arrived here with everything in disarray. Many people dead, everything familiar gone and yet what's absolutely remarkable about Cherokee people is that they almost immediately began to reform the Cherokee Nation and rebuild their families and rebuild their communities and rebuild a nation and it's just absolutely amazing that they were able to do that given what had just occurred. So everybody helped each other.

Hepsi Barnett (Osage Nation) 2011 recalls the devastating history of land loss and dispossession experienced by the Osage Nation:⁶⁹⁶

... then looking back on your American history, does anybody recall what happened in the 1800s? It really started with the Lewis and Clark expedition. They came right through Osage territory. When that expedition ended, it resulted in great change for the Osage Nation. We lost huge portions of land during that time through [the] treaty process.

Through forced removal, the Osage people were first moved on to land in Missouri, and then again to Kansas as the Government and white settlers claimed more and more of the land for themselves.

Taonga Tuku Iho – Cultural Aspirations Principle

⁶⁹⁶ Above n 644.

Kaupapa Māori theory supports the principle that to be Māori (indigenous) is taken for granted and that indigenous language, knowledge and culture are legitimated. These aspects are handed down from our ancestors and are considered, treasured things (taonga) evoking an emotional and spiritual element which is absent in a western understanding of governance. However, many contemporary indigenous tribal organisations are increasingly evolving as new indigenous business models within which cultural values and practices may become marginalised.

Rangihau reminds us of the importance for Tuhoe of retaining traditional practices within the boardroom. In particular, the use and privileging of te reo Māori.⁶⁹⁷

All hui were conducted in te reo Māori. A lot of their governance was still traditional. They participated and actively supported tribal and cultural activities and ceremonies in the tribe. Lots of tikanga was adhered to but one I didn't buy into and raised at a board level was the notion of women not speaking. That was a Tuhoe tradition but I didn't buy it because of the teachings of my parents. That wasn't Tuhoe. I was told that was about my modern thinking, and that could be right. Maybe it was, I don't know.

Milne delves further into the centrality of te reo Māori-to-Māori traditions and cultural values:⁶⁹⁸

Te reo Māori as a source of wellbeing:

It is said that the Māori language is an elixir for the mind and spirit. Through the use of language, it becomes clear that the connection between functions of the mind and the Māori language is the wellbeing of the mind. In other words, it is my view that through the use of language, the mind will thrive. The language is the essence of Māori rangatiratanga or autonomy. Mauri must exist, as mauri is the source of life. In our discussions as whānau and hapū, we hypothesised that if you have a strong grounding in the Māori world, the rules and traditions come naturally. ... A language does not survive if it is not spoken, and our language will not survive if it is not used to illustrate one's

⁶⁹⁷ Rangihau, above n 646.

⁶⁹⁸ Milne, above n 663.

environment. The language will not survive if you do not use it to describe how you are feeling, your thoughts, your difficulties and your triumphs.

In the United States, the introduction of the Indian Reorganisation Act (IRA) 1934 unilaterally imposed a western constitutional framework upon the tribes. The IRA regime allowed for a measured self-administrative function under the authority of the Bureau of Indian Affairs as well as the practice of *tribal cultural sovereignty*. Mankiller talks about the notion of passing down important knowledge pertaining to the Cherokee people, their cultures, values and traditions. Mankiller alludes to the spiritual bereavement and cultural death possible if they don't uphold and maintain the old ways.⁶⁹⁹

Angela Wesley, tribal leader of the Huu-ay-aht First Nation (2013) shares that the dilemma for her people is making the constitution authentically reflect who they are and what they believe in:⁷⁰⁰

What does it mean to us to be Huu-ay-aht? What are our traditional values and practices? How can we make things work for today and tomorrow based on our own values? How can we make things work better for today and for tomorrow? And then we asked sort of just the general questions to get people thinking that this is how we have a say in how we build our government. What do you see in terms of numbers, in terms of council for chief and council? How long should they be in place? What about gender equality, did we want to see balance of males and females, did we want to see youth on councils? What about our hereditary chiefs' involvement? How are they going to be involved? What about decision makers and processes, elections, meeting frequencies, how often should our council be reporting to us as citizens? We asked questions about finances and budgets, approvals, reporting requirements. What kind of ethical conduct we expected out of our leadership, what our expectations were, what were the restrictions around the use and allocations of land and other assets and where did the decision points lie?

⁶⁹⁹ Mankiller, above n 690.

⁷⁰⁰ Wesley, above n 661.

Ako Māori – Culturally Preferred Pedagogy Principle

Culturally preferred pedagogies support teaching, learning settings and practices that can connect with the cultural backgrounds and socio-economic circumstances of the indigenous community. Pedagogical practice is underpinned by emancipatory theory, and in Kaupapa Māori methodology, pedagogy is the marriage between cultural tradition and theory to the extent that cultural positioning transforms and evolves. The application of culturally appropriate pedagogies in the context of indigenous governance is about legitimating the importation of indigenous language, law, custom and practice with transformative intent in the rebuilding of traditional governance structures.⁷⁰¹

Mahuika was emphatic about the transmission of knowledge through te reo Māori and the transmission of Māori culturally relevant ways:⁷⁰²

I know that's a lot to deal with, but I do believe that within our culture exists a number of teachings, values, ideas, and practices that can provide us with the tools we need to empower and liberate ourselves. Indeed, I think ultimately this is the only way we will be able to resolve these issues – doing it ourselves, and using our frameworks and matakā! Not because Māori and Indigenous ways of knowing and being, hold some mystically based set of ancient ideals that will magically reform our situation, but ultimately because they belong to us.

In comparison, the building of native nations through the Harvard Project is based on the following cultural characteristics, which comprise an approach to reservation economic development:⁷⁰³

⁷⁰¹ See generally Graham Hingangaroa Smith “The Development of Kaupapa Maori Theory and Praxis” (Doctoral Dissertation, University of Auckland, 1997); Linda Tuhiwai Smith *Ngā kura Māori* (Auckland University Press, 1998); Graham Hingangaroa Smith *The Development of Kaupapa Maori* (University of Auckland, Auckland, NZ, 2002); Leonie Pihama and others “A literature review on kaupapa Maori and Maori education pedagogy” [2004] Prep ITP N Z Int Res Inst Maori Indig Educ IRI; Graham Smith, Te Kawehau Hoskins and Alison Jones “Interview: Kaupapa Māori: the dangers of domestication” (2012) 47 N Z J Educ Stud 1; Linda Tuhiwai Smith *Decolonizing methodologies* (2nd ed, Zed Books : Distributed in the USA exclusively by Palgrave Macmillan, New York, 2012).

⁷⁰² Mahuika, above note, 647.

⁷⁰³ Cornell and Kalt, above n 145.

Practical Sovereignty – Practical decision-making or genuine self-rule put growth into Indian hands.

Effective governing institutions – Includes the importation of constitutions rules, by-laws etc., and the shared understanding about the appropriate distribution of authority.

Cultural match – Cornell and Kalt state that cultural match is not a prescription for ‘a return to ancient political traditions’ but that governing institutions need to be culturally appropriate taking into account that the traditional forms and practices may be inadequate to the demands of the modern world. The cultural match they suggest is limited to ‘deeply held community beliefs about the authority that needs to adjust to modern times.

Strategic Orientation – Requires the development of long-term planning and thinking.

Nation-building leadership – In the nation-building approach leadership requires but is not limited to elected officials as its distinctive feature is public-spiritedness and empowering individuals as well as the nation.

Cornell and others⁷⁰⁴ of the Harvard Project have had limited discussions in Aotearoa (New Zealand) about governance and development issues, with Māori by invitation having provided research assistance and having delivered presentations in both tribal and academic settings. Cornell readily admits to a speculative view of his non-United States-based research but maintains an on-going and growing collaborative relationship with non-United States indigenous nations including Māori.

While the cultural characteristics outlined by the Harvard Project have potential applicability in other jurisdictions like Aotearoa (New Zealand), Australia and Canada, two significant aspects appear to conflict. First, the notion of a cultural match is incongruent with Kaupapa Māori theory, which has an emancipatory

⁷⁰⁴ Cornell refers to “colleagues” as referring to the community of scholars, practitioners and students concerned with Indigenous government and development issues that have affiliations with the Native Nations Institute at the The University of Arizona and the Harvard Project on Native American Economic Development at Harvard University.

agenda. Second, the indigenous feminism elements are missing from the discourse of the native nation. Mana wahine is fundamental to indigenous and Māori women's rights and to the positioning of tribal governance based as it is on both critical emancipatory feminist theory and anti-colonial critiques of race, class and gender.

Begay describes cultural match as it is applied to nation building as:⁷⁰⁵

Cultural match ... [is where a] really interesting piece of the research that took place. To be effective, governing institutions must have legitimacy with the people. In other words, the people have to think and believe in the government that this is the way that Ysleta Pueblo operates; this is the way we have always done it; this is the way Laguna operates their government; this is the way Navajos really do it – this is the Navajo way; this is the Blackfoot way; this is the O'odham way. There is this perception, there is this belief that this is the way we do it, so that sort of sends the message that the government is legitimate in the eyes of the people. It is a reflection on who they are as a people.

Eva Petoskey, former council member (Grand Traverse Band of Ottawa and Chippewa Indians) 2013 comments on ways in which traditional and modern governance can be 'grown' through the incorporation of culture:⁷⁰⁶

[Y]ou're growing a seed, you're growing a seed of translating your own traditional teachings and culture and language into your contemporary setting. So I always feel like people were going way too fast. I think one way to incorporate your culture into your governance is to slow it down, and maybe not in all contexts because some meetings have to be conducted maybe in a more rapid manner because you're dealing with so many issues but there

⁷⁰⁵ Manley Begay "The importance of Cultural Match" (Lecture, Native Nations Institute for Leadership, Management, and Policy, University of Arizona, 2011). Transcript provided by the Native Nations Institute for Leadership, Management and Policy, the University of Arizona. (Tucson Arizona).

⁷⁰⁶ Interview with Eva Petoskey "Empowering Good Leadership Through Capable Governance: What my leadership experience taught me" (Ian Record, Leading Native Nations interview series. Native Nations Institute for Leadership, Management, and Policy. The University of Arizona. Tucson, Arizona, October 3, 2013). Transcript provided by the Native Nations Institute for Leadership, Management and Policy, the University of Arizona. (Tucson Arizona).

should be a time where people can talk together and maybe in a formal way, maybe it's an informal meeting with the constituents, with your citizens where you can talk things through.

Ka piki ake i nga raruraru o te Kainga – The Socio-Economic Mediation

Principle

This principle is about mediating the negative impact of the socio-economic background of Māori by Māori cultural customary practice, values and knowledge. In Kaupapa Māori educational initiatives, the common principles come to the fore. This knowledge does not belong to individuals; individuals are repositories of group knowledge; they have a responsibility to look after knowledge for the benefit of the whole group; the mana (standing and prestige) of the group is dependent upon the sum contributions of the individuals who make up the group; because the group is seen as 'only being as strong as its weakest link', members of the group have a responsibility to share and uplift those who need assistance and support.⁷⁰⁷

Gay Kingman (Cheyenne River Sioux) 2004 talks about the path to self-sufficiency as a way out of poverty.⁷⁰⁸

I would like to see our sovereignty have true sovereignty where we're self-sufficient and our tribes are self-sufficient and our people aren't in poverty. My tribe and some of the tribes in the Great Sioux Nation live in, by the U.S. Census, some of the highest poverty in the United States, the counties that they're in and that shouldn't be in this United States with all of the wealth. When you think that we were self-sufficient here before the coming of the White Man, we had strong values that of fortitude and generosity and all of these things that kept us strong and I'd like to see that shared but until all people in this United States become out of poverty and self-sufficient, that would be my dream.

Angela Wesley (Huu-ay-aht First Nation) 2013:⁷⁰⁹

⁷⁰⁷ Graham H. Smith, above n 228, at 468.

⁷⁰⁸ Kingman, above n 641.

⁷⁰⁹ Wesley, above n 661.

We have just a daunting set of health, education, housing and economic development problems but the central issue I think for people is going to be ... the central question is going to be, “How do we hold on to a sense of who we are as Indigenous people?” We can’t do that if we lose traditional medicines, traditional knowledge systems, any sense of connection to our history and to our stories and to the land. And we’ve lost everything if we’ve lost that.

Native American tribes continue to struggle against rampant unemployment, high rates of alcohol and substance abuse, domestic violence and suicide. Overwhelmingly, women and children suffer the consequences of these struggles. Quite literally, the central issue confronting Native American women is survival.

Whānau – Extended Family structure

Rangihau shared a Tuhoe view of the concept of whānau:⁷¹⁰

In the social organisation of the whānau, a Tuhoe View. The most important principles underpinning whānau decision-making is tuakana/teina. Formally constructed it is the basis of good governance. Tuakana (traditionalist) – role is to hold on to tradition. *Pupuri te mana o te whanau ... Tikanga me nga matauranga.*

That’s why they have a special role with mokopuna. Ko te mahi o ngā teina “te potiki te” Role is to challenge tradition. Has space to say ... not like the older ones ...

In Māori culture whānau and the concept of the *extended family* is an essential cultural and social structure for the transmission of cultural practice, values and thinking (whanaungatanga).⁷¹¹ In comparison to Native American culture, there are some significant differences to consider. Māori as a people share one whakapapa (genealogy) and speak one language, te reo Māori. While dialectical differences exist, the language is common to all Māori tribes as well as to parts of the Pacific

⁷¹⁰ Rangihau, above n 646.

⁷¹¹ Smith, above n 697, at 471.

peoples, exemplifying our Polynesian origins. Māori benefit from having a culturally oriented structure that supports the mitigation of social and economic problems so that whānau take collective responsibility to assist and intervene.⁷¹² In a Kaupapa Māori context *whanau* refers to a collective concept that can be more widely defined to include a group or association of people that share common interests or circumstances and that is not restricted to just those of common ancestry. Similarly, the traditional Indian family unit is the extended family that includes both blood relatives and clan relatives.

Māori and Native American peoples share similar experiences of urban migration whether forced by State policy⁷¹³ or as a result of impoverished rural circumstances.⁷¹⁴ Māori and Indian alike were exposed to new cultural norms based on western ideas of what constituted a *family* and the *culture shock* experienced by many families moving into the cities in the 1950s and 1960s was replicated in the workplace, schools and communities. So whānau or the *extended family* took on a broader meaning in these changed circumstances as is reflected in the establishment of Indian and Māori urban community centres.

Mankiller (Cherokee Nation) 2001 remembers her upbringing as one where her family aided other families to transition from reservation to city life:⁷¹⁵

There were always Indian people at our house and there was always discussion of what was going on in the world, what was going on in the communities and so eventually there were a lot of people who had ideas about relocation, which was really a very misguided policy and just about things in general. In terms of a political background or figuring out how to be engaged in the community I probably figured out how to do that just by listening to people at home. At the time I did not appreciate that. All I saw as a child and as a teenager is that dad would bring home people and my sister and I would have to give up our bedroom so these strangers could stay there but it sort of

⁷¹² At 471.

⁷¹³ 1952 Indian Relocation policy adopted by the Bureau of Indian Affairs to remove Indians from reservations into urban centres. See <https://www.dailyonder.com/indian-relocation-sending-roots-under-pavement/> accessed 9/02/2019

⁷¹⁴ The Māori Urban migration See generally <https://teara.govt.nz/en/maori-Pākehā-relations/page-5> accessed /02/2019

⁷¹⁵ Mankiller, above n 690.

soaks in. Or dad didn't have money for us but he always had a \$20 bill that he folded up and kept way in the back of his wallet that he would give to a family down on their luck. And so we would rather he had taken us to the beach or given us the money for the show and then later you realize that all that has an impact on you.

Mankiller's experience mirrors closely the movement of Māori from rural poverty into the urban centres in search of work. The Indian Relocation Act of 1956 intended to advance the policy of assimilation of Native Americans into mainstream society. For Māori whānau, Government policy gave effect to the Hunn Report of 1961, which made recommendations on social reforms and relocation to urban centres.⁷¹⁶

Conversely, Native American and First Nations tribes are distinctive and diverse as to cultural practices, traditions and languages. Each tribe has its own culture, language, history and distinct way of life. To this effect, it is problematic to extend one essential principle of family structure over all the tribes. Common to all indigenous peoples, however, are core values derived from their unique relationship with the natural world.

Pecos Regis (Pueblo de Cochiti) 2015:⁷¹⁷

Oren Lyons, who I have had the honor of sharing much time with in our relationship with the Native Nations Institute and Honoring Nations, calls this time a time when the creator gifted to us as Indigenous people, the original instructions. The original instructions of a way of life. I start with this core values paradigm because these gifts are really about what you shared this morning that binds you together as a family as part of a community.

The concept of original instructions resonates with indigenous peoples and the

⁷¹⁶ Bruce Biggs "Maori Affairs and the Hunn Report" (1961) 70 *Journal of the Polynesian Society*, The 361.

⁷¹⁷ Pecos Regis "Regis Pecos Addresses Rebuilders Cohort", (Native Nations Institute, University of Arizona, Tucson, AZ, 12 September 2015) Transcript provided by the Native Nations Institute for Leadership, Management and Policy, the University of Arizona. (Tucson Arizona).

family orientation toward cultural values and identity.

Kaupapa – The Collective Philosophy Principle

Envisioning a future around a common and collective philosophy is a strategy that indigenous peoples are employing to realise a self-determining future. In governance, having and fostering a collective vision enjoins others to work towards change and set new directions.

Tuwhare comments with regard to the Ngāpuhi treaty settlement:⁷¹⁸

We really want to create an environment where we have healthy, happy, thriving communities again, like we once did. It wasn't that long ago that it was like that. It's just that the urban drift has taken a massive toll on Ngāpuhi and taken away that wrap-around support that we used to have as hapū and whānau communities.... Part of ensuring we have that type of environment is having leadership who support and encourage that young talent to come through. This is also happening now, which is great to see. Our whanaungatanga amongst the hapū and our networks of Ngāpuhi coming together is strengthening by the week. Pulling in the same direction, and a force to be reckoned with. It's awesome to be part of.

Eva Petoskey (Grand Traverse Band of Ottawa and Chippewa Indians) (2013) states:⁷¹⁹

... how do you incorporate this into tribal governance in terms of setting the priorities for what the tribe does in the future and the vision of the tribe in the future, you have to have elders and people with that collective [Anishinaabe language] vision to speak up so that we're not just taking care of ourselves, which is important – not at all to diminish that – we're taking care of those inner circles of [Anishinaabe language], but we're also taking care of the larger circle of the planet that we live on, very important today. Every day we

⁷¹⁸ Dale Husband “Moana Tuwhare: Respecting the mana of Ngāpuhi hapū” (24 February 2019) E-Tangata <<https://e-tangata.co.nz/korero/moana-tuwhare-respecting-the-mana-of-ngapuhi-hapu/>>.

⁷¹⁹ Petoskey above n 701.

wake up with an acute awareness of how responsible we are and I think tribes have a lot of power in that way because I know we do. We still have ... we still retain our inland hunting and fishing and gathering within the Great Lakes, within regions of the Great Lakes and within inland. So we have a lot to say about our environment and if I live long enough I'm going to continue ... that's going to be one of my priorities is on the water and things like that.

Suzan Shown Harjo (Cheyenne and Hodulgee Muscogee) 2008 shares.⁷²⁰

A Statement Toward the Next 500 Years. And essentially it says we're going to be talking our languages, speaking in our languages, we're going to be the Native people, we're going to reclaim a lot of our traditions, we're going to clear out some of the underbrush of stereotypes so our images come through. And it talked a lot about reclamation in a sense and who we were going to be not in relation to anyone else, but as ourselves. And one thing ... it was just a marvelous, marvelous thing, and there were all sorts of people there who knocked each other off the charisma meter.

Resilience as Governance

The common theme throughout these narratives is one of resilience. Resilience may be defined as “the means by which indigenous people make use of individual and community strengths to protect themselves as cultural identity, tradition and values remain a source of strength where once they were viewed by the colonisers as barriers to assimilation into mainstream white society. It is difficult to summarise the different fundamental beliefs and worldviews expressed in the interviews and presentations of native nation leaders who represent just a small proportion of the 573 tribes in the United States and an almost equal number in Canada. Despite the differences, tribes do share core values and beliefs that underpin cultural resilience. Iris Heavyrunner offers the following as a guide to portray resilience including, spirituality, child rearing and extended family, regard for age, wisdom and tradition, respect for nature, generosity and sharing, cooperation/group harmony, autonomy/respect for others, composure/patience, the relativity of time and non-

⁷²⁰ Harjo above n 651.

verbal communication.⁷²¹ These resonate with the guidance provided by Cajete.⁷²²

... what I talk about really is the Native ecological mind if you will, the perspectives and understandings that Native people have and have developed a knowledge base around that has sustained them through many generations within the context of the communities and the places in which they have lived. So the thoughts and ideas of Native Science are really about looking at and trying to understand and trying to bring forward some of those foundational ideas, those essential ideas into a dialogue and into a kind of context of education for the 21st century. And what I talk about in Native Science is really the understandings that Indigenous people have about their relationship not only to each other but to the world around them and especially to the cosmos. Moreover, so while I use primarily examples from Native communities in the United States and a few from Mexico and Canada, a lot of the thoughts and ideas and perspectives and orientations actually could be utilized for tribal peoples from Africa, from Asia, from Australia, from New Zealand and so on.

Pecos Regis (Pueblo de Cochiti) 2015 states:⁷²³

But what we have to celebrate, if we know our history, is the resiliency of our forefathers to respond in ways that we all still have much of what the creator gave to us that defines who we are and how we respond to challenges today. Look at all of this alignment of policies over the course of several hundred years, purposefully conceived creating a time and a policy when our religious leaders were persecuted. When we were prevented from practicing our own religions. When we were prohibited to speak our own languages. That a group of people would create for dismantling family by one, taking our children because the mantra was that they're better off somewhere else and not with

⁷²¹ Iris Heavyrunner and Joann Sebastian Morris "Traditional native culture and resilience" (1997) Spring 1997 Newsletter, Resiliency – a Paradigm Shift for Schools, Vol 5, No 1 at 1.

⁷²² Gregory Cajete "Indigenous Paradigm: Building Sustainable Communities" (Department of Language, Reading and Culture, University of Arizona Tucson, Arizona, 23 April 2007).

⁷²³ Regis, above n 636.

their families and their communities, right? The great American adoption was a program to do just that. Look at all of the ways in which those were imposed.

The narratives reveal the resilience and pragmatism of Māori, Native American and First Nations women who have faced multiple challenges and tribulations over time. The extent to which historical trauma has impacted women's lives cannot be underestimated in this analysis, and their stories depict the tangible actions they have taken as agents of change for their families, communities and tribal nations. To this effect, it is essential to acknowledge that the people behind these narratives are not an homogenous group. They come from diverse realities with a breadth of cultural variety and a range of languages. A few of the above quotes are derived from respected male elders and faith leaders who possess revered cultural knowledge. What they share in common is a commitment to strengthening self-governance and self-determination through native nation building.

The narratives also reflect the extent to which women have committed to protecting their culture and providing for their communities in the wake of generations of hardship and adversity.⁷²⁴ While tribal governance was generally not something that they aspired to as a career choice, they expressed a strong desire to take on the challenge of leadership as their duty after many years of community-based service. The research into Native American women's leadership is consistent with this view although some would argue that leadership is not synonymous with governance.⁷²⁵ Tippeconnic Fox, Luna-Firebaugh and Williams have indeed made this point, stating that governance does not fit into a traditional Native American leadership conceptual framework.⁷²⁶ I endorse what Becker and Tippeconnic Fox maintain about *governance* deriving from non-indigenous traditions. However, I contend that the Native American leaders who have informed this analysis are actively involved in governance as *authentic* tribal leaders exhibiting many of the same skills, knowledge and cultural practices that Becker states exemplify Native American leadership. In my view, this is especially true of the women who relate the

⁷²⁴ Wesley-Esquimaux, above n 203, at 13.

⁷²⁵ Tracy Becker *Traditional Native American leadership* (Native American Research and Policy Institute, 1997).

⁷²⁶ Tippeconnic Fox, Luna-Firebaugh and Williams, above n 54 at 85.

complementarity of their gendered roles and responsibilities in the context of their individual tribal political, social and cultural realities. For this reason, I suggest that Becker's reliance on a *historical* conceptual model of Native American leadership does not account for the intergenerational transfer of knowledge which these tribal leaders give voice and expression to in the pursuit of self-determination. Significantly absent however in the emerging self-determination discourse are indigenous women's subjectivities, i.e. their perceptions, experiences, expectations, personal or cultural understanding and beliefs.

The indigenous resilience literature provides a context from which to analyze Native American women's subjectivities in relation to their experience of leadership in tribal governance. Beginning with a definition of indigenous resilience, Durie has defined resilience as:

Superimposed on adversity and historic marginalization, Indigenous resilience is a reflection of an innate determination by Indigenous peoples to succeed. Resilience is the polar opposite of rigidity. It provides an alternate perspective to the more usual scenarios that emphasize Indigenous disadvantage and allows the Indigenous challenge to be reconfigured as a search for success rather than an explanation of failure.⁷²⁷

Luthar has defined resilience as positive adaptation despite adversity.⁷²⁸ Over the years, research into resilience has progressed from a focus on the individual to an examination of the factors that promote resilience which is external to the individual and about family, community and more recently, culture.⁷²⁹ Furthermore, cultural resilience is a relatively new concept in the literature but has significance for indigenous communities for its recognition and application to whole communities

⁷²⁷ Mason Durie "Indigenous Resilience: from disease to disadvantage to the realisation of potential" (Unpublished Paper, paper presented to Pacific Region Indigenous Doctors Congress, Rotorua, NZ, December 2006) at 2.

⁷²⁸ SS Luthar "Resilience in Development: A synthesis of research across five decades" in D Cicchetti and DJ Cohen (eds) *Dev Psychopathol Risk Disord Adapt* (Wiley, New York, 2006) 740.

⁷²⁹ See John Fleming and Robert J Ledogar "Resilience, an evolving concept: A review of literature relevant to Aboriginal research" (2008) 6 *Pimatisiwin* 7; Glenn E Richardson "The metatheory of resilience and resiliency" (2002) 58 *J Clin Psychol* 307.

and entire cultural systems. Cultural resilience interrogates the capacity of a distinct community or cultural system to absorb disturbance and reorganize while changing to retain key elements of structure and identity that preserve its distinctness.⁷³⁰ Chandler and Lalonde have attributed cultural continuity to First Nations communities who have actively sought to re-engage their young people with their cultural heritage to protect them against suicide ideation.⁷³¹ More recently, native language revitalization has been added to measurement components for the effectiveness of cultural resilience in addressing the problem of youth suicide.

Research into resilience in Native American communities has identified some risk factors associated with the impacts of colonization. A significant factor is racism and on-going experiences of discrimination. The second major factor involves historical trauma and unresolved historical grief. Native American scholars Bonnie Duran, Karina Walters, and Eduardo Duran have led critical conversations with Māori scholars about the impact of historical traumatic events on Māori leading to an understanding of how the intergenerational transmission of cultural traditions, language, and knowledge were disrupted by colonisation.⁷³² Māori academic Leonie Pihama has examined the relevance of historical trauma theory about Māori experiences which she argues must be sufficiently articulated to understand how historical trauma events in Aoptearoa (New Zealand) have contributed to the negative health and socio-economic disparities suffered by Māori whānau, hapū, and iwi.⁷³³ Furthermore, Chandler and Lalonde have examined the improved quality of life in First Nations communities that are self-governed.⁷³⁴ Self -

⁷³⁰ S Healy “Cultural resilience, identity and the restructuring of political power in Bolivia” in Paper Submitted for the 11th Biennial Conference of the International Association for the Study of Common Property, Bali, Indonesia June (2006).

⁷³¹ Michael J Chandler and Christopher E Lalonde “Cultural continuity as a moderator of suicide risk among Canada’s First Nations” [2008] *Heal Tradit Ment Health Aborig Peoples Can* 221; Michael J Chandler and Christopher E Lalonde “Transferring whose knowledge? Exchanging whose best practices? On knowing about Indigenous knowledge and Aboriginal suicide” [2004].

⁷³² “Family, community, and school influences on resilience among Native American adolescents in the upper Midwest” (2006) 34 *J Community Psychol* 193 at 203.

⁷³³ Leonie Pihama and others “Positioning Historical Trauma Theory within Aotearoa new Zealand” (2014) 10 *Altern Int J Indig Peoples* 248 at 248.

⁷³⁴ Michael J Chandler, Christopher E Lalonde and Ulrich Teucher “Culture, Continuity, and the Limits of Narrativity A Comparison of the Self-Narratives of Native and Non-

government was a factor in meeting all of the markers required for cultural continuity including land claims, education, health services, cultural facilities, police and fire services, women in government and community-run child welfare services as markers for decreased suicide rates. In 2006, Cornell drew some comparisons between the United States, Australia, Canada, and Aotearoa (New Zealand), citing tribes and nations in the United States as exemplars for poverty reduction amongst Native American tribes.⁷³⁵ From an economic development perspective, there are some lessons to be learned from the successes of the Harvard Project and Stephen Cornell continues to be a welcomed commentator on comparative indigenous governance to Māori researchers and students in Aotearoa (New Zealand). Equally, Māori exemplars of self-determining governance provide wisdom for others about how economic, social and cultural development can be achieved for indigenous peoples by indigenous peoples. Māori have established legitimate tribal governance and economic success alongside a deep commitment to cultural practices and traditions, and in contradistinction to the Harvard Project's notion of *cultural match*. The return of homelands, resources and the acknowledgement of Māori *mana motuhake* (self determination) are central to Māori well-being. The iwi of Tūhoe exemplify this:⁷³⁶

We are not a corporation and we are not a business. We happen to be connected to those things, but our nature as an iwi is not business. That is one of the enemies we have to fight, is the inclination and the pressure to become a business, so we have the approval of all New Zealanders. So all New Zealanders can say: "What a great iwi that is — they have plenty of money to invest in Auckland now. Perhaps they'll be interested in our rail system that they can put shares in"?

An iwi declines self-interest, and we accentuate belonging and being connected to each other, connected to the land, connected by culture and by

Native Youth" In *Narrative Analysis*, by Colette Daiute and Cynthia Lightfoot (California USA: SAGE Publications, Inc., 2004); Chandler and Lalonde, above n 648.

⁷³⁵ Stephen Ellicott Cornell Indigenous peoples, poverty and self-determination in Australia, New Zealand, Canada and the United States (Native Nations Institute for Leadership, Management, and Policy, 2006).

⁷³⁶ Kruger, above n 142.

identity.

In this chapter, I have applied a uniquely indigenous approach, i.e. Kaupapa Māori methodology, to identify the transformative potential of inherent cultural knowledge as a theory of change. Kaupapa Māori theory, as outlined at the beginning of this chapter, seeks to normalise and legitimise indigenous ways of knowing, doing and being. This thesis, therefore, is concerned with identifying and working toward dismantling impediments to the legitimisation of indigenous knowledge in the construction of authentic tribal indigenous institutions. Where indigenous knowledge is contested, marginalised or oppressed then that is a site of struggle for indigenous people because what is at play in such structures are unequal power relations that seek to subordinate and continue the project of neo-colonisation and assimilation in ways that remain hegemonic while outwardly legitimating iwi and tribal structures. In Aotearoa (New Zealand) for example, tribal governance is forced to conform to state-determined models through the Treaty settlement process. Similarly, Native American tribes are subject to a process of federal recognition. In Canada, the Indian Act is the key determinant of indigenous identity.

This thesis takes a decolonising view of indigenous women's perspectives in terms of the perceived disconnect between traditional and contemporary tribal decision-making where women were considered essential decision-makers. An understanding of the resilience of Native American women characterizes their approach to governance and ultimately to their leadership.

Chapter 7 – Wai 2700: The Mana Wahine Inquiry

Background to Wai 381 – The original Mana Wahine Claim

The first national Māori organisation was established in 1951 by a new wave of Māori women's leadership, spurred on by the worsening post-war social conditions for Māori women and children. The Māori Women's Welfare League began in the wake of Te Puea's successful struggle against the government for the unjust confiscation of tribal Waikato land. Having won the battle for compensation, Te Puea set about helping to rectify the depressed social and economic circumstances of the Waikato people.⁷³⁷ Her leadership motivated other Māori women to set up the Māori committees of the Women's Health League and the Country Women's Institute. Their activities in these organisations and as Māori welfare officers motivated them to establish the Māori Women's Welfare League to focus on the needs of Māori women and families within the tribal boundaries as well as those that had moved into urban areas.⁷³⁸ In just ten years, the League became the authoritative voice on Māori social and economic affairs making submissions to Government that were taken seriously by government departments. It provided advice on housing to the Housing Corporation, gave out budgeting advice, supported the Pākehā playcentre movement and fundraised for the launch of the Māori Education Foundation.⁷³⁹ There was very little that the League would not turn its attention to where the needs of Māori women and whānau were concerned.

In 1962 however, the New Zealand Māori Council, a group dominated by Māori men was established taking over Māori leadership initiatives from the League. Dame Mira Szaszy was noted as saying:⁷⁴⁰

After 10 years of Māori women, running the Māori world there [is] a reaction amongst men that they were being left out of things? So the men moved to

⁷³⁷ See Michael King *Te Puea* (Penguin UK, 2013) at 320. Compensation amounted to a payment of £10000 for the first year, £6000 a year for fifty years and thereafter £5000 a year (later \$15,000) in perpetuity.

⁷³⁸ Walker, above n 10, at 202.

⁷³⁹ At 202–203.

⁷⁴⁰ Anna Rogers and Miria Simpson *Te Tīmatanga - Tātau Tātau: Te Rōpū Wāhine Māori Toko i te Ora Early stories of the Māori Women's Welfare League* (Bridget Williams Books, Wellington, 1993) at 225.

get the government to approve the establishing of the National Māori Council? For me that was the beginning of the dichotomy of power and development within the Māori world.

Māori committees were formed under the Welfare Act 1962 which also established a top tier Pākehā bureaucratic organisation model. According to Walker, the Māori committees were an artificial construct that did not resemble in any way the authentic model of Māori decision-making at the whānau, hapū and marae committee level.⁷⁴¹ The dichotomous nature of Council leadership evolved from tribal leaders publicly identifying with Pākehā party politics while concurrently attempting to address the same issues that the League had grappled with i.e. the struggle for the good of the people against the forces of colonisation.⁷⁴² The formation of a power elite with strong political affiliations was inevitable in these circumstances and the Council became publicly identifiable with the National Government as a result.⁷⁴³

The 1970s and 80s heralded a movement of Māori protest, calls for honouring of the Treaty, for Māori sovereignty and Māori nationalism.⁷⁴⁴ Māori women were at the forefront of this movement, ‘organic intellectuals’ women who were well educated, driven by emancipatory ideals and prepared to engage with the dominant structures in order to effect transformative change.⁷⁴⁵ The Māori feminist movement was born out of the struggle for Māori rights as a challenge to the Pākehā system and Pākehā feminism. Donna Awatere was unapologetically critical of white feminists at the time who she stated were ‘using status and privilege to supersede Māori women.’⁷⁴⁶

White women supported the white system, they ‘do this by defining “feminism” for this country and by using their white power, status and privilege to ensure that their definition of “feminism” supercedes [sic] that of

⁷⁴¹ Walker, above n 10, at 203–206.

⁷⁴² At 205.

⁷⁴³ Identified members of the National Party were Sir Tui Carroll who was the first president; Henare Ngata secretary; and Pei Te Hurunui Jones and Sir Graham Latimer were succeeding presidents. At 205.

⁷⁴⁴ Awatere Huata, above n 60; Evans, above n 578.

⁷⁴⁵ See Graham H. Smith, above n 205, at 147–157.

⁷⁴⁶ Donna Awatere “Maori Sovereignty part two” [1982] Broadsheet 24 at 26.

Maori women.’ Furthermore, Awatere stated ‘when individual white women succeed they wrongly believe they are spearheading changes for *all* women, that their success represents a real challenge to the patriarchy,’ and such methods meant that ‘you will never achieve real changes for *all* women.

Awatere captured an important perspective for this wave of Māori activism which helped shape the direction of Māori feminism and the movement as a whole... ‘that the Māori language is a feminist issue, the Land is a feminist issue, Separate Development is a feminist issue, the venomous hatred of the Māori by the Pākehā is a feminist issue’. That racism had been an on-going issue for Māori women came as some surprise to Pākehā feminists, some of whom loudly condemned Broadsheet Magazine’s on-going publication of Awatere and others articles. Notably, other Pākehā feminists responded positively going so far as to establish ‘Women for Aotearoa’ a group that sought to understand the oppressions of women from a Māori perspective. In her comprehensive Masters Thesis entitled “The Scholarship of Sandra Coney”, Hayes refers to a 1985 interview with well known feminist, activist and politician Sandra Coney who commented on the importance of Donna Awatere’s contribution to feminist analysis.⁷⁴⁷

It was very exciting, it really challenged and extended my own thinking. No-one else was saying what Donna was saying. It was important for everyone in New Zealand, not the least for Pākehā feminists because we had really ignored the existence of Maori women, working class women and other groups while we’d got on with our assertiveness training...It was very important that all the things that Donna said were printed.

As Treaty of Waitangi claims and the Treaty Settlements process gained momentum in the early 1990s, Māori women were becoming increasingly concerned regarding the notable absence of women from leading roles in the Treaty negotiation and settlement process. This was evident in the negotiations for tribal fishing rights that became known as the Sealord Deal.⁷⁴⁸ Apart from the inclusion of Denese Henare

⁷⁴⁷ Kimberley Hayes “The Scholarship of Sandra Coney”(Master of Arts Dissertation, University of Canterbury,2015) at 53.

⁷⁴⁸ See Waitangi Tribunal *The Fisheries Settlement Report* (Wai 307,1992). See also Walker, above n 10, at 295–6.

who was the senior legal advisor at the time for Waikato-Tainui, both sides were heavily male-dominated.⁷⁴⁹ Walker comments that the Sealord deal became known for exemplifying “the politics of expedience and pragmatism.”⁷⁵⁰

As soon as the deal was struck the Māori negotiators, like a mini-government, went around the tribes belatedly seeking a mandate for what was in effect a *fait accompli*. One of the negotiators rationalised what had been done as ‘the only deal in town’. For pragmatic reasons, the Māori negotiators were prepared to surrender the moral high ground of owning customary property rights in the sea guaranteed by the Treaty and ratified by judgement in the High Court for 150 pieces of silver.⁷⁵¹

According to Seuffert, an examination of Treaty settlement discourse of the time shows the re-emergence of colonial attitudes of race and gender. Neoliberal ideology married with a rising elite of entrepreneurial and powerful Māori men, some of whom became Treaty negotiators for the first large Treaty settlements, shaped the process by which claims for redress of Treaty grievances were met.⁷⁵² The pragmatism and expedience referred to by Walker in the full and final settlement of Treaty breaches, such as the 1992 Sealord deal, reflected the hegemonic reality of a colonial society headed by a mainly male Pākehā elite i.e the Crown. Most analyses focus on the topic of race while ignoring the dynamic interdependence that continues to exist within Māori society of gender. The convergence of cultures under a ‘new’ neoliberal nationalism ostensibly built around Treaty principles of ‘equality’ and ‘partnership’, provided for an alliance of privileged, powerful and entrepreneurial men for whom the potential of economic prosperity outweighed traditional Treaty rights and obligations. From 1987 onward the government recognised ‘the mandate of an extremely select group of Māori men to act as negotiators on behalf of all men’ despite the mandate being challenged by

⁷⁴⁹ The Māori negotiators were Matiu Rata from Muriwhenua; Tipene O’Regan from Ngai Tahu; Sir Graham Latimer from the New Zealand Māori Council; and Denise Henare on behalf of Tainui. The negotiators had been mandated at a national hui in 1988 to seek a settlement of not less than 50% of the fisheries in question. See Justine Munro “The Treaty of Waitangi and the Sealord Deal” (1994) 24 *Vic Univ Wellingt Law Rev* 389 at 403.

⁷⁵⁰ Walker, above n 10, at 297–298.

⁷⁵¹ Ranginui Walker *Ngā pepa a Ranginui - The Walker Papers* (Penguin Books, Auckland, NZ, 1996) at 102.

⁷⁵² Seuffert, above n 108, at 487.

iwi all over the country implying that Māori women have less value than Māori males or even Pākehā males. Thus the settlement process was at the time blatantly dominated by men who were not taking into account the core substantive nature of the breaches in question, opting instead for financial settlements with iwi consultation. Self-determination became about competition and progress. Tino rangatiratanga as guaranteed by the Treaty of Waitangi 1840 became the vehicle for Māori buy-in, but not the prize.

For decades Māori women have been integral to the revitalisation of Māori culture, the revitalisation of language and the re-emergence of Kaupapa Māori pedagogically sound education. Māori women were all at the forefront of the Māori Women's Welfare League, Te Kohanga Reo, Kura Kaupapa Māori and Nga Tamatoa. The erasure of Māori women from roles of mana, power and status flowed easily from the ignominy of Māori leadership traditions. Evans reminds us that the term Mana Wahine:⁷⁵³

...signifies the process of self-determination by which we determine our social and cultural future and give effect to our status as tangata whenua – as Māori women. There is a link between Mana Wahine and Mana Tangata insofar as Mana Wahine denotes practices and procedures in exercise of self-determination which are peculiar to women. Such practices and procedures are collectively performed by women or as a part of Māori social groupings or activities which contribute to the self-determination of Māori as Tangata Whenua.

The Genesis of Wai 381

In her book – *Māori Sovereignty the Māori perspective*, Hineani Melbourne interviews Donna Awatere-Huata who talks about some of her personal experiences of sexism and how they contributed to her feminist views about Māori politics in the 1990s. Regarding the Wai 381 Mana Wahine claim, she states that it was prompted by the removal of Mira Szasy from the Fisheries Commission in favour

⁷⁵³ Evans, above n 578, at 3.

of Shane Jones.⁷⁵⁴

We as Māori women were insulted by that. The Crown is basically dealing, negotiating with a group of Māori men who have set themselves up as dealers. I believe the real development of Māori is not just in the big economic and macro issues such as land and fisheries. The real development is in the micro issues – the issues of family, the quality of education, the quality of health, the quality of the life of our children – that are being led by our women.

In reference to the Wai 381 claim, Annette Sykes has steadfastly supported the need for the participation of Māori women in the constitutional makeup of Aotearoa. She remains unequivocal in this respect stating in 1994 “that the status, existence and rights of Māori women guaranteed under the Treaty has never been addressed nor actively protected through legislation.”⁷⁵⁵

The essence of the claim, brought on behalf of the past presidents of the Maori Women's Welfare League, some young Maori women including Donna Awatere, Ripeka Evans and Paparangi Reid, supported by Te Runanga o Ngati Hine and Nga Kuia o Ngati Hine including Lady Rose Henare, is to bring to the forefront of the current Treaty jurisprudence the need to look at notions of governance in Aotearoa. In particular, the claim looks at the exclusionary practices which inhibit and prevent participation by Maori women in the tribal models for self-determination that have been erected under New Zealand legislation, and the erosion this has had on te mana wahine in te ao Maori.⁷⁵⁶

The 1993 Mana Wahine claim specified that the Crown breached the obligation of equality in relation to Māori women. It is founded upon the traditional balance and notion of equality between Māori men and women that has been corrupted through the importation of colonial patriarchal constructs and practices. For example, the 1995 election of Cathy Dewes to the Te Arawa Māori Trust Board in Rotorua highlights how these practices have become embedded. Having been nominated

⁷⁵⁴ Hineani Melbourne *Maori Sovereignty: the Maori perspective* (Hodder Moea Publishers, 1995) at 179–180.

⁷⁵⁵ Sykes, above n 60, at 40.

⁷⁵⁶ At 41.

and supported by her own Ngāti Rangitihī iwi, Dewes won a seat in the 1993 Board elections. The Board however, rejected her nomination on the grounds that Te Arawa tikanga did not allow for a woman to act as a spokesperson for the iwi. Having appealed the action to the High Court, another election was held and in 1995 Dewes became the first woman in 50 years to sit on the Te Arawa Trust Board. A Trust Board spokesperson would only say that “the role of women had been accounted for.”⁷⁵⁷ Areta Koopu lodged the original claim in 1993 on behalf of herself and the Māori Women’s Welfare League. Past Presidents including Dame Mira Szaszy, Dame Whina Cooper, Dr Erihapeti Murchie, Georgina Kirby, Violet Pou, June Mariu, Hine Potaka, Aroha Reriti-Crofts also became joint claimants as did Ripeka Evans, Paparangi Reid, Donna Awatere-Huata, Lady Rose Henare, Katarina Hoterene, Teparā Mabel Waititi and Kare Cooper-Tate on behalf of themselves and for all Māori women.

The Wai 381 claim was an umbrella claim representing all Māori women including members of the League but also activists, professionals and women leaders in their field. Māori women advocated for a return to traditional practices with respect to Māori sovereignty Eg. governance. In fact, it was intended to represent all women who had challenged Crown policy and practice that negatively impacted on Māori women. The claim alleged that:

- (a) ‘Maori women individually, as tribal members, family members and leaders have been systematically deprived of their spiritual, cultural, social and economic well- being by Crown actions and policies’ in breach of Articles II and III of the Treaty of Waitangi; and that
- (b) The Crown has not fulfilled its obligations ‘to protect and ensure the rangatiratanga of Maori women as individuals and members and leaders of tribes and families’, and has failed ‘to accord Maori women status and power within the political, cultural, social and economic structures it has created’, resulting in ‘an undermining of Maori women so that their status as rangatira has been expropriated’.

⁷⁵⁷ Interview with Cathy Dewes, Trustee to Te Arawa Trust Board (Geoff Robinson, Morning Report, National Radio, 11 April, 1995) retrieved from <ngataonga.org.nz/collections>.

Waitangi Tribunal - Kaupapa Inquiries

In July 2014 the Waitangi Tribunal released a new long-term strategic direction which signalled the shift in focus from a concentration on historic district inquiries to the focus on contemporary and kaupapa (thematic) inquiries. The overarching objective is to complete most registered claims by mid-2020. To that end, the kaupapa claims inquiry programme is intended to address kaupapa issues arising from the district inquiries that have a historical dimension but which are, by definition, of national scope and significance. Kaupapa grievances may be historical in that they arose prior to September 1992, or involve contemporary or on-going issues.

Currently, there is a substantial backlog of kaupapa grievances before the Tribunal. Some have been waiting for years to be heard given the prioritisation of the district claims and hearing process. Any kaupapa claims for specific matters bearing a significant risk of ‘imminent or irreversible prejudice’⁷⁵⁸ can be heard as an urgent inquiry however, the breadth of evidential research and investigative resourcing required to sufficiently explore the historical context of the issues can also be prohibitive.⁷⁵⁹ Given the current backlog, the Tribunal has decided to move ahead with the kaupapa inquiries, providing for a hearing timeframe within which claimants can make submissions.

Contemporary Claim Wai 2700 – the Mana Wāhine Inquiry

In 2018 Chief Judge Isaac of the Waitangi Tribunal convened a judicial conference to discuss the approach on how the Mana Wahine claims were to proceed.⁷⁶⁰ A large component of the discussion involved addressing how the original Wai 381 claim

⁷⁵⁸ W Isaac “Memorandum of the Chairperson Concerning the Kaupapa Inquiry Programme” [2015] Wellington N Z Wait Trib at 3.

⁷⁵⁹ See for example Waitangi Tribunal *Tū Mai te Rangi: Report on the Crown and Disproportionate Reoffending Rates Wai 2540* (Wai 2540 2017). The inquiry was granted urgency to focus on what the Crown, through the department of Corrections, is doing now to address the disproportionate rates of Māori offending. Claimants provided evidence on the broader socio-economic and historical issues relating to the effects of colonisation; the position of Māori in the criminal justice system; the structural causes of offending; issues of systemic racism and the potential for reformation of the criminal justice system as a whole which will likely also form the basis of a proposed kaupapa inquiry.

⁷⁶⁰ W Isaac “Mana Wahine Kaupapa Inquiry Judicial Conference Wai 2700, #411” [2018].

was to be progressed in relation to the more contemporary claims of Housing and Mana Tāne or Crown inquiries into State abuse and Health. In response to calls from Counsel to prioritise other claims and in particular, to hear the Mana Tāne claim in conjunction with the Mana Wahine claims, Counsel Annette Sykes highlighted the need for the inquiry to follow a feminist pedagogy.⁷⁶¹ In relation to the claimants, *Ngā Wahine Kaitiaki o Te Ao*, comprising Māori women intellectuals, Ms Sykes pointed out that:⁷⁶²

One of the key issues is that their mana was [sic] women is actually not recognising health services so, therefore, if you talk about priority Sir, it would inform the Health Inquiry if the dignity of 15 women which were preserved by the Treaty is actually found here as a finding that then informs these other inquiries so that they do not continue to deal with Māori women as second-class adjuncts to Crown policy. So I would be asking for a priority finding on some of the clear claims that were expressed by Wai 381.

Ms Sykes added in relation to Mana Wahine standing alone and being at the forefront of this inquiry:⁷⁶³

...Mana Tāne being given ascendancy or equality with Mana Wahine as part of the discussions. I think the pedagogy of what we are here before [sic] needs to be upfront and straight. Māori women are not to be treated as we have been, even with Wai 381, it has been 25 years before we can even get the matter dealt with and yet the issue that it raised which was the lack of representation of Māori Women in leadership roles over asset deliberation has continued in 25 years unabated with very little change in their representation statistics.

After further deliberation, it was decided that Mana Tāne claim would be dealt with separately from the Mana Wahine claims. In addition, submissions were heard from claimants as to the desire to progress the Mana Wahine claim with urgency. Dr Leonie Pihama stated:⁷⁶⁴

⁷⁶¹ At 56.

⁷⁶² At 56.

⁷⁶³ At 57.

⁷⁶⁴ At 93.

... I think that Māori women deserve to have our voices heard. I think this needs to be less about lawyers and more about Māori women. I think that Māori women you know we have been waiting for a very long time for this claim to be ignited in this way. I think we underestimate our Māori women's networks and the networks if we think that our Māori women do not know this claim is happening because our networks are very strong.

With regard to the research required for the inquiry, Dr Pihama makes the point regarding the need for a Kaupapa Māori approach.⁷⁶⁵

...it needs to be done by a Māori women's view in a Māori women's approach. So any Mana Wahine research that is done around the Mana Wahine claim needs to have a kaupapa Māori and a Mana Wahine approach to it. Simultaneously it needs to have strong advocacy in terms of Māori approaches to the work and so I think that there does need to be some consideration around having some conversation around some researchers that it would be appropriate which should be around the Māori women's issues.

The process for the Mana Wahine claims hearings is expected to address a number of concerns raised by the parties represented in the judicial conference. Amongst these are strong calls for adequate funding and resources to allow for appropriate research to be conducted and for the use of te re Māori in submissions. In addition, the request for a feminist presiding judge underlies the kaupapa Māori Wahine approach sought from some Counsel but in particular those involved in and supporting the original claim. This request aligns with Indigenous women's feminist discourse that has developed significantly over the last twenty-five years. While the issues that gave rise to the original Wai 381 claim remain unaddressed, Indigenous women's discourse has developed significantly around sovereignty and rights issues as this thesis has illustrated.

In December 2018 Chief Judge Isaac initiated the Mana Wahine claim and announced the appointment of Judge Sarah Reeves, a Māori woman, to lead the Mana Wahine claim hearings. As yet a date has not been set for the commencement

⁷⁶⁵ At 94–95.

of the hearings.

A Kaupapa Māori Analysis of the Mana Wahine Submissions

A Kaupapa Māori approach is taken in this Chapter with a view to theorising Mana Wahine Voices. This Chapter will examine the main Treaty-based discourses that Māori women assert have created an oppressive state for women, whānau, hapū and iwi. This thesis argues that Indigenous governance is a significant site of struggle for Indigenous women. Therefore it privileges the voices of women and gives substance to their narratives of struggle and resistance. I remind the reader that these submissions are but the first stage of a State-driven reparative process and that evidence is yet to be provided in formal Tribunal hearings however, the words and the stories are substantive and still resonate. As stated by Dr Leonie Pihama:

Having the opportunity to articulate our views is a part of what this Kaupapa Inquiry enables. It enables Māori women to have a voice after effectively 200 years or more of others speaking about us without us having any input or voice in the telling of those stories and the recording of those histories.⁷⁶⁶

According to Linda Tuhiwai Smith the concept of struggle is an important tool for social activism. “It is a tool that has the potential to enable oppressed groups to embrace and mobilize agency, and to turn the consciousness of injustice into strategies for change. Struggle can be mobilised as resistance and as transformation”⁷⁶⁷In Aotearoa, Mana Wahine is epitomised in Te Rarawa Leader Whina Cooper who serves as an embodied symbol of resistance and resilience. Leading the Māori Land March in protest, “*Not One More Acre*” became the rallying cry for Māori to take action and to face the colonisers head on against the on-going confiscation of Māori land. While there is some debate on whether or not the Land March achieved what it set out to do, Aroha Harris reminds us that it was an important consciousness-raising exercise for Māori.

It was a ...huge accomplishment rarely achieved, and testament to the depth of feeling about the land issue. The conduct of the march itself cannot be

⁷⁶⁶ Wai 2700, 3.1.037(a) (1) Speaking Notes of Dr. Leonie Pihama, 28/03/2018.

⁷⁶⁷ Smith, above n 61, at 199.

faulted; its dignity has made a permanent impression on New Zealand's history.⁷⁶⁸

The establishment of the Waitangi Tribunal in the same year of Te Matakite Māori Land March is significant for bringing to the fore longstanding Māori grievances in relation to land ownership, alienation and the Crown's systematic removal of Māori land to Pākehā control. By 1975, only 1.2 million hectares of Māori land remained but was subject to Pākehā control. This was the consequence of a number of factors that included the combined operation of the Māori Affairs Amendment Act 1967, the Rating Act 1967 and the Town and Country Planning Act 1953 that resulted in increased Māori resentment as Māori land was confiscated or rendered unfeasible due to unfair restrictions and high rating levies. Bruce Stirling, in his report on rating in Northland for Te Paparahi o Te Raki inquiry, notes: that:⁷⁶⁹

...despite enormous increases in the Maori rates take, they [counties] continued to complain that they were not collecting enough from Maori. As a result, the counties continued to resort to legal enforcement of unpaid rates, usually through receivership leases.

The land takings were a major consideration for Māori moving to the cities, regardless that most still possessed ancestral land holdings. Migration to urban centres brought with it more problems including loss of language and culture, inadequate housing, detrimental economic and health impacts plus the general dislocation and displacement from rurally based collective communities.

This analysis necessitates exposing the dominant interests that have been at play throughout the process of colonisation and which are embedded in how we talk about, refer to and understand the Treaty of Waitangi within New Zealand society. The racialised discourses of law and gender are uncovered in the analysis of submissions to illuminate how these discourses converge in complex ways around a neoliberal ideology that has permeated Treaty discourse in relation to Treaty settlements. In other words, the assimilationist agenda of colonialism into what was

⁷⁶⁸ Harris, above n 17, at 76.

⁷⁶⁹ B Stirling Eating Away at the Land, Eating Away at the People: Local Government, Rates and Maori in Northland (Wai 1040, A15 CFRT 2008) at 37.

once known as the welfare state has shifted to accommodating economic priorities which no longer view Māori as a cheap labour workforce, but views Māori tribes as neo-corporations. As Seuffert argues, the redress of historical grievances and the availability of Treaty settlements has shaped law and policy (Treaty jurisprudence) into a new nationalism of Crown–Māori partnership. “It produced a symbolic alliance of men across race that silenced and erased Māori activists’ demands, and the leadership of Māori women, at a national level.”⁷⁷⁰ As a result, the early Treaty settlements paved the way for a male-dominated alliance within which Māori women’s voices were silenced according to the Grandmother Council of the Waitaha Nation.⁷⁷¹ For example, the Grandmother Council claim that the 1997 Ngaitahu Claims Settlement Act reportedly subsumed Waitaha Wahine within the larger Ngai Tāhu tribe.⁷⁷²

Waitaha wāhine proudly puri their rangatiratanga and deep-seated history as a Matriarchal iwi. The essence of their claim is founded on Waitaha Nation’s taketake wāhine leadership and pacifist disposition.

In terms of the delay of twenty-five years for the Mana Wahine claim to be heard, the original claimants agreed for the hapū and iwi claims to be heard before it.⁷⁷³ It was thought that the redress of those claims would resolve the issues for women and whānau. The Wai 381 claimants now state that they were wrong.

Firstly, our claim would have informed the whole of the claims process as the mana wahine story puts women and the whānau in the centre of the breaches against the Treaty, rather than on the margins or invisible. Secondly that the settlement processes included mana wahine, the redress to Māori women, children and the whānau would have been a guiding principle.

⁷⁷⁰ Seuffert, above n 108, at 485.

⁷⁷¹ See *Wai 2700, Wai 1940* (2018) at [55]. Brought by Jane Mihingarangi Ruka Te Korako, on behalf of the Grandmother Council of the Waitaha Nation, including three hapū of Ngāti Kurawaka, Ngāati Rakaiwaka and Ngāti Pakauwaka, the claimants state that “... specific Crown settlements with some Iwi and Hapū in effect cut across Waitaha mana whenua, and Waitaha interests can vanish with the stroke of a pen. An obvious example of this is the 1988 Ngai Wai 2700 and Wai [sic] Tahu Claims Settlement Act which on paper all but snuffed out the whenua of southern Waitaha.”

⁷⁷² *Wai 2700, Wai 1940* at [3]

⁷⁷³ *Wai 2700, Wai 381, Wai 2494*, 3.1.039 (a), at 23

The Crown's settlement policies have also been called into question generally as exclusionary of Māori women. The settling of claims based on "large natural groupings" is claimed to undermine women's rights of natural justice and ignores the customary underpinnings of the parties that the Crown is settling with.

A Kaupapa Māori gender analysis of the Treaty settlements process is due in light of the Mana Wahine claim which provides a critical commentary of the Crown and the State's indifference to Māori women. What relevant analysis does exist has come through the marginalised writings of Māori feminists from the early days of the Māori protest movement that supported the original Mana Wahine claimants in 1993.⁷⁷⁴ Legal and political critique of the positioning of Māori women as a result of colonisation gave visibility to the serious social, economic and justice issues they were facing.⁷⁷⁵ For Māori and Indigenous women, the negative impacts are worsening warranting a much broader and in-depth focus of the issues. This is provided for finally, in the Mana Wahine inquiry. Whereas the Treaty settlement process to date has wholly ignored women, the Crown has also been complicit in ignoring the leadership and activists roles of Māori women in the struggle for self-determination. To make gender visible in the Treaty settlement process now, is to listen to their voices, hearts and minds in the context of the Mana Wahine Claim Inquiry. A Kaupapa Māori approach to the analysis of the Mana Wahine

⁷⁷⁴ Donna Awatere "Korero-Tia Wahine Ma! Women Speak Out! The First National Black Women's Hui" (1980) 84 *Broadsheet* 10; Donna Awatere "Mam Sovereignty" [1984] *Broadsheet*; Awatere Huata, above n 38; Donna Awatere-Huata "Zero Tolerance" [1998] *Parliam Build* Wellington; Awatere, above n 524; Ripeka Evans "The negation of powerlessness: Maori feminism, a perspective" (1994) 20 *Hecate* 53; Sykes, above n 38.

⁷⁷⁵ Milroy, above n 558; Caren Wickliffe *Indigenous claims and the process of negotiation and settlement in countries with jurisdictions and populations comparable to New Zealand's* (Office of the Parliamentary Commissioner for the Environment, Wellington, NZ, 1994); Caren Wickliffe "Issues for Indigenous Claims Settlement Policies Arising in Other Jurisdictions Treaty of Waitangi: Special Issue" (1995) 25 - *Vic Univ Wellingt Law Rev*; Caren Wickliffe and Matu Dickson "Māori and Constitutional Change" (1999) 3 *Yearb N Z Jurisprudence*; Caren Wickliffe "Maori women's access to justice" (2005) 8 *Yearb N Z Jurisprud* 217; Mikaere, above n 18; Ani Mikaere "Colonisation and the imposition of patriarchy: A Ngati Raukawa woman's perspective" (1999) 1 *Te Ukaipo* 34; Ani Mikaere *Māori and self-determination in Aotearoa/New Zealand* (University of Waikato, 2000); Ani Mikaere "Racism in contemporary Aotearoa: A Pākehā problem" [2001] *Indig Peoples Racism U N* 133; Ani Mikaere "Are we all New Zealanders now" [2004] *Māori Response Pākehā Quest Indig Bruce Jesson Meml Lect*; Mikaere, above n 387; Ani Mikaere "The Treaty of Waitangi and recognition of tikanga Māori" [2005] *Wait Revisit Perspect Treaty Wait* 330; Mikaere, above n 270; Mikaere, above n 61; Mikaere, above n 201.

submissions seeks to identify with and proactively advance the cause of ‘being Māori’. At the heart of Kaupapa Māori is the transformative potential that comes from resisting the on-going assimilation of Māori language, knowledge and culture by the dominant Pākehā society.

The Mana Wahine claim to the Waitangi Tribunal provides the space for critical reflection of 175 years of oppression and marginalisation. The submissions inform Māori Women’s struggle and resistance and cannot be hurried but neither can it be left any longer. The claim is being heard at a time when Indigenous resistance is at its height and has the potential, in my view, to galvanise Indigenous women’s political action for self-determination and against oppression. The original claim which has been shelved for 25 years still provides the impetus for giving voice to Māori women, and Māori women are vocal in their resolve to be heard.

Analysis of the Submissions

The Mana Wahine Inquiry stems from Māori women’s challenges to their positioning following the signing of Te Tiriti o Waitangi 1840. At least thirteen Māori women are known to have signed Te Tiriti. Other women may have signed but as Mikaere notes, the gender neutral nature of te reo Māori means that names are not identifiable by gender.⁷⁷⁶ Many chiefs left their mark and again there is no certainty as to whether the markings were made by men alone. In addition, opposition from missionaries present at the signings suggests that Māori women ‘intended’ to sign, but were prevented from doing so. Their number of course is unknown but clearly, Māori women were essential decision-makers at the time that they signed Te Tiriti o Waitangi. Fundamentally, the guarantee of tino rangatiratanga applies equally to Māori women as to Māori men. The marginalisation of Māori women’s roles and status flow from Crown breaches of the guarantees of Te Tiriti o Waitangi.

Kaupapa Mana Wahine Theme “Whenua ki te Whenua”

Following the Judicial Conference held 13 March 2018, Māori women claimants

⁷⁷⁶ Mikaere, above n 21, at 115.

decided upon a distinctly Kaupapa Mana Wahine approach to frame the Inquiry as it proceeds. They have ascribed the term “*Whenua ki te Whenua*” a concept that derives from:⁷⁷⁷

...the experience of how women, the *whare tangata*, the keepers of *whenua* (the placenta) were dislocated from their *kāinga*, their territories, their connections to *Papatuanuku*, their status as decision makers and how the claims seek to restore Māori women to those *turangawaewae* to exercise all the contingent obligations that women assert to ensure Māori ways of life and experience are to be sustained in Aotearoa / New Zealand. . In a conceptual sense that *turangawaewae* encapsulates both the loss of decision-making ability as patriarchal Victorian attitudes came to dominate in the early colonial period and the diminished status that was effected deliberately by schooling processes of the early colonising period that discriminated against girls.

Framing the Inquiry from a Kaupapa Māori theoretical perspective positions the inquiry research at the nexus of the political relationship between Māori women and the Treaty. It is at this intersection that the structural and cultural impediments can be addressed. For example, how breaches of the Treaty have impacted on Māori women’s role and status within Te Ao Māori.⁷⁷⁸

Determining how the role of historical ideologies, practices, policies and State developed legislative impositions have been instrumental in the denial of fundamental rights and status of Māori Women in all contexts including the processes of decision-making internal to Māori communities.

Examining the causes of the structural discrimination and disparities that have resulted for Māori Women in education, health, economic development, justice and other identified priority areas.

Identifying the barriers to equal opportunity and equity for Māori women and girls and their over-representation in negative statistics in youth suicide, incarceration in

⁷⁷⁷ Wai 2700, 3.1.54 MWWL (381), 1885, 2494, 2713, Tbc Pihama et al, 2/5/18 at 2 (j).

⁷⁷⁸ Wai 2700, 3.1.54 MWWL (381), 1885, 2494, 2713, Tbc Pihama et al, 2/5/18 at 21 (a) – (e).

prisons and mental health institutions.

Identifying why the State has failed to prevent the disproportional impact of sexual violence, state violence and domestic violence on Māori women and girls in breach of its obligations to protect all its citizens from harm.

Addressing the Treaty relationship between Māori women and the Crown is critical to the Mana Wahine Inquiry producing a transformative outcome. This is dependent on the Crown's acknowledgement of the rangatiratanga of Māori women that embraces women's epistemologies and requires an authentic understanding of the on-going issues of colonialism.⁷⁷⁹

We therefore believe that a fundamental priority issue in this inquiry has to be that, as expressed by Dr Leonie Pihama in her Statement of Position to the Tribunal, the role of colonisation and the historical acts that are grounded upon the intersection of sexism, racism, capitalist class oppression and homophobia have been instrumental in the marginalisation and subjugation of Māori girls and women. A subsidiary issue that flows from that issue is the need to determine how the role of historical ideologies, practices, policies and State-developed legislative impositions have been instrumental in the denial of fundamental rights and status of Māori women.

The colonial underpinnings of the Crown – Māori Treaty relationship is inherently about struggle particularly the on-going struggle for and about land. The struggle for land is even more significant for Māori women as the kaupapa for this inquiry signifies. “Whenua ki te whenua” is an intrinsic relationship that women have with Papatūānuku that pre-dates the concept of ‘land’ as a commodity or land as property; both concepts that served to dispossess and marginalise Māori women within the Treaty framework.

The Mana Wahine submissions describe the actions, policies and practices of the Crown that have served to oppress Māori women in breach of the guarantees afforded them in the signing of TeTiriti o Waitangi 1840. This analysis utilises the

⁷⁷⁹ Wai 2700, 3.1.54 MWL (381), 1885, 2494, 2713, Tbc Pihama et al, 2/5/18 at 13.

Kaupapa Māori elements developed by Professor Graham H. Smith as a framework to critique the emerging themes. This is intended as a contribution to a developing theory of Kaupapa Mana Wahine theory in relation to the *re-positioning* of Māori women in Treaty of Waitangi discourse.

Tino Rangatiratanga – Self-Determination Principle

Central to the Mana Wahine claims is the question: *What was the effect of Crown policies on the authority of Māori women?* While this question forms one of the issues fundamental to the unreported Stage II of Te Paparahi o Te Raki Inquiry 1040, it is most pertinent in this discussion as it applies in the district, regional and national contexts for which submissions have been received.

This analysis begins with the overarching principle of sovereignty which like the principle of self-determination is inherent within the notion of rangatiratanga. The Mana Wahine 2700 Claimants rely upon the findings made in Stage 1 of Te Paparahi o Te Raki Inquiry (“the Wai 1040 Inquiry”), which are:⁷⁸⁰

In February 1840, the rangatira who signed te Tiriti did not cede their sovereignty. That is, they did not cede their authority to make and enforce law over their people or their territories. Rather, they agreed to share power and authority with the Governor. They agreed to a relationship: one in which they and Hobson were to be equal - equal while having different roles and different spheres of influence. In essence, rangatira retained their authority over their hapū and territories, while Hobson was given authority to control Pākehā.

While the prevailing narrative of the settlement of Aotearoa New Zealand has been one of the cession of sovereignty by Māori to the British Crown, the Tribunal’s decision in the Te Raki Stage I inquiry provides a moral victory if not a legal one. With the Stage II hearings completed, Māori can rely on the knowledge that an agreement was made between Māori and the Crown with regard to sovereignty. It is from that agreement that obligations and duties derived from the principles of the treaty must flow.⁷⁸¹ The tino rangatiratanga principle underpins the goal of taking

⁷⁸⁰ Waitangi Tribunal, above n 89, at 525–529.

⁷⁸¹ At 527.

more control over key decision-making and is consistent with Kaupapa Māori initiatives such as Kohanga Reo and Kura Kaupapa Māori within schooling and education settings that were major sites of struggle for Māori.⁷⁸² Similarly, Māori governance is also a major site of struggle as its co-option by the State through the vehicle of Treaty settlements is inconsistent with Māori aspirations for self-determination. The context of the Mana Wahine inquiry in relation to Te Tiriti/Treaty of Waitangi is the on-going struggle against prevalent colonialism and for the return of land.

The claimants did not cede their Tino Rangatiratanga to the Crown. The Crown's imposition of Kāwanatanga over them was a grave breach of te Tiriti/the Treaty. In imposing its laws over them, the Crown put in place various mechanisms, including, the Old Land Claims processes, Crown purchases and other direct acquisitions and confiscations, and the various Native Land Court regimes, which facilitated, in breach of te Tiriti/the Treaty, the wrongful transfer of Māori lands to the new settler communities.⁷⁸³

In view of Te Paparahi o Te Raki Stage I findings, it is now axiomatic that the sovereignty or kawanatanga of the Crown was and remains subject to the guarantee to protect tino rangatiratanga or, in English, tribal autonomy⁷⁸⁴.

The ability of tribal communities to govern themselves as they had for centuries, to determine their own internal political, economic and social rights and objectives, and to act collectively in accordance with those determinants.

Self – Determination or Relative Autonomy

The self-determination principle is intrinsic to human rights discourse and is enunciated in the United Nations Declaration of the Rights of Indigenous

⁷⁸² See generally Smith, above n 147.

⁷⁸³ Wai 1541, 1.1.1(d) Wai – 2660, 2750, 1040, 1541, 3/09/2018, at 29

⁷⁸⁴ Waitangi Tribunal Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims (Wai 814) Volume 1 (Wai 814 2004) at 113. See also “The Lands Case” Council Zealand Māori Council v Attorney-General [1987] 1 NZLR 641 (CA).

Peoples.⁷⁸⁵ For Māori, self-determination contextualised within the Treaty principles of *rangatiratanga* and *kawanatanga* whereby the Crown guarantees to protect Māori autonomy. The Turanga Tribunal report defined autonomy as ‘the ability of tribal communities to govern themselves as they had for centuries, to determine their own political, economic, and social rights and objectives, and to act collectively in accordance with those determinants.’⁷⁸⁶

The issue for the Mana Wahine claimants is how to ensure that Māori women have increased control over their own lives and cultural well-being, a guarantee that the Crown has failed to live up to. It requires greater autonomy over key decision-making so that Māori women are empowered to make choices and decisions that reflect their cultural, political, economic and social preferences.⁷⁸⁷

A successful model of Māori women’s autonomy and self-determination has been in operation for years in Te Whakaruruhau, Māori women’s refuge. In 1985 the National Executive for Refuge adopted a practice of parallel development to better meet the needs of Māori women while remaining under the umbrella of the national women’s organisation. As the basis for the development, the Treaty of Waitangi informed the practices of the movement to ensure Māori visibility and equal representation that were conducive to the principles of active protection and partnership. After twenty years this model of autonomy began to disintegrate as Government funding dwindled and compliance costs grew. In their Mana Wahine claim, Māori Women’s Refuge state that the Crown has failed to protect Māori women who have suffered physical and systemic violence which is a violation of their responsibility under the Treaty of Waitangi.⁷⁸⁸ Roma Balzer of Te

⁷⁸⁵ See **Article 3** – Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. **Article 4** – Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. GA Res 61/295, above n 391.

⁷⁸⁶ Waitangi Tribunal, above n 704, at 113.

⁷⁸⁷ Graham . Smith “Kaupapa Maori Theory: Theorising Indigenous Transformation of Education & Schooling” (paper presented to NZARE/ AARE JOint Conference, Hyatt Hotel, Auckland, NZ, 2003) at 8.

⁷⁸⁸ Wai 2700, Wai 1885, #3.1.42 (a).

Whakaruruhau states:⁷⁸⁹

Te Whakaruruhau was opened 32 years ago. Since then we have worked face to face with in excess of 100,000 women and their children. 98% of these were Maori.

In this time, on our watch women have been murdered by their abusive partners. We believe that almost all of their deaths were avoidable if it had not been for the inability, indifference and failure of the Crown to intervene, to impose consequences on the offender or to provide adequate safety for victims.

Too often, Crown agencies look past the violent offender and will question what is it about this woman that makes her want to stay. They will hold her accountable for the violence or for her failure to stop or move away from the abuser.

Te Whakaruruhau believes it is this attitude which absolves those agencies and agents from their responsibility to create a barrier between her abuser and his ability to 'get' to her.

It is the diminished status of Māori women within New Zealand society that has resulted in the Mana Wahine claim coming to the fore.

The Status of Māori Women

In 1993 the Minister of Māori Affairs Doug Kidd was infamously quoted as responding to the news of the Mana Wahine claim with the comment that: “*the lack of status accorded to Māori women was the fault of Māori men – not the Crown.*”⁷⁹⁰ The Minister was not only unsympathetic to the position of Māori women but also highly critical of any challenges to the Crown’s moves to engage Māori male leaders that were problematic for the swift passage of Treaty Settlements. In 1992 Hirini Moko Mead produced three booklets about Māori Leadership for Te Puni Kokiri based on a paper he had written.⁷⁹¹ In a Radio New Zealand interview, Mead declares that the Minister for Māori Affairs (Te Puni Kokiri) found the work

⁷⁸⁹ At 12.

⁷⁹⁰ Denese Henare “Carrying the Burden of Arguing the Treaty” in Witi Ihimaera (ed) *Vis Aotearoa Kaupapa N Z* (Bridget Williams Books, Wellington [NZ], 1994) at 126.

⁷⁹¹ Hirini Moko Mead “The mandate of leadership and the decision-making process” [1992] Te Puni Kōkiri Wellington at 2.

offensive and banned their production.

What this exemplifies is a situation where the Crown were actively engaged in cultivating with Māori a certain type of Māori male dominated leadership. Kidd's comments are intended to deflect attention away from the Crown agenda. As Seuffert suggests:⁷⁹²

The new identity of Māori entrepreneurs mobilizing the law and the settlements process as reasonable, rational, regulated subjects contrasted with the demands of Māori activists, including some Māori women, who refused to participate in the settlements process and demanded full political self-determination.... At the same time as many Māori women leaders and activists were ignored and silenced at the national level, the media focused relentless (mis) recognition on the critiques of Māori culture as sexist by a few Māori women.

The status of women is central to this thesis. More importantly, are the allegations of Crown failure and disregard for the systemic acts of discrimination and racism levelled at Māori women from the earliest time of British arrival in breach of the guarantees of the Treaty of Waitangi.

The Wai 2494 claimants state that “ Wāhine Māori were most adversely affected because the (re)imaging and (re)construction of the mana and role of wāhine Māori were replaced by Western ideologies and social, political and religious constructs that men were superior, and therefore the impacts of colonisation on wāhine Māori were far greater.”⁷⁹³

Wāhine Māori (Re)Imaging and Othering

The reimaging and othering of Mana Wahine is the consequence of Western ideologies replacing tikanga Māori. The settler colonies relied on the logics of race, class and gender to displace those that were deemed as inferior thus introducing the prevailing colonial narrative of 'nationbuilding' within which the Treaty of Waitangi was promulgated .⁷⁹⁴ In Wai 2494, the claimant Donna Awatere-Huata,

⁷⁹² Seuffert, above n 108, at 488.

⁷⁹³ Wai 2700, 2494, at 19

⁷⁹⁴ Linda T. Smith, above n 61, at 48.

references Ponzanesi who argues that colonial discourse constructed the black body as an iconography of sexuality and desire.⁷⁹⁵ Ponzanesi refers to this as the unfolding colonial discourse, the way the black body became an icon for sexuality in general and how sexuality became a metaphor for domination.⁷⁹⁶

The representation of the racial sexual other was first seen in orientalist paintings, and reached its apogee in the colonial era. Racial diversity, invented at the height of European empire to create a cultural divide between colonizers and colonized, was also forcefully implemented through rigorous social-scientific scholarship. The research on women's bodies went hand in hand with the colonial production of knowledge of race and alterity. This literature not only documents the highly asymmetrical form of interaction between Western imperialist discourse and colonized subjectivities, but also questions the inherent universalising and essentialising nature of scientific knowledge when based on biased racial assumptions. In many cases, the results of ethnographic fieldwork or clinical trials obtained in the colonial settings journeyed back to the European heartland where they achieved the status of pristine scholarly findings. These cultural technologies of domination, as the American anthropologist Nicholas Dirks (1996) has labelled them, demonstrated European innate superiority over Indigenous people, and colonized the space of representation of the Other for many decades to come.

Evidence of the objectification of Māori women are found throughout the Waitangi Tribunal Te Raki report historical accounts.⁷⁹⁷ Māori women are frequently referred to in relation to sex, sexual relations and the sex trade than in any other context. The European demand for sex was strongly evident while Māori women were typically commodified as prostitutes in these accounts. Their representation as wanton and lascivious by colonial historians, missionaries and ethnographers rendered them as less than white men or white women. In stark contrast, Aroha Yates-Smith reminds us that Mana Wahine is the essence of feminine generative

⁷⁹⁵ Wai 2700, 2494, at 25.

⁷⁹⁶ Sandra Ponzanesi *Beyond the black Venus* (na, 2005) at 165 -166.

⁷⁹⁷ Waitangi Tribunal, above n 89.

power in Māori cosmological narratives. However, the feminine principle ‘Hine’ has become marginalised by colonisation and the introduction of new, western religions rendering the feminine ‘invisible and voiceless’.⁷⁹⁸

Reconstructing the Role of Māori women

Similarly, the Wai 2700 claimants contend that a consequence of colonisation was that the leadership and governance capability of wahine Māori in a contemporary context was undermined. According to Mikaere the pattern of excluding wahine Māori from all political decision-making began with the signing of the Treaty of Waitangi.

It is plain, that the Crown has, since the signing of the Treaty of Waitangi, created this imbalance by treating Māori women and men differently. It has refused, and still refuses, to recognise Māori women as exercising any form of power. The Crown’s differential treatment of Māori women and men has resulted in the redefinition of Māori women’s roles, by Māori men and by Māori women themselves.

In their claim, Pihama and others assert that Māori women were deliberately marginalised in the manner by which signatures were obtained in order to confirm hapū and iwi assent. This deliberately undermined the ability of these wahine kahautū to act, govern and lead their whānau, hapū and iwi in the relationships being developed between Māori and the crown in this early contact period. Consequently, wahine rangatira were denied their rightful status by Crown officials who refused to acknowledge their equal status with Māori men. The imposition of a colonial patriarchal philosophy effectively ignored, dismissed and replaced tikanga Māori practices which included women as essential decision-makers. Their interests being assimilated into colonial structures of representation within which Māori men gained support and took on new forms of leadership.

It has been a source of wonder to me that as Māori we can lay claim to Wahine Rangatira, female ancestors that manifested great courage and wisdom through their feats of bravery, leadership and fortitude. The narratives abound with the escapades

⁷⁹⁸ Yates-Smith, above n 61.

of these wahine Māori and yet, we quite easily overlook the fact that for the last 175 years, Wahine Rangatira (women of rank) narratives have diminished in direct correlation with the status of Māori women. In comparison, Māori men continue to be espoused as great leaders, ‘corporate warriors’ and treaty entrepreneurs. This is not to say that Wahine Māori have not been recognised as great leaders in contemporary times, but evidence shows that they are the exception and not the rule. Take the traditional British honours system for example that serves to entrench British ideas of nationhood, it is after all, still a Royal honours system. In New Zealand, it has been a system where a white norm was assumed as well as a male norm, where Māori who were honoured had often achieved in traditionally Pākehā ways.⁷⁹⁹ Honours have been granted to men of wealth and status and other bastions of phallogocentric subjectivity such as the military and sports. The Honours system is anachronistic and sexist. A woman cannot receive a Knighthood.

The marginalisation of Māori women stands in contradiction to the proclamation of the Waitangi Tribunal in the Te Raki report, that Māori did not cede sovereignty to the Crown. Māori women take as axiomatic that the Crown did not envisage the guarantees of the Treaty to apply to them. Whether by design or default, Mana Wahine claimants allege that the Crown has failed to uphold the principles of Active protection and Equality. Wai 2494 – Awatere-Huata

In breach of the principles of Te Tiriti o Waitangi, Crown policies, practices and omissions to intervene have diminished the status of Māori women and made them vulnerable to discrimination and racism in all contexts of economic, social, cultural and spiritual well-being.

Taonga tuku iho – Cultural Aspirations Principle

A fundamental principle of Te Tiriti o Waitangi is the protection and preservation of Māori property, land and taonga.⁸⁰⁰ Inherent in Mana Wahine is the notion of taonga tuku iho – treasures that are handed down. Aspirations for the survival of

⁷⁹⁹ Karen Fox “Dames in New Zealand: Gender, Representation and the Royal Honours System, 1917-2000” (Master of Arts in History, Canterbury, 2005) at 159.

⁸⁰⁰ New Zealand Māori Council v Attorney-General [1987] 1 NZLR 641 (CA)

our language, traditions, of our bodies, minds and futures, all of these aspects reside within a Kaupapa Mana Wahine framework and permeate the Mana Wahine claims. Taking a Kaupapa Māori approach to the analysis of the submissions reinforces for Māori women the existence and the importance of Mana Wahine cultural aspirations to the survival of whanau, hapu and iwi. Contained within the submissions is a diversity of Māori women's thought in terms of cultural aspirations but there is agreement that the advancement of colonisation has served to domesticate and assimilate Māori women, a severe curtailment of Mana Wahine. These dominant colonial perceptions negatively impacted women's decision-making, ignored Māori women leaders and those who were of rank and status.⁸⁰¹

A Kaupapa Māori approach requires that we theorise our Mana Wahine practice with a view to transformative change which, in terms of tribal governance, requires addressing the structural impediments that invisibilise Māori women and perpetuate the dominance of men over women. The notion of resistance is inherent in our collective understanding of struggle, which is at the heart of the Mana Wahine claim.

According to Graham H. Smith:⁸⁰²

In a Kaupapa Māori framework, to be Māori is taken for granted; one's identity is not being subtly undermined by 'hidden curriculum'. Māori language, knowledge, culture and values are validated and legitimated. Māori cultural aspirations, particularly in a wider societal context of the struggle for language and cultural survival, is more assured.

Linda T. Smith also talks about the strong emotional and spiritual factors associated with identity and culture which drives a commitment to intervention and transformative change. In her submission, Te Ringiahuia Hata reminds us of the significance of *te mana o te wahine* in her submission and how it encompasses the emotional and spiritual elements that Smith refers to. She says:⁸⁰³

I will fundamentally deal with *te mana o te wāhine* in a Te Ao Māori context,

⁸⁰¹ Linda T. Smith above n 604, at 48–9.

⁸⁰² Graham H. Smith, above n 228, at 467.

⁸⁰³ Wai 2700, #3.1.037(b) Hata Speaking Notes, at [5].

praxis and a kaupapa wāhine Māori pedagogy underpinned by the philosophies of Tikanga me ngā Kawa o Te WA o te HINE, and Te Reo Māori as the medium to which our world is perceived and then articulated.

Te Mana o te Wāhine / Mana Wāhine

Both concepts of te mana o te wāhine and mana wāhine however, should not be seen as definitive or exclusive, but should be viewed and accepted as fluid and aqueous as the water from which human life is born from within the nurturing womb, or te whare tangata, of wāhine. Her survival is then articulated in the ways in which she perceives, views and then engages with the world as a wāhine Māori, with her mana and dignity intact. Therefore, I ask this Tribunal that when you begin to look at the philosophical underpinning of the term MANA WĀHINE to be very careful how it is defined in the context and purposes of this Inquiry as the perception will become etched in history.

Te Whare Tangata

Hata describes the sacredness of te whare tangata.⁸⁰⁴

All wāhine Māori are honoured and acknowledged as te whare tangata (the house of humanity) and the concept of kaitiakitanga is imbued within that responsibility that permeates throughout all forms of life, survival, protection and guardianship. As we proceed on this journey an ensure that the mana of ngā wāhine Māori remains intact and is respected. I am highlighting this point that in protection of our whare tangata – we ensure our support systems are always in place and tikanga and te reo are up front and center for eg. Ensuring there is always an interpreter/translator present in all hui this Inquiry convenes.

Te Whenua

The claimants argue for not only the protection of their land, water and taonga but also for their right and aspirations to deal with their property in a manner that accords with tikanga Māori and their own cultural preferences.

⁸⁰⁴ At [6].

The decimation of the relationships between wāhine Māori and Papatūānuku have brought significant prejudices in the health; wellbeing; survival and rejuvenation of whānau, hapū, and iwi and their cultural and social institutions by severing them from their tūrangawaewae and alienating them from their lands.

The detrimental impacts of Crown policies and practices on the mana of our wāhine Māori is an attack on their particular status as kaitiaki of Te Ao Māori tikanga and kawa and Papatūānuku who assures the future survival of all.⁸⁰⁵

Te Reo me ona Tikanga Māori

In 1986 the Waitangi Tribunal held that the Crown had failed to protect the Māori language as required by Article II of the Treaty.⁸⁰⁶ As a result, Te Reo Māori was recognised as an official language in 1987.⁸⁰⁷

“Ka ngaro te reo, Ka ngaro taua, pera I te ngaro o te Moa”

(If the language be lost, man will be lost, as dead as the moa)⁸⁰⁸

Central to Mana Wahine cultural aspirations are the revitalisation and recognition of te reo me ona tikanga ‘wahine’ Māori. While Te reo Māori has undergone a resurgence in the last 30 years, the impact of colonisation and the imposition of English through assimilatory education practices has had a profound negative effect on its retention leading to a noticeable decline.⁸⁰⁹

Ensuring the sustainability of the language for future generations requires the Crown to acknowledge their obligations with affirmative action which have been

⁸⁰⁵ At 15.

⁸⁰⁶ Waitangi Tribunal “Report of the Waitangi Tribunal on the te reo Maori claim” [1986] Web Www Wait-Trib Govt Nzreports at 49.

⁸⁰⁷ See the Māori Language Act 1987: repealed on 30 April 2016, by section 48 of Te Ture mō Te Reo Māori 2016/ Māori Language Act 2016 (2016 No 17), retrieved from <http://www.legislation.govt.nz/act/public/1987/0176/latest/whole.html> on 19/01/2019.

⁸⁰⁸ Tribunal, above n 726, at 7.

⁸⁰⁹ In the 2013 Census, 21.3 percent of all Māori reported that they could hold a conversation in Māori about everyday things. This was a decrease from 23.7 percent in 2006 and 25.2 percent in 2001. Of the 148,400 people (or 3.7 percent of the total New Zealand population) who could hold a conversation in Māori in 2013, 84.5 percent identified as Māori. Retrieved from <http://socialreport.msd.govt.nz/cultural-identity/maori-language-speakers.html> 19/01/2018.

strongly articulated by the Waitangi Tribunal:⁸¹⁰

The evidence and argument has made it clear to us that by the Treaty the Crown did promise to recognise and protect the language and that that promise has not been kept. The ‘guarantee’ in the Treaty requires affirmative action to protect and sustain the language, not a passive obligation to tolerate its existence and certainly not a right to deny its use in any place. It is, after all, the first language of the country, the language of the original inhabitants and the language in which the first signed copy of the Treaty was written. But educational policy over many years and the effect of the media in using almost nothing but English has swamped the Maori language and done it great harm.

Concurrently with the marginalisation of Māori women from leadership roles in the Treaty settlement process, the issue of the practice of Tikanga or Māori protocol should also be addressed. In recent times tikanga as it pertains to speaking rights on the marae has been critiqued as a sexist practice.⁸¹¹ While protocol varies widely, the practice defaults to Māori men even when the gathering is not on the marae. Government departments, tertiary institutions and indeed, most organisations where Māori men are present at formal welcomes, default to a dominant practice of men speaking and being seated in front of women. Like other Indigenous peoples, Māori value the experience and knowledge of our elders – both kuia and kaumatua (women and men). There are still times like in traditional times when roles and responsibilities are gendered – but complementary. Māori men carry on our tribal traditions of oratory, and traditionally, Māori women carry out certain roles on the marae, such as the karanga, or ‘first call’ during the powhiri, a ritual process of encounter. But even this is evolving within some tribes.

However, there are many that would reject some of the sexist attitudes and practices that have infiltrated our traditional notions of tribal governance. There is a dearth of women in tribal leadership today and it is likely that Māori men and some Māori women, confuse our traditions of formal oratory with male-centric leadership. I have attended meetings, not traditional gatherings, where we have been made to

⁸¹⁰ Tribunal, above n 726, at 1.

⁸¹¹ Kathie Irwin “Towards theories of Maori feminism” in *Fem Voices Womens Stud Texts Aotearoa* (Oxford University Press, Auckland, NZ, 1992) at 13.

wait for an older male to start proceedings, and then he has delivered a very simple karakia. Or meetings where women were ignored and only men spoke the whole time. A very dear friend of mine recently took an emotional battering from a male family member about her involvement in tribal settlement negotiations and he had the audacity to ask “Who do you think you are”? she was elected that weekend into the role of Tribal Chair. There are still too many stories like that, where Māori women continue to be ignored, invisibilised and grayscaled.

To reaffirm the initial reason for bringing the Wai 381 Mana Wahine claim. Māori women were marginalised in an appointment process dominated by an alliance of Pākehā and Māori men. While the Crown has failed in its obligations under the Treaty of Waitangi to Māori women, the Mana Wahine inquiry must acknowledge that Māori men have been complicit in the oppression of Māori women.

Ako Māori - culturally preferred pedagogy principle

Ako Māori promotes culturally appropriate teaching and learning pedagogies that are unique to tikanga Māori.⁸¹² It involves the reinvigoration of cultural ideas in the pursuit of self-development and ultimately transformation. The articulation of women’s pedagogies begins with the legitimisation of a Mana Wahine perspective:⁸¹³

...te mana o te wāhine in a Te Ao Māori context, praxis and a kaupapa wāhine Māori pedagogy underpinned by the philosophies of Tikanga me ngā Kawa o *Te WA o te HINE*, and Te Reo Māori as the medium to which our world is perceived and then articulated.

In this thesis, the emphasis is on transforming Indigenous governance and unearthing the unseen ways in which gendered social and cultural divisions are maintained through dominant pedagogies that are not our own and not of our choosing. The analysis of the Mana Wahine submissions emphasises this need for change. A Kaupapa Wahine analysis dictates that the change be transformative. As agents of change Māori women are desirous of finding ways of responding to their critical circumstances. In the judicial conference convened to set the direction for

⁸¹² Graham H. Smith, above n 228, at 468.

⁸¹³ Wai 2700, 3.1.073(b), at [5].

the Mana Wahine claim, a proposal was mooted to hear the Mana Tane claim alongside the Mana Wahine claim. The response from Counsel for the Māori Womens Welfare League original claimants, Annette Sykes was unequivocal:⁸¹⁴

...suggested today was that Mana Wahine claims should be included as a part of a joint Mana Wahine and Mana Tāne Inquiry and I must say I am angry Sir. That is what Māori women have to put up with all of the time and the pedagogy of what we are seeking is not for us to be equal but to be recognised that we have a special status and that the Treaty proclaims that status and kawa and tikanga recognise that status in the survival of Māori people as a whole.

It is the recognition of the status of Māori women that needs to inform culturally appropriate pedagogies for progressing Mana Wahine in decision-making roles that are integral to the ‘rangatiratanga’ self determination vision for Māori as promised under Te Tiriti o Waitangi. This is pursued by actively participating in the development of alternatives to the current organisational models which are typically male dominated, male oriented and reliant on Crown derived policies and procedures.

Dr Leonie Pihama states in her speaking notes how it was through the Mission and Native Schools that Māori women first experienced the impact of patriarchal policies and practices.⁸¹⁵ The Mission and Native Schools systems also played a critical role in the development of Pākehā-Māori relations. As a significant site for the interaction between Māori and Pākehā social systems, early schooling was fundamental in developing hegemonies to align Māori with Christian family and moral values.⁸¹⁶ Notwithstanding that Māori actively sought access to ‘selected’ aspects of Pākehā language, knowledge and culture especially material properties and technology, schooling pedagogies actively served in the British agenda of Māori exploitation. In Smith’s view:⁸¹⁷

While the combining of the missionary and education agendas came together

⁸¹⁴ Isaac, above n 680, at [20].

⁸¹⁵ Wai 2700, #3.1.037(a) (1), at [4].

⁸¹⁶ Graham H. Smith, above n 228, at 183.

⁸¹⁷ At 184.

overtly within the missionary and church schools, the ‘occupation’ of tribal lands and tribal minds was more subtly conceived. In some areas, for example Ngati Awa, schools were staffed by retired military personnel (see Smith, L., 1994; Submissions of Ngati Awa claim – Te Teko School). In most schools a form of military type curricula was used to ‘domesticate’ Māori. Such curricula involved the singing of Pākehā nationalistic songs, flag-pole ceremonies, cadets and marching, the holding of formal assemblies and marching parades. The establishment of militia communities in tribal areas were also common strategies used to insert the ‘Empire’ within the Māori communities. This military type curricula also asserted a regulatory regime of ‘conformity’ and ‘obedience’ from Māori within schools – this influence based on obedience to the flag and the ‘King’ often extended beyond the school yard and into their very homes and communities.

Missionary and State aims of assimilation and industrial training to provide a labour workforce for Pākehā conflicted with Māori aspirations for the education of Māori children. Māori girls were targeted for domestic work and boys for manual labour.⁸¹⁸ Within schools, concepts derived from British legislative frameworks such as ‘private property’ and ‘individual rights’ were used to unravel Māori ideologies of collective ownership of land allowing for land to be bought more easily.⁸¹⁹ State funding of Mission schools had started in 1847 at a time when Māori and Pākehā were in a contest for sovereignty and land. State intentions were that schools which by this time were integral to Māori communities, supported settler and State interests in the acquisition of Māori land. By 1862 and the establishment of the Native Land Court through the Native Land Act, the State agenda for social control and land acquisition was well established in colonial policy and legislative frameworks including Native schooling. Notably, the Native Land Courts main purpose was the conversion of communal landholdings into individual title making it easier for Pākehā to buy Māori land. As a result, the historical practices that sought to marginalise and subjugate Māori girls in schooling converged with processes to dispossess Māori women of their land and status.

⁸¹⁸ Linda Tuhiwai Smith *Ngā kura Māori* (Auckland University Press, 1998) at 10.

⁸¹⁹ At 1–3.

What Smith identifies as the ‘hidden curriculum’ within New Zealand schooling and education settings depicts how colonisation was implemented.⁸²⁰ Colonisation he states, was conducted over multiple sites having many overlapping and intersecting dimensions. The domestication of Māori women and girls was just one dimension of a project of assimilation. The agenda of ‘colonising the mind’ through schooling and education is a well documented apparatus of the subjugation of Indigenous peoples and must be understood as central to the colonisers project to assume control over Indigenous land and resources.⁸²¹

The colonisation of the Māori mind was to be effected through a variety of covert and overt strategies and in two principal sites, the church and school. Key strategies were to be the hegemonic influence of church doctrine, the introduction of formal schooling, and the use of military force when these strategies failed. Always the covert influence of ideology was at work, Māori people were to come to believe in the inferiority of their own culture, spirituality, language and knowledge frameworks and conversely to hegemonically believe in the new order, the superiority of Pākehā knowledge, language, religion, culture, values and customs. Pākehā knowledge was to be reified within the missionary agenda as ‘virtuous’, ‘righteous’, ‘moral’, ‘christian’ and ‘good’. As far as education and schooling was concerned Pākehā language, knowledge and culture was to be associated with concepts such as ‘scientific’, ‘technological’, ‘advance’, ‘complex’ and ‘sophisticated’.

To effect influence and control over Māori knowledge, the validity and legitimacy of Māori language, culture and knowledge was constantly and effectively undermined. A state of ‘induced cultural disorientation’ caused Māori to be more predisposed to the exploitative practices and policies of the church and missionaries as well as the manipulation of the State through legislative measures designed to facilitate both legitimate, illegitimate land sales followed by wholesale

⁸²⁰ Graham H. Smith, above n 228, at 186.

⁸²¹ At 186.

confiscations of Māori land.⁸²² These colonial ideologies remain, not only within our current educational structures, they are embedded within the State system and within those Māori institutions which the colonial state gave birth to. The Treaty settlement process and subsequent governance structures are Crown derivatives as are the rules pertaining to PSGE's and contemporary tribal governance structures.

The Mana Wahine Inquiry is an opportunity for Māori women to voice their concerns regarding Crown constructed institutions that propose to represent Māori while marginalising Māori women in the process. Despite Māori women being large landowners in their own right; where the Crown made official appointments to governance positions concerning land ownership, the appointees were invariably male.⁸²³ One of many submissions, Mana Wahine claimant Ani Taniwha on behalf of herself and Te Uri o Te Pona, Ngati Haiti, Ngati Kawau, Ngati Kawhiti, Ngati Kahu o Roto Whangaroa, Ngati Tupango, Te Uri o Tutehe, Te Uri Mahoe and Te Uri Tai hapū of Te Tai Tokerau state for example:

...that they have been and will continue to be prejudiced by the Crown settlement policy which, as applied, pressures claimants and the claimant community into settlement before hearing and promotes mandate of people of the Crown's chosing [sic], not of the claimants' and claimant community's chosing [sic], contrary to the promises in the Treaty of Waitangi/Te Tiriti of Waitangi.

Specifically, the claimants state that the Crown:

Failed to recognise the rangatiratanga of Te Tai Tokerau wāhine;

q. Failed to provide for adequate representation for Te Tai Tokerau wāhine in the systems established for governance of Māori land;

r. Failed to provide for adequate representation for Te Tai Tokerau wāhine in the development of national and local government systems and structures,

⁸²² Richard Boast *The Native Land Court 1862-1887* (Brookers Ltd, Wellington, [New Zealand], 2013); MP Sorrenson "The Lore of the Judges: Native Land Court Judges' Interpretations of Maori Custom Law" (2015) 24 J Polyn Soc 223; Pihama and others, above n 650; Williams, above n 552.

⁸²³ Wai 2157, at 15, submission of H. Ranginui et al for and on behalf of the descendants of Heeni Matene and Pokairangi Ranginui stating that all crown appointees to the Aotea Māori Land Council; and later the Aotea Māori Land Board were men.

s. Failed to provide for adequate representation for Te Tai Tokerau wāhine in the administration and management of Māori owned economic and cultural assets; and

t. Failed to provide for the rangatiratanga of Māori women and their role within whānau, hapū and iwi in the administration and management of economic, educational, social and health services delivery services in the Te Tai Tokerau.

The Wai 1729 claim by Sara Poananga for and on behalf of the whanau, hapū and iwi of Ngati Kauwhata ki te tonga summarises the gravamen for this Inquiry in relation to Māori women and governance:⁸²⁴

Under the Treaty of Waitangi / Te Tiriti o Waitangi, the Crown has a duty to:

Recognise that Māori women rights should be provided for at the same level as Pākehā as their Treaty partner;

Consult with and allow Māori women to participate and be represented in decision making processes regarding issues affecting them.

Recognise that Māori society was not patriarchal. Māori women had mana and authority.

Recognise that the introduction of Pākehā laws altered Māori women's value, recognition and their direct involvement in Māori self-governance.

While the Mana Wahine Inquiry submissions are indicative of desired future directions and remedies sought for Crown breaches etc, the Mana Wahine hearings are yet to proceed. Calls for a Kaupapa Mana Wahine process, an actively decolonising and feminist approach to a Waitangi Tribunal Inquiry is a new but much needed approach to deconstructing the issues of race, class and gender that continue to negatively impact Māori women as a result of colonisation. As part of a radical and transformative approach to Māori governance, decolonising cultural pedagogies will play a significant role in making over the status quo but also ensuring intergenerational transfer of knowledge.

⁸²⁴ Wai 1729, 1.1.1.(b), at 5.

Ka Piki ake I nga Raruraru o te Kainga - socio-economic mediation principle

This principle encourages Māori communities to mitigate, collectively the debilitating effects of negative socio-economic circumstances by Māori customary practice, values and knowledge. Prior to colonisation, wahine Māori were essential to the well-being of the whanau, hapu and iwi.

The Mana Wahine claims draw attention to a crisis of deprivation facing Māori women and whanau in contemporary times that is unprecedented in New Zealand's history. The issues faced include increasing poverty, homelessness, unemployment, rising suicide particularly amongst young people, a staggering incarceration rate for young Māori women and the forced removal of tamariki into State care.⁸²⁵ Coupled with poor health statistics across the board, Māoridom is in crisis. Socioeconomic position is regarded as a major determinant of health and while the Wai 2687 Tribunal claim into Māori Health is yet to be heard, the Mana Wahine claim recognises the socioeconomic positioning of Māori women and children as a significant issue that both claims must consider.⁸²⁶

With governance structures that were developed from a Mana Wahine perspective and for the benefit of Māori women and whānau, the claims of the MMWL and Māori Women's Refuge are particularly relevant to this thesis.⁸²⁷ The Māori Women's Welfare League is a prime example of wahine leadership intended to alleviate poor social conditions for whanau especially in their earlier years of their establishment. In addition, organisations like Māori Women's Refuge and the Māori Nurses Association exemplify women driven initiatives to address family and health fall-out from negative social and economic impacts on women and whanau.⁸²⁸ All three organisations claim that the Crown, the State and the government have failed in their duty to mitigate against the disparities and disadvantage that Māori whanau are facing. They also cite a lack of support and

⁸²⁵ Wai 2700 TBC and Wai 2494 - #1.1.0001 (d)

⁸²⁶ See generally: Ministry of Health "Ngā awe o te hauora: Socioeconomic determinants of health" <<https://www.health.govt.nz/our-work/populations/maori-health/tatau-kahukura-maori-health-statistics/nga-awe-o-te-hauora-socioeconomic-determinants-health>> retrieved 20/01/2019.

⁸²⁷ See Wai 2700, #3.1.56 and Wai 2700, #3.1.56.

⁸²⁸ See Wai 2700, Wai 2713, #1.1.1(b).

funding availability to carry on their work. With no clear Crown intention to intervene, it is incumbent on whānau and Māori agencies to support other whanau who are enduring difficulty.

Whanau - extended family structure' principle

The whanau principle takes into account the collective responsibility for providing an extended social structure and support network for Māori. In terms of governance it requires incorporating cultural structures that emphasise the collective rather than the individual. Collective responsibility acknowledges that actions taken have impact when individuals are working toward a common agenda thus adhering to the notion of 'whanaungatanga' which is not restricted to those who are related by blood.

Kimberley Kilgour on behalf of taitamāwahine Māori makes clear that in accordance with tikanga, wahine Māori were essential elements of the whanau. The survival of the whānau depended on all roles within the whānau being valued and protected. The whānau was the primary source of support for wāhine Māori.⁸²⁹

In addition, the claimant alleges that Crown policies and practices have resulted in the dissolution of whānau and limited the role of wāhine Māori. This has in turn contributed to wāhine Māori suffering poor political, social and economic outcomes.⁸³⁰

For the Wai 144 Claimants – Winitana for Ngati Ruapani, this claim is about the lack of aroha and respect shown by taane for their wahine as a whole, including Kuia, Maamaa, Tamahine, Tuahine, and Mokopuna in respect of physical, emotional, mental and physical abuse.⁸³¹ Furthermore, that wahine Māori were holders of whakapapa, protectors of the land for whanau and hapu until colonisation disrupted and diminished the roles and status of Mana Wahine.

Original Māori Women's Welfare Claimant Donna Awatere - Huata:

We of the Mana Wāhine claim did not object to the hapū and iwi claims being

⁸²⁹ See Wai 2700, Wai TBC, at [17].

⁸³⁰ At [19].

⁸³¹ Wai 144 at [5-7].

heard before us. Perhaps we felt the redress of those claims would make a more important difference to our whānau than our claim. But we were wrong. Firstly, our claim would have informed the whole of the claims process as the mana wāhine story puts women and the whānau in the centre of the breaches against the Treaty, rather than on the margins or invisible. Secondly had the settlement processes included mana wāhine, the redress to Māori women, children and the whānau would have been a guiding principle.

Had our whānau and hapū not had their lands taken and had continued running their lives and their new businesses their own way, it is feasible that the British model of women as property and of family abuse may not have been taken up quite so willingly by Māori men. Prosperity and wealth held by the whānau would have validated the Māori world view of communal kaitiakitanga, of mana wāhine, of communal sharing, of whakapapa. And at the least provided a buffer to the cringe worthy adoption of three of the worst Pākehā ideas – patriarchy, capitalism and duality.

Instead, the result of colonisation was the loss of rangatiratanga and wealth by the whānau and hapū and the full-scale adoption of the British model of the patriarchy with its institutionalised prejudice against women and its historical precedence of violence towards women and children.

The Māori world view of woman would benefit all women. The observations of Māori fathers by 19th century commentators, a world view in which man is part of nature, in which girls are valued as equally as boys, communal sharing – all have to be so much more appealing than what we've got. But in fact, many women's liberationists of those times believed Māori women should stick with the women's movement and were too ignorant and racist to value the Māori world view.

In Treaty discourse, tino rangatiratanga is hegemonically understood as tribal autonomy.⁸³² The Mana Wahine claims lay bare the contention of Māori women that the influence of the Crown through the State in the *re*-construction of

⁸³² Graham H. Smith, above n 228, at 415.

contemporary iwi through Treaty settlements, has ignored the autonomy and identity of Māori women. Smith discusses how Pākehā interests based on the privatisation of resources and the individualisation of rights, has supported iwi restructuring in ways that validated the commodification of Treaty rights, Māori identity, traditional knowledge and perhaps unconsciously at first, also served to marginalise Māori women in the process.⁸³³ The question of whether or not Māori men intentionally set out to disempower women is perhaps not the right question to ask. The issue to be considered in the Mana Wahine inquiry is, to what extent Māori men were influenced by Pākehā patriarchal ideology to convey Māori women to the domestic sphere in the same way that Pākehā women were? How can contemporary iwi understand tino rangatiratanga if the whanau are not thriving except in a Pākehā colonised context where Māori resources are exploited and Māori whanau are oppressed.

Kaupapa - collective philosophy principle

The Mana Wahine submissions are merely a primer of the issues to be addressed in depth at tribunal hearing. Nonetheless, there are strong themes emerging from the submissions which already give voice to Māori women's struggle. That is not to say that Māori women speak with one voice to a single set of circumstances and I don't wish to essentialise. The Mana Wahine submissions are the first expression of a range of Māori women's subjectivities.⁸³⁴

The term wahine designates a certain time and space for Māori women but is by no means a universal term like the term woman in English. There are many times and spaces Māori women move through, in our lives, wahine is one of those. There are others. There are varying terms that relate to times in our lives and relationships. From birth we journey through those spaces.

The Mana Wahine Inquiry however, provides an important opportunity for the crystallisation of Māori women's subjectivities in relation to the Treaty of Waitangi and the Crown's role in the positioning and status of Māori Women in New Zealand society. As the submissions attest to, Māori women are at the forefront of the

⁸³³ At 413–417.

⁸³⁴ Pihama, above n 203, at 261–262.

struggle for social justice that will remain an on-going issue and one which leading into the Kaupapa Inquiries, the Waitangi Tribunal will be challenged to address. Linda T. Smith reminds us that ‘Māori struggles for social justice in New Zealand are messy, noisy, simultaneously celebratory and demoralising, hopeful and desperate,’⁸³⁵ No doubt, the Mana Wahine Inquiry will reflect this as the evidence comes forward as other claims hearings have done.

What differentiates the Mana Wahine Inquiry already from the others, is the consolidation of the ‘Kaupapa’ around a future vision for women and whanau.

Wai 2700, Wai 1940 –being a claim on behalf of the Grandmother Council of the Waitaha Nation.⁸³⁶

Waitaha wāhine aspiration in joining the Mana Wāhine Kaupapa Inquiry is to place before the Tribunal evidence of the discrimination and disparities faced by Māori women, to highlight legislative and policy imbalances that restrict the full expression and accomplishments of Mana Wāhine, and to ultimately acknowledge and honour the work of all atua wāhine and tūpuna wāhine who are of this land and who provide Māori women and girls of the past, present and future with pathways for transformation.

Wai 2700, Wai 862 being a claim by Kiharoa Menehira Retireti Parker on behalf of the Descendants of Hare Matenga and the various Hapu of Waimate Taiamai:⁸³⁷

That Wāhine Māori are recognized as equals in social cultural political and economic society and that steps be taken to ensure Crown policy reflects that;

That the Crown adequately resource the next generation of wahine Maori with programs and resourcing for women health and well being in the transfer of past knowledge to the present and future generations;

⁸³⁵ Linda T. Smith, above n 701, at 198.

⁸³⁶ Wai 2700, Wai1940 at [5].

⁸³⁷ Wai 2700, Wai 862, at [21, b. and d].

Wai 2700, Wai 972.⁸³⁸

The Claimants hope to actively participate in this inquiry so as to achieve those goals and to design legislation and policy that supports the empowerment of wāhine and a nation devoid of gender inequality in the future.

Roma Balzer speaking on behalf of the Māori women's refuge:⁸³⁹

Make sure sexism, racism, colonisation, paternalism, power inequalities and misogyny are addressed within the shared analysis and that each participating group are able and resourced to do their work to the best of their ability.

Therefore more than seeking just compensation, the Mana Wahine claim will be about setting a vision for the future of Māori women, whanau, hapu and iwi. The seeds are being sown as these submissions attest to. This discussion aligns to what Linda T. Smith calls is the Indigenous project of '*Envisioning*'. It is a strategy that she states binds people together politically and asks people to ... "imagine a future, that they rise above present-day situations which are generally depressing, dream a new dream and set a new vision".⁸⁴⁰ I suggest that this is inherent within Mana Wahine and that our cosmological beginnings foreshadowed a future state that is elemental and powerful. Awatere –Huata recounts these facets of Mana Wahine as:⁸⁴¹

Mana wāhine, includes many elements and powers. One element is mana atua – female godliness - the cosmology of Māori women – our presence in the beginnings of the universe as atua, as having powers and responsibilities to that universe. Mana atua is integral to the tino rangatiratanga of Māori women.

Another element is mana whenua – the rights to exercise mana whenua, to inherit lands, to assert leadership, to hold a place in whakapapa. Also integral

⁸³⁸ Wai 2700, Wai 972, at [9].

⁸³⁹ Wai 2700, # 3.1.42(a), at [48].

⁸⁴⁰ Linda T. Smith, above n 701, at 153.

⁸⁴¹ Wai 2700, 3.1.039 (a), at [8-11].

to the rangatiratanga of Māori women.

Another element is mana tangata, of attributing mana to women as rangatira, as the whare tangata and for their services to the whānau and hapū. Also central to the rangatiratanga of Māori women.

Another element is mana tamariki – the inherent respect for children – and the equal treatment that was given to girls as well as boys. Also central to the rangatiratanga of Māori women.

The Crown Response

In their response of October 2018, the Crown acknowledges both the historical and contemporary nature of the grievances raised in the Mana Wahine claims and reaffirms the Crown's position in terms of eligibility and jurisdiction.⁸⁴² That is, that the Presiding Officer and Panel are required to determine the issues prior to the inquiry proceeding. The Crown makes three broad submissions:⁸⁴³

1. claims that have been settled are ineligible for inquiry
2. Treaty settlements and the legislation that gives effect to them settle fully and finally all historical claims of the individuals who come within the settling group.
3. the Tribunal has said it will not inquire into issues that are being heard in other kaupapa inquiries

The Tribunal is yet to determine the extent to which these delimitations may circumscribe the Mana Wahine claims. The Crown have signalled their intent to await the Presiding Officer and Panel's instructions however, it will be interesting to see how points 1. and 2. above will be handled by the Waitangi Tribunal. On one hand, Māori women by virtue of their kinship ties and whakapapa do comprise a significant body of previously settled claimant groups which on the face of it, could be exclusionary under the Kaupapa claim eligibility criteria. Conversely, the Kaupapa inquiries are the Crown's response to responding to broader issues that are compounding the deleterious impacts of colonisation in a contemporary sense for Māori. The Mana Wahine claim however is not just about gender, it is multi-

⁸⁴²Wai 2700, #3.1.109, 4.

⁸⁴³ At 5.

layered requiring the Crown to come to terms with Mana Wahine epistemologically, conceptually and pedagogically, socially, economically and politically. As this thesis has strived to convey, Mana Wahine responds to colonial structurally inherent power relations at the intersections of race, class and gender that serve to dominate Māori and Indigenous women.

Without having completed a claim by claim analysis, the Crown makes early acknowledgements of the following reoccurring ‘themes’ and declares a desire to initiate ‘direct dialogue’ if appropriate in the interest of efficiency and timeliness.⁸⁴⁴

The erosion of the rangatiratanga of wahine Māori caused by colonial laws and political, economic and social systems;

the undermining of leadership and governance capability of wahine Maori in a contemporary context;

failures of the Crown in relation to domestic and sexual violence;

institutional racism by Crown departments including child protection services; and

failures of the Crown in relation to education, and employment and equal pay.

A Crown approach for direct dialogue is not unusual within the schema of the Waitangi Tribunal and in many instances, has been a sought after option for some settled iwi as a prelude to direct negotiations. However, in regard to the Mana Wahine claims, it is difficult to determine the size, shape and imperatives of the claimant groups with whom to dialogue. In addition, the recognised organisations that have brought claims such as the MWWL and Māori Women’s refuge, point to the on-going failings of the State to adequately meet the needs of a significant sector of New Zealand society, that being Māori women and whānau. Furthermore, that Māori are now in a state of crisis due to the systemic failure of the State to meet the obligations of Partnership with Māori women.

The essence of this Claim is that the Crown, by way of its policies and practices which surround the status and treatment of Māori women have breached te Tiriti/the

⁸⁴⁴ At 6

Treaty of Waitangi and its principles (“the Principles”). The late Dame Mira Szászy gave the following evidence in the Muriwhenua Inquiry. Her words still resonate:⁸⁴⁵

In developing policy and implementing legislative framework the Crown has:

1. Failed to acknowledge and affirm the role of wāhine Māori women as rangatira in their own right and equal in status to Queen Victoria and Queen Elizabeth;
2. Failed to ensure wāhine Māori women are represented across structures and governance positions;
3. Failed to recognise the mana of wāhine Māori;
4. Failed to assist with the facilitation of Māori women’s models of wellbeing across sectors;
5. Failed to effectively develop Whānau Ora to benefit wāhine Māori in particular;
6. Failed to stem racism and structural discrimination suffered by wāhine Māori;
7. Failed to ensure the cultural safety of wāhine Māori;
8. Failed to fund Māori women's initiatives across sectors; and
9. Failed to recognise equal pay parity for wāhine Māori.

Summary

This Chapter provides a case study analysis of the claims to the Mana Wāhine Inquiry that is due to be heard by the Waitangi Tribunal in 2019. A key focus of this thesis has been the critique of colonial ideologies of race, class and gender that have led to the invisibility of Indigenous women and women’s knowledge in tribal governance. Colonisation has marginalised Māori women to the extent that they no longer have a role as essential decision-makers for whānau, hapū and iwi where once they were esteemed and highly respected leaders.

The need to do this is related to developing an overarching Kaupapa Māori approach to addressing the thesis topic of the invisibility of Indigenous women in tribal governance and the negative resultant impacts for Indigenous communities and family. The Mana Wahine claims are the first step toward developing transformative strategies that empower Māori women to bring a gender balance

⁸⁴⁵ Brief of Evidence of Mira Szászy, December 1987, Wai 45, #A6.

back to tribal governance structures. As I have stated in previous Chapters, tribal self-determination is unachievable as long as only one part of the 'self' is determining that agenda in collusion with a State apparatus that is driven by a hegemonic neoliberal agenda. Kaupapa Māori theory is transformative and the transformative potential of both the Mana Wahine Inquiry and this thesis can potentially provide a catalyst for change for all Indigenous women

Chapter 8 - Conclusion

Me aro ki te hā o Hineahuone.

Mai te tīmatanga, ko Papatūānuku te whaea whenua,

Ko Hineahuone te ira tangata tuatahi,

he wahine.

Tihei Mauriora~

Pay heed to the dignity and the essence of Māori women.

From the beginning of time, was Papatūānuku the Earth Mother,

Then Hineahuone the first human created, a woman.

I sneezed, and therefore I live!

In this thesis, I set out to examine how can Indigenous women reinvigorate their role in tribal governance structures when many such structures continue to reinforce gendered colonial constructs within which women are marginalised?

While there has been a growth in the literature associated with Indigenous women's leadership, little attention has been given for the fundamental reasons why Indigenous women are no longer at the forefront of Indigenous tribal decision-making. This thesis examines the literature available in the leading-edge context of the anti-colonial movement of Indigenous feminism. The focus on Indigenous women in this thesis reflects the anti-colonial movement of Indigenous feminism.

This research draws attention to the significant diminution of the role and status of Indigenous women as a result of three related and deleterious events that have become institutionalised over time. British colonialism and the ensuing colonisation of Indigenous women's lived realities has resulted in the imposition of dominant colonial ideologies which have constructed negative discourses around Māori and Indigenous women. The destruction of the ethic of 'balance' which was well understood in pre-colonial times has led to the redefinition of women's roles as

domestic, subservient and relegated Indigenous women to the private sphere. The universal imposition of a gendered colonial system of law throughout the four nation-states of Aotearoa (New Zealand), Australia, Canada and the United States has had similar devastating impacts on Indigenous legal traditions. Pre-colonial and traditional beliefs, values and practices were corrupted by ideologies of race, class and gender devastating a complex yet balanced social system that relied on Indigenous law for the maintenance and sustainability of the social order. The disruption of Tikanga Māori and other Indigenous legal traditions have in many instances left some Indigenous societies bereft while others are made vulnerable to patriarchal ideologies that have become hegemonic over time. Finally, Indigenous peoples have suffered the loss of massive tracts of land, the ramifications of which are still being felt today. In Aotearoa (New Zealand) the machinations of the Native Land Court led to the individualisation of title and the destruction of the collective ownership of land. It was as landowners that Māori women exercised much of their influence and power. The imported patriarchal notions that underpinned colonial law and the operations of the Native Land Court meant that Māori women landowners became dispossessed of their lands. Similarly, other Indigenous peoples suffered under the same colonial imposition for the ultimate purpose of taking land for white settlement.

In this research I highlight the belief that Indigenous women are essential to the reinvigoration of Indigenous cultures. The women interviewed for this thesis share their aspirations for flourishing futures. While I have provided an overview of the positioning of Indigenous women in contemporary tribal governance and the hegemonic influences that have negatively impacted them, there is much work to be done to bring together the very important ways in which Indigenous women are setting their own self-determination agenda.

Indigenous governance has been examined through an Indigenous lens and world view from the perspective of elevating Indigenous legal traditions as the compass for this research. The fundamental principles of chthonic law were introduced to exemplify the relevance that Indigenous law based on traditional customs and practices has to contemporary Indigenous tribal institutions that are working toward self-determination. My research supports that the two are inextricably linked. The pursuit of self-determination requires adherence to the Indigenous tradition of law

within which the female essence is fundamental. We understand this to be correct because of our cosmology and creation stories. The challenge is in how to reconcile competing externalities that would disrupt Indigenous self-determination efforts through the exclusion of Indigenous women.

Treaty-making, reconciling and settling are particular externalities that are problematic for Indigenous women. Having been excluded from colonial Treaty discourses, Indigenous women's views are also excluded from contemporary moves to reconcile historical breaches and set sustainable research agendas that can account for the wellbeing of Indigenous communities.

My adherence to a Kaupapa Māori methodological approach for this thesis was two-fold. Kaupapa Māori has as its foundation both decolonising and transformative elements that seek to establish the liberatory intent within the research. That Kaupapa Māori also legitimates and takes for granted Indigenous languages and cultural practices signified its appropriateness for this inquiry. One of the critical contributions of this research has been in my view, the application of an authentic Indigenous research theory and methodology.

This research contributes to legal scholarship in a number of significant ways. It provides an in-depth comparative analysis of the similar trajectories of Indigenous women which will aid in the growth of an Indigenous feminist jurisprudence. It is intentionally anti-colonial and seeks to equip Indigenous women with a knowledge base from which to critically engage their own lived realities with a view to emancipatory theorising.

It is envisaged that this thesis will contribute further to the development of a Mana Wahine theory. The need for Indigenous women to develop their own 'theory'(ies) is implicit in a Kaupapa Māori approach the point of which is to achieve meaningful change and transformation.

Finally, this thesis is not intended to serve as the final word on the role of Indigenous women in Indigenous governance. The desire is to provide a launch pad for further discussion, scholarship and research that can lead to the realisation of Mana Wahine. I submit that given the low number of Māori women in tribal governance as shown by the Te Puni Kokiri information and the thrust of this

research to examine the marginalisation of Māori women in Māori governance supported by this thesis that further empirical research is not only called for but imperative. Furthermore, that further research is required to examine the practical ways that barriers to participation in governance for Māori and Indigenous women can be addressed. The potential for gender analysis of governance policies and practices as developed in Canada is of high interest and relevance to Indigenous women's governance and would provide the impetus for the next steps of this research journey.

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