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ARTICLE

He Mokopuna He Tupuna: Exploring the Rights of Māori Children to te Reo Māori through the Oranga Mokopuna Framework

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Te reo Māori (the Māori language) was threatened from the 1900s onward by Crown policies explicitly and implicitly promoting monolingualism. After te reo Māori reached the point of near-extinction in the 1980s, revitalisation efforts were spear-headed by Māori and more recently supported by the Crown. Mokopuna Māori (Māori children) have a clear stake in the future of te reo: within te ao Māori (the Māori world), the language is understood to be a taonga (treasure) handed down to them by tīpuna/tūpuna (ancestors), and is central to Māori culture and identity. Against this background, this article argues that a mokopuna rights framework premised on Māori conceptions of rights can be applied to the rights of mokopuna to te reo. Such a framework gives a different perspective to universal children's rights frameworks because it takes a different starting point, congruent with te ao Māori. The framework employed in this article is the Oranga Mokopuna framework, as articulated in "Oranga Mokopuna: A tāngata whenua rights-based approach to health and wellbeing", written by Paula King, Donna Cormack and Mark Kōpua. This article explores Māori conceptions of rights and discusses them in the context of Māori children's rights to te reo. These conceptions of rights are found within tikanga Māori (customary Māori system of values and practices), within the relationship between the Crown and Māori contemplated by te Tiriti o Waitangi (the Treaty of Waitangi) and within the international human rights framework. This article follows mokopuna rights

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to te reo through the Oranga Mokopuna framework, rights that are derived from the whakapapa (genealogy) of Māori children, shaped by tikanga Māori and articulated in te Tiriti o Waitangi in the context of the Māori-Crown relationship. These rights are further articulated by international instruments, interpreted through the United Nations Declaration on the Rights of Indigenous Peoples. This application of Oranga Mokopuna demonstrates that mokopuna rights frameworks can be used to analyse mokopuna rights in particular contexts, in a manner that challenges the universalist and Western underpinnings of the New Zealand state legal system. As the author is not Māori, this article is not a Māori articulation of Māori conceptions of rights. Instead, this article takes its lead from Oranga Mokopuna in order to argue for the decentring of universalist and Pākehā rights conceptions in favour of centring Māori rights frameworks.

I Introduction

"We are expected to know our language, to know songs and the haka but we aren't given the opportunity to actually learn it. It just makes me feel bad."[1] These are the words of a Māori student interviewed by the Office of the Children's Commissioner as part of a study of children's perspectives of the education system, titled: "Education matters to me: Experiences of tamariki and rangatahi Māori". The student speaks to the painful experiences of mokopuna Māori[2] (Māori children) who are disconnected from their language after decades of monolingual Crown policies that took te reo Māori[3] (the Māori language) from vitality to near extinction. Few would argue with the view that mokopuna Māori have a right to speak te reo. The corollary of this is the right to a flourishing language. The Crown has historically ignored and eroded these rights. To address this situation and prevent similar erosions in future, understanding and exercising these rights are key.

Mokopuna rights can be explored through a universal children's rights perspective, by looking at the United Nations Convention of the Rights of the Child (UNCRC),[4] analysing the relevant rights within and applying them to the particular situation. Mokopuna rights can also be explored through a general indigenous children's rights perspective, by applying the rights within the UNCRC, the United Nations Declaration on the Rights of

1 Office of the Children's Commissioner *He manu kai mātauranga: He tirohanga Māori / Education matters to me: Experiences of tamariki and rangatahi Māori* (March 2018) at 12.

2 "Mokopuna" generally means descendant or grandchild. The choice of these kupu (words) to refer to Māori children is explained in Part III. "Mokopuna" and "mokopuna Māori" are used interchangeably throughout this article. The rights of this group are referred to as "mokopuna rights". An English translation is provided in parentheses after the first mention of each kupu Māori throughout this article. Where possible, the translations are guided by the glossary in Paula King, Donna Cormack and Mark Kōpua "Oranga Mokopuna: A tāngata whenua rights-based approach to health and wellbeing" (2018) 7 MAI Journal 186 at 198–199, given the heavy reliance of this article on the ideas expressed in Oranga Mokopuna. Te Aka Māori Dictionary <maoridictionary.co.nz> has also been consulted in preparing these translations. Note that the English language often fails to express the full meaning of a Māori concept; this is especially true of the concise translations in this article, which are intended to be taken as a guide only. Any errors are the author's own.

3 Henceforth referred to as "te reo".

4 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCRC].

Indigenous Peoples (UNDRIP) and other relevant international instruments.[5] However, such perspectives are of limited use in the context of mokopuna rights, as they tend to fail to locate Māori conceptions of rights within their analyses or else tack them on unsatisfactorily.[6]

This article argues that rights frameworks premised on Māori conceptions of mokopuna rights can be used to analyse issues affecting mokopuna Māori. This argument is developed in the context of mokopuna rights to te reo. The framework employed in this article is Oranga Mokopuna, as articulated in "Oranga Mokopuna: A tāngata whenua rights-based approach to health and wellbeing", an article written by Paula King, Donna Cormack and Mark Kōpua in 2018.[7] Oranga Mokopuna contemplates Māori conceptions of mokopuna rights within tikanga Māori (customary Māori system of values and practices), the rights articulated within te Tiriti o Waitangi[8] (the Treaty of Waitangi) and the rights contained in international covenants as connected and interrelated. It successfully co-locates these three rights spaces within one framework; each is framed differently, while still being part of a complementary whole. Such a framework offers a different perspective to universal children's rights frameworks because it takes a different starting point, congruent with te ao Māori (the Māori world).

The phrase "He Mokopuna He Tupuna" was chosen for the title of this article for the reasons articulated by Ngaropi Cameron, Leonie Pihama, Rawinia Leatherby and Awhina Cameron:[9]

> The phrase 'He Mokopuna He Tupuna' is one that provides a cultural framework for understanding the positioning of tamariki [children] within Te Ao Māori. It is drawn from the following whakataukī [proverb][:]
>
> He Tupuna he mokopuna. Māwai i whakakī i ngā whawharua o ngā mātua Tupuna? Mā ā tātou mokopuna! He mokopuna he Tupuna.
>
> This whakataukī draws us to the essence of the whakapapa [genealogical] relationship between generations. It asserts that we are all mokopuna and we are all tupuna [ancestors]. The mokopuna will in future generations take the place of the tupuna. All grandchildren in time become grandparents. Each generation links through whakapapa [genealogy] to each other and we are a reflection and continuance of our ancestral lines.

Within this article, the phrase refers to the intergenerational nature of both mokopuna rights and te reo: both are passed down from tūpuna (ancestors) and will be passed onto future mokopuna.

Part II locates the field of mokopuna rights, before Part III introduces the Oranga Mokopuna framework. Part IV gives a history of te reo since 1900 for context. Part V explores Māori conceptions of rights within a tikanga Māori framework, including how the rights of mokopuna Māori to te reo are framed. Part VI discusses Māori conceptions of te Tiriti o Waitangi in relation to rights, ending with an application in the context of rights to

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5 United Nations Declaration on the Rights of Indigenous Peoples GA A/RES/61/295 (2007) [UNDRIP].

6 King, Cormack and Kōpua, above n 2, at 187–188.

7 At 189–198.

8 Through its reference only to the Māori text of te Tiriti, Oranga Mokopuna holds that Māori never ceded sovereignty to the Crown. See King, Cormack and Kōpua, above n 2, at 193. See also 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, 2014).

9 Ngaropi Cameron and others *He Mokopuna He Tupuna: Investigating Māori views of Childrearing Amongst Iwi in Taranaki* (Tu Tama Wahine o Taranaki Inc, December 2013) at 4 (footnotes omitted). My thanks to Māmari Stephens for suggesting this title.

te reo. Part VII looks at the UNCRC and the UNDRIP, and what those instruments mean in the context of these rights. Part VIII ties Parts V–VII together, analysing these rights through Oranga Mokopuna in its entirety. Finally, the article concludes that the application of Oranga Mokopuna to the case study of mokopuna rights to te reo demonstrates the potential for issues affecting mokopuna to be analysed through mokopuna rights frameworks premised on Māori conceptions of rights.

The author is Malaysian-Chinese and Pākehā (of European descent), a tauiwi (settler) in this land. The author recognises this identity comes with significant privilege which must be acknowledged in writing this article on te reo and mokopuna rights. Additionally, as the author is not Māori, this article is not a Māori articulation of Māori conceptions of rights. Instead, this article closely follows the scholarship of King, Cormack and Kōpua, taking its lead from Oranga Mokopuna in order to argue for the decentring of universalist and Pākehā rights conceptions in favour of centring Māori rights frameworks.

The author intends for this article to uphold a decolonising approach to rights scholarship that gives priority to Māori voices; treats mātauranga (Māori knowledge) with respect and care; and is true to the spirit of Oranga Mokopuna. Any occasions where this article falls short of this intention are due to the author's own errors and biases.

II The Need for Indigenous Mokopuna Rights Frameworks

This article concerns the rights of mokopuna Māori. While this field overlaps with universal children's rights to an extent, as both look to the rights of children, the starting points of these fields differ considerably.

Universal children's rights discourse is largely centred around the UNCRC, although it is certainly not limited to the UNCRC. Konai Thaman argues that most international human rights conventions, being based on Western beliefs and values, form part of a "cultural agenda" that marginalises indigenous peoples.[10] Ani Mikaere elaborates on this critique of universal human rights:[11]

> As an indigenous person, therefore, it should not be surprising that the mention of human rights immediately puts me on my guard. The widely held assumption that the concept of human rights is "self-evident, universal, culture-free and gender neutral"[12] merely increases my suspicion. Simply asserting the universality of a concept does not make it so… [Under this regime], the Western concept of human rights is regarded as the norm, while tikanga becomes the 'other', something for which allowances might reasonably be made.

10 Konai Thaman "A Pacific Island Perspective of Collective Human Rights" in Nin Tomas (ed) *Collective Human Rights of Pacific Peoples* (University of Auckland, Auckland, 1998) 1 at 2–3 as cited in Ani Mikaere "Seeing Human Rights Through Māori Eyes" (2007) 10 Yearbook of New Zealand Jurisprudence 53 at 53.

11 Ani Mikaere "Seeing Human Rights Through Māori Eyes" (2007) 10 Yearbook of New Zealand Jurisprudence 53 at 53.

12 Thaman, above n 10, at 2.

Universal human rights thought finds its starting point in Western beliefs and values.[13] Such thought emphasises individual rather than collective rights.[14] By contrast, Carwyn Jones notes that Māori conceptions of rights emphasise collective rights. Individual rights are understood "in relation to the rights of the wider kinship group".[15] The UNDRIP does focus on declaring the collective rights of indigenous peoples,[16] but this does not change the inherently Western underpinnings of the universal human rights field.

In universal human rights thought, rights are only held by, and obligations owed to, the living.[17] Contrastingly, Moana Jackson has stated that, historically, public power in Māori society:[18]

> … was held by and for the people, that is it was a taonga [treasure] handed down from the tipuna [ancestors] to be exercised by the living for the benefit of the mokopuna.

This references a worldview in which tūpuna and mokopuna are deeply interconnected with the living, owing obligations to and being owed obligations by the living because of, rather than in spite of, their being deceased or yet unborn. As this article discusses in Part III, Oranga Mokopuna identifies Māori children with the concept of mokopuna, contemplating the rights of Māori children as inextricable from the rights of future generations.[19]

Therefore, universal human rights approaches are of limited value when analysing issues affecting mokopuna Māori. Instead, as Luke Fitzmaurice expresses, "we need to centre indigenous perspectives and be willing to use indigenous rights frameworks as the starting point".[20] Fitzmaurice, along with the authors of Oranga Mokopuna, supports the existence of indigenous conceptions of rights within te ao Māori, separate from universalist human rights thought.[21] Such rights do not originate from Western values or universal human rights instruments.[22] Rather, they originate from whakapapa and tikanga Māori.[23] Thus, these authors express the need for rights frameworks centring indigenous perspectives to be used when investigating the rights of mokopuna.[24]

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13 See also George Fitzgerald and Stephen Young "Agony, Exclusion and Colonial Reproduction: A Critical Examination of the Doctrine of Difference in Aotearoa New Zealand" (2020) 29 NZULR 313.

14 Karen Engle "On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights" (2011) 22(1) EJIL 141.

15 Carwyn Jones "Māori and State visions of law and peace" in Mark Hickford and Carwyn Jones (eds) *Indigenous Peoples and the State: International Perspectives* (Routledge, New York, 2018) 13 at 18.

16 UNDRIP, preamble and art 1; and Engle, above n 14, at 148–150.

17 See, for example, Kirsten Rabe Smolensky "Rights of the Dead" (2009) 37 Hofstra L Rev 763.

18 Waitangi Tribunal, above n 8, at 454.

19 King, Cormack and Kōpua, above n 2, at 188.

20 Luke Fitzmaurice "Centring Indigenous Children's Rights – The Problem with Universalism" in Nessa Lynch (ed) *Children's Rights in Aotearoa New Zealand: Reflections on the 30th Anniversary of the Convention on the Rights of the Child* (Wellington, 2019) 42 at 44.

21 At 43–44; and King, Cormack and Kōpua, above n 2, at 188. See also Māmari Stephens "Fires Still Burning? Māori Jurisprudence and Human Rights Protections in Aotearoa New Zealand" (2019) 9(8) VUWLRP 31 at 30–45.

22 King, Cormack and Kōpua, above n 2, at 188.

23 At 191–192.

24 Fitzmaurice, above n 20, at 44; and King, Cormack and Kōpua, above n 2, at 188.

III Oranga Mokopuna

A *Background to Oranga Mokopuna*

Having articulated the need for indigenous mokopuna rights frameworks, this article moves to one such framework: Oranga Mokopuna. King, Cormack and Kōpua describe Oranga Mokopuna as a:[25]

> … rights-based approach to health and wellbeing in Aotearoa that foregrounds whānau [extended family/family group], whakapapa, tikanga Māori, he Wakaputanga [the Declaration of Independence] and te Tiriti, while incorporating international human rights conventions such as the UNCRC and, specifically, the UNDRIP.

"Oranga" in this context translates to "welfare, health, living",[26] and in Oranga Mokopuna it refers to the health and wellbeing of mokopuna Māori. The authors chose the concept of mokopuna (descendants) to refer to Māori children:[27]

> … to position pēpē [babies], tamariki and rangatahi [younger generation] Māori within Te Ao Māori as the sacred reflection of our ancestors and blueprint for future generations. … Cameron et al. highlight how "we are all mokopuna and we are all tūpuna … mokopuna will in future generations take the place of the tūpuna. All grandchildren in time become grandparents … we are a reflection and continuance of our ancestral lines".

In the same vein, this article refers to Māori children as mokopuna Māori. While Oranga Mokopuna was specifically designed to provide "a conceptual frame of reference for the realisation of tāngata whenua [indigenous people] rights to health and wellbeing",[28] the approach it takes is applicable to other contexts of mokopuna rights. This is demonstrated in its application in this article to the rights of mokopuna to te reo. Because of this, references in Oranga Mokopuna to rights to health and wellbeing are interpreted as applicable to mokopuna rights in general.

B *Oranga Mokopuna and the Harakeke*

Oranga Mokopuna conceptualises the different aspects of the mokopuna rights framework as different parts of the harakeke (New Zealand flax) plant, and the framework itself as the harakeke (see Figure 1).[29] In the words of the authors, "[a] taonga in Aotearoa, as a symbol it foregrounds the centrality of whānau and relationships and is used in mātauranga Māori practices of child-rearing."[30]

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25 King, Cormack and Kōpua, above n 2, at 197.
26 Te Aka Māori Dictionary "Oranga" <maoridictionary.co.nz>.
27 King, Cormack and Kōpua, above n 2, at 188 (citations omitted). The quotation cites Cameron and others, above n 9, at 4.
28 At 186.
29 At 190.
30 At 189 (citations omitted).

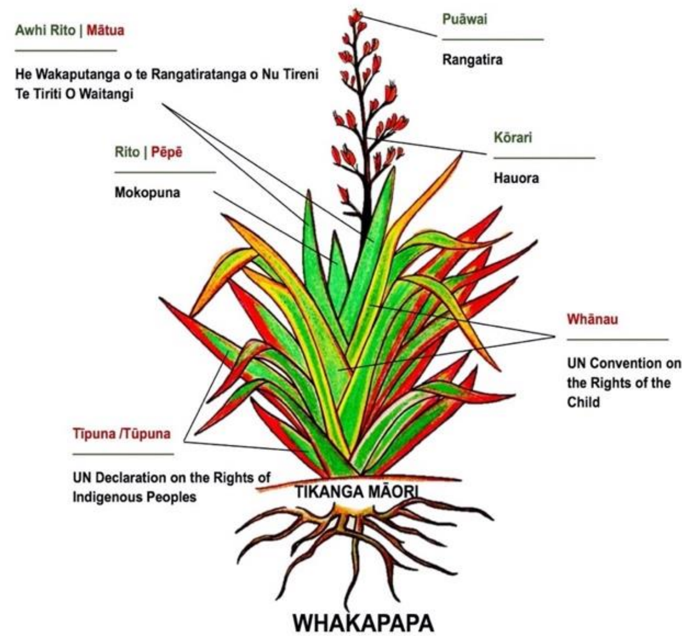

Figure 1: Aspects of the Oranga Mokopuna framework conceptualised through the harakeke plant[31]

What follows is a brief explanation of the aspects of this framework, with each being explained in greater depth later in the article. According to the authors, "[t]he nurturing soils of the whenua [ground/land] that create life for the harakeke symbolise inherent tāngata whenua rights of mokopuna", which are derived from whakapapa.[32] Tikanga Māori forms the pakiaka [roots] of the harakeke. As for the rito [centre shoot], the harakeke "centralises the rito/pēpē as highly prized and pivotal to the sustenance of future generations emerging from, nurtured by and protected by the awhi rito [leaves embracing the centre shoot]/ngā mātua [the parents]".[33] Ngā mātua in Oranga Mokopuna are he Whakaputanga o te Rangatiratanga o Nu Tireni[34] and the Māori text of te Tiriti o Waitangi.[35] The outermost leaves, representing tūpuna in mātauranga Māori, symbolise "the articles of the UNDRIP, which provide the supportive framework for the realisation of both individual and collective rights under the UNCRC and other international rights conventions".[36] In the authors' original conception of Oranga Mokopuna as a rights-based approach to health and wellbeing, "[t]he kōrari as the stem of the harakeke represents hauora [health/wellbeing]."[37] According to the authors, "the pūawai [flower] centralises mokopuna as our rangatira of today".[38] Like the pūawai, "[m]okopuna will thrive and flourish as rangatira [chiefs/chieftanesses] when their tāngata whenua rights to health and wellbeing are fully realised."[39]

31 At 190.
32 At 191.
33 King, Cormack and Kōpua, above n 2, at 189.
34 He Whakaputanga is also known as he Wakaputanga. The use of the former rather than the latter in this article reflects the name in that is in more common usage.
35 King, Cormack and Kōpua, above n 2, at 193.
36 At 195.
37 At 196.
38 At 196.
39 At 196.

C *Oranga Mokopuna in its entirety*

King, Cormack and Kōpua summarise how Oranga Mokopuna functions holistically:[40]

> Realisation of tāngata whenua rights occur[s] fundamentally through whakapapa and decolonised tikanga Māori. These are articulated by he Wakaputanga and te Tiriti, which stipulate the provisions for mokopuna rights to health and wellbeing. Tāngata whenua rights are then further developed by individual and collective human rights outlined under the articles of the UNCRC as well as other international rights conventions. The full realisation of both individual and collective human rights is articulated through the UNDRIP.

This article contends that Oranga Mokopuna can therefore be used to explore the rights of mokopuna in a particular context in three steps: first, by looking at these rights as conceived by their starting point, being whakapapa and tikanga Māori; secondly, by exploring how he Whakaputanga and te Tiriti articulate those rights; and, finally, by examining how the UNCRC as well as other international rights conventions develop these rights, as articulated through the UNDRIP. This article employs this method in exploring the rights of mokopuna to te reo through Oranga Mokopuna, before tying each of these strands together in Part VIII. The use of this method demonstrates the workings of Oranga Mokopuna "in its entirety",[41] as the authors word it. Preceding this exploration, this article gives an overview of the history of te reo since 1900 to provide context for these rights.

IV Overview of the History of te Reo Māori since 1900

While many Māori were bilingual at the start of the 20th century, most spoke te reo for everyday communication.[42] The next 75 years saw drastic changes to the health of the language:[43]

> Māori children … had to leave te reo at the school gate and were punished if they did not. … [They] grew to adulthood and … would not speak Māori to their children. Parents simply did not want their own children to be punished in the way that they had been. … The period from 1950 to 1975 was one of accelerating monolingualism, as education policies were compounded by urbanisation …

Against this background, "[t]here was a true revival of te reo in the 1980s and early-to-mid-1990s" by Māori, "spurred on by the realisation of how few speakers were left".[44] This revival:[45]

> … included petitions, a Māori radio station, the first kura kaupapa Māori [Māori medium primary school], and – most importantly of all – the birth of the kōhanga reo [Māori language preschool] movement in 1982 and its subsequent spectacular growth.

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40 At 197.
41 At 197.
42 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 2 at 393.
43 At 393–394 (footnotes omitted).
44 At 439.
45 At 407.

In 1986, in its *Report on The Te Reo Māori Claim* (Wai 11):[46]

> … the Waitangi Tribunal recommended that te reo be made an official language, that a Māori language commission be established, [and] that the education system and broadcasting policy support the Māori language …

The Waitangi Tribunal report for Wai 262, *Ko Aotearoa Tēnei*, stressed that te reo was "in renewed decline".[47] Contemporary trends suggested "that the ongoing gains being made with te reo [were] not offsetting the ongoing losses occurring as older speakers pass away".[48] The report highlighted that the Crown had not acted in partnership with Māori to preserve te reo, failing to make and adequately resource effective policies to this end.[49]

V Tikanga Māori and mokopuna rights

A *Tikanga Māori*

To locate the origins of mokopuna rights to te reo, this article first looks to whakapapa and tikanga Māori, the whenua and pakiaka from which mokopuna rights grow and develop. According to Māmari Stephens, tikanga Māori refers to:[50]

> … the content, practices, concepts and theories of Māori law, all of which make it possible for someone with sufficient correct knowledge to predict possible outcomes when such laws are called into action.

Tikanga Māori is underpinned by a collection of interrelated values:[51]

> … that are linked with, and expressed by, Māori cultural practices that reveal legal thinking and practice, whereby a collation of enforceable rules and processes of decision-making is understood to control and direct human behaviour. In particular it is possible to view such inter-related values and practices in terms of the obligations and entitlements they create.

These values include whakapapa, whanaungatanga, mana and utu.[52] Each of these values will be considered in turn, alongside their implications for rights in tikanga Māori.

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46 At 407.
47 At 439.
48 At 436.
49 At 470.
50 Stephens, above n 21, at 2. Stephens' use of the term "Māori jurisprudence" is largely equivalent to the use of "tikanga Māori" in Oranga Mokopuna. This article follows the terminology of Oranga Mokopuna.
51 At 8.
52 At 8. This Part follows Stephens in characterising whakapapa as one of the values underpinning tikanga Māori. However, it must be highlighted that in Oranga Mokopuna, whakapapa is the original source of mokopuna rights, rights which are then developed within tikanga Māori and its underpinning values.

(1) Whakapapa

According to Khylee Quince:[53]

> The structural framework of Māori society is based on whakapapa, or genealogical connection — from our primordial parents Papatūānuku (Earth Mother) and Ranginui (Sky Father) and their descendants, down to human beings. Whakapapa links human beings to the natural and spiritual worlds, so that people are related to all aspects of the environment.

Whakapapa determines one's place in Māori society, providing individuals with collective identity.[54] One's rights are derived from whakapapa, passed down from tupuna to mokopuna through an inherent intergenerational connection.[55]

(2) Whanaungatanga

According to Stephens, whanaungatanga:[56]

> … calls for the creation and maintenance of relationships, utilising the "expected mode of behaviour" based on those whakapapa connections. The traditional Māori value of whanaungatanga is broadly understood today to refer to the notion of collective obligation within kin groups whereby the collective is entitled to expect the support of its individuals and whereby also, individuals are entitled to the support of the collective.

Thus, whanaungatanga underpins relationships in Māori society, imposing corresponding rights and obligations on individuals and collectives. Stephens also notes:[57]

> Whanaungatanga is not restricted in modern practice to people connected by blood relations. It can also refer to those who are already connected, and those who *become* whanaunga [kin/relations], by way of shared experiences.

(3) Mana

Mana is described as "combining notions of psychic and spiritual force and vitality, recognised authority, influence and prestige, and thus also power and the ability to control people and events".[58] Stephens describes mana as "relational", explaining that one's mana is determined by one's place within the collective, "taking into account factors such as ancestry and birth order".[59] Mana is drawn from one's tūpuna and from "the proven

53 Khylee Quince "Māori and the Criminal Justice System in New Zealand" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (Auckland, LexisNexis, 2007) at [12.2.1].
54 Stephens, above n 21, at 9.
55 King, Cormack and Kōpua, above n 2, at 191.
56 At 10 (citations omitted) (emphasis in original).
57 At 11; and Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 28–29.
58 Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, Victoria University Press, 2013) at 154.
59 Stephens, above n 21, at 12.

works, skills and/or contributions" to the collective that one has made.[60] It is, therefore, "both ascribed and achieved".[61]

(4) Utu

According to Jones, the principle of utu "drives actions which seek to restore balance and to provide for reciprocity" in relationships.[62] Stephens explains how it operates in practice:[63]

> If a person or a collective has behaved in a manner that builds the mana of an individual or collective, say by way of hospitality or generosity, an obligation can be incurred by the receiving party to repay that mana-enhancing action to an appropriate degree. Conversely, if the actions of a group or individual have undermined or tarnished the mana of an individual or collective, a right can be created whereby the offended party can seek retribution or compensation.

(5) Rights and relationships in tikanga Māori

The values underpinning tikanga Māori work together to create a system in which rights and obligations are exercised and discharged:[64]

> Whakapapa and whanaungatanga can identify relationships and kin connection from which rights, entitlements and obligations could arise, and mana can also give rise to rights and obligations … Utu provides the mechanism for determining the correct and proportionate actions for upholding and restoring mana to individuals and collectives.

Rights and obligations in tikanga Māori are therefore inextricable from the relationships between those holding rights and obligations. These rights and obligations are held by both individuals and collectives.[65]

Drawing on Stephens' work, within tikanga Māori, an obligation is an individual or collective *duty* owed to an individual or collective. Correspondingly, a right is an individual or collective *entitlement* to be fulfilled by an individual or collective. Both arise from, and are enforced through, the interrelated workings of tikanga Māori values such as whakapapa, whanaungatanga, mana and utu.

In tikanga Māori, collectives of whānau, hapū and iwi are networks within which individuals hold rights and obligations in relation to each other. Individuals are also collective actors in their own right, who owe and are owed various obligations.[66]

Jacinta Ruru defines whānau as "a group of relatives defined by reference to a recent ancestor, comprising several generations, several nuclear families and several households, and having a degree of ongoing corporate life".[67] Ruru explains that, conventionally:[68]

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60 At 34.
61 Eddie Taihakurei Durie *Custom Law* (Treaty of Waitangi Research Unit, 1994) at 8.
62 Jones, above n 15, at 25.
63 Stephens, above n 21, at 14.
64 At 15.
65 At 10–11.
66 At 10–11; and Jones, above n 15, at 17.
67 Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 59.
68 At 61 (footnotes omitted).

> Whānau descent groups constitute the lowest tier in a hierarchy of groups organised on the basis of descent. The middle tier consists of hapū, each made up of related whānau and associated with a marae and a local community. The top tier consists of iwi, each made up of related hapū and associated with a regional territory.

Dame Joan Metge describes the rights and obligations of mokopuna within this relational framework:[69]

> … children also have rights and responsibilities. They have rights to their genealogical identity, to love, to support and to socialisation in tikanga Māori, from other members of their whānau, as well as and sometimes instead of their parents. In their turn they are expected to honour reciprocal responsibilities to their parents, their ancestors and the whānau as a group.

John Rangihau articulates similar rights and obligations in the relationship between mokopuna and their hapū.[70] Thus, collectives in Māori society owe obligations to their mokopuna to honour their whakapapa, provide for their wellbeing and socialise them in Māori ways of life. Mokopuna have corresponding rights to the provision of these by their whānau and hapū, by virtue of their whakapapa and duties imposed by whanaungatanga.

B *Application to mokopuna rights to te reo*

This article now moves to exploring mokopuna rights in the context of rights to te reo. As stated in Part I, what follows is not a Māori articulation of mokopuna reo rights, as the author is not Māori. Instead, it is the author's attempt to explore potential implications of Oranga Mokopuna and tikanga Māori, as articulated by King, Cormack, Kōpua and the (predominantly Māori) authors cited in this Part, on mokopuna reo rights.

Te reo is of fundamental importance to Māori and to the collective flourishing of whānau, hapū and iwi. Tā James Henare demonstrated this importance while speaking to the Waitangi Tribunal in 1985. He said:[71]

> The language is the core of our Maori culture and mana. Ko te reo te mauri o te mana Maori (The language is the life force of the mana Maori). If the language dies, as some predict, what do we have left to us? Then, I ask our own people who are we? … the taonga, our Maori language, as far as our people are concerned, is the very soul of the Maori people.

While the Waitangi Tribunal recognises this conception of te reo as a taonga,[72] the true importance in tikanga lies in Māori seeing it as an irreplaceable treasure. It follows that protecting this taonga is of the utmost importance to Māori society, with particular implications for mokopuna. As the Tribunal expressed in *Ko Aotearoa Tēnei*:[73]

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69 Joan Metge *New Growth from Old: the Whānau in the Modern World* (Victoria University Press, Wellington, 1995) at 141.

70 John Rangihau *Address to High Court Judges* (3 April 1987) at 6 as cited in Di Pitama, George Ririnui and Ani Mikaere *Guardianship, Custody and Access: Māori Perspectives and Experiences* (Ministry of Justice, August 2002) at 39.

71 Waitangi Tribunal *Report of The Waitangi Tribunal on The Te Reo Maori Claim* (Wai 11, 1986) at 34.

72 At 20.

73 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 1 at 157.

> The decline in Māori-language acquisition among children must be a matter of the deepest concern. It is literally true that the survival of te reo depends on this age group.

Mokopuna, through their whakapapa, have the right to have this taonga passed down. As such, mokopuna must be given sufficient opportunity to learn te reo so that the language is preserved for them and future generations, noting that Oranga Mokopuna identifies children with future generations through the concept of mokopuna.[74] Because of this, whakapapa and whanaungatanga impose an obligation on whānau, hapū and iwi to protect and nurture te reo alongside bestowing a corresponding right on mokopuna to a flourishing reo.

The Waitangi Tribunal's conclusions in *Ko Aotearoa Tēnei* on the duty for Māori to speak te reo in everyday life provide some guidance as to what the substance of such a right might be. The Tribunal's conclusions are not the starting point for mokopuna rights to te reo, but rather can be followed upstream, through Oranga Mokopuna, to the true starting point: whakapapa within a tikanga Māori context. Hence, the Tribunal's conclusions may be reframed in this context.

The Tribunal expresses the duty on Māori to preserve te reo through speaking it:[75]

> While the classroom is a starting point, it is in the home and community that the language will truly live … There is no alternative but for Māori to speak Māori in these environments, in particular to children, if te reo and its dialects are to survive and flourish. They must guard against complacency about the health of the language and overcome any whakamā [embarrassment] they may feel in using it.

Described by the Tribunal as the duty to "kōrero Māori" (speak Māori), it contemplates whānau, hapū and iwi speaking te reo in everyday contexts in order to build environments in which mokopuna can learn it and take it to heart. The Tribunal also mentions "the classroom", referring to formal education, as a medium through which te reo is taught to mokopuna. The Tribunal does so in the context of Crown-funded Māori-medium education, contemplating a Māori–Crown partnership aimed at revitalising te reo through the education system, as discussed in Part VI. However, it would be remiss to ignore what the Tribunal points to in this context: that whānau, hapū and iwi may be bound by an obligation more holistic in what it requires to protect te reo than the duty to speak te reo in everyday life.

Given the gravity of the need to revitalise and nurture the taonga of te reo by imparting it to mokopuna, such a duty might go beyond what the Tribunal outlines. It obliges whānau, hapū and iwi to do what they can to create a holistic environment in which their mokopuna can become fluent in te reo. This will look different in different contexts and at different levels. For whānau, this could mean speaking te reo at home and in community life, and otherwise supporting the efforts of their mokopuna to learn te reo wherever possible. For hapū and iwi, in addition to having duties to kōrero Māori, this may imply hapū- and iwi-wide language planning as well as the development and maintenance of educational institutions that teach te reo, depending on resources.

However, the duties on whānau, hapū and iwi and the corresponding rights of mokopuna should not be conceived as rigid or abstracted from lived realities. The notions of balance and reciprocity contemplated by the principle of utu suggest that such obligations should only be imposed to the extent that it is possible to live them out, given the different contexts within which each whānau, hapū and iwi operates. This recognises

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74 King, Cormack and Kōpua, above n 2, at 188.
75 Waitangi Tribunal, above n 73, at 167.

that colonisation has undermined the capacity of each whānau, hapū and iwi to meet their obligations to their mokopuna in terms of language proficiency and available financial, mental and emotional resources. Without colonisation, te reo would not be under threat. However, the importance of te reo to collective flourishing and in its own right is not diminished by this accommodation of lived experience. Therefore, any duty to protect te reo would look not to the amount of resources a whānau, hapū or iwi puts towards te reo, but rather the level of priority given to te reo in allocating resources.

For some collectives, there may be little available to give. In some cases, colonisation has taken away the language completely and left collectives with scant resources to revitalise it. For these whānau, hapū and iwi in particular, there will be deep intergenerational mamae (pain) associated with the loss of te reo.[76] In these situations, it would be insensitive and impractical to impose the duty to kōrero Māori as articulated by the Tribunal. Such a duty would likely extend only to being open to their mokopuna learning te reo and supporting them in their learning journeys where possible.

Tikanga Māori imposes the obligation on whānau, hapū and iwi to preserve te reo for mokopuna and future generations, taking lived realities into account. Equally, mokopuna have the right to a flourishing reo and to have sufficient opportunities to partake in this flourishing through learning and speaking it. The rights of mokopuna, to use the language of Oranga Mokopuna, are tāngata whenua rights inherent in whakapapa which are then articulated in te Tiriti. It is to te Tiriti that this article now turns.

VI Te Tiriti o Waitangi and Mokopuna Rights

A *Locating He Whakaputanga and Te Tiriti o Waitangi in Oranga Mokopuna*

Growing from the soil and roots of tikanga Māori, he Whakaputanga and te Tiriti are the awhi rito, the twin leaves who nurture and support the mokopuna most closely.[77] He Whakaputanga is described in Oranga Mokopuna as "an internationally recognised decree of the independent state of Aotearoa, the provisions of which affirm that full sovereign power and authority resides collectively with rangatira and their hapū".[78]

According to the King, Cormack and Kōpua, "it is he Whakaputanga that affirms that tāngata whenua rights of mokopuna exist, under the established constitutional framework of tikanga Māori".[79] King, Cormack and Kōpua also acknowledge "the critical role [played by] he Wakaputanga in setting the context for the signing of te Tiriti" by bringing about, in the words of Matike Mai Aotearoa, "a constitutional transformation in which Iwi and Hapū would exercise an interdependent authority while retaining their own independence".[80]

Historically, academic and political discourses have focused heavily on te Tiriti, often neglecting he Whakaputanga in the process. It is therefore important to acknowledge he Whakaputanga in discussions of the rights of mokopuna and challenge its historical side-lining. As Hone Sadler states, "He Whakaputanga te matua, Te Tiriti te tamaiti—He Whakaputanga is the parent, Te Tiriti is the child".[81] Te Tiriti can only realise mokopuna rights because he Whakaputanga paved the way first.

76 Rebecca Wirihana and Cherryl Smith "Historical Trauma, Healing and Well-Being in Māori Communities" (2014) 3 MAI Journal 197 at 201.
77 King, Cormack and Kōpua, above n 2, at 193.
78 At 193.
79 At 193.
80 Matike Mai Aotearoa *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa - The Independent Working Group on Constitutional Transformation* (2016) at 44.
81 National Library "A declaration: He Whakaputanga" <natlib.govt.nz>.

As this article moves to discuss te Tiriti in the context of mokopuna rights, it is worth highlighting again that te Tiriti is neither the starting nor the end point for Oranga Mokopuna. It is certainly the aspect of Oranga Mokopuna that has been discussed in the courts, in Parliament and in the Waitangi Tribunal more than any other. However, Oranga Mokopuna provides a different starting point for mokopuna rights in whakapapa and tikanga Māori. As Mikaere states:[82]

> For Māori, however, te Tiriti is not the source of our rights but rather a reaffirmation of rights that stem from the fact that we are tāngata whenua, the people of the land.

B *Māori conceptions of Te Tiriti o Waitangi*

In order to explore the rights of mokopuna to te reo in the Tiriti space, this article first discusses Māori conceptions of te Tiriti o Waitangi. Jones argues it is important when interpreting treaties "to consider how they are given meaning within Indigenous constitutional traditions".[83] Jones looks at the place of te Tiriti o Waitangi within the Māori constitutional tradition, defining "constitutional tradition" as "the collection of rules, principles and practices that shape the way in which public power is exercised within a political community".[84] According to Jones, the Māori constitutional tradition can be found in systems of tikanga, which "speak to the exercise of public power and the relationships between the institutions of public power and the interaction between those institutions and members of the community".[85]

The perspective that Jones takes is "one that considers te Tiriti as a Māori legal mechanism, which protects Māori rights, sourced in Māori legal traditions".[86] Jones draws on Robert A Williams Jr's exploration of indigenous treaty-making,[87] which he summarises as follows:[88]

> Ultimately, Williams suggests that treaties can be understood as a means of connecting diverse communities with common aspirations. This forms links between distinct constitutional traditions but does not require an amalgamation of those traditions. Treaties provide bridges between those traditions but are premised on a continuing diversity of thought and practice of law and peace.

Moving away from an "assimilationist approach" to te Tiriti or conceptualising its role as "amalgamating Indigenous and State law", Jones argues that te Tiriti, when viewed through the Māori constitutional tradition, "provides a framework for contemplating how we might best give effect to Māori and state visions of law and peace".[89] To this end, Jones cites Williams' exposition of indigenous treaty-making traditions, in which treaties can be understood as "sacred texts" or "sacred covenants". This means they are "not merely negotiated political settlements, but instead reflect higher purposes that the parties are bound to pursue".[90] Jones notes that "[b]ecause of the *tapu* [sacred/set apart]

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82 Mikaere, above n 11, at 54.
83 Jones, above n 15, at 17.
84 At 14.
85 At 15.
86 At 13.
87 See Robert A Williams Jr *Linking Arms Together: American Treaty Visions of Law and Peace, 1600–1800* (Routledge, New York, 1999).
88 Jones, above n 15, at 14.
89 At 27.
90 At 15–16.

nature of agreements, consequences for breaching an agreement are ultimately backed by spiritual sanction".[91]

Rights and identity in indigenous treaty-making traditions are "inherently bound up with relationships". Through treaties, these can be extended beyond kin ties to "make new, enduring relationships possible".[92] Reflections of these conceptions can be seen in Māori conceptions of whanaungatanga which, in the context of treaty-making:[93]

> … means that Māori legal and constitutional systems tend to emphasise the maintenance of relationships and foster mechanisms and processes that provide for this. Relationships are generally prioritised in decision-making and legal and constitutional practice. An individual's rights and obligations are always understood in the context of his or her network of relationships and are, effectively, defined by those relationships.

In the context of Māori conceptions of rights, this means that "there is an emphasis on collective rights and obligations" in mechanisms such as te Tiriti o Waitangi.[94] Additionally, since "phenomena cannot be understood in isolation or by separating them from their network of connections" in a worldview rooted in whanaungatanga, the principle of whanaungatanga influences the ways in which the text and terms of te Tiriti are interpreted.[95] In this fashion, Metge has given evidence before the Waitangi Tribunal that te Tiriti should be understood as an "undivided whole", and Hohepa has described Crown attempts to view te Tiriti in separate parts as "dissective" and "[negating] its overall context".[96] In the same spirit, Oranga Mokopuna prefers to read the articles and intention of te Tiriti a whole, as opposed to "the use of Crown-defined 'principles of the Treaty'", noting that the latter approach tends to lead to marginalisation of Māori rights.[97]

The principle of utu in the context of treaty relationships contemplates "the need to maintain and perpetuate relationships through ongoing reciprocal exchanges".[98] According to Jones:[99]

> The relationship does not begin and end with the specific articles of the Treaty, rather there are enduring obligations on the Treaty partners to continually respond to exchanges within the relationship.

C *Māori conceptions of Te Tiriti and rights*

From the emphasis on relationship that emerges from Māori conceptions of te Tiriti and tikanga Māori, a foundation for rights in this space can be established. According to Stephens, the understanding that tikanga Māori is "fundamentally relational" means that:[100]

> The relationship between the Crown and Māori, in all its permutations, forms the bedrock for understanding how rights are to be viewed. Māori political constitutionalism has motivated and enforced the creation of this relationship, as affirmed by literally thousands

91 At 24 (emphasis in original).
92 At 16.
93 At 17.
94 At 18.
95 At 18.
96 Waitangi Tribunal, above n 18, at 452.
97 King, Cormack and Kōpua, above n 2, at 197.
98 Jones, above n 15, at 26.
99 At 26.
100 Stephens, above n 21, at 45 (citations omitted).

> of deeds, contracts, and agreements, only one of which is the Treaty of Waitangi. These agreements enforce notions of special rights belonging to Māori that the Crown is bound to protect as a direct fruit of the covenant or contract or deed entered into.

This means the Crown and Māori are in a relationship premised on the rights of tāngata whenua being upheld and realised (as well as those of the Crown).[101] Rights are thus inextricable from the relationship envisioned in te Tiriti between the Crown and Māori.[102] Because of this, it is artificial to separate so-called "rights dimensions" from the whole of te Tiriti, as the Human Rights Commission is tasked with doing.[103] In addition, as it is underpinned by utu, the Māori-Crown relationship is an ongoing and reciprocal one.[104] Continued dialogue is necessary to facilitate continued realisation of tāngata whenua rights.

Bishop Manuhuia Bennett has described the essence of te Tiriti as "the promises of two people to take the best possible care they can of each other".[105] Jones and Stephens both highlight that these "two people" often have very different ideas about what flourishing looks like: Jones calls these "visions of law and peace",[106] while Stephens calls them conceptions of "the good life".[107] Therefore, when examining these rights, they must be viewed in the context of two parties supporting each other to live out their "vision of law and peace" or conception of "the good life". These parties are obliged to protect and not unilaterally compromise each others' rights, and initiate dialogue whenever these different visions are in tension in order to find a way forward. In this conception, resolving disputes in the courts, negotiations with the Crown, the Parliamentary legislative process and Waitangi Tribunal hearings are but some of the ways this relationship plays out in different places and times, with the view of moving towards living out the relationship contemplated in te Tiriti in all its fullness.

However, the Pākehā legal system[108] does not share this vision of the Māori-Crown relationship. Parliament uses the phrase "the principles of the Treaty of Waitangi" when it references te Tiriti in legislation.[109] Such an approach obscures the text and intention of te Tiriti in favour of "Crown-defined" principles, enabling further erosion of Māori rights.[110] The courts have followed suit, interpreting these principles in line with Western common

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101 Maui Solomon "The Context for Māori (II)" in Alison Quentin-Baxter (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Wellington, 1998) 60 at 63.

102 Drawing on existing scholarship, this article conceptualises the relationship contemplated by te Tiriti as one between Māori and the Crown. It is important to note that others, such as Tā Edward Taihakurei Durie, have conceptualised it differently, as a relationship between tangata whenua (people of the land, that is, Māori) and tangata Tiriti (people of the Tiriti, a group which encompasses Pākehā and, according to many accounts, all non-Māori who have migrated to Aotearoa). See John Borrows "Origin stories and the law: Treaty metaphysics in Canada and New Zealand" in Mark Hickford and Carwyn Jones (eds) Indigenous Peoples and the State: International Perspectives (Routledge, New York, 2018) 30 at 45. The author's hope is that scholarship and national conversations about te Tiriti continue to move beyond the confines of the Māori-Crown relationship and increasingly begin to implicate all tangata whenua and tangata Tiriti.

103 Human Rights Act 1993, s 5(2)(d).

104 Jones, above n 15, at 26.

105 Waitangi Tribunal *The Te Roroa Report* (Wai 38, 1992) at 30.

106 Jones, above n 15, at 26.

107 Stephens, above n 21, at 50 and 60.

108 Commonly known as the "New Zealand legal system". With this wording, the author wishes to emphasise that this legal system is not the only one operating in Aotearoa New Zealand. Tikanga Māori has long existed in Aotearoa as a functioning system governing Māori society.

109 See, for example, Treaty of Waitangi Act 1975, s 6(1); and Resource Management Act 1991, s 8.

110 King, Cormack and Kōpua, above n 2, at 197.

law concepts such as reasonableness, fiduciary duties and good faith.[111] Additionally, as discussed in Part II, the universalist conception of human rights (which underpins domestic human rights legislation)[112] tends to prioritise individual rights over indigenous conceptions of rights.

In this context, Māori conceptions of the Māori-Crown relationship can and often must be imperfectly reduced to a question akin to: can it be proven that the Crown has breached the rights of Māori in a particular area and what is the remedy Māori can demand in this context? However, this question misses the relationship. A better question would read: what is each party obliged to do in the situation implicating rights that have been highlighted in the relationship dialogue today in this particular forum? In other words, what would it look like for each party to take the best possible care of each other?

D *The Māori–Crown relationship and the enforceability of rights*

An important part of relationships is how parties hold each other to account, recognising the reciprocity and accountability inherent in relationships underpinned by utu. The first port of call for Māori is an expectation that the Crown will strive to do its part to uphold the relationship, given that it is now "a relation [of Māori], deeply bound by obligation to the relationship".[113] This expectation is described by Stephens in the following manner:[114]

> [The] relational approach to rights protection under the Treaty … [means] Māori will often expect the State to act with authority according to the mana afforded it by virtue of the relationship (whanaungatanga) with Māori collectives so as to uphold the rangatiratanga [chiefly authority/self-determination/sovereignty] of those collectives, as well as its own rangatiratanga.

However, the Crown has often not been a responsive and willing partner, nor seen itself as bound solely by virtue of its relationship with Māori. Instead, Māori have historically attempted to hold the Crown to account through the Pākehā legal system, in ways the Crown deigns to respect, in order to realise Māori rights. Primarily, this has taken place in the courts and the Waitangi Tribunal.

The courts will not directly enforce any rights contained in te Tiriti, unless these have been incorporated into legislation.[115] However, the decisions of *Huakina Development Trust v Waikato Valley Authority* and *Barton-Prescott v Director-General of Social Welfare* (*Barton-Prescott*) have increased the viability of Māori actions relying on te Tiriti.[116] The former held it to be a valid extrinsic aid to statutory interpretation, while the latter held that te Tiriti "colour[s]" the interpretation of every statute.[117] These advances are far from satisfactory in terms of the full realisation of Māori rights. In *Barton-Prescott*,

111 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664. For further judicial discussion on "reasonableness", see *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517.

112 For example, the long title of the New Zealand Bill of Rights Act 1990 says the Act was passed "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights", a universalist human rights instrument.

113 Stephens, above n 21, at 46.

114 At 46.

115 *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC).

116 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210; and *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC).

117 Barton-Prescott, above n 116, at 184.

for example, the application of te Tiriti was "subsumed within the concept of the welfare of the child, which provides the ultimate standard under all of the statutory provisions concerned".[118]

Māori can bring claims to the Waitangi Tribunal for "breaches of the principles of the Treaty".[119] The Tribunal then rules on whether a prejudicial breach has taken place and issues non-binding recommendations on how the Crown can remedy the breaches.[120] While the Tribunal's discourse largely centres around these "Treaty principles", Edward Willis argues that the Tribunal, through its reports, has also developed "a framework of Treaty rights that is consistent with both the principles of the Treaty and legal principle".[121] The non-binding nature of the Tribunal's recommendations,[122] however, means that the extent to which it can hold the Crown accountable for breaches of the Māori-Crown relationship and associated rights is limited. This makes the force of these recommendations more moral or political in nature.

Other sites of the Māori–Crown relationship, where Māori seek dialogue directly with the Crown over the realisation of their rights, are heavily dependent on Crown goodwill and feature significant power imbalances. This has been true of Treaty settlement negotiations, in which the Crown has tended to set the terms upon which it will negotiate, imposing processes inconsistent with tikanga Māori and leading to unsatisfactory settlements for Māori collectives.[123]

The mechanisms for accountability in the Māori–Crown relationship are therefore lacking in effectiveness for Māori and have become an obstacle to the realisation of Māori rights, given the Crown's unwillingness to consistently be bound by virtue of this relationship.[124]

E *Application to mokopuna rights to te reo*

This article now turns to exploring what a Māori conception of te Tiriti o Waitangi might have to say about mokopuna rights to te reo. This article borrows from the Waitangi Tribunal's analysis of te Tiriti. However, the relevance of Tribunal's reports is limited because of the Tribunal's mandate to conclude on breaches of the "principles of the Treaty" rather than on te Tiriti itself.[125]

The submission of Hirini Moko Mead to the Tribunal, in the context of the Wai 11 claim, illustrates that the art II phrase "'[o] ratou taonga katoa' covers both tangible and intangible things and can best be translated by the expression 'all their valued customs and possessions.'"[126] The Tribunal concluded:[127]

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118 At 189.
119 Treaty of Waitangi Act, s 6(1).
120 Section 6(3).
121 Edward Willis "Legal recognition of rights derived from the Treaty of Waitangi" (2010) 8 NZJPIL 217 at 222.
122 Treaty of Waitangi Act, s 6(4).
123 Maria Bargh "The Post-Settlement World (So Far): Impacts for Māori" in Nicola R Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) 166 at 166–173.
124 The author notes the growing call from Māori for constitutional transformation that honours te Tiriti and addresses the power imbalance in the Māori-Crown relationship, among other aims. This call for constitutional transformation is prominently expressed by Matike Mai Aotearoa, above n 80.
125 Jones, above n 15, at 13.
126 Waitangi Tribunal, above n 42, at [4.2.3].
127 At [4.2.4].

> When the question for decision is whether te reo Maori is a "taonga" which the Crown is obliged to recognise we conclude that there can be only one answer. It is plain that the language is an essential part of the culture and must be regarded as "a valued possession".

Thus, te reo is a taonga protected by art II of te Tiriti. *Ko Aotearoa Tēnei* sets the scene for the Māori–Crown relationship in the context of protecting this taonga:[128]

> Te reo Māori is a taonga. It is the platform upon which mātauranga Māori stands, and the means by which Māori culture and identity are expressed. Without it, that identity – indeed the very existence of Māori as a distinct people – would be compromised. No party before us disagreed with these propositions.

This passage shows the Crown and Māori agree on the significance of te reo and its status as a taonga. This is important not because it validates the significance and status of te reo, but in that both Crown and Māori are on the same page in negotiating their relationship in this context.

As such, the question to be explored in looking at the mokopuna rights to te reo in the Tiriti space might be articulated as follows: what does the ongoing Māori–Crown relationship, underpinned by tikanga Māori values, mean for mokopuna rights in the context of this taonga needing revitalisation? In other words, what does it look like for each party to "take the best possible care of each other" in this context and how do the parties achieve this?

Ko Aotearoa Tēnei draws out a number of duties on the Crown and Māori in this context that aid in answering this question:[129]

> … we think there are four primary duties on the Crown and two on Māori in terms of te reo. The Crown's duties are partnership, wise policy, appropriate resources to achieve policy goals, and a Māori-speaking government.
>
> The Māori duties are necessarily directed to the areas in which Māori have the greatest contribution to make. They are kōrero Māori and partnership.

These are framed as duties owed in the context of the Māori–Crown relationship, as conceptualised by the Waitangi Tribunal. Acknowledging the differences between Māori conceptualisations of the relationship and the Tribunal's, given the latter's reliance on Treaty principles, these duties can be recontextualised in light of Māori conceptualisations of the relationship and applied to the context of mokopuna rights in this area. Such duties, while owed by Māori and the Crown to each other as part of upholding their relationship, can also be construed as duties owed by both in relation to mokopuna (who have corresponding rights), considering that, within Oranga Mokopuna, te Tiriti articulates the rights of mokopuna. This view finds support in the aforementioned Māori understanding that public power (such as the power exercised by the rangatira who signed te Tiriti and which they continue to exercise in the context of the Māori–Crown relationship) is "held by and for the people … to be exercised by the living for the benefit of the mokopuna".[130]

128 Waitangi Tribunal, above n 73, at [5.2].
129 At [5.6.1].
130 Waitangi Tribunal, above n 18, at 454.

This being established, the duties can now be explored, starting with the duty to kōrero Māori. As has already been discussed, the duty that rangatira—and through them, iwi, hapū and whānau—owe to mokopuna to speak and revitalise te reo to the extent possible is already established within tikanga Māori. In this context, it is thus an articulation of existing tāngata whenua rights by te Tiriti, to use the language of Oranga Mokopuna, noting again that te Tiriti is not the origin of these rights.

The partnership duty on both the Crown and Māori contemplates that:[131]

> … the future of the Māori language … cannot be made secure by Māori efforts alone or Crown efforts alone. It will depend on the ability of both sides to co-operate, participate, and contribute.

Rather than basing this duty on the Treaty principle of partnership, like the Tribunal does,[132] a conception more resonant with Oranga Mokopuna and tikanga Māori is that this duty is based on the whanaungatanga central to the Māori-Crown relationship. The way in which the Tribunal articulates the details of this duty is helpful in describing what this relationship practically looks like in this context:[133]

> On the Crown's part there must be a willingness to share a substantial measure of responsibility and control with its Treaty partner. In essence, the Crown must share enough control so that Māori own the vision, while at the same time ensuring its own logistical and financial support, and also research expertise, remain central to the effort. Partnership in the context of te reo should be a true joint venture.
>
> If at the strategic and policy-formulation level the Crown must reach out to Māori, then Māori must also reach out to the Crown. They must step up to take a leading role in building the vision. Once it is built, Māori must be prepared to take co-ownership of it. We use the term co-ownership in two senses. First, Māori must welcome the Crown as a partner in Māori-language revival; and secondly, Māori must accept the responsibilities that come with ownership of the vision – most importantly, shared responsibility for its success or failure.

Moving to the Crown's other duties to mokopuna in this context, the Tribunal's articulation of the duty to make wise policy contemplates:[134]

> … transparent policies forged in the partnership to which we have referred; and implementation programmes that are focused and highly functional. Te reo Māori deserves the best policies and programmes the Crown can devise.

In *Matua Rautia: The Report on the Kōhanga Reo Claim*, the Tribunal considered that "effective and efficient policy" was a better term for this aspect of the Crown's obligation to Māori, given that "wise" is a subjective term.[135]

The Tribunal expressed the following about the duty to adequately resource policies to revitalise te reo in *Ko Aotearoa Tēnei*:[136]

131 Waitangi Tribunal, above n 73, at 161.
132 At 161.
133 At 161–163.
134 At 163.
135 Waitangi Tribunal *Matua Rautia: The Report on the Kōhanga Reo Claim* (Wai 2336, 2013) at 87.
136 Waitangi Tribunal, above n 73, at 166–167 (citations omitted).

> It is not our place to dictate which should take priority – hip replacements or reo teachers. It is sufficient for us to reiterate two important points of principle: te reo Māori is a taonga, the protection of which is guaranteed by the Treaty of Waitangi; and the Treaty itself is a constitutional instrument of overriding significance. Indeed, the Treaty is the source of the Crown's right to decide on priorities. All of this means, in our view, that in the competition for Crown resources te reo Māori must take a "reasonable degree of preference".

Finally, the Tribunal considered that the Crown owes a duty to develop the capacity of the government to speak te reo, so that it would cease to be an "English-speaking monolith"[137] and instead come to "reflect the aspirations of a growing number of the citizens it represents".[138]

Unlike the duty to kōrero Māori, these other duties could be seen as a product of te Tiriti rather than an articulation of independent tāngata whenua rights, and thus as inconsistent with Oranga Mokopuna's conception of te Tiriti. However, this article argues that these duties are instead an articulation of existing tāngata whenua rights in the "new" context of the relationship between Crown and Māori contemplated by te Tiriti. This may seem like a matter of semantics, but it is important in following Oranga Mokopuna that tāngata whenua rights (with whakapapa as their source) are kept as the starting point for all rights held by mokopuna.

The aforementioned duties shed light on what mokopuna rights to te reo might look like in the Tiriti space: rights that their iwi, hapū and whānau, through their rangatira, must uphold (mokopuna rights to benefit from kōrero Māori and partnership with the Crown) and rights that the Crown must uphold (mokopuna rights to effective and adequately resourced policies, a Māori-speaking government, and an active and committed Crown contribution to the Māori–Crown relationship). These rights are enforceable within the context of the obligations implicit in the Māori–Crown relationship through whanaungatanga, though mokopuna may yet need to seek recourse through the Pākehā legal system to supplement this if the Crown proves unwilling to act as a whanaunga, bound by its relationship with Māori, in future.

VII International Instruments and Mokopuna Rights

A *Locating international covenants in Oranga Mokopuna*

The UNDRIP, the UNCRC and other international instruments inform the rights of mokopuna as articulated by Oranga Mokopuna, developing what has already been articulated in the tikanga Māori and Tiriti spaces. However, they are not the starting point of the rights themselves. They are the whānau and tūpuna of the harakeke,[139] the outer leaves rather than the soil or roots.

Thus, an important question to be explored when international covenants are discussed in relation to Māori rights is: what do these instruments add to the rights inherent in whakapapa, conceived within tikanga Māori and articulated through he Whakaputanga and te Tiriti?

Additionally, not all international instruments are created equal. While the rights in the UNCRC and other covenants "develop" the rights of mokopuna, the UNDRIP has the special role of articulating "the full realisation of both [the] individual and collective human rights" in these covenants. In this way, the UNDRIP is the tupuna whose role is to bear the

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137 Waitangi Tribunal, above n 42, at 450.

138 Waitangi Tribunal, above n 73, at 169.

139 King, Cormack and Kōpua, above n 2, at 194–196.

brunt of the wind and rain and protect the rito, representing mokopuna. This article now discusses Māori conceptions of the UNDRIP, before looking to what it and other international instruments say within the Oranga Mokopuna framework about the rights of mokopuna to te reo.

B *Māori conceptions of the UNDRIP*

In his chapter in *Recognising the Rights of Indigenous Peoples*, Tā Te Atawhai Taiaroa begins an exploration of the context for Māori that surrounded the Draft Declaration on the Rights of Indigenous Peoples (as it then was) by talking about the whakapapa of the UNDRIP.[140] Taiaroa honours the efforts and sacrifices of indigenous leaders from around the world in coming together for almost two decades to negotiate the text of the UNDRIP.[141] He describes the way in which the drafting of the UNDRIP brought together indigenous people from all across the world as one of the UNDRIP's "greatest achievements".[142] In his words:[143]

> Now we know we are part of the global indigenous community that understands and respects us. Our increased understanding of the world and of other indigenous peoples, as well as the wider recognition by others of the oppression that indigenous peoples have experienced, and still do experience, form other layers of the Declaration's whakapapa.

Because of this whakapapa, "[i]n a Maori sense, the Declaration is tapu. It possesses its own mauri [life force]."[144] The UNDRIP, like te Tiriti, is therefore a sacred covenant, with "consequences for breach [which] are ultimately backed by spiritual sanction".[145]

Stephens comments on the UNDRIP in the context of the Māori–Crown relationship, specifically referencing the UNDRIP's similarities to te Tiriti:[146]

> … many Māori understood that when New Zealand signed the Declaration on the Rights of Indigenous Peoples, the New Zealand State was reaffirming the guarantees already made under the Treaty of Waitangi: to protect and uphold Māori rangatiratanga.

The reference to rangatiratanga pertains primarily to the UNDRIP's focus on the rights of indigenous peoples to self-determination, found in art 3:[147]

> 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.

Stephens describes art 3 as protecting "the quest of all peoples and all people to be free to live their own vision of the good life". Maui Solomon highlights that "[s]elf-determination is an evolving concept and will mean different things to different

140 Te Atawhai Taiaroa "The Context for Māori (I)" in Alison Quentin-Baxter (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Wellington, 1998) 54 at 54–55.
141 At 54–55.
142 At 55.
143 At 55.
144 At 56.
145 Jones, above n 15, at 15–16 and 24.
146 Stephens, above n 21, at 46. The author notes that the UNDRIP is a United Nations General Assembly resolution. It is not a treaty or convention. States do not sign the UNDRIP, they endorse it.
147 UNDRIP, art 3.

peoples."[148] Referring to self-determination in the context of a Māori worldview, Jackson states:[149]

> That sounds to me like rangatiratanga. That iwi and hapū determine for themselves the social, cultural, political and economical development, which is what our people have been doing for centuries in this land.

Self-determination, and therefore rangatiratanga, are key threads that run through the whole Declaration, meaning that the UNDRIP provides a basis for "justifying self-determination as a vehicle for ongoing Indigenous development into the 21st century".[150]

The Committee on the Convention on the Rights of the Child (the UNCRC Committee) has advised that the UNDRIP provides guidance on the protection of indigenous children's rights generally.[151] This is similar to, although not as strong as, the language of Oranga Mokopuna around the rights in international covenants being fully realised through the UNDRIP.[152] The UNDRIP, in turn, mandates that particular attention be paid to "the rights and special needs of indigenous … youth [and] children" in its implementation.[153]

At this stage, it is appropriate to note the New Zealand government has approved the development of a plan to implement the UNDRIP in Aotearoa New Zealand,[154] having commissioned an independent report to inform the plan—*He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration of the Rights of Indigenous Peoples in Aotearoa/New Zealand* (*He Puapua*).[155] The report was submitted to the Minister for Māori Development in November 2019, and a full version was made publicly available in April 2021. *He Puapua* provides recommendations that work towards a vision for Aotearoa by 2040, the bicentenary of the signing of te Tiriti o Waitangi. Drawing on the Matike Mai report, *He Puapua* recommends the elevation of Māori rangatiratanga in constitutional arrangements through the Crown sharing governmental power with Māori.[156] It also recommends the creation of a Māori court system based on tikanga[157] and contemplates tikanga operating as a legal system across Aotearoa.[158] The report envisions Māori exercising authority over every aspect of Māori culture by 2040.[159] It contains specific recommendations for the flourishing of te reo, including prioritising Māori access to te reo education, investing in te reo teachers, and resourcing iwi, hapū and marae to

148 Solomon, above n 101, at 62.

149 Moana Jackson "It's Quite Simple Really" (2007) 10 Yearbook of New Zealand Jurisprudence 33 at 39.

150 Robert Joseph "Indigenous Peoples' Good Governance, Human Rights and Self-Determination in the Second Decade of the New Millennium – A Māori Perspective" (2014) December Māori LR 1.

151 Committee on the Rights of the Child *General Comment No 11: Indigenous children and their rights under the Convention* CRC/C/GC/11 (12 February 2009) at [10] and [82].

152 King, Cormack and Kōpua, above n 2, at 195 and 197.

153 UNDRIP, art 22.

154 Cabinet Māori Crown Relations - Te Arawhiti Committee "New Zealand's Progress on the United Nations Declaration on the Rights of Indigenous Peoples: Development of National Plan" (5 March 2019) MCR-19-MIN-0003.

155 Clare Charters and others *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration of the Rights of Indigenous Peoples in Aotearoa/New Zealand* (Declaration Working Group, November 2019).

156 At 35 and 38–40.

157 At 91.

158 At [12] and 30.

159 At 75.

provide their own te reo education.[160] If implemented by the government, these recommendations would represent significant advancements for mokopuna rights. According to Hon Willie Jackson, the Minister for Māori Development, *He Puapua* is a "starting point for discussion" to be followed by wider public consultation.[161] At the time of writing, Te Puni Kōkiri (the Ministry for Māori Development) has completed "targeted engagement with Māori" and has begun drafting a Declaration Plan, which will be open to public consultation in 2022.[162] Time will tell how the Declaration Plan will contribute towards realising mokopuna rights.

C *International instruments and the enforceability of rights*

The UNDRIP, along with other international instruments, provides Māori with additional pathways for rights-enforcement and rights-based advocacy against the Crown, the party on whom these instruments impose obligations.[163] This is important in the context of increasing the opportunities for accountability in the Māori–Crown relationship in line with the principle of utu, bearing in mind that this tends to be required in cases where the Crown has not acted in accordance with tikanga Māori principles, ignoring the obligations imposed upon it in the Māori-Crown relationship through whanaungatanga and the tapu nature of te Tiriti (noting also the tapu nature of the UNDRIP itself).

As discussed in Part VI, the courts are a forum for accountability that can issue binding judgments on the Crown. This allows Māori to enforce, to some extent, the obligations in international instruments the Crown has ratified or endorsed. The Crown has endorsed the UNDRIP, having changed its position in 2010 from an initial "no" vote in the United Nations General Assembly in 2007,[164] demonstrating—to an extent—a willingness to support its contents. This being said:[165]

> … the Declaration does not, itself, have binding legal force in New Zealand's legal system. It would not have such force even if it were a Treaty, given New Zealand's dualist approach to international law. As a declaration, it certainly does not have legal force … It is soft law, not hard law.

In contrast, the UNCRC is an international treaty that the Crown has ratified. This makes it "hard law", in that it carries enforceable obligations at international law, compared to the "soft law" Declaration, which does not.[166] *General Comment No 11* is another example of non-binding "soft law". Nevertheless, this distinction is not particularly relevant within the New Zealand courts, as neither "hard" nor "soft" international law has binding force unless incorporated into domestic legislation. The

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160 At 73.

161 Te Puni Kōkiri "Next steps for Declaration plan on indigenous rights" (1 July 2021) <www.tpk.govt.nz> at [5].

162 Te Puni Kōkiri "Drafting to commence on Declaration Plan, targeted engagement feedback released" (26 April 2022) <www.tpk.govt.nz> at [3].

163 Claire Charters "Use It or Lose It: The Value of Using the Declaration on the Rights of Indigenous Peoples in Māori Legal and Political Claims" in Andrew Erueti (ed) *International Indigenous Rights in Aotearoa New Zealand* (Victoria University Press, Wellington, 2017) 137.

164 Department of Economic and Social Affairs of the United Nations "United Nations Declaration on the Rights of Indigenous Peoples" United Nations <www.un.org>.

165 Matthew SR Palmer and Matthew S Smith "The Status and Effect in New Zealand Law of the UN Declaration on the Rights of Indigenous Peoples" in Andrew Erueti (ed) *International Indigenous Rights in Aotearoa New Zealand* (Victoria University Press, Wellington, 2017) 79 at 79.

166 Kenneth W Abbott and Duncan Snidal "Hard and Soft Law in International Governance" (2000) 54 International Organization 421 at 421–422.

UNCRC has been partially incorporated into a handful of legislative schemes, "in a piecemeal way, not as a general touchstone that impacts on the whole canon of child law".[167] Outside of such incorporation, the UNCRC does not have binding legal force, similar to the UNDRIP, which is not incorporated into legislation.[168] However, unincorporated instruments can be used by the courts as extrinsic aids to statutory interpretation.[169] They may also be argued to constitute mandatory considerations in Crown decision-making[170] or standards with which Crown decisions must complt (in the absence of any direction to the contrary from Parliament).[171] This allows for at least limited recourse to international instruments as accountability mechanisms in the relationship between Māori and the Crown.

Periodic reporting cycles provide opportunities for Māori to make their voices heard through civil society groups, as these cycles involve international bodies. For example, the UNCRC Committee receives "shadow reports" from civil society groups within states, alongside reports from the states themselves. This process provides the potential for such bodies to make recommendations to the Crown in line with Māori views. However, because the Crown's own reports can frame its actions as complying with international covenants, even when the shadow reports disagree, Committee recommendations may be watered down such that they are insufficient to protect Māori rights.[172]

International instruments also add weight to advocacy in other fora, such as Waitangi Tribunal hearings,[173] and debates in the public square,[174] given that they have been agreed on by the international community. Moreover, as the Court stated in *Tavita v Minister of Immigration*, "legitimate criticism" could extend where the Crown does not abide by its international commitments.[175]

The sum of all of this is to provide Māori with additional pathways to hold the Crown accountable where rights are concerned. Claire Charters argues that the use of these pathways by indigenous peoples is "[o]ne of the most effective ways to increase the legal and political impact of the Declaration".[176] The same could be said for how Māori can use the UNCRC, to the extent that it is useful, in holding the Crown accountable for its obligations to mokopuna. International instruments therefore provide additional avenues

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167 Bill Atkin "Children's Rights and the Family Justice System – The Korowai as a New Motif" in Nessa Lynch (ed) *Children's Rights in Aotearoa New Zealand: Reflections on the 30th Anniversary of the Convention on the Rights of the Child* (Wellington, 2019) 4 at 5.

168 Palmer and Smith, above n 165, at 79. The author notes that legislation implementing aspects of the UNDRIP may result from the New Zealand government's upcoming plan to implement the UNDRIP. Any such legislation would have binding legal force in domestic courts.

169 At 80.

170 At 80.

171 Alice Osman "Demanding Attention: The Roles of Unincorporated International Instruments in Judicial Reasoning" (2014) 12 NZJPIL 345 at 358.

172 For an example of this in action, compare Action for Children & Youth Aotearoa *United Nations Convention on the Rights of the Child: Alternative Report by Action for Children and Youth Aotearoa* (November 2015) at 39; and *United Nations Convention on the Rights of the Child: Fifth Periodic Report by the Government of New Zealand* (CRC/C/NZL/5, 2015) at 47.

173 See, for example, Waitangi Tribunal *Whaia te Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 33–34.

174 See, for example, Jo Waitoa "Voting isn't everything: On Māori politics and the meaning of participation" (7 July 2020) *The Spinoff* <spinoff.co.nz>; Rawiri Taonui "Rawiri Taonui: Declaration just the beginning for indigenous communities" (13 September 2017) *Stuff* <stuff.co.nz>; and Meng Foon "Me hoki whenua mai? Putting tāngata back on the whenua" (28 October 2020) *The Spinoff* <thespinoff.co.nz>.

175 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

176 Charters, above n 163, at 137.

for promoting accountability within the Māori-Crown relationship, albeit with limited effect. However, the effect should increase, as Charters argues, as these covenants are increasingly put to use by Māori.[177]

D *Application to mokopuna rights to te reo*

With Māori conceptions of international instruments in mind, this article turns to exploring mokopuna rights to te reo in this space. Due to the multiplicity of relevant rights articulated in international instruments, this article is only able to discuss a selection. First, two key concepts of the international children's rights framework are analysed in light of this context: best interests and participation. These are followed by analyses of the rights to culture, language and education—three interconnected rights that further inform the right to te reo.

(1) Best interests

According to art 3(1) of the UNCRC:[178]

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

This provision should be taken as including the interests of children as a collective.[179] What comprises the best interests of children in a given situation will be contextual and is an "inherently subjective" judgement.[180] This being said, the UNCRC Committee has provided guidance in *General Comment No 11* that the cultural rights of indigenous children (for example, the rights to culture and language, discussed below) should be part of all best interests assessments regarding indigenous children, along with the need for indigenous children "to exercise such rights collectively with members of their group".[181] Therefore, in the context of Crown policies, Acts of Parliament, court decisions, administrative decisions and other exercises of public power concerning the revitalisation of te reo, these cultural rights must be considered with significant weighting.

(2) Participation rights

In art 12, the UNCRC states that:[182]

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Laura Lundy argues this formulation implies that children must "be given the opportunity to express a view" and "be facilitated to express their views", and these views

177 At 137.
178 UNCRC, art 3(1).
179 Philip Alston "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights" (1994) 8 International Journal of Law and the Family 1 at 14.
180 At 11.
181 Committee on the Rights of the Child, above n 151, at [31].
182 UNCRC, art 12.

must be "listened to" and "acted upon, as appropriate".[183] As "all matters affecting the child" is a broad, expansive formulation,[184] children, who have a significant stake in the future of te reo, have participation rights in decisions affecting te reo. Participation rights in the UNDRIP, framed in art 19 as the right of indigenous peoples to be consulted with in order for States to "obtain their free, prior and informed consent", similarly apply in the case of all "legislative or administrative measures that may affect them".

Reading the UNDRIP and the UNCRC together, for the Crown to comply with rights in making decisions affecting the preservation of te reo, sufficient consultation with mokopuna Māori of all affected ages and levels of maturity would be necessary. If mokopuna express clear preferences for ways forward, these would need to be at least taken into account, if not given complete effect, to meet participation standards.

(3) The rights to culture, language and education

The rights to culture, language and education are classed in the international human rights framework as "social and cultural rights", which States are required to realise progressively by undertaking appropriate implementation measures "to the maximum extent of their available resources".[185] These rights, as they apply to mokopuna, primarily stem from the UNCRC and the UNDRIP. A common theme of self-determination connects them. As Stephens expresses:[186]

> Only when we can express and live our own cultures, speak our own languages, and have access to learning about our world, all without impediment, can we be said to have truly found a place in the world.

It is difficult to define the concept of culture, but one influential definition is that of the United Nations Educational, Scientific and Cultural Organisation in its Universal Declaration on Cultural Diversity:[187]

> … the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and … encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.

However, Stephens notes that this definition misses aspects of culture that are important to indigenous peoples. Such aspects include "physical and spiritual connectedness to land of origin in the face of disrupted histories, and striving for political self-determination".[188]

The UNCRC guarantees not only the rights of all children to participate in cultural life,[189] but also, in art 30, that the indigenous child "shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture".[190]

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183 Laura Lundy "'Voice' is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child" (2007) 33 British Education Research Journal 927 at 933.

184 Mark Henaghan "Article 12 of the UN Convention on the Rights of Children: Where Have We Come from, Where Are We Now and Where to from Here?" (2017) 25 International Journal of Children's Rights 537 at 540.

185 UNCRC, art 4.

186 Māmari Stephens "Rights to Culture, Language & Education – A Tricephalos" (2019) 9(8) VUWLRP 32/2019 at 1–2.

187 *UNESCO Universal Declaration on Cultural Diversity* UNESCOGC Res 25 (2001), preamble.

188 Stephens, above n 186, at 6.

189 UNCRC, art 31.

190 Article 30.

The UNDRIP provides guidance as to what the indigenous right to culture looks like in practice, declaring the rights of indigenous peoples to: practice and revitalise cultural customs and traditions;[191] to practice and teach spiritual and religious traditions, including the right to maintain cultural sites and use cultural objects;[192] and to "the dignity and diversity of their cultures, traditions, histories and aspirations".[193]

The UNCRC contains partial protection of indigenous children's right to language in art 29. This requires States to direct education towards "the development of respect for the child's … language".[194] Article 30 also states that the indigenous child "shall not be denied the right … to use his or her own language". The UNDRIP contains a stronger protection. It declares that indigenous peoples "have the right to revitalize, use, develop and transmit to future generations their … languages".[195] Furthermore, States must take "effective measures" to ensure that this right is protected.[196] The UNCRC Committee has stated that in order to implement the right to language, "education in the child's own language is essential",[197] demonstrating the intertwined nature of these two rights.

Article 28 of the UNCRC provides that States recognise the right of the child to free education at the primary level at a minimum.[198] This education must be directed to "the development of the child's personality, talents and mental and physical abilities to their fullest potential" and the development of respect for "his or her own cultural identity, language and values", among other aspects.[199] The Committee has recommended that States implement the right of indigenous children:[200]

> … to be taught to read and write in their own indigenous language or the language most commonly used by the group to which they belong, as well as in the national language(s) of the country in which they live.

States should take measures to ensure there are adequate numbers of qualified indigenous language teachers,[201] who should "to the extent possible be recruited from within indigenous communities",[202] and "allocate sufficient financial, material and human resources" to the training of these teachers.[203] Article 14(1) of the UNDRIP affirms that:[204]

> Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Article 14(3) recognises the rights of indigenous people to education in one's mother-tongue, stating that:[205]

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191 UNDRIP, art 11.
192 Article 12.
193 Article 15.
194 UNCRC, art 29.
195 Article 13(1).
196 Article 13(2).
197 Committee on the Rights of the Child, above n 151, at 14.
198 UNCRC, art 28.
199 Article 29.
200 Committee on the Rights of the Child *Day of discussion on the rights of indigenous children: recommendations* (2003) at 4.
201 At 4
202 Committee on the Rights of the Child, above n 151, at 14.
203 At 4.
204 UNDRIP, art 14(1).
205 Article 14(3).

> States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children … to have access, when possible, to an education in their own culture and provided in their own language.

Looking at the rights to culture, language and education together in the context of mokopuna rights to te reo, a general link to the Crown's obligations to mokopuna emerges. The Crown has an obligation to progressively realise the right of mokopuna to te reo classes in the English-medium schools they attend.[206] Drawing on art 14(3) of the UNDRIP and the Committee's comments on art 30 of the UNCRC in *General Comment No 11*, the realisation of this right contemplates the teaching of te reo in all schools as an optional subject at minimum.[207] Progressive realisation of this right by the Crown is likely to involve ensuring sufficient numbers of qualified te reo teachers and the devotion of sufficient resources to achieve this.[208] In the spirit of self-determination, where possible, these teachers should be Māori themselves.[209] Any te reo education must include education around te ao Māori, tikanga Māori and other aspects of Māori culture in order to meet cultural and educational rights standards.[210] Mokopuna also have the right to education in Māori-medium schools, where this is possible, with the government needing to take effective measures in conjunction with Māori to realise this right.[211] The Crown also has an obligation to take effective measures to support Māori efforts to "revitalize, use, develop and transmit [te reo] to future generations".[212] This obligarion overlaps with these education obligations to mokopuna.

Using the language of Oranga Mokopuna, these obligations and rights build on those contemplated by te Tiriti o Waitangi. In turn, the rights and obligations contemplated by te Tiriti are an articulation of rights inherent in whakapapa, realised in the context of a Māori-Crown relationship underpinned by whanaungatanga. One way in which international instruments develop mokopuna rights is that they tend to give guidance on the specifics of Crown duties and the corresponding rights of mokopuna in areas where the obligations imposed by the Māori–Crown relationship may benefit from this.[213] The discussion in the preceding paragraph on the level of te reo education the Crown is obliged to work towards is one example of this; until a Waitangi Tribunal report or other detailed research on mokopuna rights in this area is published, international instruments provide guidance for the realisation of these rights for the meantime.

It is also true that the international instruments themselves are not comprehensive. They leave gaps in certain areas. For example, the international instruments give little detail on what the implementation of the right to education involves in practice. This is less of a problem when international instruments are considered within Oranga Mokopuna, as they are seen as developing the rights of mokopuna rather than as their source. Addressing the example of the right to education, in drawing on art 14 of the UNDRIP as well as the relevant rights implicit in the Māori–Crown relationship, it is apparent that Crown partnerships with Māori in this area should be guided by Māori as to what this education should look like.[214]

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206 UNCRC, arts 4 and 28–29; and UNDRIP, art 14(3).
207 UNDRIP, art 14(3); and Committee on the Rights of the Child, above n 151, at 14.
208 Committee on the Rights of the Child, above n 151, at 4.
209 At 14.
210 UNCRC, art 29; and UNDRIP, art 14(3).
211 UNDRIP, art 14(3).
212 Articles 13(1)–13(2).
213 Palmer and Smith, above n 165, at 81.
214 UNDRIP, art 14.

VIII Oranga Mokopuna as a Whole

This article now takes a step back to look at Oranga Mokopuna in its entirety, as its authors mandate. Oranga Mokopuna is represented by the harakeke plant, in which all the different aspects work together and are inextricably connected to one another; it is not a disjointed collection of components. Thus, each of the aspects of Oranga Mokopuna discussed previously must be shown to be part of the integrated whole. This Part discusses each aspect in relation to the rights of mokopuna to te reo, in the order they are introduced by the authors of Oranga Mokopuna.

Mokopuna rights to te reo, like all other Māori rights, are derived from whakapapa, the whenua in which the harakeke sits and by which the harakeke is nurtured. Te reo is a taonga passed down to mokopuna by their tūpuna, theirs by the rights bestowed on them by whakapapa, which they will one day pass down to their own mokopuna.

Within the soils of whakapapa grow the pakiaka of tikanga Māori, ways of life and values underpinning them that have been passed down by tūpuna. These values impose obligations on whānau, hapū and iwi to ensure the rights of their mokopuna to te reo are upheld. For example, whanaungatanga contemplates that the collective holds the responsibility for teaching te reo to mokopuna. Whānau, hapū and iwi are thereby obliged to do what they can, given the resources they have and the contexts in which they operate, to create an environment in which their mokopuna can become fluent speakers.

From the pakiaka grow the rito. These are the mokopuna, gifts from the tūpuna who grow in an environment governed by the values of tikanga Māori, protected by the outer leaves from harms of all kinds, including the harms caused through disconnection from, and loss of, language.

Ngā matua stand either side of the rito, nourishing and protecting it closely. These are he Whakaputanga and te Tiriti o Waitangi, which articulate the rights of mokopuna to te reo in the context of Māori, having declared their independence and sovereignty, entering into a sacred, covenantal relationship with the Crown. As public power in te ao Māori is exercised for the benefit of mokopuna, the exercise of public power of the rangatira in signing te Tiriti was for the benefit of mokopuna. Rights in the Māori–Crown relationship are therefore an articulation of mokopuna rights. The two parties to the relationship are bound by the tapu nature of this covenant, and the values of whanaungatanga and utu underpinning it, to "take the best possible care of each other", which includes taking the best possible care of each other's languages and partnering with one another to protect each other's languages when they are under threat. To these ends, the Crown has obligations to make effective and adequately resourced policies to protect te reo, and to become Māori-speaking itself. Where the Crown is unwilling to play its part as a whanaunga of Māori, accountability mechanisms framed by the principle of utu are available to restore balance.

Surrounding ngā matua are te whānau, to whom the child belongs and by whom the child is supported and nurtured. The rights of mokopuna are also supported by the UNCRC and other international covenants, clarifying obligations on the Crown and providing additional paths for accountability. The principle of best interests, participation rights, and the rights to culture, language and education found in the UNCRC all develop the rights of mokopuna to te reo, not pretending to be their source but emerging outwards to complement the foundational roots of tikanga Māori and whenua of whakapapa.

The outermost leaves, the tūpuna, face the harshness of the elements to ensure the rito and its surrounding leaves are protected. Likewise, the UNDRIP bears the weight of filtering out the colonialism inherent in universal human rights frameworks, offering itself

up to do the necessary work of translation so that the individual and collective rights of indigenous peoples can be fully realised. Thus, the UNDRIP is recognised by the UNCRC Committee as providing guidance on every aspect of the UNCRC's implementation regarding indigenous peoples, and reorients the rights to culture, language and education towards self-determination and rangatiratanga as exercised by the collective. The UNDRIP has the potential to be ground-breaking within the relationship between Māori and the Crown, if it is trusted by Māori and called upon in times of need.

When the harakeke is allowed to flourish, the kōrari grows tall and flourishes. The stem of the harakeke represents hauora (health). Where the inherent rights of mokopuna to te reo Māori are respected, protected and fulfilled, the health of the language will be restored and mokopuna will be able to flourish.

If the harakeke is healthy, it will produce beautiful pūawai. The flower represents the blossoming of mokopuna into rangatira, fluent in te reo, leading the movement to preserve the language and teaching it to their mokopuna in turn.

When the harakeke is able to flourish, an immovable forest of harakeke grows. As each whānau, hapū and iwi upholds the rights of their mokopuna to te reo, supported by he Whakaputanga, te Tiriti, the UNCRC, the UNDRIP and other international covenants, the language will return to health and become unassailable. It will be a taonga guaranteed for all future descendants.

IX Conclusion

Oranga Mokopuna stands in contrast to universal human rights frameworks that are premised on Western beliefs and values, as a mokopuna rights framework based in te ao Māori and shaped by tikanga Māori. By following the rights of mokopuna to te reo through the various aspects of the Oranga Mokopuna framework, this article shows that there are alternatives to analyses through the universal human rights paradigm, which allow for issues affecting mokopuna to be explored instead through mokopuna rights frameworks that are rooted in Māori conceptions of rights.

By taking whakapapa as its starting point and tikanga Māori values as its underpinnings, Oranga Mokopuna is not bound by the limits of universal children's rights frameworks, such as the dualism of legal systems that stand in the way of the enforceability and realisation of rights in international instruments. It does run into a different limit, however: the fluctuating willingness of the Crown to perform the obligations under the principles of whanaungatanga and utu. There are no easy ways around this. However, there is hope that, building on what Charters articulates,[215] the legal and political weight of the UNDRIP and other pathways to accountability will increase as these continue to be used in different contexts. This, in turn, will encourage the Crown to respect its relationship with, and associated obligations to, Māori. This article explores only one context in which a mokopuna rights framework can be applied. Similar mokopuna rights analyses can be conceivably conducted in the contexts of care and protection, housing, poverty, justice, wider educational contexts or any other context in which mokopuna have a stake. Additionally, the existence and efficacy of mokopuna rights frameworks lays down a challenge to institutions such as the Crown, the courts, the Human Rights Commission, Parliament and the Waitangi Tribunal, to pay more heed to Māori conceptions of rights and cease privileging universal human rights above them.

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215 Charters, above n 163, at 137.

When all of these things come to fruition, Aotearoa New Zealand can begin to move towards the fulfilment of what te Tiriti o Waitangi contemplated: co-existing visions of law and peace in a land where mokopuna can blossom like the puāwai, fluent in their reo and on their way to becoming rangatira leading the next generation of mokopuna towards the good life.