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REALISING THE RIGHTS OF MĀORI CHILDREN TO TE REO MĀORI THROUGH THE ORANGA MOKOPUNA FRAMEWORK

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Abstract

This paper argues that a Māori children's rights framework premised on Māori conceptions of rights can have conceptual and practical application, which it demonstrates in the context of the rights of Māori children to te reo Māori. Such a framework gives a different perspective to universal children's rights frameworks because it takes a different starting point, one that is congruent with te ao Māori (the Māori world). The framework employed in this paper is Oranga Mokopuna, as articulated in "Oranga Mokopuna: A tāngata whenua rights-based approach to health and wellbeing", written by Dr Paula King, Dr Donna Cormack and Mark Kōpua. Māori conceptions of rights within a Māori jurisprudential framework, within the relationship contemplated by te Tiriti o Waitangi and within the international human rights framework are explored and applied to the context of Māori children's rights to te reo Māori. The paper ends with an analysis of these rights through Oranga Mokopuna in its entirety before concluding that this application of Oranga Mokopuna demonstrates that Māori children's rights frameworks can have conceptual and practical application.

Word length

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Subjects and Topics

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Māori Jurisprudence-Māori Children's Rights

The Treaty of Waitangi / Te Tiriti o Waitangi

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*. They speak to the painful experience of Māori children who are disconnected from their language after decades of monolingual Crown policies took te reo Māori from vitality to near extinction.[2] Few would argue with the view that Māori children have a right to speak te reo Māori, a corollary of which is the right to a flourishing language. These rights have historically been ignored and corroded by the Crown; understanding and exercising these rights is a key way to change this situation for the better and prevent similar occurrences in future.

These rights can be explored through a universal childen's rights perspective, by looking at the Convention of the Rights of the Child (the Convention, or CRC), analysing the relevant rights within and applying them to the situation at hand. They can also be explored through a generic indigenous children's rights perspective, by applying the rights within the CRC, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and other relevant international covenants.[3] However, such perspectives are of limited use in this situation, in that

[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] See part IV.

[3] See for example Claire Breen "The Declaration and the Implementation of the Rights of the Indigenous Child in Aotearoa" in Andrew Erueti (ed) *International Indigenous Rights in Aotearoa New Zealand* (Victoria University Press, Wellington, 2017) 86.

they tend to either fail to locate Māori conceptions of rights within their analyses, or else tack them on unsatisfactorily.[4]

Intead, this paper argues that a Māori children's rights framework premised on Māori conceptions of rights can have conceptual and practical application, which it demonstrates in the context of the rights of Māori children to te reo Māori. Such a framework gives a different perspective to universal children's rights frameworks because it takes a different starting point, one that is congruent with te ao Māori (the Māori world). The framework employed in this paper is Oranga Mokopuna, as articulated in "Oranga Mokopuna: A tāngata whenua rights-based approach to health and wellbeing", written by Dr Paula King, Dr Donna Cormack and Mark Kōpua in 2018.[5] Oranga Mokopuna contemplates Māori conceptions of rights within a Māori jurisprudential framework, the rights articulated within te Tiriti o Waitangi and the rights contained in international covenants as connected and interrelated, successfully co-locating these three rights spaces within one framework, though each is framed differently, while still being part of a conducive whole.

This paper begins in Part II by locating the field of Māori children's rights, before introducing the Oranga Mokopuna framework in Part III. For context, a history of te reo Māori since 1900 is given in Part IV. Māori conceptions of rights within a Māori jurisprudential framework, including how they frame the rights of Māori children to te reo Māori, are explored in Part V. Part VI discusses Māori conceptions of te Tiriti o Waitangi in relation to rights, similarly ending with an application to the context of rights to te reo Māori. Part VII looks at the Convention and the Declaration, and what they mean in the context of these rights. Part VIII

[4] 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 187–188.
[5] King, Cormack and Kōpua, above n 4.

ties Parts V–VII together, giving an analysis of these rights through Oranga Mokopuna "in its entirety" before the paper concludes that the application of Oranga Mokopuna to this case study of the rights of Māori children to te reo demonstrates the potential for Māori children's rights frameworks premised on Māori conceptions of rights to have conceptual and practical application.

I note that I am Pākehā and Malay-Chinese. I intend that the mahi (work) of this paper uphold a decolonised approach to rights scholarship that is true to the spirit of Oranga Mokopuna and prioritises Māori voices. Any occasions where this paper falls short of this intention are due to my own error and biases.

II Locating the field of Māori children's rights

A The need for an alternative starting point

This paper is about the rights of Māori children. While there is some overlap between this field and the field of universal children's rights, considering that both look to the rights of children and the CRC protects the rights of Māori children (as it protects the rights of all children), I stress that the starting points of these fields differ considerably.

Universal children's rights discourse is largely centred around the CRC (though is certainly not limited to the CRC). In discussing international human rights conventions (such as the CRC), Konai Thaman highlights that:[6]

[6] 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.

> [M]ost international covenants are based on Western, liberal beliefs and values, and like all beliefs and values they are embedded in a particular cultural agenda, where indigenous peoples and their assumptions and values have been disregarded and marginalised.

Against this background, Ani Mikaere makes the following critique of universal human rights:[7]

> 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"[8] 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.

Thus, these authors argue that universal human rights thought finds its starting point in Western beliefs and values. One area where this is evident is that it emphasises individual rather than collective rights.[9] Contrastingly, 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".[10] The UNDRIP does focus on declaring the collective rights of indigenous peoples,[11] but this does not change the inherently Western nature and starting point of the universal human rights field.

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[7] Ani Mikaere "Seeing human rights through Maori eyes" (2007) 10 *Yearbook of New Zealand Jurisprudence* 53 at 53.

[8] Thaman, above n 6, at 2.

[9] 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.

[10] 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.

[11] United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/Res/61/295 (2007), preamble and art 1; Engle, above n 9, at 148–150.

In universal human rights thought rights are only held by, and obligations owed to, the living.[12] In contrast, Moana Jackson has stated that historically, public power in Māori society:[13]

> 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 [descendants][,]

referencing a worldview that sees tīpuna and mokopuna as deeply interconnected with the living, owing obligations to and being owed obligations by the living because, not in spite of, their being dead or yet unborn. As is discussed later in this paper, Oranga Mokopuna identifies Māori children with the concept of mokopuna, contemplating the rights of Māori children as inextricable from the rights of future generations.[14]

With these things in mind, it is important to highlight that Māori children's rights approaches (as with other indigenous children's rights approaches) take a different starting point to universal children's rights approaches. Luke Fitzmaurice expresses that a Māori children's rights approach:[15]

> views tamariki Māori as indigenous rights holders first and children's rights holders second. This does not diminish their rights as children, but it does centre an indigenous perspective instead of the dominant Western perspective.

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[12] See for example Kirsten Rabe Smolensky "Rights of the Dead" (2009) 37(3) Hofstra Law Review 763; Claire Moon "What Remains? Human Rights After Death" in Kirsty Squires, David Errickson and Nicholas Márquez-Grant (eds) Ethical Approaches to Human Remains (Springer, Cham, 2019) 39; and Equality and Human Rights Commission "What are human rights?" (19 June 2019) <www.equalityhumanrights.com>.

[13] 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) at 454.

[14] King, Cormack and Kōpua, above n 4, at 188.

[15] Luke Fitzmaurice "Centring indigenous children's rights – the problem with universalism" in Nessa Lynch *Children's Rights in Aotearoa New Zealand: Reflections on the 30th Anniversary of the Convention on the Rights of the Child* (Wellington, 2019) 43 at 44.

In other words, the focus in exploring the rights of Māori children should primarily be on their being Māori, while not ignoring that they are children. These rights come from their being Māori and must be understood in the context of Māori conceptions of rights, rather than imposing Western conceptions of rights on them.

All of this is to say that this is a paper on Māori children's rights rather than universal children's rights. Analogies may be drawn between the two fields. They both, to differing extents, look to the CRC's exposition of the rights of children. They are discussed in the same conferences and academic publications. But neither field is a subset of another or able to be conflated with another.

B Common ground between Māori children's rights and Māori rights

Given that Māori children's rights approaches look to Māori children being Māori first and children second, there is less distance between the rights held by Māori children and the rights held by all Māori than there is between universal children's rights and universal human rights. The field of universal children's rights is premised on a power struggle between children and adults, as the following quotation from Freeman reveals:[16]

> It has always been to the advantage of the powerful to keep others out. It is not, therefore, surprising that adults should want to do this to children … For the powerful, and as far as children are concerned adults are always powerful, rights are an inconvenience. The powerful would find it easier if those below them lacked rights.

[16] Michael Freeman "Why It Remains Important to Take Children's Rights Seriously" (2007) 15 International Journal of Children's Rights 5 at 7–8.

John Rangihau's articulation of the place of children in Māori society paints a different picture:[17]

> The Māori child is not to be viewed in isolation, or as part of a nuclear family. The Māori child is not the child of the birth parents. Under Māori tradition, the importance attached to the child's interest is subsumed under the importance attached to the responsibility of the tribal group through the tribal traditions and lore of inherited circumstances.

This is not to say that Māori society is free from the disenfranchisement of children, rather that children are conceptually integrated into society to a greater extent within this worldview than within a Pākehā worldview, making it less necessary to draw bold lines between Māori rights and Māori children's rights. In fact, given the collective nature of Māori society, it is artificial to separate out Māori children's rights from Māori rights. Perhaps a better way of looking at it, in line with Luke Fitzmaurice's articulation of Māori children's rights, is that the field of Māori children's rights looks at Māori rights, as they apply to Māori children within a Māori worldview.

Thus, there is much common ground between Māori rights and Māori children's rights, to the extent that the latter can arguably be seen as a subset of the former. With all of this in mind, before analysing Māori children's rights in the context of a particular issue, it is important to explore what a Māori conception of Māori rights, as they apply to Māori children, might look like, given that universal frameworks are colonialist and do not have indigenous starting points. Having articulated the need for an alternative starting point for Māori children's rights, this

[17] John Rangihau *Address to High Court Judges* (3 April 1987) at 6.

paper moves to one conception of Māori children's rights that takes such an alternative starting point: Oranga Mokopuna.

III Oranga Mokopuna

A Background to Oranga Mokopuna

One of the most prominent conceptions of Māori children's rights is found in the Oranga Mokopuna framework. The authors of the framework note that "dominant Westernised conceptions of rights have been criticised for their ties to colonialism and individualistic focus" and posit Oranga Mokopuna as an alternative "Based in Te Ao Māori" that "disrupts Western notions of rights that are assumed to have universal application".[18]

"Oranga" in this context translates to "welfare, health, living",[19] and in Oranga Mokopuna it refers to the health and wellbeing of Māori children. The authors chose the concept of mokopuna:[20]

> … to position pēpē, tamariki and rangatahi Māori [Māori babies, children and youth] 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".

[18] King, Cormack and Kōpua, above n 4, at 186.

[19] Māori Dictionary "Oranga" <maoridictionary.co.nz>.

[20] King, Cormack and Kōpua, above n 4, at 188 (citations omitted). The quotation cites Cameron and others *He mokopuna he tupuna: Investigating Māori views of childrearing amongst iwi in Taranaki* (Tu Tama Wahine o Taranaki Inc, 2013) at 4.

With this in mind, the group referred to as mokopuna by the authors is referred to in this paper as "Māori children", in the knowledge that this phrase cannot capture the concept of mokopuna in all its fullness.

While Oranga Mokopuna was specifically designed to provide "a conceptual frame of reference for the realisation of tāngata whenua rights to health and wellbeing",[21] this paper argues that the approach it takes is applicable to other contexts of Māori children's rights, as will be demonstrated in its application in this paper to the rights of Māori children to te reo Māori. Because of this, references in Oranga Mokopuna to rights to health and wellbeing will be taken as referring to Māori children's rights in general.

B Oranga Mokopuna and the harakeke

Oranga Mokopuna conceptualises the different aspects of the Māori children's rights framework as different parts of the harakeke plant and the framework itself as the harakeke (see Figure One).[22] In the words of the authors:[23]

> A taonga in Aotearoa, as a symbol it foregrounds the centrality of whanau and relationships and is used in mātauranga Māori practices [practices based on traditional knowledge] of child-rearing.

[21] At 186.
[22] At 190.
[23] At 189.

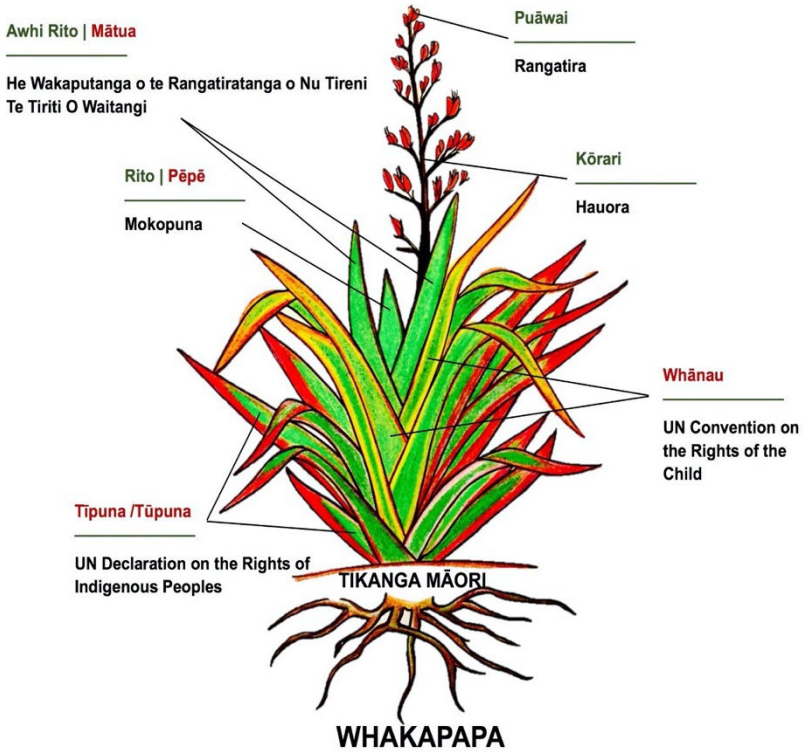

Figure One

C Whenua—Whakapapa

According to the authors, "The nurturing soils of the whenua [ground] that create life for the harakeke symbolise inherent tāngata whenua rights of mokopuna", which are:[24]

> derived from the layering of whakapapa, representing genealogical relationships to one another in the past, present, future, to the world, across the cosmos, and from beyond the origins of the universe. …Inherent tāngata whenua rights exist regardless of whether or not mokopuna have access to their own whakapapa and histories.

[24] At 191.

D Pakiaka—Tikanga Māori

In Oranga Mokopuna, tikanga Māori forms the pakiaka (roots) of the harakeke.[25] The authors state that "Māori society enjoyed tāngata whenua rights well before Pākehā arrived, under a constitutional framework based on principles, practices, processes, rituals and knowledge".[26] They continue by articulating that even "Though processes and practices have adapted over time to meet changing contexts, a common set of fundamental core values can be considered to underpin tikanga Māori", including mana and whanaungatanga.[27] The authors acknowledge that "tikanga Māori values and practices will vary between whanau, hapū and iwi, or may be described or implemented in different ways dependent on context",[28] and provide the following diagram to illustrate this (Figure Two):[29]

Figure Two

[25] At 191.
[26] At 191.
[27] At 192.
[28] At 192.
[29] At 196.

The authors explain this diagram in the following way:[30]

> As the interconnectedness of the roots of each unique harakeke plant supports the collective, so do the values and practices of unique whanau, hapū and iwi interact and interconnect with one another under the constitutional framework of tikanga Māori. Tāngata whenua rights are thus manifest via the fundamental norms underpinning tikanga Māori.

E Rito—Mokopuna

According to the authors, "The fan-shaped harakeke centralises the rito/pēpē [symbolising children] as highly prized and pivotal to the sustenance of future generations emerging from, nurtured by and protected by the awhi rito/ngā mātua [the leaves either side of the rito]".[31]

F Awhi Rito/Mātua—He Wakaputanga o te Rangatiratanga o Nu Tireni 1835 and te Tiriti o Waitangi 1840

Oranga Mokopuna sees the awhi rito/matua either side of the rito as he Whakaputanga o te Rangatiratanga o Nu Tireni (he Whakaputanga),[32] known in English as the Declaration of Independence, and the Māori version of te Tiriti o Waitangi.[33] It holds that Māori never ceded sovereignty to the Crown, and so:[34]

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[30] At 192.

[31] At 189.

[32] The use of "he Whakaputanga" rather than "he Wakaputanga" in this paper reflects the name in that is in more common usage. Both refer to the same document; different dialects of te reo Māori prefer the use of "wh" to "w" and vice versa.

[33] At 193.

[34] At 193.

> it is tikanga Māori that forms the foundation for the constitutional framework and legal system of laws in Aotearoa, as opposed to an imported and inflicted Anglocentric legal positivist system of contemporary time.

He Whakaputanga is described as:[35]

> 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.

According to the authors, "it is he Whakaputanga that affirms that tāngata whenua rights of mokopuna exist, under the established constitutional framework of tikanga Māori".[36] The authors acknowledge "the critical role [played by] he Wakaputanga in setting the context for the signing of te Tiriti" by bringing about, to quote Matike Mai Aotearoa, "a constitutional transformation in which Iwi and Hapū would exercise an interdependent authority while retaining their own independence".[37]

The authors reference only the Māori version of te Tiriti, due to this version being the one that was signed by the overwhelming majority of rangatira.[38] According to the authors, te Tiriti:[39]

> reiterates and further articulates existing tāngata whenua rights … under all three articles as well as the intention of te Tiriti, based on its specific phrasing and words of the text collectively.

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[35] At 193.
[36] At 193.
[37] Matike Mai Aotearoa *He whakaaro here whakaumu mö Aotearoa: The report of Matike Mai Aotearoa—The Independent Working Group on Constitutional Transformation* (2016) at 44.
[38] King, Cormack and Kōpua, above n 4, at 186.
[39] At 194.

Oranga Mokopuna prefers the articles and intention of te Tiriti over "the use of Crown-defined 'principles of the Treaty'", given that:[40]

> Māori continue to argue that the growing body of predominantly Crown legislative discourse surrounding te Tiriti contributes to conflicting reinterpretations, leading to further marginalization of Māori rights.

G Whānau—United Nations Convention on the Rights of the Child

The innermost leaves, representing the whānau (family) in matauranga Māori, symbolise "the articles of the UNCRC as well as other international human rights conventions ratified by the government".[41]

H Tīpuna/Tūpuna—United Nations Declaration on the Rights of Indigenous Peoples

The outermost leaves, representing tīpuna (ancestors) in matauranga 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".[42] The authors follow Anaya[43] in explaining that the UNDRIP:[44]

> expands on fundamental rights articulated in existing international human rights instruments ratified by member states but with regard to the "specific cultural, historical, social and economic circumstances of indigenous peoples".

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[40] At 194.
[41] At 194–195.
[42] At 195.
[43] James Anaya *Report of the Special Rapporteur on the rights of indigenous peoples* LXVI, UN Doc EA/66/288 (10 August 2011) at 13.
[44] King, Cormack and Kōpua, above n 4, at 195.

I Kōrari—Hauora

In the authors' original conception of Oranga Mokopuna as a rights-based approach to health and wellbeing, "The kōrari as the stem of the harakeke represents hauora [health and wellbeing]".[45] Given the authors' comment that:[46]

> Based on Te Ao Māori holistic worldviews, self-determined health and wellbeing will flourish when mokopuna tāngata whenua rights are respected, protected and fulfilled[,]

a tentative analogy in the context of the right to te reo Māori can be drawn, in that, when the rights of Māori children to te reo Māori are fulfilled, the language will flourish also.

J Pūawai—Rangatira

According to the authors, "the pūawai [blossom/flower] centralises mokopuna as our rangatira [chiefs] of today".[47] Like the pūawai, "Mokopuna will thrive and flourish as Rangatira when their tāngata whenua rights … are fully realised".[48]

K Oranga Mokopuna "in its entirety"

In order to show how the different aspects of Oranga Mokopuna work together, it is worth quoting the authors in full where they give a summation of how Oranga Mokopuna functions holistically:[49]

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[45] At 196.
[46] At 196.
[47] At 196.
[48] At 196.
[49] At 197.

> 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.

The authors warn that:[50]

> Oranga Mokopuna cannot be employed in a way that disrupts whakapapa or be co-opted in ways that do not align with tāngata whenua rights. Nor can it be fragmented—Oranga Mokopuna must be applied in its entirety.

One way of using Oranga Mokopuna to explore the rights of Māori children in a particular context is to first look at these rights as conceived by their starting point, whakapapa and tikanga Māori, then to explore how he Whakaputanga and te Tiriti articulate them, then to look at how the CRC as well as other international rights conventions develop these rights, as articulated through UNDRIP. This is the method that this paper employs in exploring the rights of Māori children to te reo Māori through Oranga Mokopuna. It does so with the intention of neither co-opting Oranga Mokopuna nor fragmenting it but instead applying it "in its entirety". To this end, it finishes in Part VIII by weaving the analyses in each of the three spaces together, so that the realisation of the rights of Māori children may also be seen "in its entirety".

IV Overview of the history of te reo Māori since 1900

[50] At 197.

While many Māori were bilingual at the start of the twentieth century, most spoke te reo for everyday communication.[51] The next 75 years saw drastic changes to the health of the language:[52]

> 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, there 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".[53] This revival:[54]

> included petitions, a Māori radio station, the first kura kaupapa Māori, and – most importantly of all – the birth of the kōhanga reo movement in 1982 and its subsequent spectacular growth.

In 1986, in its *Report on The Te Reo Maori Claim* (Wai 11):[55]

> 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[.]

[51] 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.
[52] At 393–394.
[53] At 439.
[54] At 407.
[55] At 407.

The Wai 262 report, *Ko Aotearoa Tēnei*, highlighted in 2011 that te reo was "in renewed decline".[56] Contemporary trends suggested "that the ongoing gains being made with te reo [were] not offsetting the ongoing losses occurring as older speakers pass away".[57] The report highlighted that the Crown had not acted in partnership with Māori to preserve te reo, made effective policy to this end or adequately resourced these policies.[58]

V "Realisation of tāngata whenua rights occur[s] fundamentally through whakapapa and decolonised tikanga Māori"

A Māori jurisprudence

In order to locate the starting point of the rights of Māori children to te reo Māori, this paper first looks to the whenua and pakiaka of Oranga Mokopuna, the soil and roots from which the rights of Māori children grow and develop. Māmari Stephens discusses the starting point of these rights in "Fires still burning? Māori jurisprudence and human rights protections in Aotearoa New Zealand".[59] In the words of Stephens, "Māori jurisprudence" refers to:[60]

> 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.

Underpinning Māori jurisprudence is a collection of interrelated values:[61]

> … 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

[56] At 439.
[57] At 436.
[58] At 470.
[59] Māmari Stephens "Fires still burning? Māori jurisprudence and human rights protections in Aotearoa New Zealand" 9 VUWLRP 31/2019.
[60] At 2.
[61] At 8.

> 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 include (but are not limited to) whakapapa, whanaungatanga, mana and utu.[62] Oranga Mokopuna refers to these as "a common set of fundamental core values [which] can be considered to underpin tikanga Māori".[63] This being the case, it appears that Stephens and the authors of Oranga Mokopuna are referring to largely similar concepts when one talks about "Māori jurisprudence" and the other talks about "tikanga Māori". For ease of reference, this paper uses "Māori jurisprudence" to refer to both Stephens' conception of the system within which rights inherent to Māori find their source and outworking, and the conception found in Oranga Mokopuna. The paper continues by looking at these values in turn and their implications for rights in Māori jurisprudence.

1 Whakapapa

According to Khylee Quince:[64]

> The structural framework of Maori 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.

Importantly, whakapapa determines one's place in Māori society:[65]

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[62] At 8.

[63] King, Cormack and Kōpua, above n 4, at 192.

[64] Khylee Quince "Māori and the Criminal Justice System in New Zealand" in Julia Tolmie and Warren Brookbanks (eds) *The New Zealand Criminal Justice System* (Auckland, LexisNexis, 2007) at [12.2.1].

[65] Stephens, above n 59, at 9.

> Through whakapapa individuals gained a collective, tribal identity from which Māori derived, in the words of Andrew Sharp, "his physical and jural existence".[66]

This has a bearing on rights and obligations where whakapapa is shared:[67]

> The existence of connections by way of whakapapa will often determine how people live and interact with each other. Further, those connections can determine rights and obligations between people.

2 Whanaungatanga

According to Stephens, whanaungatanga:[68]

> 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 notes further that:[69]

> 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 [relations], by way of shared experiences.[70]

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[66] Andrew Sharp "Traditional authority and the legitimation of 'urban tribes': the Waipareira case" (2003) 6 Ethnologies Comparées available at <www./alor.univ–montp3.fr>.
[67] Stephens, above n 59, at 9.
[68] At 10 (citations omitted).
[69] At 11.
[70] Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 28–29.

3 Mana

Mana is described in *Te Mātāpunenga* as:[71]

> A key philosophical concept combining notions of psychic and ritual force and vitality, recognized authority, influence and prestige, thus also power and the ability to control people and events.

Stephens describes mana as "relational", explaining that:[72]

> … in the case of kin-based collectives, an individual's mana will be determined by his or her place within the kinship group, taking into account factors such as ancestry and birth order.[73]

Mana is drawn from one's tīpuna and from "the proven works, skills and/or contributions to the group made over time by an individual".[74] It is therefore is both "ascribed and achieved".[75]

4 Utu

According to Jones, the principle of utu "drives actions which seek to restore balance and to provide for reciprocity" in relationships.[76] Stephens explains how it operates in practice:[77]

> 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

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[71] 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.
[72] Stephens, above n 59, at 12.
[73] Mead, above n 70, at 29–30.
[74] At 34.
[75] Eddie Taihakurei Durie *Custom Law* (Treaty of Waitangi Research Unit, 2013) at 8.
[76] Jones, above n 10, at 25.
[77] Stephens, above n 59, at 14.

> 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 in Māori jurisprudence

The values underpinning Māori jurisprudence work together to create a system in which rights and obligations are exercised and discharged:[78]

> 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 Māori jurisprudence are therefore inextricable from the relationships between those holding rights and obligations. These rights and obligations are held by both individuals and collectives.[79]

Drawing on the values underpinning Māori jurisprudence, a working definition of "obligation" would be: a duty that an individual or collective is bound to carry out for an individual or collective, due to and enforced through the interrelated workings of Māori jurisprudential values such as whakapapa, whanaungatanga, mana and utu. A corresponding definition of "right" would be: something that an individual or collective is entitled to have done or upheld by an individual or collective, due to and enforced through the interrelated workings of Māori jurisprudential values.

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[78] At 15.

[79] At 10–11.

In Māori jurisprudence, collectives of whānau, hapū and iwi are both networks within which rights and relationships exist and collective actors in their own right, to which obligations are owed and by which obligations are held.[80] Whānau is defined by Jacinta Ruru as:[81]

> 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.

Ruru explains that, conventionally:[82]

> 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 children within this relational framework:[83]

> Children have rights to their genealogical identity, to love, to support and to socialisation in tikanga Maori, from other members of their whanau, 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 whanau as a group.

John Rangihau articulates similar rights and obligations in the relationship between children and their hapū.[84] Thus, collectives in Māori society have obligations to their children to honour

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[80] At 10–11; Jones, above n 10, at 17.

[81] 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.

[82] At 61.

[83] Joan Metge *New Growth from Old: the Whānau in the Modern World* (Victoria University Press, Wellington, 1995) at 140.

[84] Rangihau, above n 17, at 6.

their whakapapa, provide for their wellbeing and socialise them in Māori ways of life. Children have corresponding rights to the provision of these by their whānau, hapū, by virtue of their whakapapa and duties imposed by whanaungatanga.

B Application to the rights of Māori children to te reo Māori

Te reo Māori is of fundamental importance to Māori and to the collective flourishing of whānau, hapū and iwi. This is demonstrated in the words of Sir James Henare, speaking to the Waitangi Tribunal as part of Wai 11 in 1985:[85]

> 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.

This conception of te reo Māori as a taonga is reflected in the Waitangi Tribunal's recognition of it as such,[86] but the true importance in Māori jurisprudence lies in Māori seeing it as an irreplaceable treasure. It follows that the protection of this taonga is of the utmost importance to Māori society, and Māori children are especially implicated in this. As the Tribunal expressed in *Ko Aotearoa Tēnei*:[87]

> 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.

Māori children, who have every right through whakapapa to have this taonga passed down to them, must be given sufficient opportunity to learn te reo Māori in order for the language to be preserved for them and for future generations (noting that Oranga Mokopuna identifies children

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[85] Waitangi Tribunal *Report of The Waitangi Tribunal on The Te Reo Maori Claim* (Wai 11, 1986) at 34.
[86] At 20.
[87] 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.

with future generations through the concept of mokopuna).[88] Because of this, the principles of whakapapa and whanaungatanga impose an obligation on whānau, hapū and iwi to protect and nurture te reo Māori and bestow a corresponding right on children to a flourishing reo.

The Waitangi Tribunal's conclusions in *Ko Aotearoa Tēnei* on the duty for Māori to speak Māori 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 the rights of Māori children to te reo Māori. However, through Oranga Mokopuna, they can be followed upstream to the true starting point, whakapapa within a Māori jurisprudential context, and reframed in this context.

The Tribunal expresses the duty on Māori to preserve te reo Māori through speaking it as follows:[89]

> 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 (embarassment) they may feel in using it.

Labelled the duty to "kōrero Māori" by the Tribunal, it contemplates whānau, hapū and iwi speaking te reo Māori in everyday contexts in order to build environments in which children can pick it up and take it to heart. The Tribunal also mentions "the classroom"—formal education—as a medium through which te reo is taught to children. It does so in the context of Crown-funded Māori-medium education, contemplating a partnership between the Crown and Māori aimed at revitalising te reo through the education system, which is discussed in Part VI. However, it would be amiss to ignore what it points to in this context, that whānau, hapū and

[88] King, Cormack and Kōpua, above n 4, at 188.
[89] Waitangi Tribunal, above n 87, at 167.

iwi may be bound by an obligation more holistic in what it requires to protect te reo than the duty to speak te reo Māori in everyday life.

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

However, the duties on whānau, hapū and iwi and the corresponding rights of children 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 that the capacity of each whānau, hapū and iwi to meet their obligations to their children (in terms of language proficiency and available financial, mental and emotional resources) has been impaired by colonisation: without colonisation, after all, te reo Māori would not be under threat. But the importance of te reo Māori to collective flourishing and in its own right is not diminished by this accommodation of lived experience, so 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—the experience of colonisation has taken away the language completely in some cases and left them with scant resources to revitalise it. For these whānau, hapū and iwi especially there will be deep intergenerational mamae (pain) associated with the loss of te reo[90] and it is both insensitive and impractical to impose the duty to kōrero Māori as articulated by the Tribunal here. In these cases, such a duty would likely extend only to being open to their children learning te reo Māori and supporting them in their learning journeys where possible.

As can be seen, Māori jurisprudence imposes the obligation on whānau, hapū and iwi to preserve te reo Māori for children and future generations, taking lived realities into account, while Māori children have the right to a flourishing reo and to have sufficient opportunity to partake in this flourishing through learning and speaking it. These rights of Māori children, to use the language of Oranga Mokopuna, are tāngata whenua rights inherent in whakapapa of mokopuna Māori which are then articulated in te Tiriti. It is to te Tiriti that this paper now turns.

VI "These are articulated by he Wakaputanga and te Tiriti, which stipulate the provisions for mokopuna rights"

A Locating he Whakaputanga and te Tiriti o Waitangi in Oranga Mokopuna

[90] Rebecca Wirihana and Cherryl Smith "Historical trauma, healing and well-being in Māori communities" (2014) 3(3) MAI Journal 197.

Oranga Mokopuna places high value on both he Whakaputanga and te Tiriti, seeing them as the awhi rito, who nurture and support the mokopuna most closely.[91] However, academic and political discourse has historically 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 Māori children and challenge its historical sidelining, while acknowledging that, at this point in time, the realisation of Māori children's rights in this space will largely come through te Tiriti.

As this paper moves to discuss te Tiriti in the context of Māori children's rights, it is worth highlighting again that te Tiriti is not the starting point or end point for Oranga Mokopuna. It is certainly the part that has been researched, discussed and applied more than any other, which is not a bad thing in itself. However, Oranga Mokopuna provides a different starting point for Māori children's rights in the rights that are inherent to tāngata whenua, which are derived from whakapapa. As Ani Mikaere states:[92]

> 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.

Following Oranga Mokopuna, this paper discusses Māori conceptions of te Tiriti o Waitangi in order to explore the rights of Māori children to te reo Māori.

B Māori Conceptions of te Tiriti o Waitangi

[91] King, Cormack and Kōpua, above n 4, at 193.
[92] Mikaere, above n 7, at 54.

Carwyn Jones argues it is important when interpreting treaties "to consider how they are given meaning within Indigenous constitutional traditions".[93] In his piece "Māori and State visions of law and peace", Jones looks at the place of te Tiriti o Waitangi within the Māori constitutional tradition; he defines "constitutional tradition" as "the collection of rules, principles and practices that shape the way in which public power is exercised within a political community".[94] According to Jones, the Māori constitutional tradition can be found in systems of tikanga, which:[95]

> 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.

The perspective Jones takes is "one that considers te Tiriti as a Māori legal mechanism, which protects Māori rights, sourced in Māori legal traditions".[96] Jones draws on Robert Williams' exploration of indigenous treatymaking in *Linking Arms Together*,[97] which he summarises as follows:[98]

> 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.

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[93] Jones, above n 10, at 17.
[94] At 14.
[95] At 15.
[96] At 13.
[97] Robert A Williams Jr *Linking Arms Together: American Treaty Visions of Law and Peace, 1600–1800* (Routledge, New York, 1999).
[98] Jones, above n 10, at 14.

Moving away from an "assimilationist approach" to te Tiriti or seeing 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".[99] To this end, Jones cites Williams' exposition of indigenous treatymaking traditions, in which treaties can be understood as "sacred texts" or "sacred covenants", meaning they are "not merely negotiated political settlements, but instead reflect higher purposes that the parties are bound to pursue".[100] Jones explains that "Māori constitutional tradition also constructs agreements as sacred covenants and the Treaty of Waitangi is clearly an agreement formed within the context of that constitutional tradition".[101] He notes that "Because of the *tapu* [sacred] nature of agreements, consequences for breaching an agreement are ultimately backed by spiritual sanction".[102]

Rights and identity in indigenous treatymaking traditions are "inherently bound up with relationships", which, through treaties, can be extended beyond kin ties to "make new, enduring relationships possible".[103] Reflections of these conceptions can be seen in Māori conceptions of whanaungatanga, which in the context of treatymaking:[104]

> 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. This leads to legal and constitutional systems that are primarily collective in their orientation.

[99] At 27.
[100] At 15–16.
[101] At 15–16.
[102] At 24.
[103] At 16.
[104] At 17.

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.[105] 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 te Tiriti's text and terms are interpreted.[106] In this fashion, Dame Joan Metge has given evidence in the Waitangi Tribunal that te Tiriti should be understood as an "undivided whole" and Dr Patu Hohepa has described Crown attempts to view te Tiriti in separate parts as "dissective" and "[negating] its overall context".[107] In the same spirit, Oranga Mokopuna prefers the articles and intention of te Tiriti read as a whole over "the use of Crown-defined 'principles of the Treaty'", noting that the latter approach tends to lead to marginalisation of Māori rights.[108]

The principle of utu in the context of the Treaty relationship contemplates "the need to maintain and perpetuate relationships through ongoing reciprocal exchanges".[109] According to Jones:[110]

> 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

[105] At 18.
[106] At 18.
[107] Waitangi Tribunal, above n 13 at 452.
[108] King, Cormack and Kōpua, above n 4, at 197.
[109] Jones, above n 10, at 26.
[110] At 26.

From the emphasis on relationship that emerges from Māori conceptions of te Tiriti and Māori jurisprudence generally, a foundation for rights in this space can be established. According to Stephens, the understanding that Māori jurisprudence is "fundamentally relational" means that:[111]

> 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 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 which is premised on the rights of tāngata whenua being upheld and realised. As Maui Solomon states:[112]

> The theory of the Treaty was the creation of a partnership, with each side respecting the rights and the obligations of the other. The reality is that only one of the partners has substantially performed its side of the bargain. It remains for the other to do so.

Rights are thus inextricable from the relationship envisioned in te Tiriti between the Crown and Māori. 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.[113] In addition, as it is underpinned by utu, the Treaty relationship is an ongoing and reciprocal one,[114] with continued dialogue necessary to facilitate the continued realisation of tāngata whenua rights in relationship.

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[111] Stephens, above n 59, at 45 (citations omitted).

[112] 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.

[113] Human Rights Act 1993, s 5(2)(d).

[114] Jones, above n 10, at 26.

Bishop Manu Bennett has described the essence of te Tiriti as "the promise of two peoples to take the best possible care of each other".[115] Jones and Stephens both highlight that these two peoples often have very different ideas about what flourishing looks like: Jones calls these "visions of law and peace",[116] while Stephens calls them conceptions of "the good life".[117] Therefore, when rights are being examined, these rights must be viewed in the context of two parties who each support the other to live out their "vision of law and peace" or their conception of "the good life". These parties are obliged to look out for the rights of each other, not unilaterally compromise the rights of each other and have dialogue with each other 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 outplays in different places and at different times, with the view of moving towards living out the relationship contemplated in te Tiriti in all its fullness.

All of this can, and practically often must, given the preferences of the Pākehā legal system, the mandate of the Waitangi Tribunal to rule on breaches of "the principles of the Treaty" and the pull of universal human rights, imperfectly be reduced to a question something like the following: "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?" But this misses the point, by missing the relationship. A better question would be something like the following: "in the situation implicating rights that has been highlighted in the relationship dialogue today in this

[115] Waitangi Tribunal *Te Roroa Report* (Wai 38, 1992) at 30.
[116] Jones, above n 10, at 26.
[117] Stephens, above n 59, at 50 and 60.

particular forum, what is each party obliged to do?" In other words, "what would it look like for each party to 'take the best possible care of each other' and how do we get there?"

1 The Treaty relationship and the enforceability of rights

An important part of relationship is how parties hold each other accountable, 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."[118] This expectation is described by Stephens in the following manner:[119]

> [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 of those collectives, as well as its own rangatiratanga.

Unfortunately, the Crown historically has often not been a responsive and willing Treaty partner and has not seen itself to be bound solely by virtue of the Treaty relationship. Instead, Māori have historically seen fit to hold the Crown accountable with the Pākehā legal system in the ways the Crown deigns to respect, in order to realise Māori rights. Primarily, this has taken place in the courts and in the Waitangi Tribunal.

The courts will not directly enforce any rights contained in te Tiriti, unless these have been incorporated into legislation.[120] However, the decisions of *Huakina Development Trust* and *Barton-Prescott* have increased the viability of Māori actions relying on te Tiriti. The former

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[118] At 46.

[119] At 46.

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

held it to be a valid extrinsic aid to statutory interpretation,[121] while the latter held that te Tiriti "colour[s]" the interpretation of every statute.[122] However, these advances are far from satisfactory in terms of the full realisation of Māori rights. In *Barton-Prescott*, 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".[123]

Māori can bring claims to the Waitangi Tribunal for "breaches of the principles of the Treaty",[124] which judges whether a prejudicial breach has taken place and issues non-binding recommendations on how to remedy breaches to the Crown.[125] While the Tribunal's discourse largely centres around the "principles of the Treaty", 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".[126] The non-binding nature of the Tribunal's recommendations,[127] however, means that the extent to which it can hold the Crown accountable for breaches of the Treaty relationship and associated rights is limited, making the force of these recommendations more moral or political in nature.

Other sites of the Treaty 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

[121] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).
[122] *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184.
[123] At 189.
[124] Treaty of Waitangi Act 1975, s 6(1).
[125] Section 6(3).
[126] Edward Willis "Legal recognition of rights derived from the Treaty of Waitangi" (2010) 8(2) NZJPIL 217 at 222.
[127] Treaty of Waitangi Act 1975, s 6(4).

has tended to set the terms upon which it will negotiate, imposing processes inconsistent with tikanga Māori that have led to unsatisfactory settlements for Māori collectives.[128]

The mechanisms for accountability in the Treaty 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 the Treaty relationship.

D Application to the rights of Māori children to te reo Māori

This paper now turns to exploring what a Māori conception of te Tiriti o Waitangi might have to say about the rights of Māori children to te reo Māori. While it borrows from the analysis of the Waitangi Tribunal, the extent to which the Tribunal's reports are relevant is limited because of the Tribunal's mandate to conclude on breaches of the "principles of the Treaty" rather than on te Tiriti itself.[129]

Professor Hirini Moko Mead's submission to the Wai 11 Tribunal illustrates that the art II phrase "o rātou taonga katoa" covers "both tangible and intangible things and can best be translated by the expression 'all their valued customs and possessions'".[130] In this context, the Tribunal concluded:[131]

> 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".

[128] 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.
[129] Jones, above n 10, at 13.
[130] Waitangi Tribunal, above n 83, at 22.
[131] At 22.

Thus, te reo Māori is a taonga protected by art II of te Tiriti. *Ko Aotearoa Tēnei* sets the scene for the Treaty relationship in the context of protecting this taonga:[132]

> 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 are in agreement on the significance of te reo Māori and its status as a taonga. This is important not in that it validates these things, but that both parties of the Treaty relationship are on the same page in negotiating the Treaty relationship in this context.

This being the case, the question to be explored in looking at the rights of Māori children to te reo Māori in the Treaty space is something like the following: what does the ongoing relationship between the Crown and Māori, underpinned by Māori jurisprudential values such as whanaungatanga and utu, mean for the rights of Māori children 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 we get there?

The Wai 262 report draws out a number of duties on the Crown and Māori in this context that aid in answering this question:[133]

> … 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.

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[132] Waitangi Tribunal, above n 87, at 154.
[133] At 161.

These are framed as duties owed in the context of the Treaty relationship, as conceptualised by the Waitangi Tribunal. Acknowledging that there are differences in the Treaty relationship as conceptualized by Māori and as conceptualised by the Tribunal, with the latter's reliance on "the principles of the Treaty", these duties can be recontextualised in light of the former and applied to the context of Māori children's rights in this area. Such duties, while owed by Māori and the Crown to each other as part of upholding the Treaty relationship, can also be construed as duties owed by both to Māori children (who have corresponding rights), considering that, within Oranga Mokopuna, te Tiriti articulates the rights of Māori children. 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 continue to exercise it in the context of the Treaty relationship) is "held by and for the people … to be exercised by the living for the benefit of the mokopuna",[134] considering that Oranga Mokopuna identifies children with the concept of mokopuna.[135]

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

The partnership duty on both the Crown and Māori contemplates that:[136]

[134] Waitangi Tribunal, above n 13 at 454.
[135] King, Cormack and Kōpua, above n 4, at 188.
[136] Waitangi Tribunal, above n 87, at 161.

> 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 (as the Tribunal does),[137] a conception more resonant with Oranga Mokopuna and Māori jurisprudence is that this duty is based on the whanaungatanga that is central to the Treaty relationship. The way in which the Tribunal articulates the details of this duty is helpful in giving practical steps for what being in relationship looks like in this context:[138]

> 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 Māori children in this context, the Tribunal's articulation of the duty to make wise policy contemplates:[139]

> … 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.

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[137] At 161.
[138] At 161–163.
[139] At 163.

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.[140]

The Tribunal expressed the following about the duty to adequately resource policies to revitalise te reo Māori in *Ko Aotearoa Tēnei*:[141]

> 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 there was a duty on the Crown to develop the capacity of the government to speak te reo Māori, so that it would cease to be an "English-speaking monolith"[142] and instead come to "reflect the aspirations of a growing number of the citizens it represents".[143]

Unlike kōrero Māori, the other duties on Māori and the Crown are arguably created by te Tiriti rather than an articulation of tāngata whenua rights that exist outside of the Treaty context and thus inconsistent with Oranga Mokopuna's conception of te Tiriti. One way of reconciling this is that these duties are 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

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[140] Waitangi Tribunal *Matua Rautia: the Report on the Kōhanga Reo Claim* (Wai 2336, 2012) at 87.

[141] Waitangi Tribunal, above n 87, at 166–167 (citations omitted).

[142] Waitangi Tribunal, above n 51, at 450.

[143] Waitangi Tribunal, above n 87, at 169.

rights (with whakapapa as their source) are kept as the starting point for all rights held by Māori children.

These duties shed light on what the rights of Māori children to te reo Māori might look like in the Treaty space: rights that their rangatira, and through them iwi, hapū and whanau, must uphold (to benefit from kōrero Māori and partnership with the Crown) and rights that the Crown must uphold (to effective and adequately resourced policy, a Māori-speaking government and an active and committed Crown contribution to the Treaty relationship). These rights are enforceable within the context of the obligations implicit in the Treaty relationship through whanaungatanga, though Māori children 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 the Treaty relationship in future.

VII "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 [international covenant rights] is articulated through the UNDRIP"

A Locating international covenants in Oranga Mokopuna

This paper now discusses the UNDRIP, CRC and other international covenants in the context of Māori children's rights as articulated by Oranga Mokopuna. These covenants inform the rights of Māori children, developing what has already been articulated in the Māori jurisprudential and Treaty spaces, but they are not the starting point of the rights themselves: they are the whānau and tīpuna of the harakeke,[144] the outer leaves rather than the soil or roots.

[144] King, Cormack and Kōpua, above n 4, at 194–196.

Thus, an important question to be explored when international covenants are discussed in relation to Māori rights is: what do these covenants add to the rights inherent in whakapapa, conceived in the space of Māori jurisprudence and articulated through he Whakaputanga and te Tiriti? Or, as Ani Mikaere asks, "what do human rights principles have to offer by way of useful adaptation to or development of tikanga Māori in a contemporary context?"[145]

Additionally, not all international covenants are created equal. While the rights in the CRC and other covenants "develop" the rights of Māori children, the UNDRIP, as the tīpuna whose role is to bear the brunt of the wind and rain and protect the rito, the inner leaves representing mokopuna, has the special role of articulating "the full realisation of both [the] individual and collective human rights" in these covenants. This paper now discusses Māori conceptions of the UNDRIP, before looking to what it and other international covenants say within the Oranga Mokopuna framework about the rights of Māori children to te reo Māori.

B Māori conceptions of the UNDRIP

In his chapter in *Recognising the Rights of Indigenous Peoples* 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 Declaration.[146] He 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 Declaration.[147] He describes the

[145] Mikaere, above n 7, at 58.
[146] 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.
[147] At 54–55.

way in which the drafting of the Declaration brought together indigenous people from all across the world as one of the Declaration's "greatest achievements".[148] In his words:[149]

> 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, "In a Maori sense, the Declaration is tapu. It possesses its own mauri [life force]."[150] The Declaration, like te Tiriti, is therefore a sacred covenant, the "consequences for breach [which] are ultimately backed by spiritual sanction".[151]

Taiaroa states that "Maori are inextricably linked to the Draft Declaration" due to "substantial" contributions made by Māori to the Declaration, including having major roles in the incorporation of intellectual property and cultural rights and Maori leadership within the indigenous caucus during the drafting period.[152] He makes the following comment in relation to the relationship between Māori and the Crown in the process of finalising the Declaration in the UN:[153]

> Maori Congress would like to see Maori and the Crown working together to ensure that the Declaration is finalised. The first step is to agree at the domestic level on the approach … it is exciting to consider the possibilities if we combine our diplomatic and negotiating skills and work together on a common purpose, the Declaration. This would add the final layer to the whakapapa of the Draft Declaration on the Rights of Indigenous Peoples.

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[148] At 55.
[149] At 55.
[150] At 56.
[151] Jones, above n 10, at 15–16 and 24.
[152] Taiaroa, above n 146, at 57.
[153] At 58.

Thus, even prior to its adoption by the UN General Assembly in 2007 and eventual endorsement from the Crown in 2010,[154] Taiaroa linked the Declaration with the relationship between Māori and the Crown and saw it as another space in which this relationship was to be outworked. Similarly, Maui Solomon argues that "In the case of the New Zealand Government, there is a continuing duty under the Treaty of Waitangi to support the Draft Declaration" (and presumably, by extension, a continuing duty to honour its contents, now it has endorsed the finalised Declaration). Stephens also comments on the Declaration in the context of this relationship, specifically referencing the Declaration's similarities to te Tiriti:[155]

> … 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 Declaration's focus on the rights of indigenous peoples to self-determination, found in art 3:[156]

> 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 this article as protecting "the quest of all peoples and all people to be free to live their own vision of the good life". Solomon highlights that "Self-determination is an evolving concept and will mean different things to different peoples".[157] As Aroha Mead articulates:[158]

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

[155] Stephens, above n 59, at 46.

[156] *United Nations Declaration on the Rights of Indigenous Peoples*, art 3.

[157] Solomon, above n 112, at 62.

[158] Aroha Te Pareake Mead "Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific" in Leonie Pihama and Cherryl Waerea-i-te-rangi Smith Cultural And Intellectual Property Rights: Economics,

> The fundamental area of commonality, is the experience of colonisation and the wish therefore to decolonise, but the journey of decolonisation will be different according to the needs and aspirations of respective indigenous peoples end of how they view their future relationship with colonising governments.

Referring to self-determination in the context of a Māori worldview, Jackson states:[159]

> 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 Declaration provides a basis for "justifying self-determination as a vehicle for ongoing Indigenous development into the 21st century".[160]

In its *General Comment No. 11*, the Committee on the Convention on the Rights of the Child (the Committee) advises that UNDRIP provides guidance on the protection of indigenous children's rights generally,[161] similar to Oranga Mokopuna's language around the rights in international covenants being fully realised through the UNDRIP).[162] The Declaration, in turn, mandates that particular attention be paid to "the rights and special needs of indigenous … youth [and] children" in its implementation.[163]

Politics & Colonisation (International Research Institute for Maori and Indigenous Education, Auckland, 1997) vol 2 20 at 20.

[159] Moana Jackson "The journey from a Spanish monastery to Whitianga" (2007) 10 *Yearbook of New Zealand Jurisprudence* 59 at 64.

[160] Dr Robert Joseph, Director of Te Mata Hautū Taketake – the Māori and Indigenous Governance Centre of the University of Waikato "Indigenous Peoples' Good Governance, Human Rights and Self-Determination in the Second Decade of the New Millennium – A Māori Perspective" (speech to the United Nations Permanent Forum on Indigenous Issues, New York, May 2014).

[161] 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 3 and 18.

[162] King, Cormack and Kōpua, above n 4, at 195 and 197.

[163] *United Nations Declaration on the Rights of Indigenous Peoples*, art 22.

1 International covenants and the enforceability of rights

The Declaration (along with other international covenants) provides Māori with additional pathways for rights-enforcement and rights-based advocacy against the Crown, the party on whom these covenants impose obligations.[164] This is important in the context of increasing the opportunities for accountability in the Treaty 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 Māori jurisprudential principles, ignoring the obligations in the Crown-Māori relationship imposed upon it through whanaungatanga and the tapu nature of te Tiriti.

As discussed in Part VI, the courts are a forum for accountability that can issue binding judgments on the Crown, allowing Māori to enforce, to some extent, the obligations in international covenants the Crown has ratified or endorsed. The Crown has endorsed the Declaration, changing its position in 2010 from an initial "no" vote in the UN General Assembly in 2007,[165] demonstrating, to an extent, a willingness to support its contents. This being said:[166]

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[164] 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.

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

[166] 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.

> 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 CRC 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.[167] *General Comment No. 11* is another example of non-binding "soft law". As the above quotation demonstrates, however, this distinction is not particularly relevant within the Pākehā courts, as neither "hard" nor "soft" international law has binding force unless incorporated into legislation. The CRC 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".[168] For example, in the Oranga Tamariki Act 1989, the rights in the CRC are mentioned within one of the principles by which decision-makers must be guided as follows:

> the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld[.]

Outside of such incorporation, it does not have binding legal force, similar to the Declaration, which is not incorporated into any legislation whatsoever.[169]

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[167] Kenneth W Abbott and Duncan Snidal "Hard and Soft Law in International Governance" (2000) 54(3) International Organization 421 at 421–422.

[168] Bill Atkin "Children's Rights and the Family Justice System – the Korowai as a New Motif" in Nessa Lynch *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.

[169] Palmer and Smith, above n 166, at 79.

However, unincorporated covenants can be used in court as extrinsic aids to statutory interpretation,[170] argued to be mandatory considerations in Crown decision-making,[171] and argued to be standards with which Crown decisions must be consistent (in the absence of any direction to the contrary from Parliament).[172] This allows for at least limited recourse to international covenants as accountability mechanisms in the relationship between Māori and the Crown.

Periodic reporting cycles, in which international bodies such as the CRC Committee receive reports from States and "shadow reports" from civil society groups within these States, provide opportunities for Māori to make their voices heard (through civil society groups), with the potential for such bodies to make recommendations to the Crown in line with Māori views. However, in its own reports to these bodies, the Crown has the ability to frame its actions as having complied with international covenants, even when the shadow reports disagree, potentially leading to watered-down recommendations that are insufficient to protect Māori rights. For example, in the most recent CRC reporting cycle, Action for Children and Youth Aotearoa's shadow report criticised the Crown for "lack of significant investment in either education delivered in te reo or in cultural settings appropriate for Maori children".[173] The Crown's report did not specifically address te reo Māori education in its report but described itself as "a world leader in providing inclusive education"[174] and working to "ensure all learners achieve their potential", citing Ministry of Education strategies aimed at meeting the

[170] At 80.
[171] At 80.
[172] Alice Osman "Demanding Attention: The Roles of Unincorporated International Instruments in Judicial Reasoning" (2014) 12 NZJPIL 345 at 358.
[173] 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.
[174] New Zealand Government *United Nations Convention on the Rights of the Child: Fifth Periodic Report by the Government of New Zealand 2015* (CRC/C/NZL/5, 2015) at 47.

needs of Māori students.[175] In response to these reports, the Committee concluded the Crown's efforts in this area were "insufficient" and recommended that it "intensify efforts to promote and foster Maori language, culture and history in education and increase enrolment in Maori language classes".[176] This demonstrates the success that is possible through pursuing this form of accountability, though whether they are given effect still depends on Crown willingness to adhere to them.

International covenants also add weight to advocacy in other fora, such as Waitangi Tribunal hearings[177] and debate in the public square,[178] given that they have been agreed on by the international community and, as the court stated in *Tavita v Minister of Immigration*, "legitimate criticism" could extend where the Crown does not abide by its international commitments.[179]

The sum of all of this is to provide Māori with additional pathways to hold the Crown accountable where rights are concerned. Clare Charters argues that the use of these pathways by indigenous peoples is "One of the most effective ways to increase the legal and political impact of the Declaration".[180] The same could be said for how Māori can use the CRC, to the extent that it is useful in holding the Crown accountable for its obligations to Māori children. International covenants therefore provide additional avenues for promoting accountability

[175] At 47.
[176] Committee on the Rights of the Child Concluding observations on the fifth periodic report of New Zealand CRC/C/NZL/CO/5 (30 September 2016) at 5.
[177] Charters, above n 164.
[178] 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>; Susan Edmunds "Air New Zealand 'not actively pursuing' attempt to trademark Kia Ora" (18 September 2019) Stuff <stuff.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>.
[179] *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).
[180] Charters, above n 164 at 137.

within the Crown-Māori relationship, albeit with limited effect that should increase, as Charters argues, as these covenants are increasingly put to use by Māori.

C Application to the rights of Māori children to te reo Māori

With Māori conceptions of international covenants in mind, this paper turns to exploring the rights of Māori children to te reo in this space. Due to the multiplicity of relevant rights articulated in international covenants, this paper 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 Māori.

1 Best Interests

According to art 3(1) of the CRC:[181]

> 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.

The provision should be taken as including the interests of children as a collective.[182] What comprises children's best interests in a given situation will be contextual and is an "inherently

[181] Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 3(1).

[182] 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.

subjective" judgement.[183] This being said, the 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". 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 Māori, these cultural rights must therefore be considered and given significant weighting.

2 Participation Rights

In art 12, the Convention states that:[184]

> 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.

Lundy argues this formulation implies that children must "be given the opportunity to express a view" and "be facilitated to express their views", while these views must be "listened to" and "acted upon, as appropriate".[185] As "all matters affecting the child" is a broad, expansive formulation,[186] children, who have a significant stake in the future of te reo Māori, have participation rights in decisions affecting te reo Māori.

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[183] At 11.

[184] Convention on the Rights of the Child, art 12.

[185] 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.

[186] 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 The International Journal of Children's Rights 537 at 540.

Participation rights in 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" (FPIC), similarly apply in the case of all "legislative or administrative measures that may affect them". When read together with art 22's focus on the rights and needs of children in the Declaration's implementation, FPIC requirements oblige that in dialogue between States and indigenous peoples, "All parties should ensure representation from … children [and] youth … and efforts should be made to understand the specific impacts on them."[187]

Reading the Declaration and Convention together, for a rights-compliant approach to be taken by the Crown to decisions affecting the preservation of te reo, sufficient consultation with Māori children of all affected ages and levels of maturity would be necessary and if clear preferences for ways forward existed these would need to be taken into account to meet participation standards, if not given complete effect.

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 progressively realise: to undertake appropriate implementation measures "to the maximum extent of their available resources".[188] The relevant rights, as they apply to Māori children, primarily stem from the

[187] Expert Mechanism on the Rights of Indigenous Peoples *Free, prior and informed consent: a human rights-based approach* A/HRC/39/62 (10 August 2018) at 7.
[188] Convention on the Rights of the Child, art 4.

CRC and the UNDRIP and a common theme of self-determination connects them. As Stephens poetically expresses:[189]

> 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.

Thus, these rights are inextricably linked and are explored in this paper with this in mind.

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, which defines it as:[190]

> 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.

Stephens notes this definition misses aspects of culture that are important to indigenous peoples, including "physical and spiritual connectedness to land of origin in the face of disrupted histories, and striving for political self-determination".[191]

The CRC guarantees not only the rights of all children to participate in cultural life,[192] but also, in art 30, the rights of the indigenous child, who "shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture".[193] The Committee

[189] Māmari Stephens "Rights to Culture, Language & Education—a Tricephalos" (2019) 9 VUWLRP 32/2019 at 1–2.

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

[191] Stephens, above n 189, at 6.

[192] Convention on the Rights of the Child, art 31.

[193] Article 30.

has expressed that implementation of this article should be prioritised highly by States, stating that:[194]

> States parties should provide detailed information in their periodic reports under the Convention on the special measures undertaken in order to guarantee that indigenous children can enjoy the rights provided in 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,[195] to practice and teach spiritual and religious traditions, including the right to maintain cultural sites and use cultural objects,[196] and to "the dignity and diversity of their cultures, traditions, histories and aspirations".[197]

The CRC contains partial protection of the indigenous child's right to language in art 29, requiring states to direct education towards "the development of respect for the child's … language".[198] Article 30, mentioned above, also states that the indigenous child "shall not be denied the right … to use his or her own language". The UNDRIP contains a far stronger protection, declaring that indigenous peoples "have the right to revitalize, use, develop and transmit to future generations their...languages".[199] Furthermore, States must take "effective measures" to ensure that this right is protected.[200] The Committee has stated that in order to

[194] Committee on the Rights of the Child, above n 161, at 5.
[195] *United Nations Declaration on the Rights of Indigenous Peoples*, art 11.
[196] Article 12.
[197] Article 15.
[198] Convention on the Rights of the Child, art 29.
[199] *United Nations Declaration on the Rights of Indigenous Peoples*, art 13(1).
[200] Article 13(2).

implement the right to language, "education in the child's own language is essential",[201] demonstrating the intertwined nature of these two rights.

Article 28 of the CRC provides that States recognise the right of the child to free education at the primary level at a minimum.[202] 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.[203] The Committee has recommended that States implement the right of indigenous children "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".[204] States should take measures to ensure there are an adequate number of qualified indigenous language teachers,[205] who should "to the extent possible be recruited from within indigenous communities",[206] and "allocate sufficient financial, material and human resources" to the training of these teachers.[207]

Article 14(1) of the UNDRIP affirms that "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."[208] Article 14(3) recognises the rights of indigenous people to education in one's mother-tongue, stating that:[209]

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[201] Committee on the Rights of the Child, above n 161, at 14.
[202] Convention on the Rights of the Child, art 28.
[203] Article 29.
[204] Committee on the Rights of the Child *Day of discussion on the rights of indigenous children: recommendations* (2003) at 4.
[205] At 4
[206] Committee on the Rights of the Child, above n 161, at 14.
[207] Committee on the Rights of the Child, above n 204, at 4.
[208] *United Nations Declaration on the Rights of Indigenous Peoples*, art 14(1).
[209] 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.

Further guidance on the right to education has been provided by former United Nations Special Rapporteur on the Right to Education Katarina Tomaševski,[210] whose criteria for education systems was expressed in the following manner by the New Zealand Human Rights Commission:[211]

1. Availability: ensuring free and compulsory education for all children in respect and parental choice of their child's education;
2. Accessibility: eliminating discrimination in access to education as mandated by international law;
3. Acceptability: focussing on the quality of education and its conformity to minimum human rights standards; and
4. Adaptability: ensuring education responds and adapts to the best interests and benefit of the learner in the current and future contexts.

Importantly, in the context of indigenous rights to language and education, a rights-compliant education system would therefore provide indigenous language education (whether this is education provided in the indigenous language or indigenous language classes in majoritarian language schools) which is of sufficient quality and is available to all indigenous children.

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[210] Katarina Tomaševski *Human rights obligations: making education available, accessible, acceptable and adaptable* (Novum Grafiska AB, Right to Education Primers No. 3, 2001).

[211] Human Rights Commission *Human Rights in New Zealand 2010 - Summary* (2010) at 171.

Looking at the rights to culture, language and education together in the context of the rights of Māori children to te reo, a general tenure to the Crown's obligations to Māori children emerges. The Crown has an obligation to progressively realise the right of Māori children to te reo classes in the English-medium schools they attend.[212] Drawing on art 14(3) of the Declaration and the Committee's comments on art 30 of the CRC 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.[213] Progressive realisation of this right by the Crown is likely to involve ensuring sufficient numbers of qualified te reo teachers (who, where possible, are Māori themselves)[214] and the devotion of sufficient resources to achieve this.[215] In order for this right to be upheld, such education should be accessible and available to all Māori children and of sufficient quality.[216] 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.[217] Māori children 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.[218] 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",[219] which necessarily overlaps with these education obligations to Māori children.

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[212] Convention on the Rights of the Child, arts 4, 28–29; *United Nations Declaration on the Rights of Indigenous Peoples*, art 14(3).

[213] *United Nations Declaration on the Rights of Indigenous Peoples*, art 14(3); Committee on the Rights of the Child, above n 161, at 14.

[214] Committee on the Rights of the Child, above n 161, at 14.

[215] Committee on the Rights of the Child, above n 204, at 4.

[216] Human Rights Commission, above n 211, at 121.

[217] Convention on the Rights of the Child, art 29; *United Nations Declaration on the Rights of Indigenous Peoples*, art 14(3).

[218] *United Nations Declaration on the Rights of Indigenous Peoples*, art 14(3).

[219] Articles 13(1) and 13(2).

Using the language of Oranga Mokopuna, these obligations and rights develop the duties and rights that are part of the Treaty relationship, which are in turn an articulation of rights inherent in whakapapa in the context of a Crown-Māori relationship underpinned by whanaungatanga. One way in which they develop these rights is that they tend to give guidance on the specifics of Crown duties and the corresponding rights of Māori children in areas where the obligations imposed by the Treaty relationship may benefit from this.[220] The above discussion on the level of te reo Māori education the Crown is obliged to work towards is one example of this; until a Waitangi Tribunal report or other detailed research on Māori children's rights in this area comes out, the international covenants provide ample guidance for the realisation of these rights in the meantime.

It is also true that the international covenants themselves are not fully comprehensive and leave gaps in certain areas. For example, the international covenants give little detail on what the implementation of the right to education involves in practice. This is less of a problem when international covenants are considered within Oranga Mokopuna, as they are seen as instruments developing the rights of Māori children rather than their source. Addressing the example of the right to education, in drawing on art 14 of the Declaration as well as the relevant rights implicit in the Treaty 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.[221]

VIII Applying Oranga Mokopuna "in its entirety"

[220] Palmer and Smith, above n 167, at 81.

[221] *United Nations Declaration on the Rights of Indigenous Peoples*, art 14.

Having focused in on the three spaces of Māori jurisprudence, te Tiriti and international covenants in applying Oranga Mokopuna, this paper 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 an unrelated 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 of them in relation to the rights of Māori children to te reo Māori, in the order they are introduced by the authors of Oranga Mokopuna

The rights of Māori children to te reo Māori, 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 Māori is a taonga passed down to children by their tīpuna, theirs by the rights bestowed on them by whakapapa, which they will one day pass down to their mokopuna.

Within the soils of whakapapa grow the pakiaka, roots, of tikānga Māori, or Māori jurisprudence, ways of life and values underpinning them that have been passed down by tīpuna. These values impose obligations on whānau, hapū and iwi to ensure that the rights of their children to te reo Māori are upheld. For example, whanaungatanga contemplates that responsibility for a child's learning of te reo lies with the collective. 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 children can become fluent speakers.

From the pakiaka grow the rito, the vulnerable innermost leaves of the harakeke. These are the mokopuna, gifts from the tīpuna who grow in an environment governed by the values of Māori

jurisprudence, protected by the outer leaves from harms of all kinds, including the harms caused through disconnection from and loss of language.

The awhi rito, ngā matua, the parent leaves of the rito, 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 Māori children to te reo Māori in the context of Māori, having declared their independence and sovereignty, entering into a sacred, covenantal relationship with the Crown. As public power in Māori jurisprudence 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 Treaty 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 policy to protect te reo that is adequately resourced, 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 the whānau, to whom the child belongs and by whom the child is supported and nurtured. So too do the Convention and other international covenants support and develop the rights of Māori children, clarifying obligations on the Crown and providing additional paths for accountability in the relationship with the Crown. The principle of best interests, participation rights and the rights to culture, language and education found in the Convention all develop the rights of Māori children to te reo Māori, not pretending to be their

source but emerging outwards to complement the foundational roots of Māori jurisprudence and whenua of whakapapa.

The outermost leaves, the tīpuna, face the harshness of the elements to ensure the rito and its surrounding leaves are protected. Likewise, the Declaration 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, it is recognised by the Committee to provide guidance on every aspect of the Convention'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 Declaration has the potential to be groundbreaking 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, and where the inherent rights of Māori children to te reo Māori are respected, protected and fulfilled, the health of the language will be restored and the children 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 multiple harakeke plants are able to flourish, an immovable forest of harakeke grows. As each whānau, hapū and iwi upholds the rights of their children to te reo Māori, supported

by he Whakaputanga, te Tiriti, the Convention and other international convenants and the Declaration, the language will return to health and become unassailable, 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 Māori children's rights framework based in te ao Māori and shaped by Māori jurisprudence. By following the rights of Māori children to te reo Māori through the various aspects of the Oranga Mokopuna framework, this paper shows that Māori children's rights frameworks that are rooted in Māori conceptions of rights can have conceptual and practical application. As it takes whakapapa as its starting point and Māori jurisprudential values as its underpinnings, Oranga Mokopuna is not bound by the limits of universal children's rights frameworks, such as the dualism of the legal system that stands in the way of the enforceability and realisation of rights in international covenants. It does run into a different limit, however: the fluctuating willingness of the Crown to perform the obligations imposed upon it by the principles of whanaungatanga and utu. There are no easy ways around this. However, there is hope that, building on what Charters articulates,[222] as the Declaration and other pathways to accountability continue to be used in different contexts, their legal and political weight will increase. This in turn will encourage the Crown to respect its relationship with Māori and the associated obligations it carries. Indeed, this paper explores only one context in which a Māori children's rights framework can be applied. Given that this paper demonstrates that Māori children's rights frameworks have practical application, there is nothing to stop such frameworks from being used to analyse the rights of Māori children in the

[222] Charters, above n 164, at 137.

contexts of care and protection, housing, poverty, justice, wider educational contexts or any other context in which Māori children have a stake. Additionally, the existence and efficacy of such 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 to privilege universal human rights above them. When all of these things start to happen, we can begin to move towards the fulfilment of what te Tiriti o Waitangi contemplates: coexisting visions of law and peace in a land where Māori children can blossom like the puāwai, fluent in their reo and on their way to become rangatira leading the next generation of mokopuna towards the good life.

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