CONCEPTUALISING MANA WĀHINE AS A LEGAL FORCE

Nerys Udy*

This article emerged from kōrero with Annette Sykes and her challenge that we, as Māori, need to continue exploring new ideas and pushing boundaries; her tono was for us to keep writing. Annette's contribution to the mana wāhine kaupapa is renowned, as is her advocacy for tino rangatiratanga. My kōrero with Annette has been integral in developing my understanding of the work that has already been done in relation to this kaupapa in order to think about where we need to go. Consequently, this article aims to explore new ways of conceptualising mana wāhine and to encourage fuller exploration as to how it could be recognised as a legal principle to serve our wāhine Māori. This piece is dedicated to the multitude of wāhine toa who have been advocating, challenging and tirelessly working toward a better future in which the mana of wāhine is protected and upheld.

I INTRODUCTION

Women constitute our world. This statement is evident perhaps no more clearly than in the well-known directive "Me aro ki te hā o Hineahuone - Pay heed to the dignity and power of women". This whakatauākī[1] is not merely an instruction (or a warning, depending on context!) to recognise the power of women, but it is also a potent reminder of where that power comes from. It was from the clay of Papatūānuku that Hineahuone was formed, the first woman from whom we all descend.[2] Her breath has given life to us all, and has constituted our very existence. Focus your attention on the breath, the essence,

* Nerys Udy (Ngāi Tahu) graduated from the University of Otago in 2020 with a BA/LLB(Hons) majoring in History and minoring in Māori Studies. Thank you to the many tuakana who supported the development of this article. Many of the tikanga concepts I discuss in this article are drawn both from written sources and from my own experiences and kōrero with tuakana and tikanga practitioners. The views expressed in this article are the author's own.

1 Famously uttered by Dame Mira Szazy in the title of a landmark address to the Māori Women's Welfare League conference in 1983.

2 For more on the narrative of Hineahuone in Māori cosmogony, see Witi Ihimaera *Navigating the Stars* (Penguin Random House, New Zealand, 2020) at 124.

of this first ancestress that breathes in every woman and feel the constituting power of women. Me aro ki te hā o Hineahuone!

This article is an exploration of that power, of the mana of wāhine as both a constituting and constitutional force. With the Mana Wāhine claim now progressing through the Waitangi Tribunal, it is timely to give active consideration to mana wāhine and the way our society and law responds to wāhine Māori. The aim of this article is to provoke consideration of how mana wāhine as a concept may be of relevance to the legal world. It begins by briefly delving into the origins and forms of mana wāhine before illustrating through examples the way mana wāhine has been denigrated over time, with a particular focus on the role of the State.

This article then considers how the mana of wāhine can be honoured and protected in Aotearoa New Zealand today. It is argued that mana wāhine can be conceptualised as a legal principle, which is constitutionally protected and embedded by Te Tiriti o Waitangi (Te Tiriti). Appropriate mechanisms for upholding and protecting mana wāhine must therefore be informed by the concepts and processes of tikanga Māori within a legal framework that affirms te tino rangatiratanga embodied in Te Tiriti. From that foundation, this article examines the current protections in place for wāhine who have suffered in the spaces constructed by colonial law, using the example of wāhine Māori suffering violence at the hands of the State in prisons to develop that argument.

This article concludes that the available international and domestic instruments that are premised on Western individualised concepts of rights are not appropriate as legal mechanisms to restore mana wāhine to its proper status. Constitutional transformation that embeds mana wāhine as part of a Te Tiriti-centred structure is required to restore that status. Common law mechanisms that invoke tikanga to challenge the State's action may also offer pragmatic and immediate responses but remain embedded within the colonial constitutional framework. This article ends by exploring benefits and drawbacks of recognising the legal force of mana wāhine through both constitutional and common law mechanisms, as a means to advance the current conversation over future possibilities for the legal landscape of Aotearoa New Zealand. Ultimately, this article concludes that upholding Te Tiriti must include breathing life back into mana wāhine as a constitutional and actionable legal force.

II TE MANA O TE WĀHINE

Mana wāhine is an expansive concept, of central importance in the Māori worldview. Mana wāhine is a form of mana; the expressions and forms of which are diverse and wide ranging. Mana is variously described as dignity, prestige, authority and sacred power but it defies complete translation into the English language. At its core, mana is a metaphysical force that can manifest in various ways.

Forms of mana include:[3]

i) mana atua (mana derived from the divine ancestors);

ii) mana tīpuna (mana derived from one's ancestors);

iii) mana whenua (mana derived from and indicating authority in relation to land); and

iv) mana tangata (mana gained through one's personal actions).

These various forms of mana refer to the different ways in which mana can manifest in people and natural features and how it can be obtained and utilised.

Mana wāhine is the metaphysical force possessed by women. As Ataria Sharman defines it, "mana wāhine is the expression of mana from the atua through Māori women, the expression of mana through the hine element, the female essence and time and space".[4] It exists in balance with the mana tāne of men and refers to the mana inherent in all women, as a collective.[5] At its core, it is a force that denotes the prestige, authority, sacrality and power of women. It is closely related to the cosmological principle of tapu (sacrality, state of restriction), as the mana of wāhine is informed by the inherent tapu of women, deriving from their whakapapa connection to the atua (divine ancestor) Papatūānuku and Hineahuone. This intrinsic tapu gives wāhine the ability to control the sacrality and restriction of people and things around them, thus informing their authority and prestige.[6]

3 Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, England, 2019), at 60.

4 Ataria Sharman "Mana Wahine and Atua Wāhine" (MA Thesis, Victoria University of Wellington, 2019) at 46.

5 It is important to note here that in exploring this power, this article has a narrow focus and does not specifically address mana tāne nor the mana of those who exist outside the gender binary. This article has a specific focus on mana wāhine but acknowledges the gender diversity within te ao Māori.

6 Suzanne Duncan and Poia Rewi "Tikanga: How Not to Get Told Off" in Michael Reilly and others (eds) *Te Kōparapara: An Introduction to the Māori World* (Auckland University Press, Auckland, 2018) 30 at 40.

It is important to understand that mana wāhine is not simply a Māori equivalent of western concepts of feminism, although there are intersections.[7] Rather, it is a way to understand sacred feminine energy as a collective spiritual force which exists within a broader cultural and spiritual context, thriving in balance with mana tāne and the many other forces that shape our world. In order to truly understand mana wāhine, one must understand its cosmological origins and how those origins relate to the position of women in today's society. The mana of wāhine is not something that is merely gained by individual women throughout time but rather has its origins in the very cosmology of the universe, from a Māori perspective. Wāhine Māori collectively possess tapu and mana that derives from their whakapapa connections to the whenua (land). This is evident within the various stories of creation within te ao Māori. The mana and tapu of women can be traced back to the creation of the first human, Hineahuone from the clay of Papatuānuku.

A Creation and Mana wāhine

The mana of wāhine is evident in the very stories of creation that abound in te ao Māori, even despite the many iwi variations in the cosmological beginnings of the universe. Within Ngāi Tahu, one account of this is that the universe was sung into creation by the atua, going through many stages of creation, from Te Kore to Te Ao, to Te Mākū to Te Po, where Papatūānuku resided. Although Papatūānuku is famously known as the intertwined partner of Ranginui, in this account she was first married to Tangaroa.[8] She is a powerful example of female agency, wielding her sexuality in choosing to engage with Ranginui in Tangaroa's absence, and leaving the tāne to battle it out between themselves upon Tangaroa's return. In this account, Papatūānuku eventually formed a lasting relationship with Ranginui, and it is this relationship that forms the basis for most iwi accounts of creation. Papatūānuku and Ranginui, Earth and Sky, lay intertwined, until they were separated by their children, Tāne, atua of the forests, and his brothers. Through this separation, Te Ao Mārama, the world of light we inhabit today, was formed.[9]

7 See Leonie Pihama "Mana Atua, Mana Tangata, Mana Wahine" in Leonie Pihama and others (eds) *Mana wāhine Reader: A collection of Writings 1999-2019 (Volume II)* (Te Kotahi Research Institute, Hamilton, 2019) 190 at 195.

8 See Matiaha Tiramōrehu *Te Waiatatanga Mai o te Atua* (Manu van Ballekom and Ray Harlow (eds), Department of Māori, University of Canterbury, Christchurch, 1987).

9 See Witi Ihimaera and Whiti Hereaka (eds) *Pūrākau: Māori Myths Retold by Māori Writers* (Penguin Random House, New Zealand 2019); see also Michael Reilly "Te Tīmatanga Mai o te Ao: The

It is from Papatūānuku's sacred feminine energy that humankind descends. When the first woman was formed by Tāne with clay taken from Papatūānuku's pubic region, she was imbued with this energy.[10] Many iwi accounts identify Hineahuone as the first woman, although in the Ngāi Tahu account described above she was named Io-wāhine.[11] The sacred, feminine energy that Papatūānuku provided for the creation of this first woman has passed down into her female descendants and is central to the mana and tapu of wāhine Māori today. The ability to bear children means women continue to give life to humankind, beyond this first instance of creation. Women quite literally constitute the world. Women hold the whare tangata (houses of humanity, referring to their childbearing capabilities) and thus the mana and tapu of women are intrinsically tied to the ability to bring forth new life. At the end of life, woman is also central. Hinenuitepō, the guardian of the underworld, awaits the dead, who pass back through her whare tangata to Rarohenga, closing off the cycle of life in Te Ao Mārama, that begins and ends with woman.[12]

These cosmological explanations of the universe demonstrate that women have always had an important position in the world, built into the very creation of the universe and deriving from the whenua itself. This is evident not only from the creation of woman from Papatūānuku but also in the many intertwined concepts relating to land and new life. For example, the word "whenua" can refer to land but also refers to the placenta, emphasising the parallel between the land nourishing humankind and the nourishment a child receives in the womb.[13] As Annette Sykes has described, "we earth our mana wāhine to Papatūānuku the earth mother and her mauri. From this whakapapa Māori women established their identity as being the land".[14]

Beginning of the World" in Michael Reilly and others (eds) *Te Kōparapara: An Introduction to the Māori World* (Auckland University Press, New Zealand, 2018) 12 at 18.

10 For further discussion of Hineahuone and her role in Māori cosmology see; Ani Mikaere *The Balance Destroyed* (Te Tākapu, Te Wānanga o Raukawa, Ōtaki, 2017) at 28; Ihimaera, above n 2.

11 Tiramōrehu, above n 8, at 33. Note that in the Tiramōrehu account, before creating Io-wāhine, Tāne first created a man, Tiki-auaha.

12 Reilly, above n 9, at 29.

13 Huia Jahnke "Towards a Theory of Mana Wāhine" in in Leonie Pihama and others (eds) *Mana wāhine Reader: A collection of Writings 1987-1998 (Volume I)* (Te Kotahi Research Institute, Hamilton, 2019) 183 at 186.

14 Annette Sykes "Constitutional Reform and Mana Wahine" in Leonie Pihama and others (eds) *Mana wāhine Reader: A collection of Writings 1999-2019 (Volume II)* (Te Kotahi Research Institute, Hamilton, 2019) 19 at 22.

These parallels between women, land, and life-giving ability are central to the mana of wāhine. As Ani Mikaere notes in her seminal work, *The Balance Destroyed*, "the significance of the whare tangata is rooted in the creation of the world and in the overriding tapu of whakapapa".[15] Mikaere links this tapu to the broader power and position of women in society,[16] explaining that women had many important social and spiritual ritual roles in traditional Māori society as a result of their tapu and mana.[17] This meant that women were a powerful force in society, such that it is "indisputable that their female presence makes the difference between life and death".[18] That can be true both in the immediate sense of exercising their power to assist the community in various ways and from the generational perspective of the continuation of whakapapa. Thus, women play a vital role in constituting our universe and in constituting humankind. Mana wāhine is therefore inherent in the creation of the universe and continues to be a powerful force today.

B Constitutional Power of Wāhine

The constituting power of wāhine is complemented by, and indeed gives rise to, their constitutional power. The role of wāhine Māori in both pre and post-colonial society was not limited to the unique mana they held as whare tangata. Wāhine were also powerful leaders, military strategists and political agents. Female sexuality could itself be a potent political tool, as evidenced by women such as Erenoa Taratoa of Ngāti Raukawa, who composed the famous pātere Poia Atu Taku Poi, celebrating both her strategic and political connections with male rangatira throughout the North Island.[19] During early settlement, wāhine Māori were also influential and deliberate in connecting Pākehā men into their communities, which brought with it prestige and influence, thus playing a role in constituting new communities and eventually a new nation.[20]

The role of wāhine Māori in constituting a new nation is most significantly demonstrated through Te Tiriti. This constitutional power of wāhine is both asserted and protected under Te Tiriti, with at least 13 women signing Te Tiriti,

15 Mikaere, above n 10, at 41.
16 At 43.
17 At 39–40.
18 At 41.
19 Apirana Ngata and Pei Te Hurinui Jones (eds) *Ngā Moteatea the songs: Part Two* (AH and AW Reed Ltd, Wellington, 1974) at 142.
20 Angela Wanhalla *In/visible Sight: The Mixed-Descent Families of Southern New Zealand* (AU Press, Edmonton, 2010) at 4.

although it is possible there are more given many Māori names are not gender specific. In signing Te Tiriti, wāhine asserted their mana as constitutional actors, agreeing to the creation of a new constitutional structure founded upon tino rangatiratanga and (limited) kāwanatanga.[21] There are also examples of wāhine Māori being denied the opportunity to sign Te Tiriti by English men.[22] This not only suggests that more women would have likely signed Te Tiriti given the chance, but also highlights the lack of political agency the British worldview afforded women, in contrast to the te ao Māori centering of mana wāhine.

Arguably, mana wāhine is also inherently protected in Article Two of Te Tiriti, which affirms the rangatiratanga of Māori, naturally including the constitutional and constituting mana that wāhine Māori wield.[23] Article Two essentially asserts that, in the new constitutional vision, te ao Māori and its tikanga will be recognised and Māori will retain control over it.[24] In tikanga Māori, mana wāhine is a central concept as is evidenced by its inalienable entwinement with the te ao Māori worldview and the place of women embedded in Māori cosmology. Consequently, mana wāhine is a constitutional force inherent in the notion of tino rangatiratanga. It is also a powerful legal principle, which will be explored later in this article.

III KUA TAKAHIA TE HĀ O HINEAHUONE: THE DENIGRATION OF MANA WĀHINE BY THE STATE

Despite the centrality of mana wāhine in traditional Māori society, our present-day society is marred by continual inequalities for women, with wāhine Māori particularly afflicted. The stark history of colonisation in Aotearoa New Zealand illustrates the way mana wāhine has been steadily denigrated over time. The arrival of waves of settlers brought patriarchal values that positioned women as inferior to men. Ani Mikaere's *The Balance Destroyed* explores the way this imposition persisted not only in Pākehā society, but also how

21 See Margaret Mutu "Constitutional Intentions: The Treaty of Waitangi Texts" in Malcolm Mulholland and Veronica Tawahi (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 13 at 30.

22 See for example Interview with Moana Jackson (He Tohu Permanent Exhibition, National Library of New Zealand, 2017).

23 For more on the recognition of mana wāhine as a constitutional principle in Te Tiriti, see Annette Sykes "Constitutional Reform and Mana Wahine", above n 14.

24 Justice Joe Williams describes tikanga as a "necessary and inevitable expression of self determination", which is encapsulated in the term tino rangatiratanga. See Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 9.

it invaded te ao Māori.[25] Mikaere demonstrates how the new patriarchal framework obscured certain tikanga processes and principles that recognised the mana of wāhine. The Crown played a key role in the introduction and perpetuation of these values. Whilst the introduction of such patriarchal values into Māori society has meant that mana wāhine has suffered denigration within te ao Māori, this article focuses on the ways in which Crown actions have contributed to that denigration and failed to address it effectively.

A State Systems that Operate Against Wāhine Māori

The Mana Wāhine claim (Wai 2700) currently before the Waitangi Tribunal addresses this very issue. Wai 2700 was first filed in 1993, after Dame Mira Szazy was removed from contention for the Waitangi Fisheries Commission and replaced with a male candidate. This action was the catalyst for a group of wāhine Māori to bring a claim against the Crown for its ongoing adherence to the patriarchal values which have denigrated mana wāhine, in breach of Te Tiriti. Wai 2700 was formally initiated by the Tribunal in 2018 and is currently being heard at the time of writing this article. The Tribunal will explore if, and how, Te Tiriti has been breached by the Crown in relation to wāhine Māori, across four key focus areas: rangatiratanga (self-determination), whenua (land), whakapapa/whānau (family) and whai rawa (prosperity).[26]

Within this, a key focus of Wai 2700 is to look at the way the effective participation of wāhine Māori in decision making and the Māori relationship with the Crown has been restricted by colonial laws and political, economic and social systems.[27] In addition to the political aspect of the claim, Wai 2700 will also look at the personal injustices wāhine Māori have suffered in relation to failures by the Crown regarding domestic and sexual violence, justice, education, health, social development, employment and equal pay.[28] These are areas in which wāhine Māori have particularly suffered, largely as a result of the cycle of trauma and deprivation resulting from colonisation.[29]

The Tribunal Inquiry is ongoing, but there is long-standing evidence to

25 Mikaere, above n 10.

26 Waitangi Tribunal *Kaupapa Inquiry into Claims Concerning Mana Wāhine* (Wai 2700) Memorandum-Directions of Presiding Officer 22 July 2020, at 3.

27 Waitangi Tribunal, above n 26, at 2.

28 At 2.

29 See for example Law Commission *Justice: The Experience of Māori Women* (NZLC R53, 1999). See also Patricia Johnston and Leonie Pihama "The Marginalisation of Māori Women" in Leonie Pihama and others (eds) *Mana wāhine Reader: A collection of Writings 1987-1998 (Volume 1)* (Te Kotahi Research Institute, Hamilton, 2019) 114.

demonstrate the barriers Māori women have faced in these areas. Wāhine Māori are particularly overrepresented in negative social statistics, at disproportionate risk of sexual and physical abuse. According to recent research, 36 per cent of Māori adults experience some form of intimate partner violence in their lifetimes and being female is a factor associated with higher risk.[30] 41 per cent of referrals to Women's Refuge in 2019 were Māori, compared to 41.2 per cent of Pākehā women[31], which is starkly disproportionate to the fact that wāhine Māori only make up approximately 16.5 per cent of the female population in Aotearoa New Zealand.[32] Further, 66 per cent of female prisoners in New Zealand are Māori.[33] These negative statistics demonstrate that the State has failed to effectively safeguard both Pākehā and Māori women and children from violence. While the previous term Labour government has made some progress in the prevention of family violence, this is an ongoing issue:[34]

> …victims' access to safety, justice, and recovery remain hindered by aspects of the wider social and legislative contexts that frame their vulnerability to family violence, experiences of family violence and opportunities to rebuild their lives in the aftermath of family violence.

Wāhine Māori are particularly vulnerable to the impact of violence and marginalisation from support systems, given the prevailing social and legislative contexts are not designed for them. Research demonstrates that there are structural barriers in the social, economic and legal spheres that have hindered wāhine Māori from accessing support services and seeking justice in the face of abuse and poverty.[35] In the late 1990s, the Law Commission report *Justice: The Experiences of Māori Women* found that "the rules and values of colonial society effectively marginalised [Māori women] from participating in the

30 Ministry of Justice *Māori victimisation in Aotearoa New Zealand – Cycle 1 and 2 (March 2018 – September 2019)* (March 2021) at 3.

31 National Collective of Independent Women's Refuge Inc *Annual Report 2019-20* (2020) at 31.

32 Figure calculated by reviewing the number of Māori women in New Zealand (426,800) and identifying that number as a percentage of the total female population in New Zealand (2,571,600): Compare "Population – Summary figures" (December 2020) Stats NZ <www.stats.govt.nz> and "Māori population estimates: At 30 June 2020 (17 November 2020) Stats NZ <www.stats.govt.nz>.

33 Department of Corrections *Wāhine – E rere ana ki te pae hou Women's Strategy 2021–2025* (28 October 2021) at 7.

34 National Collective of Independent Women's Refuge Inc *Briefing to Incoming Minister* (2020) at 4.

35 Law Commission (NZLC R53), above n 29. See also The Royal Commission on Social Policy *The April Report* (Volume II) April 1988.

new regime"[36] which bled into the contemporary sphere, creating "systematic failure" of the justice system and the marginalisation of Māori women.[37] The marginalisation of wāhine Māori through colonisation has only been exacerbated by the structures of the State that act as disincentives for Māori women to be able to engage with these imposed justice processes, with factors such as lack of legal aid, socio-economic disadvantage and the responsibilities of motherhood presenting powerful barriers for wāhine Māori.[38]

B State Violence Against Wāhine Māori

The State has not only created the conditions for this denigration of mana wāhine but has itself been an active participant in that destructive task. This was reflected most recently in the appalling treatment of wāhine Māori in Auckland's Women's Prison. In 2020, a Radio New Zealand investigation revealed that two wāhine Māori, Mihi Bassett and Karma Cripps, were gassed with high strength pepper spray and subjected to dehumanising treatment.[39] They were required to change in front of male guards, beg for hygiene products and lie prone on the floor to receive food. Mihi and Karma were subjected to long-term cell confinement and prolonged solitary confinement. Following an in-prison protest, Mihi was charged with arson. At her sentencing Judge McNaughton described her treatment as "serious physical and psychological abuse"[40] and heavily criticised the Department of Corrections, stating:[41]

> …the measure of a civilised society is how it treats its most vulnerable and disadvantaged citizens... we judges know from experience that Māori women prisoners are amongst our most vulnerable and disadvantaged and damaged citizens.

36 Law Commission, above n 29, at 20.

37 At 20–21.

38 Law Commission (NZLC R53), above n 29, at 27. See also The Royal Commission, above n 35, at 155. In the decades since these reports it is clear there has only been tinkering at the margins and not widespread structural change: see for example; Khylee Quince "Bottom of the Heap? Why Māori Women are Over Criminalised in New Zealand" (2010) 3 Te Tai Haruru Journal 99; Ministry of Women's Affairs *CEDAW Report: New Zealand's Seventh Report on its Implementation of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women March 2006 - March 2010* (2010); Human Rights Commission *A Fair Go for All? Addressing Structural Discrimination in Public Services* (Discussion Paper, July 2012).

39 Guyon Espiner "Gassed in their cells, 'begging' for food at Auckland Women's Prison" Radio New Zealand (24 November 2020) <www.rnz.co.nz>.

40 *R v Bassett* [2021] NZDC 5067 at [22].

41 At [20].

This treatment continued a tradition of similar State abuses against women in prison, such as the use of mechanical shackles on pregnant women and those in labour.[42] This practice is particularly harmful to the mana of wāhine, degrading them at a time when they are especially vulnerable and tapu, bringing new life into the world. Associate Professor Khylee Quince said of the practice, "the overwhelming majority of female prisoners have lived histories of trauma and these practices serve to physically and psychologically re-traumatise women at their most vulnerable".[43]

This trauma forms part of the broader history of State violence against vulnerable people, including wāhine Māori and children. The Royal Commission into Abuse in State Care currently underway is providing a long overdue focus on the brutal treatment that vulnerable New Zealanders, including Māori, have suffered. The scale of this violence is profound and, again, Māori were disproportionately victims of this violence as a "direct result of enduring structural and systemic racism across multiple settings" including social welfare, health and disability, educational and law enforcement contexts.[44]

Ultimately, this brief visitation of the Crown's violence against Māori highlights that the denigration of mana wāhine has not merely been an incidental consequence of colonisation. There is clearly a connection between the State's co-option of the constitutional space belonging to mana wāhine and the consequent harms wāhine Māori suffer, as the essence of their mana suffers in the face of violence, poverty and social inequality. This has occurred both indirectly through the State's failure to maintain the balance of mana tāne and mana wāhine that was inherent in pre-colonial Māori society,[45] through the structural barriers that exist in State systems for wāhine Māori to find justice and support,[46] and directly, in cases where the State has been an active participant in such violence.

42 Michelle Duff "Women are being forced to give birth in handcuffs, with prison officers in the room" Stuff (9 May 2021) <www.stuff.co.nz>.

43 Duff, above n 42.

44 Ihi Research *Hāhā-uri, hāhā-tea: Māori Involvement in State Care 1950-1999 Executive Summary* (Royal Commission of Inquiry into Abuse in Care, July 2021) at 14.

45 See "Tikanga Colonised" in Mikaere, above n 10.

46 Law Commission (NZLC R53), above n 29. See also The Royal Commission on Social Policy, above n 35.

IV DEFICIENCIES IN THE CURRENT LEGAL FRAMEWORK TO PROTECT WĀHINE MĀORI

The denigration of mana wāhine traversed above is not new or unknown.[47] It speaks to the need for the constitutional power of wāhine Māori to be appropriately recognised, so that they can enact their tino rangatiratanga in seeking solutions that work for wāhine as a collective. Wai 2700 is a significant step on the journey to addressing these issues.

This article now turns to consider how, if at all, our modern legal framework addresses these deeply embedded issues, beyond the political Tribunal process. Where can wāhine turn to have their mana recognised and vindicated at law, when it is the State, the parent of settler law, that has been integral in denigrating that mana and co-opting the constitutional space? Where could a woman like Mihi Bassett, for example, turn for relief?

There are a broad range of legal instruments of specific relevance to women, as well as laws of more general application to which women may have recourse. Ultimately however, while there are legal instruments that women could turn to, they are conceptually insufficient in that they do not recognise the integral mana of wāhine Māori women as a collective force.

A Human Rights Protection for Māori Women

The Human Rights arena is a forum where wāhine Māori (and women in general) could look to protect and invigorate their position in relation to the State.

Targeted instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Declaration for the Eradication of Violence Against Women (DEVAW) and the Declaration on the Rights of Indigenous Peoples (UNDRIP)[48] all offer rights and protections of varying relevance to wāhine Māori. General human rights mechanisms such as the United Nations Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Social, Cultural and Economic Rights, the New Zealand Bill of Rights Act 1990 (NZBORA)

47 See Leonie Pihama and others (eds) *Mana wāhine Reader: A collection of Writings 1987-1998 (Volume I)* (Te Kotahi Research Institute, Hamilton, 2019) and Leonie Pihama and others (eds) *Mana wāhine Reader: A collection of Writings 1999-2019 (Volume II)* (Te Kotahi Research Institute, Hamilton, 2019) for a comprehensive collection of writings on mana wāhine from multi-disciplinary perspectives.

48 Article 22 is of particular relevance, and its inclusion was hard fought for by indigenous women, including Dama Mira Szazy. It requires that States take measures to ensure that indigenous women and children enjoy full protection against violence and discrimination.

and the Human Rights Act 1993 are also of relevance to the relationship between Māori (as a collective and as individuals) with the State. Many of these mechanisms allow for individual complaints to be brought against the State, including for inhuman treatment in detention, or for failure to properly implement mechanisms to uphold the rights enshrined in these documents.

The concept of human rights has a complicated relationship with indigenous peoples and it is clear that human rights discourse can have value for indigenous communities. Fundamentally, as Moana Jackson has stated:[49]

> [T]he whole history of human rights was based on the idea that all peoples have the right to self-determination. It is the base from which all other rights flow. If Indigenous Peoples were denied that right, then their very existence as free peoples was again being dismissed.

Human rights discourse that includes indigenous peoples and recognises their right to self-determination can therefore be important in affirming indigenous peoples as 'free peoples'[50] and can galvanise positive change for indigenous communities.[51] For example, UNDRIP plays an important role in affirming Māori self-determination and is increasingly recognised as sitting alongside Te Tiriti o Waitangi.[52] Human rights instruments can also provide immediate redress. In the case of State abuse of wāhine Māori in prison, such as the abuse of Mihi Bassett, s 9 of the NZBORA allows for a claim against cruel, degrading or inhuman treatment, (a right also reflected in UNDR, ICCPR and CEDAW) while s 23(5) of the NZBORA protects the "inherent dignity" of incarcerated persons. However, these rights have high thresholds and there is no guarantee that a claim for breach of these rights would be successful.[53]

At the same time, however, it is clear that the discourse of human

49 Moana Jackson "A challenge not a threat" *E-Tangata* (online ed, New Zealand, 1 August 2021).

50 While recognising that the self-determination of indigenous peoples is only recognised by, but not founded in human rights instruments.

51 See for example Linda Te Aho "Creating our Own Prosperity: Human Rights from a Tainui Perspective" (2007) 10 Yearbook of New Zealand Jurisprudence 43.

52 See Claire Charters and others "He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand" ((November 2019) (Obtained under Official Information Act 1982 Request) [He Puapua] at i.

53 *Taunoa v Attorney General* [2007] NZSC 70, [2008] 1 NZLR 429 at [175], [176] and [209]–[212]. Taunoa discusses a graduated hierarchy of standards between s 9 and s 23(5). In that case the Supreme Court found that treatment of prisoners, arguably analogous to the treatment suffered by Basset and Kripps, was not a breach of s 9, but did breach s 23(5).

rights sits in tension with the Māori worldview. Much of the law relevant to human rights in Aotearoa New Zealand does not truly hold space for wāhine Māori. Whilst wāhine Māori can search for justice in the spaces that the law leaves open, there is little specific, collective protection,[54] despite the constitutional embedding of mana wāhine in Te Tiriti. As such, the lack of specific constitutional protection for women, and indigenous women particularly, in our current legal framework creates a conceptual, ideological gap. It is not enough to simply turn to international rights instruments or to domestic mechanisms to protect the mana of wāhine in the face of continued degradation. Avenues such as s 9 and s 23(5) of the NZBORA are lacking conceptually in that they do not directly address the denigration of mana wāhine.

The individualistic nature of gender-neutral rights instruments illustrates this ideological gap and has faced criticism from authors such as Caroline Morris, who highlights this difficulty in relation to reproductive and sexual rights, freedom from violence and rights to just working conditions.[55] Morris demonstrates that the framing of certain rights as universal has often allowed the interests of the individual to be prioritised over the collective interests of women. For example, the right to freedom of expression has been utilised to prevent the passage of anti-pornography legislation in the US, which might have had a significant impact in curbing negative social attitudes that contributed to sexual violence against women.[56] Commentators have also criticised gender-specific instruments like CEDAW for attempting to empower women to a male-defined standard of equality that may not be appropriate or relevant for women.[57]

54 In addition, even where protections are available to Māori women, institutional racism and other social obstacles can create barriers to women actually accessing these options as discussed above.

55 See Caroline Morris "Remember the Ladies: A Feminist Perspective on Bills of Rights" [2002] 18 VUW Law R 33.

56 Morris, above n 55, at 460 citing *American Booksellers Association v Hudnut* (1985) 771 F 2d 323 (7th Cir). There are of course, nuanced arguments in this space, especially regarding what the collective interest of women might be in these kinds of scenarios, which we do not intend to explore here.

57 Kerensa Johnston "Discrimination, the State and Māori Women: An Analysis of International Human Rights Law and the Convention on the Elimination of All forms of Discrimination Against Women" (2005) 8 Yearbook of New Zealand Jurisprudence 32 at 55, citing Charlesworth and Chinkin *The Boundaries of International Law: A Feminist Analysis* (Manchester, Manchester University Press, 2000) at 248.

Relating the ideological tension within these instruments directly to the indigenous experience, Mikaere's argument is fundamental:[58]

> Reliance on principles of international human rights law as a means of overcoming current disparities is illogical…and founded on a form of selective amnesia which assumes that we can understand the present and plan effectively for the future without reference to the past. It is an undeniable fact that the current status of Māori women and men is colonisation. It makes little sense therefore for Māori to seek salvation in principles of law which have been formulated by colonisers.

Mikaere does not advocate jettisoning all rights-based discourse. Instead, she says the starting point must be the recognition of the inherent rights of Māori to self-determination and rangatiratanga as asserted by Te Tiriti and "first returning to our law to find workable solutions".[59]

Moana Jackson has also highlighted this ideological deficit in using Western rights in indigenous contexts, noting that: [60]

> …the mind from which the definitions [of rights] have sprung has remained bound by its own particular view of the world and by its own particular interests in relation to other people.

The late Dr Haunani-Kay Trask held a similar view, arguing that:[61]

> …Once indigenous peoples begin to use terms like language 'rights' and burial 'rights', they are moving away from their cultural universe… These…practices are not 'rights' which are given as the largesse of colonial governments. These practices are, instead part of who we are, where we live and how we feel.

Trask's analysis highlights the fundamental difficulty with turning to human

58 Ani Mikaere "Collective Rights and Gender Issues: A Māori Woman's Perspective" in Nin Thomas *Collective Human Rights of Pacific Peoples* (International Research Unit for Māori and Indigenous Education, Auckland, 1998) at 79.

59 For more on the view that tikanga must be the starting point for any interaction with human rights, rather than the inverse, see Ani Mikaere "Seeing Human Rights Through Māori" (2007) 10 Yearbook of New Zealand Jurisprudence 53.

60 Mikaere, "Collective Rights and Gender Issues" above n 58, at 183, citing Moana Jackson.

61 Haunani-Kay Trask *From a Native Daughter: Colonialism and Sovereignty in Hawaii* (University of Hawaii Press, Hawaii, 1993) at 112.

rights instruments framed by largely Western thinkers, to answer indigenous problems, aligning with Mikaere's view. This links directly to the constitutional issues at play. In order for concepts such as mana wāhine to be given space to operate fully, the tino rangatiratanga of Māori to live within the Māori worldview must be recognised, which indeed aligns with UNDRIP's affirmation of the indigenous right to self-determination. If the mana of wāhine Māori can only be honoured and protected through human rights law, then mana wāhine itself is not actually upheld because that mana is not explicitly recognised in the legal response. Framing this as a struggle to uphold mana wāhine is important. It means that a wahine Māori does not, for example, have to resort to western concepts of discrimination, before the law responds. The law ought to be able to respond to the denigration of mana wāhine from within its own cultural reality, independently of western notions of discrimination, cruel treatment and inherent dignity.

B Mana Wāhine as a Legal Principle

It is clear the current protections in place for women, and wāhine Māori particularly, are conceptually insufficient. There is space for legal arguments to be made to protect wāhine Māori under the mechanisms currently in place, but this is almost incidental space. Arguably, what is needed is specific space to uphold mana wāhine as law. This article suggests that mana wāhine should be conceptualised not merely as a social concept, but also as a legal principle in its own right.

As discussed, mana wāhine is a central principle in the tikanga system. In the traditional tikanga understanding, mana wāhine is not merely a principle, but a literal metaphysical force possessed by wāhine, passed down through our whakapapa from Papatūānuku and Hineahuone. Arguably, this metaphysical force can also be conceptualised as a legal force.

Tikanga Māori is both a legal and a social system at its core. Recently, this fact was recognised by the Supreme Court in *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board*, where the Court held that a statutory reference to "any other applicable law" could include tikanga.[62] The Court definitively acknowledged that tikanga Māori is a body of law, moving beyond simple relegation of tikanga as values within the settler law. Of course,

62 *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [169].

this State recognition of tikanga is not the starting point and indeed is long overdue. Without delving into jurisprudential discussion of what "law" is,[63] tikanga has long been understood as "law" within its own cultural context, that is, te ao Māori.[64] Tikanga literally refers to that which is "right" and it operates to regulate human behaviour, as all law does. Key principles within the law of tikanga include whanaungatanga (kinship), tapu (sacrality and restriction), utu (balance) and mana (authority, prestige);[65] although they are not necessarily always talked about in strictly legal terms, largely due to the intertwined nature of tikanga as a social, legal and spiritual system.[66] However, many principles of tikanga are already explicitly acknowledged as being integral to the legal regulation that tikanga provides. For example, mana whenua, a principle regulating rights over land, plays an important role in the discrete tikanga realm but also is of increasing relevance in the legal intersection between State and tikanga law.[67] There is also value in explicitly considering the nature of mana wāhine as a legal concept as well as a social and spiritual force. The legal nature of mana wāhine is evident in the way that it operated to regulate human behaviour in pre-colonial society in a wide variety of ways, mandating certain behaviours and denouncing others.

As Leonie Pihama et al suggest, "sexual violence within Māori understandings is an absolute violation of the mana of the person and the collective mana of whānau, hapū and iwi." The rejection of sexual or physical abuse of women is embedded within pūrākau (oral traditions) and, as Pihama highlights, can be understood as connected to the mana and tapu of wāhine, which is intrinsically connected to her whakapapa and her constituting ability,

63 While we do not focus on debate on what law is, Māmari Stephens has challenged the notion that tikanga Māori does not fit within popular jurisprudential definitions of law; see Māmari Stephens "Māori Law and Hart: A Brief Analysis" [2001] VUWLR 44.

64 See for example Eddie Durie "Custom Law" (Waitangi Tribunal Research Unit Discussion Paper, 1994), at 3; Ani Mikaere *Colonising Myths, Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 254 and 264; Jacinta Ruru "First Laws: Tikanga Māori In/And The Law" (2018) 49 VUWLR 211 and Williams, above n 24.

65 See Carwyn Jones *New Treaty New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 38 and Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

66 Williams, above n 24, at 3.

67 See for example *Mercury NZ Ltd v The Waitangi Tribunal* [2021] NZHC 654 and *Ngāti Whātua Ōrakei Trust v Attorney-General* [2018] NZSC 84. See also Jacobi Kohu-Morris "Ko Wai Te Mana Whenua? Identifying Mana Whenua under Aotearoa New Zealand's Three Laws" (LLB (Hons) Dissertation, University of Otago, 2020).

and therefore the mana of all generations connected to her; past, present and future.[68]

This is embedded in pūrākau such as the story of Mataora and Niwareka and how the practice of tā moko (tattooing) was brought to human-kind.[69] Mataora, a human, abused his partner, Niwareka, who fled to her home in Rarohenga (the underworld). In striking her, he disrespected her inherent mana. Overcome by regret, Mataora followed her to Rarohenga. Mataora encountered Niwareka's father Uetonga, who was a skilled practitioner in the art of permanent tā moko. Uetonga tattooed Mataora's face and it was during this painful process that he reconciled with Niwareka. They both returned to the physical world and Mataora gave an oath to Uetonga that he would never harm his daughter again.

When I first heard this pūrākau explained by a kaumatua at a mokopapa (tattooing day), he emphasised that tā moko is therefore inherently intertwined with the principle of anti-violence against women. In this way, every tā moko that is applied, is, from one perspective, a reminder that such abuse is not accepted in Māori society and indeed could be conceptualised as honouring the mana and tapu of wāhine tracing back through to Niwareka.[70]

From one perspective, this pūrākau is a vessel of law, highlighting a legal principle relating to domestic violence that flows out of the recognition of the tapu and mana of wāhine. This principle could be actioned within te ao Māori in concrete ways. As Judge Stephanie Milroy discussed, "In pre-colonial Māori society a man's house was not his castle. The community intervened to prevent and punish violence against one's partner in a very straightforward way".[71] Rangimarie Rose Pere tells the story of a woman who was physically abused by her husband, resulting in the wider whānau declaring the abuser "dead" in the sense that he was shunned by the entire community and exiled from participating in ceremonial and mundane aspects of the community's life.[72]

These examples all demonstrate the power and importance of respecting

68 See Leonie Pihama and others "Māori Cultural Definitions of Sexual Violence" (2016) 7 SAANZ at 912.

69 Ngahuia Te Awekotuku and others *Mau Moko: The World of Māori Tattoo* (Viking Books, New Zealand, 2007) at 14.

70 At 14.

71 Stephanie Milroy "Domestic Violence: Legal Representation of Māori Women" (unpublished paper, 1994) 12, as cited in Ani Mikaere "Māori Women Caught in the Contradictions of a Colonised Reality" (1994) 2 Wai L Rev 125.

72 Rose Pere "To Use the Dreamers Are Important" in Leonie Pihama and others (eds) *Mana wāhine Reader: A collection of Writings 1987-1998 (Volume I)* (Te Kotahi Research Institute, Hamilton, 2019) 4.

the mana of wāhine and the consequences that could flow from a failure to do so within tikanga Māori. These specific practices also demonstrate the interconnections with other legal principles, such as whanaungatanga obligations, which in these examples create the conditions for community intervention when violence occurs.[73]

Mana wāhine also operated as law at the constitutional level in pre-colonial society. In pre-colonial society, to deliberately close off leadership spaces from women would also have been contrary to the principles of mana wāhine. As noted, at the time of the signing of Te Tiriti, the principle of mana wāhine meant that women had the political power to sign Te Tiriti, in contrast to the lack of such power afforded to women in British society at the time. The mana of wāhine requires that women are represented, or given the opportunity to be represented, in public positions in balance with men and their mana tāne. Mana wāhine as a metaphysical force gave rise to the political, military, social power of women in both pre and post-colonial society[74] and in this sense it is also a legal force, which mandates holding space for wāhine to commandcertain roles, power and authority within society today.

C Relating to the State

Explicitly recognising mana wāhine as a legal force within tikanga could be a powerful tool in shifting how we understand the relationship between wāhine Māori and the kāwanatanga State. It allows us to conceptualise that State abuse of wāhine Māori in prisons, for example, is an unlawful action, without needing recourse to the human rights framework and is fundamentally unconstitutional because it fails to uphold the holistic law of mana wāhine, in contravention of Te Tiriti o Waitangi.[75] Equally, the failure of the State to take active steps in combatting the degradation of mana wāhine in the social and economic spheres emerges as unconstitutional. Deliberately couching this in legal terms can be important in shifting our conceptual focus.

Once conceptualised from a legal perspective, the question of practical

73 See Pihama, above n 68, at 11.

74 Aroha Yates-Smith "Te Ukaipo- Te Taiao: The Mother, The Nurturer, Nature" in Leonie Pihama and others (eds) *Mana wāhine Reader: A collection of Writings 1999-2019 (Volume II)* (Te Kotahi Research Institute, Hamilton, 2019) 75 at 81.

75 Of course, some would also view the state imposition of a carceral criminal justice system as fundamental breach of Te Tiriti, regardless of how Māori within those institutions are treated; see Moana Jackson "Why Māori Never Had Prisons" (speech presented to JustSpeak New Zealand public meeting, Wellington, 2017).

value can be considered. When the State is unlawfully acting in contravention of mana wāhine, how can it be prevented from doing so? As a legal principle of tikanga, how can mana wāhine protect and assert itself as it exists, inherent within the hā (lifebreath) of women? This is a difficult question to address in the context of the Crown's co-option of "sovereignty", in breach of Te Tiriti's grant of kāwanatanga to the Crown subject to Māori tino rangatiratanga.

This article suggests two potential approaches arise to advance the recognition of mana wāhine. The first is a constitutional transformation approach, which focuses on giving life to mana wāhine as a legal principle through restructuring our systems into a Te Tiriti-based constitution, in which processes that uphold mana wāhine is embedded. This approach is the most ideologically sound pathway because it seeks to directly uphold Te Tiriti o Waitangi. This approach can therefore directly address the ideological deficit discussed in this article.

The second approach is to consider how mana wāhine, as a legal principle within tikanga, could exist in relationship with the common law of Aotearoa. This approach carries the risk of distorting tikanga and does not go as far in giving force to the constitutional nature of mana wāhine. It retains many of the ideological difficulties discussed earlier in this article because this option operates within the orthodoxy of the Crown legal system. However, this does not mean it is necessarily at odds with the constitutional approach, and it could be powerful in giving practical force to the legality of mana wāhine, as a step on the longer journey to the ultimate destination of constitutional transformation. However, this pathway must be approached with a sound understanding of potential risks.

V THE CONSTITUTIONAL APPROACH

There is growing and consistent discourse about the need for constitutional transformation in Aotearoa New Zealand to properly uphold Te Tiriti o Waitangi. Māori have long maintained that they did not cede sovereignty to the British in Te Tiriti o Waitangi[76] but rather Te Tiriti represented a bicultural power-sharing agreement.[77] Initiatives such as the 2015 Matike Mai Aotearoa

76 Indeed, the fact that Te Tiriti was not a treaty of cession has been recognised by the Waitangi Tribunal in 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).

77 For a discussion of the historical Māori assertion of Te Tiriti as a bicultural power sharing agreement and the need for the doctrine of parliamentary sovereignty to adapt to that agreement, see Jacinta Ruru and Jacobi Kohu-Morris "Maranga Ake Ai: The Heroics Of Constitutionalising Te Tiriti o Waitangi/

Independent Working Group on Constitutional Transformation have examined how constitutional transformation could occur to realise that bicultural power sharing agreement. Recently, the He Puapua report commissioned by Te Puni Kōkiri has also outlined constitutional amendments that could be made to better recognise the rights of Māori and to fundamentally affirm their tino rangatiratanga and right to self-determination.[78] The authors of He Puapua drew on the recommendations of Matike Mai Aotearoa in formulating the report.

In agreement with this discourse, this article supports the view of Te Tiriti as the foundational constitutional document of Aotearoa.[79] The text of Te Tiriti is clear that the Crown has the right to exercise a limited kāwanatanga, subject to the tino rangatiratanga of Māori.[80] The inherent nature of tikanga as an aspect of tino rangatiratanga therefore affirms tikanga as law, including concepts of mana wāhine.[81] As it currently stands, the Crown has co-opted more than the limited kāwanatanga that Te Tiriti granted, which has been part of the co-option of the constitutional power of mana wāhine.

As such, mana wāhine is a relevant legal principle in the Crown-Māori relationship by virtue of Te Tiriti, deriving from a distinct body of law; tikanga. Tikanga as law operates every day in Aotearoa, in Māori communities. It is more difficult to point to how tikanga can and does operate in the relational space between Crown and Māori, when the State is in breach of tikanga (and therefore of Te Tiriti). This issue requires consideration of how tikanga can operate as constitutional law in the relational space between the Crown and Māori.

The employment of mana wāhine as a constitutional legal principle in this relational space can be subversive. Mana wāhine does not have to operate analogously to a singular human "right" to be upheld or breached. Rather, it imports a holistic philosophy that can be used to guide the shape of constitutional power in Aotearoa as based on Te Tiriti. Matike Mai Aotearoa,

The Treaty of Waitangi in Aotearoa New Zealand"(2020) 48(4) ANU Fed Law Rev 556.

78 He Puapua, above n 52.

79 Currently, Te Tiriti/The Treaty is recognised as a document of constitutional importance, see for example *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) and *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127. Nonetheless it is excluded from domestic enforceability under the common law; *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (Privy Council).

80 Mutu, above n 21, at 30.

81 Williams, above n 24.

in their seminal constitutional proposals, conceptualised constitutional authority as being based on both a concept and a site of power. A site of power is the practical expression of the philosophy that underpins the exercise of authority.[82] If mana wāhine is properly understood as a constitutional legal principle, it could act as one aspect of a tino rangatiratanga philosophy of authority, and thus be used to reshape the sites of power in Aotearoa in line with Te Tiriti. The State currently monopolises the site of power and uses that power to abuse wāhine Māori in prisons, for example. Mana wāhine provides the constitutional obligation to reshape state institutions in a way that upholds, instead of denigrates the hā of Hineahuone. Shaping sites of power can extend to acknowledgment that a western human rights legal framework is unable to truly uphold mana wāhine.

New legal frameworks based in tikanga could be embedded within reshaped sites of power. Systems and process that uphold mana wāhine itself would be embedded so that wāhine Māori are not left to battle for the space to exercise their constitutional and constituting power. The ability to self-determine their own world would be returned to wāhine Māori as a collective, as their mana dictates.

A constitution in which mana wāhine is appropriately embedded can allow for mana wāhine to find appropriate room to operate as law in the Crown-Māori relationship. Currently, the rights protected by the NZBORA are recognised as being of constitutional importance and are given special consideration in the formulation of laws and policy in this country.[83] If mana wāhine is given its proper constitutional recognition, it arguably ought to wield similar influence, and ensure that, within a reformulated constitutional structure that upholds tino rangatiratanga and kāwanatanga, law and policy is developed and applied through a lens that has considered how to uphold and enhance mana wāhine. This could have a powerful impact on our society in healing the denigration of mana wāhine which has resulted in consistent negative outcomes for wāhine Māori over the last two centuries. It would lift up the force of mana wāhine and bring it squarely to the forefront. In this way, it could be powerful to create appropriate legal frameworks that address State

82 Matike Mai Aotearoa "He Whakaaro Here Whakaumu Mo Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation" (University of Auckland, Auckland, 2016) at 31.

83 New Zealand Bill of Rights Act 1990, s 7. See also Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 3.

abuse of wāhine Māori. It could also lead to policy and action that addresses the myriad of issues facing wāhine Māori, such as poverty, domestic violence and more, in a reshaped constitutional structure that centres the collective autonomy of wāhine Māori as active partners in that work. As Michael Reilly describes in relation to the powerful atua wāhine who featured in Māori cosmology and often faced adversity, such as Hinenuitepō, "[b]y taking control of their destiny, they countered any loss of mana".[84] This demonstrates the precise importance of giving "control of their destiny" to wāhine Māori in order to uphold mana wāhine. The work being undertaken in Wai 2700 may well be critical in understanding how these structural changes can be made.

VI THE COMMON LAW PATHWAY

The second option that arises is to consider whether mana wāhine could operate as a discrete legal principle informing the development of an endemic Aotearoa New Zealand common law under current constitutional arrangements.[85] There has always existed a relationship between the common law and tikanga since the arrival of British common law to Aotearoa.

This relationship between tikanga as law and English-derived common law was confirmed when the Supreme Court in *Takamore v Clarke* held that tikanga is part of the values of the common law of New Zealand.[86] Takamore left the exact boundaries of that relationship unclear, but a succession of later cases continued to affirm the relevance of tikanga. In *Ngāti Whatua Orakei v the Attorney-General*, the Supreme Court found that "rights and interests according to tikanga may be legal rights recognised by the common law".[87] In *Trans-Tasman Resources v Taranaki Conservation Board*, the Court of Appeal found that it is:[88]

> …axiomatic that the tikanga Māori that define and governs the interests of tangata whenua in the taonga protected by the Treaty is an integral strand of the common law of New Zealand.

Significantly, in *Ellis v R*, both the appellant and the respondent agreed that

84 Reilly, above n 9, at 29.

85 For the concept of an endemic law of Aotearoa New Zealand developing with reference to both tikanga and English common law see Ruru, above n 64, at 217, and Williams, above n 24, at 12.

86 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].

87 *Ngāti Whatua Orakei v the Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116, at [77].

88 *Trans Tasman Resources v Taranaki Conservation Board* [2020] NZCA 86, [2020] NZRMA 248, at [177].

tikanga was of relevance to the question of whether an appeal could continue after death, in order to potentially vindicate the mana of the appellant.[89] The Supreme Court judgment has not yet been released so it is unclear precisely how the bench has taken tikanga into account in *Ellis v R*. However, it is clear there is a growing acknowledgment that tikanga has a relationship with the common law derived from the English tradition in some form.

Precisely because the boundaries between tikanga and the English-derived common law are unclear, it is not certain how mana wāhine could act in conjunction with the common law of Aotearoa New Zealand. Nonetheless, there are already cases that are beginning to recognise in parallel both the indigenous and western frameworks in dealing with issues traditionally framed as human rights problems. In *Sweeney v The Prison Manager*, Spring Hill Corrections Facility,[90] Palmer J found that Mr Sweeney's NZBORA rights to natural justice had been breached by the unilateral revocation of his visitor pass at the Spring Hill Corrections Facility. While this is an orthodox application of the western rights framework, Palmer J then exercised his discretion to issue a formal declaration of unlawfulness as a remedy "in order to uphold Mr Paul Sweeney's mana and vindicate his rights".[91] Consequently, the Court recognised that Mr Sweeney's mana was important in a legal sense. This links back to the way mana was employed as a legal principle in *Ellis v R*. It would arguably be a small but impactful step to further recognise that mana itself can be unlawfully trampled, without the need to first mould a claim into the western framework of rights.

In this way, it is arguable that the endemic common law of Aotearoa New Zealand could support a cause of action that is based in mana wāhine. In considering this article's example of the State abuse of wāhine Māori in prisons, mana wāhine as a legal principle could be understood as contextualising and providing the legal framework for the relationship between the Department of Corrections and the wāhine in its custody. The rights framework traversed above focuses on the individual, whereas tikanga Māori is fundamentally about collectivity and one's connections as part of a wider kinship group. As Justice Joe Williams describes, whanaungatanga is central to tikanga and means that no one was ever just an individual.[92] He further explains that whanaungatanga

89 *Ellis v R* [2020] NZSC 89.
90 *Sweeney v The Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181.
91 At [76].
92 Williams, above n 24, at 4.

is "the fundamental law of the maintenance of properly tended relationships."[93] In this sense, where the Western worldview is largely premised on the concept of individual rights, tikanga Māori turns on a sense of obligation arising out of relationships. The relationship between the Department of Corrections and women in its care should be understood as framed by the tikanga of mana wāhine. In conceptualising the tikanga of mana wāhine as a legal force therefore, it could be understood to give rise to an obligation upon the Department of Corrections to treat wāhine Māori in its custody in a way that upholds and does not denigrate their mana and tapu. A failure to do so could therefore be conceptualised as a legal failure, breaching the obligations that the tikanga of mana wāhine gives rise to. This could therefore form the basis of a claim against Corrections, rather than requiring a wāhine to demonstrate breach of s 9 or s 23(5) of NZBORA, for example. In taking this relational approach, individual outcomes can be reached for particular women, while still appropriately setting Corrections obligations to wāhine Māori as a collective, in line with the collective nature of mana wāhine and the Māori worldview.

In addition, the explicit recognition of mana wāhine as a principle informing the common law could hold the potential to give rise to interpretive presumptions for statutory interpretation, so that contentious legislation would be required to be interpreted through a lens that would, as far as possible, be mana-enhancing for wāhine. Indeed, in the recent *Trans-Tasman Resources*,[94] the Supreme Court recognised an interpretive presumption of consistency with Treaty principles, stating that the constitutional significance of the Treaty means that "the courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question.", affirming previous authority[95] If it is accepted that mana wāhine is protected under Te Tiriti, as this article has argued, then an interpretive presumption in favour of mana wāhine may be a natural extension of the Trans-Tasman Resources position, tying back to the constitutional relevance of mana wāhine.[96] Such an avenue could aid in centring the collective nature of mana

93 At 4.

94 *Trans-Tasman*, above n 79.

95 At [151], citing *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210 and 233; *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184; *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [36]–[37]; and *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [46]

96 Although noting that the *Trans Tasman* presumption is for consistency with Treaty principles, rather than with Te Tiriti, under which mana wāhine is most strongly protected.

wāhine by contributing to the way statutory frameworks are interpreted and thus how they impact wāhine Māori. These possibilities require much further thought and development but this article touches on this to demonstrate that these are possibilities worth full exploration that can be considered when this conceptual shift is made to viewing mana wāhine as a legal force.

In this way, employing mana wāhine as the mechanism for redress in this way could create a necessary shift. Using mana wāhine to contextualise the boundaries of relationships of obligation between State actors and wāhine Māori, instead of attempting an argument under the NZBORA for example, places the hara (wrong) in context of the world that wāhine Māori inhabit. It does not homogenise the female experience with that of men, rather, it provides an avenue for protection that specifically recognises the cultural context of harm outside of the traditionally male driven, individualistic western rights framework. This approach operates at the interface of the relationship between the Crown and Māori, in some ways making it an appropriate site for engagement between these two legal systems.

However, there are risks in this approach, and it raises the broader question of whether it is desirable to weave tikanga principles such as mana wāhine into a common law that nonetheless operates under a Te Tiriti-inconsistent constitutional system. To do so imports the ideological difficulty that, without constitutional transformation, common law mechanisms remain embedded in the colonial constitutional construct.

One response is that the value in conceptualising mana wāhine as a principle informing the common law is that it requires the State to come into te ao Māori and engage on tikanga terms. It operates at the interface of the Crown-Māori relationship. The invocation of mana wāhine fundamentally invokes the entire Māori worldview, because mana wāhine is embedded in creation and is a holistic principle grounded in collectivism. Such engagement arguably upsets some of the underlying anchor points of the colonial constitutional construct by challenging the Western individualistic, liberal framework that underpins the English common law. This is emphasised when remembered that the legality of mana wāhine cannot be severed from its fundamental constitutional nature. As leading scholars of indigenous law, John Borrows and Leonard Rotman, suggest for the Canadian context:[97]

97 John Borrows and Leonard I Rotman "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference" (1997) 36 ALTA L REV 9, at 28. See also Natalie Coates' discussion of Borrows' and

> Clearing a site in the common law that respects Aboriginal perspectives only serves the limited purpose of providing a toehold to bridge out of colonial territory into one they can call their own. Therefore finding this place in the common law does not represent a consent to colonialism. The use of sui generis principles within the common law pours footings for a bridge that permits an exit from colonialism's hostile and confining thicket.

In this way, the consideration of mana wāhine as a legal principle informing the common law could represent a way to begin hacking out of the "hostile and confining thicket" that colonialism has captured mana wāhine within. It is a "limited purpose" but one that could have immediate practical effect.

There is also the risk that mana wāhine as a concept may be weakened, distorted or further denigrated by building its relationship with the common law. Mana wāhine as a metaphysical, social and legal force has already suffered denigration at the hands of the State and to invite it into conversation with the State-bound common law construct may continue this. It is evident that mana wāhine as a concept has been warped even within te ao Māori.[98]

Therefore, if such a path is followed, further, measured consideration will be required at each step so that it is utilised in a way that protects the integrity of the tikanga and the living mana of the wāhine in question.[99] This also requires consideration of broader practical issues, such as the willingness and ability of both the legal profession and the judiciary to properly engage with tikanga. This article does not consider the full breadth of those issues, but it seems inevitable that judicial engagement would require support from pūkenga (experts), should those with the relevant knowledge wish to support such a pathway. The use of pūkenga is already being deployed in other cases involving tikanga.[100]

The inverse to the risk of distortion, is that the centring of mana wāhine as

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Rotman's perspective, for the New Zealand context of the recognition of tikanga in the common law in Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2015) 1 NZLR 1.

98 See Mikaere, above n 10.

99 Other indigenous jurists have suggested that indigenous laws may be insulated from distortion through debate in non-indigenous spaces, because indigenous laws persist in their own world. See Val Napoleon "Did I Break It? Recording Indigenous (Customary) Law" (2019) 22 PER/PELJ 2. Napoleon suggests that, at least in the classroom setting, indigenous law will not be damaged by debate, because it has an existence outside of the classroom. This may apply in the judicial sphere, although the differing context requires caution because the official nature of judgments arguably provides greater scope for mischaracterisations to become entrenched.

100 *Re Edwards (No 2)* [2021] NZHC 1025.

applicable law may help to uphold mana wāhine, and begin to clear the thicket of misunderstanding that has warped it, by requiring both te ao Pākehā and te ao Māori to delve into the depths of its meaning (if done with appropriate support).[101] This is the power of the law. The law can shape our values as a society, as much as it is drawn from our values. As Te Kooti famously said "mā te ture anō te ture e akī"— only the law can strike back against the law. If the law is conceptualised as a broad force that belongs neither to te ao Māori nor to te ao Pākehā, the centring of mana wāhine as a legal force may act as the law that pushes back against the same legal structure that has historically side-lined the inherent mana of wāhine and imposed patriarchal values.

In summary, although the common law may offer one avenue for giving power to mana wāhine as a legal force, it is still the ultimate position of this article that mana wāhine is first and foremost a constitutional principle protected under Article Two of Te Tiriti. As earlier noted, the journey towards constitutional transformation is still ongoing. As such, the common law route may offer an alternative, a pragmatic stop gap measure to provide alternative solutions for wāhine Māori in the face of current mechanisms that are conceptually deficient. Annette Sykes has previously cautioned against "allowing the use of Māori values to advance a position of justice which would be denied Māori because of the institutional pitfalls that Māori confront in their quest for justice".[102] The recognition of mana wāhine as a legal principle may be able avoid this pitfall if approached with care, precisely because it can fill a justice gap for wāhine Māori in relationship with the State, that is not sufficiently covered by the current legal frameworks in place. It is not a path without risks, but it may be practically effective.

VII CONCLUSION

The constituting and constitutional power of wāhine Māori has been denigrated across time and must be afforded its proper place. Recognising that mana wāhine is a constitutional principle will be an important step in that ongoing journey. Understanding that mana wāhine is an active legal principle may have the potential to provide avenues to assert that constitutional importance and

101 This is not to say that Māori communities cannot carry out the recentering and rediscovery of aspects of mana wāhine within their own context, and indeed such work is already occurring. This is specifically in the context of discussion about the relationship between the Crown and wāhine Māori.

102 Annette Sykes "The Myth of Tikanga in The Pakeha Law" (Nin Thomas Memorial Lecture, Faculty of Law, University of Auckland, 5 December 2020).

to make progress. This article has discussed the mechanisms that exist currently and has concluded they are of limited assistance, although there are extant options. Two possible approaches grounded in tikanga have been explored, as a means of encouraging imagination and further conceptualisation of how mana wāhine could be employed.

Fundamentally, this article affirms the need for constitutional transformation based on the power-sharing vision of Te Tiriti. This must include embedding the principles of mana wāhine within constitutional institutions so that the unique constitutional and constituting power of women is explicitly provided for in the exercise of power in Aotearoa New Zealand. Current constitutional arrangements do not provide appropriate space for mana wāhine, as has been demonstrated by the various ways in which this force has been denigrated directly and indirectly by the Crown since 1840. Consideration is needed as to how this constitutional embedding might flow into influencing the very structure of law and policy, so that it is formulated and applied in a way that gives force to mana wāhine, just as fundamental human rights in the NZBORA are currently given constitutional precedence.

This article has also explored the possibility of empowering the legality of mana wāhine through the common law, as one way to seek better outcomes than the state law currently provides. This pathway presents risks and potential gains and should be approached with care.

Ultimately this article is intended to spark further conversation about the possibilities the law offers to respond to the unique challenges wāhine Māori face, sitting alongside the ongoing Mana Wāhine claim currently before the Waitangi Tribunal. It does not provide all the answers and represents only the continuation of a broader discussion. There are multiple ways in which mana wāhine as a legal force could be employed but what is evident is that it has untapped power. As the Mana Wāhine claim progresses through the Waitangi Tribunal process, it is timely to consider how that power can be utilised within the legal and constitutional sphere for the benefit of Aotearoa New Zealand society as a whole. We have the ability to turn to our unique historical, legal and social circumstances and recognise that these are values that have always existed in Aotearoa New Zealand. It is time to bring them squarely to the forefront once more.