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Does the Whanganui River Own Itself?

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ABSTRACT: Since it was introduced, the legal personhood of Te Awa Tupua (the Whanganui River—located in the North Island of Aotearoa, New Zealand) has often been associated with the broader international discourse on rights of nature. This article focuses on one specific aspect of this association: the extent to which legal personhood can be said to result in 'self-ownership' for the Whanganui River. The legal personality of the river has been recognized by the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, which is intended to give effect to a Treaty of Waitangi settlement between Whanganui iwi (a collective terms for Māori tribal groups associated with the river) and the New Zealand Government (or 'Crown'). The purpose of the Act means that it is necessary to have an understanding of te ao Māori (the Māori world) and tikanga Māori (Māori law and custom), and of the relational values and ontology that provide its foundations, in order to understand the legal personhood of the river. In tikanga Māori, concepts such as whakapapa (ancestral genealogy) and whanaungatanga (a relational ethic of kinship) are fundamental. These concepts encompass more-than-human nature and directly challenge the human/nature dichotomy that sits at the heart of Western property law. To support the inquiry into the extent to which legal personhood can be said to result in self-ownership for the Whanganui River, this article is divided into three parts. In the first part, some key principles of tikanga Māori are introduced, and the relationship of these principles to certain Western jural concepts that are relevant to ownership is discussed. In the second part, ownership of freshwater is discussed. In the third and final part, the question of self-ownership is considered in the light of the preceding discussions.

Keywords: Legal personhood; Rights of nature; Property rights; Environmental law; Ecological law; Tikanga Māori; Whanganui River

1. Introduction

Te Awa Tupua is the name given to the Whanganui River by Whanganui iwi. There is no direct translation of "Te Awa Tupua" into English, but Anne Salmond has explained that the name can be understood as "river with ancestral power" [1]. The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (TATA) recognises Te Awa Tupua to be "… an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements" (TATA, s 12). TATA also recognises the inalienable connection between Whanganui iwi and the river: "*Ko au te Awa, ko te Awa ko au*: I am the river and the river is me" (TATA, s 13). Perhaps most intriguingly from a Western legal perspective, TATA declares that "Te Awa Tupua is a legal person and has all the rights, powers, duties and liabilities of a legal person" (TATA, s 14). Since it was introduced, the legal

personhood of Te Awa Tupua (the Whanganui River—located in the North Island of Aotearoa, New Zealand) has often been associated with the broader international discourse on the idea of rights of nature [2]. This article focuses on one specific aspect of this association: the extent to which legal personhood can be said to result in 'self-ownership' for the Whanganui River. To a limited extent, self-ownership can be seen as an obvious outcome of TATA, which transfers the legal title to those parts of the riverbed previously held by the New Zealand Crown to Te Awa Tupua itself (TATA s 41). However, the flowing water in the river cannot be owned in a Western legal sense, and, as TATA is examined more closely and in context, it becomes apparent that speaking in terms of 'ownership' is fundamentally the wrong approach to describing the new legal arrangements.

In the Anglo-American legal tradition (broadly referred to in this article as 'Western law'), introduced to colonial New Zealand in the mid-late 19th century, the concept of a 'legal person' is used to describe an entity that has its own distinct and enforceable legal interests. Traditionally, Western law differentiates between 'natural' and 'artificial' legal persons; the former are individual human beings, whereas the latter are corporate legal entities typically comprising a defined group or succession of human beings. In terms of Western property law, a key distinction is drawn between a legal person or subject and a thing or object (including land). Things are typically either owned by persons, sometimes in common, or are regarded as *res nullius* ('nobody's thing'). Legal ownership can be understood as a bundle of legal interests that a person holds in respect of a thing, which is extensive enough to result in a sufficient degree of exclusive possession. This framing sets up a legal dichotomy and hierarchy between humans and non-human nature, which dates back at least to Roman law. In simplistic terms, Western property law (to be distinguished in this context from the broader category of environmental law) requires any 'interests' of non-human nature to be presented in terms of the interests of its human owners. TATA presents a fundamental challenge to this narrative by recognising that the Whanganui River has its own legal rights and interests (TATA, s 14) relating to its own health and wellbeing (TATA, s 13).

There are, of course, many ways in which Western legal systems recognise and provide for intrinsic and societal environmental values which are not reducible to property rights. In New Zealand, examples of this include the Conservation Act 1987 (in which "conservation" is defined as "the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations") and the Resource Management Act 1991 (which seeks "to promote the sustainable management of natural and physical resources"). Due to its physical characteristics and public importance, naturally flowing water has a distinctive legal status in Western law, and is also not described in terms of property rights. While the bed of a river or lake can be owned, the water is categorised as *publici juris* ("of public right") and is not amenable to exclusive possession. Notwithstanding this complexity, the way in which Western property law characterises the relationship between humans and non-human nature remains deeply influential and is rooted in a different ontology to te ao Māori (the Māori world). The statutory recognition of Te Awa Tupua as a legal person, with its own rights and interests, disrupts the traditional Western legal framing, raising novel questions of legal theory from a Western legal perspective. It is quite common in rights of nature discourse for the legal personhood of natural entities such as rivers, forests, and mountains to be characterised in terms of a 'resource' that 'owns itself' [3]. Both critics and proponents of the idea of rights of nature often assume that extending rights to natural entities means extending or transferring property rights in the entity to the entity itself [4–7]. This approach is referred to in this article as 'self-ownership', and the article focuses on why it is neither accurate nor helpful for understanding the legal personhood of Te Awa Tupua.

To support the inquiry into the extent to which legal personhood can be said to result in self-ownership for the Whanganui River, the article is divided into three parts. In the first part, some key principles of tikanga Māori are introduced, and their relationship to certain Western juridical concepts relevant to

ownership is discussed. The tension between tikanga Māori and Western law can be traced back to fundamental ontological and axiological differences. Western law traditionally assumes a normative-moral standpoint of value-individualism, grounded in science and economics, and treating adjudication between the conflicting interests of human individuals as the core function of law [8]. In contrast, tikanga Māori applies a more collective and relational set of values, grounded in mātauranga Māori and whanaungatanga. "Mātauranga Māori" can be translated as " Māori knowledge—the body of knowledge originating from Māori ancestors, including the Māori worldview and perspectives, Māori creativity and cultural practices" [9]. "Whanaungatanga" can be translated as "relationship, kinship, sense of family connection—a relationship through shared experiences and working together which provides people with a sense of belonging. It develops as a result of kinship rights and obligations, which also serve to strengthen each member of the kin group. It also extends to others to whom one develops a close familial, friendship, or reciprocal relationship" [9]. As will be discussed, whanaungatanga also extends to kinship relationships with nature.

In the second part of the article, ownership of freshwater is discussed, and in the third and final part, the question of self-ownership is considered in the light of the preceding discussions. The article concludes that characterising the legal personhood of Te Awa Tupua in terms of self-ownership is misleading. The purpose of TATA is to give effect to the Treaty settlement between Whanganui Iwi (Māori tribal groups associated with the Whanganui River) and the New Zealand Crown (*i.e.*, government). This Treaty settlement is premised on an approach that gives effect to tikanga Māori (Māori law and custom) in the context of the relationship between Whanganui Iwi and the Whanganui River. Tikanga Māori does not share the same understanding of the relationship between humans and the natural world that is found in Western property law. Defaulting to a conventional Western understanding of individual property rights and corporate legal personality would therefore contradict and undermine the text, purpose, and spirit of the Treaty settlement.

Instead, the legal personhood of Te Awa Tupua can be better understood as a key element of a strategic approach that aims to achieve a fundamental shift in the values applied to decision-making that affects the health and well-being of the Whanganui River. This approach enables the viewpoints and interests of other stakeholders, such as the New Zealand government, private businesses, and the public, to be considered, while ensuring that decision-making remains consistent with relevant aspects of tikanga Māori as set out in TATA (especially TATA s 13—Tupua te Kawa). The application of this strategic approach under TATA, and the potential for application of similar strategies in different contexts (including outside of Aotearoa New Zealand), has great potential in terms of future research. However, these operational matters are not addressed in detail in this article, which focuses instead on preliminary theoretical and conceptual questions concerning property rights and ownership.

2. Tikanga Māori

In its seminal 2001 report *Māori Custom and Values in New Zealand Law* [10], the New Zealand Law Commission advised that:

> "If society is truly to give effect to the promise of the Treaty of Waitangi to provide a secure place for Māori values within New Zealand society, then the commitment must be total. It must involve a real endeavour to understand what tikanga Māori is, how it is practised and applied, and how integral it is to the social, economic, cultural, and political development of Māori, still encapsulated within a dominant culture in New Zealand society."

To begin to understand te ao Māori (the Māori world) and tikanga Māori (Māori law and custom), it is necessary to have some understanding of the relational values and ontology that provide its foundations. In tikanga Māori, concepts such as whakapapa (ancestral genealogy) and whanaungatanga (a relational ethic

of kinship) are fundamental. These concepts encompass more-than-human nature and directly challenge the human/nature dichotomy that sits at the heart of Western property law.

A crucially important element of TATA is section 13, which states that Tupua te Kawa comprises the intrinsic values that represent the essence of Te Awa Tupua. These "metaphysical elements" are also intended to be part of the legal description of Te Awa Tupua (the legal person):

"*Tupua te Kawa*

(a) *Ko te Awa te mātāpuna o te ora*: the River is the source of spiritual and physical sustenance:
Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the health and well-being of the iwi, hapū, and other communities of the River.

(b) *E rere kau mai i te Awa nui mai i te Kahui Maunga ki Tangaroa*: the great River flows from the mountains to the sea:
Te Awa Tupua is an indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and all of its physical and metaphysical elements.

(c) *Ko au te Awa, ko te Awa ko au*: I am the River and the River is me:
The iwi and hapū of the Whanganui River have an inalienable connection with, and responsibility to, Te Awa Tupua and its health and well-being.

(d) *Ngā manga iti, ngā manga nui e honohono kau ana, ka tupu hei Awa Tupua*: the small and large streams that flow into one another form one River:
Te Awa Tupua is a singular entity comprised of many elements and communities, working collaboratively for the common purpose of the health and well-being of Te Awa Tupua."

In its second report on tikanga Māori, the New Zealand Law Commission explained how tikanga operates in Māori life in jural ways, in the sense that it "… relates to powers, rights, duties, liabilities and other interests or restrictions that govern relationships" [11]. The report acknowledges that this approach of "… seeing tikanga as a system and … providing a jural analysis of the important purposes of tikanga concepts and how they may be grouped" differs from most explanations, and cautions that " terms such as "power", "right" or "title" have different connotations in a Māori context. It is important not to presume that tikanga translates into norms exactly equivalent to those of non-Māori law" [11]. The Law Commission's approach helps to dismiss any preconception that when TATA, for example, refers to Te Awa Tupua having all the "… rights, powers, duties and liabilities of a legal person", this must be simply referring to jural relationships as found in Western law and based on a Western worldview. The relevant rights, powers, duties, and liabilities of Te Awa Tupua may equally (and more appropriately) be found in tikanga Māori and based on te ao Māori. This approach of looking to tikanga to determine the legal rights of Te Awa Tupua finds judicial support at the highest level in New Zealand. For example, the New Zealand Supreme Court has confirmed that [12]: "Rights and interests according to tikanga may be legal rights recognised by the common law and, in addition, establish questions of status which have consequences under contemporary legislation".

The fact that tikanga may translate into legal rights does not mean that tikanga can be fully expressed in jural terms: "The term 'tika' means 'to be right'. Tikanga Māori, therefore, means the right Māori way of doing things. It is what Māori consider to be just and correct" [13]. As this implies, tikanga represents an expansive and holistic concept of justice; it includes "the tools of thought and understanding" as well as applied law and ethics [14]. Related to this is the fact that tikanga Māori is " fundamentally values based not rules oriented" [15]. As the Law Commission has explained [11]:

> "Tikanga Māori comprises a spectrum with values at one end and rules at the other, but with values informing the whole range. It includes the values themselves and does not differentiate between sanction-backed laws and advice concerning non-sanctioned customs. In tikanga Māori, the real challenge is to understand the values because it is these values that provide the primary guide to

> behaviour. Aspects of tikanga may be subject to a particular interpretation according to certain circumstances, but then reinterpreted in the light of other circumstances. Thus, tikanga Māori as a social system was traditionally pragmatic and open-ended, and it remains so today. It is by understanding these underlying values that order may be discerned, and tikanga may be appreciated."

This contrasts with a Western legal positivist approach, according to which a much clearer distinction is drawn between legality and morality. Another key difference between tikanga and Western legal systems is the source of law. The English common law was originally based partly on British customary rights and practices (in addition to laws imported from the continent through Roman and Norman conquest); however, over time, this community basis for the common law has been superseded by rules of legal precedent [16]. Thus, today, while " the common law is generated by the work of the courts, tikanga flows out of the matrix of iwi, hapu and whanau relationships that fundamentally frame the Māori world" [13].

3. Principles of Tikanga Māori

In the brief overview of certain important principles of tikanga Māori that follows, the Law Commission's grouping of core tikanga concepts into five categories (a.—d. below) has been adopted [11]. Despite this categorisation, it is important to remember that the fundamental concepts of tikanga "… are intertwined and cannot be defined in isolation or translated by a simple English word. They exist in an interconnected matrix" [13]. Similarly, a key finding of the Law Commission is that tikanga Māori cannot be regarded as a "grab bag" of principles; instead, the principles of tikanga are interrelated and represent a consistent worldview [11]. It is also important to remember that this interconnected matrix is grounded in a very different cultural context and worldview. Joan Metge has cautioned that [17]:

> "To come to grips with Maori custom law, it is necessary to recognise that Maori concepts hardly ever correspond exactly with those Western concepts which they appear, on the surface, to resemble. While there is a degree of overlap, there are usually divergences as well. Even if the denotation—the direct reference—is substantially the same, the connotations are significantly different."

In *Ellis v R*, the NZSC made a similar point, emphasising the importance of maintaining the integrity of tikanga, and finding that care must be taken not to "pick and choose" elements of tikanga, which remains rooted in its own world [13].

3.1. Whakapapa and Whanaungatanga

The understanding of Te Awa Tupua as "river with ancestral power" [1] is grounded in the concept of whakapapa, which, among other things, "records genealogical layers and notes connections to place and community, in ways that may reach beyond human ancestors" [11]. As explained in the Statement of Tikanga presented in the *Ellis* case: "The world and everyone in it is part of a huge interlocking family tree" [13]. This resonates strongly with a contemporary scientific understanding of nature, which recognises that everything in our world is interconnected. However, the normative implications of this scientific understanding are only beginning to find their way into Western legal systems.

Whanaungatanga also refers to relationships, and specifically the centrality of relationships to Māori life [18], described by Williams as "the fundamental law of the maintenance of properly tended relationships" [16]. It is the most pervasive of all the values of tikanga Māori [19], and this is explained by the fact that [10]:

> "… in traditional Māori thinking, relationships are everything—between people; between people and the physical world; and between people and the atua (spiritual entities). The glue that holds the Māori world together is whakapapa, identifying the nature of relationships between all things."

The reference to "relationships between all things" indicates that the concept of whanaungatanga encompasses rights and obligations between individuals and the ecosystems in which they live, as well as between current and future generations [20]. The Law Commission describes whakapapa and whanaungatanga as "concepts of connection" and as "structural norms" describing relationships which shape the Māori worldview [11]. Observing that the two concepts are closely linked and can be difficult to differentiate, they cite Nin Tomas, who considered that [21]:

> "… whanaungatanga is widely used to refer to the responsibilities inherent in kinship relationships, while whakapapa is used to represent the genealogical connections that form the basis of those relationships."

The fact that tikanga begins by recognising interconnectedness and prioritises relational values has profound implications. The result is that individuals always have whanaungatanga responsibilities—they are "never just individuals" [13]. These responsibilities then "… drive tikanga behaviours, expressed in norms … such as kaitiakitanga (guardianship) and manaakitanga (generosity)" [11]. The prioritisation of relational values has two key implications in the context of property and environmental law. Firstly, tikanga treats nature as much more than merely a store of instrumentally valuable resources to be distributed among people. Secondly, tikanga is far more collective in its outlook, in contrast to Western law, which is structurally fixated on adjudicating between the competing claims of individuals. As Carwyn Jones explains, in tikanga [22]:

> "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."

In terms of the legal status of Te Awa Tupua—the Whanganui River, which is first and foremost an expression of whakapapa and whanaungatanga, it is clear from the above that it would be a mistake to approach the subject by beginning with the Western legal concept of property rights, which tend to describe individual entitlements, often without direct reference to associated responsibilities. Instead, relational values and collective responsibilities should be the starting point.

3.2. Mauri, utu, and ea

The Whanganui River has its own mauri, or 'life-force'. Utu and ea describe ways in which this mauri is expressed and how we should relate and respond to it. Each of these concepts will be relevant for decision-making processes concerning the river, just as (in a general sense) they would be relevant to decision-making concerning other living beings that form part of the interconnected web of whanaungatanga.

The Law Commission describes mauri, utu, and ea as "concepts of equilibrium or balance", that "… function as prescriptive norms, which must be maintained" [11]. Te Aka Māori Dictionary translates mauri as [9]:

> "Life principle, life force, vital essence, special nature, a material symbol of a life principle, source of emotions—the essential quality and vitality of a being or entity. Also used for a physical object, individual, ecosystem, or social group in which this essence is located."

In the broadest sense, mauri is "the distinctive nature all things have" [11]. Protecting and restoring mauri requires maintaining "a physical connection to whenua", which will include drawing on the resources of the land [11]. In this respect, the concept of mauri differs from the conservation ethic of intrinsic value and the concept of wilderness in United States law, both of which emphasize preservation and non-use, other than for recreational purposes, rather than a more active relationship between people and the rest of nature. In contrast, according to mauri, human participation is constrained by the need for activities to be

respectful and consistent with ensuring the health and well-being of the natural environment. Abuses of mauri create an imbalance and are therefore "hara" or wrongs [11]. Throughout tikanga Māori there is a strong focus on reciprocity—the offence or transgression is to be understood in terms of imbalance: "a violation of tikanga resulting in harm to the affected party, including harm to their mana, and thus an imbalance is created between those involved" [13].

Another way in which the concept of mauri contrasts with a contemporary Western understanding of legal rights is that legal rights—despite inevitably correlating to a duty of some kind [23]—are often regarded as freestanding entitlements, rather than working to maintain balance. Nonetheless, the idea of Te Awa Tupua having a legal right to enjoy mauri is quite comprehensible. This idea is also promising in terms of encouraging active public engagement and an understanding of collective responsibilities.

Translating as "repay, pay, respond, avenge, reply, answer" [9], utu has been described in general terms as "the principle of balance and reciprocity" [24]. It is another concept premised on the desirability of maintaining a state of balance: "utu underpinned the essential 'give and take' nature of the Māori social and legal order" [8], and refers to "…the basic principle of reciprocity underlying the operation of all Māori legal traditions" [18]. Thus, utu engages with Western jural concepts of compensation and liability for breaking the law [1], while remaining focused on "… the maintenance of relationships by striving for balance of contribution" [24]. Again, the integrated and holistic approach of tikanga, centred on the key concept of whanaungatanga, helps to distinguish utu from Western jural concepts. In Western law, a right to compensation is not generally understood to impose moral or legal obligations on the injured party. In contrast, according to tikanga, utu cannot be separated from the accompanying values of "… aroha and manaakitanga, which require respect, empathy and generosity" [24].

Translating as "be satisfied (an account, score, *etc.*), satisfy, settled, avenged" [9], the concept of ea also recognises the importance of maintaining balance and securing peaceful relationships: "The concept of ea refers to a resolved or settled state" [11], or "… the state of resolution or equilibrium that is achieved once the appropriate action has been taken to address the breach" [22]. In contrast with a Western jural approach, which aims for final judgment and a definitive determination of rights, the dynamic nature of relationships means that achievement of ea must be an ongoing and reciprocal process. Engaging with this concept could potentially have profound implications for Western environmental law. Although it is obviously concerned with the effects of human activities on the natural environment, Western environmental law has its foundations in property law and therefore tends to focus on the need for some kind of distributive or transactional justice between human individuals (sometimes extended to include future generations). Through concepts such as ea, which extend to achieving balance in our relationships with more-than-human nature, tikanga Māori encourages a broader perspective. This may weaken presumptions that favour the commodification of nature, and lead to a better understanding of the responsibilities of landowners, including "… the need to maintain and perpetuate relationships through ongoing reciprocal exchanges" [22]. For decision-making processes under TATA, it can be expected that recognising the mauri of the Whanganui River, and applying the principles of utu and ea, will result in more respectful and responsive arrangements—rather than outcomes which simply result in a transfer or vesting of legally enforceable property-type entitlements.

3.3. Mana, Tapu and Noa

The Law Commission describes mana, tapu, and noa as "concepts relating to the status of an entity", and as "… relational norms that achieve regulative purposes. Relationships are organised and interactions defined by reference to these concepts" [11]. For Te Awa Tupua, these relational norms will also help to define our understanding of what the "rights, powers, duties and liabilities" (TATA, s 14) consist of.

Mana is a broad concept "combining notions of psychic and spiritual force and vitality, recognised authority, influence and prestige, and … power and ability to control people and events" [25]. Although

often translated in jural terms as power, authority, jurisdiction, and right, mana also refers to the way in which these outcomes are achieved, which, according to tikanga, is by fulfilling your responsibilities [25]. As Tāmati Kruger (chief negotiator for Tūhoe in the Te Urewera Treaty Settlement) has explained, "mana must always have a source (whether in gods, ancestors, people or land), and that source must be established and maintained by discharging certain responsibilities to the source of that mana" [11]. Kruger concludes that "you cannot divorce responsibility from mana". Again, this marks a clear distinction from the Western jural conception of a legal right, which can often be reified and transferred as if it were a commodity and which, as a general rule, does not entail responsibility on the part of the right holder. In contrast, mana "… is characterised by both respect and a high level of accountability, exercised through hui and rūnanga" (meetings and formal deliberations) [24].

Although one of the English words sometimes used to translate mana is "power", mana must not be confused with the Western concept of power. Consistent with whanaungatanga, mana is strongly relational: "… the concept of mana is itself understood within the framework of whanaungatanga, and whanaungatanga provides some important constraints and limitations on the exercise of public power" [22]. This is an especially important consideration in the context of TATA, where public officials will often make decisions impacting on the health and well-being of the Whanganui River. In *Ellis v R*, Williams J explained that "Mana occupies the same space as common law principles of individual dignity and integrity, but is a more woven, less individualistic concept…" [13]. According to tikanga, "… *mana whenua* is the authority sourced in the land itself" [18]. Carwyn Jones gives the example of evidence of Ngāti Pahauwera to the Waitangi Tribunal in its *Report on the Mohaka River*, stating that their mana (in this context "authority") had been [18]:

> "… passed down from ancestors over many generations, and that the essential element of the mana of Ngāti Pahauwera is the fact that it comes from the river itself. Thus, their mana is bound up in the joint history of the community and the river, and is reflected in the central role the river has in the identity of the people."

In *Ko Aotearoa Tēnei* [26], the Waitangi Tribunal considered that mana and kaitiakitanga go together, and those who have mana " must exercise it in accordance with the values of kaitiakitanga—to act unselfishly, with right mind and heart, and with proper procedure" [26]. The closest common law approximation could perhaps be found in fiduciary relationships, relationships of trust where the power of a trustee to act is always constrained by a duty of care arising from the trustee's relationship with the beneficiary on which the power is based. For decision-making under TATA, this means that we are not primarily talking about a situation in which the Whanganui River (or its legal guardians) must seek to enforce its new property rights against competing claims, with the Courts ultimately defining the outcome and crystalising the competing entitlements of each party. Instead, recognising the reciprocal nature of mana means that all those who seek to have a relationship with the river must recognise their responsibility to ensure its health and wellbeing.

Tapu refers to "the spiritual quality of all things and the associated restrictions and regulations that relate to the spiritual dimension" [18]. The Māori Dictionary translates tapu (in part) as [9]:

> "Restriction, prohibition—a supernatural condition. A person, place, or thing is dedicated to an atua and is thus removed from the sphere of the profane and put into the sphere of the sacred. It is untouchable, no longer to be put to common use."

However, as Mead has explained [14]:

> "Tapu is everywhere in our world. It is present in people, in places, in buildings, in things, in words, and in all tikanga. Tapu is inseparable from mana, from our identity as Māori and from our cultural practices."

The Law Commission has observed that tapu is "closely allied with concepts of mana and mauri", and that it "works to regulate, protect and preserve mana and mauri by imposing behavioural restrictions or requiring that certain actions or processes be followed" [11]. Thus, tapu can be thought of as involving " a restriction for spiritual purposes", or more precisely, " involving varying degrees of restriction" [11]. These restrictions can be lifted in appropriate circumstances, thereby managing the implications of tapu in everyday interactions, and tapu must be understood together with the concept of noa, which describes "… when tapu is removed or cleared through the proper karakia ritual, removing the spiritual restriction" [11]. There can be a public health and safety aspect to tapu-based restrictions. For example, one purpose of tapu is "to protect the mauri (whakaū mauri)" [11], and this can sometimes be achieved by imposing temporary restrictions, called rāhui, on access to an area, which acknowledge "both the sacrality of that place and the potential for harm" [11]. In this way, restricted areas that are tapu or subject to rāhui can be " associated with more mundane or practical objectives, for example, to avoid spread of disease or for sustainable management purposes" [11].

Modern Western law aims to maintain a rational and functional approach [27]. Nonetheless, the (secular) recognition that certain places have special cultural and spiritual significance, which can in turn affect their legal status, is unproblematic and commonplace. It is therefore not surprising that the concept of tapu is well-established as a feature of New Zealand law. For example, section 6(e) of New Zealand's Resource Management Act states that decision-makers must "recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga". Another example can be found in the Heritage New Zealand Pouhere Taonga Act, where wāhi tapu is defined as "… a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense". Under the Marine and Coastal Area (Takutai Moana) Act 2011, wāhi tapu protections represent the only limitation on public rights of access and navigation in the foreshore and seabed areas that are otherwise guaranteed. As was explained in the evidence on tikanga before the High Court in *Re Edwards* [28]:

> "Wāhi tapu can include urupā, birthing sites, placenta burial sites, battle sites, sites of old and existing pā, midden and archaeological sites, sources of water, sites of valued natural resources, sites of ritual practises, significant sites attached to tūpuna, and sites of extreme tragedy."

Because of its potential to limit otherwise lawful activities and the need for members of the public to be able to understand and comply with these limitations, it is critical that the boundaries of a wāhi tapu or wāhi tapu area can be precisely defined. As observed in *Re Edwards*, this specificity is important in tikanga, just as it is in Western law [28].

In contrast to tapu, a state of noa is one in which strict protocol is not required. The Law Commission explains that tapu and noa are not opposites: "Rather, tapu and noa work in tandem, each needing to be maintained at appropriate levels for Māori society to function in different situations", and suggests that "jurally, noa can be associated with freedom and powers" [11]. Noa can be achieved, in some cases, by means of karakia (ritual incantation), and processes such as pōwhiri whereby visitors are invited to interact freely with the host group on a marae. The Law Commission concludes that [11]:

> "Relational norms established by mana, tapu, and noa are among the most fundamental norms governing Māori society. They stand alongside the structural norms of whakapapa and whanaungatanga and prescriptive norms of mauri, utu, and ea. In a sense, mana, tapu, and noa might be termed the tikanga "engine room" because of the essential regulative role that they play."

For decision-making under TATA, the concepts of tapu and noa are likely to operate in a similar way to Western legal instruments such as bylaws and regulations. However, the more agile and responsive nature of tikanga is likely to mean that those seeking to have a legal relationship with the river will need to accept that arrangements will be contingent on accepting new restrictions from time to time to ensure the health and wellbeing of the river.

3.4. Kaitiakitanga, Manaakitanga, Aroha, and Atawhai

The Law Commission describes kaitiakitanga, manaakitanga, aroha, and atawhai as examples of "concepts of responsibility" and as "associated norms" closely connected with the concepts of mana and whanaungatanga described above [11].

Kaitiakitanga has been described as " the central tenet of Māori resource management" [19]. As Jones explains, the current meaning of kaitiakitanga has recent origins, although the root word kaitiaki (often translated as "guardian") has a long history. Traditionally, "a kaitiaki commonly took the form of an ancestor, an animal, or even a supernatural being rather than a living individual" [18]. In his evidence in *Re Edwards,* Professor Williams described kaitiakitanga as: "the obligation of stewardship and protection of one's own. It is closely linked to mana, which supplies authority for the exercise of stewardship, and tapu, which recognises the special or sacred character of all things" [24]. As emphasised above, the various tikanga concepts being discussed are closely related to each other, and kaitiakitanga can be described as [11]:

Essentially the responsibility aspect of mana. It recognises the responsibility of iwi and hapū to protect and look after the whenua (land), moana (ocean), and taonga (treasures) within their rohe (territory). It also reflects the fact that iwi and hapū do not see themselves as owning the whenua, or moana, in the sense that we understand ownership today.

Therefore, kaitiakitanga requires Māori communities "to protect the spiritual wellbeing of the natural resources within their mana" [11]. However, this is not equivalent to the Western idea of nature conservation. The Waitangi Tribunal observed this difference in *Wai 1071* (its Report on the Crown's Foreshore and Seabed Policy), stating that kaitiakitanga "best explains the mutual nurturing and protection of people and their natural world" [29].

Literally translated, manaakitanga means "to care for mana" [11], but more specifically, it can be described as "the reciprocal process of showing and receiving care and hospitality. It is a dimension of mana because the ritual exchange confers mana on both parties" [25]. Manaakitanga "speaks to the duty of care people have to each other, the environment, mātauranga Māori, the past, the atua, and to all things", and encompasses "generosity, caring for others and compassion" [11]. In comparison with typical Western property rights and resource management, the associated concepts of manaakitanga and kaitiakitanga result in a less rigid approach to land tenure and rights. For example [11]:

> "Our customary areas are not as rigid as Western boundaries. Other Whakatōhea hapū can come into our sector; for instance, we wouldn't stop Ngāti Patu from coming to fish in our area. The tikanga is that we share the kai because our hapū of Whakatōhea are related to each other by whakapapa, and it is part of our collective responsibility to care for our whanaunga, as they do for us (this is known as manaakitanga). However, there is a distinction between permitting access to our sea territory as a matter of manaakitanga and having the customary authority to act as the kaitiaki."

The Law Commission observes that "Aroha is an expression of love, care, respect and affection in its widest sense", and that "similar to aroha, atawhai relates to nurturing, caring and kindness and "extends to embracing and supporting others in its broadest sense" [11]. Together with kaitiakitanga and manaakitanga, "aroha and atawhai each describe norms of care and responsibility" [11]. Because of their close association with whanaungatanga, these norms also encompass relationships with the more-than-human world of atua (gods), ancestors, and natural resources. This illustrates a clear difference to Western legal traditions, in which concepts of good stewardship tend to be confined to the consideration of human interests (including the interests of future generations).

For decision-making processes under TATA, at a high level, the implications of applying the principles of kaitiakitanga, manaakitanga, aroha, and atawhai are hopefully self-evident. Rather than focusing on the Whanganui River merely as a potential physical resource, decision-makers will need to accept the reciprocal and ongoing obligations that must be essential elements of any legal relationship with Te Awa

Tupua. All the above principles of tikanga Māori are closely connected and intertwined, and they all essentially point in the same direction.

4. Ownership of Freshwater

Cultural differences between Māori and European cultures have often crystalised into disputes over legal ownership. As Lyndsay Head has argued [30]:

> "Among Maori, the power of decision making was the chiefly role (whatever was at issue); the power to make decisions over land is therefore the Maori meaning of what is expressed in English as 'land ownership'."

However, a basic problem with addressing governance in terms of ownership is that it creates a hierarchy and conveys the symbolism of a winner and a loser. This is the problem that led Alex Frame to suggest that "there might be a case for the development of a form of title which is neutral on that symbolic question" [31].

TATA has been described as a "compromise to prevent iwi from gaining ownership" [32]. There is certainly some force to this criticism. However, there are underlying questions about what ownership means in this context. In the sense of outright ownership (an unencumbered freehold title), ownership of the Whanganui River as a whole (*i.e.*, not merely the bed of the river) was never a likely outcome of Treaty negotiations, and this was recognised by Whanganui iwi in their submissions to the Waitangi Tribunal [33]. More importantly, for the purposes of this article, framing the issues in terms of allowing or preventing ownership tends to obscure important nuances regarding authority and control over decision-making.

The novel legal framework created by TATA challenges important assumptions made in Western law about our relationship with land (especially the idea that it must ultimately be owned by individuals and described in terms of a transferable bundle of property rights). From a Western legal standpoint, it may seem obvious that a particular person or group of people cannot 'own' nature in its holistic sense. However, when it comes to the commodification of nature into discrete parcels that can be owned, this holistic perspective tends to be forgotten or elided. The origins of the Western concept of legal ownership—expressing the notion of an exclusive power relationship between a person and a thing—can be found in Roman law with its intense focus on individual *dominium*. This notion found expression in modern statements about Western law, such as those of Blackstone, who described property as [34]:

> "…that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."

Although outdated, this well-known passage from Blackstone helps to illustrate the stark ontological and axiological contrast between tikanga Māori and Western property law: the foundational distinction between an atomistic and relational worldview; and between value-individualism and value-collectivism.

As discussed above, in vivid contrast to Western property law, which tends to treat land as a commodity, "the core elements of tikanga relate to relationships, including the relationship of Māori with the environment and the interconnectedness of the spiritual with the physical" [16]. For Māori, tikanga is "the law that grew from and is very much embedded in our whenua (land)" [13], and this relationship with land is also deeply embedded in te reo Māori [35]:

> "It is the cultural and spiritual significance of the land that distinguishes Māori land from the European concepts of real estate. It is the spiritual significance of land that is most dear to the Māori. Whenua—land—also means placenta; hapu—the wider family or community—means pregnant; and the expression te ukaipo means the area in which one was brought up, but it also means to be breast-fed."

Therefore, whenever land is spoken about in te reo Māori, it is bound to be in terms that also refer to ancestral genealogy (whakapapa), and "part of being ancestrally connected to nature means that humans are not considered separate from or above it, and they cannot own it" [23]. While undoubtedly including an appreciation of natural resources, tikanga Māori demands constraints on processes of commodification and resource exploitation, based on a set of values which are not generally recognised in Western property law. This has been explained by Māori kaumātua (tribal leaders, elders) giving evidence to the Environment Court, for example [11]:

> "We use the concept of whakapapa both to analyse into separate parts and to bind the parts together as a whole entity of creation, of which we see ourselves are also a part our cultural concept in the land begins in Papatuanuku, and her resources are seen as a whole but we go on to categorise the parts of the whole in respect to their uses and functions. But when we go out to make use of the resources of nature, we do not forget the whakapapa binding all together, at the same time as we distinguish the resources of land and sea."

4.1. Legal Ownership and Sovereignty

In the common law, a distinction can be drawn between legal ownership and sovereignty. Sovereignty describes both the radical title—*i.e.*, reversionary, or underlying, legal title—and the ability to set the axiological parameters within which restrictions on legal ownership are determined. In both English and New Zealand common law, the radical title is vested in the Crown, as the embodiment of State authority and control. Legal ownership is not clearly defined in the common law. Indeed, at least from a British common law perspective, ownership is more of an heuristic device than a precise legal concept. As Harry Lawson has explained, the fee simple estate is regarded as "a fragmentable quantum of interest", and the ability to break ownership down into component parts and deal with them separately [36]:

> "Has, more than any other factor, made it both impossible and superfluous to attempt to rivet what a Common Lawyer would consider the oversimplified notion of ownership on the common law system of real property law."

Probably the most influential legal analysis of ownership from a common law perspective was provided by Tony Honoré, who described "the 'liberal' concept of 'full' individual ownership…" which he saw as comprising "eleven leading incidents" [37]:

> "Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary: this makes eleven leading incidents."

In contrast, in traditional Māori society, "while individuals or particular families had use rights of various kinds at several places, the underlying or radical title was vested in the hapu" [15]. This also implied inalienability (in cases other than violent conquest): " the land of an area remained in the control and authority of an associated ancestral descent group, and, like fee tail, neither the land as a whole, nor a use right within it, could pass permanently outside the bloodline. Land and ancestors were fused" [15]. This had the further implication that "land rights were thus inseparable from duties to the associated community", with "… no room for absentee ownership, only the right of absentees to return" [15].

This Māori legal system presented an existential challenge to the British colonial project. Steps were quickly taken to introduce a system of land tenure that would "detribalise" Māori and enable both the ability to impose restrictions on legal ownership and the alienation of land from Māori ownership [38]:

> "The Native Land Court was not designed to accommodate the complex and fluid customary land usages of Maori, as it assigned permanent ownership. Moreover, land rights under customary

> tenure were generally communal, but the new land laws gave individuals rights. It was also hoped that the application of the native land laws would eventually lead Maori to abandon the collective structures of their traditional landholdings. Among other objectives, the Crown hoped to detribalise Maori, and thought the new land laws would promote their eventual assimilation into European culture."

Janet Stephenson has observed that in New Zealand "the contemporary legal structure makes a distinction between "ownership"—that is, the right to use, trade and benefit from the use of the resource—and "resource management", which incorporates concepts of controlling the use of the resource" [39]. This distinction also exemplifies the sense in which legal ownership describes a bundle of property rights that are free from inherent normative restrictions on the legal owner's use and enjoyment. In contrast, as discussed, tikanga does not recognise a concept of land ownership based exclusively on instrumental values, and as such "does not fit easily within the contemporary legal structure" [39].

This helps to explain why vesting legal ownership (in the bundle of property rights sense), without any corresponding change in sovereignty (authority and control over decision making), is unlikely to result in fully satisfactory outcomes for Māori, especially in relation to significant taonga. Legal ownership does not necessarily guarantee decision-making rights and, as Alex Frame has observed, the economic dividend that private ownership brings "forced into Blackstonian form has sometimes been a poison chalice for Maori, as for example in the case of fish quota" [40]. What Frame describes as a "Tragedy of the Commodities" is characterised by ownership claims which (pragmatically and yet paradoxically) see private property rights as the only way to protect collective values [40]. Proprietary rights are obviously also important to Māori, as they describe relationships with other people, the ability to control use, protect the resource, and receive economic benefits. However, private property rights are simply not well-suited to recognising and providing for collective and relational values; instead, they tend to prioritise individual interests, facilitate the commodification of non-human nature as resources, and perpetuate a conventional Western worldview which sees nature-as-other.

4.2. Legal Ownership of Freshwater Resources

Ownership claims in respect of water elicit an impassioned response from across the political spectrum in Aotearoa New Zealand, because ownership tends to be construed as meaning private ownership. From one perspective, Māori private ownership would be a direct fetter on others' ability to profit from the resource, and from another, it would represent a challenge to deep-rooted cultural notions of the common good. In relation to freshwater resources, the legal position is further complicated by the *publici juris s*tatus of naturally flowing water in Western law. From a Western legal perspective, removing naturally flowing water from the realm of *publici juris* and placing it into private ownership would undermine the common law concept of the common good, which is arguably the closest that the common law comes to expressing Māori concepts such as kaitiakitanga [41]. The political refrain that "no one owns water" finds both judicial and academic support in New Zealand as elsewhere, for example [42]:

> "Water has never been subject to the ordinary rules of private property. Except when appropriated and taken into possession (say in a tank), it is incapable of being owned. Rights in respect of natural water have, thus, been rights of use, not of ownership, and in this respect the common law has recognized its public character—that it is, as a seventeenth century Judge said, 'necessary for the preservation of the commonwealth'; and hence that no man can have property in streams or rivers or surface waters."

In relation to individual Treaty settlements, the Crown's negotiating stance has been set out in what is known as the "Red Book", a government publication intended to inform Māori about the Treaty settlement process; the Red Book states that "New Zealand law does not provide for ownership of water in rivers and

lakes" [43]. However, the New Zealand Government's official position on ownership and control of freshwater resources has sometimes been disingenuous. The State has assumed control of freshwater resources for the common good, without acknowledging the legitimacy of Māori claims to freshwater governance based on tikanga. Instead, Māori claims based on tikanga have been countered by: (a) falsely equivocating them with proprietary claims; and then (b) dismissing them because they involve "assertions of a metaphysical and ideological nature" which are incongruous in the context of property rights [33]. This false equivocation with proprietary claims has also resulted in an inaccurate perception that Māori legal interests in 1840 were limited to use rights [33], and as such were *something less* than English legal ownership [40].

A good example of disingenuous arguments employed by the New Zealand government in this context can be found in the Crown's back-to-front submission in *Wai 167*, which argues that the fact that iwi did *not* treat the Whanganui River as an item of property implies an absence of ownership [33]. In response, counsel for Whanganui iwi [33]:

> "Challenged the distinction between authority and control on the one hand, and ownership on the other. Counsel contended that the focus had to be on rangatiratanga, or the mana to control possessions, and reiterated that thinking in categories of property interests, with the river seen only as a resource, and not as a taonga essential to the identity, culture, and spiritual wellbeing of the people, merely perpetuated the English property approach."

In contrast to the Crown's longstanding position vis-à-vis Māori claims (*i.e.*, that "nobody owns water"), the New Zealand Parliament has undoubtedly placed authority and control over freshwater resources in the hands of the Crown. In legislative terms, this was achieved by section 21 of the Water and Soil Conservation Act 1967, which provided that:

> "Except as expressly authorised by or under this Act or any other Act, the sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, or to use natural water, is hereby vested in the Crown subject to the provisions of this Act…"

It would be difficult to contend that this does not, in effect, comprise a declaration of ownership. The Crown's rights under section 21 were preserved by sections 354(1)(b) and 14 of the Resource Management Act 1991, which provides that nobody "may take, use, dam or divert" water other than as permitted under the Act. Although it is true that "ownership" is a distinct concept from the "use" of water, this elides the point that those who take exclusive control over water resources, and those granted exclusive consents to use these resources on a 'first-in, first-served' basis [44], do effectively own these resources. Although section 122 of the Resource Management Act expressly states that resource consents are not property rights, this statement does not ring true in a practical sense. For example, Barry Barton has pointed out that the duration and exclusive nature of water permits, together with the processes for renewal, result in "a degree of security of tenure" for consent holders [45]. In practice, the reality is that, if proprietary interests have not first been established, decision-makers exercising functions under the RMA will assume that no such interests exist, and can grant consents that are substantially equivalent to property rights.

What ultimately emerges from this discussion of the intricacies of New Zealand resource management law is an uneasy feeling that, when it comes to water, property rights are about as clear as mud. It isn't possible to hold property rights over naturally flowing water yet, at the same time, exclusive rights have been vested in the Crown and can be handed over to applicants on a first-come, first-served basis. Questions about who gets to make these decisions, and how the decisions are made, (*i.e.*, where does sovereignty sit?) are much more important in practice than the theoretical question of whether outcomes can be described in terms of property rights or ownership.

4.3. Māori Ownership of Freshwater

From a tikanga perspective, Honoré's "leading incidents of ownership" do not adequately describe the tangata whenua relationship. In particular, the incidents of transmissibility and liability to execution are incompatible with the principle of *whanaungatanga*, according to which the "land was not a tradable or disposable item. Having passed down through forebears from Papatuanuku, it was entailed to the tribe's future generations—unless they were removed through war" [33]. More generally, the formal incidents of ownership describe only the commodity value of land to individual human beings who are parties to any given property relationship and fail to express collective values. Nonetheless, since the 1980s the privatisation of public assets in New Zealand "has sharpened the demand to speak of ownership" [46]. In this context, Frame has described how [40]:

> "Claims to water flows, electricity dams, airwaves, forests, flora and fauna, fish quotas, geothermal resources, seabed, foreshore, and minerals have followed the tendency to treat these resources, previously viewed as common property, as commodities for sale to private purchasers. Not surprisingly, the Māori reaction has been: if it is property, then it is our property!"

Similarly, Salmond has made the point that "if Māori kin groups do not claim "ownership" of ancestral freshwater bodies and rights to freshwater are privatized, they may be left with nothing" [1]. Māori have "long asserted a view that the land cannot be owned, but rather that they belong to the land" [47], yet in Western legal terms they have been given little option but to relinquish claims based on customary rights in exchange for forms of legal tenure, such as bare title to the bed of a lake (e.g., Te Arawa Lakes Settlement Act 2006, s 23), which—being largely symbolic—are pale reflections of rangatiratanga (chiefly sovereignty), and which also implicitly confirm and reinforce the colonial legal system.

Some critics regard the declaration of legal personhood in TATA as essentially an abrogation of Māori property rights, for example, Tom Collins and Sara Esterling have argued that [48]:

> "The Act's grant of legal personality fails to afford Indigenous peoples with the material protections offered by international human rights law in relation to core property rights in light of Māori advocacy for the ownership of freshwater."

Similar concerns have been expressed by the Waitangi Tribunal. For example, in *Wai 2358* the Tribunal recommended that Māori proprietary rights in water should be recognised, with "proprietary redress" consisting of an allocation of freshwater resources to iwi, observing that [49]:

> "Although there were some concerns about the term 'ownership', the IAG reported 'strong and widespread support for the assertion that Māori have rights in the nature of ownership in water and for the language of proprietary rights'."

The issue of freshwater allocation remains very much on the table in New Zealand, and there is also the potential for Māori proprietary rights to freshwater resources to be recognised through the Courts, by application of orthodox principles of common law and equity. As Elias CJ observed in *Ngati Apa*, the registration of freehold interests does not inevitably extinguish all customary rights associated with land, but only those rights that are inconsistent with the registered interests [50]. However, it is not clear what the practical legal implications of recognising native title to water would be. A key question is how such legal title would interact with statute law, given that the New Zealand common law needs to be consistent with legislation.

Furthermore, as Frame observed, forcing Māori customary interests into Blackstonian form may be a "poisoned chalice" [40]. Frame hoped that his proposal (with reference to *Trees* [7]) for a novel form of legal title could be [40]:

> "… a small contribution to the on-going search for a New Zealand jurisprudence which reconciles rather than divides out principal cultures, and which speaks in a language close to rather than distant from Maori and Polysnesian conceptions."

For such an outcome to be achieved, it is important not to forget that Māori claims are primarily for *Māori ownership* [51], which is a more expansive concept than the English notion of legal ownership (based on, and constrained by, the underlying concept of feudal tenure). From a Māori perspective, Mia Wikaira has argued that [51]:

… to adopt a liberal conception of ownership *in accordance with tikanga Māori* to advance freshwater rights in New Zealand would be to import a paradox under tikanga Māori, and to erode those very values from which a Māori world view sources its existence.

Nevertheless, as Wikaira also observed: "that Māori have chosen the term 'ownership' to frame rights discourse in the freshwater arena is clear" [51]. She goes on to explain that in this context "ownership" is merely considered to be "the most appropriate term to represent assertions of rangatiratanga, mana and kaitiakitanga over freshwater as understood in accordance with tikanga Māori" [51].

It is hopefully clear from the above that, in the context of freshwater governance, the concept of ownership needs to be treated with caution. To the extent that it is widely considered to refer to common law legal ownership, rather than to overarching governance frameworks, the concept can be misleading in a Treaty context. Having introduced this additional level of complexity and disambiguating the imprecise concept of ownership, the final step is to consider the extent to which it may be helpful to describe Te Awa Tupua—or the Whanganui River—as somehow "owning itself".

4.4. Self-Ownership

It is, of course, true that certain aspects of legal ownership are key features of TATA. For example, the legal title to previously Crown-owned parts of the bed of the Whanganui River is now vested in Te Awa Tupua itself (TATA, s 41). It is therefore true to say that Te Awa Tupua owns this land, even though it is inalienable—it cannot either be sold or encumbered (for example, by a lease or a mortgage) (TATA, s 43). However, despite the fact that "Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements" (TATA, s 12), those parts of the riverbed that are held under the Public Works Act 1981 (associated with infrastructure), or that are located in the marine and coastal area, are expressly excluded (TATA, s 41). Furthermore, TATA provides that the legal vesting of the riverbed: "does not create or transfer—(a) a proprietary interest in water; or (b) a proprietary interest in wildlife, fish, aquatic life, seaweeds, or plants (except in relation to plants attached to the bed of the Whanganui River)" (TATA, s 46). As discussed above, it is also possible that the native title of iwi and hapū to the water itself may be recognised, and this potential outcome is provided for by s 46(2)(b). Given these various provisos, the broad proposition that Te Awa Tupua owns the Whanganui River does not seem tenable.

In these circumstances, can it still sensibly be said that Te Awa Tupua owns itself? The main problem with this idea is that it conflates the relationship between Whanganui iwi and the Whanganui River with Western legal concepts of individual ownership and tenure. As Durie observed [15]:

> "The first presumption of English law to be applied was probably the doctrine of tenure. It had an immediate deleterious impact and was in conflict with Maori law."

It would be strange, therefore, if the legal status of Te Awa Tupua could be adequately expressed in terms of individual tenure. The grievances of Whanganui iwi that TATA addresses are not merely the loss of property, and therefore cannot be fully addressed by proprietary remedies. Discussing the diversion of a substantial part of the headwaters of the Whanganui River as part of the Tongariro Power Development, the Environment Court found that [52]:

> "The most damaging effect of both diversions on Māori has been on the wairua or spirituality of the people. Several of the witnesses talked about the people "grieving" for the rivers. One needs to understand the culture of the Whanganui River iwi to realise how deeply engrained the saying ko au te awa, ko te awa, ko au is to those who have connections to the river. The iwi see the river as a part of themselves, and themselves as part of the river. Their spirituality is their "connectedness" to the river. To take away part of the river (like the water or river shingle) is to take away part of the iwi. To desecrate the water is to desecrate the iwi. To pollute the water is to pollute the people."

These relational values are now expressed in Tupua te Kawa (TATA, s 13). Detracting from these values by positing Te Awa Tupua as an entirely separate and autonomous "self-owning" legal entity would be against both the purpose of TATA and principles of tikanga Māori. By severing the intrinsic relationship between Te Awa Tupua and Whanganui iwi, it would potentially make the legal interests of Te Awa Tupua vulnerable to interpretation and appropriation by those desiring either to exploit the river as a resource or alternatively, to treat it as a conservation park [53,54]. TATA represents a move "beyond human ownership" [46] not only because legal title is vested in a non-human entity, but more importantly because the relational values which it legally embodies are not the instrumental values of an individual owner—instead they describe the inalienable collective relationship between Whanganui iwi and the river. In terms of Māori ownership, we are talking about something other than the Western concept of property rights. Resource-based agreements between humans are certainly not ruled out, but the transactions must always be consistent with the intrinsic relationship between people and place. In TATA, legal personhood describes this intrinsic relationship and, in Western legal terms, Te Awa Tupua is not concerned so much with the incidents of ownership as it is with *constraints* on the incidents of ownership. In the more holistic and relational approach of tikanga, incidents and constraints are inseparably intertwined.

5. Conclusions

It is important to conclude by emphasising that the differences between Western legal concepts of property and ownership, and a traditional Māori worldview, are much deeper than the differences between private and common property rights. Although collective in nature, the relationship between Whanganui iwi and the Whanganui River (Te Awa Tupua) is based on distinctive relational values and is substantially different from any of the categories of ownership that have been identified in a Western legal context for the purposes of exploiting and managing the commons [55,56], all of which are fundamentally based on the same legal regime or system of property rights. Instead, TATA embeds the distinctive and intrinsic relationship between Whanganui iwi and the river in decision-making processes and thereby, from a Western legal perspective, enables a genuine paradigm shift with the objective of prioritising the health and wellbeing of the river. This is made possible not because legal personhood conveys self-ownership in a Western legal sense, but instead because legal personhood can provide a vehicle for giving effect to tikanga Māori, including its collective and relational core values.

The observation that tikanga Māori can be expressed in terms of jural relations helps to dismiss any preconception that the rights, powers, duties, and liabilities of Te Awa Tupua (TATA, s 14) must refer to these concepts as they are generally understood and applied in Western law. However, when considering whether the idea of rights of nature may provide scope for a closer approximation of tikanga values in Western law, it must also not be assumed that jural relations according to tikanga Māori are based on the same normative-moral standpoint, or worldview. This means that it is not possible simply to transpose Western jural concepts onto tikanga Māori or *vice versa*. It cannot be assumed that Western rights, duties, powers, and liabilities will directly correspond to equivalent concepts in tikanga. In terms of tikanga Māori, the real challenge is to understand the core values, because it is these values which provide the primary

guide to behaviour. There is no disagreement about the central relational values of tikanga, and generations of Māori scholars have been able to find ways to express them in English. These values certainly describe a different human-nature relationship from the one generally assumed and imposed by Western legal systems. Nonetheless, these values are also perfectly intelligible from a Western jural perspective, with the important proviso that the integrity of tikanga must be maintained; care must be taken not to "pick and choose" elements of tikanga to fit a legal argument.

The Māori concept of whanaungatanga is at the heart of tikanga Māori. It includes reciprocal relationships between human beings, ecosystems, and atua domains, and between the living, ancestors, and unborn descendants. In the broadest terms, tikanga Māori is concerned with reciprocal rights and obligations between people and an animated world (*i.e.*, a world that is alive). This understanding of an animated world is also expressed in the concept of mauri (life force), which again refers to an active relationship, based on reciprocal obligations and advantages. The prioritisation of relational values has two key implications in the context of environmental law. Firstly, tikanga treats nature as much more than merely a store of instrumentally valuable resources to be distributed among people. Secondly, tikanga is far more collective in its outlook, in contrast to Western law, which is structurally fixated on adjudicating between the competing claims of individuals. These features of tikanga, which are also integral to TATA, mean that it would be both reductionist and wrong to characterise the rights, powers, duties, and liabilities of Te Awa Tupua (TATA, s 14) merely in terms of Western property rights and ownership.

The collectivism of tikanga has historically presented an obstacle to its judicial acceptance and application within the dominant Western legal framework in New Zealand [57]. Other obstacles have included perceived inscrutability from an outsider's perspective [58] and the perception that the spirituality of tikanga means that it is too subjective to provide legal grounding [41]. TATA offers the potential to overcome these obstacles in a way that would also have tangible benefits for Western approaches to environmental decision-making. For example, acknowledging a normative-moral standpoint of value-collectivism could yield better frameworks for collective and deliberative decision-making and, ultimately, better, more widely acceptable outcomes. Similarly, the challenges posed by perceived inscrutability and spirituality can potentially be addressed by recognising and providing for appropriate values in a clear and directive way as an essential part of the architecture of decision-making processes, instead of treating tikanga values merely as a cultural 'input'. These key advantages of TATA, which are important in terms of giving effect to the Treaty settlement, would not be achieved if the legal personhood of Te Awa Tupua were to be understood in terms of Western property rights and ownership.

Finally, although this article has focused on conceptual and theoretical questions about property rights and ownership, the effectiveness of TATA in terms of achieving positive outcomes for the Whanganui River and its ecological communities will depend on the ability to shape and influence decision-making processes. It is in this context that future research is likely to be of greatest value: to study the implementation of the adopted strategy and to consider the extent to which this strategy can provide lessons for community engagement and decision-making in different contexts—both within Aotearoa New Zealand and internationally.

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Informed Consent Statement

Not applicable.

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