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ARTICLE

Reconciliation and Self-Determination: Incorporating Indigenous Worldviews on the Environment into Non-Indigenous Legal Systems

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Reconciliation and self-determination are two fundamental claims of Indigenous peoples in their relationship with the state. The recent enactment of Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, and the inclusion of the "Rights of Nature" in the Ecuadorian Constitution nearly a decade earlier are two key case studies. These cases show how incorporation of Indigenous worldviews into non-Indigenous legal systems has the potential to lead to both reconciliation and self-determination. This paper provides a comparative analysis of the process of incorporation for both Te Awa Tupua and the Rights of Nature, and comes to two tentative conclusions. First, that the incorporation of Indigenous perspectives into a non-Indigenous legal system may foster reconciliation between a people and a system that have often been at odds, but that this will only be realised if the process is conciliatory and mutually respectful. Secondly, that while effective incorporation may allow for reconciliation, it does not necessarily provide Indigenous peoples with the legal self-determination to fully realise and enforce their worldview.

I Introduction

There is an inherent tension between Western and Indigenous legal traditions. This tension arises through the divergent worldviews propounded by the respective normative

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systems, which are often difficult to reconcile.[1] Natural resources, such as rivers and forests, provide perhaps the most cogent example of the conceptual difference between the two perspectives. Locke's theory of property encapsulates the traditional Western worldview: natural resources are considered to be property an individual can own, consume or benefit from.[2] They are characterised as insentient and subject to the "sole and despotic dominion of humankind".[3] It is undeniable that Indigenous peoples also take advantage of and consume natural resources.[4] It is also undeniable that the Western perspective has evolved from its traditional basis, with greater global focus on conservation, rather than exploitation.[5] But the foundational perception of Indigenous groups towards nature often differ from their Western counterparts. The Indigenous view tends to be founded upon a recognition of nature as a living entity. This gives rise to an approach where obligations are centred around nature, not humanity. As this differs from the traditional Western worldview, fusion or incorporation of the two perspectives could be considered paradoxical.

However, two recent embodiments of Indigenous worldviews into non-Indigenous law in this area lead to two tentative conclusions. First, that the incorporation of Indigenous perspectives into a non-Indigenous legal system *may* foster reconciliation between a people and a system who have often been at odds, but that this potential will only be realised if the process is conciliatory and mutually respectful. Secondly, that while effective incorporation may allow for reconciliation, it does not necessarily provide Indigenous peoples the right of legal self-determination to fully realise and enforce their worldview.

Since its enactment, Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 has been a cynosure in environmental and Indigenous law. National and international discourse around the Act has focused on its unique proposal to give the Whanganui River legal personality.[6] However, a less heralded, but arguably more important aspect of the Act is its adoption of a Māori worldview on the environment. In this worldview, the River is considered by Whanganui Iwi to be a living, indivisible being.[7]

Nearly 10 years before the enactment of Te Awa Tupua Act, the Ecuadorian government chose to include the "Rights of Nature" in its constitutional amendments. Such rights were based on the Indigenous Quechua concept of *Pacha Mama,* which the Ecuadorian Constitution of 2008 recognises as "Mother Earth, of which we are a part and which is vital to our existence".[8] This article will assess the process by which these similar perspectives on the environment are incorporated into the law. The process is critical to understanding this trend, as it demonstrates how Indigenous groups adapt their values to

1 Benjamin J Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Oxford, 2009).

2 John Locke *Second Treatise of Government: An Essay Concerning the True Original Extent and End of Civil Government* (Richard H Cox (ed), Harlan Davidson, Illinois, 1982) at 18.

3 William Blackstone *Commentaries on the Laws of England* (William Carey Jones (ed), Bancroft-Whitney, San Francisco, 1916) vol 1 at 707.

4 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007), art 26; and Rodolfo Stavenhagen *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people* A/59/258 (12 August 2004) at [14].

5 James Tully *Public Philosophy in a New Key — Volume I: Democracy and Civic Freedom* (Cambridge University Press, Cambridge, 2008) at 251.

6 Eleanor Ainge Roy "New Zealand river granted same rights as a human being" *The Guardian* (online ed, London, 16 March 2017); and Bryant Rousseau "In New Zealand, Lands and Rivers Can Be People (Legally Speaking)" *The New York Times* (online ed, New York, 13 July 2016).

7 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 12.

8 Constitution of the Republic of Ecuador, preamble.

fit into non-Indigenous legal systems. Te Awa Tupua and the Ecuadorian Rights of Nature are two examples of differing processes of incorporation and provide evidence supporting the two tentative conclusions identified here.

II Defining the Criteria of Reconciliation and Self-determination

A *Justification of criteria*

Principles of reconciliation and self-determination are common threads running through Indigenous legal relations with the state, and are consistently claimed by Indigenous peoples around the world.[9] Indigenous-state reconciliation is often informed by the critical principle of partnership. This principle was elaborated by the Court of Appeal in *Attorney-General v New Zealand Māori Council* as entailing good faith partnership designed to reconcile Māori and the Crown.[10]

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) also implies the importance of reconciliation in its preamble. The preamble stresses that based on principles of justice, recognition of the rights of Indigenous peoples will enhance harmonious relations between the state and Indigenous peoples. The preamble also notes the fundamental importance of self-determination to Indigenous peoples. Furthermore, art 18 of UNDRIP asserts that "Indigenous Peoples have the right to participate in decision-making in matters which would affect their rights …". This expresses principles of both reconciliation and self-determination. Articles 3 and 4 also expressly affirm the right of Indigenous peoples to self-determination.

B *Defining the scope of reconciliation*

A critical facet of reconciliation is the relationship between both parties.[11] As previously discussed, the principle of partnership is fundamental to the relationship between Māori and the Crown.[12] This was reiterated in the Waitangi Tribunal Te Whanau o Waipareira Report. In that Report, the Tribunal discussed the notion of a relationship of reconciliation based on mutual respect, equality and good faith as a critical aspect of the "partnership" principle.[13] Siegfried Wiessner also identifies the good faith principle in Indigenous-state reconciliation in the international arena. Assessing the development of international law concerning Indigenous peoples, Wiessner notes that states honouring their promises of good faith is an integral part of effective Indigenous-state relationships.[14]

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9 James Anaya *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people* A/HRC/12/34 (15 July 2009) at [41]; and James Anaya *Indigenous Peoples in International Law* (2nd ed, Oxford University Press, Oxford, 2004) at 98.

10 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664.

11 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 58–59; and see also Paul Nadasdy "The antithesis of restitution? A note on the dynamics of land negotiations in the Yukon, Canada" in Derick Fay and Deborah James (ed) *The Rights and Wrongs of Land Restitution: Restoring What Was Ours* (Routledge-Cavendish, Abingdon, 2009) 85 at 87.

12 *New Zealand Maori Council v Attorney-General*, above n 10, at 664.

13 Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at xxvi.

14 Siegfried Wiessner "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis" (1999) 12 Harv Hum Rts J 57 at 124.

James Tully perhaps best captures the fundamental principles behind Indigenous-state reconciliation. He identifies five principles necessary for effective reconciliation from an Indigenous perspective.[15] First, mutual recognition. This involves two steps: acceptance of Indigenous peoples having equal legitimacy with the state and public affirmation of the recognition in the basic institutions and symbols of the state.[16] Secondly, intercultural dialogue. Tully asserts that dialogue is not based on "once-and-for-all agreement" but a continuing conversation designed to maintain relationships.[17] Thirdly, mutual respect. Tully suggests that respect from an Indigenous perspective has a broader meaning, as it relates to respect for natural resources and the environment.[18] Carwyn Jones argues that this view is similarly endorsed in tikanga Māori through values such as manaakitanga, sharing and mutual responsibility.[19] Fourthly, the principle of sharing. Simply defined as the giving and receiving of benefits, Tully argues that in a legal and economic sense, a post-colonial Indigenous-state relationship of reconciliation would include factors such as the sharing of land.[20] Finally, mutual responsibility. This final principle is critical to this article's argument. Traditional Indigenous and non-Indigenous legal approaches to responsibility are markedly different, but the modern approaches are arguably easier to reconcile. The traditional Western approach to responsibility, particularly in the legal sense, highly values individual responsibility. Conversely, the traditional Indigenous approach places greater emphasis on collective responsibility. Notably, this does not simply include the rights of humankind, but also rights and obligations to the environment. However, with increasing awareness and support for protecting vulnerable natural environments and ecosystems in the Western world, Tully suggests that the two views may be weaved together as the final fibre in an Indigenous-state relationship of reconciliation.[21]

C *Defining the scope of self-determination*

Self-determination is often equated with the Māori concept of tino rangatiratanga.[22] While this is a difficult term to encapsulate in the English language,[23] Mason Durie suggests that at a minimum, tino rangatiratanga includes a level of political autonomy and authority, both within Māori society and between Māori and the state.[24] The international community has also recognised, through a number of international documents, the rights of Indigenous peoples to autonomy. The reports of the Special Rapporteur on the Rights of Indigenous Peoples indicate that providing an Indigenous group with autonomy over decision-making with regard to natural resources is a critical step in ensuring effective self-determination.[25] Further UN documents, including the Report of the Monitoring

15 Tully, above n 5, at 229.
16 At 230.
17 At 239
18 At 243.
19 Jones, above n 11, at 62.
20 Tully, above n 5, at 247.
21 At 250–252.
22 Mason Durie "Tino Rangatiratanga" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Oxford, 2005) 3 at 4.
23 Waitangi Tribunal *Maori Electoral Option Report* (Wai 413, 1994) at 4.
24 Durie, above n 22, at 4.
25 James Anaya *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people* A/HRC/15/37 (19 July 2010) at 11; and Rodolfo

Mechanism regarding the implementation of UNDRIP in New Zealand, also signal that autonomy over decision-making is crucial to recognising Indigenous self-determination.[26]

Self-determination may also contain an element of sustainability. Jeff Corntassel argues that governments frame self-determination rights in a manner which deliberately undermines critical relationships Indigenous peoples have within their community.[27] In order to truly give effect to Indigenous self-determination, a more holistic and sustainable benchmark ought to be implemented.[28] Glen Coulthard also criticises state-driven, rights-based recognition as entrenching the colonial status quo, as opposed to adopting an approach founded on Indigenous and community values[29] Corntassel instead suggests that sustainable self-determination should be founded upon the provision of holistic Indigenous responsibilities over critical tenets of the Indigenous culture.[30] This could include communal responsibilities for health, family, food and the environment. In particular, Indigenous peoples should be able to apply their own natural laws and solutions to natural resources.[31] This sustainable view is also supported by Winston Nagan and Craig Hammer in their legal analysis of the property rights of the Indigenous Shuar people of Ecuador.[32] They argue that in order to realise the goal of sustainable self-determination, the legal framework which supports it should be based around holistic Indigenous views.[33] Nagan and Hammer place particular emphasis on the Indigenous worldview on the environment as not merely being an aspect of the Indigenous community, but the basis of the community itself.[34] The framework of self-determination must therefore be dynamic enough to not only reflect this worldview, but also provide Indigenous peoples the powers and responsibilities to realise it in a practical way.

III Background and Context

A *Māori and Quechuan perspectives on the environment*

The connection between Te Ao Māori and the environment is underpinned by two fundamental concepts: whanaungatanga and kaitiakitanga.[35] Whanaungatanga expresses the innate relationship that Māori have with the environment. Māori emphasise the

Stavenhagen *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples* A/HRC/4/32 (27 February 2007) at 6.

26 Human Rights Council *Report of the Monitoring Mechanism regarding the implementation of the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand* A/HRC/EMRIP/2016/CRP.4 (13 July 2016) at 5.

27 Jeff Corntassel "Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse" (2008) 33 Alternatives 105 at 107.

28 At 124.

29 Glen Coulthard "Place against Empire: The Dene Nation, Land Claims, and the Politics of Recognition in the North" in Avigail Eisenberg and others (eds) *Recognition versus Self-Determination: Dilemmas of Emancipatory Politics* (UBC Press, Vancouver, 2014) 147 at 169.

30 Corntassel, above n 27, at 118.

31 At 118.

32 Winston P Nagan and Craig Hammer "The Conceptual and Jurisprudential Aspects of Property in the Context of the Fundamental Rights of Indigenous People: The Case of the Shuar of Ecuador" (2013) 58 NYL Sch L Rev 875.

33 At 917.

34 At 876.

35 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuatahi* (Wai 262, 2011) at 105.

relationship of their mauri (lifeforce) with the mauri of parts of nature, such as rivers, lakes and mountains.[36] This is the Whanganui Iwi's view in relation to the Whanganui River; it is considered to have its own mauri, to which the people of the Iwi are intrinsically linked.[37] Kaitiakitanga is an obligation to both care for and nurture the mauri of the environment. It has a communal aspect in that it is not the sole responsibility of an individual to protect the waterways and mountains, but that of the collective.[38] Kaitiakitanga and whanaungatanga are interrelated in that they both support the notion that Māori are inherently connected and related to the natural environment, particularly through the mauri of the waterways and mountains that surround them.

Underlying the Ecuadorian constitutional developments are two Indigenous concepts: *sumac kawsay* and *Pacha Mama.* These stem from the Indigenous Quechua people and are both critical to the Rights of Nature incorporated into the Ecuadorian Constitution. *Sumac kawsay* describes a quality of life that promotes harmony within both the community and environment that surrounds an individual.[39] In a similar manner to whanaungatanga, *sumac kawsay* places emphasis on the interrelation between humans and nature. On this view, humanity's welfare is intertwined with the welfare of natural ecosystems.[40] This view rejects the traditional Western notion that natural resources can be owned, instead proposing that natural resources are living beings, with will and feelings.[41] *Pacha Mama* is analogous to the Western concept of "mother earth" or the Māori deity Papatuanuku, representing the Quechuan concept of nature as a living deity.[42] The Ecuadorian Constitution defines nature or *Pacha Mama* as the place where "life is reproduced and occurs".[43] The two concepts are complementary in that protection of *Pacha Mama* gives rise to harmonious coexistence with the natural environment, thus fulfilling *sumac kawsay.*[44]

B *The context behind the Ecuadorian Rights of Nature*

The concept of the "Rights of Nature" is a relatively modern phenomenon in Western legal thought. Environmental law in Western society has traditionally been anthropocentric, focusing on the ability of humans to use or benefit from a natural resource, rather than on the natural resource itself.[45] This approach is exemplified in a variety of sources—from Blackstone's traditional statement of a person's "sole and despotic dominion"[46] over property, to modern international treaties such as the Rio Declaration on the Environment, which places emphasis on sustainable development for human benefit.[47]

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36 At 23.
37 Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at 39.
38 Waitangi Tribunal, above n 35, at 23.
39 Catherine Walsh "Afro and Indigenous Life — Visions in/and Politics. (De)colonial Perspectives in Bolivia and Ecuador" (2011) 18 Bolivian Studies Journal 50 at 56.
40 Eduardo Gudynas "Buen Vivir: Today's tomorrow" (2011) 54 Development 441 at 445.
41 At 445.
42 Gordon F McEwan "Pachamama" in Jay Kinsbruner and Erick D Langer (eds) *Encyclopedia of Latin American Culture and History* (2nd ed, Gale, Detroit, 2008) vol 5 at 2.
43 Constitution of the Republic of Ecuador, art 71.
44 Catherine Walsh "Development as *Buen Vivir*: Institutional arrangements and (de)colonial entanglements" (2010) 53 Development 15 at 18.
45 Marc Pallemaerts "International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process" (1996) 15 JL & Com 623 at 642.
46 Blackstone, above n 3, at 707.
47 Pallemaerts, above n 45, at 642.

The notion that nature itself should have rights was given attention in a formal Western legal context in the 1970s, through Christopher Stone's seminal text *Should Trees Have Standing?*[48] This approach differed from the traditional Western legal perspective on the environment in that it was ecocentric, by which the rights of the environment itself, rather than humans, were the central focus.[49] Since then, there has been a gradual progression in the recognition of an ecocentric approach in domestic and international law. An ecocentric approach is a critical facet of what Joel Colón-Rios considers to be a new wave of constitutional developments in the Latin American region in the early 21st Century.[50] Riding the crest of this wave is the Ecuadorian Constitution, which has incorporated an ecocentric approach based on the Rights of Nature.

C *The context behind Te Awa Tupua*

Unlike in Ecuador, where an Indigenous perspective was incorporated through novel constitutional amendments, Te Awa Tupua Act codified a Māori worldview through what is now a relatively well-practised Treaty Settlement Process. In the case of the Whanganui Iwi, the legislation was the fruit of negotiations with the Crown occurring after a Waitangi Tribunal claim process. Since 2010 there has been a greater emphasis in Treaty settlements on the Māori worldview of natural resources as living entities.[51] The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 records Crown recognition of the Waikato River as a tupuna (ancestor), and its mana, which in turn represents the mana and mauri of Waikato-Tainui.[52] This was followed by Te Urewera Act 2014, which provides Te Urewera National Park with legal identity,[53] while concurrently recognising that it has an identity "in and of itself".[54] Te Awa Tupua follows on from this trend.

IV Ecuadorian Rights of Nature

A *The Rights of Nature in the Constitution of Ecuador*

(1) The Preamble

The Constitution of Ecuador, in its preamble, declares the importance of both an Indigenous worldview on the environment and the Rights of Nature: [55]

48 Christopher D Stone *Should Trees Have Standing?: Law, Morality, and the Environment* (3rd ed, Oxford University Press, New York, 2010).

49 Ngaire Naffine "Legal personality and the natural world: on the persistence of the human measure of value" 3 Journal of Human Rights and the Environment 63 at 63.

50 Joel Colón-Ríos "Constituent Power, the Rights of Nature, and Universal Jurisdiction" (2014) 60 Mcgill LJ 127.

51 James D K Morris and Jacinta Ruru "Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water?" (2010) 14(2) AILR 49 at 52.

52 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, preamble.

53 Te Urewera Act 2014, s 4.

54 Section 3(3).

55 Constitution of the Republic of Ecuador, preamble.

> We women and men, the sovereign people of Ecuador … celebrating nature, the Pacha Mama (Mother Earth), of which we are a part and which is vital to our existence … hereby decide to build a new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living, the sumak kawsay.

(2) Article 71

Chapter Seven then sets out the Rights of Nature. Article 71 provides the most explicit reference to an Indigenous worldview: [56]

> Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.

B *Process of constitutional development*

The Rights of Nature first arose in Ecuador during its 2006 general election. Eventual President Rafael Correa and his *Alianza País* political coalition appealed to a disillusioned population by suggesting alternative models of development and constitutional reform.[57] After winning the election , the government held a national public referendum in 2007, establishing a constituent assembly.[58] The Assembly was consequently elected in the same year. It consisted of 130 members, with representatives from *Alianza País* holding a majority of 80 seats.[59]

The Assembly maintained 10 working groups which were tasked with drafting and debating particular themes within the constitution.[60] Assembly members were encouraged to travel the country to engage and hear the opinions and proposals of citizens, including Indigenous groups.[61] Working Group Five focused on the theme of "Natural Resources and Biodiversity", and was tasked with codifying the Rights of Nature into a set of constitutional provisions.[62] This task was eventually passed on to Working Group One, which dealt with fundamental rights in the Constitution. The Rights of Nature were included in the final draft, which was voted on and approved in a July 2008 meeting of the Assembly.[63] In September of that year, the Constitution was ratified by referendum.[64]

56 Article 71.

57 J D Bowen "Ecuador" in Jake Dizard, Christopher Walker and Vanessa Tucker (eds) *Countries at the Crossroads 2011: An Analysis of Democratic Governance* (Rowman & Littlefield, Maryland, 2011)..

58 European Union Election Observation Mission *Ecuador 2007: Final Report* (2007) at 4.

59 European Union Election Observation Mission *Ecuador Final Report: Presidential and Parliamentary Elections — 26 April 2009* (June 2009) at 9.

60 The Carter Centre *Report No. 1 on the National Constituent Assembly of the Republic of Ecuador* (January 2008) at 4.

61 The Carter Centre *Report on the National Constituent Assembly of Ecuador* (March 2008) at 8.

62 Mihnea Tanasescu *Environment, Political Representation, and the Challenge of Rights: Speaking for Nature* (Palgrave MacMillan, London, 2016) at 95–96.

63 At 99.

64 European Union Election Observation Mission, above n 59, at 10.

C *Indigenous influence on process of constitutional development*

The Indigenous peoples of Ecuador have historically organised themselves on the basis of a corporatist model in national politics.[65] Their largest federation is the Confederation of Indigenous Nationalities of Ecuador (CONAIE). This umbrella group represents 14 Indigenous nationalities within the state.[66]

CONAIE expressed concern that the constitutional reform would place emphasis on universal rights, which would exclude the specific needs of Indigenous peoples.[67] Even when the Rights of Nature was first discussed in the Constituent Assembly, Indigenous groups were wary of the rights emphasising nature, rather than the collective rights of the Indigenous communities.[68] Despite this, Indigenous representatives still took part in the Constituent Assembly, mainly in coalition with *Alianza País*, so as to influence the drafting of the constitution.[69] However while *Alianza País* had several Indigenous representatives, *Pachakutik* (the predominant Indigenous party in Ecuador) only won four seats in the Assembly elections.[70] Notably, Mihnea Tanasescu suggested that the rights were the product of a political elite with interests in environmentalism, but not necessarily Indigenous rights.[71] This was evidenced by the transfer of the codification of the rights from Working Group Five to Working Group One, which had few Indigenous representatives but a number of environmental activists.[72]

Nevertheless, the importance of *sumac kawsay* as an underlying principle to the rights should not be discounted. The influence of *sumac kawsay* over the development of the Rights of Nature was explicitly asserted by delegates during the Constituent Assembly.[73] This was motivated by the accessible nature of the constitutional reform process, which allowed for significant submission by Indigenous groups. Joel I Colón-Rios noted the significance of a constituent assembly, rather than the state legislature, being used for constitutional reform. While the latter deals with issues of daily governance, the former is concerned with fundamental issues of law.[74] Constituent assemblies may attract participants who have historically been excluded from the traditional branches of government. These participants, such as Indigenous peoples, may consider constituent assemblies a new avenue for expressing their rights.[75] This was particularly prevalent in the Ecuadorian case, as it was CONAIE who had previously called for the establishment of a constituent assembly before the 2008 election.[76] As a result, Indigenous peoples were

65 Marc Becker "Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador" (2011) 38 Latin American Perspectives 47 at 48.
66 At 48.
67 Maria Akchurin "Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador" (2015) 40 L & Soc Inquiry 937 at 956.
68 At 956.
69 Becker, above n 65, at 51.
70 At 50.
71 Mihnea Tanasescu "The rights of nature in Ecuador: the making of an idea" (2013) 70 International Journal of Environmental Studies 846 at 854.
72 At 851.
73 Akchurin, above n 67, at 954.
74 Joel I Colón-Ríos "Notes on Democracy and Constitution-Making" (2011) 9 NZJPIL 17 at 29.
75 At 29.
76 Marc Becker *Pachakutik: Indigenous Movements and Electoral Politics in Ecuador* (Rowman & Littlefield Publishers, Maryland, 2011) at 110.

able to influence the decisions of the Assembly and the Rights of Nature through direct engagement, such as proposals and petitions to delegates.[77]

V Te Awa Tupua

A *Relevant provisions of Te Awa Tupua Act*

Te Awa Tupua is the result of over two decades of Crown-Iwi relations. These began in 1994 with the Waitangi Tribunal Whanganui River claim and concluded in 2017, when the Act itself was passed after a Tribunal Report and prolonged Treaty Settlement negotiations. While the Act maintains a number of traditional Treaty Settlement aspects such as Crown acknowledgements[78] and apology,[79] its structure and provisions are unique. In particular, Part 2 of the Act sets out a number of the significant provisions which assert the Whanganui Iwi's worldview on the environment. It provides the overall framework over which the River will be recognised as a legal person.

Section 12 of the Act identifies Te Awa Tupua as an indivisible and living whole, comprising the Whanganui River from the mountains to the sea and incorporating all its physical and metaphysical elements.

Section 13 comprises the four intrinsic values, or Tupua te Kawa, which represent the essence of Te Awa Tupua. These are:

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

(2) 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.

(3) 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.

(4) 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 well-being of Te Awa Tupua.

Section 14 declares Te Awa Tupua a legal person, with all attendant rights, powers, duties and liabilities.

B *Waitangi Tribunal and Treaty Settlement Process*

Te Awa Tupua was developed within the legal framework relating to the Treaty of Waitangi. Therefore, it arguably provided Māori with greater ability to influence the process of incorporation than the Ecuadorian Constitution did for Ecuador's Indigenous communities. The Treaty framework is mainly focused on the legal relationship between

77 At 130.
78 Section 69.
79 Section 70.

Māori and the Crown, as opposed to the Ecuadorian Constitution, which covers a broader range of obligations. In the case of Te Awa Tupua, the process of incorporation consisted of two key elements: a Waitangi Tribunal Report and the Treaty Settlement Process.

The Waitangi Tribunal Report on the Whanganui River is a comprehensive assessment of the relationship of the Whanganui Iwi with the River. Its recommendations provide a critical foundation for the basis of the Treaty Settlement Process and the Te Awa Tupua framework.

First, the Tribunal found that Whanganui Iwi held the River in 1840, at the time of signing the Treaty of Waitangi.[80] This foreshadowed a recognition of a Māori worldview which continued throughout the Treaty Settlement Process. According to the Tribunal, the question of whether Whanganui Iwi held the River should be based on the context of "Māori social dynamics". The concept of ownership was an "alien structure" to which Māori norms do not relate.[81] By basing its assessment on a Māori worldview, the Tribunal considered that the River was not a commodity that could be owned, but rather a taonga inherently connected to the Iwi.[82] However the Tribunal noted that traditional usage and activities by Whanganui Iwi gave them significant customary proprietary rights, leading to the conclusion that the River was held by Māori in 1840.[83]

Secondly, the Tribunal emphasised the recognition by Whanganui Iwi of the River as a living entity. The Tribunal held that the River was a single and indivisible entity, and a tupuna awa (river ancestor).[84] Furthermore, the Tribunal followed Māori cosmogony in noting that all things have a mauri, and that the River was so endowed. As a result, it had to be "respected as though it were one's close kin".[85]

Finally, the Tribunal made two recommendations for consideration in Treaty Settlement negotiations. It recommended that either the entirety of the River be vested in an ancestor representative of the Whanganui Iwi, or the Whanganui River Māori Trust Board be added as a "consent authority" to the River under the Resource Management Act 1991.[86] This would allow the Iwi to act jointly with other consenting authorities over any applications or decisions regarding the River. A dissenting opinion in the Tribunal presented a third option. This option entailed equal ownership by the Crown and the Whanganui Iwi over the Riverbed, in the form of a joint body which would exercise all the rights and responsibilities of legal ownership.[87]

The Tribunal's recommendations heavily influenced the Treaty Settlement Process. Negotiations began in 2002.[88] In 2012, after delays in negotiations, an agreement on the Whanganui River, *Tutohu Whakatupua*, was reached. This detailed a decision between Whanganui Iwi and the Crown to provide statutory recognition to the Whanganui River as a legal entity.[89] The process was developed further in the Deed of Settlement (*Ruruku Whakatupua—Te Mana o Te Awa Tupua)*, which also refined the body or "human face"

80 Waitangi Tribunal, above n 37, at xiii.
81 At 46.
82 At 46.
83 At 47–48.
84 At xiv.
85 At 39.
86 At 343.
87 At 347.
88 *Record of Understanding in relation to Whanganui River Settlement* (Office of Treaty Settlements, 13 October 2011) at [1.16].
89 *Tūtohu Whakatupua* (Office of Treaty Settlements, 30 August 2012) at [2.1.2].

designed to represent the river: Te Pou Tupua.[90] This body consists of two human representatives of the River (one representing the Crown, one representing the Whanganui iwi),[91] to act on behalf of the River and promote its health and wellbeing.[92] After the Deed was signed in 2014, a Treaty Settlement Bill was drafted in 2016 and passed in 2017. This enacted the framework and values set out in the Deed of Settlement, including Te Pou Tupua and ss 12, 13 and 14, mentioned above.

C *Indigenous influence on process*

There is a marked difference between the level of Indigenous influence over Te Awa Tupua and over the Ecuadorian Rights of Nature. While Indigenous peoples tended to be on the periphery of Ecuadorian constitutional reform, the Settlement Process for Te Awa Tupua was always intended to occur between the Crown and Whanganui Iwi. Thus, the perspective of the Iwi held significant weight throughout this process. This influence can be measured at two distinct points.

First, the release of the Waitangi Tribunal Whanganui River Report in the period before negotiations and settlement. Whanganui Iwi's claim for recognition of their rights and relationship to the River is not recent. The Waitangi Tribunal Report, and to an extent Te Awa Tupua as a whole, is a culmination of decades of litigation between Whanganui Iwi and the Crown.[93] As a result, the Tribunal's Report and recommendations are heavily influenced by the traditional Whanganui Iwi worldview.

Secondly, the influence of the Whanganui Iwi is reflected in the settlement stage and in the legislation itself. This is present throughout the framework, but a tikanga Māori perspective is particularly prevalent in several parts. These include ss 12, 13 and 14 of the Act, as well as:

- *Te Pā Auroa Nā Te Awa Tupua*: The overall Te Awa Tupua framework, based on Te Pā Auroa, a broad eel weir designed to withstand the autumn, winter and spring floods and symbolizing a framework that is enduring and well-constructed.[94]
- *Te Kōpuka Nā Te Awa Tupua:* Te Awa Tupua Strategy Group. Te Kōpuka represents the White Manuka, a raw material used to build the Pā Auroa. This symbolises the connection, co-operation and strength within Te Awa Tupua.[95]

Finally, s 82 and Schedule 8 set out a special acknowledgement of the more than 240 identified ripo (rapids) on the Whanganui River.[96] Each rapid is recognised as a guardian by Whanganui hapu. Guardians are responsible for the lifeforce of the River and provide insight and guidance in relation to matters affecting the River, its resources and life in general.[97]

90 *Ruruku Whakatupua: Te Mana o te Awa Tupua* (Office of Treaty Settlements, 5 August 2014) at 10.
91 At 11.
92 At 10.
93 *Tūtohu Whakatupua*, above n 89, at [1.1]–[1.11].
94 *Ruruku Whakatupua: Te Mana o te Awa Tupua*, above n 90, at [1.1]–[1.7].
95 At [5.1]–[5.6].
96 Section 82.
97 Schedule 8.

VI Analysis of Process and Results

A *Reconciliation between Indigenous peoples and the state*

Both the Te Awa Tupua Settlement process and the Ecuadorian Constitutional reform provided significant potential for reconciliation. In both cases, the natural environment was of crucial significance.

In Ecuador, there was significant emphasis on the use of constituent power in the constitutional reform process. Colón-Rios, citing Sieyes, defines constituent power as the notion that in every society someone must have the right to make and amend constitutions. In a democracy, that power lies with the people.[98] The Ecuadorian Constitution was unique in the South American context, according to Colón-Rios, because of the Constituent Assembly and its processes.[99] The Assembly was structured to encourage transparency and participation. As a result, it was not only a valid avenue for Indigenous people to express their rights, but also a democratically legitimate one.

Conversely, in the Te Awa Tupua process, the Waitangi Tribunal and Treaty Settlement approach provided a significant mandate for reconciliation. The Whanganui River Waitangi Tribunal Report also expressly recognised the social cost of cultural deprivation flowing from the Crown's refusal to respect the mana of the Whanganui Iwi and the Whanganui River.[100] This harm, according to the Tribunal, ought to be rectified and the government-iwi relationship reconciled.[101] This mandate was carried through to the Treaty Settlement stage. The Treaty Settlement Process as a whole is intended to heal the relationship between the Crown and the Māori claimant group.[102] This is expressed in the Crown apologies and recognition of the relationship between Whanganui Iwi and the Whanganui River in Te Awa Tupua.[103] These provisions acknowledge and apologise for the harmful effect on the Whanganui Iwi of Crown actions regarding the Whanganui River.[104]

It is evident that there was clear *potential* for reconciliation in Ecuador and New Zealand. Both cases were capable of fostering and improving the Indigenous-government partnership through mutual recognition and intercultural dialogue. However the cases diverge in terms of whether that potential was *realised*. It appears that Te Awa Tupua did, based on this article's criteria, advance reconciliation. Conversely the Ecuadorian process failed to lead to reconciliation, which, as will be later discussed, undermined the right to self-determination.

Despite its potential, Ecuador's constitutional reform lacked a number of critical characteristics required for effective reconciliation. First, Tully posits that mutual recognition requires both acceptance of Indigenous peoples and their institutions as having equal legitimacy with the state, and public affirmation of this acceptance.[105] Although CONAIE did enter into a political coalition with the governing *Alianza País* party, they comprised a small minority in the Constituent Assembly. Furthermore, they were not afforded any express influence over the drafting of the Rights of Nature or the Constitution

98 Colón-Ríos, above n 50, at 132.
99 Colón-Ríos, above n 74, at 32–33.
100 Waitangi Tribunal, above n 37, at xvii.
101 At 145.
102 Maureen Hickey "Apologies in Treaty Settlements" in Nicola R Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) 79 at 80.
103 Sections 69–71.
104 Section 70.
105 Tully, above n 5, at 230.

as a whole. The Working Groups which drafted the Rights of Nature had greater influence in numbers and represented the voice of elite environmentalist politicians, as opposed to Indigenous representatives. This points away from the state's acceptance of the legitimacy of Indigenous peoples and their institutions. There was also no public affirmation of any acceptance. As head of state, Correa criticised the Indigenous *Pachakutik* and CONAIE movements for their attempt to introduce *Pacha Mama* into the constitution, and for their wider constitutional aspirations.[106] Not only does this indicate a lack of mutual respect and recognition, it also undermines any notion of intercultural dialogue.[107]

Furthermore, while discourse from environmentalist politicians did not oppose the Indigenous worldview, it similarly served to undermine it. Cristina Espinosa posits that although Indigenous peoples were considered important stakeholders for environmental governance, they were also depicted by environmentalist politicians as subordinate victims.[108] Notably, despite the importance of the environment to Indigenous peoples, their interests do not always automatically align with the interests of environmentalists. Kent H Redford has discussed the notion of the "ecologically noble savage": the use of Indigenous peoples by environmentalists to promote their own agenda without considering the collective rights of Indigenous peoples themselves.[109] Paul Nadasdy also suggests that idealistic notions of Indigenous ecological respect can be colonial cultural assumptions, as the cultural norms underlying these notions are often not considered.[110] Given the lack of representation of Indigenous peoples in the Assembly and Espinosa's view of the depiction of Indigenous peoples in the Assembly,[111] there does not appear to be effective intercultural dialogue, nor mutual and equal recognition between environmentalist politicians and the Indigenous peoples themselves.

Good faith is another factor consistently present in successful Indigenous-state reconciliation. Wiessner emphasises that states honouring their promises is an integral part of the Indigenous-state relationship.[112] The relationship between Indigenous institutions and the state after the incorporation of the Rights of Nature in the Ecuadorian Constitution indicate that the state did not respect its promises in good faith. This was due to both Correa's political attacks against CONAIE and *Pachakutik*, and the enactment of legislation harmful to culturally important natural resources. The Ecuadorian Constitution is designed to protect the Rights of Nature. Article 57 provides a right to prior Indigenous consultation on plans for producing non-renewable energy located on Indigenous lands, and for Indigenous people to maintain their practice of managing biodiversity and the natural environment.[113] These rights were directly infringed by the Mining Act, which authorised the extraction of natural resources (even in protected areas) through large-

106 Becker, above n 76, at 58; Kenneth P Jameson "The Indigenous Movement in Ecuador: The Struggle for a Plurinational State" (2011) 38 Latin American Perspectives 63 at 70; and Marisol de la Cadena "Indigenous Cosmopolitics in the Andes: Conceptual Reflections Beyond Politics" (2010) 25 Cultural Anthropology 334 at 336.

107 Tully, above n 5, at 239.

108 Cristina Espinosa "Interpretive Affinities: The Constitutionalization of Rights of Nature, *Pacha Mama*, in Ecuador" (2015) Journal of Environmental Policy & Planning 1 at 10.

109 Kent H Redford "The Ecologically Noble Savage" *Cultural Survival Quarterly* (online ed, Massachusetts, March 1991).

110 Paul Nadasdy "Transcending the Debate over the Ecologically Noble Indian: Indigenous Peoples and Environmentalism" (2005) 52 Ethnohistory 291 at 293.

111 Tanasescu, above n 71, at 854; and Espinosa, above n 108, at 10.

112 Wiessner, above n 14, at 124.

113 Constitution of the Republic of Ecuador, art 57.

scale open-pit mining.[114] Kotze and Calzadilla note that not only has the government ignored the Rights of Nature and the constitutional right to consultation, it has also sought to suppress any Indigenous protest.[115] According to Amnesty International, the Ecuadorian government has perpetrated significant human rights breaches against Indigenous protesters.[116] It is therefore clear that the Indigenous-state relationship has fallen far short of good faith.

Mutual responsibility and sharing were two final aspects of reconciliation not present in the Ecuadorian case study. In relation to the former, Tully emphasises not only individual responsibility, but also collective responsibility from both Indigenous peoples and the state to humankind and the environment.[117] It is unlikely that mutual responsibility can be effected if power is not shared. In this case, there was potential for these factors to be achieved. The open nature of the Assembly, the use of *Pacha Mama* as the basis of the Rights of Nature and the art 57 right to consultation indicates that mutual responsibility between the two parties could have been shared. Two examples after the constitutional reforms indicate that this did not occur. The first was the aforementioned Mining Act, which ignored Indigenous peoples' protests and rights to consultation, as well as the Rights of Nature. The second occurred in 2009, amid escalating tensions between Indigenous peoples and the state regarding the Mining Act. The government introduced a Water Act, governing water management.[118] There was a distinct lack of consultation with Indigenous peoples. Protests resulted, with the government again suppressing these in a manner contrary to human rights.[119] While CONAIE and the government later sought to negotiate over the Water Act,[120] these examples indicate the state's reluctance to share power and effect any form of mutual responsibility.

Unlike in Ecuador, the Te Awa Tupua process was arguably characterised by mutual respect and recognition. However, the socio-political contexts of the two states are markedly different. In the Ecuadorian context, the government was faced with broader constitutional issues of reform and its main form of communication with the Indigenous peoples was through highly diverse political actors. While the New Zealand government does interact with a diverse range of hapu and iwi through Treaty Settlements, these settlements are negotiated between two distinct parties. The process does not involve constitutional reform debated in a constituent assembly. Nevertheless mutual recognition, based on Tully's two elements, was present in the Te Awa Tupua context. As discussed by Jones and Tully, reconciliation requires the dominant, colonial relationship to be rejected and replaced by a "treaty relationship", where Indigenous peoples engage with the state on an equal basis.[121] The Treaty Settlement Process provides a medium for the transition from a colonial relationship to a Treaty relationship. This promotes effective intercultural dialogue. This is indicated by the principles of partnership underlying the settlements, as well as tikanga Māori values of whanaungatanga and manaakitanga.[122]

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114 Amnesty International "*So That No One Can Demand Anything": Criminalizing the Right to Protest in Ecuador?* (2012) at 17.

115 Louis J Kotzé and Paola Villavicencio Calzadilla "Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador" (2017) 6 TEL 401 at 430.

116 Amnesty International, above n 114, at 26.

117 Tully, above n 5, at 251.

118 Amnesty International, above n 114, at 21.

119 At 26.

120 At 21.

121 Jones, above n 11, at 59.

122 At 62.

The Waitangi Tribunal process further lends legitimacy to Indigenous institutions by providing them with a clear mandate to address their grievances with the Crown. The Treaty Settlement Process has been subject to significant political criticism and interference,[123] and for Whanganui Iwi a Treaty Settlement only arose after decades of litigation and cultural and socio-economic harm by the Crown.[124] However the Waitangi Tribunal report did eventually provide a strong mandate to the Whanganui Iwi, while the Record of Understanding, Deed of Settlement and Te Awa Tupua Act all provide explicit governmental affirmation of this legitimacy. As a result, while the process still has some flaws, the two factors of mutual recognition and respect appear present.

Due to Te Awa Tupua Act being a recent enactment, it is difficult to measure reconciliation under the factor of good faith. However, mutual responsibility and sharing can still be assessed. The joint custodianship of the government and Whanganui Iwi over the Whanganui River indicates mutual responsibility and sharing of power. Despite this, the governance framework of the River does not necessarily reflect the Waitangi Tribunal's recommendations. The framework more closely resembles the dissenting opinion in the Tribunal (equal ownership by the Crown and the Whanganui Iwi over the Riverbed in the form of joint body). Given the previously discussed Crown dominance over the Treaty Settlement Process, this possibly indicates an unwillingness to provide Whanganui Iwi the ability to own the River themselves. Providing this ability would signal the Crown's preparedness to sustain a relationship with the Whanganui Iwi based on real mutual responsibility, whereby the Iwi share the same equal rights and powers as the government. The lack of real autonomy weakens the overall conclusion that reconciliation was achieved. The substantial recognition, respect and intercultural dialogue throughout the settlement process and reflected in Te Awa Tupua Act offers a strong argument in favour of reconciliation. However, the Crown's option to implement the dissenting opinion raises the question: how much more effective could reconciliation have been if the Crown had been prepared to allow full ownership?

B *Opportunities for self-determination*

A number of the issues hindering reconciliation between the Indigenous peoples of Ecuador and the state have had a similar effect on the development of self-determination in other contexts. As Corntassel notes, for self-determination to be effective, it must be sustainable. In this sense, sustainability essentially means a dynamic, holistic approach which reflects an Indigenous worldview.[125] As a result, for there to be successful self-determination of the Indigenous peoples of Ecuador, they would need to have the responsibility to realise their worldview in a practical way.

After the Rights of Nature were introduced, local residents of the Vilcabamba River filed a lawsuit in the Provincial Court of Loja (a province in Ecuador). The suit concerned the Provincial Government of Loja's decision to deposit rocks and excavation materials for road-building into the River, without an environmental impact study or permits.[126] This led

123 Nicola R Wheen and Janine Hayward "The Meaning of Treaty Settlements and the Evolution of the Treaty Settlement Process" in Nicola R Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) at 14.

124 Te Awa Tupua Act, ss 69 – 70.

125 Corntassel, above n 27, at 107.

126 Joel I Colón-Ríos "On the theory and practice of the rights of nature" in Paul Martin and others (eds) *The Search for Environmental Justice* (Edward Elgar Publishing, Cheltenham, 2015) 120 at 127.

to significant flooding of the River, affecting the local Riverside populations. The claim against the Provincial Government alleged a breach of the Rights of Nature due to the harm caused to the Vilcabamba River.[127] The Court found that the Provincial Government was violating the Right of Nature to regenerate its lifecycle by harming the River, and had thus breached art 71 of the Constitution.[128] This ruling indicated that the rights *could* be enforceable, particularly to protect Indigenous autonomy. However, an overall assessment of the Rights of Nature process and its effect ultimately shows a distinct lack of sustainable self-determination. This is illustrated in two examples.

First, there was little Indigenous consultation during or after the process of incorporation. During the constitutional reform process, there were only a small minority of Indigenous representatives in the Constituent Assembly. Further, despite the Indigenous concept of *Pacha Mama* forming the basis for the Rights of Nature, the drafting of the rights was influenced more by environmentalist politics than Indigenous institutions. The constitutional reform did realise certain positive outcomes for Indigenous peoples, including the Rights of Nature themselves and the art 57 right to consultation. Furthermore, Indigenous institutions and politicians were able to introduce the concept of plurinationality or *plurinacionalidad* into the Constitution.[129] Plurinationality is defined as a form of multiculturalism that seeks to provide Indigenous peoples with greater autonomy over their territories.[130] Despite this, the Ecuadorian government's actions in respect of both the Mining and Water Acts suggest that although rights relating to self-determination are enshrined in the constitution, they are yet to be recognised.

Three lawsuits brought after the introduction of the Rights of Nature further indicate Indigenous peoples' sustainable self-determination will not be realised. First, in 2012 the Ecuadorian government entered into a contract to construct a large-scale open-pit mine in the Amazonian Province of Zamora-Chinchipe. The proposed construction would cause significant environmental damage.[131] A number of Indigenous institutions filed a lawsuit in the Pichincha Province Civil Court for a breach of the Rights of Nature.[132] This claim was dismissed, with the Court finding that the acts of Indigenous peoples to protect nature constituted a private goal. Construction of the mine was in the public interest and thus took precedence.[133]

Secondly, the Tangabana case concerned a private agriculture company extending its plantation lands, which had a detrimental effect on the local plants and ecosystem important to an Indigenous community.[134] Indigenous groups filed a lawsuit based on a breach of the Rights of Nature. This lawsuit was similarly rejected.

Finally, there has been constant tension between Indigenous groups, the Ecuadorian government and foreign multinational corporations over oil rights in the Amazonian Yasuni National Park.[135] The park contains a number of Indigenous groups who have been

127 At 127.

128 At 129.

129 Constitution of the Republic of Ecuador, art 257.

130 Pascal Lupien "The incorporation of indigenous concepts of plurinationality into the new constitutions of Ecuador and Bolivia" (2010) 18 Democratization 774 at 776.

131 Craig M Kauffman and Pamela L Martin "Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian lawsuits Succeed and Others Fail" (2017) 92 World Development 130 at 134.

132 At 135.

133 At 135.

134 At 135.

135 Judith Kimerling "Habitat as Human Rights: Indigenous Huaorani in the Amazon Rainforest, Oil, and Ome Yasuni" (2016) 40 Vt L Rev 445 at 451.

adversely affected by oil-drilling.[136] There was significant litigation against oil companies and an eventual government pledge to suspend drilling in the area. However, after the Rights of Nature were enacted, the government revoked its suspension of oil-drilling.[137] Judith Kimerling argues that this undermined the right to self-determination of Indigenous peoples,[138] and in turn contradicted the Rights of Nature.[139] These legal issues demonstrate that the Rights of Nature have not been formed within, nor led to, a state of self-determination for Ecuador's Indigenous peoples.

A determination of whether the Te Awa Tupua Treaty Settlement process and legislation accords self-determination depends on the context in which the process is framed. First, it is clear that the Te Awa Tupua Treaty Settlement goes further than previous settlements by implementing legal personality and mātauranga Māori throughout its framework. Jacinta Ruru argues that Te Awa Tupua builds on a trend of recognising waterways and natural resources as living entities in Treaty Settlements (such as Te Urewera Act 2014). It is a demonstration of the flexibility of New Zealand's legal system to "embrace Māori notions of law, custom and values".[140] In particular, Ruru notes the use of Te Pou Tupua as human representatives of the River as a living ancestor.[141] The use of Te Pou Tupua as guardians to act on behalf of the River is arguably more consistent with the notion of kaitiakitanga and the Whanganui Iwi worldview than handing over complete ownership. This is particularly so given that the traditional Western notion of ownership is not easily compatible with tikanga Māori.[142] Furthermore, Te Pou Tupua does allow for joint governance between the Crown and Māori through an individual representative from each party. This still gives Whanganui Iwi significant influence. Combined with the provision of legal agency for the River and explicit acknowledgement of tikanga Māori through the Act, this arguably accords with Corntassel's notion of sustainable self-determination.[143]

Conversely, while the Te Awa Tupua Framework may reflect self-determination in one sense, it arguably does not fully reach this standard. In its National Freshwater and Geothermal Resources Inquiry, the Waitangi Tribunal noted a "fundamental gulf" between the positions of the Māori claimants and the Crown.[144] The latter argued that natural water could not be owned. Instead, the most appropriate mechanism for recognising Māori rights in water was through an interpretation of kaitiakitanga, amounting to kaitiaki control, partnership or consultation.[145] The Māori claimants argued that given the significant customary rights of Māori in rivers, the closest cultural equivalent to these rights was "English-style ownership".[146] The claimants also argued that ownership would allow them to practically realise the principles of kaitiakitanga and tino rangatiratanga.[147]

136 At 450–451.
137 At 516.
138 At 501.
139 David R Boyd "Recognizing the Rights of Nature: Lofty Rhetoric or Legal Revolution?" (2018) 32 Natural Resources & Environment 13 at 15.
140 Jacinta Ruru, "Listening to Papatūānuku: a call to reform water law" (2018) 48 Journal of the Royal Society of New Zealand" 215 at 220.
141 At 220.
142 Waitangi Tribunal, above n 37, at 48.
143 Corntassel, above n 27, at 119.
144 Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 62.
145 At 37.
146 At 62.
147 At 62.

The Tribunal noted the validity of both arguments, but stressed that Māori had rights of a proprietary nature in specific freshwater bodies, the extent of which warranted "serious inquiry".[148] Furthermore, in the Whanganui River Report, the Tribunal consistently referred to the unique nature of the Whanganui River case, given the close physical and spiritual association of the Iwi to the River and the history of their assertion of ownership rights.[149]

These rulings by the Tribunal indicate that if sustainable self-determination is to truly be achieved, the Crown ought to accord ownership rights over the River to the Whanganui Iwi. This corresponds to Corntassel's requirement for sustainable self-determination: a process perpetuating Indigenous livelihoods by regenerating roles and responsibilities to their homelands. This would be achieved by providing Whanganui Iwi autonomous control or tino rangatiratanga over the River.

In the National Freshwater and Geothermal Resources Inquiry, the Tribunal also reiterated the conceptual understanding of the River as a tupuna or ancestor representing the River as a single undivided entity, without distinction between its bed, banks, water, fisheries or aquatic plants.[150] Section 12 recognises Te Awa Tupua as an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.[151] This assertion is not necessarily compatible with the vesting of the River in Te Pou Tupua. Section 41 of the Act only vests Crown-owned parts of the Riverbed in Te Pou Tupua. It does not include legal roads, railway infrastructure or any part of the bed held under the Public Works Act 1981 or located in marine and coastal area.[152] Furthermore, certain rights from other groups including fishing rights,[153] State-Owned Enterprises[154] or private property rights are still protected.[155] Section 46(1) also explicitly states that the vesting does not create or transfer proprietary interests in the River water or its wildlife, fish, aquatic life, seaweed or plants.[156] Given the importance of the River as a whole to the Whanganui Iwi and its expression as an *indivisible* entity, vesting only Crown-owned parts of the riverbed suggests that sustainable self-determination has not yet been achieved.

VII Conclusion

Ultimately, while reconciliation arguably occurred in the Te Awa Tupua process, it cannot be confidently concluded that either Te Awa Tupua or the Rights of Nature realised the principle of Indigenous self-determination. The Indigenous influence on the Rights of Nature has been consistently undermined, both throughout the process of constitutional reform and in the subsequent actions of the government. This eroded the process' ability to assist in reconciliation—lacking mutual responsibility, recognition and good faith. The Ecuadorian Government's implementation of both the Water and Mining Acts is an example of the failure to achieve reconciliation. The Rights of Nature also failed to act as a catalyst for self-determination, as indicated by the three lawsuits where the rights were

148 At 229.
149 Waitangi Tribunal, above n 37, at 294.
150 Waitangi Tribunal, above n 144, at 226.
151 Section 12.
152 Section 41(2).
153 Section 46(2)(e).
154 Section 46(2)(c).
155 Section 46(2)(b).
156 Section 46(1).

not upheld. Conversely, the Te Awa Tupua process *did* maintain significant factors of reconciliation—particularly mutual recognition, respect and intercultural dialogue. This is evident in the joint governance framework between the Crown and Whanganui Iwi, as well as the recognition of mātauranga Māori throughout the Act. However, while it may go further towards achieving self-determination for the Whanganui Iwi over the Whanganui River than previous settlements, the issue of ownership and the autonomous control that it would entail has not yet been settled. This precludes effective self-determination.

An underlying theme throughout this analysis has been the *potential* for reconciliation and self-determination inherent in both the Ecuadorian and New Zealand contexts. This is an important factor. Although this potential was not fully realised in either case, both processes may provide useful illustrations for future frameworks between Indigenous peoples and the state. These frameworks will, hopefully, go further and achieve both reconciliation and self-determination.