

DOES SELF-DETERMINATION FLOW FROM THE CONFERRAL OF LEGAL PERSONHOOD ON TE AWA TUPUA?

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I Introduction

E rere kau mai te Awa nui

Mai i te Kāhui Maunga ki Tangaroa

Ko au te Awa, ko te Awa ko au.

The Great River flows

From the Mountains to the Sea

I am the River and the River is me.¹

This whakataukī, or Māori proverb, celebrates the special relationship that Whanganui iwi have with the Whanganui River.² Whanganui iwi are tangata whenua (land people) of Aotearoa New Zealand and are, therefore, indigenous peoples. Rather than adopting a Western anthropocentric view of the river as a resource solely for human use, Whanganui iwi conceive of the river as a living being, with whom they share an identity, ancestry and spiritual connection.³ This conception was recently recognised by the New Zealand Parliament when it passed the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (TAT Act 2017) into law.

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1 Ngā Tāngata Tiaki o Whanganui “Submission to the Māori Affairs Select Committee on the Te Awa Tupua (Whanganui River Claims Settlement) Bill 2016” at 2.

2 “Whanganui iwi” is defined by s 8 of the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 [TAT Act 2017]. It is the collective group of individuals who are descended from a person who, at any time after 6 February 1840, exercised customary rights and responsibilities in respect of the Whanganui River by virtue of being descended from Ruatipua, Paerangi or Haunui-ā-Pāpārangi. This includes but is not limited to hapū and tūpuna rohe groups listed in sch 1 of the TAT Act 2017.

3 Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at xiii.

The TAT Act 2017 is ground-breaking because it represents the first time legal personhood has been extended to a river anywhere in the world.⁴ It quickly drew international interest and imitation. In New Zealand, it paved the way for recognition of the legal personality of other aspects of the natural world, including Mount Taranaki.⁵ Overseas, the High Court of Uttarakhand, India made an order that the Ganges and Yamuna rivers be accorded the status of living human entities, citing the New Zealand legislation as precedent, although this has since been overruled.⁶ Yet despite the high level of interest, there has been little inquiry into whether the TAT Act 2017 assists Whanganui iwi, as indigenous peoples, to be self-determining in their relationship with the river.

This article will critically analyse the TAT Act 2017 through the lens of the cornerstone indigenous right to self-determination under international law. Part II will outline the special relationship between the iwi and the river, the effect of colonisation on that relationship, and the efforts of the iwi to protect the river through the legal system. Part III will outline the key sections of the TAT Act 2017. Part IV will discuss the indigenous right to self-determination, and Māori interpretations of that right. Parts V–VIII will apply a norm-based self-determination framework to the Act to determine whether the legislation enables Whanganui iwi to express greater self-determination.

The article finds that despite international acclaim, the TAT Act 2017 does not go as far as it should to express the Whanganui iwi right to self-determination. The Act only partially enhances self-determination. It expresses certain elements of self-determination (such as cultural integrity) in a highly visible manner, but beneath this veneer, it fails to express other crucial elements of self-determination (for example, self-government). Furthermore, it leaves Whanganui iwi with a large

4 Abigail Hutchison “The Whanganui River as a Legal Person” (2014) 39 *AltLJ* 179 at 179.

5 Eleanor Ainge Roy “New Zealand gives Mount Taranaki same legal rights as a person” *The Guardian* (online ed, London, 22 December 2017).

6 Michael Safi “Ganges and Yamuna rivers granted the same legal rights as human beings” *The Guardian* (online ed, London, 21 March 2017).

execution gap to fill, because it fails to adequately enhance the capacity of the iwi to take advantage of the Act to realise their self-determination aspirations.

II Te Awa Tupua

What is the nature of the relationship between Whanganui iwi and the Whanganui river? How has colonisation affected that relationship, and how have the iwi sought to protect the river through the Western legal system? This Part attempts to answer those questions, grounding the TAT Act 2017 in its historical and contemporary contexts.

The Whanganui River is the longest navigable river in Aotearoa New Zealand, flowing for 290 kilometres from the northern slopes of Mount Tongariro to the Tasman Sea.⁷ The Māori people of the river are often referred to as Te Atihaunui-a-Paparangi, but this article will use the broader term “Whanganui iwi” referred to in the Act for completeness.⁸ Whanganui iwi have held the river and lived along its banks for nearly a millennium.⁹ The river is a crucial element of their collective identity and existence. The Waitangi Tribunal describes it as “the aortic artery of the Atihaunui heart”, providing sustenance, connection and spiritual mentorship.¹⁰ Whanganui iwi perceive the river as an ancestor and a taonga (treasured resource) that is essential to their “identity, culture, and spiritual wellbeing”.¹¹ The river is, therefore, living, with personality, and ought to be considered an indivisible whole.¹²

Historically, Whanganui iwi asserted rangatiratanga (chieftainship, authority) over the Whanganui river as a single entity. They exercised various overlapping property rights to the river in accordance with their tikanga.¹³ This was the case in May 1840,

7 “Whanganui Iwi (Whanganui River) Deed of Settlement Summary 5 Aug 2014” (31 October 2019) New Zealand Government <www.govt.nz>.

8 See TAT Act 2017, s 8 definition of “Whanganui iwi”. Te Atihaunui-a-Paparangi is a collective term for the many hapū that live along the river. It is related to but not synonymous with “Whanganui iwi”.

9 Waitangi Tribunal, above n 3, at xiii.

10 At xiii.

11 At 25.

12 At 23.

13 “Whanganui Iwi (Whanganui River) Deed of Settlement Summary 5 Aug 2014”, above n 7.

when 14 rangatira from Whanganui signed Te Tiriti o Waitangi, the Māori language version of the treaty between Māori and the British Crown. Article 2 of this text guaranteed to Māori tino rangatiratanga (chieftainship, sovereignty) over the property and treasures they possessed, which included the river as a single and indivisible entity.¹⁴ Even the English language version, the Treaty of Waitangi, confirmed in Article 2 that Māori would have “exclusive and undisturbed possession” of their properties.

The Crown, relying on the English common law principle of *ad medium filum viae*, purchased land adjacent to the river in 1848, and asserted ownership and authority over the riverbed within this boundary.¹⁵ It then passed the Coal-mines Act Amendment Act 1903 which deemed the beds of navigable rivers as always having been vested in the Crown, without consulting Whanganui iwi. This ultimately led to Treaty breaches, such as the extraction of river gravel, taking of land for scenery preservation, damage to pā tuna and utu piharau (eel and lamprey weirs), and diversion of water from the river and other rivers into an electricity generation scheme. Whanganui iwi contended that such actions reduced the health and wellbeing of the Whanganui River and “adversely affected their cultural and spiritual values”.¹⁶

Whanganui iwi continually protested these actions through the Western legal system. Prior to 1938, they brought petitions, claims and protests indicating that, from their perspective, land alienation did not extinguish their right to the river.¹⁷ In 1938, the Native Land Court — and then the Native Appellate Court — ruled that their right was preserved. But, in 1949, the Crown successfully appealed this ruling in the Supreme Court, which held that Parliament had vested the riverbed in the Crown by the Coal-mines Act Amendment Act.¹⁸

14 Waitangi Tribunal, above n 3, at xiii.

15 See generally “Whanganui Iwi (Whanganui River) Deed of Settlement Summary 5 Aug 2014”, above n 7.

16 “Whanganui Iwi (Whanganui River) Deed of Settlement Summary 5 Aug 2014”, above n 7.

17 Waitangi Tribunal, above n 3, at 4.

18 At 4.

However, in 1950 a Royal Commission endorsed the Native Land Court view, arguing that *but for* the 1903 legislation, Whanganui iwi would be the customary owner of the bed, and were owed compensation.¹⁹ Progress was reversed in 1962, when the Court of Appeal held that customary river interests were extinguished by the Native Land Court when it investigated the titles to adjoining land, and thus the riverbed passed to the Crown when it acquired Māori land.²⁰ The Waitangi Tribunal claim was a last resort, with the chairman of the Whanganui River Māori Trust Board commenting: “our people are tired, they’re fed up, they feel embarrassed to come along continually and to say who they are, what is theirs”.²¹

The claim led to the Wai 167 report.²² In the report, the Waitangi Tribunal held that Whanganui iwi had never willingly alienated the river.²³ This finding led to Ruruku Whakatupua, the Whanganui River Deed of Settlement, which settled the Whanganui iwi claim with the Crown.²⁴ In this settlement, the Crown promised to establish a new legal framework for the Whanganui River. It did so by passing the TAT Act 2017 into law, which came into force on 21 March 2017.²⁵

As such, it is clear that Whanganui iwi have a close relationship with Te Awa Tupua. Colonisation interfered with this relationship by damaging the river and, by extension, the relationship. Whanganui iwi fought this interference through the Western legal system, and finally made progress through the Waitangi Tribunal and the passing of the TAT Act 2017.

19 At 4.

20 At 4.

21 At 5.

22 Waitangi Tribunal, above n 3.

23 At xiii.

24 *Whanganui River Deed of Settlement Ruruku Whakatupua - Te Mana o Te Iwi o Whanganui* (5 August 2014). See also *Whanganui River Deed of Settlement Ruruku Whakatupua - Te Mana o Te Awa Tupua* (5 August 2014).

25 See TAT Act 2017, s 2.

III Te Awa Tupua (Whanganui River Claims Settlement) Act 2017

This article is primarily concerned with the TAT Act 2017 and whether it expresses the Whanganui iwi right to self-determination. But what does the Act achieve? The following Part seeks to answer this question by outlining the key sections of the Act.

The Act declares the Whanganui River, under the name of Te Awa Tupua, to be a legal person with all of the rights, powers, duties, and liabilities of a legal person.²⁶ As Hutchison notes, this is “the first example of extending the legal personhood category to a non-human and inanimate object” in the world.²⁷ Decision-makers on matters related to Te Awa Tupua must recognise and provide for its unique legal status.²⁸

Of significance to Whanganui iwi, Te Awa Tupua is recognised as “an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements”.²⁹ The legislation also vests the Crown-owned riverbed in Te Awa Tupua.³⁰ Section 18 establishes Te Pou Tupua, the “human face” of Te Awa Tupua.³¹ Te Pou Tupua acts and speaks on behalf of Te Awa Tupua, and upholds its status while promoting and protecting its health and wellbeing.³² It is comprised of two persons, one nominated by Whanganui iwi and one by the Crown.³³

The Act also establishes Te Karewao, an advisory group providing advice and support to Te Pou Tupua, and Te Kōpuka, a strategy group whose membership will reflect the

26 TAT Act 2017, s 14.

27 Hutchison, above n 4, at 179.

28 TAT Act 2017, s 13.

29 Section 12.

30 Section 41.

31 Section 18.

32 Section 19.

33 Section 20.

diverse Māori, Crown and public interests in the river, and will act “collaboratively to advance the health and well-being of Te Awa Tupua”.³⁴ To further provide for wellbeing, ss 57–58 establish Te Korotete, a Crown-funded contestable fund administered by Te Pou Tupua on behalf of Te Awa Tupua.³⁵

When Parliament passed the TAT Act 2017, it extended the category of legal personhood in an innovative way. But does this unprecedented legislation express the indigenous right of Whanganui iwi to self-determination? To answer this question, it is first necessary to locate the right of self-determination in international law and examine its meaning.

IV Indigenous Self-Determination under International Law

Despite the international interest in the TAT Act 2017, it fails to sufficiently express the indigenous right to self-determination when analysed under a framework of indigenous rights in international law. The TAT Act 2017 is only partially self-determination enhancing. It expresses certain elements of self-determination, such as cultural integrity in a highly visible manner, but behind this veneer it fails to express other critical elements of self-determination, such as self-government. Furthermore, it leaves a large execution gap unfilled, because it fails to enhance Whanganui iwi capacity to take full advantage of the Act to realise their self-determination aspirations. Before proceeding with a critical analysis of the Act, it is first necessary to locate and define the indigenous right to self-determination in international law, then explain Māori conceptions of self-determination, to understand what it means for Whanganui iwi to be self-determining in their relationship with the Whanganui river.

34 Section 29.

35 Sections 57 and 58.

A Location of Self-Determination in International Law

Self-determination is a foundational principle of international law and a cornerstone right of indigenous peoples.³⁶ The indigenous right to self-determination is affirmed by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The UNDRIP represents the pre-eminent statement of the United Nations General Assembly on the rights and status of indigenous peoples.³⁷ While it is not legally binding, it “demonstrates a remarkable consensus among States” that indigenous peoples are “collective actors with distinct rights and status under international law”.³⁸ Article 3 of the UNDRIP provides that indigenous peoples have the right to self-determination. In exercising this, they “freely determine their political status and freely pursue their economic, social and cultural development”.³⁹ Notably, the indigenous right is constrained by art 46(1) of the UNDRIP, which excludes an interpretation of the right that would include cession, given this would impair the “territorial integrity or political unity of sovereign and independent States”.

This language mirrors the words of the joint art 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.⁴⁰ The concept of self-determination is also found in the United Nations Charter — the United Nations exists in part to ensure the self-determination of peoples.⁴¹ Beyond references in international documents, self-determination is also considered to be a principle of customary international law and potentially even a peremptory norm.⁴²

36 James Anaya *Indigenous Peoples in International Law* (2nd ed, Oxford University Press, New York, 2004) at 97.

37 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007) [UNDRIP].

38 Catherine Iorns Magallanes *ILA Interim Report on a Commentary on the Declaration of the Rights of Indigenous Peoples* (Victoria University of Wellington, 2 VUWLRP 50/2012, 2012) at 2.

39 UNDRIP, art 3.

40 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 1; and International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 1.

41 Charter of the United Nations, art 1(2).

42 Michla Pomerance *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (Martinus Nijhoff Publishers, The Hague, 1982) at 1.

B Modern Meaning of Self-Determination in International Law

What, then, does indigenous self-determination under international law mean in a modern context? Many academics agree it represents the ability to collectively envision and pursue a way of life. According to Dylan Lino, self-determination means that people should “collectively have control over, and be able to make decisions about, their own lives”.⁴³ Iris Marion Young agrees, arguing that self-determination is a form of relational autonomy in the context of non-domination.⁴⁴ For Young, this means that peoples have the right to independent institutions through which they decide on their own goals and interpret their way of life, so long as they respect the legitimate claims of others affected by their actions.⁴⁵ This constraint is echoed in Lino’s concept of relational self-determination, whereby indigenous autonomy ought to operate within the “terms and dynamics of the Indigenous state relationship”.⁴⁶

Arguably, self-determination is not possible without a degree of empowerment and self-actualisation across many different spheres of peoples’ lives. James Anaya’s leading view on self-determination incorporates that requirement. Anaya conceives of indigenous self-determination as a foundational base, upon which sits a set of “particularized norms” that fall under five categories: cultural integrity, self-government, lands and natural resources, non-discrimination, and social welfare and development.⁴⁷ This broad conception of self-determination argues that the right exists within intersecting economic, social, cultural, political and environmental spheres. If, as Lino suggests, self-determination is one’s ability to collectively exercise control over, and make decisions about, one’s life and destiny, then fulfilment of the right requires self-actualisation across multiple, significant areas of one’s life.⁴⁸

43 Dylan Lino “The Politics of Inclusion: The Right of Self-Determination, Statutory Bills of Rights and Indigenous Peoples” (2010) 34 MULR 839 at 845.

44 Iris Marion Young “Two Concepts of Self-Determination” in Stephen May, Tariq Modood and Judith Squires (eds) *Ethnicity, Nationalism and Minority Rights* (Cambridge University Press, Cambridge, 2004) 176 at 177.

45 At 187.

46 Lino, above n 43, at 853.

47 Anaya, above n 36, at 129.

48 Lino, above n 43, at 845.

One issue with Anaya's approach is that he artificially separates the norms into discrete concepts when they are in fact highly interrelated. This is potentially problematic because it risks ignoring the fact that no norm can be fully exercised in isolation, and the fulfilment of each norm is interdependent on the fulfilment of other norms. While acknowledging this flaw, this article will follow the Anaya approach of discussing each norm separately for the purpose of clarity.

C Māori Conceptions of Self-Determination

Māori are entitled to self-determination because, as tangata whenua of Aotearoa New Zealand, they are indigenous peoples for the purposes of the UNDRIP. For Nin Tomas, the fact that Māori are tangata whenua and Aotearoa is their kaainga tuuturu (rightful home) means that Māori are entitled to have their "collective Māori cultural, social, and economic interests preserved, protected, and developed as a foundational aspect of Aotearoa New Zealand society".⁴⁹ Tomas goes further, arguing that Māori are also entitled to self-determination in a domestic context because, as signatories of Te Tiriti o Waitangi, they preserved for themselves under Article 2 tino rangatiratanga, a "legitimate basis for Māori self-determination in Aotearoa New Zealand".⁵⁰

But what does self-determination mean to Māori? Given the diversity of thought amongst Māori, there is no single Māori understanding of self-determination. However, we can look to several leading interpretations of the term and draw out common themes. To Mason Durie, Māori self-determination is about "the advancement of Māori people, as Māori, and the protection of the environment for future generations".⁵¹ This has three dimensions: Māori economic, social and cultural advancement; affirming Māori identity in a changing world; and conserving the environment.⁵² Ani Mikaere takes a slightly narrower approach, arguing that "the aim

49 Nin Tomas "Indigenous Peoples and the Maori: The Right to Self-Determination in International Law – From Woe to Go" [2008] NZ L Rev 639 at 665.

50 At 641.

51 MH Durie *Te Mana, te Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) at 4.

52 At 4.

of self-determination should be to give life to Māori worldviews in a contemporary context, to take principles of Māori law and adapt them to suit present-day realities”.⁵³ For Mikaere, it is crucial that Māori strive for a form of self-determination that is not defined according to the standards of their colonisers.⁵⁴ Dominic O’Sullivan favours a more political interpretation of the right, whereby self-determination is “concerned with creating, to the greatest extent possible, independence and autonomy for Māori communities”.⁵⁵ Tomas promotes a broader approach, emphasising that the concept of self-determination is peoples-centred and “lends international support to indigenous peoples to re-establish social, economic, and political institutions in order to perpetuate their existence”.⁵⁶

We can see how certain Māori academics approach self-determination in a similar manner to Anaya, recognising that it involves Māori empowerment across multiple spheres of life. For Durie, self-determination is equivalent to tino rangatiratanga or “Māori ownership and active control over the future”, which applies to iwi and hapū as well as all Māori collectively.⁵⁷ According to Durie, four foundations make up the “essential constitutional elements of the Maori nation” and guide the meaning of tino rangatiratanga.⁵⁸ These include:⁵⁹

... mana wairua — a spiritual dimension relevant to all aspects of Maori life and organisation; mana whenua - the security of relationships with land and other physical resources and the authority of tribes to exercise control over their own resources; mana tangata — individual wellbeing, citizenship rights and freedom from financial dependence on governments; [and] mana Ariki — the authority of Ariki to lead and guide their own and other peoples.

53 Ani Mikaere *Māori and Self-Determination in Aotearoa/New Zealand* (Working Paper No 5/2000, University of Waikato, 2000) at 5.

54 At 5.

55 Dominic O’Sullivan “Māori Self-Determination: In the Modern Political Context” (2005) 1 *AlterNative* 48 at 49.

56 Tomas, above n 49, at 681.

57 MH Durie “Tino Rangatiratanga: Maori Self Determination” (1995) 1 *He Pukenga Korero* 44 at 46.

58 At 48.

59 At 48.

Durie refers to these foundations in his “ngā pou mana” model, a framework to explain self-determination through the “foundational stones” (ngā pou mana) of authority and standing for Māori. These foundation stones often mirror Anaya’s particularised norms. For example, mana wairua mirrors the cultural integrity norm, given that spirituality is a large component of culture. Yet it also links to the lands, territories and resources norm, given the kaitiakitanga (spiritual guardian) role Māori may fulfil with respect to the natural world. Mana tangata and mana ariki relate to aspects of self-government, including the ability to lead independently-funded indigenous institutions. Mana whenua has direct links to the lands, territories and resources norm.

The above discussion confirms that two leading interpretations of self-determination (those of Anaya and Durie) conceive of the indigenous right to self-determination as empowerment across multiple spheres of collective life. Whanganui iwi cannot be self-determining in their relationship with the Whanganui river unless all aspects of the right are fulfilled, and they can collectively pursue and fulfil their destiny and way of life within each self-determination norm or foundational stone. Together, these norms “form the benchmarks for ensuring indigenous peoples of ongoing self-determination”.⁶⁰ As such, this essay will proceed by using these benchmarks to assess the extent to which the TAT Act 2017 expresses the self-determination of Whanganui iwi.

V The Recognition of Te Awa Tupua as an Expression of Cultural Integrity

Anaya identifies cultural integrity as one of five norms which elaborate on self-determination.⁶¹ The TAT Act 2017 helps Whanganui iwi enhance their cultural integrity to a degree, because it confers legal personality on Te Awa Tupua, legitimising the Whanganui iwi view of a personified natural world. This Part will explain Anaya’s cultural identity norm in the context of indigenous self-determination and

60 Anaya, above n 36, at 129.

61 At 131.

link it to Durie's concept of mana tūpuna. It will then analyse how the Act enables Whanganui iwi to be self-determining by promoting their cultural integrity.

A Cultural Integrity Encompasses Identity, Worldview and Ways of Thinking

According to Anaya, the cultural integrity norm “upholds the right of indigenous groups to maintain and freely develop their cultural identities in coexistence with other sectors of humanity”.⁶² It refers to the ability of indigenous peoples to protect and promote their collective identity, worldview, way of thinking and values. Culture is crucial to indigenous peoples: it is the “entity which covers all aspect of their existence — as the cornerstone around which the entire edifice of indigenous identity is built”.⁶³

Cultural integrity is also deeply rooted in indigenous self-determination.⁶⁴ Without cultural integrity, there would be no collective sense of “self” for peoples to determine. Furthermore, indigenous peoples typically wish to collectively determine their destiny or way of life *as indigenous peoples*. Protecting and promoting their culture helps them to retain their indigenous identity while advancing as peoples. Durie notes that Māori self-determination would be pointless if it did not include the strengthening of a Māori identity and the expression of Māori culture — “the advancement of Māori peoples as Māori”.⁶⁵ He links self-determination to mana tūpuna, the mana from Māori and hapū identity, heritage, traditional knowledge, language and culture. Mana tūpuna is essential because it forms “the seed from which positive Māori development can grow”.⁶⁶ From this we understand the immense significance of cultural integrity to Māori self-determination.

A core aspect of Māori cultural integrity is mātauranga Māori. This refers to the Māori worldview, epistemology and body of knowledge derived from a Māori

62 At 131.

63 Committee on the Rights of Indigenous Peoples *Final Report Sofia Conference (2012)* (International Law Association, 2012) at 16.

64 Magallanes, above n 38, at 16.

65 Durie, above n 51, at 52.

66 At 79.

cultural context.⁶⁷ It includes traditional knowledge, but is ever-evolving and can modernise.⁶⁸ It also includes tikanga, the underlying values which form the basis of the Māori worldview and the right way of doing things. Mātauranga Māori and tikanga are flexible and vary across different hapū and iwi.

The next section considers the Whanganui iwi worldview and tikanga in relation to Te Awa Tupua. This is a necessary precondition to an assessment of whether the TAT Act 2017 adequately reflects and legitimises this worldview.

B Whanganui Iwi Worldview and Conception of Te Awa Tupua

To Whanganui iwi, the river is a taonga over which they assert tino rangatiratanga. The river is a living person “with its own personality and life-force”.⁶⁹ It exists as a single indivisible whole and cannot be artificially separated into constituent parts. The river is a tupuna (ancestor) and Whanganui iwi whakakapapa (link genealogically) to it — this reflecting the wider Māori worldview that all elements of Te Aō Marama (the natural world) are interconnected and descended from a common ancestor.⁷⁰ The river ties Whanganui iwi together “like the umbilical cord of the unborn child”.⁷¹

The river is central to the existence of Whanganui iwi. It provides them with food and physically links them through a central highway. But it also informs their identity and spiritual existence. For Māori, a person’s identity is strongly linked to their river.⁷² As Matiu Mareikura notes, the river represents the mana of the iwi, as well as “our tapu, our ihi, our wehi, all these things make up what the river means to us. It is our life cord ... because it’s sacred water to us”.⁷³ For Turama Hawira, the

67 JB Hōne Sadler, Senior Lecturer at the University of Auckland “Te Marae, A Metaphor For A Te Ao Mārama Paradigm” (Māori 130G Lecture, University of Auckland Māori Studies Department, Auckland, 12 January 2017).

68 Sadler, above n 67.

69 Waitangi Tribunal, above n 3, at 23.

70 Magallanes, above n 38, at [7].

71 Waitangi Tribunal, above n 3, at 57.

72 James DK 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 49.

73 Waitangi Tribunal, above n 3, at 57.

Whanganui iwi representative to Te Pou Tupua, the river is “the place we go to heal, the place we go for solace”.⁷⁴

Whanganui iwi belong to the river, just as the river belongs to them. To them, “the river is a taonga and a possession of central significance, temporally and spiritually”.⁷⁵ As previously discussed, Whanganui iwi assert rangatiratanga over the river. For Mareikura, this rangatiratanga means that “nothing shall come between what is right for me, Whanganui, and what has been left behind from our ancestors”.⁷⁶

C The TAT Act 2017 Partially Expresses the Cultural Integrity Norm

The TAT Act 2017 expresses cultural integrity to a degree, as it incorporates the Whanganui iwi view of a personified natural world into legislation which legitimises and supports the assertion of the Whanganui iwi cultural identity. However, it expresses this worldview through the English language and Western legal concepts, which may be counterproductive to the promotion of a unique Whanganui iwi indigenous culture. The result is a hybrid of indigenous and non-indigenous ideas, which has both positive and negative implications.

Prima facie, the Act explicitly adopts the Whanganui iwi view of the river into law. As James Morris and Jacinta Ruru note:⁷⁷

... it takes a western legal precedent and gives life to a river that better aligns with a Māori worldview that has always regarded rivers as containing their own distinct life forces ...

It does so by first referencing intrinsic Whanganui iwi values. It then expresses those values by conferring legal personality on Te Awa Tupua, placing requirements on decision-makers and vesting ownership of the riverbed in Te Awa Tupua itself.

74 Turama Hawira, Whanganui iwi representative to Te Pou Tupua “Homage to the River” (Auckland Writers Festival, Aotea Centre, Auckland, 18 May 2018).

75 Waitangi Tribunal, above n 3, at 23.

76 At 57.

77 Morris and Ruru, above n 72, at 58.

The Act references intrinsic Whanganui iwi values by including them in a section called Tupua Te Kawa, and stating that the values “represent the essence of Te Awa Tupua”.⁷⁸ The values include:⁷⁹

- (a) Ko te Awa te mātāpuna o te ora – the River is the source of spiritual and physical sustenance.
- (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.
- (c) Ko au te Awa, ko te Awa ko au – I am the River and the River is me.
- (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.

According to Hawira, the legislative recognition of these values is important.⁸⁰ But the next step is encouraging the whole iwi and the wider community to approve, adopt and adhere to the values. This will instil the “collective duty to care and whole spirit of collaboration” which is necessary to “make the difference in terms of what will happen for Te Awa Tupua”.⁸¹ By recognising the values, the Act provides a platform for the iwi to be self-determining in relation to the wellbeing and future of Te Awa Tupua.

One might criticise the reference to Whanganui iwi values as tokenistic. Yet the legislation goes beyond mere reference. It expresses these values by conferring legal personality on Te Awa Tupua, placing requirements on decision-makers, and vesting ownership of the riverbed in Te Awa Tupua itself.

First, it grants legal personality to the Whanganui river, recognising its status as a subject rather than an object of law.⁸² According to Hutchison, this represents a shift from a Western anthropocentric viewpoint where “humans are at the top of the hierarchy, above the natural world and animals” to a view where humans, animals and nature are interrelated aspects of the natural world, co-dependent on one another for

78 TAT Act 2017, s 13.

79 Section 13.

80 Hawira, above n 74.

81 Hawira, above n 74.

82 TAT Act 2017, s 14.

their existence, and where no clear hierarchy exists.⁸³ As Morris and Ruru note, this gives recognition to the mana (authority) and mauri (life force) of the river.⁸⁴ Under tikanga, Māori view the river as an entity with its own integrity, and act in a way that reflects this. In Metiria Turei's view, the law has been catching up with tikanga by "starting to find ways — clumsy and not perfect by any means ... to understand that core concept".⁸⁵

Secondly, it puts the "health and wellbeing of the river at the forefront of decision-making".⁸⁶ It does so by requiring decision-makers who exercise functions related to the Whanganui river under various statutes to recognise and provide for: the status of Te Awa Tupua as a legal person; and the Tupua Te Kawa values. An example is decision-makers preparing or changing regional policy statements and regional or district plans under the Resource Management Act 1991 (RMA).⁸⁷ Decision-makers exercising other relevant functions under the RMA must at the very least "have particular regard to ... the Te Awa Tupua status" and values.⁸⁸ Importing Whanganui iwi values as relevant considerations in decision-making that affects Te Awa Tupua and Whanganui iwi is a step forward. However, it is arguable that the legislation should place those values at the forefront of decisions as the deciding factor rather than merely as one factor among many to be weighed, considered and potentially dismissed. For example, decision-makers preparing regional plans under the RMA will weigh this factor against other factors including the sustainable use and development of natural and physical resources.⁸⁹ The latter factor may resonate more strongly with anthropocentric decision-makers than the Tupua Te Kawa values, causing them to make final decisions that are adverse to Te Awa Tupua and Whanganui iwi interests.

The Act also divests ownership of the riverbed from the Crown and vests it in Te Awa Tupua. This is intended to "reflect the Whanganui iwi view that the River is a

83 Hutchison, above n 4, at 180.

84 Morris and Ruru, above n 72, at 50.

85 (24 May 2016) 714 NZPD 11220.

86 Morris and Ruru, above n 72, at 50.

87 TAT Act 2017, s 15.

88 Section 15(3) and sch 2, cl 2.

89 Resource Management Act 1991, ss 5(2) and 66.

living entity in its own right and is incapable of being ‘owned’ in an absolute sense”.⁹⁰ At first glance, the shift from dividing the river into constitutive parts with ownership assigned over those parts, to declaring the river incapable of being owned and vesting the riverbed in the legal entity of the river itself, seems to legitimise the Whanganui iwi worldview. But, as Linda Te Aho argues, while this legislation purports to honour an indigenous worldview, it is really a thinly disguised “compromise to prevent iwi from obtaining ownership”.⁹¹

It is worth noting that existing private property rights in the river are not extinguished by the vesting of the riverbed in Te Awa Tupua.⁹² This contradicts the government’s commitment to recognising the Whanganui iwi view of the river as an “indivisible and living whole”, perhaps indicating that the vesting of the riverbed is an attempt to pacify Whanganui iwi in settlement negotiations for past Treaty of Waitangi breaches, rather than an honest effort to adopt their worldview.

While the TAT Act 2017 has made some progress in reflecting the Māori worldview through legislation, and thus expressing the cultural integrity self-determination norm, its ability to achieve this goal is severely limited because it relies on Western legal constructs and the English language. Possessing the rights and obligations of a legal person only entitles someone or something to be a subject under the law; it does not reflect the indigenous concept of being a living being. Similarly, the English language cannot perfectly translate concepts like rangatiratanga, tapu and mana because such concepts reflect a way of thinking that does not exist outside of Māoridom. Arguably, then, there should be both a Te Reo Māori version and an English version of the Act, with the former given preference in any dispute regarding the Act’s interpretation or translation.

When Mātauranga Māori is expressed in a non-indigenous language and through Western legal constructs, it is arguably distorted. Linda Tuhiwai Smith notes that

90 *Tūtohu Whakatupua* (Office of Treaty Settlements, 30 August 2012) at [2.7.1].

91 Linda Te Aho “Ruruku Whakatupua Te Mana o te Awa Tupua - Upholding the Mana of the Whanganui River” (2014) May Māori LR 12 at 20.

92 TAT Act 2017, s 46.

for indigenous peoples, recording indigenous concepts in writing is never neutral. It can be “dangerous because we reinforce and maintain a style of discourse which is never innocent” and “reveal ourselves in ways which get misappropriated and used against us”.⁹³ Here the risk is that the Whanganui view of the river is wrongly equated with the Western concepts of “legal personality” and the “vesting” of a “Crown-owned river bed” into a legal entity. This is arguably a form of colonisation of thought because it compromises the integrity of indigenous ideas by imposing Western thinking on them.

On the other hand, the TAT Act 2017 genuinely represents a hybrid of Western and Māori indigenous thinking. It brings together Western legal concepts like legal personality and private property rights which are expressed in English and extends them to a new context — the natural world. Moreover, the legislation is the result of a negotiation between Whanganui iwi and the Crown. Given Whanganui iwi advocated for this hybrid legislation, perhaps it is indeed an expression of their self-determination — after all, it is the output of their thinking, desires and negotiation. It represents their aspiration for the way in which their river ought to be managed and protected in the future. Furthermore, Western legal concepts may be a helpful tool to scale certain indigenous ideas worldwide. While the Act does not perfectly capture the Whanganui iwi worldview, it does advocate and legitimise an interpretation of this worldview within the context of the Whanganui iwi-Crown relationship. As such, it does affirm Whanganui iwi cultural integrity, and is a means of expressing Whanganui iwi self-determination.

93 Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (University of Otago Press, Dunedin, 1999) at 36.

VI The Recognition of Te Awa Tupua as an Expression of Self-Government

A Self-Government as Autonomy and Participation

Part V outlined how the TAT Act 2017 expresses cultural integrity in a visible manner. Part VI explains Anaya's self-government norm and analyses the extent to which the Act provides for Whanganui iwi self-government through the legal recognition of Te Awa Tupua. It argues that the Act does not sufficiently provide for expressions of iwi self-government. It fails to provide for iwi autonomy and, while it attempts to provide for iwi participation rights, it does so in a highly ambiguous manner.

According to Anaya, "self-government is the overarching political dimension of ongoing self-determination".⁹⁴ At its core is the idea that a government, through its actions, ought to represent the will of the people it governs.⁹⁵ Anaya divides this norm into two related strains. The first strain, autonomy, "upholds spheres of governmental or administrative autonomy for indigenous communities".⁹⁶ This is affirmed by art 4 of the UNDRIP. The second strain, participation, "seeks to ensure the effective participation of those communities in all decisions affecting them that are left to the larger institutions of decision making".⁹⁷ This mirrors art 5 of the UNDRIP.

Self-government is strongly linked to indigenous self-determination. It allows indigenous peoples to collectively establish and progress towards a vision of the future through the ability to govern their own autonomous institutions and participate in external institutions. The autonomy strain is important because it provides indigenous peoples with freedom from external control — an essential precondition to asserting power and control over their own lives. O'Sullivan notes that self-determination, or reproduction of the social order, "requires considerable autonomy and control over the institutions and practices that most influence that order".⁹⁸ The participation strain is also critical because indigenous peoples do not exist in isolation. They exist within,

94 Anaya, above n 36, at 150.

95 At 150.

96 At 151.

97 At 151.

98 O'Sullivan, above n 55, at 50.

and often actively lead, other social groupings such as communities and states whose actions affect their interests. For example, at the time of writing, 29 Members of the New Zealand Parliament are of Māori descent, but they actively participate within the state apparatus.⁹⁹

B The TAT Act 2017 Does Not Deliver on the Autonomy Strain

The TAT Act 2017 does not express iwi autonomy. The Act does not grant Whanganui iwi exclusive, independent control over their river free from government interference or domination. Rather, the government actively retains a co-management role over the river. This interferes with the right of Whanganui iwi to exert autonomy over internal affairs, including their unique rangatiratanga relationship with Te Awa Tupua.

One might argue that autonomy is evident because Whanganui iwi actively chose the management structure over Te Awa Tupua during the settlement process. This is reinforced by the fact that 95.9 per cent of the iwi approved the ratification of Ruruku Whakatupua, the deed of settlement between the Crown and Māori over the Whanganui river, following a significant consultation period.¹⁰⁰ Yet this argument is partially negated by the inherent power imbalance in the Treaty settlement process. Whanganui iwi had less power than the Crown and were forced to compete with other claimants for a share of a limited resource pool. In this situation, their autonomy was arguably restricted.¹⁰¹

The Act also creates Te Korotete, a \$30 million contestable fund administered by Te Pou Tupua on behalf of Te Awa Tupua. Theoretically, hapū can apply for grants to fund projects which support their rangatiratanga role of providing for the health and wellbeing of the river. However, it can be argued that this fund does not support iwi autonomy. Grants are highly restricted — there are two submission dates per year,

99 Teparu Koti “Who are our Māori Members of Parliament now?” (24 September 2017) Māori Television <www.maoritelevision.com>.

100 Ngā Tāngata Tiaki o Whanganui, above n 1, at 3.

101 Mikaere, above n 53, at 17.

projects must align with strategic priority areas of the fund and the grants are capped at \$5,000 per project.¹⁰² Presumably, other funding requirements such as reporting obligations also exist. This means that hapū do not have true control or autonomy over their projects, and, by extension, their relationship with the river.

Overall, the TAT Act 2017 does not express iwi autonomy. It does not create an autonomous Whanganui iwi institution with exclusive authority to govern the river. Its management structure reflects the power imbalance of the settlement negotiations. And the nature of its contestable fund limits iwi control.

C The TAT Act 2017 Delivers Partially on the Participation Strain

The TAT Act partially delivers on the participation strain of Anaya's self-government norm. It creates several legal structures for decision-making and expressly provides for Whanganui iwi participation within these structures. These include Te Pou Tupua, Te Karewao and Te Kōpuka. Yet the actual level of decision-making power that Māori wield in these bodies varies and participation is at times tokenistic.

The most significant progress the Act makes towards greater Whanganui iwi participation in decisions affecting the Whanganui river is the creation of the office of Te Pou Tupua, the "human face" of the river.¹⁰³ Te Pou Tupua is the key body, with primary responsibility and authority in relation to Te Awa Tupua. It is a singular guardianship role consisting jointly of two persons: one appointed by the Crown; and one appointed by iwi with interests in the Whanganui river. Together, these persons represent the interests of, and act on behalf of, Te Awa Tupua. Currently, Te Pou Tupua consists of Dame Tariana Turia and Whanganui iwi Poukōrero (tribal historian) Turama Hawira, who were inaugurated on 29 August 2017.¹⁰⁴ According to Whanganui iwi rangatira Gerrard Albert, in the three years following their appointment, Turia and Hawira will take on an active role and "speak, promote and

102 Te Mana o te Awa Fund Manager *Te Mana o Te Awa Contestable Fund Application* (Tāngata Tiaki o Whanganui, Whanganui, 2010) at 1.

103 TAT Act 2017, s 18.

104 Nga Tāngata Tiaki o Whanganui "Historic Inauguration Ceremony Welcomes Te Pou Tupua" (press release, 5 November 2017).

take any appropriate action they feel necessary to uphold, promote and protect Te Awa Tupua”.¹⁰⁵

Theoretically, Whanganui iwi can participate indirectly in the management of the river through Hawira, their representative to Te Pou Tupua. They can influence him to bring legal claims on behalf of Te Awa Tupua, encourage him to use certain words when speaking on behalf of the river, or ask him to take certain actions to protect the health and wellbeing of the river. However, the role is a new concept. At the time of writing, the representatives have spent most of their time encouraging the various hapū of Whanganui iwi to take ownership of the shared value system.¹⁰⁶ Therefore, it is difficult to speculate what future actions Te Pou Tupua might take and what level of involvement the iwi will have in Te Pou Tupua. It is, however, important to emphasise that due to the singular nature of the Te Pou Tupua role, any decision will require the unanimous agreement of the Whanganui iwi and Crown representatives. This limits the decision-making power of the Whanganui iwi representative and, by extension, limits the ability of the iwi to influence decisions.

Furthermore, the Act establishes Te Karewao, an advisory group which will advise and support Te Pou Tupua.¹⁰⁷ The group consists of three persons: one appointed by the trustees of Ngā Tāngata Tiaki o Whanganui (the Whanganui iwi post-settlement governance entity); one appointed by iwi with interests in the Whanganui river (other than Whanganui iwi); and one appointed by the relevant local authorities. Preparatory work to form Te Karewao has commenced but the group has not yet been established.¹⁰⁸ Given this, it is difficult to speculate about the actions the group will take and the extent to which Whanganui iwi will participate. However, decision-making power appears even more limited than Te Pou Tupua, given Te Karewao clearly sits under Te Pou Tupua and the latter “must not delegate any decision-making

105 Ngā Tāngata Tiaki o Whanganui, above n 104.

106 Hawira, above n 74.

107 TAT Act 2017, s 27.

108 *Annual Report of Ngā Tāngata Tiaki o Whanganui Trust* (Ngā Tāngata Tiaki o Whanganui, 31 March 2017) at 14.

function to Te Karewao”.¹⁰⁹ Notably, the Crown will pay \$200,000 each year over 20 years to cover the administrative costs associated with Te Pou Tupua and Te Karewao. This leaves an execution gap for Whanganui iwi and other representatives to fill. The long-term ability of the iwi to participate in the decision-making bodies is compromised because, without a guaranteed funding stream in perpetuity, the bodies are not sustainable. This forces current representatives to dedicate significant time and effort to ensuring that the bodies can survive in the long term.

Finally, the Act creates Te Kōpuka, the strategy group for Te Awa Tupua. Te Kōpuka is comprised of up to 17 representatives of persons and organisations with interests in the Whanganui River, including iwi, local and national authorities and parties with commercial, recreational and environmental interests.¹¹⁰ The trustees of Ngā Tāngata Tiaki o Whanganui may appoint one member, while iwi with interests in the Whanganui River may appoint up to five members. This group is tasked with developing, implementing and monitoring Te Heke Ngahuru, the strategy document for Te Awa Tupua. Its purpose is to bring together stakeholders with interests in the Whanganui River to work collaboratively on a strategy that will provide for the “future environmental, social, cultural and economic health and wellbeing of the Whanganui River”.¹¹¹ This is significant because it allows Whanganui iwi to participate in key long-term decision-making regarding their river. The inaugural appointees met for the first time in May 2019.¹¹² The extent to which Whanganui iwi will participate in long-term decision-making in the river strategy — and the influence that the strategy will have on Te Pou Tupua — remain to be seen. Moreover, the Crown only agreed to contribute a one-off payment of \$430,000 to the Horizons Regional Council towards the costs of establishing Te Kōpuka and the strategy. This leaves a similar execution gap, such that it is incumbent on Whanganui iwi to secure sustainable funding if they wish to participate in the body indefinitely.

109 TAT Act 2017, sch 3, pt 2, s 8(2).

110 Section 29.

111 *Tūtohu Whakatupua*, above n 90, at [2.24].

112 “Te Heke Ngahuru / Te Kōpuka” Ngā Tāngata Tiaki o Whanganui <www.ngatangatatiaki.co.nz>.

In summary, the TAT Act 2017 creates a range of structures which facilitate shared decision-making by Whanganui iwi, the Crown and other stakeholders in Te Awa Tupua. This theoretically allows Whanganui iwi to participate in key decisions affecting the wellbeing of their river. But the Act does not itself clearly provide for expressions of Whanganui iwi participation.

Overall, the Act fails to sufficiently provide for expressions of self-government. As discussed, it fails to provide for Whanganui iwi autonomy and, while it attempts to provide for greater Whanganui iwi participation in decision-making bodies, it provides almost no clarity about how this participation will be achieved.

VII The Recognition of Te Awa Tupua as an Expression of Lands and Natural Resources

A Elaborating on the Norm of Lands and Natural Resources

Anaya's norm of lands and natural resources captures the crucial role of lands and natural resources in indigenous self-determination.¹¹³ Self-determination often requires that indigenous peoples have close relationships with surrounding lands and natural resources: these provide a strong economic base for indigenous development, territory over which indigenous peoples can exert autonomy and safe areas where cultural traditions can be practised with state backing to facilitate the development of indigenous culture and identities.¹¹⁴ In the UNDRIP, rights to lands, territories and resources are central, indicating their importance. Land rights are particularly important for Māori, as indicated by the fact that, historically, most of the high-profile Māori protests were about land, including the 1975 Māori land march, the 1977–1978 occupation of Bastion Point, and the 2004 Foreshore and Seabed hīkoi.

Two of Durie's foundation stones for self-determination, *mana atua* and *mana whenua*, help to explain the fundamental importance of lands and natural resources to Māori

113 Anaya, above n 36, at 141.

114 Durie, above n 51, at 115.

mana.¹¹⁵ Mana atua starts from the Māori point of view that the environment is “an interacting network of related elements, each having a relationship to the others and to earlier common origins”.¹¹⁶ In other words, all aspects of the natural world, including people, can trace their origins to Ranginui and Papatūānuku through Māori cosmology stories, and thus all aspects are interrelated. Mana atua also includes certain Māori values which govern the management of the environment. The first, taonga, refers to the high value Māori place on certain natural resources or aspects of the natural world. The second, tikanga (in its environmental context), discusses the preferred way of “protecting natural resources, exercising guardianship, determining responsibilities and obligations, and protecting the interests of future generations”.¹¹⁷ The third, mauri, describes the life essence contained within all living things.¹¹⁸ The final, kaitiaki, denotes “the burden incumbent on tangata whenua ... to be guardians of a resource or taonga for future generations”.¹¹⁹

Mana whenua recognises the importance of land for indigenous spiritual growth and economic survival. As Durie notes:¹²⁰

... it contributes to sustenance, wealth, resource development, tradition; land strengthens whanau and hapū solidarity, and adds value to personal and tribal identity as well as the well-being of future generations ...

Durie goes on to emphasise that, for many Māori, “loss of land is loss of life, or at least loss of that part of life which depends on the connections between the past and the present and present with the future”.¹²¹

In the following section, this article will focus on three aspects of Anaya’s lands and natural resources norm: the strength of the property rights indigenous peoples hold in relation to lands and natural resources (mana whenua); the extent to which indigenous

115 At 14.

116 At 21.

117 At 23.

118 At 23.

119 At 23.

120 At 115.

121 At 115.

peoples can participate in conservation efforts; and the spiritual connection that indigenous peoples share with their environment (mana atua). These aspects are predictably interlinked. Strong property rights like ownership make it easier to practice cultural traditions in relation to the land through state support and enforcement, while the ability to conserve the land may strengthen indigenous peoples' spiritual relationship with it. Ultimately, the TAT Act 2017 gives partial expression to the norm of lands and resources, but does not go as far as it should.

B Ownership, Possession, Control of Lands, Territories and Resources

The TAT Act does not confer greater ownership or possession of the river to Whanganui iwi and so it arguably does not further the lands and natural resources norm. The Act does not transfer ownership of the river to Whanganui iwi; rather, it vests ownership of the fee simple estate in Crown-owned parts of the riverbed in Te Awa Tupua itself.¹²² Notably, this vesting does not affect private property rights or public use and access rights.¹²³

At first glance, this aligns with the Māori worldview that rivers are not property capable of being “owned”. However, the absence of ownership rights puts the iwi at a disadvantage because, without such rights and accompanying state protection, it is difficult for the iwi to fully assert their tino rangatiratanga over the river. Furthermore, the Waitangi Tribunal has previously held that tino rangatiratanga is more than, but includes, ownership.¹²⁴ This implies that full ownership rights are necessary for Whanganui iwi to assert their rangatiratanga relationship over the river free from external interference.

However, it can be argued that Whanganui iwi do achieve greater control over Te Awa Tupua through the Act. This occurs via the ability to nominate a representative to Te Pou Tupua, who may perform landowner functions over land vested in

122 TAT Act 2017, s 41(1).

123 Section 46(2).

124 Waitangi Tribunal *Interim Report on National Freshwater and Geothermal Resources* (Wai 2358, 2012) at 101.

Te Awa Tupua.¹²⁵ Presumably, this means the nominated representative can bring claims on behalf of the river, as discussed below.

This aspect of the lands and natural resources norm connects to art 26(1) of the UNDRIP, which states that indigenous peoples “have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”. Yet, arguably, both the norm and the right are outdated. Providing protection for rights *to* land and natural resources is potentially not the best way to conceive of and protect indigenous interests in land, and ought to be replaced with protection for rights *of* land and natural resources. This raises the question — if the Whanganui river is a legal person, could the river and the iwi together be considered “indigenous peoples” for the purposes of the UNDRIP? If so, could the river together with the iwi be self-determining under international law? The answer may depend on whether indigenous rights are human rights that only human beings are entitled to. While this area of inquiry is beyond the scope of this article, it indicates that concepts, such as legal personhood, have the potential to advance indigenous interests beyond the traditional scope of UNDRIP rights.

Ultimately, under Anaya’s interpretation of the lands and natural resources norm, the TAT Act 2017 fails to substantially express self-determination through greater ownership, control or possession of lands, territories and resources.

C Environmental Conservation

By conferring legal personhood on Te Awa Tupua, the TAT Act 2017 assists Whanganui iwi in conserving the Whanganui River. It does so by making it easier for the representative of Whanganui iwi, nominated to Te Pou Tupua, to bring an environmental or conservation-related legal claim on behalf of Te Awa Tupua with the agreement of the Crown-nominated representative.

125 TAT Act 2017, s 19(1)(d).

James DK Morris and Jacinta Ruru describe three ways in which conferring legal personhood makes it easier to bring legal claims to protect the environment.¹²⁶ First, the issue of third party standing is removed, because the guardians of the river, Te Pou Tupua, are empowered by legislation to bring claims on behalf of the river. Secondly, it is easier to demonstrate harm or loss, because the claimants need only demonstrate harm to the river, and not third-party economic loss flowing from such harm. Finally, compensation awarded for any successful claim would go to the river directly, rather than a third party, and could be used to enhance its wellbeing. We can see how conferring legal personhood on aspects of the natural world can directly express the lands, territories and resources self-determination norm, by making it easier for indigenous peoples to achieve environmental protection through the legal system.

D Spiritual Relationship

The TAT Act 2017 also expresses the indigenous right under the UNDRIP to maintain and strengthen a distinctive spiritual relationship with lands, territories and waters traditionally owned or occupied, and uphold their responsibilities to future generations.¹²⁷ Schedule 8 of the Act recognises that Whanganui iwi hold a kaitiakitanga role (obligation to nurture and provide care) in relation to the rapids of the Whanganui River, which they believe are inhabited by a kaitiaki (spiritual guardian) unique to each hapū. It states:¹²⁸

Each of these kaitiaki is a mouri [vital essence] and is responsible for maintaining the lifeforce and therefore the health and well-being of the Whanganui River and its people. Each hapū and the whānau within that hapū are responsible collectively for maintaining the mouri of the ripo and, in so doing, the collective mouri of Te Awa Tupua.

126 Morris and Ruru, above n 72, at 50.

127 See *UNDRIP*, art 25.

128 TAT Act 2017, sch 8.

The aforementioned Te Korotete \$30 million contestable fund is available to Whanganui iwi for projects which protect the health and wellbeing of the Whanganui river. Therefore, it provides the iwi with some degree of practical assistance, helping them to fund projects that preserve the river's physical and spiritual wellbeing in fulfilment of their kaitiakitanga role. However, this \$30 million is arguably insufficient to rectify the years of physical damage to the Whanganui river permitted by the Crown. Furthermore, it cannot rectify the spiritual damage that the Crown has caused to it, including diverting life forces from the river through the Tongariro electricity scheme.

Overall, conferring legal personality to aspects of the natural world expresses the lands and natural resources norm to a small extent because it allows for greater indigenous environmental conservation and acknowledges the unique spiritual relationship that Whanganui iwi share with their river. But separate legal personality also serves to reduce Whanganui iwi hard rights of ownership of their natural resources.¹²⁹

VIII The Recognition of Te Awa Tupua as an Expression of Non-discrimination and Social Welfare

For completeness, it is necessary to briefly reflect on how the TAT Act 2017 expresses the remaining two self-determination norms: *non-discrimination*; and *social welfare*.

The non-discrimination norm recognises that the “absence of official policies or practices that invidiously discriminate against individuals or groups” is a basic requirement of self-determination.¹³⁰ Arguably, the TAT Act 2017 violates this norm and discriminates against Whanganui iwi because it deliberately does not vest ownership of the river in the iwi. Recall that the Waitangi Tribunal held that the iwi has a rangatiratanga relationship with the river, and that the closest approximation of

129 Sheryl Lightfoot “Emerging International Indigenous Rights Norms and ‘Over-Compliance’ in New Zealand and Canada” (2010) 62 Political Science 84.

130 Anaya, above n 36, at 129.

tino rangatiratanga in this context is full ownership.¹³¹ Parliament, by allowing anyone to own land yet refusing to recognise the Whanganui iwi right to own the river, arguably discriminates against Whanganui iwi on the grounds of their race and indigenous identity.

The social welfare and development norm recognises that having a stable economic base and the ability to develop as peoples is essential for self-determination.¹³² The TAT Act 2017 goes some way to provide for this norm. It does so through the establishment of the \$30 million Te Korotete contestable fund to support river projects. Whanganui iwi can use this fund to clean up the river and potentially invest in projects which generate sustainable revenue streams by harnessing the river as a natural resource in a culturally sensitive way. However, this amount is only a drop in the ocean when considering the value of the land and other assets wrongfully taken — reflecting the extreme inequality in bargaining power inherent in the Treaty settlement processes.¹³³ Arguably, the economic, environmental and spiritual loss flowing from the Crown's treaty breaches far exceeds the \$30 million one-off payment. As such, the social welfare and development norm is only partially satisfied.

IX Conclusion

While the TAT Act 2017 expresses Whanganui iwi self-determination in a limited way, it falls short of its potential. The most significant way in which it assists Whanganui iwi in enhancing their self-determination is through the cultural integrity norm. It incorporates the Whanganui iwi worldview and way of thinking into domestic legislation and, therefore, legitimises it. However, the Act largely fails to help Whanganui iwi assert greater self-government, given that it does not create an autonomous indigenous institution to manage the river and affords limited Whanganui iwi decision-making power within river management structures. It does deliver on aspects of the lands and natural resources norm by: assisting Whanganui iwi

131 Waitangi Tribunal, above n 3, at 23.

132 Anaya, above n 36, at 149.

133 See, for example, Andy Fyers "The amount allocated to Treaty of Waitangi settlements is tiny, compared with other Government spending" (3 August 2018) Stuff <www.stuff.co.nz>.

in their efforts to conserve the river; and recognising their spiritual connection to the river. Yet it also fails to deliver hard property rights, such as ownership, to the iwi — although, admittedly, this failure indicates that the lands and resources norm may be outdated in its approach to protecting indigenous interests in the natural world. Finally, it violates the non-discrimination norm through the same refusal to recognise iwi ownership over non-land aspects of the natural world, and delivers only a weak form of the social welfare norm through the provision of a relatively small contestable fund. At the same time, the Act leaves a large execution gap for Whanganui iwi to fill. This includes finding a sustainable funding source to ensure the long-term survival of river management structures, and developing feedback loops between iwi members and representatives on those structures that allow Whanganui iwi to actively participate in the management of the river.

While clearly imperfect, the TAT Act 2017 is particularly useful in two regards. First, it demonstrates that Parliament is willing to innovate in its law-making by extending traditional legal concepts, such as legal personality, to new indigenous contexts. In New Zealand, iwi that are yet to settle with the Crown may be able to take advantage of this flexible attitude by advocating for other legal concepts to be used in novel contexts to their benefit. Secondly, it provides a case study which other states can observe and improve upon, as indicated by the India example. Indigenous peoples can point to the TAT Act 2017 as a potential way in which states might protect their indigenous rights under international law. Just as the Whanganui river flows from the mountains to the sea, so too might the concept of conferring legal personality to aspects of the natural world flow to, and develop in, other jurisdictions and contexts.