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ARTICLE

Applying te ao Māori to Redefine Property Rights

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Ko te whenua te wai ū mō ngā uri whakatipu.[1] The world of private free enterprise frames natural resources as things to be owned, exploited, and consumed. Interactions between Western philosophies of short-time horizons and property rights have protected individual freedom of action in the commons, threatening humanity's long-term survival unless society changes course. Some communal property systems, like those of te ao Māori, overcome this tragedy of the commons by recognising a bedrock of duties to the environment. First, this article argues that any right to use resources under the law should come with a reciprocal legal obligation to maintain the lifeforce and well-being of Mother Earth and her integrated systems as a living whole. Secondly, this article contends that states should adopt a governance ethic of kaitiakitanga rather than Earth trusteeship because it provides a conceptual basis for understanding property entitlements through a genealogical paradigm that weaves ancestral, social and environmental threads of identity, practice and purpose. This article aims to broaden the discourse on property rights by breaching the stronghold of legal formalism. Creative governance approaches that express connection and belonging for the entities and communities involved are still in their infancy. However, they comprise a continuous learning process and illustrate that the choice is not necessarily an "either/or" indigenous or Western philosophy.

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1 "The land will provide the sustenance for future generations."

I Introduction

The world of free enterprise frames natural resources as things to be owned, exploited and consumed. Moreover, it views natural resources as discrete collections of commodities external to our well-being and concepts of decentralisation, rampant individualism, and unrestricted growth motivate a perverse public morality that permits environmental degradation in the service of the market.[2] Living sustainably is the defining challenge of our time, growing in urgency as evidence emerges that the biosphere is approaching a planetary "tipping point".[3] In an age where humanity's long-term survival is uncertain, nature finds a price tag hanging around its neck.

The tragedy of the commons is a tale about the destruction of a collectively held resource due to a lack of private ownership. It has influenced the regulation of natural resources for decades.[4] In this fable, when a user of a collectively held resource increases their use, they obtain all the benefits of that increased use and bear only a fraction of the costs. Incentives to conserve or develop the resource are scarce because no user stands to benefit from long-term use of the resource. So the story goes: communal ownership supposedly brings destruction to all. However, this article will demonstrate that the tragedy of the commons cannot accurately condemn all communal property systems.[5]

Legal scholars must broaden the discourse on property rights to consider how redefined property concepts can champion sustainable human-nature relationships. This article will breach the stronghold of legal formalism to advocate for a new paradigm of property entitlements and obligations through te ao Māori (the Māori worldview), which maintains the life force of Mother Earth and her integrated systems. While there is no obvious or universally accepted approach to understanding property entitlements and the ethical imperatives that outline our moral relationship to the environment, te ao Māori provides a valuable conceptual source of duties. Secondly, from a governance standpoint, this article will argue that adopting an ethic of kaitiakitanga may be more useful than Earth trusteeship in the pursuit of reclaiming the commons. Rather than simply managing connections between environmental resources and humans, kaitiakitanga weaves together ancestral, social and environmental threads of identity, practice and purpose. In doing so, te ao Māori and kaitiakitanga clarify rather than obscure our relationship with the Earth.

This article will first summarise the concept of property rights and Western understandings of ownership that cast the land user as distinct from and superior to nature. Part III will then explore te ao Māori and Māori conceptions of ownership, which encourage the strengthening of mauri (life-sustaining capacity) for a collective interest.[6] Part IV will survey the changing lens through which legal scholarship views property rights

2 Joseph L Sax "The Law of a Liveable Planet" in R J Fowler (ed) *Proceedings of the International Conference on Environmental Law* (The National Environmental Law Association of Australia and the Law Association for Asia and the Pacific, Sydney, 1989) at 8.

3 Anthony D Barnosky and others "Approaching a state shift in Earth's biosphere" (2012) 486 Nature 52.

4 Garrett Hardin "The Tragedy of the Commons" (1968) 162 Science 1243.

5 Nebojsa Nakicenovic and others *Global Commons in the Anthropocene: World Development on a Stable and Resilient Planet* (International Institute for Applied Systems Analysis, WP16-019, October 2016).

6 Māori Marsden "The Natural World and Natural Resources: Māori Value Systems and Perspectives" in C Royal (ed) *The Woven Universe: Selected Writings of Rev Māori Marsden* (Estate of Rev Māori Marsden, Masterton, 2003) 24 at 43–45.

and natural resources to reconstruct individual and collective entitlements against the backdrop of protecting and enhancing ecological systems for the common good.

Finally, Part V of this article will explore the risk of artificial selection and the politics of te ao Māori representation. It will conclude that Western systems may act as agents for change if they act in a manner that appreciates the complex nature of Māori identity and gives Māori the power to decide how to respond to issues within new contexts. Property concepts must be systematically and meticulously rethought from a normative and technical angle to recalibrate the balance of duties, entitlements, and liabilities. Humans are not conquerors of Mother Earth; we are merely guests in residence, and we must understand how we fit amongst her integrated systems.

It is important to note that the author is not of Māori descent and only speaks from a research perspective. The author acknowledges that there is no one Māori reality, and Māori views on the incorporation of te ao Māori concepts into Western governance regimes are as diverse as Māori themselves. Some Māori demonstrate an ongoing willingness to incorporate Māori methodologies within Western legislative frameworks to advance Māori culture and assert local authority.[7] However, other Māori believe that attempts to include their cultural paradigms in Western legal systems, which are subject to non-Māori decision-making, merely consolidates current institutional power and evades the conflict between kāwanatanga (governance) and tino rangatiratanga (sovereignty or absolute chieftainship) and the "subordination of Mana Māori to absolute Crown authority".[8] When this article refers to "Māori", it acknowledges that Māori are not a homogenous group but rather consist of diverse iwi, hapū and whānau, each with their own whakapapa. It also recognises that it will not always be possible to translate te reo terms into English neatly.[9]

II The Status Quo: Property Rights and Sustainability

Property refers to rights that people have in and over things.[10] It ultimately articulates a power relationship between a person and a valued resource, which is universally binding.[11] Property rights may include claims to possess, use, transfer and abandon, and liberties to

7 The integration of Māori principles into the legal system can be viewed as an ongoing effort by Māori to adapt Western systems strategically, with the goal of advancing their own cultural values. Examples such as the Kingitanga, the Māori Parliament, and even the Treaty itself have illustrated this strategic approach. See Te Puni Kōkiri *Te Kotahitanga o te Whakahaere Rawa: Māori and Council Engagement Under the Resource Management Act 1991* (February 2006) at 8–11.

8 Richard Dawson *The Treaty of Waitangi and the Control of Language* (Institute of Policy Studies, Wellington, 2001) at 163.

9 This article draws on tikanga Māori as "[t]he set of beliefs associated with practices and procedures to be followed in conducting the affairs of a group or individual." Before the arrival of colonists, Māori literature was oral, transmitted from one generation to the next through means including whaikorero (speeches), whakataukī (traditional sayings), waiata (song), haka, tauparapara, and karanga (call). References to the literature are provided in this article where possible, but not in every case. See Hirini Moko Mead *Tikanga Māori: Living by Māori values* (Huia Publishers, Wellington, 2003), at 12.

10 Thomas W Merrill and Henry E Smith *The Oxford Introductions to US Law: Property* (Oxford University Press, Oxford, 2010) at 8–11.

11 At 9.

consume or destroy. Thus, property is a bundle of rights to use a resource, enforced by a mixture of moral, social and legal sanctions.[12]

The duty to avoid inflicting harm to others restricts the exercise of property rights. Determining the extent to which this duty restricts the exercise of property rights is often undertaken through a cost-benefit analysis.[13] While their exact content may vary, all property rights include claims against the interference of others, an exclusive feature clearly expressed by John Locke.[14] Locke believed the legitimate claim of a property right to what was formerly owned communally "excludes the common right of other men".[15] Locke viewed it as ethically necessary to leave "enough, and as good" for others when land came under private ownership.[16] However, this proviso is overly optimistic, as traditional property law does not limit cumulative harm to an ecologically sustainable level.

Property rights have played a key role in libertarian perceptions of justice and present a sharp contrast to ecological sustainability (preserving the integrity of ecological systems).[17] Communities and cultures have formed different relationships with nature, founded on diverse values, standards and political structures. The property rights that have followed are similarly distinct. However, as Parts III(B) and IV(A) will explore, Western norms and ideals have prevailed in much of the world and have caused significant harm to all life on Earth.[18]

A *Modern property rights*

While there has been increasing recognition throughout the 20th and 21st centuries that natural resources are finite, utilitarianism continues to inform decision-making. Humanity's love affair with private property rights have compounded the effects of its embrace of utilitarianism to create a theory of morality that casts humans as the most valuable resource, whose only sovereign masters are "pain and pleasure".[19] Under this paradigm, legal rights and duties exist only between humans and favour individual and material values over collective and environmental values.[20] Indeed, John Foster's laws of capitalism name the cash nexus as "the only lasting connection between things" and "nature's bounty" as a "free gift to the property owner".[21] If the law views human welfare as more important than environmental welfare, then courts will resolve legal cases in a way that serves human needs over ecological needs. The extent to which the law maintains

12 Kevin Guerin *Property Rights and Environmental Policy: A New Zealand Perspective* (New Zealand Treasury, Working Paper 03/02, March 2003) at 3–4.

13 Svetozar Pejovich "Towards an Economic Theory of the Creation and Specification of Property Rights" (1972) 30 Review of Social Economy 309.

14 A M Honoré "Ownership" in A G Guest (ed) *Oxford Essays in Jurisprudence* (Oxford University Press, London, 1961) 107.

15 Ian Shapiro (ed) *Two Treatises of Government and a Letter Concerning Toleration: John Locke* (Yale University Press, 2003) at 112.

16 At 128.

17 Klaus Bosselmann *The Principle of Sustainability: Transforming Law and Governance* (2nd ed, Routledge, New York, 2017) at 1.

18 The term "Western" is used in this article as a convenient label to refer to intellectual traditions which have their root in Europe and have since spread via colonisation to include North America, parts of Oceania and the international sphere.

19 Jeremy Bentham *An Introduction to the Principles of Morals and Legislation* (Oxford, Great Britain, 1863) at 50.

20 Bosselmann, above n 17, at 130.

21 John Bellamy Foster *The Vulnerable Planet: A Short Economic History of the Environment* (Monthly Review Press, New York, 1999) at 120.

the presumption of human dominance over the environment will determine the extent to which it protects the environment. Where this dominance manifests itself in unfettered property rights and economic growth, the environment will inevitably suffer.[22]

The "right to own property alone" and freedom from being arbitrarily deprived of one's property is widely recognised worldwide and expressed as a universal freedom in the 1948 Universal Declaration of Human Rights.[23] It represents an entitlement to use the environment and its resources in a system of individual decision-making defined and protected by the sovereign state. Property rights can be a beneficial and effective tool for dealing with ecological issues by encouraging moral self-governance when properly framed and understood.[24] By determining who bears the costs and benefits of natural resource use, property rights can align users' self-interest with Mother Earth's long-term interests and thus promote sustainable resource use.[25] However, Western society and the state have never viewed the prevention of overexploitation and environmental degradation as the primary role of property rights.[26]As articulated by Leopold, our traditional "Abrahamic" perspective on land (including private property) confers privilege without imposing any corresponding obligation.[27] Whether it be the patricians of Ancient Rome or the bourgeoisie since industrial capitalism, individuals have only ever been interested in obtaining a piece of the cake.[28]

The new public environmental law of the 1960s added only specific environmental obligations to almost limitless private property rights. Legislatures tacked conservation measures onto existing laws of exploitation and free resource use without integrating the two.[29] The existence of environmental law as a separate and defined subject area demonstrates that values of ecological integrity have not entered the legal system.[30] Environmental governance remains "the poor cousin of property and commercial law", characterised by anthropocentric and non-integrated ideals.[31] More specifically, the idea that human beings are the most significant entity of the universe and are separate from and superior to nature. Environmental law has failed to sufficiently penetrate the content of property rights or achieve intra- and inter-generational justice. Its ignorance of the ecological value in limiting any individual entitlement to use the environment has, therefore, promoted modern economic liberalism instead of transforming it.[32]

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22 Bosselmann, above n 17, at 130.

23 Universal Declaration of Human Rights GA Res 217A (1948), art 17.

24 For example, using tradeable environmental allowances (such as the New Zealand Emissions Trading Scheme or quota management system) to manage natural resources may provide environmental protection at a minimum cost, create more flexibility and thereby encourage a broader range of responses from producers and consumers, and directly promote an economically efficient allocation of scarce resources: see Benjamin Richardson "Economic Instruments and Sustainable Management in New Zealand" (1998) 10 JEL 21.

25 Ben Cousins "A Political Economy Model of Common Property Regimes and the Case of Grazing Management in Zimbabwe" (paper presented to International Association for the Study of Common Property conference, Washington DC, September 1992).

26 Klaus Bosselmann *When Two Worlds Collide: Society and Ecology* (RSVP, Auckland, 1995) at 57.

27 Aldo Leopold *A Sand County Almanac: and Sketches Here and There* (Oxford University Press, New York, 1949) at 167–168.

28 Bosselmann, above n 26, at 58.

29 Bosselmann, above n 17, at 12.

30 At 12.

31 At 14.

32 Klaus Bosselmann "Wendezeit im Umweltrecht" (1985) 18 Kritische Justiz 345 (translation: "Turning Point in Environmental Law").

Property rights have, in some cases, begun to be limited by social, ecological, and democratic considerations. For example, art 14(2) of the German constitution states, "Property imposes obligations. Its use should also serve the public good."[33] In 1981, the German Federal Constitutional Court ruled in a case related to groundwater levels that "private land use is limited by the rights and interests of the general public, to have access to certain assets essential for human well-being such as water".[34] The late 19th and early 20th centuries saw the rise of progressive legal thought, which promoted the idea that property rights need continuous review and alteration as the balance of political power shifts in society.[35] However, respect for the intrinsic value of the community of life, in its own right, has rarely been the focus of environmental protection measures. Instead, strategies have aimed to and continue to correct previous errors in development regarding property rights and the use of natural resources. Environmental law has never truly sought to end humanity's war on nature.

Liberal approaches to ecological justice simply add duties to rights while disregarding the non-human world and, therefore, fail to illustrate why ecological considerations should constrain personal freedoms such as property rights.[36] The anthropocentric bias of any liberal hinders them from extending justice among humans to encompass "inter-species" justice.[37] Conversely, ecological realities demand us to redefine the ethical reasoning underpinning property rights to accommodate environmental ethics in conceptions of justice. While the history of property concepts is important, contemporary society must evolve these traditional approaches rather than remain illogically bound by them.

B *Property rights in New Zealand*

New Zealand has followed the international tradition of defining property broadly to encompass real, personal, tangible and intangible things.[38] Property may be public, private, customary or open-access. However, there is no absolute conception of private property in New Zealand. Many New Zealanders believe that while property ownership is a fundamental right, property owners must not abuse their rights. The public also generally recognises that Parliament, as the supreme law-making body, may pass laws that modify property rights to achieve desired ends.

There is continuous public debate about the expectations of private property and who is permitted to use and access the environment. Notable examples include disputes surrounding the purchase of large sections of land by foreign investors, the privatisation of water resources,[39] ongoing conflict surrounding the allocation of emissions units under

33 Basic Law for the Federal Republic of Germany 1949 (Germany), art 14(2).

34 Klaus Bosselmann "Human Rights and the Environment: Redefining Fundamental Principles?" in Brendan Gleeson and Nicholas Low (eds) *Governing for the Environment: Global Problems, Ethics and* Democracy (Palgrave, Basingstoke, 2001) 118 at 132.

35 James W Ely "The Progressive Era Assault on Individualism and Property Rights" (2012) 29 Social Philosophy & Policy 255 at 260.

36 Bosselmann, above n 17, at 103.

37 Andrew Brennan and Norva Lo "The Environment" in John Skoruptski (eds) *The Routledge Companion to Ethics* (Routledge, London, 2010) 764.

38 Property Law Act 2007, s 2.

39 See, for example, Michael Neilson "Three Waters to Affordable Water Reform: Labour's last roll of the dice" *The New Zealand Herald* (online ed, 14 April 2023).

the New Zealand Emissions Trading Scheme (NZETS),[40] and ownership and access claims to the foreshore and seabed.[41] Tension also exists between land productivity and conservation, private property and public entitlements, orthodox English legal rights and indigenous customary rights. Subsequently, the position of Māori, te Tiriti o Waitangi, and the essence of land rights in New Zealand has been muddled and divided.[42]

New Zealand has several regimes that control the private use of publicly significant resources. Legislative objectives are diverse, including utilisation[43] and conservation.[44] Existing management expresses a blend of anthropocentric and ecological desires that facilitate and restrict the environment's private use. Central and local governments have traditionally employed regulatory structures to manage natural resources.[45] For example, a concession scheme controls private activities on conservation land.[46] The Resource Management Act 1991 (RMA) also rejects traditional freedoms to make land use decisions and has been described as "very close" to a "completely centralised regulatory system".[47]

However, New Zealand has also begun adopting private property responses to environmental issues. The Fisheries Act 1983 marked New Zealand's first employment of a statutory private property framework to address an environmental issue. The subsequent quota management system remains a leading example of a property rights scheme designed to promote the responsible use of a natural resource. The NZETS is another notable example of a private property management regime for natural resources. Section 16 of the Personal Property Securities Act 1999 expressly classifies emissions units as personal property. However, the NZETS has failed to cause a long-term drop in emissions because participants can accrue significantly more units in their private accounts than they require to cover their level of emissions. Their ability to stockpile units in this way, and the government's lack of political will to reduce issuance of emissions units, has reduced the emissions unit price. Consequently, the NZETS has not effectively incentivised participants to lower their emissions and engage in emissions removal.[48] Legal scholarship must consider the role of property in environmental management and the proper function and obligations of the state, property owners and civil society to protect and restore the ecological integrity of Earth's systems.

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40 The Government will commence a review of the New Zealand Emissions Trading Scheme in 2023 to assess whether changes are needed to provide a stronger incentive for businesses to transition away from fossil fuels. See James Shaw "New independent ETS advice will keep NZ on track to meet emission targets" (press release, 13 April 2023).

41 For example, the enactment of ss 13–14 of the Foreshore and Seabed Act 2004 was a response to potential claims of Māori ownership over the foreshore and seabed as a result of *Attorney General v Ngati Apa* [2003] 3 NZLR 643 (CA).

42 Treaty of Waitangi 1840; and Mick Strack *Rethinking Property Rights in New Zealand* (International Federation of Surveyors (FIG), May 2004) at 1.

43 Fisheries Act 1996, s 8(1).

44 Conservation Act 1987, ss 2 and 6(a).

45 Daniel H Cole "New Forms of Private Property: Property Rights in Environmental Goods" in Boudewijn Bouckaert (eds) *Property Law and Economics* (Edward Elgar, Cheltenham, 2010) 274, at 275.

46 Conservation Act, pt 3B.

47 Olivia Nyce "Water Markets Under the Resource Management Act 1991: Do They Hold Water" (2008) 14 Canta L R 123 at 137.

48 Ministry for the Environment *Proposed changes to New Zealand Emissions Trading Scheme limit and price control settings for units 2022: Consultation document* (September 2022) at 19.

III The Role of te ao Māori

There are diverse ways of perceiving the environment and optimal human-nature relationships. Both municipal and international legal systems are becoming increasingly conscious of the wisdom of indigenous cultures and their peoples as teachers of sustainable living.[49] Te ao Māori offers a unique human perception of the natural environment that challenges assumed Western wisdom, particularly in the two theoretical domains of dignity and time.[50] Māori hapū and iwi have a shared language and series of concepts and principles for building relationships with the natural world. Variations exist among local groups. However, these are differences in application rather than in character.[51]

Indigenous communities are cautious of those who seek to force Western rationality upon them, especially individualist Lockean notions of property, which marginalise indigenous knowledge, values, and ways of life.[52] The decision by the Supreme Court in *Ellis v R* reaffirmed the relevance of tikanga Māori to New Zealand's legal framework and that the common law has not extinguished it.[53] Where a dispute occurs at the intersection between te ao Māori and the wider community, Williams J suggested resolution is "likely to require careful weighing of common law and tikanga principles according to the facts and the needs of the case".[54] In these circumstances, te ao Māori will be an ingredient in a "broader analysis in which the common law has already developed relevant rules or principles that must be taken into account".[55]

Ellis has demonstrated that conflict between Māori and Western worldviews and between tikanga Māori and the common law is not inevitable. However, this article argues that the te-ao-Māori-as-an-ingredient approach is insufficient in the resource management sphere. Instead, te ao Māori concepts should form the foundation of both property entitlements and the responsibility of the New Zealand state.

A *Māori aspirations for property*

Within the framework of te ao Māori, all existing things are experienced as interconnected. In this framework, "every living organism in the natural world, every tree, fish, bird or object is the result of a prior cause, of a chain or procession of events".[56] Tikanga Māori, drawing upon Māori cosmology, informs te ao Māori and emphasises that the linkages of

49 Bradford Morse "Indigenous Rights as a Mechanism to Promote Environmental Sustainability" in Richard Westra, Laura Westra and Klaus Bosselmann (eds) *Reconciling Human Existence and Ecological Integrity: Science, Ethics, Economics and Law* (Earthscan, London, 2008) 159.

50 Meg Parsons, Karen Fisher and Roa Petra Crease "Environmental Justice and Indigenous Environmental Justice" in Justin Taberham (ed) *Decolonising Blue Spaces in the Anthropocene: Freshwater management in Aotearoa New Zealand* (Palgrave Macmillan, London, 2021) 39 at 55.

51 Nin Tomas "Maori Concepts of Rangatiratanga, Kaitiakitanga, the Environment, and Property Rights" in David Grinlinton and Prue Taylor (eds) *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff, Leiden, 2011) 219 at 220.

52 Parsons, Fisher and Crease, above n 50, at 46–47.

53 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [107]–[119].

54 At [267].

55 At [267].

56 Marsden, above n 6, at 31.

whakapapa spiritually animate a sense of being in people.[57] A Māori worldview rests on three essential concepts.[58] The first is te ao Korekore, a realm of energy and unlimited potential beyond awareness, space or time. The second is te ao Pō, the dark realm of becoming and transformation. The third is te ao Mārama, the material realm of physical being, with light and life. Te ao Māori ecological principles reside within these embedded energies and offer wisdom into a multi-dimensional, woven universe.[59]

Property ownership is neither a concept nor an individual right in te ao Māori.[60] Ahi kā (keeping the fires burning) refers to a group's maintenance of land that ensures its continued attachment to that land.[61] It shares similarities with possession in common law, which often recognises an occupant group's rights as superior to a non-occupant's.[62] However, ahi kā differs from ownership due to the profound moral and spiritual obligations to Papatūānuku (Earth Mother) inherent to it, such as kaitiaki responsibilities to the community of life.[63] Tūrangawaewae (standing and connection) is a related term that determines relevant hapū and iwi memberships that create an entitlement to claim ahi kā. These are based on mana (intrinsic authority and power), with ties to whenua (land) and ancestry, and often overlap in a patchwork of use and access rights that may exist for the same area or thing as a collective interest.[64] Humans are the potiki (last born); thus, resource use aims to retain and enhance connections that enable the community of life to thrive.[65] Several groups may assert the same right and share their obligations to the land.[66]

Rangatiratanga and Māori customary rights are distinct from property rights and private title. A Western view holds that title to property creates a regime of rights to exclude, develop, capture and keep a resource. In contrast, rangatiratanga is the collective exercise of duties to conserve and augment resources for the benefit of future generations. While both concepts aim to increase value, Western thinking measures the value of resources based on the profit obtained. In contrast, te ao Māori measures value based on the taonga's contribution to the longevity of the collective.[67]

Since colonisation, state law has required hapū and iwi seeking recognition of their rangatiratanga to talk in the language of Western property rights, creating a concerning tension. Alex Frame argues that the commodification of common resources through the sale of state assets has driven an influx of ownership claims through the belief that "if it *is* property, then it is *our* property",[68] confronting Māori claimants with the dilemma that if they do not claim "ownership" of natural resources the state is privatising, state law may leave Māori kin groups with nothing. As Part IV(C) of this article illustrates, modern debates

57 Ulrich Klein "Belief-Views on Nature — Western Environmental Ethics and Maori World Views" (2000) 4 NZJEL 81.

58 Marsden, above n 6, at 30.

59 Maori Marsden "God, Man and Universe: A Maori View" in Michael King (ed) *Te Ao Hurihuri: Aspects of Maoritanga* (Reed Publishing, Dunedin, 1993) 117.

60 Parsons, Fisher and Crease, above n 50, at 53.

61 At 47.

62 Tomas, above n 51, at 233.

63 At 233.

64 Andrew Erueti "Māori Customary Law and Land Tenure: An Analysis" in Richard Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) 41 at 43.

65 Parsons, Fisher and Crease, above n 50, at 53.

66 At 53.

67 Pita Sharples "Maori perspectives on water resources" *The New Zealand Herald* (online ed, 15 December 2008).

68 Alex Frame "Property and the Treaty of Waitangi: A Tragedy of the Commodities?" in Janet McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 1999) 224 at 234.

surrounding ownership are thus more concerned with claims to status and power and te ao Māori relationships between land and political authority.

The fundamental values of te ao Māori go above and beyond what Aldo Leopold has called the oldest task in human history, "to live on a piece of land without spoiling it".[69] Those who practise the values of te ao Māori aim to reflect, rather than dominate, their surroundings. The following sub-section explores Māori conceptions of the environment and argues that Western property rights must recognise our intergenerational duty to restore and increase the mauri of te Taiao (our land, water, climate, and all living communities).

(1) Earth as a living mother (Papatūānuku)

Te ao Māori sees the Earth as a living entity, establishing a sense of ecological responsibility sourced in a conscious awareness of Papatūānuku. Papatūānuku's innate, all-powerful and primordial personality that is entirely independent of human existence is the foundation of Māori resource governance regimes.[70] In spiritual terms, Papatūānuku belongs to a genealogy that started before the world took physical form and comprises intrinsic mana, tapu (sanctity) and mauri (life force) in her nature. These are foundational elements of Māori reality, found in all living things. In physical terms, Papatūānuku is more than the origin of human existence; she is the source of nourishment for all things. In this sense, Papatūānuku connects the physical world in a symbiotic and interdependent genealogy where various species influence the welfare of other species and jointly sustain the biological foundations of the whole ecological system.[71]

In human terms, actively recognising Papatūānuku and understanding how to live within her generosity are fundamental to human existence. Other indigenous peoples worldwide hold similar worldviews, which some countries have enshrined in law. For example, Ecuador's 2008 constitution is the first to recognise and protect Mother Earth's significance and rights:[72]

> 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.

Similarly, Bolivia's Framework Law of Mother Earth 2012 aims to guarantee "the continuity of the regeneration capacity of the components and life systems of Mother Earth" by adopting the precautionary principle, employing holistic management, and indigenous worldview.[73] It also emphasises the complementarity between the rights of human beings and those of Mother Earth, stating: "A right cannot materialise without the others or it cannot be on the others".[74] This approach is a direct alternative to current global neoliberal practices. Bolivia's law defines Mother Earth as; "the dynamic living system made up of

69 Aldo Leopold "Conservationist in Mexico [1937]" in Susan L Flader and J Baird Callicott (eds) *The River of the Mother of God and Other Essays by Aldo Leopold* (University of Wisconsin Press, Madison, 1991) 239 at 243.

70 Marsden, above n 6, at 45.

71 At 45.

72 Constitution of the Republic of Ecuador 2008, art 71.

73 Framework Law of Mother Earth and Integral Development for Living Well 2012 (Law 300 of the Plurinational State of Bolivia), art 1.

74 Article 4.1.

the community indivisible from all life systems and living beings, interrelated, interdependent and complementary, which they share a common destiny". [75]

The law authorised the establishment of two new institutions to protect Mother Earth: the Mother Earth Ombudsman's Office, which investigates alleged violations of the rights of Mother Earth, and the Plurinational Mother Earth Authority, a state entity which oversees development and projects relating to climate change.[76] However, as ground-breaking as the law may be, it contains contradictory objectives that frame integral socio-economic development as necessary for living well. For example, mining is legalised rather than prohibited, and the law obligates the state to create conditions to industrialise Mother Earth's components and invest in and distribute wealth generated through the exploitation of natural resources.[77] The Bolivian government has not taken steps to pass new environmental laws in line with the Framework Law, nor has it revoked significant laws conflicting with these statutes.[78] Additionally, it has yet to establish the Mother Earth Ombudsman Office. Calzadilla and Kotzé have criticised the Framework Law as an attempt to "window-dress ongoing environmental destruction". It may thus reinforce the neoliberal development paradigm rather than ushering in a novel form of development that upholds Mother Earth's rights.[79]

Māori would agree with these Andean countries that protecting Papatūānuku is integral to good governance. The rules and principles these legal frameworks establish primarily promote her value as a unified system. Justice from a Māori view is not simply about people but also concerns justice for all parts of the environment, including non-humans and non-living entities.[80] Indigenous worldviews understand that the fate of humanity and Mother Nature are intimately bound together and, thus, the need for a respectful and holistic outlook on the environment. Furthermore, a Māori worldview accepts that human needs are inferior to those of the broader environment, challenging human-centred and individualistic Western property rights.[81] Western thinking has developed along a distinct pathway that actively detaches the spiritual from the secular, the physical from the non-physical and humans from broader creation. This thinking marginalises, if not wholly dispenses with, the non-physical world's relevance to legal reasoning and creates a notable disjuncture between Western and Māori perceptions of how parts of the environment interconnect.

(2) The role of humans as kaitiaki

When Māori first discovered Aotearoa New Zealand, around 1350 CE, they became tangata whenua: people belonging to the land rather than owners of it.[82] For Māori, behaviour towards the environment should reflect the modesty of their reliance on it and appreciate sources of authority beyond human control, such as mana atua (authority from the gods),

75 Article 5.
76 Articles 39 and 53.
77 Articles 10.6, 15.3 and 18.
78 For example, Environmental Law No.1333 1992 (BO) is still in force and provides the legislative framework for industrial activities in Bolivia and an anthropocentric mode of environmental protection.
79 Paola Villavicencio Calzadilla and Louis J Kotzé "Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia" (2018) 7 TEL 397 at 416.
80 Parsons, Fisher and Crease, above n 50, at 53.
81 At 53.
82 Richard Walter and others "Mass Migration and the Polynesian Settlement of New Zealand" (2017) 30 J World Prehist 351.

mana whenua (authority from the land), and mana tangata (human authority).[83] Rangatiratanga is about having the mana or authority to manage and control resources and regulate people's behaviour concerning those resources. Kaitiakitanga is similar to the ethic of stewardship and is the correlative duty to the authority right of rangatiratanga.[84] These concepts are two intrinsically linked sides of the same coin.

Rangatiratanga often includes the right to make, modify and enforce decisions regarding how a resource will be used and managed and by whom. It arises from the mana whenua of hapū and iwi and does not rely on Parliament for its validity. Te Tiriti o Waitangi promised Māori the exercise of tino rangatiratanga over their lands, villages and taonga. Thus, rangatiratanga forms the basis of most Māori claims to authority over natural resources.[85]

Māori society believes humans have an eternal kaitiaki or caretaking role within the physical environment,[86] not a position of power or control. Kaitiakitanga represents a profoundly reciprocal relationship to nurture and protect the environment as our revered whānau and conscientiously uphold the well-being of individuals and the collective. For Māori, the kaitiaki role transcends the liberal management of private property and has both spiritual and practical aspects.[87]

Māori, through kaitiakitanga, become guardians for the physical environment with which they share whakapapa. In a practical sense, the kaitiaki role requires each whānau and hapū to ensure the mauri of taonga in the area they hold mana whenua is robust. Failing in this role damages the kin group's mana.[88] Māori are thus appropriately cautious of meddling with the natural balance of things with modern technological advances out of fear that short-term benefits may bring long-term damage and loss of mauri. Māori traditionally believe that nature will strike back against humans for disturbing her other living systems or exploiting their non-human relatives.[89] Consequently, Māori have developed strict regimes over centuries to protect the sanctity of resources they continue to practise today, such as rāhui and tapu.[90]

(3) Continuity of whakapapa processes

Te ao Māori emphasises the power discrepancy between Papatūānuku and humans by contrasting the ostensibly infinite lifespan of the environment that repeatedly regenerates itself with the short human lifespan.[91] Māori see humans as agents in a developing cosmological community who must maintain strong intergenerational relationships

83 At 360.

84 Te Rununga o Arowhenua and others "The Legal Basis for a Consideration of Cultural Values of Kai Tahu" in *Cultural Impact Assessment: Project Aqua* (30 June 2002) 51.

85 Katherine Sanders "'Beyond Human Ownership'? Property, Power and Legal Personality for Nature in Aotearoa New Zealand" (2018) 30 JEL 207 at 214.

86 Māori Marsden "Kaitiakitanga: A Definitive Introduction to the Holistic Worldview of the Māori" in Charles Te Ahukaramū *The Woven Universe: Selected Writings of Rev Māori Marsden* 54 at 65.

87 Merata Kawharu "*Kaitiakitanga*: A Maori Anthropological Perspective of the Maori Socio-Environmental Ethic of Resource Management" 109 The Journal of the Polynesian Society 349 at 351.

88 McCully Matiu and Margaret Mutu *Te Whānau Moana: Ngā kaupapa me ngā tikanga = customs and protocols* (Reed Books, Auckland, 2003) at 168.

89 Tomas, above n 51, at 228.

90 Law Commission *Maori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

91 Tomas, above n 51, at 228.

between groups and taonga such as mountains, rivers and lakes, begetting claims of mana whenua (tribal territorial authority) in certain groups.[92]

As descendants of the land, Māori have strong whakapapa connections to the environment: "Kei raro i te tarutaru, te tuhi o ngā tū puna. The signs or marks of the ancestors are embedded below the roots of the grass and the herbs."[93] Whakapapa is concerned with genealogy and the connections between things and is a central concept of te ao Māori. It provides stability by fixing people in time and place within many otherwise distinct relationships to connect generations, whānau, hapū, iwi, whenua, and the broader universe.[94] Māori use their whakapapa with rivers, birds and oceans to better understand the environment, establish tūrangawaewae, and obtain long-term foresight to ensure no activity detrimentally affects the not-yet-borns' physical, spiritual or cultural health. In te ao Māori, the present generation has no right to sever relationships with the environment because we have received these in trust from our ancestors.

In contrast, Western property law views the natural measure of time to be the human lifespan. For example, the law of trusts has a rule *against* perpetuity.[95] Intergenerational responsibility is a minute concern, contrasting with te ao Māori, where the duty to care for the environment is a pivotal element of all property concepts. Use-right holders must exercise their rights to support the spiritual and physical links between humans and natural systems across generations and realms.

B *Contact with the West*

European intervention during the 19th century did not merely consist of the physical taking of land but also the re-conceptualisation of the essence of land to recast the colonised in the image of the coloniser.[96] Lockean notions of the need to "civilise" indigenous peoples shaped colonial New Zealand's property policies, prioritising Western cultural practices.[97] Parliament rooted property legislation in individualised ownership, which aimed to reconfigure the way land and its resources were owned and managed to:[98]

> … resile [Māori] from the "beastly communism" of the tribal collectivity[,] … embrace individualism fervently, [and] maximise their profits by selling the land to those with the superior technology to use it efficiently.

Accordingly, colonial property laws removed Māori rights in land and other natural resources, the foundations of Māori economic prosperity.[99] Māori have mutually exclusive

92 At 228.
93 Law Commission, above n 90, at 47.
94 Tomas, above n 51, at 228.
95 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 46.
96 Ani Mikaere *Colonising Myths – Māori realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011).
97 John Reid and Matthew Rout "Māori Tribal Economy: Rethinking the Original Economic Institutions" in Terry L Anderson (ed) *Unlocking the Wealth of Indian Nations* (Lexington Books, Lanham (Maryland), 2016) 84.
98 Richard S Hill *State Authority, Indigenous Autonomy: Crown-Maori Relations in New Zealand/Aotearoa 1900–1950* (Victoria University Press, Wellington, 2004) at 20.
99 Hazel Petrie *Colonisation and the Involution of the Maori Economy* (13 World Congress of Economic History, Buenos Aires, July 2002).

and politically established tribal territories.[100] However, the judiciary has traditionally treated Māori perceptions of the environment as an add-on or an afterthought when required by statute, and these remain subsidiary to Western concepts.[101]

New Zealand's legal profession has subscribed to "a unified, centralised system of sovereignty" that is hostile to recognising any external system of customary law.[102] Inadequate constitutional recognition of tino rangatiratanga has largely impeded Māori from constructing legally accepted systems to guard their relationships with the environment. Instead, Western interpretations of sovereignty dominate domestic and international political and legal discourse.[103] The concept of sovereignty has proven so powerful that New Zealand law regards the Treaty of Waitangi as asserting the formal transfer of authority over the whole territory of Aotearoa New Zealand, including radical title to all its resources, into British, and now New Zealand government control.[104] Furthermore, while art 2 of the English version states that Māori are guaranteed full rights "[to] their Lands and Estates Forests Fisheries and other properties", the Māori version of the Treaty expresses these "other properties" as "o ratou *taonga* katoa".[105] Hirini Moko Mead translates this phrase as "all their valued customs and possessions" because "taonga" goes beyond Western concepts of property as restricted to tangible things and includes children, language and culture.[106]

To protect their relationship with Papatūānuku, Māori have attempted to gain a foothold within a framework founded upon alien values and concepts. Despite some taking the view that the law should view sovereignty and tino rangatiratanga as "successive, coexisting layers of power and authority lying over the territory of Aotearoa/New Zealand"[107] Western legal distinctions between rights derived from sovereignty and property rights have suppressed Māori governing systems. For example, the constantly changing nature of Māori property title.[108]

However, tikanga has continued to form and regulate the lives of iwi, hapū and whānau to the present day, and the development and acceptance of te ao Māori in New Zealand law are certainly not static. For example, the RMA curved thinking away from "ownership"

100 Tomas, above n 51, at 220.

101 For example, in *Haddon v Auckland Regional Council* [1994] NZRMA 49 (PT), hapū took a stand as tangata whenua and kaitiaki for Pakiri Beach, opposing the potential seabed sand extraction near the coastline. The Planning Tribunal recognised the significance of kaitiakitanga but, ultimately, permitted the proposed sand extraction to move forward because it aligned with the principles of sustainable management. See also Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato Law Review 1 at 21.

102 John Dawson "The Resistance of the New Zealand Legal System to Recognition of Maori Customary Law" (2008) 12 Journal of South Pacific Law 56 at 61.

103 Nin Tomas "Coming Ready or Not! The Emergence of Maori Hapu and Iwi as a Third Order of Governance in Aotearoa New Zealand" (2010) 3 Te Tai Haruru: Journal of Māori and Indigenous Issues 14.

104 Treaty of Waitangi, arts 1–3; and te Tiriti o Waitangi 1840, arts 1–3. In art 1 of the English version, Māori cede "sovereignty" to the Crown, while the Māori version uses the term kāwanatanga, which translates as "governance". The Crown has historically perceived the Treaty as signifying Māori submission to British sovereignty.

105 Treaty of Waitangi, art 2; and te Tiriti o Waitangi, art 2 (emphasis added).

106 Waitangi Tribunal *Report of the Waitangi Tribunal on the Te Reo Maori Claim* (Wai 11, 1989) at [4.2.3]; and Waitangi Tribunal *The Petroleum Report* (Wai 796, 2003) at [5.3].

107 Tomas, above n 51, at 222.

108 See David V Williams *Te Kooti Tango Whenua: The Native Land Court 1864–1909* (Huia Publishers, Wellington, 1999) at 5.

and toward the "intrinsic values of ecosystems" and includes kaitiakitanga as a principle.[109] However, these are one of "several other matters" to be considered against a host of Western concerns, such as "the efficient use and development of natural and physical resources";[110] the RMA balancing exercise does not give Māori concepts sufficient priority.

In early 2021, the Labour Party government announced its intention to repeal and replace the RMA with three new pieces of legislation. One was the Natural and Built Environment Act 2023 (NBEA), passed by Parliament in August 2023. It was to be the primary replacement for the RMA. However, at the time of writing in January 2024, the new National-led government has now repealed the NBEA under urgency.[111] A notable strength of the NBEB exposure draft was the obligation to uphold "Te Oranga o te Taiao" (the well-being of the natural environment),[112] expressing the intergenerational significance to Māori of environmental well-being and their intrinsic relationship with the environment. The inclusion of this obligation thus centralises a relationship for resource decision-making with hapū and iwi. Clause 18 also states, in part, that decision-makers must:

> (b) recognise and provide for the application, in relation to [te Taiao], of [kawa, tikanga (including kaitiakitanga) and mātauranga Māori] …
>
> (e) recognise and provide for the authority and responsibility of each iwi and hapū to protect and sustain the health and well-being of [te Taiao].

The decision-making principles under the NBEA follow those in the exposure draft. Section 8 provides that:

> (2) All persons exercising powers and performing functions and duties under this Act must recognise and provide for the responsibility and mana of each iwi and hapū to protect and sustain the health and well-being of te Taiao in accordance with the kawa, tikanga Māori (including kaitiakitanga), and mātauranga Māori in their rohe or takiwā.

Treating these concepts as mandatory decision-making requirements is a considerable advancement from the RMA's treatment of kaitiakitanga as a relevant principle. Section 8(2) of the NBEA safeguards people's right to utilise the environment while upholding the kaitiakitanga duty to preserve the mauri of te Taiao. It underscores the interconnectedness of the environment and critical relations typically formed through whakapapa and whānaungatanga. Section 8(2) seems to represent a sincere effort to integrate Western and Māori perspectives on the environment and thus to forge a mutual environmental ethos rooted in fundamental Māori principles rather than an attempt to replicate a te ao Māori concept. However, these advancements are now uncertain with the government's plan to replace the RMA and NBEA with "new resource management rules based on the enjoyment of property rights, while ensuring good environmental outcomes".[113]

Many government departments and private entities have guidelines that ensure engagement with Māori communities is consistent with tikanga and Treaty principles,

109 Resource Management Act 1991, s 7.
110 Section 7.
111 Chris Bishop "NBEA and SPA successfully repealed" (press release, 20 December 2023).
112 David Parker *Draft for Consultation: Natural and Built Environments Bill*, cl 5.
113 Bishop, above n 111.

including the principles of consultation and partnership.[114] However, academics such as Ani Mikaere have criticised the notion of Treaty principles as the judicial rewriting of te Tiriti at the expense of what was agreed.[115] Agencies broadly recognise that the best way to engage with Treaty principles is to adopt te ao Māori-based policies and strategies to enhance outcomes for Māori.[116] It is also significant that te ao Māori and tikanga will become compulsory in the tertiary legal curriculum from January 2025.[117]

IV Te ao Māori and the Sovereign Trustee

Te ao Māori is not the antithesis of Western capitalism. Defining te ao Māori as diametrically opposed to the Western worldview is a form of reactionary traditionalism and exaggerates actual practical and conceptual differences.[118] Precolonial Māori society shares some features with Western capitalism, such as a hierarchical leadership structure that created governance systems that aimed to produce strong economic growth.[119] Both te ao Māori and Western governance systems see the environment as a source of human welfare. However, the West could learn from te ao Māori ethics to improve its interactions with the environment.

Harmonising te ao Māori and Western practices to enhance the well-being of humans and nature is plausible.[120] In the spirit of the partnership of te Tiriti o Waitangi, Māori are essential to developing and managing an appreciation of the importance of our natural environment. Creative governance approaches that demonstrate connection and belonging for the entities and communities involved, as will be explored in Part IV(C), are still in their infancy. These structures illustrate that the choice is not necessarily one of either indigenous or Western philosophy.

A *Reframing state sovereignty*

The traditional notion of Westphalian sovereignty is uncompelling in contemporary society. As discussed in Part II, the modern state was born from concerns for property and territorial rights at the exclusion of all others and has asserted its ongoing role in their protection.[121] "Others" refers to non-citizens, plants, animals, global commons, and future generations.[122] Principle 2 of the 1992 Rio Declaration on Environment and Development

114 See, for example, New Zealand Petroleum & Minerals *Best Practice Guidelines for Engagement with Māori* (August 2014); and Waka Kotahi *Hononga ki te Iwi: our Māori engagement framework* (December 2021).

115 Ani Mikaere "Seeing Human Rights Through Māori Eyes" (2007) 10 YBNZ Juris 53 at 57.

116 See, for example, the District Court of New Zealand's new operating model, te ao Mārama: Heemi Taumaunu, Chief District Court Judge of New Zealand "… mai te pō ki te ao mārama … the transition from night to the enlightened world: Calls for Transformative Change and the District Court Response" (Norris Ward McKinnon Annual Lecture 2020, 11 November 2020).

117 "New Tikanga Māori Requirements" New Zealand Council of Legal Education <nzcle.org.nz>.

118 Carla A Houkamau and Chris G Sibley "The role of culture and identity for economic values: a quantitative study of Māori attitudes" 49(sup1) Journal of the Royal Society of New Zealand 118.

119 Reid and Rout, above n 97, at 113–115.

120 Amber Nicholson, Chellie Spiller and Edwina Pio "Ambicultural Governance: Harmonizing Indigenous and Western Approaches" 28 Journal of Management Inquiry 31.

121 Klaus Bosselmann "Environmental trusteeship and state sovereignty: can they be reconciled?" (2020) 11 TLT 47.

122 At 51.

proclaims: "States have … the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies".[123] Like a private land owner, the state has the exclusive right to exploit its territory, absent any duty to protect the environment under a binding environmental policy. However, the modern sovereign state no longer lives in the narrow time and space horizons of the Holocene. The transnational reality of accelerating global ecological destruction demands a departure from the archaic assumption that the global environment is territorial and divisible. Nonetheless, the difficulty with the current model is states will inevitably call the shots.[124] we must work with the state-centric framework.

The international concept of sovereignty is crucial in transforming property rights, and there are significant parallels between the two ideas. Just as state sovereignty is indefinable without its international qualities, private property is indefinable without its social attributes.[125] Both involve authority relations, and neither is absolute nor isolated from the system it functions in. However, traditionally, the community of states has not outlined any restrictions to sovereignty. If the protection of the environment were founded on the reciprocal confidence of states, then global environmental conservation would remain subordinate.[126] Appreciating the collective nature of sovereignty is thus only the first stride.

Everyone and no one holds the title to Earth, and humanity has abused this legal vacuum. Western constructs create inherent difficulties in accepting that the environment is entrusted to each state, not by its sovereignty or any legal entitlement, but due to the existence of any territory as part of an indivisible, unified environment.[127] Te ao Māori best illustrates that the environment belongs only to itself and is incapable of ownership claims by people. Using Mother Earth's resources is a privilege, not a right, and sets limits to state sovereignty.

Legal scholarship must infuse concepts of property and sovereignty with ecological dimensions that recognise the global environment as an indivisible whole. Te ao Māori provides a bedrock of duties people owe to the environment and its resources.[128] Applying a te ao Māori lens to resource use, it becomes clear that the law must carve any use rights out of this bedrock to prevent environmental destruction that merely satisfies short-term human desires. For example, while iwi and hapū may own only a percentage of the total marine farming space in a region as kaitiaki, they still owe kaitiaki duties over the whole area under te ao Māori. If the marine area becomes polluted or species numbers fall, the life force of the area will also diminish. Kaitiaki must do everything possible to restore resources to their original strength and uphold their mana.

State legitimacy to govern relies heavily on its capacity to serve the dynamic, common interest.[129] There is arguably a common moral interest in protecting Earth's ecological

123 Rio Declaration on Environment and Development UN Doc A/CONF 151/26 (14 June 1992), principle 2.

124 Klaus Bosselmann "State as environmental trustee" in *Earth Governance: Trusteeship of the Global Commons* (Edward Elgar Publishing, Cheltenham, 2015) 155 at 170.

125 Bosselmann, above n 17, at 196.

126 Prudence E Taylor "From Environmental to Ecological Human Rights: A New Dynamic in International Law?" 10 Geo Intl Envtl L Rev 309 at 384–385.

127 Tomas, above n 51, at 220.

128 At 220.

129 Klaus Bosselman "The atmosphere as a global commons" in Jordi Jardia-Mazano and Susana Borrás (eds) *Research Handbook on Global Climate Constitutionalism* (Edward Elgar, Cheltenham, 2019) 75 at 83.

integrity today andenvironmental trusteeship is certainly a common concern amongst international environmental lawyers.[130] These shared concerns generate a fiduciary relationship between people and the state, requiring the state to steward the natural environment for present and future generations. States' trusteeship role must, however, be derived from the environment and not from the community of states.[131] The claim that trusteeship duties are an emerging *grundnorm* is increasingly tenable, which the Earth Charter and the 2018 Hague Principles reflect.[132]

Public morality should restrict sovereignty in a manner that permits rights to use but not to abuse, exploit or pollute the environment. The distinction between use and abuse of the environment is practically challenging to determine. However, a recognisable difference exists and centres on ecological integrity and Earth ethics. Earth trusteeship is the institutionalisation of the responsibility to protect the integrity of environmental systems. It refers to legal rights and duties founded on humanity's belonging to the community of life. Under the concept of a legal trust, the current generation are trustees who act as prudent managers to serve the interests of present and future beneficiaries. An example is leaving the natural environment in no worse condition than we received it. However, a meaningful definition of the relationship between humanity and nature must be capable of explaining the obligations that govern present actions affecting the environment and future generations.

B *Applying an ethic of kaitiakitanga*

Earth trusteeship and kaitiakitanga both repackage the idea of sovereignty to require states to honour duties of guardianship and protection for Earth's ecological systems. However, Earth trusteeship is a Western legal construct that arguably cannot resist a capitalistic profit-at-all-costs philosophy. It may, therefore, fail to protect the environment in an ecocentric manner. Earth trusteeship provides a useful view on the interactions between present and future beneficiaries. However, it disguises the unceasing reality that private property rights dictate the course of discretion.[133]

Earth trusteeship does not provide a conceptual basis for understanding states' duties. The presence of rights and duties among humans, based on utilitarian principles, does not necessitate the existence of a trustee-beneficiary relationship. While the trust may embody specific obligations of the present generation to the future, it does not create those commitments.[134] Earth's resources also do not belong to a trust; humans belong to the Earth. Earth trusteeship fails to encompass the genealogical layering paradigm where all features of the universe exist in linear and layered relations to one another, which undergirds the notion of kaitiakitanga.[135] Notwithstanding the good intentions of its

130 Bosselmann, above n 17, at 200.

131 At 198.

132 A grundnorm is a fundamental norm or abstract concept whose validity is rooted in the explicit or implicit consent of society's members, and it serves as the basic source of normativity for the law. See Hans Kelsen *The Pure Theory of Law* (Max Knight (translator), University of California Press, Berkeley, 1967).

133 Mary Christina Wood "Nature's Trust: A Legal, Political and Moral Frame for Global Warming" (2007) 34 Environmental Affairs 577 at 592.

134 For example, what are the scope of the obligations of the trustee? How much can the present alter the natural environment at the expense of the future? What does Earth trusteeship tell us about the limits of our authority in taking actions that lead to a loss of species?

135 Kawharu, above n 87, at 349.

proponents, by focusing on the concept of trust, Earth trusteeship obscures, rather than clarifies, our relationship with the environment.[136]

The concept of kaitiakitanga goes beyond Earth trusteeship because it weaves together ancestral, social and environmental threads of identity, practice and purpose.[137] Rather than simply managing connections between ecological resources and humans, it also involves managing the logical order of relationships between people in the past, present and future,[138] thus demanding a holistic duty to serve the well-being of communities. While no obvious or universally accepted approach exists to understanding the rights, obligations and ethical imperatives that outline our moral relationship to the environment, te ao Māori provides a desirable conceptual source of duties. For example, environmental rāhui is now widely understood and generally adhered to by the broader community, not only because of increasing respect towards the rangatiratanga of iwi but also because people understand and easily resonate with the principle and ethic behind rāhui, being kaitiakitanga.[139]

The exercise of kaitiakitanga requires the appointment of kaitiaki; they do not own the resource, nor are they state actors. Instead, they act on behalf of nature and their ancestors to promote and protect the health and well-being of ecosystems for mokopuna (future generations). The state would not lose sovereignty. It would foster sovereignty ethically, providing an opportunity for partnership with Māori. Responsible sovereignty would see states employ their sovereignty to shield citizens and nature from global market forces. Kaitiakitanga provides a pathway out of the sovereignty paradox by embracing customary values while adapting to emerging political and legal issues.

Adopting an ethic of kaitiakitanga does not simply suggest separation or dissociation from mainstream Western institutions and knowledge systems. Intermingling Western and te ao Māori paradigms can potentially strengthen management practice. For example, private property is vital in encouraging individual creativity and moral self-governance required to preserve the planet while sheltering owners from the unfair exercise of state power. However, the values and interests currently served by property rights should involve eternal responsibilities. These need to protect, nurture, and maintain the spiritual and material welfare of precious resources that our ancestors have handed down and that we will pass on to future generations. Western and te ao Māori paradigms may work together through an informed and dynamic use of both to facilitate holistic and sustainable governance.

However, transforming governance regimes and property concepts requires civil and political will. The proper vehicle for responsible sovereignty, informed by te ao Māori, relies on the strength of a mobilised civil society that values the wisdom of indigenous worldviews to reframe the state's role as a guardian.[140] Civil society must understand what the states' rights and duties entail.[141] As the common interest of the people is dynamic, it is at least plausible to extend the Western concern for the integrity of the global environment to the environmental indigenous-based concern of maintaining the mauri of Papatūānuku and her integrated systems as a living entity. If the international community acted on this basis, the world would surely be better for it.

136 Jeffrey M Gaba "We Do Not Hold the Earth in Trust" (2003) 33 ELR 10325 at 10327–10328.
137 Kawharu, above n 87, at 350.
138 At 352.
139 *Ellis*, above n 53, at [43]–[47] and 324–337 (Appendix: Statement of Tikanga of Sir Hirini Moko Mead and Professor Pou Temara).
140 Bosselmann, above n 17, at 196.
141 At 171.

Adopting a broader environmental worldview rooted in indigenous ideas would enhance implementation and avoid anthropocentric and economic interests dictating the content of sovereignty. A new system of ecological interaction might be one in which:

(1) Western thinking extends to understand that all aspects of the natural world have an independent mauri that humans must respect;
(2) nature and humans have a familial relationship as connected parts of a unified whole;
(3) states show respect for Mother Earth and her integrated systems by adopting the ethic of kaitiakitanga and partnering with local communities;
(4) duties to act in the best interests of human welfare limit private property rights, and ensure the preservation of taonga for future generations; and
(5) humans view themselves as guardians in the past, the present, and the future.

C *Recent developments*

Several nations have already begun integrating indigenous worldviews into their laws. Co-management structures in New Zealand are still in early development but have significant potential to become hubs of identity that illustrate positive relationships with nature. One of the developments in protecting taonga is the granting of legal personhood to various ecosystems in New Zealand, requiring representation by guardians who act on nature's behalf, notably Te Urewera,[142] Te Awa Tupua (Whanganui River),[143] Taranaki Maunga (Mount Taranaki).[144] Te Urewera is declared a "place of spiritual value" with "its own mana and mauri, … an identity in and of itself".[145] Ngā Iwi o Taranaki (the eight iwi of Taranaki) have collectively negotiated with the Crown to sign the Taranaki Maunga Collective Redress Deed, Te Ruruku Pūtakerongo.[146] Papakura o Taranaki (Taranaki National Park), Taranaki Maunga and the surrounding peaks of Taranaki Maunga have been vested a legal person, named Te Kāhui Tupua. This reflects the tūpuna status the maunga have in te ao Māori as part of a "living and indivisible whole".[147] Te Tōpuni Kōkōrangi is the representative entity that will act as its voice, consisting of iwi and Crown appointees.

The relevant legislation appoints a board of human kaitiaki to protect the interests of these ecosystems, some of which contain both Māori and non-Māori members in a co-governance arrangement. Ownership is vested in the ecosystems themselves rather than in kaitiaki. These examples represent a significant step Māori have taken to implement their constitutional right to act as kaitiaki and to build the social and cultural licence to authorise kaitiaki. It offers a practical means by which Māori and Pākehā, and potentially other ethnic groups, may discuss differing ideas and values concerning the use of the land. However, there is criticism that the conceptual framing of these regimes remains anthropocentric and inconsistent with te ao Māori.[148] They have little to no impact on

142 Te Urewera Act 2014, s 11.
143 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14.
144 Te Anga Putakerongo Act 2017.
145 Te Urewera Act, s 3.
146 Ngā Iwi o Taranaki, Te Tōpuni Ngārahu and the Crown *Te Ruruku Pūtakerongo* (1 September 2023).
147 At [5.1]–[5.5].
148 Anne Salmond, Gary Brierley and Dan Hikuroa "Let the Rivers Speak: thinking about waterways in Aotearoa New Zealand" (2019) 15(3) Policy Quarterly 45.

existing public use and access rights, existing private property rights, and existing rights of state-owned enterprises,[149] demonstrating that property remains the organising principle.

Furthermore, co-management structures are not an alternative to shared governance. The partnership between Māori and the Crown is often one of senior and junior, and iwi, hapū and other Māori communities do not have the independent political space needed to genuinely exercise rangatiratanga.[150] For example, only considering te ao Māori when making decisions about matters affecting Māori assumes a relationship where the Crown has the final say and in which the Crown only considers te ao Māori if it so chooses. A reluctance to recognise and address Māori claims to political authority limits the positive effect of these structures,[151] as Te Urewera and the Whanganui River agreements demonstrated: the government refused to transfer ownership of these ecosystems to hapū and iwi. Conflict regarding the authority to make property allocations underpins the disagreement concerning the ownership of Te Urewera and the Whanganui River.

Some iwi, such as Ngāi Tūhoe, have opposed these structures because they avoid returning ancestral lands.[152] At issue is the normative resilience of property, which attempts to explain why one may remain attached to an object, irrespective of knowledge that the property system is generally unjustified or that one came to own an object in unjust circumstances.[153] Te Urewera and Te Awa Tupua legislation acknowledges the potential for disagreement in these bodies, which aims to reframe ongoing contests over the relationship between people and the environment by emphasising processes and principles.[154] However, the strength of the Crown's association with natural resources may place settlements such as Te Urewera and Te Awa Tupua in endless conversations about whether indigenous property rights should be related to authority over territorial space.[155] It represents a broader indigenous challenge to the distribution of power.

V Artificial Selection

While incorporating te ao Māori concepts into governance regimes and legislation follows hard-won battles of cultural recognition, it creates new challenges. Kaitiakitanga has become part of everyday legal vocabulary. However, its direct transplantation into New Zealand legislation has arguably downsized this concept to fit into and become an

149 See, for example, ss 41 and 43 of the Te Awa Tupua (Whanganui River Claims Settlement) Act, where the fee simple estate in the Crown-owned parts of the bed of the Whanganui River are vested in Te Awa Tupua, and an easement, lease, or licence may be granted on behalf of Te Awa Tupua for a term of less than 35 years.

150 Dominic O'Sullivan *Beyond Biculturalism: The Politics of an Indigenous Minority* (Huia Publishers, Wellington, 2007).

151 Sanders, above n 85, at 209.

152 Brad Coombes "Nature's rights as Indigenous rights? Mis/recognition through personhood for Te Urewera" (2020) 1–2 Espace populations sociétés.

153 Jeremy Waldron "The Normative Resilience of Property" in Janet McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 1999) 170 at 175.

154 For example, members of the Te Urewera Board and the Whanganui river strategy group, Te Kōpuka, are mandated to promote unanimous decisions, which are those made when there is no formally recorded dissent. A formal vote is only conducted if achieving unanimity or consensus proves unworkable, and even then, a substantial level of support for each measure is required. See Te Urewera Act, ss 7 and 31(1)(b); and Te Awa Tupua (Whanganui River Claims Settlement) Act, sch 4, cls 6 and 10.

155 Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, New York, 2011) at 8–9.

operational part of an individualistic property rights regime. For example, in New Zealand, kaitiakitanga is used almost exclusively in resource management law, which is inconsistent with its broader use in te ao Māori.[156] Section 2 of the RMA defines kaitiakitanga as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship".[157] While this definition indicates what kaitiakitanga is, it does not detail all the values or practices it may include.

A *The challenge*

Artificial selection refers to the process by which the meaning of concepts and customs are "subject to manipulation by the group that holds sovereign power, and who will inevitably select and interpret them in ways that suit the group's own values and interests".[158] British control over the drafting and interpretation of the Treaty of Waitangi illustrates a strong example of this process. Creative governance approaches founded on an environmental indigenous-based ethic create the inherent risk that te ao Māori concepts will become detached from their natural purpose and meaning.

Integrating Māori concepts into governance regimes has been one of many methods the New Zealand government has used to acknowledge and endorse Māori cultural identity and honour theTreaty of Waitangi. However, the government has arguably made its conscious effort to accommodate the cultural position of Māori in a "sympathetic legal regime" where selective recognition and interpretation of te ao Māori has reinforced the government's preferred interpretations of concepts.[159] The capability of Western institutions, such as the courts, to adequately consider and apply Māori concepts in a manner that endorses rather than subverts Māori culture is open to doubt.[160]

European legal institutions have subjected te ao Māori to methods of translation and analysis through dominant knowledge systems based on distinct values. The context of the Crown and Māori's unequal power relations in a post-colonial society insidiously influences the courts' interpretation of Māori concepts. Thus, chosen words and language arguably represent politicised measures of racial reconciliation, rather than te ao Māori, and further entrench Crown control,[161] undermining the cultural sovereignty of Māori to make decisions about how to apply their cultural concepts in contemporary society. Artificial selection challenges the proposition that opportunities for legal recognition of significant indigenous values and practices outweigh the inherent risks of exposing those concepts to Western governance processes.

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156 One exception is the Waka Umanga Bill 2007 preamble which refers to kaitiaki as a defining feature of Māori groups.

157 Resource Management Act, s 2. The NBEB includes a similar definition of kaitiakitanga under s 11 as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources" but omits the inclusion of an ethic of stewardship.

158 Dawson, above n 8.

159 P G McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-determination* (Oxford University Press, Oxford, 2004) at 55.

160 See Catherine Iorns Magallanes *The Use of Tangata Whenua and Mana Whenua in New Zealand Legislation: Attempts at Cultural Recognition* (2011) 42 VUWLR 259; and Arnu Turvey "Te Ao Maori in a 'Sympathetic' Legal Regime: The Use of Maori Concepts in Legislation" (2009) 40 VUWLR 531.

161 John R Commons *The Legal Foundations of Capitalism* (Macmillan, New York, 1924) at 299.

B *A possible solution*

Establishing a fictional, unified cultural group has been suggested as an unavoidable process to assist the claims of that marginalised group to recognition.[162] However, post-recognition, cultural politics may dismantle these fantastical ideas of identity and empower Māori to define their identity on their terms.[163] The politics of representation itself ultimately entails the endorsement of Māori in decision-making processes to determine the proper definition and application of te ao Māori concepts. It likely requires a more sophisticated set of institutional arrangements that carefully considers how Parliament and the legal system should recognise Māori concepts. For example, should Parliament reproduce an authentic meaning of a concept in a new context, or rather unearth "that which the colonial experience buried and overlaid"?[164] As a basic principle, Māori must have a level of authority over decisions that influence the development of their value system. It is possible to bring knowledge systems together while staying firmly rooted in spirituality and culture. Western systems may act as agents for change if they can express Māori culture in a manner that appreciates the complex nature of Māori identity and empowers Māori to decide how to respond to issues within new contexts. Discussions of identity should question and expose Eurocentric assumptions of authenticity and inhibiting definitions of culture. Lawmakers must establish an environment where productive conversations about the transformation of Māori cultural identity can occur. Nganeko Minhinnick argues that the underlying intention of those with the mandate to act determines whether an act or process is a genuine expression of kaitiakitanga. So long as actors conduct themselves with the "same set of intentions about ensuring the health and balance of a system", the expression is valid.[165]

VI Conclusion

This article is not anti-property rights. Property rights are a crucial legal institution that play a significant role in contemporary society. However, if left unchallenged, Western property rights threaten the biophysical foundations of humanity's existence. The issue thus turns on what we understand property rights entitle and obligate us to do rather than on property rights per se.

Humans must, out of simple necessity, look to themselves for solutions, and te ao Māori has, for centuries, provided clear answers. While the scale of such recalibration is ambitious, it is at least plausible that future property concepts could become far more diverse when considering the malleability of property rights and the dynamic nature of public morality. The very purpose of environmental law, which emerged from the need to prevent an exploitative human-nature relationship, is to establish a property regime where responsibility is inherent to property ownership.

This article illustrated that te ao Māori offers a more principled foundation for governing how property functions in the contemporary world. Any right to use resources

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162 Stuart Hall "New Ethnicities" in David Morley and Kuan-Hsing Chen (eds) *Stuart Hall: Critical dialogues in cultural studies* (Routledge, London and New York) 441 at 441–445.

163 At 442.

164 Stuart Hall "Cultural Identity and Diaspora" in Padmini Mongia (ed) *Contemporary Postcolonial Theory: A Reader* (Arnold, London, 1996) 110 at 111.

165 Mere Roberts and others "Kaitiakitanga: Māori Perspectives on Conservation" (1995) 2 Pacific Conservation Biology 7 at 12.

under the law should come with a reciprocal legal obligation to maintain the lifeforce and well-being of Mother Earth and her integrated systems as a living whole. Furthermore, this article has demonstrated that states should adopt an ethic of kaitiakitanga through a broader environmental indigenous-based worldview that clarifies our relationship with the Earth, enhancing the harmonisation of te ao Māori and Western practices to redefine sovereignty.

The evolving trajectory of New Zealand's legal system and society suggests a likely future in which te ao Māori and Western beliefs can work together amicably to improve Aotearoa New Zealand. While the principle and intention of integrating te ao Māori concepts into legislation are commendable, it is detrimental when these concepts are defined inaccurately. There is a critical need for more comprehensive and all-encompassing definitions of concepts such as kaitiakitanga in legislation and policies. However, mana whenua should guide their practical manifestation and execution to prevent an individualist property regime from distorting the effect of te ao Māori concepts.