

**NOPERA ISAAC DENNIS-MCCARTHY**

**RECONCILIATION AND SELF-DETERMINATION:  
INCORPORATING INDIGENOUS WORLDVIEWS  
ON THE ENVIRONMENT INTO NON-INDIGENOUS  
LEGAL SYSTEMS**

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*Abstract:*

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

*Keywords:* Indigenous, Māori, Reconciliation, Rights of Nature, Self-Determination.

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## *I Introduction*

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

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<sup>1</sup>Benjamin Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford, Portland, 2009).

<sup>2</sup>Richard Cox (ed) *Second Treatise of Government: An Essay Concerning the True Original Extent and End of Civil Government by John Locke* (John Willey & Sons, New Jersey, 1982) at 18.

<sup>3</sup>William Carey Jones (ed) *Commentaries on the Laws of England by Sir William Blackstone* (Bancroft-Whitney, San Francisco, 1915) at 707.

<sup>4</sup>*United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/RES/61/295 (2007) at 8; and Human Rights Council *The Situation of Human Rights and Fundamental Freedoms of Indigenous People, Report by Rodolfo Stavenhagen, Special Rapporteur for the Rights of Indigenous Peoples A/59/258* (2004) at 6.

<sup>5</sup>James Tully *Public Philosophy in a New Key Vol. 1. – Democracy and Civic Freedom* (Cambridge University Press, Cambridge, 2008) at 251.

worldviews on nature into non-Indigenous law indicate two tentative conclusions which might be drawn. Firstly, the incorporation of an Indigenous perspective into a non-Indigenous legal system has the *potential* to foster reconciliation between a people and a system who have often been at odds, but this potential will not be realised if the process is not enacted in a conciliatory and mutually respectful manner. Secondly, while effective incorporation may allow for reconciliation, it does not necessarily provide Indigenous peoples with the legal self-determination to fully realise and enforce their worldview.

Since its enactment, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 has been a cynosure in environmental and Indigenous law. The national and international discourse regarding the Act has predominantly focused on its unique proposal to provide the Whanganui River with legal personality.<sup>6</sup> However a less heralded, but arguably more important aspect of the Act is its adoption of a Māori worldview on the environment, whereby the River is considered by Whanganui Iwi to be a living, indivisible being.<sup>7</sup> Nearly 10 years before the enactment of Te Awa Tupua, the Ecuadorian government chose to include the “Rights of Nature” in its constitutional amendments; based on the Indigenous Quechua concept of *Pacha Mama*, in which nature is a living, spiritual entity.<sup>8</sup> This paper will assess the process in which these similar perspectives are incorporated into the law. The process is critical to understanding this trend, as it portrays how Indigenous groups adapt and frame their values to fit into non-Indigenous legal

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<sup>6</sup>Eleanor Ainge Roy “New Zealand River Granted Same Rights as a Human Being” *The Guardian* (United Kingdom, 16 March 2017); and Bryant Rousseau “In New Zealand, Lands and Rivers Can Be People (Legally Speaking)” *New York Times* (New York, July 13 2016).

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

<sup>8</sup>Edmund A. Walsh Center for Latin American Studies “Constitution of the Republic of Ecuador 2008 (English Translation)” (January 2011) Political Database of the Americas [www.pdba.georgetown.edu/Constitutions/Ecuador/english08](http://www.pdba.georgetown.edu/Constitutions/Ecuador/english08), art 71.

systems. Te Awa Tupua and the Ecuadorian Rights of Nature are two examples of differing processes of incorporation and provide evidence to support the two tentative conclusions discussed above.

## *II Defining the criteria of reconciliation and self-determination*

### *A Justification of criteria*

Reconciliation and self-determination are common threads which run throughout Indigenous legal relations with the state, and are consistently claimed by Indigenous peoples around the world.<sup>9</sup> Indigenous-state reconciliation is often informed by the critical principle of partnership. This was espoused by the Court of Appeal in *Attorney-General v New Zealand Māori Council*, namely as a partnership in good faith designed to reconcile Māori and the Crown.<sup>10</sup> The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) also implies the importance of reconciliation in its Preamble. This stresses that recognition of the rights of Indigenous peoples will enhance harmonious relations between the state and Indigenous peoples based on principles of justice.<sup>11</sup> The Preamble also notes the fundamental importance of self-determination to Indigenous peoples.<sup>12</sup> Furthermore, article 18 of UNDRIP asserts that “Indigenous Peoples have the right to participate in decision-making in matters which would affect

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<sup>9</sup>Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya A/HRC/12/34* (2009) at para. 41; and James Anaya *Indigenous Peoples in International Law* (2nd Ed, Oxford University Press, Oxford, 2004) at 98.

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

<sup>11</sup>*United Nations Declaration on the Rights of Indigenous Peoples*, above n 4, at 3.

<sup>12</sup>*United Nations Declaration on the Rights of Indigenous Peoples*, above n 4, at 3.

their rights”<sup>13</sup> which expresses both reconciliation and self-determination. Articles 3 and 4 also expressly affirm the right of Indigenous peoples to self-determination.<sup>14</sup>

### *B Defining the scope of reconciliation*

A critical facet of reconciliation is the relationship between both parties.<sup>15</sup> As previously discussed, the principle of partnership is fundamental to the relationship between Māori and the Crown.<sup>16</sup> This was reiterated in the Waitangi Tribunal *Te Whanau o Waipareira* Report. In that Report, the Tribunal discussed the notion of a relationship of reconciliation being based on mutual respect, equality and good faith, as a critical aspect of the “partnership” principle.<sup>17</sup> Wiessner also derives the principle of good faith from Indigenous-state reconciliation in the international arena. In his assessment of the development of international law concerning Indigenous peoples, Wiessner infers that states honouring their promises in good faith is an integral part of an effective Indigenous-state relationship.<sup>18</sup>

These fundamental principles behind Indigenous-state reconciliation are perhaps best captured by Tully. He identifies five principles necessary for effective reconciliation from

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<sup>13</sup>Article 18.

<sup>14</sup>Article 3.

<sup>15</sup>Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 58-59. See also: Paul Nadasdy “The antithesis of restitution? A note on the dynamics of land negotiations in the Yukon, Canada” in Derick Fay and Deborah James (ed) *The Rights and Wrongs of Land Restitution: Restoring What was Ours* (Routledge-Cavendish, Kentucky, 2009) 85 at 87.

<sup>16</sup>*New Zealand Maori Council v Attorney-General*, above n 10, at 664.

<sup>17</sup>Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at xxvi.

<sup>18</sup>Siegfried Wiessner “Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis” (1999) 12 *Harvard Human Rights Journal* 57 at 124.

an Indigenous perspective.<sup>19</sup> Firstly, mutual recognition. This requires two steps: acceptance of Indigenous peoples having equal legitimacy with the state and public affirmation of the recognition in the basic institutions and symbols of the state.<sup>20</sup> Secondly, intercultural dialogue. Tully asserts that dialogue is not based on a “once and for all agreement” but a continuing conversation designed to maintain relationships. Thirdly, mutual respect. Tully suggests that respect from an Indigenous perspective has a broader meaning as it relates to respect for natural resources and the environment.<sup>21</sup> Jones argues that this view is similarly endorsed in tikanga Māori through values such as manaakitanga, sharing and mutual responsibility.<sup>22</sup> Fourthly, the principle of sharing. Simply defined as the giving and receiving of benefits, Tully suggests that from a legal and economic sense, a post-colonial Indigenous-state relationship of reconciliation would include factors such as the sharing of land.<sup>23</sup> Finally, mutual responsibility. In the context of this paper, this final principle is critical, as the traditional Indigenous and non-Indigenous legal approaches to responsibility are markedly different, but the modern approaches are arguably easier to reconcile. The traditional Western approach to responsibility, particularly in the legal sense, places high value on individual responsibility. Conversely, the traditional Indigenous approach places greater emphasis on the responsibilities of the collective. Notably this does not simply include the rights of humankind, but rights and obligations to the environment. However with increasing awareness and support for protecting vulnerable natural environments and ecosystems in

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<sup>19</sup>Tully, above n 5, at 229.

<sup>20</sup>At 230.

<sup>21</sup>Tully, above n 5, at 243.

<sup>22</sup>Jones, above n 15, at 62.

<sup>23</sup>Tully, above n 5, at 247.



the Western world, Tully suggests that the two views may be weaved together as the final fibre in an Indigenous-state relationship of reconciliation.<sup>24</sup>

### *C Defining the scope of self-determination*

Self-determination is often equated with the Māori concept of tino rangatiratanga.<sup>25</sup>

While the Waitangi Tribunal has expressed that this is a difficult term to fully encapsulate in the English language,<sup>26</sup> Durie suggests that at a minimum, tino rangatiratanga includes a level of political autonomy and authority within both Māori society and between Māori and the state.<sup>27</sup> The international community has also recognised the rights of Indigenous peoples to autonomy through a number of international documents. The reports of the Special Rapporteur on the Rights of Indigenous Peoples indicate that providing an Indigenous group with the capacity to have autonomy over decision-making with regard to natural resources is a critical step in developing effective self-determination.<sup>28</sup> Further UN documents, including the Report of the Monitoring Mechanism regarding the implementation of UNDRIP in New Zealand, also signal that capacity or autonomy over decision making is crucial to recognising Indigenous self-determination.<sup>29</sup>

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<sup>24</sup>At 250.

<sup>25</sup>Mason Durie “Tino Rangatiratanga” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 2005) at 4.

<sup>26</sup>Waitangi Tribunal *Maori Electoral Option Report* (Wai 413, 1994) at 4.

<sup>27</sup>Durie, above n 25, at 4.

<sup>28</sup>Human Rights Council *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya A/HRC/15/37* (2010) at 11; and Human Rights Council *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen A/HRC/4/32* (2007) at 6.

<sup>29</sup>Human Rights Council *Report of the Monitoring Mechanism regarding the implementation of the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand A/HRC/EMRIP/2016/CRP.4* (2016) at 5.

Self-determination may also contain an element of sustainability. Corntassel argues that governments frame self-determination rights in a manner which deliberately undermines critical relationships that Indigenous peoples have within their community.<sup>30</sup> In order to truly give effect to Indigenous self-determination, a more holistic and sustainable benchmark ought to be implemented.<sup>31</sup> Coulthard also criticises state-driven, rights-based recognition as entrenching the colonial status quo as opposed to utilising an approach founded on Indigenous and community values.<sup>32</sup> Corntassel instead suggests that sustainable self-determination should be founded upon the provision of holistic Indigenous responsibilities over critical tenets of the Indigenous culture.<sup>33</sup> This can include communal responsibilities over health, family, food and the environment. In particular, Indigenous peoples should be able to apply their own natural laws and solutions over natural resources.<sup>34</sup> This sustainable view is also supported by Nagan and Hammer in their legal analysis of the property rights of the Indigenous Shuar people of Ecuador.<sup>35</sup> They argue that in order to realise the goal of sustainable self-determination, the legal framework which supports it should be based around holistic Indigenous views.<sup>36</sup> Nagan and Hammer place particular emphasis on the Indigenous worldview on the environment as “not just an aspect of the Indigenous community, but the basis of the

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<sup>30</sup>Jeff Corntassel “Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse” (2008) 33 *Alternatives* 105 at 107.

<sup>31</sup>At 124.

<sup>32</sup>Glen Coulthard “Place Against Empire: The Dene Nation, Land Claims and Politics of Recognition in the North” in Avigail Eisenberg, Jeremy Webber, Glen Coulthard, and Andree Boisselle (eds) *Recognition versus Self-Determination: Dilemmas of Emancipatory Politics* (UBC Press, Vancouver, 2014) 147 at 169.

<sup>33</sup>Corntassel, above n 30, at 118.

<sup>34</sup>At 118.

<sup>35</sup>Winston Nagan and Craig Hammer “The Conceptual and Jurisprudential Aspects of Property in the Context of the Fundamental Rights of Indigenous People: The Case of the Shuar of Ecuador” (2013) 58 *N.Y. L. Sch. L. Rev* 875.

<sup>36</sup>At 917.

community itself”.<sup>37</sup> The framework of self-determination must therefore be dynamic enough to not only reflect this worldview, but also provide Indigenous peoples the responsibilities to practically realise it.

### *III Background and context*

#### *A Māori and Quechuan perspectives on the environment*

The connection between Te Ao Māori and the environment is underpinned by two fundamental concepts: whanaungatanga and kaitiakitanga.<sup>38</sup> Whanaungatanga espouses the innate relationship that Māori have with the environment. Māori place emphasis on the relationship of their mauri (lifeforce) with the mauri of parts of nature, such as rivers, lakes and mountains.<sup>39</sup> This captures the view of the Whanganui Iwi in relation to the Whanganui River; it is considered to have its own mauri to which the people of the Iwi are intrinsically linked.<sup>40</sup> Kaitiakitanga is an obligation to both care for and nurture the mauri of the environment. It has a communal aspect in that it is not the sole responsibility of an individual to protect the waterways and mountains, but that of the collective.<sup>41</sup> Kaitiakitanga and whanaungatanga are interrelated in that they both support the notion that Māori are inherently connected and related to the natural environment, particularly through the mauri of the waterways and mountains that surround them.

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<sup>37</sup>At 876.

<sup>38</sup>Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 237.

<sup>39</sup>At 267.

<sup>40</sup>Waitangi Tribunal *Whanganui River Report* (Wai 167, 1999) at 39.

<sup>41</sup>*Ko Aotearoa Tenei*, above n 38, at 238.

Underlying the Ecuadorian constitutional developments are two Indigenous concepts: *sumac kawsay* and *Pacha Mama*. These stem from the Indigenous Quechua people and are both critical to the Rights of Nature incorporated into the Ecuadorian constitution. *Sumac kawsay* describes a quality of life that promotes harmony within both the community and environment that surrounds an individual.<sup>42</sup> In a similar manner to whanaungatanga, *sumac kawsay* places emphasis on the interrelation between humans and nature. Under this concept, the welfare of humanity is intertwined with the welfare of natural ecosystems.<sup>43</sup> This rejects the traditional Western notion that natural resources can be owned and instead proposes a view whereby natural resources are considered to be living beings, with will and feelings.<sup>44</sup> *Pacha Mama* is analogous to the Western concept of “mother earth” or the Māori deity Papatuanuku, representing the Quechuan concept of nature as a living deity.<sup>45</sup> The Ecuadorian constitution defines nature or *Pacha Mama* as the place where “life is reproduced and occurs”.<sup>46</sup> The two concepts are complementary in that protection of *Pacha Mama* gives rise to harmonious coexistence with the natural environment, thus fulfilling *sumac kawsay*.<sup>47</sup>

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<sup>42</sup>Catherine Walsh “Afro and Indigenous Life– Visions in/and Politics. (De)colonial Perspectives in Bolivia and Ecuador” (2011) 18 *Bolivian Studies Journal* 50 at 56.

<sup>43</sup>Eduardo Gudynas “Buen Vivir: Today’s Tomorrow” (2011) 54 *Development* 441 at 445.

<sup>44</sup>At 445.

<sup>45</sup>Gordon McEwan “Pachamama” in Jay Kinsbruner and Erick Landger (ed) *Encyclopedia of Latin American Culture and History* 2 at 2.

<sup>46</sup>“Constitution of the Republic of Ecuador”, above n 8, art 71.

<sup>47</sup>Catherine Walsh “Development as Buen Vivir: Institutional Arrangements and (de)colonial Entanglements” (2010) 53 *Development* 15 at 18.

*B The context behind the Ecuadorian Rights of Nature*

The Rights of Nature are a relatively modern phenomenon in Western legal thought. Environmental law in Western society has traditionally been anthropocentric or human centred, in that it focuses on the ability of humans to use or benefit from a natural resource, rather than on the natural resource itself.<sup>48</sup> This approach is exemplified in a wide variety of sources, from Blackstone's traditional statement of a person's "sole and despotic dominion"<sup>49</sup> over property to modern international treaties such as the Rio Declaration on the Environment, which places emphasis on sustainable development for human, rather than environmental benefit.<sup>50</sup>

The notion that nature itself should have rights was given attention in a formal Western legal context in the 1970s, through Christopher Stone's seminal text *Should Trees Have Standing?* This approach differed from the traditional Western legal perspective on the environment in that it was ecocentric, in which the rights of the environment itself, rather than humans, were the central focus.<sup>51</sup> Since this time, there has been a gradual progression in the recognition of an ecocentric approach in domestic and international law. An ecocentric approach is a critical facet of what Colón-Rios considers to be a new wave of constitutional developments in the Latin American region in the early 21<sup>st</sup>

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<sup>48</sup>Marc Pallemerts "International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process" (1996) 15 *Journal of Law and Commerce* 623 at 642.

<sup>49</sup>Jones (ed), above n 3, at 707.

<sup>50</sup>Pallemerts, above n 48, at 642.

<sup>51</sup>Christopher Stone *Should Trees Have Standing? Law, Morality and the Environment* (3<sup>rd</sup> ed, Oxford University Press, 2010).

Century.<sup>52</sup> Riding the crest of this wave is the Ecuadorian constitution, which has incorporated an ecocentric approach based on the Rights of Nature.

### *C The context behind Te Awa Tupua*

Unlike Ecuador, where an Indigenous perspective was incorporated through novel constitutional amendments, Te Awa Tupua codified a Māori worldview through what is now a relatively well-practiced Treaty Settlement Process. In the case of the Whanganui Iwi, the legislation was the fruit of negotiations with the Crown which had occurred after a Waitangi Tribunal claim process. Since 2010 there has been a greater emphasis in Treaty settlements on the Māori worldview of natural resources as living entities.<sup>53</sup> The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 records Crown recognition of the Waikato River as a tupuna (ancestor) and its mana, which in turn represents the mana and mauri of Waikato-Tainui.<sup>54</sup> This was followed by the Te Urewera Act 2014, which provides Te Urewera National Park with legal identity,<sup>55</sup> while concurrently recognising that it has an identity “in and of itself”.<sup>56</sup> Te Awa Tupua follows on from this trend.

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<sup>52</sup>Joel Colón-Rios “Constituent Power, The Rights of Nature, and Universal Jurisdiction” (2014) 60 McGill Law Journal 127.

<sup>53</sup>James Morris and Jacinta Ruru” Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water” (2010) 14 AILR 49 at 52.

<sup>54</sup>Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

<sup>55</sup>Te Urewera Act 2014.

<sup>56</sup>Section 3.

## *IV Ecuadorian Rights of Nature*

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

#### *1 The Preamble*

The Constitution of Ecuador immediately declares the importance of both an Indigenous worldview on the environment and the Rights of Nature in its preamble:<sup>57</sup>

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

#### *2 Article 71*

Chapter Seven then explicitly sets out the Rights of Nature. Article 71 provides the most explicit reference to an Indigenous worldview:<sup>58</sup>

“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.”

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<sup>57</sup>“Constitution of the Republic of Ecuador”, above n 8, Preamble.

<sup>58</sup>Article 71.

### *A Process of constitutional development*

The Rights of Nature first arose in Ecuador during its 2006 general election. Eventual President Rafael Correa and his *Alianza País* political coalition sought to appeal to a disillusioned population by suggesting alternative models of development and constitutional reform.<sup>59</sup> After the election was won, a national public referendum establishing a Constituent Assembly was held in 2007.<sup>60</sup> The Assembly was consequently elected in the same year. It consisted of 130 members, with representatives from *Alianza País* holding a majority of 80 seats.<sup>61</sup> The Assembly maintained ten working groups which were tasked with drafting and debating particular themes within the constitution.<sup>62</sup> Assembly members were encouraged to travel the country to engage and hear the opinions and proposals of citizens, including Indigenous groups.<sup>63</sup> Working Group Five focused on the theme of Natural Resources and Diversity, and was tasked with codifying the Rights of Nature into a set of constitutional provisions.<sup>64</sup> This task was eventually passed on to Working Group One, which dealt with fundamental rights in the Constitution, and the Rights of Nature were included in the final draft, which was voted on and approved in a meeting of the Assembly in July 2008.<sup>65</sup> In September of that year,

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<sup>59</sup>James Bowen *Countries at the Crossroads 2011: Ecuador* (Freedom House, 2011) at 1.

<sup>60</sup>European Union Election Observation *Final Report of the European Union Election Observation Mission: Ecuador 2007* (European Union Election Observation Mission, 2007) at 4.

<sup>61</sup>European Union Election Observation *Final Report of the European Union Election Observation Mission: Ecuador 2009 Presidential and Parliamentary Elections* (European Union Election Observation Mission, 2009) at 9.

<sup>62</sup>The Carter Centre *Report on the National Constituent Assembly of the Republic of Ecuador January 2008* (The Carter Centre, 2008) at 4.

<sup>63</sup>The Carter Centre *Report on the National Constituent Assembly of the Republic of Ecuador March 2008* (The Carter Centre, 2008) at 8.

<sup>64</sup>Mihnea Tanasescu *Environment, Political Representation and the Challenges of Rights* (Pallgrave MacMillan, London, 2016) at 95-96.

<sup>65</sup>At 99.



the Constitution was ratified by a majority of the Ecuadorian population in a referendum.<sup>66</sup>

*B Indigenous influence on process of constitutional development*

The Indigenous peoples of Ecuador have historically organised themselves on the basis of a corporatist model in national politics.<sup>67</sup> Their largest federation is the Confederation of Indigenous Nationalities of Ecuador (CONAIE). This umbrella group represents 14 Indigenous nationalities within the state.<sup>68</sup> There was concern on the part of CONAIE that the constitutional reform would place emphasis on universal rights which would exclude the specific needs of Indigenous peoples.<sup>69</sup> Even when the Rights of Nature were first discussed in the Constituent Assembly, Indigenous groups were wary of the rights emphasising nature rather than the collective rights of the Indigenous communities who resided within the natural environment.<sup>70</sup> Despite this, Indigenous representatives still took part in the Constituent Assembly, mainly in coalition with *Alianza País*, so as to exert influence over the drafting of the constitution.<sup>71</sup> However while *Alianza País* contained several Indigenous representatives, *Pachakutik* (the predominant Indigenous party in Ecuador) only won four seats in the Assembly elections.<sup>72</sup> Notably, Tanasescu suggests that the rights were the product of a political elite with interests in

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<sup>66</sup>*Final Report of the European Union Election Observation Mission: Ecuador 2009 Presidential and Parliamentary Elections*, above n 61, at 10.

<sup>67</sup>Marc Becker “Indigenous Movements, and the Writing of a New Constitution in Ecuador” (2011) 38 *Latin American Perspectives* 47 at 48.

<sup>68</sup>At 48.

<sup>69</sup>Maria Akchurin “Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador” (2015) 40 *Law and Social Inquiry* 937 at 956.

<sup>70</sup>At 956.

<sup>71</sup>Becker, above n 67, at 51.

<sup>72</sup>At 50.

environmentalism, but not necessarily Indigenous rights.<sup>73</sup> This is evidenced by the transfer of the codification of the rights from Working Group Five to Working Group One, which had few Indigenous representatives, but a number of environmental activists.<sup>74</sup> However the importance of *sumac kawsay* as an underlying principle to the rights should not be discounted. The influence of *sumac kawsay* to the development of the Rights of Nature was explicitly asserted by delegates during the Constituent Assembly.<sup>75</sup> This was motivated by the accessible nature of the constitutional reform process, which allowed for significant submission by Indigenous groups. Colón-Rios notes the significance of a Constituent Assembly being used for constitutional reform rather than the state legislature. While the latter deals with issues of daily governance, the former is concerned with fundamental issues of law.<sup>76</sup> They may attract participants who have historically been excluded from the traditional branches of government. These participants, such as Indigenous peoples, may consider constituent assemblies a new avenue for expressing their rights.<sup>77</sup> This is particularly prevalent in the Ecuadorian case, as it was in fact CONAIE who had previously called for the establishment of a constituent assembly before the 2008 election.<sup>78</sup> As a result, Indigenous peoples were able to influence the decisions of the Assembly and the Rights of Nature through direct engagement, such as proposals and petitions to delegates.<sup>79</sup>

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<sup>73</sup>Mihnea Tanasescu “The Rights of Nature in Ecuador: The Making of an Idea” (2013) 70 *International Journal of Environmental Study* 846 at 854.

<sup>74</sup>At 851.

<sup>75</sup>Akchurin, above n 69, at 954.

<sup>76</sup>Joel Colón-Rios “Notes on Democracy and Constitution-Making” (2011) 9 *NZJPIL* 17 at 29.

<sup>77</sup>At 29.

<sup>78</sup>Marc Becker *Pachakutik: Indigenous Movements and Electoral Politics in Ecuador* (Rowman and Littlefield Publishers, Maryland, 2010) at 110.

<sup>79</sup>At 130.

## *V Te Awa Tupua*

### *A Relevant provisions of the Te Awa Tupua*

Te Awa Tupua is the result of over two decades of Crown-Iwi relations. This began in 1994 with the Waitangi Tribunal Whanganui River claim and concluded in 2017, when the Act itself was passed after a Tribunal Report and prolonged Treaty Settlement negotiations. While the Act maintains a number of traditional Treaty Settlement aspects such as Crown acknowledgements<sup>80</sup> and apology,<sup>81</sup> its structure as well as a number of its provisions are relatively unique in Treaty Settlement legislation. In particular, Part 2 of the Act sets out a number of the significant provisions which assert the worldview of the Whanganui Iwi on the environment. It provides the overall framework over which the River will be recognised.

Section 12 of the Act identifies Te Awa Tupua as an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.<sup>82</sup>

Section 13 comprises of the four intrinsic values, or Tupua te Kawa, which represent the essence of Te Awa Tupua. These are:<sup>83</sup>

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<sup>80</sup>Section 69.

<sup>81</sup>Section 70.

<sup>82</sup>Section 12.

<sup>83</sup>Section 13.

- 1) *Ko te Awa te mātāpuna o te ora - the River is the source of spiritual and physical sustenance:* Te Awa Tupua is a spiritual entity that sustains both the life and natural resources within the Whanganui River and the well-being of the iwi, hapū, and other communities of the River.
- 2) *E rere kau mai i te Awa nui mai i te Kahui Maunga ki Tangaroa - the great River flows from the mountains to the sea:* Te Awa Tupua is an indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and all of its physical and metaphysical elements.
- 3) *Ko au te Awa, ko te Awa ko au - I am the River and the River is me:* The iwi and hapū of the Whanganui River have an inalienable connection with, and responsibility to, Te Awa Tupua and its health and well-being.
- 4) *Ngā manga iti, ngā manga nui e honohono kau ana, ka tupu hei Awa Tupua - the small and large streams that flow into one another form one River:* Te Awa Tupua is a singular entity comprised of many elements and communities, working collaboratively for the common purpose of the well-being of Te Awa Tupua.

Section 14 declares Te Awa Tupua as a legal person, having all the rights, powers, duties and liabilities of a legal person.<sup>84</sup>

### *B Waitangi Tribunal and Treaty Settlement Process*

As Te Awa Tupua was developed within the legal framework relating to the Treaty of Waitangi, it arguably provided Māori with greater ability to influence the process of

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<sup>84</sup>Section 14.

incorporation than the Ecuadorian Constitution. The Treaty framework is mainly focused on the legal relationship between Māori and the Crown, as opposed to the Ecuadorian Constitution which sought to cover a broader range of obligations. In the case of the Te Awa Tupua the process of incorporation consisted of two key elements: A Waitangi Tribunal Report and the Treaty Settlement Process.

The Waitangi Tribunal Report on the Whanganui River is a comprehensive assessment of the relationship of the Whanganui Iwi with the River. Its recommendations provide a critical foundation for the basis of the Treaty Settlement Process and the Te Awa Tupua framework. Firstly, the Tribunal found that Whanganui Iwi held the River in 1840, at the time of signing the Treaty of Waitangi.<sup>85</sup> This foreshadowed a recognition of a Māori worldview which continued throughout the Treaty Settlement Process. According to the Tribunal, the question of whether Whanganui Iwi held the River should be based on the context of “Māori social dynamics” as opposed to the context of an “alien structure” (namely ownership) to which Māori norms do not relate.<sup>86</sup> By consequently basing their assessment on a Māori worldview, the Tribunal considered that the River was not a commodity that could be owned,<sup>87</sup> but rather a taonga inherently connected to the Iwi.<sup>88</sup> However the Tribunal noted that traditional usage and activities by Whanganui Iwi gave them significant customary proprietary rights, leading to the conclusion that it was held by Māori in 1840.<sup>89</sup> Secondly, the Tribunal emphasised the recognition by Whanganui

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<sup>85</sup>*Whanganui River Report*, above n 40, at xiii.

<sup>86</sup>At 46.

<sup>87</sup>At 46.

<sup>88</sup>At 46.

<sup>89</sup>At 47-48.

Iwi of the River as a living entity. The Tribunal held that the River was a single and indivisible entity, and a tupuna awa (river ancestor).<sup>90</sup> Furthermore, the Tribunal followed Māori cosmogony and noted that all things have a mauri and that the River was so endowed.<sup>91</sup> As a result, it had to be “respected as though it were one’s close kin”.<sup>92</sup>

Finally, the Tribunal made two recommendations for consideration in Treaty Settlement negotiations. They recommended that either the entirety of the River be vested in an ancestor representative of the Whanganui Iwi, or the Whanganui River Māori Trust Board be added as a ‘consent authority’ to the River under the Resource Management Act 1991.<sup>93</sup> This would allow the Iwi to act jointly with other consenting authorities over any applications or decisions regarding the River. A third option was presented in a dissenting opinion by a member of the Tribunal. This involved equal ownership by the Crown and the Whanganui Iwi over the Riverbed, in the form of a joint body which would exercise all the rights and responsibilities of legal ownership.<sup>94</sup>

The Tribunal’s recommendations heavily influenced the Treaty Settlement Process. After the Report was released, negotiations originally began in 2002.<sup>95</sup> In 2012 after delayed negotiations, an agreement on the Whanganui River, *Tutohu Whakatupua*, was reached. This detailed a decision between Whanganui Iwi and the Crown to provide statutory

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<sup>90</sup>At xiv.

<sup>91</sup> At 39.

<sup>92</sup>At 39.

<sup>93</sup>At 343.

<sup>94</sup>At 347.

<sup>95</sup>Office of Treaty Settlements “Record of Understanding in relation to the Whanganui River Settlement” (13 October 2011) New Zealand Government Treaty Settlement Documents <https://www.govt.nz/dmsdocument/3700.pdf> at 1.16.

recognition to the Whanganui River as a legal entity.<sup>96</sup> The process was developed further in the Deed of Settlement (*Ruruku Whakatupua – Te Mana o Te Awa Tupua*), which also refined the body or “human face” designed to represent the river: Te Pou Tupua.<sup>97</sup> This body consists of two human representatives of the River (one on behalf of the Crown, one on behalf of the Whanganui iwi),<sup>98</sup> to act on behalf of the River and promote its health and wellbeing.<sup>99</sup> After the Deed was signed in 2014, a Treaty Settlement Bill was drafted in 2016 and passed in 2017. This enacted the framework and values set out in the Deed of Settlement, including Te Pou Tupua and ss 12, 13 and 14 mentioned above.

### *C Indigenous influence on process*

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

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<sup>96</sup>Office of Treaty Settlements “Agreement re. Whanganui River Claims (Tūtohu Whakatupua)” (30 August 2012) New Zealand Government Treaty Settlement Documents <https://www.govt.nz/dmsdocument/3706.pdf> at 2.1.2.

<sup>97</sup>Office of Treaty Settlements “Whanganui River Treaty Settlement Ruruku Whakatupua – Te Mana o te Awa Tupua” (5 August 2014) New Zealand Government Treaty Settlement Documents <https://www.govt.nz/dmsdocument/5947.pdf> at 10.

<sup>98</sup>At 11.

<sup>99</sup>At 10.

Firstly, at the period before negotiations and settlement, specifically the Waitangi Tribunal Whanganui River Report. The claim by Whanganui Iwi for recognition of their rights and relationship to the River is not recent. The Waitangi Tribunal Report and to an extent Te Awa Tupua as a whole, is a culmination of decades of litigation and disputes between Whanganui Iwi and the Crown.<sup>100</sup> As a result, the Tribunal's Report and recommendations are heavily influenced by the traditional Whanganui Iwi worldview and disputes regarding the River.

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

*Te Pā Auroa Nā Te Awa Tupua:* The overall Te Awa Tupua framework, based on Te Pā Auroa, a broad eel weir designed to withstand the autumn, winter and spring floods and symbolizing a framework that is enduring and well-constructed.<sup>101</sup>

*Te Kōpuka Nā Te Awa Tupua:* The Te Awa Tupua Strategy Group. Te Kōpuka represents the White Manuka, a raw material used to build the Pā Auroa. This symbolises the connection, co-operation and strength within Te Awa Tupua.<sup>102</sup>

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<sup>100</sup>Office of Treaty Settlements, above n 96, at 1.1-1.11.

<sup>101</sup>Office of Treaty Settlements, above n 97, at 1.1-1.7.

<sup>102</sup>Office of Treaty Settlements, above n 97, at 5.1-5.6.



Finally, s 82 and Schedule 8 set out a special acknowledgement of the more than 240 identified ripo (rapids) on the Whanganui River.<sup>103</sup> Each rapid is recognised as a guardian by Whanganui hapu, responsible for the life force of the River and provide insight, guidance, and premonition in relation to matters affecting the River, its resources and life in general.<sup>104</sup>

## *VI Analysis of process and results*

### *A Reconciliation between Indigenous peoples and the state*

Both the Te Awa Tupua Settlement process and the Ecuadorian Constitutional reform provided significant potential for reconciliation, particularly given the crucial cultural significance of the natural environment to the Whanganui Iwi and the Indigenous Ecuadorian people.

In Ecuador, there was significant emphasis on the use of constituent power in the constitutional reform process. Colón-Rios, citing Sieyes, defines constituent power as the notion that in every society someone must have the right to make and amend constitutions, and in a democracy, that power lies with the people.<sup>105</sup> The Ecuadorian Constitution was unique in the South American context, according to Colón-Rios, because of the Constituent Assembly and its processes.<sup>106</sup> The Assembly was structured to encourage transparency and participation. As a result, it was not only a valid avenue to

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<sup>103</sup>Section 82.

<sup>104</sup>Schedule 8.

<sup>105</sup>Colón-Rios, above n 52, at 132.

<sup>106</sup>Colón-Rios, above n 76, at 32-33.

Indigenous people for expressing their rights, but also one that was democratically legitimate.

Conversely in the Te Awa Tupua process, the Waitangi Tribunal and Treaty Settlement approach provided a significant mandate for reconciliation. The Waitangi Tribunal Report also expressly recognised the social cost of cultural deprivation that flowed from the refusal by the Crown to respect the mana of the Whanganui Iwi and the Whanganui River.<sup>107</sup> This harm, according to the Tribunal, ought to be rectified and the government-iwi relationship reconciled.<sup>108</sup> This mandate was carried through to the Treaty Settlement stage. The Treaty Settlement Process as a whole is intended to reconcile and heal the relationship between the Crown and the Māori claimant group.<sup>109</sup> This is expressed in the Crown apologies and recognition of the relationship between Whanganui Iwi and the Whanganui River in the Te Awa Tupua.<sup>110</sup> These provisions acknowledge and apologise for the harmful effect of Crown actions and decisions regarding the Whanganui River on the Whanganui Iwi.<sup>111</sup>

Ultimately, it is evident that there was clear *potential* for reconciliation in Ecuador and New Zealand. Both cases had the capability of acting as a catalyst for fostering and improving and Indigenous-government partnership through mutual recognition and intercultural dialogue throughout the process of incorporation. However the cases diverge

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<sup>107</sup>At xvii.

<sup>108</sup>At 145.

<sup>109</sup>Maureen Hickey “Apologies in Settlements” in Nicole Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) 79 at 80.

<sup>110</sup>Sections 69, 70 & 71.

<sup>111</sup>Section 70.

upon assessment of whether that potential was *realised*. It appears on the evidence that Te Awa Tupua did, based on this paper's criteria, advance reconciliation. Conversely the Ecuadorian process failed to lead to reconciliation, which, as will be later discussed, undermined the right to self-determination.

Despite its potential, Ecuador's constitutional reform lacked a number of critical characteristics required for it to be considered a process of reconciliation. Firstly, Tully posits that mutual recognition requires both acceptance of Indigenous peoples and their institutions having equal legitimacy with the state, and public affirmation of this acceptance.<sup>112</sup> Although CONAIE did enter into a political coalition with the governing *Alianza País* party, they only consisted of a small minority in the Constituent Assembly. Furthermore, they were not afforded any express influence over the drafting of the Rights of Nature or the constitution as a whole; the Working Groups which drafted the Rights of Nature had greater influence in numbers and in voice of elite environmentalist politicians as opposed to Indigenous representatives. This suggests against acceptance of the legitimacy of Indigenous peoples and their institutions by the state. There was also no public affirmation of this acceptance. In his capacity as head of state, Correa criticized the Indigenous *Pachakutik* and CONAIE movements, both in their attempt to introduce the concept of *Pacha Mama* into the constitution and in their wider constitutional aspirations.<sup>113</sup> Not only does this indicate a lack of mutual respect and recognition, it also

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<sup>112</sup>Tully, above n 5, at 230.

<sup>113</sup>Becker, above n 78, at 58; Kenneth Jameson "The Indigenous Movement in Ecuador: The Struggle for a Plurinational State" (2011) 38 *Latin American Perspectives* 63 at 70; and Marisol de la Cadena "Indigenous Cosmopolitics in the Andes: Conceptual Reflections Beyond Politics" (2010) 25 *Cultural Anthropology* 334 at 336.

undermines any notion of intercultural dialogue.<sup>114</sup> Furthermore while discourse from environmentalist politicians did not oppose the Indigenous worldview, it arguably similarly served to undermine it. Espinosa holds that although Indigenous peoples were considered important stakeholders for environmental governance, they were also depicted by environmentalist politicians as subordinate victims.<sup>115</sup> Notably, despite the importance of the environment to Indigenous peoples, their interests do not always automatically align with the interests of environmentalists. Redford has discussed the notion of the “ecologically noble savage”: the use of Indigenous peoples by environmentalists to promote their own agenda without considering the collective rights of Indigenous peoples themselves.<sup>116</sup> Nadasdy also suggests that idealistic notions of Indigenous ecological respect used by environmentalists can be colonial cultural assumptions, as the cultural norms underlying these notions are often not considered.<sup>117</sup> Given the lack of Indigenous constituents in the Assembly and the manner in which Indigenous peoples were depicted according to Espinosa, there does not appear to be effective intercultural dialogue or mutual, equal recognition between environmentalist politicians who propounded the Rights of Nature stemming from an Indigenous view, and the actual Indigenous peoples themselves.

Another factor consistently present in successful Indigenous-state reconciliation is that of good faith. Wiessner specifically emphasises states honouring their promises as being an

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<sup>114</sup>Tully, above n 5, at 239.

<sup>115</sup>Cristina Espinosa “Interpretive Affinities: The Constitutionalization of Rights of Nature, Pacha Mama, in Ecuador” (2015) *Journal of Environmental Policy and Planning* 1 at 10.

<sup>116</sup>Kent Redford “The Ecologically Noble Savage” (1991) 15 *Cultural Survival Quarterly* 46 at 46.

<sup>117</sup>Paul Nadasdy “Transcending the Debate over the Ecologically Noble Indian: Indigenous Peoples and Environmentalism” (2005) 52 *Ethnohistory* 291 at 293.

integral part of the Indigenous-state relationship.<sup>118</sup> The relationship between Indigenous institutions and the state after the incorporation of the Rights of Nature in the Ecuadorian Constitution indicate that the state did not respect its promises in good faith. This was due to both Correa's political attacks against CONAIE and *Pachakutik* and the enactment of legislation harmful to the natural resources culturally important to Indigenous peoples. The Ecuadorian Constitution is designed to protect the Rights of Nature and under art 57 also explicitly provides a right to both prior Indigenous consultation on plans for producing non-renewable energy located on Indigenous lands which could have a cultural or environmental impact on them, and for Indigenous people to maintain their practice of managing biodiversity and the natural environment.<sup>119</sup> These rights were directly infringed by the Mining Act, which authorized the extraction of natural resources (even in protected areas) through large-scale open-pit mining.<sup>120</sup> As noted by Kotze and Calzadilla, not only has the government ignored the Rights of Nature and the Indigenous right to consultation under the constitution, it has also sought to suppress any Indigenous protest.<sup>121</sup> According to Amnesty International, there have been significant human rights breaches by the Ecuadorian government against Indigenous protesters.<sup>122</sup> As a result, it is clear that the relationship between Indigenous peoples and the state has been far from one of good faith.

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<sup>118</sup>Wiessner, above n 18, at 124.

<sup>119</sup>"Constitution of the Republic of Ecuador 2008", above n 8, art 57.

<sup>120</sup>Amnesty International *Criminalising the Right to Protest in Ecuador* (Amnesty International, 2012) at 17.

<sup>121</sup>Louis Kotze and Paola Calzadilla "Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador" (2017) 6 *Transnational Environmental Law* 401 at 430.

<sup>122</sup>Amnesty International, above n 120, at 26.

Two final aspects of reconciliation not present in the Ecuadorian case study were mutual responsibility and sharing. In the former, Tully emphasises not only individual responsibility but collective responsibility from both Indigenous peoples and the state to humankind and the environment.<sup>123</sup> This is influenced by the latter concept as it is unlikely that mutual responsibility can be attained if power is not shared. In this case, the potential for these factors to be achieved was present. The open nature of the Assembly, the use of *Pacha Mama* as the basis of the Rights of Nature and the art 57 right to consultation indicates that mutual responsibility between the two parties could have been shared. Two examples after the constitutional reforms indicate that this did not in fact occur. The first is the aforementioned Mining Act, where Indigenous peoples protests and rights to consultation, as well as the Rights of Nature, were ignored. Secondly in 2009, amid escalating tensions between Indigenous peoples and the state regarding the Mining Act, the government introduced a Water Act, governing water management.<sup>124</sup> There was a distinct lack of consultation with Indigenous peoples and protests occurred, with the government again suppressing these protests in a manner contrary to human rights.<sup>125</sup> While CONAIE and the government later sought to negotiate over the Water Act,<sup>126</sup> these examples indicate the reluctance of the state to share power and reach any form of mutual responsibility.

Unlike in Ecuador, the Te Awa Tupua process was arguably characterised by mutual respect and recognition. It is worth noting the socio-political contexts both two states are

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<sup>123</sup>Tully, above n 5, at 251.

<sup>124</sup>Amnesty International, above n 120, at 21.

<sup>125</sup>At 26.

<sup>126</sup>At 21.

markedly different. In the Ecuadorian context, the government was faced with broader constitutional issues of reform and its main form of communication with the Indigenous peoples was through highly diverse political actors. While the New Zealand government does interact with a diverse range of hapu and iwi through Treaty Settlements, they are essentially negotiated between two distinct parties, rather than a constitutional reform debated in a constituent assembly. Nevertheless mutual recognition, based on Tully's two elements, was present in the Te Awa Tupua context. As discussed by Jones and Tully, reconciliation requires the dominant, colonial relationship to be rejected and instead replaced by a 'treaty relationship' where Indigenous peoples engage with the state on an equal basis.<sup>127</sup> The Treaty Settlement Process, such as what occurred with Te Awa Tupua, provides a medium for the transition from a colonial relationship to a Treaty relationship; this also indicates effective intercultural dialogue. This is indicated by the principles of partnership underlying the settlements as well as tikanga Māori values of whanaungatanga and manaakitanga.<sup>128</sup>

The Waitangi Tribunal process further lends legitimacy to Indigenous institutions by providing them with a clear mandate to address their grievances with the Crown. The Treaty Settlement Process has been subject to significant political criticism and interference,<sup>129</sup> and for Whanganui Iwi, a Treaty Settlement only arose after decades of litigation and cultural and socio-economic harm by the Crown.<sup>130</sup> However the Waitangi Tribunal report did eventually provide a strong mandate to the Whanganui Iwi, while the

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<sup>127</sup>Jones, above n 15, at 59.

<sup>128</sup>At 62.

<sup>129</sup>Wheen and Hayward (eds), above n 109, at 14.

<sup>130</sup>Office of Treaty Settlements, above n 100, at 1.7-1.8.

Record of Understanding, Deed of Settlement and Te Awa Tupua Act all provide explicit public affirmation of this legitimacy by the government. As a result, while the process still has some flaws, the two factors of mutual recognition and respect appear to be present.

Due to the Te Awa Tupua Act only recently being enacted and still in the process of implementation, it is difficult to measure reconciliation under the factor of good faith. However mutual responsibility and sharing can still be assessed under this process. The joint responsibility over the Whanganui River shared between the government and the Whanganui Iwi through Te Pou Tupua in one sense indicates mutual responsibility and sharing of power. However the framework regarding the governance of the River does not necessarily reflect the Waitangi Tribunal's recommendations. A framework more similar to the dissenting opinion (equal ownership by the Crown and the Whanganui Iwi over the Riverbed in the form of joint body) was enacted. Given the previously discussed Crown dominance over the Treaty Settlement Process, this potentially indicates an unwillingness to provide Whanganui Iwi with the ability to own the River themselves. This would signal the Crown's preparedness to sustain a relationship with the Whanganui Iwi based on real mutual responsibility whereby the Iwi share the same equal rights and powers as the government; namely through the ownership of water. The lack of real autonomy weakens the overall conclusion that reconciliation was present. While ultimately the substantial recognition, respect and intercultural dialogue throughout the settlement process and reflected in the Te Awa Tupua Act proffers a strong argument in favour of reconciliation, the Crown's option to implement the dissenting opinion



avoiding ownership, raises a question as to how much more effective reconciliation could have been if the Crown was prepared to allow for full ownership, as recommended by the Waitangi Tribunal.

#### *D Opportunities for self-determination*

A number of the conflicts and issues between the Indigenous peoples of Ecuador and the state which hindered reconciliation have had a similar effect on any development of self-determination. As Corntassel notes, for self-determination to be effective it must be sustainable. In this sense, sustainability essentially means a dynamic, holistic approach which reflects an Indigenous worldview.<sup>131</sup> As a result, for there to be successful self-determination of the Indigenous peoples of Ecuador through the Rights of Nature, they would need to have the responsibility to practically realise their worldview.

Recently after the Rights of Nature were introduced, a lawsuit in the Provincial Court of Loja (a province in Ecuador) was filed. This concerned a decision of the Provincial Government of Loja to deposit rocks and excavation materials for road-building into the local Vilcabamba River, without an environmental impact study or permits.<sup>132</sup> This led to significant flooding of the River, affecting the local Riverside populations. Several local residents filed a claim against the Provincial Government for a breach of the Rights of Nature due to the harm caused to the Vilcabamba River.<sup>133</sup> The Court found that the Provincial Government was violating the Right of Nature to regenerate its lifecycle by

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<sup>131</sup>Corntassel, above n 30, at 107.

<sup>132</sup>Joel Colón-Rios “On the Theory and Practice of the Rights of Nature” in Paul Martin, Sadeq Bigdeli, Trevor Daya-Winterbottom, Willemien du Plessis and Amanda Kennedy (eds) *The Search for Environmental Justice* (Edward Elgar Publishing, Cheltenham, 2015) 120 at 127.

<sup>133</sup>At 127.

harming the River and had thus breached the art 71 of the Constitution.<sup>134</sup> This ruling indicated that the rights could potentially be enforceable, particularly to protect Indigenous autonomy. However an overall assessment of the Rights of Nature process and its effect ultimately shows a distinct lack of sustainable self-determination. This is illustrated in two examples.

Firstly, there was little Indigenous consultation during the process of incorporation or afterwards. During the constitutional reform process, there were only a small minority of Indigenous representatives in the Constituent Assembly and despite the basis of the Rights of Nature being the Indigenous entity of *Pacha Mama*, the drafting of the rights were more influenced by environmentalist politics than Indigenous institutions. The constitutional reform did garner certain positive aspects for Indigenous peoples, including the Rights of Nature themselves and the art 57 right to consultation. Furthermore, Indigenous institutions and politicians were able to introduce the concept of ‘plurinationality’ or *plurinacionalidad* into the Constitution.<sup>135</sup> This is defined as a form of multiculturalism which seeks to provide Indigenous peoples greater autonomy over their territories.<sup>136</sup> Despite this, the Ecuadorian government’s action over both the Mining and Water Acts suggest that although potential rights relating to self-determination are enshrined in the constitution through the Rights of Nature and plurinationality, they are yet to be recognised.

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<sup>134</sup>At 129.

<sup>135</sup>“Constitution of the Republic of Ecuador”, above n 8, art 257.

<sup>136</sup>Pascal Lupien “The Incorporation of Indigenous Concepts of Plurinationality into the New Constitutions of Ecuador and Bolivia” (2010) 18 *Democratization* 774 at 776.

Secondly, three lawsuits that occurred after the introduction of the Rights of Nature further indicated that any potential for Indigenous peoples to achieve sustainable self-determination would not be realised. Firstly, in 2012 the Ecuadorian government entered into a contract to construct a large-scale open-pit mine in the Amazonian Province of Zamora-Chinchiipe, which would cause significant environmental damage.<sup>137</sup> In 2013, a number of Indigenous institutions filed a lawsuit in the Pichincha Province Civil Court for a breach of the Rights of Nature through the government's mining contract.<sup>138</sup> This claim was dismissed, with the Court finding that the acts of Indigenous peoples to protect nature constituted a private goal, while the mine was a public interest (in the name of development) and thus took precedence.<sup>139</sup> Secondly, the Tangabana case concerned a private agriculture company extending its plantation lands collectively owned by an Indigenous community, which had a detrimental effect on the local plants and ecosystem important to that community.<sup>140</sup> A similar lawsuit based on a breach of the Rights of Nature was filed by Indigenous groups and was similarly rejected. Finally, there has been constant tension between Indigenous groups, the Ecuadorian government and foreign multinational corporations over oil rights in the Amazonian Yasuni National Park.<sup>141</sup> The park contains a number of Indigenous groups who have been adversely affected by oil-drilling.<sup>142</sup> Despite significant litigation against oil companies responsible for

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<sup>137</sup>Craig Kaufmann and Pamela Martin "Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Others Fail" (Paper Presented to the International Studies Association Annual Convention, Atlanta, March 2016) at 9.

<sup>138</sup>At 10.

<sup>139</sup>At 11.

<sup>140</sup>At 11.

<sup>141</sup>Judith Kimmerling "Habitat as Human Rights: Indigenous Huaorani in the Amazon Rainforest, Oil, and Ome Yasuni" (2016) 40 Vermont Law Review 445 at 451.

<sup>142</sup>At 450-451.

environmental harm and a pledge by the government to suspend drilling in the area, after the Rights of Nature were enacted the government revoked its suspension of oil-drilling and allowed it to continue.<sup>143</sup> Kimmerling argues that this undermines the right to self-determination of Indigenous peoples,<sup>144</sup> which in turn contradicts the Rights of Nature.<sup>145</sup> These legal issues exemplify that the Rights of Nature have not been formed in, or led to, a state of self-determination for the Indigenous peoples of Ecuador.

A determination of whether the Te Awa Tupua Treaty Settlement process and legislation accords self-determination depends on the context in which the process is framed. Firstly, it is clear that the Te Awa Tupua Treaty Settlement goes further than previous settlements by implementing legal personality and mātauranga Māori throughout its framework. Ruru argues that the Te Awa Tupua builds on a trend of recognising waterways and natural resources as living entities in Treaty Settlements (such as the Te Urewera Act 2014) and is a demonstration of the flexibility of New Zealand's legal system to "embrace Māori notions of law, custom and values".<sup>146</sup> In particular, Ruru notes the use of Te Pou Tupua as human representatives of the River as a living ancestor.<sup>147</sup> The use of Te Pou Tupua as guardians to act for and on behalf of the River is arguably more consistent with the notion of kaitiakitanga and the Whanganui Iwi worldview than handing over complete ownership, particularly given that the traditional Western notion of ownership is not

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<sup>143</sup>At 516.

<sup>144</sup>At 501.

<sup>145</sup>David Boyd "Recognising the Rights of Nature: Lofty Rhetoric or Legal Revolution?" (2018) 32 *Natural Resources & Environment* 13 at 15.

<sup>146</sup>Jacinta Ruru, "Listening to Papatūānuku: a call to reform water law" (2018) 48 *Journal of the Royal Society of New Zealand* 215 at 220.

<sup>147</sup>At 220.

easily compatible with tikanga Māori.<sup>148</sup> Furthermore, Te Pou Tupua does allow for joint governance between the Crown and Māori through an individual representative from each party, which still gives Whanganui Iwi significant influence. This, combined with the provision of legal agency for the River and explicit acknowledgement of tikanga Māori through the Act, arguably accords with Corntassel's notion of sustainable self-determination.<sup>149</sup>

Conversely, while the Te Awa Tupua Framework may in one sense reflect self-determination, it arguably does not reach this standard. In their National Freshwater and Geothermal Resources Inquiry, the Waitangi Tribunal noted a “fundamental gulf” in the position of the Māori claimants and the Crown.<sup>150</sup> The latter argued that natural water could not be owned and that the most appropriate mechanism for recognising Māori rights in water was through an interpretation of kaitiakitanga, amounting to kaitiaki control, partnership or consultation.<sup>151</sup> The Māori claimants argued that given the significant customary rights of Māori in rivers, the closest cultural equivalent to these rights was “English-style ownership”.<sup>152</sup> The claimants also argued that the provision of ownership would allow them to practically realise the principles of kaitiakitanga and tino rangatiratanga.<sup>153</sup> The Tribunal noted the validity of both arguments, but stressed that upon assessment of past Tribunal reports, Māori had rights of a proprietary nature in

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<sup>148</sup>*Whanganui River Report*, above n 40, at 48.

<sup>149</sup>Corntassel, above n 30, at 119.

<sup>150</sup>Waitangi Tribunal *Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 62.

<sup>151</sup>At 37.

<sup>152</sup>At 62.

<sup>153</sup>At 62.

specific freshwater bodies; the extent of which warranted “serious inquiry”.<sup>154</sup> Furthermore, in the Whanganui River Report, the Tribunal consistently elaborated the unique nature of the Whanganui River case, given the close physical and spiritual association of the Iwi to the River and the history of their assertion of ownership rights.<sup>155</sup> These rulings by the Tribunal indicate that if sustainable self-determination is to truly be achieved, the Crown ought to accord ownership rights over the River to the Whanganui Iwi. This corresponds to Corntassel’s sustainable self-determination requirement of a process perpetuating Indigenous livelihoods by regenerating roles and responsibilities to their homelands; in this case by providing Whanganui Iwi autonomous control or tino rangatiratanga over the River. In the Whanganui River Report the Tribunal also reiterated the conceptual understanding of the River as a tupuna or ancestor representing the River as a single undivided entity, without distinction between its bed, banks, water, fisheries or aquatic plants.<sup>156</sup> This is recognised in s 12 where Te Awa Tupua is described as an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.<sup>157</sup> This assertion is not necessarily compatible with the vesting of the River in Te Pou Tupua. Section 41 of the Act only vests Crown-owned parts of the Riverbed in Te Pou Tupua. It does not include legal roads, railway infrastructure, any part of the bed held under the Public Works Act 1981 or located in marine and coastal area.<sup>158</sup> Furthermore,

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<sup>154</sup>At 229.

<sup>155</sup>At 294.

<sup>156</sup>*Freshwater Report*, above n 150, at 226.

<sup>157</sup>Section 12.

<sup>158</sup>Section 41(2).

certain rights from other groups including fishing rights,<sup>159</sup> State-Owned Enterprises<sup>160</sup> or private property rights are still protected.<sup>161</sup> Section 46(1) also explicitly states that the vesting does not create or transfer proprietary interests in the River water or its wildlife, fish, aquatic life, seaweed or plants.<sup>162</sup> Given the importance of the River as a whole to the Whanganui Iwi and its expression as an *indivisible* entity, vesting only Crown-owned parts of the riverbed infers that sustainable self-determination has not yet been achieved.

## *VII Conclusion*

Ultimately while reconciliation arguably occurred in the Te Awa Tupua process, it cannot be confidently concluded that either Te Awa Tupua or the Rights of Nature reflected self-determination. The Indigenous influence on the Rights of Nature has been consistently undermined, both throughout the process of constitutional reform and in the actions of the government following the introduction of the constitution. This eroded the ability of the process to assist in reconciliation, as it lacked mutual responsibility, recognition and good faith. The Ecuadorian Government's implementation of both the Water and Mining Acts provides an example of the failure to achieve reconciliation. The Rights of Nature also failed to act as a catalyst for self-determination, as indicated by the three lawsuits where the rights were not upheld. Conversely, the Te Awa Tupua process did maintain significant factors of reconciliation, particularly mutual recognition, respect and intercultural dialogue. This is evident in the joint governance framework between the Crown and Whanganui Iwi, as well as the recognition of mātauranga Māori throughout

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<sup>159</sup>Section 46(2)(e).

<sup>160</sup>Section 46(2)(c).

<sup>161</sup>Section 46(2)(b).

<sup>162</sup>Section 46(1).

the Act. However while it may go further towards achieving self-determination for the Whanganui Iwi over the Whanganui River than previous settlements, the issue of ownership and the autonomous control that it would entail has not yet been settled, which suggests against self-determination. An underlying theme throughout this analysis has been the *potential* for reconciliation and self-determination inherent in both the Ecuadorian and New Zealand contexts. This is an important factor as although this potential was not fully realised in either case, both processes may provide useful illustrations for future frameworks between Indigenous peoples and the state which will hopefully go further and achieve both reconciliation and self-determination.



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