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A critical analysis of how state law provides for Māori rights to freshwater

I Introduction/Background

Before colonisation, Māori communally owned and managed all water in Aotearoa New Zealand (NZ) according to traditional laws and customs (tikanga).[1] Freshwater in traditional Māori society served various purposes, including sustenance, food cultivation/gathering, spiritual rituals, transport and trade. These ways of using freshwater still have contemporary relevance and underscore the special relationship Māori hold with freshwater.[2] However, the state has failed to fully recognise Māori freshwater rights and interests guaranteed by te Tiriti o Waitangi and the Treaty of Waitangi.

In response, the Waitangi Tribunal (the Tribunal) launched an urgent hearing in 2012 regarding Māori proprietary rights in freshwater and geothermal resources. These claims emerged from the Crown's policies of privatising state-owned enterprises and implementing resource management reforms without adequate consideration of Māori water rights. In its initial report, the Tribunal affirmed that "Māori had rights and interests in their water bodies" akin to ownership rights as understood in 1840 and protected by the treaties.[3]

This essay outlines NZ's current legal framework, including contrasting perspectives of common law and tikanga on freshwater, and the sources of Māori freshwater rights. It then critically analyses existing legal mechanisms for Māori to claim freshwater rights, ultimately advocating for necessary reform to better uphold and protect them.

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[1] Elizabeth Jane Macpherson *Indigenous water rights in law and regulation: lessons from comparative experience* (Cambridge University Press, Cambridge) at 99.

[2] Matthew Cunningham "Māori freshwater rights are not a woke delusion" E-Tangata (online ed, New Zealand, 18 February 2024).

[3] Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) [Wai 2358] at 81.

II NZ's Legal Framework

The legal landscape governing freshwater in NZ is complex, consisting of common law presumptions, court decisions and statutes.

A Common Law

At common law, water is "incapable of ownership" until captured/extracted.[4] Water bodies are divided into distinct compartments: beds, banks and water. While ownership can be asserted over the bank and bed, water is deemed *publici juris* – rights are shared among all people and thus, unownable.[5] Rights to access, use and manage water can be granted.

B Tikanga

Tikanga Māori views the relationship between tangata whenua (Māori) and the natural world as reciprocal.[6] Papatūānuku (earth mother), encompassing land, water, and skies, provides sustenance to Māori, who, in turn, hold collective obligations to care for Papatūānuku, epitomised by the concept of kaitiakitanga (guardianship).[7] In tikanga, rights and obligations are guided by whakapapa (kinship), possessing an intergenerational dimension; resource management and decision-making are made collectively for the benefit of past, present and future generations and the environment.[8]

Unlike common law, water and land are perceived holistically as intrinsically part of the environment, not separate entities. Water bodies are seen as the "moving lifeblood of Papatūānuku", possessing mauri (life force) and wairua (living soul) and are regarded as taonga (treasures).[9] Therefore, Māori's relationship with water encompasses both physical

[4] Alex Johnston "Murky Waters: The Recognition of Māori Rights and Interests in Freshwater" (2018) 24 AULR 39 at 40.

[5] At 40.

[6] At 41.

[7] At 41.

[8] Macpherson, above n 1 at 101.

[9] Kāhui Wai Māori *Te Mana o te Wai: Māori Rights and Interests in Freshwater Bodies* (August 2021) at 4.

and spiritual aspects. Water bodies also serve as geographical identity markers, establishing kinship relationships connected through whakapapa, which cannot be broken or given away.[10] For instance, when meeting someone new, Māori inquire about one's waters ("Ko wai koe?"), symbolising the intimate connection between water and humans.[11]

C Current legal status of freshwater in NZ

NZ applies common law principles (outlined above) to freshwater ownership and management. Water use is primarily regulated by the Resource Management Act 1991 (RMA); natural water usage rights are vested in the Crown, with regional councils managing water resources and granting permits for usage.[12] The Crown has partially recognised Māori interest in water through treaty settlements, and the courts have recognised customary title to beds of water bodies.

III Sources of Māori freshwater rights

Māori rights and interests in freshwater, and the Crown's corresponding responsibilities, are primarily sourced in te Tiriti o Waitangi and the Treaty of Waitangi, the doctrine of customary title, and international law. While some of these rights have firm legal footing, others are untested/tenuous.

A Te Tiriti and the Treaty

Article 2 of te Tiriti guarantees Māori retain tino rangatiratanga (sovereignty/unqualified chieftainship) over their land, villages and taonga (treasures). Water bodies, viewed holistically within te ao Māori as one entity with land and as taonga, are thus protected. The Tribunal affirmed that this guaranteed proprietary right grants Māori exclusive control over

[10] At 4.

[11] Jacinta Ruru "The right to water as the right to identity: legal struggles of indigenous peoples of Aotearoa New Zealand" in Farhana Sultana and Alex Loftus (eds) *The Right to Water: Politics, Governance and Social Struggles* (Taylor & Francis Group, 2011) 110 at 110.

[12] Resource Management Act 1991, s 30.

water access and use.[13] Likewise, Article 2 of the Treaty guarantees Māori "the full exclusive and undisturbed possession of their land… and other properties" for as long as they wish to retain them.[14] These possessory interests clearly aim to protect existing customary property interests of Māori. Additionally, the Crown has a duty of active protection to uphold tino rangatiratanga, including over water bodies.[15]

B Doctrine of Native Title

The common law doctrine of native/customary title recognises Māori proprietary interests in water. It asserts that upon proclamation of sovereignty, the colonising power acquires radical title to all land, subject to pre-existing native rights.[16] Initially recognised in *R v Symonds*, the doctrine was re-introduced in *Ngati Apa* by overturning a previous ruling that held customary property rights unenforceable.[17] The Court of Appeal, finding in favour of customary interests in the foreshore and seabed, affirmed that Māori customary title survived British sovereignty and requires lawful extinguishment for existence to cease.[18]

C International law

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), endorsed by NZ in 2010, offers another protection layer for Māori freshwater rights. While non-binding as a declaration, UNDRIP provides rights surpassing the Crown's current recognition. This includes self-determination, free, prior and informed consent before state decisions affecting indigenous peoples or resources like water, legal recognition of traditional resources, and redress for harm/confiscation/utilisation of traditional resources.[19]

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[13] Waitangi Tribunal *The Stage 2 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2019) at 17-18.

[14] Treaty of Waitangi 1840, art 2.

[15] Treaty of Waitangi 1840, art 3.

[16] *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 at 22-24.

[17] *R v Symonds* [1847] NZPCC 387 at 390.

[18] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 at [47].

[19] United Nations Declaration on the Rights of Indigenous Peoples, arts 3, 19, 32(2), 26, 28(1).

IV Avenues for Māori claiming rights to freshwater

This section of the essay will critically examine the limited avenues available to Māori for asserting their customary rights to freshwater.

A Waitangi Tribunal Claims

Māori can bring claims to the Tribunal, alleging that Crown actions/omissions have prejudiced them, constituting a Treaty breach.[20] The Tribunal can then investigate and make recommendations for actions the Crown should take in response.[21] A relevant example is the ongoing National Freshwater and Geothermal Resources Claim, which addresses the claim that Māori possess unsatisfied/unrecognised property rights in water and have suffered prejudice from Crown policies that fail to recognise or compensate for their commercial usurpation of these rights.[22] Despite the Tribunal's recognition of Māori customary property rights in freshwater, its recommendations – including convening a national hui to address the issues, delaying asset sales until resolution and suggesting shares or royalties for Māori as a remedy –[23] were not upheld by the government and proceeded with the proposed share sales, a decision later approved by the Supreme Court.[24] Thus, while the Tribunal provides a platform for recognising Māori customary interests, its non-binding nature leaves implementation subject to government discretion and vulnerable to political discourse.

B Litigation

Māori can initiate legal proceedings following a Tribunal report (as evidenced in the *Lands* case) or independently, but it is at the court's discretion to uphold such recommendations.[25]

[20] Treaty of Waitangi Act 1975, s 6.

[21] Sections 5-6.

[22] Wai 2358, at 1.

[23] At 143.

[24] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (HC) at [149].

[25] At 641.

1 Native title doctrine

Māori could also bring proceedings relying on the doctrine of native title, which directly addresses ownership rights. The preliminary questions of whether this doctrine extends to water and can trump the doctrine of *publici juris* must be addressed.[26]

While freshwater ownership is yet to be addressed, recent precedents have recognised customary ownership of land above or below water and usage rights: *Ngati Apa*, *Te Weehi* and *Paki*.[27] Extending the doctrine to encompass water aligns with its purpose of safeguarding indigenous property and Māori's holistic view of nature.[28] Limiting the doctrine to land "would appear farce" given Māori holistically view water and land as one entity, so such distinction would not have been known by Māori at 1840.[29] CJ Elias suggested against applying different property regimes to different parts of land, supporting an argument for extension.[30] Additionally, native title rights covering both land and water in Australia provide a precedent.[31]

CJ Elias in *Ngati Apa* emphasised that common law must adapt to local circumstances; established Māori customary property interests take precedence over contrary presumptions derived from English common law (i.e. *publici juris*).[32]

Assuming preliminary questions are satisfied, claimants would likely need to demonstrate:[33]

1. Customary property interest in water in accordance with Tikanga Māori
2. Non-extinguishment

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[26] Jacinta Ruru *Māori egal rights to water: ownership, management, or just consultation?* (RMLA, October 2010).

[27] *Ngati Apa above n 18*; *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680; *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67.

[28] Kāhui Wai Māori *Te Mana o te Wai: Māori Rights and Interests in Freshwater Bodies* (August 2021) at 9.

[29] At 9.

[30] *Ngati Apa*, above n 18, at [51].

[31] Native Title Act 1993 (Cth) s 233(1).

[32] *Ngati Apa*, above n 18, at [86].

[33] At [49].

Proving customary interest should be straightforward, given that parliament, courts, and the Tribunal recognise water's status as taonga. The Tribunal's acceptance of the claimants' twelve-point "indicia of ownership" provides a strong foundation to prove their customary ownership in water bodies, such as reliance on water for sustenance, cultural/spiritual rituals, and whakapapa identification with a cosmological connection.[34]

There is no presumption of Crown ownership; the Crown must demonstrate lawful extinguishment through voluntary sale, abandonment or legislation.[35] Extinguishing customary interest in adjacent dry land does not automatically extinguish customary rights in water.[36] No legislation clearly and plainly extinguishes freshwater customary title. Even the RMA, appearing the closest to doing so, seems insufficient. The RMA affects the regulation of customary rights, not an outright extinguishment. Thus, there is an arguable case for customary rights in water bodies, according to tikanga Māori, remaining unextinguished.

However, the prospect of Māori initiating a claim in the court presents challenges, including timeliness and costliness, and uncertainty of the court's recognition of ownership rights given its tendency to defer judgment on water ownership. Moreover, there is a risk that parliamentary action could nullify any court decision in favour of freshwater ownership rights. An illustrative example is the Foreshore and Seabed Act 2004, which extinguished Māori customary interests in the foreshore and seabed following the Court of Appeal's decision in favour of customary interests. Although replaced by MACA due to political controversy, it fails to fully restore the legal position found in *Ngati Apa*, instead creating a political compromise where the foreshore and seabed are placed in a special category incapable of ownership, with different parties having specific usage rights to it.

Nonetheless, Māori have legal standing to utilise this doctrine in court, potentially paving the way for the recognition of their freshwater rights, despite uncertainties regarding judicial recognition of water ownership.

[34] Wai 2358 at 32.

[35] *Ngati Apa*, above n 18, at [47].

[36] *Paki*, above n 27, at [29].

C Treaty settlements

Treaty settlements offer another avenue for providing Māori customary interests in freshwater through direct case-by-case negotiations with the Crown, often preferred over other avenues due to avoidance of cost and time constraints. These settlements establish legislative arrangements for co-governance and management, aiming to provide redress.[37]

The Waikato River settlement establishes a Māori-local authority co-management, with the Waikato River Authority as its responsible statutory body.[38] However, while granting Māori a more direct role in decision-making concerning their ancestral rivers, the settlement does not resolve the disagreement on river ownership between the Crown and iwi. Instead, its primary focus is on achieving the overarching purpose (preserving and enhancing the river's health) and recognising the iwi's special relationship with the river through co-management.[39] Consequently, the Crown fails to acknowledge Māori proprietary rights.

The Whanganui River settlement grants the river legal personhood, marking a ground-breaking milestone. Co-governed, the river has one Māori and one Crown appointee representing it. However, despite prioritising the guardians' interests over the public's, Te Awa Tupua Act 2017 maintains local authorities' decision-making authority over resource consents without requiring the guardians' consent. The Act merely vests the Crown-owned riverbed to the iwi, which does not create corresponding proprietary rights in the water.[40] This creates a legal paradox where although the river, as a legal entity, owns its water space, its guardians lack veto power over activities within that space.[41] Therefore, while aligning with tikanga's holistic view of water, the concept of legal personality, rooted in Western legal ideals, remains a compromise. Nonetheless, it represents a novel approach to addressing customary water rights and signifies progress by challenging Western property norms by

[37] Garth Harmsworth, Shaun Awatere and Mahuru Robb "Indigenous Māori Values and Perspectives to Inform Freshwater Management in Aotearoa-New Zealand" (2016) 21(4) ECOL SOC 9 at 10.

[38] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 11.

[39] Johnston, above n 4, at 46.

[40] At 57.

[41] At 57.

recognising water as a holistic entity encompassing both physical and metaphysical/spiritual elements.

Overall, while settlements signify substantial efforts in recognising Māori customary rights through co-governance/management frameworks, they remain partial resolutions. The Crown's avoidance of ownership rights through its focus on managerial roles rather than full recognition of rights perpetuates a power imbalance between the Crown and iwi.

D General statutory regimes

1 RMA

The RMA contains treaty-based protections. Māori's relationship with their ancestral land, water, and other taonga are categorised as nationally important matters that must be recognised by persons exercising powers under the Act – alongside kaitiakitanga (guardianship) and the Treaty of Waitangi principles.[42] Māori can obtain water usage grants, but these are merely temporary usage rights. They can also appeal decisions to the Environment Court (including third-party grants). However, this Court does not have jurisdiction to consider proprietary rights.[43] Iwi-local authority partnerships (i.e. Joint Management Agreements) and power transfer also do not confer ownership. Thus, despite providing a platform for Māori involvement, the RMA's limitations result in superficial consultation roles, failing to recognise Māori proprietary rights over freshwater.

2 MACA

The Marine and Coastal Area (Takutai Moana) Act 2011 (MACA) restored customary interest. However, it only applies to marine and coastal areas, excluding water bodies.

[42] Resource Management Act 1991, ss 6, 7(a) and 8.

[43] *Te Whānau a Kai Trust v Gisborne District Council* [2023] NZSC 77.

3 Te Ture Whenua Māori Act 1993

The Māori Land Court's jurisdiction to determine customary status is limited to land, excluding water.[44]

Overall, existing mechanisms fail to fully recognise Māori freshwater rights. Built upon Western concepts and Crown-centred, these perpetuate power imbalances and focus on usage and/or management rights rather than ownership. Treaty settlements offer progress but sidestep the ownership question. The doctrine of native title holds potential but judicial ruling is uncertain.

V Reform

The legal imaginary where Māori obtain full tino rangatiratanga over freshwater requires constitutional reform encompassing a co-existence of a tikanga-based legal system with the current legal system.[45] This ambitious, yet necessary endeavour necessitates a new water governance framework recognising Māori proprietary interests in water.

Central to this reform is establishing a co-governance model acknowledging both Māori tino rangatiratanga rights and the Crown's governance rights. The Tribunal acknowledged that Māori rights to water are "more than ownership."[46] While rooted in Western ideals, the concept of proprietary ownership is essential for accommodating Māori authority over freshwater in Aotearoa's bi-cultural landscape. Andrew Eureti suggests that "a claim to ownership can accommodate the Crown's right to govern, whereas [a tino rangatirtanga] claim …challenges [that] right." [47]

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[44] *Mercury NZ Ltd v Māori Land Court* [2023] NZHC 1644 at [90].

[45] Johnston, above n 4, at 63.

[46] Wai 2358 at 76.

[47] Andrew Erueti "Conceptualising Indigenous Rights in Aotearoa New Zealand" (2017) 27(3) NZULR 715 at 738.

Legislation should enshrine Māori customary rights to avoid undermining rights and vest water bodies in their entirety to iwi and hapū. A statutory body, with at least half Māori representatives, should oversee water management and Treaty compliance.

Balancing Māori rights with public access is crucial. Clear parameters for reasonable access rights should be agreed upon by Māori and the Crown. However, public access should be viewed as a privilege granted by permission, not as an inherent right. Guided by Te Mana o Te Wai, the framework should prioritise the holistic well-being of freshwater bodies for the better health of the environment and people, and implementation should start with water bodies in Māori-concentrated areas.[48] Providing a common goal not relevant to Māori only and minimising practical disruption for non-Māori can safeguard against public disagreement.

Foreseeing political and constitutional challenges to reform, ongoing negotiation of Māori freshwater interests through treaty settlements must remain. The Whanganui River Settlement, despite its limitations, stands as the golden standard for formal acknowledgement of Māori rights and the establishment of co-governance and management mechanisms. Amending the RMA to mandate iwi consultation before local authorities exercise their powers can enhance Māori involvement in resource management.

VI Conclusion

Māori freshwater rights stand as unresolved ownership rights guaranteed by te Tiriti and the Treaty. Aotearoa's legal framework presents challenges in upholding these rights and holding the government accountable. As the Tribunal's inquiry on Māori freshwater rights progresses, the government's response remains uncertain. However, the fact that Māori have been frustrated by state law since colonisation and the need for action is clear. While there has been some recognition of Māori freshwater rights, it falls short of the tino rangatiratanga promised. Despite NZ's reputation in indigenous rights, the Crown has failed to uphold Māori rights and its corresponding duty of active protection enshrined in the treaties. The Crown's tendency to sidestep the question of ownership is not a sustainable approach. A legal reform of water governance, centred on tikanga, is essential in fully recognising the property rights

[48] Kāhui Wai Māori, above n 28, at 23.

Māori assert and deserve. Water is integral to Māori well-being and identity, demanding ownership rights.[49] Thus, a paradigm shift towards a framework that respects this interconnectedness is essential for honouring the treaty honouring and ensuring justice for Māori.

[49] Ruru, above n 11, at 110.