He Pūkenga Wai

2019 Salmon Lecture*

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He pūkenga wai, he nōhanga tangata.
He nōhanga tangata, he pūkenga kōrero.

Where the rivers meet, people come together.
When people come together, there is debate and learning

Peter Salmon was a great advocate. The undisputed leader of the Planning Bar in his time. Unfailingly polite and unerringly strategic in the deployment of his forensic skills. I appeared against him once. That was enough. I was David and he was Goliath. He had a bevy of juniors from which every one of the big five firms had briefed him. I had a slingshot in my briefcase. It wasn't much use. I had no rocks.

So I should have been suspicious when, bumping into him one day, he asked me whether I'd be prepared to give a lecture on what he described as "Māori ownership of water". This is of course an inherently controversial subject. I agreed, thoroughly seduced by his skilful massaging of my ego. It's quite hard to turn Peter down. He must have known (somehow) when we spoke that day, that the Waitangi Tribunal would publish its second Fresh Water Report three weeks before I was to give this lecture. And the Government's proposed Fresh Water Policy would be published two weeks after that. Once again, Peter has cornered me and cut off all means of escape. And I still have no rocks.

The whakatauki I have used is one that is often heard on marae in whaikōrero. The marae is likened to a pūkenga wai, where debate ensues. The confluence metaphor

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† Judge of the Supreme Court of New Zealand. I wish to record my gratitude to Eru Kapa-Kingi and Nopera Dennis-McCarthy who provided exceptional research assistance in the preparation of this paper. Thanks also to Matariki Williams and Pita Roycroft for their editorial assistance. The ideas in the paper, however, are entirely my responsibility.

is not just a Māori one. Almost all ancient civilisations developed around confluences: the Nile, the Indus Valley, Mesopotamia, the Huang He, the Mekong, the Mississippi, and the list goes on. It seems ironic that at the time of preparing these comments we might also have arrived at a confluence between streams of history and law in relation to how we manage our waters. I want to explore these ideas as much as I can (which is not very much) in the time available to me. I will start with water in the Western imagination, and in Western law, before discussing water in the Māori imagination and in tikanga Māori. My premise is that in this field, our imagination has always driven the law. Then I will talk about the sites at which these two imaginings and systems of law must interact and find a means of peaceful co-existence.

Water in the Western imagination and law

Although it may seem strange, understanding the West requires me to start in the Middle East and then march westward. The Egyptians of the third Pharaonic dynasty (2900 BC) associated the Nile with the god Osiris and water belonged to the Pharaoh, a living god on Earth. The Nile was dammed, and a regulatory system imposed. The authority of the Pharaoh was administered by the Master of Canals and the Master of Lakes.[1] The Babylonians had the Hammurabi Code which reflected the fact that the god Nun personified water as the source of life, all blessings and the element of creation. Of the 26 reasons contained in the code for praising King Shulgi under whom the Hammurabi code was drafted, 13 of them related to his authority as "water ordainer".[2] The Hindu civilisation of the Indus Valley (3000 BC) also developed a system based on the divine character of the Indus River and its tributaries. The code of Manu confirmed that rivers were divine in origin and that sanctions for diverting or injuring a river without permission were significant. Breaking a dam would result in death by drowning, for example. The ancients obviously considered the punishment should fit the crime.

In Talmudic tradition, rivers and lakes were treated as belonging to all, and water (particularly springs) was associated most closely with god. The Old Testament (*Genesis*) takes a similar approach: while the birds, the beasts and the trees were subject

1 Dante Caponera and Marcella Nanni *Principles of Water Law and Administration: National and International* (3rd ed, Routledge, London, 2019) at 16–17.

2 At 18.

to the dominion of humans, water was more primal. It existed both above and below the Earth and was, in a sense, the medium within which creation occurred. The great flood meanwhile demonstrated that through water, God exercised dominion over humans and ruthlessly corrected their bad behaviour. Note also *Genesis* provides that man is born of water:[3]

> Now no shrub of the field had yet appeared on the earth, nor had any plant of the field sprouted; for the Lord God had not yet sent rain upon the earth, and there was no man to cultivate the ground. But springs welled up from the earth and watered the whole surface of the ground. Then the Lord God formed man from the dust of the ground and breathed the breath of life into his nostrils, and the man became a living being.

The equation of water with God can also be seen in *Revelations*:[4]

> Then the angel showed me a river of the water of life, as clear as crystal, flowing from the throne of God and of the Lamb down the middle of the main street of the city. On either side of the river stood a tree of life, bearing twelve kinds of fruit and yielding a fresh crop for each month. And the leaves of the tree are for the healing of the nations.

So water was mostly divine in the beginning.

The ancient Greeks identified four elements, as you know; an idea that persisted long after the Greeks. One of those elements was water. Thales propagated the idea. He is generally considered to be the first to attempt to explain the universe in non-magico spiritual terms. That is, to remove the divine from creation and from water. And so Western materialism began with the search for the basic material of all things. Of the elements, water was the most important, since the Earth rested on it, said Aristotle.

The Enlightenment and the age of reason slowly came to adopt this non-spiritual concept of water and the divine was gradually diluted to a de minimis presence. The Industrial Revolution and the important role of water in the development of industrial technology was probably the tipping point.

With that (overly) general background in mind, let me now turn to England and to the way the common law tradition, brought to Aotearoa in 1840, thought about the relationship between people and water. It is simplest to start with the Norman

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3 *Genesis* 2:5–7, Berean Study Bible.

4 *Revelations* 22:1–2.

conquest and King William I's reframing of the resource rights of "English-men". To establish and enforce loyalty to his reign where many of his Anglo-Saxon subjects entertained a distinct lack of enthusiasm for the idea, he introduced a vertically integrated set of tenures whose key feature was mutuality of right and obligation up and down the chain of command. He divided his land amongst his Lords and Barons in exchange for their loyalty and military service when required. The Lords and Barons in turn divided their land among vassals, many of whom did likewise.[5] Most farming in this agrarian society was then carried out on the common fields and pastures of manors. The King's Domesday Book of 1086 was the record of this reframing and reallocation. It included reference to thousands of water mills rented out by their noble or manorial owners to provide power for timber cutting, flour making, the spinning of yarn or the pounding of metals. Rights of navigation and of fishing were also recognised within the rubric of King William's new tenures. Initially, rights to water were founded upon rights to the adjoining land. This early period is when the doctrine of *ad medium filum* comes to apply. An adjoining land owner is said to have had a right to the water (that is to the flow) above the river bed. The owner could claim a prescriptive easement to the flow and sue in the Assizes if an upriver user interrupted it. Owners could also sue in trespass by means of the old "action on the case".[6] The treatment of water as part of the land came to fall away by the early part of the Industrial Revolution as rivers took on a new role as sources of industrial power and the means of large-scale transport of mass-produced goods. Despite the retention of the *ad medium filum* rule, water use and rights in water came increasingly to be seen as separate from any rights subsisting in its banks.

Let me now turn to Blackstone and Locke. The rise of Britain and the British sphere of influence in the 17th and 18th centuries made possible by a political revolution (about which I will comment more below) saw ideas generally of private property to the exclusion of the commons come to dominate: first with the enclosures and then with the debate around the rights of the "discovering" sovereign and its mobile subjects settling in the New World. Blackstone's 1770 *Commentaries on the Laws of England*,

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5 Anthony Scott and Georgina Coustalin "The Evolution of Water Rights" (1995) 35 Nat Resources J 821 at 838.

6 At 844.

though, did point to *Genesis* as the source of "the only true and solid foundation of man's dominion over external things".[7]

But moving the concept of private property to the centre of the Western imagination was necessary in respect of lands and moveable items in order to encourage humans to work the land and dominate nature as God ordained and modernity required:[8]

> necessity begat property; and in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, government, laws, punishments, and the public exercise of religious duties.

John Locke said:[9]

> As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour, does, as it were, enclose it from the common …

By the time of Locke in the early 19th century, the orthodoxy was "men" had a moral and natural right to appropriate and control the resources of nature. There were three conditions: only so much as can be used before it spoils may be appropriated; one must leave "enough and as good" for others; and the appropriation may only be achieved through one's own labour. In the Empire, these ideas were of course the basis for the concept of terra nullius in which it was argued the indigenous inhabitants of the New World did not own their territories and appropriating them was therefore not theft. The same basic idea also applied to water:[10]

> … he that leaves as much as another can make use of, does as good as take nothing at all. Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst. In the case of land and water where there is enough of both, is perfectly the same.

Blackstone's view was that water because of its fungible nature was more appropriately subject to mere rights of use, than outright ownership unless it was "still water" forming part of the land such as a landlocked lake. With the exception of such lakes, only

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7 William Blackstone *Commentaries on the Laws of England: Book the Second* (Clarendon Press, Oxford, 1766) at 3.

8 At 8.

9 John Locke *Second Treatise of Government* (1690) in Crawford Brough MacPherson (ed) *Second Treatise of Government* (Hackett Publishing Co, Indianapolis, 1980) at §32.

10 At §33.

economic uses generated water "rights," and the individual who appropriated it to such use thereby owned the right to do so.

The ideas espoused by Blackstone and later Locke were generated at a time of great change in the English constitution and in the common law. It was the period after the Glorious Revolution when Britannia came to rule the waves and through that, international commerce. Britain needed to shed the old feudal tenures and the commons that came with them which were seen as holding her back. The Enlightenment common law developed primarily by the reforming Judge, Lord Mansfield, brought to the ascendant in legal discourse, rights of property and of the property owners whose representatives in the newly emboldened Parliament had taken control of the state from the Stuart Kings. The significance of that Revolution in judge-made law should not be understated.[11]

Water law in New Zealand

Like Britain, and unlike Australia, water has, for the most part, been a plentiful resource in New Zealand. The Lockean approach prevailed here for much of our post-colonial history. Water was *aqua nullius* unless and until appropriated to human use by the labour of an individual.

The learned authors of *Environmental Law in New Zealand* cite Lord Macnaghten in *John Young and Co v Bankier Distillery Co* as accurately reflecting the common law of New Zealand:[12]

> A riparian proprietor is entitled to have the water of the stream, on the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality.

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11 Charles J Reid "The Seventeenth-Century Revolution in the English Land Law" (1995) 43 Clev St L Rev 221.

12 *John Young and Co v Bankier Distillery Co* [1893] AC 691 (HL) at 698 as cited in Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2018) at 708.

It was all of 127 years after the Treaty that this view was superseded. In 1967 the New Zealand Parliament enacted s 21 of the Water and Soil Conservation Act 1967, the first provision to regulate the use of water in New Zealand by means of a system of statutory permissions. It provided relevantly as follows:

> (1) Except as expressly authorised by or under this Act or any other Act, the sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, or to use natural water, is hereby vested in the Crown …
>
> Provided … that it shall be lawful for any person to take or use any natural water that is reasonably required for his domestic needs and the needs of animals for which he has any responsibility and for or in connection with fire-fighting purposes.

Whether this provision wholly displaced the common law as described by Lord Macnaghten was a matter of debate, but it certainly represented a significant interference in the *aqua nullius* doctrine.

As Phillip Milne in his 2005 Salmon Lecture noted, the position prior to the enactment of the Resource Management Act (RMA) in 1991 (to which I will come to in due course) was that statutory water rights were privileges.[13] They provided a practical but not a legal priority to privilege holders.[14] They were not a guarantee of any specified quantity and it was first in first served.

Wai in the Māori imagination and tikanga Māori

A great deal has been written about Māori cultural understandings and connections with wai. I do not have time to engage with that material in the depth I would have wanted but it is useful for my purposes to hit the highlights. As I have written elsewhere, the values that Kupe's descendants applied in the very new circumstances of Aotearoa were tried and true Polynesian values. The unifying idea of tikanga was whanaungatanga, the principle of kinship. This was the infrastructure around which the Māori values and legal system hung.[15] Not just as between people, but also as between people and their

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[13] Philip Milne "Allocation of Public Resources under the RMA: Implications of *Aoraki Water Trust v Meridian*" (Salmon Lecture 2005, Auckland Resource Management Law Association, 1 July 2005) reproduced and edited in Philip Milne "Allocation of Public Resources under the RMA: Implications of *Aoraki Water Trust v Meridian*" [2005] Resource Management Theory & Practice 146 at 154, n 33 citing *Auckland Acclimatisation Society v Sutton Holdings Ltd* [1985] 2 NZLR 94 (CA) at 99.

[14] *Auckland Acclimatisation Society v Sutton Holdings Ltd* (1984) 10 NZTPA 225 (HC) at 334.

[15] Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1.

dead, their as yet unborn, their environment and their conceptual world. This is true still. Relationships are not contractual or proprietorial. They are not freely entered into. They are blood relationships in which the relationship itself dictates its terms and conditions. Other values such as mana, tapu, utu and kaitiakitanga should really be seen as effects or consequences of whanaungatanga. This is important to understand.

Given this particular way of imagining the world, Māori law in relation to water is of necessity rather more complex than the Lockean idea that water was no one's until someone took it.

Kinship explains the world. It explains the environment. And it explains the human relationship with it.

All has life - the word is mauri. A useful if clumsy analogy is the low hum of your fridge or freezer. Corny but not far from the mark. Mauri is the hum of life in all things, often operating below the human audibility range, though if you listen closely for many generations you will come to hear it eventually. Mauri is why kinship is a credible idea in the Māori imagination.

Mana is an aspect of this kinship view of the world. Whatever it is, if it lives, it must have mana. Mana is its individual authority and dignity, though the paradox is individual mana exists only through the mana of the whole. Mana by definition cannot be isolated from whanaungatanga. To isolate it would be to extinguish it. Mana exists through the multiple connections of whanaungatanga, and the greater the connection the greater the mana. This is true for humans. And for the environment.

Tapu is a way of thinking about human interaction inter se and with the environment. Tapu too is a product of kinship. Like mauri, tapu is immanent. Almost all things have it. It can vary in strength, and if it is too strong, can be dangerous to humans, like electricity. But it is always there and must be negotiated with and respected.

And kaitiakitanga too is an aspect of whanaungatanga. It is no more nor less than the obligation to care for and protect that to which you are related. Even for Westerners, it is easy to understand the kaitiakitanga obligations that parents owe to their children, adult children to their elderly parents, and siblings to one another. Although we have

laws about this, they are for the most part unnecessary, because such obligations are inherent in our humanity.

In a kinship-based world this obligation of care and protection becomes utterly pervasive. It covers not just immediate family, but whanau, hapū, iwi, whenua, awa, moana and maunga. That is why kaitiakitanga is a central idea in tikanga-based resource management. These ideas are not revisionist reconstructions as an antidote to the modern deconstructed world in which we live both Māori and Pākehā. They are, precisely as I have articulated them, older than Kupe. They are as fundamental to tikanga Māori as individual rights, freedom of contract, the concept of property and the rule of law are to tikanga Pākehā.

So, to water. There is no single codified whakapapa for wai. Whakapapa is highly contested and much debated. Te ao Māori is immovably Polynesian, but within those broad borders, highly heterogenous. The older the whakapapa, the more the debate around the edges. And the more such debate is enjoyed. It is, in that sense, like any law. The whakapapa of wai is very old.

The whakapapa I know puts water before Rangi and Papa – Wainuātea. Some say Wainuiātea was the first partner of Ranginui – the sky – but to me Wainuiātea was an ancestor of Ranginui. Interestingly the Old Testament took the same approach so I'm in good company. But let me start with Rangi and Papa. Their eldest son Tane separated them. He was Tane Mahuta. Mahuta means a tall straight shaft reaching skyward: the great tree of the primordial forest of Aotearoa. In his separating role he became Tane Tokorangi: Tane the sky pillar. The separating caused great anguish between his parents. Ranginui shed tears and Papatuanuku heaved great sighs of mist. And so Tane became known as Tane Te Waiora – Tane who brought forth the life-giving waters of his parents. The light that shone into the gap created by Tane between Rangi and Papa, freed his 120 or so siblings who became the elements of life and existence both tangible and abstract. Tāwhirimātea alone railed against his big brother's deed – hence the wind and the storms sent to lash the forest. And in his anguish, he tore out his eyes and threw them to his father. These became the constellation we call Matariki.

So, we have the beginnings of a whakapapa. Rangi marries Papa and has Tane. Tane then marries Hine Tūparimaunga – literally women standing on the edge of the mountain precipice. Their daughter was Parawhenuamea the mother of fresh water (wai māori). And of Rakahore, the god of rocks. Parawhenuamea was also the ancestor of tuna (the eel) and of other fresh water species that live within or around her. There is debate about whether Hine Te Ihorangi (rain), Hine Wai (soft rain) and Makerewhatu (heavy rain) are ancestors of Parawhenuamea through Hine Tūparimaunga, or her children. It doesn't matter. There is also Hine Pūkohurangi (the mist), Hukarere (snow), Haukū (frost and dew) and the literally hundreds of different forms of precipitation that are found in the old whakapapa.

There are multiple specific names for water in different states and having different characteristics. Waiora is life giving or medicinal water. Waitapu – water made sacred. Waiunu – water for drinking, Waipupuke – choppy water. Waihuka – frothy water. Waiwhakaika – special water used for tapu ceremonies. Waiariki – curative waters such as hot springs. Waiparu – cloudy or muddy water. Waipiro – smelly water. Waikino – polluted water. Waikawa – slow moving, problematic water. Waimate – stagnant, dead or dangerous waters. Manowai – deep water with strong undercurrents. And so the list goes on. The point is in the Māori imagination each presentation is its own entity. The detail of the whakapapa explains the way the old people understood environmental relationships. And it also explains the perception of a level of nuance in these different elements and characteristics that is not present in the English lexicon. At least not anymore.

It must be noted that wai is almost entirely feminine. There is one school of thought that would have it that Te Ihorangi (rain) was a male, but that is a matter of some debate. For my part it makes better sense that she was Hine Te Ihorangi as previously stated. In any event, my impression is that it is the predominant view.

An interesting linguistic feature is that wai Māori – fresh or unadulterated water – is 'o' category not 'a' category. There is not time to give you a Māori Grammar 101 lesson, but the fact that wai Māori is o category connotes a particular reverence. It is in the same category as rongoā – medicine. Though wai has its own significant tapu, it is also seen as an antidote to tapu. It washes away dangerous tapu. It cures illness of the body

and mind (wairangi). It restores balance in times of disequilibrium. When troubled or in doubt, go to the wai for peace, the old people say.

All of these aspects are bound up in the whakapapa of wai. The finer detail of the whakapapa is not as important as the fact that the architects of tikanga Māori found it necessary at all to make a whakapapa for water. The compulsion to do so arises from the need for wai to make sense from the perspective of the Māori imagination. It is then a short step to speak of te mana o te wai *because it is an ancestor*. And to speak of te mauri me te tapu o te wai *because it is an ancestor*. It makes sense to debate the obligations of kaitiakitanga *because wai is an ancestor* with whakapapa.

So, the starting point is always going to be that water has personality. Not as an anthropomorphic gift from its human communities, but as a fact inherent in the whanaungatanga imagining.

This has legal consequences. It is orthodox tikanga that wai has both rights and obligations. Wai has mana, tapu and mauri: the right to be revered, to be treated as precious, and the right to life and health. These things may not be compromised. Wai has obligations. The most important one is to provide life (waiora) to its catchment. In tikanga terms, humans are the beneficiaries of that obligation provided the rights of the wai are respected. This is a whanaungatanga dynamic.

Tikanga also provides that humans, at least those with the required mana, have rights and obligations in respect of the wai: the obligation to speak for the wai in human affairs; the obligation to protect the mana, tapu and mauri of the wai; and the rights to identify with and use the wai for spiritual and temporal purposes. Wai could never be *aqua nullius* in tikanga Māori. It is an ancestor with rights and obligations inherent in that fact. Humans can never be free to take and use it at will. They must seek the support of the wai in their proposed uses. Through proper process and appropriate respect. Kinship is reciprocal.

He pūkenga wai-tikanga

In some ways the Lockean view of water and the Kupean view of wai could hardly be more different and less compatible. While that it is true at one level it is an idea worth interrogating a little more.

Since 1865 and the creation of the Native Land Court the law governing the interface between te ao Māori and te ao Pākehā has been one designed to enable the rapid (even brutal) transition of te ao Māori into "modernity". Evidence would be given in the Native Land Court to justify a claim to title to a particular block of land by reference to traditional uses in the area and maintained relationships with traditional resources not unlike those rehearsed already in this lecture. Water relationships were routinely referenced in these hearings. The Court would take that evidence, measure it against the appropriate tenurial exchange rate and then award a thing called a native freehold title, "cognisable at English law" to the successful claimants. We have been doing this exchange calculation for a long time. It is not surprising therefore that the Waitangi Tribunal in its 2012 Stage One Report on National Fresh Water and Geothermal Resources claims should conclude that recognising Māori "property rights" in water was necessary in order to properly protect Māori rights and interests even though the rights and interests are conceptually distinct from property rights.[16] The Tribunal's recent Stage Two Report confirmed this was still a necessary element of any comprehensive package of proposed reforms, including co-governance at local and national levels.[17] The Tribunal's view was that any package of reforms that reintroduced te ao Māori into water management would have to involve some level of access to the economic benefits of water and that this would most likely to take the form of a proprietary right.

The Tribunal may be right about that as a practical proposition. I understand that almost all catchments in New Zealand are now overallocated in theory if all current use and resource consent rights are taken into account. For the most part the catchments and aquifers are not over-extracted in fact, but the potential is there because the rights (that is, the necessary abstraction consents) exist to do so. Exploring the nature and extent of any Māori beneficial rights in an increasingly scarce resource will be a challenge for the law as it has been in relation to other scarce but unappropriated resources.

16 Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012).

17 Waitangi Tribunal *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358, 2019) at 551–552 and 563

The RMA and the common law

I want to now address, briefly and tentatively, two aspects of our legal infrastructure relating to water. I will ask whether, and if so how, this infrastructure might better accommodate the principle of whanaungatanga and the Kupean conception of rights, obligations and processes, in the way it operates.

Let us start with Part Two of the Resource Management Act. Section 5 speaks of the Act's sustainable management purpose including the purpose of safeguarding the life supporting capacity of water and eco-systems. Mana and mauri seem to fit rather comfortably into that construct.

Section 6 requires recognition of and provision as a matter of national importance for "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga".

We should perhaps remember that the reference is to ancestral water. That need not be taken to mean the water of their ancestors. It is equally capable of meaning the relationship of Māori with water *as* their ancestor. This framing is more tikanga-consistent. It shifts te mana, te tapu me te mauri o te wai to centre stage. It also gathers in the kaitiakitanga to which particular regard is required in s 7. And the Treaty principles referenced in s 8 echo this.

The plumbing beneath Part 2 is capable of incorporating these ideas into water management. The functions of Regional Councils in s 30 can be read consistently with a Kupean system. So can the purposes of Regional Policy Statements (s 59) and Regional Plans (s 63). And below that the infrastructure in the Act for engagement with Māori in resource management matters such as mana-whakahono-a-rohe in Subpart 2 of Part 5, consultation requirements in sch 1, and iwi planning documents in Part 5 are all capable of facilitating a water-as-ancestor approach.

A number of Environment Court decisions have explored in detail the relationship between iwi and wai,[18] and there is now a series of Treaty settlement arrangements that provide specific and special recognition for the Kupean world view of wai. Foremost

[18] *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* NZEnvC Auckland A067/2004, 18 May 2004.

amongst these is of course the Whanganui River legislation which recognises the legal personality of Te Awa Tupua.[19] And so is the adaptive co-management structure created with respect to the Waikato River under which joint management agreements (JMAs) proliferate.[20] I understand there are now 27 JMAs almost all triggered by Treaty settlement statutes which direct Councils to enter into them.

If we look at this statutory regime with fresh Kupean eyes, can we now see that the separate ancestral personality of wai is already imbedded in its values and structures? Can it be said all that remains is for Councils to declare it and proceed accordingly?

I do not wish to make any substantive comment in relation to the Government's national discussion document on "Essential Fresh Water" released last week except to say that by framing the proposals by reference to Te Mana o te Wai, it too is consistent with a Kupean approach. Draft national policy objectives in the accompanying fresh water management national policy statement (NPS) would require Regional Councils to manage fresh water in a way that "gives effect to te mana o te wai".[21] This is a potent objective. Wai has mana *because* it is an ancestor. A regime that recognised the mana of water would also logically be required to recognise its ancestor-hood.

Reading the provisions of Part 2 of the RMA and the NPS in this way could make the recognition of ancestral personality a regional water management issue without the need for bespoke legislation. Partnership arrangements for water management could follow naturally and inevitably from the impetus of that shift in perspective. A number of the specific enabling provisions have been in place for a very long time and much underused.

Now to property. Section 122 of the RMA is at pains to confirm that a resource consent is neither real nor personal property, although it then goes on to make such consents inheritable, subject to the PPSA, chargeable and declares them to be "goods" within the meaning of the Personal Properties Security Act 1999. This is an expression of the Lockean conundrum in a statutory permit regime. If the common law provides that

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19 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.
20 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.
21 Ministry for the Environment *Draft Policy Statement for Freshwater Management* (September 2019) at [2.2]. See also [3.2] as to the required terms of regional objectives.

to appropriate is to own, then a permit to appropriate is conceptually a hair's breadth from property. That's why it is not surprising that the High Court in *Aoraki* held that although a water take consent was not real or personal property, it was a right held as against the Crown's property in water and so was akin to a property right itself.[22] The Court of Appeal understandably expressed considerable doubt about that proposition and the Supreme Court has left well enough alone.[23] The current Fresh Water Management proposals do not address allocation, but it seems likely that at some point soon this will become unavoidable.

I leave aside the question of whether the regional regulators might, out of eventual necessity, choose to impose a bespoke catchment-based allocation system under the current regulatory settings. I simply do not know enough about the system to begin to express a view on that.

In the absence of a specific statutory arrangement that resolves a scarcity problem in relation to a particular resource, recourse is usually had to the common law for assistance. I am certainly not about to venture a view as to whether there might be some kind of aboriginal right to water in traditional *Ngati Apa* terms.[24] The question of whether residual indigenous proprietorial rights may be found to clear the traditionally high bar of the precontact continuity test can wait for another time. But I am interested in the way that the common law rises to the challenge of reconciling our two founding bodies of law where the interface is at a broader systemic level.

The Supreme Court in *Takamore* accepted in different ways that Kupean law is present in our common law unless displaced by inconsistent positive law.[25] It is, according to Elias CJ, a part of the "values of the common law".[26] The Kupean view is to be weighed in the balance when deriving the particular common law principles applicable to the case.[27] In the later decision of *Ngati Whatua*,[28] the Court simply accepted that tikanga involved "rights" and so was justiciable even when no property rights in the orthodox

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22 *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (HC).
23 See *Hampton v Canterbury Regional Council (Environment Canterbury)* [2016] NZSC 50, [2016] NZRMA 398; and *Hampton v Canterbury Regional Council (Environment Canterbury)* [2015] NZCA 509, (2015) 18 ELRNZ 825.
24 *Attorney-General v Ngati Apa* [2003] 3 NZLR 6343 (CA).
25 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.
26 At [12].
27 At [94].
28 *Ngati Whatua Orakei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.

sense were in direct contest. Rather, the contest was about mana. These may seem like novel ideas, but they are hardly a departure from mainstream thinking. Part 2 of the RMA and its supplementation through Treaty settlements is perhaps the best evidence of how far mainstream thinking has developed. So in *Takamore* and *Ngati Whatua,* the common law may be seen to be following rather than leading developments driven by Treaty negotiations. Cooke P, as he was then, made the same point in the *Lands* case more than 30 years ago.[29] He said s 9 of the State-Owned Enterprises Act 1986 (the Treaty-consistency clause) intentionally passed the ball to the Court of Appeal and invited the Court to run with it.[30]

In any event, the common law, as Judges will often say, is organic rather than static. Perhaps it might be said it has its own mauri too. Although certainty is one of its core values, it still borrows and adapts. It changes because the world in which it operates changes and to fail to adapt would do those who are the subjects of the law a grave disservice. That has always been the genius of the common law system. It is not a body of immutable doctrine, but a constant debate between certainty and change set to rigorous rules of engagement. As Elias CJ said in her address to the 2003 Commonwealth Law Conference in Melbourne:[31]

> The common law indeed has ancient roots, but many are not English at all. It has borrowed, adapted, travelled, and grown. It is more in debt to the doctrine of the civilians that we often care to acknowledge. … And we no longer pretend that the Judges draw the law from an eternal spring; we know that the common law has never stood still.

She cites Ibbetson's *A Historical Introduction to the Law of Obligations*.[32] Ibbetson referred to the fact that specific common law doctrines of the law of contract were openly derived from the works of the French jurist Pothier and the German jurist Savigny. They included the ideas of offer and acceptance, mistake, and the requirement of an intention to create legal relations. The writings of the German jurist Pufendorf were influential on both Locke and Blackstone, the latter, it seems, borrowing from him the essential elements of the tort of negligence. Ibbetson continued:[33]

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29 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC and CA).
30 At 660–661.
31 Sian Elias, Chief Justice of New Zealand "The Usages of Society and the Fashions of the Times (W[h]ither the Common Law?)" (address to the 13th Commonwealth Law Conference, Melbourne, Australia, 15 April 2003) at 1 (footnotes omitted).
32 David Ibbetson *A Historical Introduction to the Law of Obligations* (OUP, Oxford, 1999).
33 At 296.

> There is good reason to believe that a similar process is at work in the modern-day development in the law of unjust enrichment.

The common law, it seems, is rather promiscuous.

There is, as you will know, a developing ecocentrism movement across the west and elsewhere. It began some time ago with Christopher Stone's ground-breaking work (in the West at least), *Should Trees Have Standing?*,[34] and it has gathered considerable momentum of late. In 2017, Courts in India and Colombia recognised the legal personality of rivers.[35] Climate change, I expect, now makes the leap of imagination easier. The Indian case was appealed, but the result on appeal is not known. In February this year the High Court of Bangladesh declared its intention to recognise the Turag River as a "living being" and "legal person". The judgment has not yet been released.[36]

Whether by pointing to the dimension of New Zealand common law that is tikanga Māori the courts might be prepared to recognise legal personality in rivers in New Zealand is an interesting question. Would the Environment Court or the High Court, for example, be prepared to appoint litigation guardians, or kaitiaki, if the river wished to sue for intentional injury, or maintenance, or to oppose an abstraction or discharge said to be inconsistent with its mana or tapu?[37] Would kaitiaki be in a position to move to protect the river in the event of impending injury or loss of flow? Could they sue on behalf of the river for a declaration that it has a right or obligation to provide sustenance to hapū and iwi on its banks? These are interesting questions to consider at the pūkenga wai of law and water.

He pūkenga wai

I began this talk with a search for the shape of water in the Western and Māori imaginations; to ask whether by understanding those imaginings, I might better understand the law of Cooke and Kupe in relation to the subject. I, at least, have found

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[34] Christopher Stone *Should Trees Have Standing? Towards Legal Rights for Natural Objects* (William Kaufmann Inc, Los Altos, California, 1974).

[35] *Mohd Salim con State of Uttarakhand* HC Uttarakhand WPPIL 1226/2014, 20 March 2017; and *Centro de Estudios para la Justicia Social 'Tierra Digna' v The President of the Republic* No T-622 of 2016, Corte Constitutional [Constitutional Court] Sala Sexta de Revision [Sixth Chamber], 10 November 2016, both referred to in Elizabeth Jane MacPherson *Indigenous Water Rights in Law and Regulation: lessons from Comparative Experience* (CUP, Cambridge, 2019) at 39.

[36] See McPherson, above n 35, at 40.

[37] See High Court Rules 2016, pt 4 subpt 7.

that helpful. But it does seem to me that here in Aotearoa the shape of water in our imaginings is converging. No longer separate Western and Māori imaginings, but Aotearoan. The whenua (and the wai) seem to have drawn us closer together in a human confluence after all. So perhaps we are at a pūkenga in the law too in which, rather than importing the ideas of Pothier, Savigny and Pufendorf, the common law of Aotearoa looks in its own back yard to draw on the inspirations of Kupe and Toi.