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Title: Law, Responsibility and Indigenous thought for the governance of Common Goods: the Case of Water

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Abstract:

The interest of this paper is what forms of governance and law are needed This paper considers forms of law and governance to recognize human interdependence with the earth. A framework of responsibility is introduced as significant for governing for interdependence. Public trusteeship has potential to strengthen public good interests in the governance of natural resources such as water. Public Trust enabled indigenous Hawai'ian litigants to achieve regulation for ecosystem health and indigenous interests, alongside business interests.

In going beyond the borders of standard state law, innovations in law are considered. Examples are given of indigenous leadership in taking the law beyond standard liberal jurisprudence, as the recent vesting of the Whanganui River in Aotearoa New Zealand as a Legal Person. The contributions of indigenous law to governing earth's common resources are discussed in the context of amplifying the responsibility dimension of law.

Keywords: Law, water, common goods, responsibility, Public Trust, Legal person, indigenous.

Context: The situation of global interdependence is the backdrop for international examples of Public Trusteeship (Hawai'i) and for specific reference to Aotearoa-New Zealand. The Pacific region is a reference for Indigenous knowledge; litigation in Aotearoa New Zealand and Hawai'I is leading to Innovations in law for fresh water.

Introduction - Law, Ethics and Policy on Freshwater

Keeping in mind the global scope of challenges for the governance of common resources such as water and the atmosphere, this paper refers to the context of

Aotearoa New Zealand[1] as a Pacific nation, needing to address governance of common resources. Water and Climate Change are high on the agenda globally and specifically in Aotearoa New Zealand, where we have declining water quality, and inadequate climate change policy until the new government's proposed Zero Carbon Act (October 2017).

The serious degradation of waterways is directly associated with intensified dairy production, in order to drive our export-led economic growth (OECD 2017). Our position as a small isolated nation has, unfortunately, allowed the perception that our global climate impacts are insignificant, so, despite signing the Paris Agreement, we have been unwilling, at a political level to develop policy for transitions to a low carbon economy, with pathways to reduce Greenhouse Gas emissions (Macey, 2017).

With earth's global commons as a starting point[2], it is important to be cognizant of the integrated nature of common goods, or common pool resources. They all contribute to nature's ecosystems which function at every scale, and most clearly captured in earth's systems science (Steffan 2016). More imaginatively, this is referred to by Māori author Te Ahukaramu Royal as a 'woven universe' (Royal 2003). A woven universe incorporates the idea that all forms of life, humans, animals, plants, fish, minerals, are living and inter-related.

We have here the crucial issue – of the great dynamics of the Planet, the need to govern and use the resources of the planet, and we do so by trying to map our laws for industrial development onto the dynamic, multidimensional systems for which we have not developed corresponding laws.

We develop law for different elements of earth's global commons, water, oceans, forests…. Yet we have yet to expand complexity of legal frameworks to encompass the living dynamics of earth's ecosystems. Law for he climate – for regulating greenhouse gases, needs to be developed in reference to the multiple dimensions of climate change. Are we just going to use technology to reduce carbon emissions, and carry on exploiting, with biodiversity loss, happy to have achieved 2 degrees, or even 1.5 degrees warming?

Water and environmental law needs to be in dialogue with Forest Law and Agricultural Law and with funding mechanisms. When these fields are separated and disconnected the seeming benefits of environmental legislation are at risk of being over-ridden by the stronger policies for economic development.

An indigenous approach to the law is that the Universe establishes the law (Sciascia, 2014), thus suggesting an attunement to the systems of the planet.

[1] Aotearoa is the Māori /indigenous name for New Zealand.

[2] Earth's global commons are generally known as areas and resources beyond the borders of state law and governance, yet which are integral to the planetary scale of earth's ecosystems. With climate change, the atmosphere comes into focus as a global commons. The high seas and outer space are global commons, and can be extended to include food, livelihoods, shared knowledge and inspiration.

Perhaps this expresses the aspiration of earth jurisprudence. 'Earth jurisprudence' is an innovation to expand the horizons of law to accommodate the dynamics of living ecosystems –expressed by contributors to the book *Exploring Wild Law* (Burdon, 2011). In 'Dedication to Thomas Berry' Jules Cashford writes:

> As with all other forms of human culture, the anthropocentrism of human law for human beings had to become integral to the primary lawgiver, the universe. This is what Thomas called the 'Great Jurisprudence', the inherent order and lawfulness of the cosmos which structures and sustains all life within it (Cashford 2011, p. 7).

The impetus of earth jurisprudence has been largely morphed into the rights of nature movement. It is a cogent argument in the face the destruction of nature.

The strong move for the 'rights of nature' in law comes from an influential paper 'Should Trees Have Standing' by Harvard Professor of Law Christopher Stone (1972). Stone refers to the historical expansion of the notion of rights, children, prisoners, women, Indigenous Peoples, to argue for extending rights to nature. The more recent development of earth jurisprudence (Burdon, 2011) began with reference to the great laws of nature, and then moved towards rights as the source of legal development to achieve standing for nature.

Despite understanding the effort to give legal standing to nature, the rights approach is drawn from the conceptual frameworks the liberal legal tradition and may be insufficient to meet the complexities and richness of interdependencies at every scale. A more extended discussion on this been developed elsewhere (Iorns 2017, Martin 2018).

In reviewing state law, indigenous law and the quest to evolve law for the planet, so to speak, I see there are three forms of Law:

- The Great Law, or Law of Nature – this is a reference in the inspiration of Thomas Berry which is the principle reference for Peter Burdon's work on Earth Jurisprudence (2011).

- Indigenous Law – established prior to European settlement and is emerging into greater public view in common law cases such as the two cases taken by Māori in respect of rivers: Huakina (1987), and Paki vs Attorney General in (2012); and in the growing articulation of indigenous law (Durie 2014; Durie 2017a, Durie 2017b).

- Political law – the law of England, its development in New Zealand, North American law and in countries such as Malaysia with the influence of British colonial administration.

In this paper I will propose a refreshed orientation in law, based on responsibility, as a community-creating framework, with capacity to recognize interdependence and relationality, and provide for accountabilities for social equity and safeguards for ecological integrity.

Liberal systems of law

Current systems of law are, in general, part of the economic growth model in the globalized market system. Economic growth has an over-riding influence on environmental policy and on social policy. The fact that social and environmental policy are administratively separated, or siloed, and governed by their own laws, means that, in effect they are subordinate to economic policy; or more accurately, that they are accommodated within the ideology that drives the economy.

The liberal and 'neo-liberal' traditions are underpinned by individualism, competition, private property, freedom and rights which are the social justice dimension of the varied and complex liberal system (Martin, 2017). As recent evidence shows, it is also a system that has allowed for inequality through wealth accumulation for the few (Rashbrooke, 2015; Picketty, 2013). Responsibility can be seen as a burden or liability. It is even counter-cultural to the basic liberal value of freedom because it puts a restraint on freedom.

In saying this there is a long tradition of duties and responsibility which prioritize public welfare, not only within the liberal tradition, but across all great and ancient traditions – Hindu, Greek, Buddhism, Islam, Christianity and in Roman thought (Morgan, 2018). Modern renditions of public interests emphasize rights as a form of protection from state tyranny. Pursuing a quest into the origins of the divorce between rights and responsibilities, Professor Gay Morgan finds the Limited Liability provisions for the East India Company, in 1600 to be an origin of the restriction of responsibility in law.

The East India Company was a company with 'mercantile interests' with a purpose of 'extracting value from colonial peoples to increase government reserves and provide significant colonial administration'. Limited liability was explicitly introduced to encourage investment in the colonies – India specifically at that time, by limiting the risk of investors. As Limited liability was applied further throughout the 17 and 18th Centuries corporates were distanced from responsibility for the impacts of their ventures on society, which reached critical levels of impact in the phenomenon of corporate capitalism.

With climate change unraveling the fabric of life as we know it, with degraded water and chronic water shortage, the dramatic loss of biodiversity, and, on the human level, the impacts of war and migration, and inordinate inequality have led to the imperative for new systems and the aspiration of sustainable development to achieve integration across economic, social and environmental sectors. In other words an ecosystems approach to law and governance is needed to reflect inter-related dynamics of society and the natural world.

There are established frameworks in law, such as Public Trust with potential to address interdependence and common goods, as in Hawai'I, as well as legal innovations. The vesting of the Whanganui river with legal personality in Aotearoa-New Zealand is an innovation which has been taken up in India,

Ecuador and Colombia. The examples of Hawai'I and of Whanganui have been both been led by indigenous litigation.

Indigenous law and forms of governance and management of natural resources, and indigenous social organization are derived from integrated systems of knowledge and are therefore significant for addressing the transitions and transformations for a social order that is harmonized with nature.

Law as Responsibility for Water Commons

Public Trusteeship for water is an avenue that is being demonstrated as effective in achieving public good responsibility for water in some jurisdictions, including Hawai'i. Public trust is being thought of internationally for the governance of global commons (Bosslemann 2018), and is also being used by young legal activists in the US on climate change to protect the atmosphere.[3]

In New Zealand a coalition of academics, Indigenous academics and leaders, Non Government Organization leaders met in March 2017 to consider the serious decline of water quality in New Zealand, the over-allocation of water for industry, along with inequity of access to allocations, especially for Māori, and matters of governance of waterways.

The Waterways coalition is an interdisciplinary group with representation of indigenous leaders and disciplines of law, anthropology, fresh water ecology, agricultural science, and philosophy. Our interest in governance led to a focus on public trusteeship of water. This came from research by Kapua Sproat, an indigenous Hawaiian legal academic who led the Public Trust litigation in Hawai'i to activate public trust law with remarkable outcomes that have resonated beyond this Island state (Sproat 2007, 2015, 2018; Kyle 2014). Some provisions of the Public Trust in Hawai'i will be considered below.

The quest for new forms of governance comes in response to the failure of government to safeguard environmental interests, and in recognition that the political orientation of elected governments is for short term interests at the expense of long term and intergenerational responsibilities. In New Zealand there is some attempt to address this problem through independent Commissions, such a Parliamentary Commissioner for Environment and the Commissioner for Children. Currently there is advocacy for a Commission for the Future, a Commission for Waterways, Commission for Climate Change. The newly elected government, in October 2017, has announced the establishment of a Climate Change Commission.[4]

[3] https://www.ourchildrenstrust.org/us/federal-lawsuit/

[4] http://www.labour.org.nz/climatechange

Commissions, like Public Trust, provide institutional and legal frameworks that are more enduring than governments, and might carry a mandate for long term interests and safeguards.

With regards to climate change, and the Conference of Parties negotiations, we also recognize that governments are mandated to negotiate in their national self interest. One commentator at COP21, in 2015, said, there is no-one here to negotiate for the planet. A step towards partially remedying this came from the Marrakesh Conference of Parties where new recognition of non-state stakeholders was given form in the Marrakesh partnerships for Action on Climate Change. Fiji assumes the Presidency of Conference of Parties 23 (COP23) hosted the first Marrakesh Partnership meetings during 2017.

Alongside research into the Public Trust and the possibilities of this doctrine to be expanded and adopted in different jurisdictions, the concept of Legal Personality has come into the stage as a framework for giving legal status to entities of nature. The impetus for Legal Personality comes from a legal innovation in New Zealand, where the Whanganui River has been vested as a Legal Person. This new legal framework comes as a result of claims against the Crown for breaches of the Treaty of Waitangi.[5] The Whanganui River Claim was settled in 2015. One aspect of the claim is that the river is an ancestor in accordance with the understanding of the Whanganui people , and of Māori in general, that entities of nature, rivers, trees, birds, fish are related and are part of kin genealogies. Thus, the reference of indigenous knowledge enable the provision to recognize the Whanganui River as a legal person, Te Awa Tupua.

Te Kawehau Hoskins reflects 'Indigenous peoples, continue to remember and articulate a discourse of responsibility and obligation to others and to natural environments' (Hoskins, Martin and Humphries, 2011, p. 23). She identifies the persistence of this orientation emerging from the knowledge that people arise or are constituted in relation to the world:

> Māori see themselves as part of a familial web in which humans are junior siblings to other species beings and forms of life. People therefore don't understand themselves as exercising knowledge over the natural world but as existing always already *inside* or *as* relationships. (Hoskins, Martin and Humphries, 2011).

In indigenous thought identity is derived from a complex web of ancestral connections that arise from land, and the worldview is firmly anchored in the living universe of nature.

Public Trust –What does this offer for the governance of natural resources?

[5] The Waitangi Tribunal was established in 1976, to hear claims in respect of breaches of the Treaty of Waitangi, and to make recommendations for restitution and compensation.

Essentially, Public Trust is the idea that some resources are inherently the property of the public at large, and should be kept for public purposes. Key principles of the Public Trust are that resources cannot be alienated by government, or be transferred or controlled for private purposes only; a public purpose is required. Furthermore, the proposed use cannot materially impair the quality of the resource or its availability to the public. A third aspect is that a duty is imposed on government to account for its actions or approvals of a use. Findings on the effects of a proposed use must be recorded to assure that there is no unlawful alienation or transfer for private purpose, and that there is no material impairment of public trust resources or uses (Sax 1970).

Historically these purposes were to protect navigation and travel, the allocation of water, and to a lesser extent, fishing, and still less, recreation and public gatherings (Rose, 1998, p.351). This thinking was a reference in NZ for laws for navigable rivers (Coal-mines Amendment Act 1903) and Water and Soil Conservation Act (1967) in which public access and conservation in public interests were paramount.

Since the 1970's there has been a growing need to bolster law for environmental regulation and protection, On the political aspect, we have had majoritarian government, with, until 2017 a strong stake in economic development through exploitation of land and water resources, in which corporate interests are strongly influential – alongside weaker provisions for 'minority' environmental interests and indigenous interests.

When considering environmental governance and recourse to law, there is the pathway of claims and liability for environmental damage – the 'hard look' doctrine of environmental impacts (Rose, 1998, p. 355); and alternatively the more affirmative approach of protection of public interests in diffuse environmental resources through public trust; diffuse refers to the broader ecosystems and habitat approach to nature.

An advantage of public trust is that it requires public information to be provided, and it invokes public participation in decisions which are informed and accountable. The public trust doctrine encourages the democratisation of decision making. Indeed, the doctrine equips the public with the standing to challenge government and private proposals that threaten the trust's environmental and public access purposes; and courts are strengthened in their ability to balance proposed development against longstanding public uses grounded on reasonable public expectations.

This greater democratizatation through trusteeship increases public scrutiny of consents and licenses and give-aways of environmental resources to private interests. Although water is not a Public Trust in New Zealand, we see the process of public scrutiny in the exposure of local government providing consents for free water for bottling for private for-profit companies in New Zealand:

In August 2016 Stuff (media) reported that a Chinese owned company, Ngongfu Spring, had applied to draw 580 million liters of water per year from the pristine

Otakiri Springs, near Whakatane, to bottle and ship overseas[6]. This is enough to give every person in New Zealand a 330 ml liter bottle of water every day for a year. Similarly in 2016 Ashburton District Council gave a resource consent to bottle 1.4 billion liters of water to SpringFresh.[7] However this has not prevented free water being made available to commercial companies

There are important matters of property with Public Trust – with tensions between the State role as public trustee with a responsibility, as a representative body, to safeguard the complex issues of environmental protection. Alongside this, the State can have over-riding economic growth interests which undermine its public trust responsibilities. However the State's responsibility can also act as a brake on claims to resources that might not be in the wider, or long term public interests.

Public trusts, like national parks and other protected areas, establish a preferential legal status for specific ecosystems or attributes of ecosystems, normally for the beneficial use of humans, not necessarily for the direct and primary benefit of the ecosystem or its elements.

Public Trust as a framework for environmental governance has not been developed in NZ as it has in the US through their provisions in state constitutions and cities. For example the city of Pittsburgh in Pennsylvania declared that nature is a legal person and banned fracking in reference to this law (Shelton, para 28, p.7; City of Pittsburgh 2010).

In the New Zealand context, considerations of governance of waterways needs to be done in engagement with Māori and in recognition of Māori claims and interests in water, which are at stake. The paper by Judge Taihakurei Durie (2014) setting out a new proposal for water governance, has particular salience because it addressed the restitution of Māori rights and interests in water, as well as encompassing public good interests. It provides for water to Marae[8], proposes a Water Commission with provision for charging for commercial use and includes a polluter pays provision, with revenue going towards water restoration. Importantly it encompasses a role for Māori in the governance of water. It is proving prescient, in that many of these proposals have become the basis for for policy and implementation with the new 2017 coalition government between Labour, New Zealand First, and the Green Party.

Discussions are being pursued on whether this is a framework of value to Māori and on how it could be implemented to strengthen environmental interests. Considerations include the requirement for new legislation, or how it could be integrated into the Resource Management Act (1991) with its purpose to

[6] https://www.stuff.co.nz/business/industries/95670283/Chinese-company-seeks-consent-to-draw-580-million-litres-of-pristine-spring-water

[7] http://www.stuff.co.nz/business/78652406/the-bottledwater-giants-who-are-taking-our-water

[8] Tribal and urban customary communal houses of meeting

promote the sustainable management of natural and physical resources[9], or other relevant legislation such as the Conservation Act (1987) (Browning 2017). Foreshore and Seabed Act (2004) and the Environment Act (1996).

Public Trusteeship – the case for Water rehabilitation in Hawai'i

Indigenous Hawaiian legal expert Kapua Sproat has led litigation for the recovery of water in Hawaii. The case derives from Hawaiian custodial traditions regarding water as a physical manifestation of the deity Akua Kāne, who carries the authority of trusteeship over water for communal benefit. The Hawai'ian State constitution has an important analogous provision for water as a public trust, which allowed campaigners to seek redress in law.

With an indigenous interest in restoring Hawaii's water to ecological health the litigation was to address the massive engineering diversion of water for the sugar industry which destroyed the natural flows and quality of water. The reinstatement of the Constitutional Public Trust in water in Hawai'i is iconic in giving priority to the ecosystem health of water, along with provision for Indigenous interests. Commercial interests are considered once the criteria for health and indigenous interests are met (Sproat and Moriwake 2007).

Legal Personality

In Aotearoa New Zealand the claim of the Whanganui River Iwi (people) to the Waitangi Tribunal (Whanganui River Report 1999) and the subsequent settlement, led to the ground breaking vesting of the River as a Legal Person.

The claim itself is set against the background of a polluted river , diversions for the Tongariro Power Scheme and the general historic statutory fragmentation of riverbeds, riverbanks, minerals beneath the riverbed, air above the water and the water column. This regime has been of great distress to Māori and those who understand rivers as a living whole.

By statute, riverbeds were vested in the Crown for purposes of navigation and mining (NZ Coal-mines Act Amendment Act 1903), The New Zealand government, to date, uses the concept that no-one owns water. This position taken by the Crown has had the effect of removing Māori from their custodial role and traditional relationship with tribal waterways. The concept of non-

[9] In the Act, sustainable management means "managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment"

ownership has also brought about in effect, the commodification of water. Local government as crown derived agencies have the responsibility for the allocation of water consents. The consenting process has been subjected to scrutiny and to the view that consents for water allocation are tantamount to property with associated ownership rights.

The claim on behalf of the Whanganui River led to settlement legislation in favour of the river (Te Awa Tupua 2017). In the Te Awa Tupua Act the Whanganui River has been accorded legal recognition as an ancestor. Te Awa Tupua recognizes Whanaganui River as an integrated living whole which flows from mountains to sea, with all interests in the river to have regard to its wellbeing.

This framing recognizes the river as an ecosystem with an added significant change of vesting the riverbed (subsoil), the plants, and air above the water in Te Awa Tupua (Te Awa Tupua, S. 7).

A management strategy provides for the engagement of all stakeholders in collaborative management process to advance 'environmental, social, cultural, and economic health and wellbeing of Te Awa Tupua, with elaborate process of governance and management spelled out in the Act (2017).

Four guardians, Te Pou Tupua, are appointed to represent the River, two from the Whanganui People, and two from the Crown. Te Awa Tupua is a legal person with all the rights, powers, duties, and liabilities of a legal person; it is therefore incomplete to simply claim that the river has rights; the implications of a river having 'powers, duties and liabilities, and of legal personhood has begun in the papers of Dame Professor Anne Salmond and Professor Mark Hickford (Salmond 2018; Hickford 2018).

Te Awa Tupu has strong dimensions of pubic good interests with intergenerational responsibility embedded in the Act. Above all it is a shift away from human interest to the relational and integrated attributes of the river and all associated with her.

Following the Whanganui attribution of legal personality, this legal concept was taken up in India. Part of the Ganges and Yamuna rivers were given the status of legal personality. Legal proceedings followed in the Ganges and Yamuna case, Mohammed Salim v State of Uttarakhand (March 20, 2017) the court declared: that the Himalayan mountain glaciers and "rivers, streams, rivulets lakes, air, meadows, dales, jungles, forests, wetlands, grasslands, springs and waterfalls" were all legal entities or persons, "with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them.

Guardians were similarly appointed to the role of upholding the status of these legal persons and to promote their health and well-being. The court [explicitly noted] that "the rights of these legal entities shall be equivalent to the rights of human beings and the injury/harm caused to these bodies shall be treated as harms/injury caused to the human beings (Iorns 2017, p. ?)

A key element of Legal Personhood is that the resource itself has rights, duties and liabilities. In contrast, in the Public Trust doctrine the public has a right to access and use the resource.

Indigenous Law

Indigenous law in Aotearoa-New Zealand is coming back from the brink of mainstream legal nullification through the Waitangi Tribunal claims and settlements such as Whanganui, and through the Waitangi Tribunal Freshwater Claim (2016). Recognition also emerges from common law claims, such as Huakina Trust 1987 and Paki vs Attoney 2015.

The articulation of Māori interests from the Fresh Water Claim (2012a, 2012b) and the subsequent Durie papers 'Ngā Wai o te Māori Nga Tikanga me Ngā Ture Roia' (Durie et al 2017b), and 'Indigenous Law for Responsible Water Governance' (2017c) identify several important themes. The 'Ngā Wai o Te Māori' paper was written to support the notion of Māori relationship with water for the Waitangi Tribunal case on Freshwater. This can be seen to turn on the matter of relationship and responsibility.

> The first law for Mɑ̄ori is probably therefore, a law of relationships, about how Mɑ̄ori relate to their environment and to one another. Whether one is talking with visitors on a marae, or is fishing, hunting, building, weaving or foraging, protocols of respect are paid to keep peace in the spiritual and earthly realms. (Durie et al 2017a, para 33).

Several principles follow from this:

1. Māori interests are not confined to environmental ' kaitiaki' (care taking, custodial) interests. An accordance with tikanga, or custom Māori have a property interest, and a governance interest in water – as provided for in the Tino Rangatiratanga (chiefly authority) provisions of the Treaty of Waitangi (Durie, Ngā Wai para.160)

2. We are misusing, or misappropriating the traditional notion of kaitiakitanga (guardianship) showing the risk of capturing Māori knowledge within western conceptual frames (Durie, Ngā Wai para.19). Traditionally, kaitiaki were birds or fish or other creatures whose presence, absence, abundance, and appearances served as indicators of environmental conditions, or situations (Durie, Ngā Wai para. 41).

3. Rather than the 'bottom lines' standards outlined in government / Ministry for Environment policies for water standards, Māori work with the framework of top lines – with upwards reaching standards for water quality (Durie, Ngā Wai para. 24).

4. The Māori notion of property is different from that of government/western property rights. Property for Māori encompasses both public good interests as well as private interests (Ngā Wai para. 84)

5. Mana (authority, prestige) encompasses a public right to own and a public responsibility to control resources (para 116).

6. In Māori ways of life before settlement water was the main source of livelihoods and economic management. There were no land animals such as cows and sheep; rather, fish and birds were the sources of sustenance (Durie, Ngā Wai para. 53).

Two significant cases mentioned above, Huakina Trust, and Paki have opened the law to Māori concepts and values in New Zealand law. This paper will only comment on the Huakina case, with the benefit of a symposium to recognize the 30 year anniversary of the case, held at Hopuhopu, July 2017, in the Waikato.

The Huakina case arose from a farmer, discharging untreated water into the Kopuera Stream, which flows into the Waikato River. The farmer was ordered to treat the water. Mrs Nganeko Minhinnick , on behalf of the Huakina Trust argued against the discharge of water from the farm into the stream, whether untreated or treated on the basis of Maori understanding of the spiritual values in a river. The Māori concept of taonga (treasure, esteemed entity that includes metaphysical qualities) is specifically protected under Article two of Treaty of Waitangi. Such values were not normally provided for in law in relation to the river; in this case, the provenance of the law was claimed to only cover physical attributes (although aesthetic, and landscape values are recognized in law).

Huakina was a turning point with Judge Chilwell's recognition of the Treaty of Waitangi as part of the fabric of New Zealand society. Legal recognition of metaphysical and spiritual values has been slower in New Zealand. However a Privy Council judgment in 1925 held "that the Courts can cope with metaphysical considerations is illustrated by recognition of a Hindu idol as a juristic entity capable of suing and being sued" (Mullick vs Mullick 1925). This set a precedent for such recognition and for the concept of a river as a legal person.

Nganeko Minhinnick was quoted at the symposium with a simple statement she made before she passed away in May 2017. A colleague was recognizing her groundbreaking work in the Huakina case. Minhinnick said 'But the waters are still paru' (polluted). She was referring to the fact that despite the Huakina claim, despite other claims, and despite the provisions of the Resource Management Act water quality in New Zealand is declining.

It became clear to me that even when we have good and effective environmental legislation we cannot make headway with environmental safeguards if economic policy is not integrated with and accountable to environmental policy.

The conditions for dis-integration can be readily observed in law for environment separated from economic policy, and in practice, we have Regional Councils responsible for implementing environmental policy and standards, and the Local Government Act requiring regional councils to prioritize economic development (Kevin Haig 2017)[10]

This therefore is my main argument for a relational, integrated approach to public policy in a framework of responsibility, on the premise that responsibility strengthens integration and public good interests.

Responsibility - A Framework For Public Good Interests In Law

This proposal for a framework of responsibility is mindful of the strong current towards development of rights for the environment and that the purpose of rights is to give legal standing to environmental entities, such as trees, atmosphere, rivers, land as outlined in the introduction.

Responsibility and duties are complementary to rights; indeed, rights require a duty of implementation. The discourse of rights is produced from liberal foundations and are being grafted onto systems and institutions that were not designed for integration, collaboration and responsibility. The orientation of safeguarding earth's common goods for future generations, is new to the liberal project. The underlying premises are not often scrutinized in the effort to design and implement a new paradigm in law and governance.

We can ask again, do rights provide for interdependence? Do they account for the relationships between people and between humans and nature, and for the interconnected attributes of an ecological world-view?

Even if the river has a right – how will this be given effect if there is another right-holder to exploit the river through a consent for abstraction for irrigation. I raise the question of whether a right inclines towards commodification and ask whether this is what is in play with a consent – a consent to take water or to discharge waste into water. Indeed, a water right is specifically referred to by Martyn Craven as a commodity in his affidavit to the Waitangi Tribunal claim on Freshwater in 2016.

> If I draw water or even discharge waste on the basis of responsibility, am I more inclined towards recognizing the river as a living entity with a life-force? Am I more inclined to have regard for the health of the river, and its ecology, and to appreciate the complex influences of the insects and fish and birds – the habitat associated with the river? (Craven 2016).

[10] Haig, Director of Forest and Bird. Presentation to Environment and Conservation Conference, August 2017.

Let us consider responsibility as a theme and a framing with the idea that responsibility creates collective engagement and community. Responsibility, or 'respons-ability' is relationship; it is our response to another person, to a river, to land, to trees.

In these relationships we find recognition that my interests are interwoven with yours; that my life is drawn from reciprocal relationships, and indeed depends on reciprocal relationships. We can see this in every sphere and at every scale. A child is born of relationship, a seed grows from fertilization and from interaction with soil and water.

In our human world, our recognition of another person, is often expressed in forms of hospitality – an offer of water, of food and drink – and although we lose sight of a the source of food in our supermarket world, our sharing of food and livelihoods are entirely dependent on, and interdependent with earth and water.

Finally, Durie et al boldly refer to responsibility as a higher order than rights:

> Embedded in Tikanga Māori is a concept which transcends right use. It is the responsibility to so use as to maintain to the fullest practicable extent, pure, freshwater regimes. It is a concept which requires a balancing of the benefits of ownership with the responsibilities of ownership. It is a responsibility which is owed to one's forebears and one's descendants.

Concluding Questions

What is the potential in Public Trusteeship as a framework for governance to protect public goods?

Is there more scope to extending the framework of legal personality – where the resource itself has rights and duties/responsibilities? Is this a way of recognizing the intrinsic values of ecosystems?

Could there be more development of indigenous concepts in law with expanded notions of property which provide wider scope for public good in both social and environmental spheres?

Responsibility for a healthy environment is an important dimension to be added to rights to recognize the relational qualities between people and nature, the links between environment and economy. What forms of law give expression to interdependence between people and nature?.

We have new horizons in thought, such as how to cultivate the spiritual dimensions of life in an age of advancing technology, and how to deepen the relational dimensions of life. How does an ethics of responsibility serve to strengthen ecological transitions with care for generations to come?

One hope for legal development is that we move towards greater harmony with Great Law, the universal living dynamics of life which are intelligent and responsive. This will require new forms of law – perhaps a Taonga Law, in which metaphysical attributes of nature and people are fully recognized?

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Biography

Dr Betsan Martin is a founding member and Executive Chair of the International Alliance of Responsible and interdependent Societies, a think tank and resource centre working with responsibility as a framework for 21st century issues. Responsibility draws together common good and interdependence with provisions for accountability. Responsibility is central to indigenous knowledge systems.

Currently Dr Martin is editing a book with Linda Te Aho and Maria Humphries on Responsible Law. Authors include indigenous, western and Indian scholars with special interests in law for water and climate change. Dr Martin is involved with the United Nations University Centres of Expertise on Education for Sustainable Development globally (RCE's) and led the establishment of an RCE in New Zealand. The RCE's are to implement transformative education in local contexts through collaborative partnerships with Māori, with Pacific partners, local government, business and education sectors.

Betsan has a long association with a Māori hapü in Nga Tuwharetoa, with a purpose of enhancing waterways in the Taupo region, and beyond.

Collaboration is key, and working on education for interdependent societies includes joining with national and international organizations such as the Alliance for Responsibility, UNU RCE network, Pacific and global organizations such as IUCN (International Union for the Conservation of Nature) and ECO (Environment and Conservation Organizations, NZ), and a Public Issues network in NZ.

Betsan's academic studies in philosophy of education specialized in an ethics of responsibility, which informs themes in her work in integrating social, environmental and economic areas. Publications include water governance, Responsibility and Ethics, Education for Sustainability, Responsibility in Law.