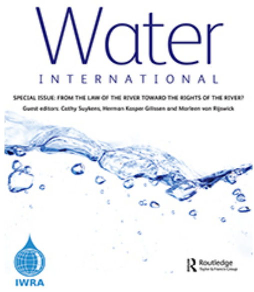

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Protection through property: from private to river-held rights

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ABSTRACT
This article explores how private owners can protect bodies of water through private property rights. It compares the use of conventional property rights in the Netherlands and New Zealand with a novel approach whereby a New Zealand river owns itself.

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Property rights; private nature conservation; ownership by river; human-nature relationships; Netherlands; New Zealand

Introduction

Protecting aquatic ecosystems and freshwater bodies is often seen as a public law matter. Indeed, a comprehensive complex of international, European and national water legislation has been established to protect water bodies from further degradation and to ensure ecological restoration. However, generally known weaknesses of public environmental law makes this a challenging task. Examples of such weaknesses include the difficulty of addressing diffuse sources of pollution, the role of politics in implementing strict licensing systems, the difficulty of ending historic rights to pollute, and weak supervision and enforcement.

Against this backdrop, this article explores the potential of private property rights in the Netherlands and New Zealand as additional legal instruments to protect bodies of water, with special attention to rivers. Property rights are rights or duties which relate to the possession or use of an object (e.g., ownership and easement rights).[1] Property rights can, within certain limits, be used to protect the environment. For example, a farmer may refrain from using parts of his land adjoining a river to allow natural aquatic wildlife to return. He may even bind subsequent owners to this non-use. However, the scope of this article goes beyond the conventional approaches in property law and includes an exploration of an alternative approach to property rights which recently emerged in New Zealand: letting a river own itself (Te Awa Tupua Act 2017).

There is a growing body of literature on comparative property law (Erp, 2006; Erp & Akkermans, 2012). Although some authors discuss the right to access water (e.g., Schorr, 2017), these comparative studies do not specifically focus on protecting the aquatic environment. The literature on property rights used for nature conservation purposes often includes

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only one particular (type of) legal system and does not specifically look at protection of the aquatic environment (e.g., Adams & Moon, 2013; Merenlender, Huntsinger, Guthey, & Fairfax, 2004; Saunders, 1996; Law Commission, 2014). This article, however, intends to compare two traditionally different property law systems in respect of protection of bodies of water: New Zealand and the Netherlands (the authors' native system). The inclusion of the novel use of property rights in New Zealand, whereby a river owns itself, gives it a unique angle.

A comparison between New Zealand and the Netherlands is particularly interesting because they belong to the two different major property law traditions of the Western world. The civil law tradition, present in the Netherlands and most other continental European countries, implies a civil code which encompasses the majority of private law rules. The common law tradition, occurring in New Zealand and most other English-speaking Western countries, implies law made by judges (case law) supplemented with legislation (Erp, 2006; Erp & Akkermans, 2012, p. 3). Comparing these two systems may give us some insight as to whether the novel approach to property rights in New Zealand could also be useful in civil law countries such as the Netherlands.

After briefly setting out the research question and methodology, the discussion starts with a theoretical and historical background of property rights and their (traditionally) anthropocentric nature. Next, the theoretical use of property rights in water protection will be discussed, exemplified by two cases from practice. Despite several advantages, these conventional uses of property rights as a water conservation tool are subject to several limitations as well. Hence, the classical Western approach to property rights will be compared with the novel approach recently adopted in New Zealand. The aim is to establish whether the latter approach – which fundamentally changes the relationships in property rights – has an added value for the protection of bodies of water. Although this article will focus on the role of property rights in protecting water quality and aquatic wild life, it may also bear relevance for the protection of other natural components (e.g., forests).

Research questions and methodology

This article addresses two questions. First, what is the potential of using private property rights for protecting bodies of water, and what are the limitations? Second, can a shift to nature-held property rights overcome these limitations? The aim is to evaluate whether the latter approach has advantages over the first. This will be done by comparing (conventional) property rights in New Zealand and the Netherlands to the novel approach in New Zealand whereby a river owns itself.

The two property regimes will be compared by using the functional method of comparative law, which is (arguably) 'the mantra of comparative law' (Michaels, 2006, p. 340). This method deems national legal institutions comparable if they fulfil similar functions in different legal systems and society as a whole (Michaels, 2006, p. 342). The idea is that laws in different legal systems respond to similar societal needs or problems (Zweigert & Kötz, 1998). Thus, an essential presumption in this comparative study is that in both countries there is a societal need to protect the aquatic environment. The different property rights will be evaluated according to how they can serve this particular function (Michaels, 2006). This requires the researcher to look at the law

in action, rather than to focus only on black letter law or legal theory (Michaels, 2006). Therefore a practical example from both jurisdictions has been selected to illustrate how property rights can (or cannot) be used to protect waters.

Private property rights and human–nature relationship

Relationships within property rights

Defining 'property rights' is not easy

Because of the different meanings 'property' may have in different cultures, often a safe approach is taken by describing characteristics of property rights. Property rights have, for instance, been defined by Singer (2014, pp. 1288–1298) as 'legal relations among persons with respect to things'. He also notes that 'under any rubric or conception, property suggests a stable basis of expectation with respect to control of valued things'. Property rights have also been described as 'particular rights that people have to do certain things with certain objects – rights which vary considerably from case to case, from object to object, and from legal system to legal system' (Waldron, 1985, p. 313).

A common denominator in these definitions is that, from a legal perspective, ownership is primarily about relationships between humans, or human-established legal persons, as right and duty holders. The object itself is not recognized as a holder of rights and duties and, therefore, the owner–object relationship appears legally less relevant (Waldron, 1985). Another prominent feature is that the owner has control and therefore takes a dominant position over the object. This also applies to ownership of components, living and non-living, of nature. Legally this is not problematic, as these components are considered 'things'.

Reflection of the dominant human–nature relationship in property theory

Both characteristics, the focus on human relationships and the control of the owner, often dominate legal discussions on ownership of (components of) nature. This reflects the dominant position that humankind in the Western world has taken over nature in previous centuries. For a very long time, humankind has positioned itself above nature, based on the conviction that nature was meant for human use (Passmore, 1974/1980). For explanations for this dominant position, reference has been made to the process of domestication of animals (around 8000–4000 BC, depending on the geographical region – Wells, 2010), Aristotle's *Politica* (Cliteur, 2005), the Judeo-Christian tradition (Minteer & Manning, 2005, White, 1967), and the 'mechanization of nature' in the theory of Descartes (1596–1650) (Bastmeijer, 2011).

This dominant attitude of humanity towards nature made it logical to think that living and non-living components of nature may be regarded as 'objects' without rights and duties that may be appropriated as private property. In fact, the dominant position of humankind has explicitly been used to justify private ownership of nature. For instance, John Locke (1690, chapter 5 at 25; see also Bastmeijer, 2016) explained that 'the earth and all that is therein is given to men for the support and comfort of their being'. This implies that appropriation of nature as private property is legitimate and even necessary. Under 'fruits and beasts of the earth', Locke stated:

'being given for the use of men, there must of necessity be a means to appropriate them some way or other before they can be of any use, or at all beneficial, to any particular men' (see also Grotius, 1583/1645). Similarly, human use, occupancy or cultivation was considered a fundamental requirement for the right to appropriate territory by states.

Certain parts of nature – such as the sea and beaches – were considered common property and outside of the scope of private property. In relation to freshwater bodies and rivers, Hugo Grotius (1583/1645, Book 2, Ch. 2, Para. 3) explained that 'fluids, which cannot be limited or restrained, except they be contained within some other substance, cannot be occupied. Thus ponds, and lakes and rivers likewise, can only be owned as far as they are confined within certain banks.' Consequently, 'rivers may be occupied by a country, not including the stream above, nor that below its own territories' (Para. 4), and 'rivers separating two powers may be occupied by both, to each of whom their use and advantages may be equal' (Para. 5).

Shifting human–nature relationships

An important nuance in this topic is that human–nature relationships have changed over time, and certainly in the last two centuries. In the nineteenth century the appreciation of nature increased, amongst other things because of the air pollution, crime and disease in cities (see e.g., Thomas, 1983). This mental shift has been reflected in nature protection law. For instance, in the twentieth century one may observe more attention to stewardship in nature protection law (Bastmeijer, 2011). After World War II several international conventions and declarations even explicitly started to emphasize the importance of intrinsic values of nature (Bastmeijer, 2011). For instance, the 1982 World Charter for Nature of the United Nations states: 'Every form of life is unique, warranting respect regardless of its worth to man.' More recently, such ecocentric and holistic views have also been reflected in global movements such as the Earth Charter initiative (http://earthcharter.org), in academic thinking such as the 'wild law' concept (Cullinan, 2011), and in domestic laws (e.g., the explicit recognition of the intrinsic values of nature in Article 1.10 of the Dutch Nature Conservation Act 2017).

These shifts to more nature-friendly attitudes may have influenced the way people think about relationships to nature in private property law. For instance, Rosenbloom (2014, at 53) explains that 'embedded in the definition of common pool resource is an assumption that human interaction with and appreciation of nature is primarily one of appropriation, where humans consume the resource'. But 'in some circumstances "rational" actors may be motivated to preserve or add to – and not consume – nature for a variety of reasons, including to promote human development (such as health)'. So, property of nature may entail much more than human exploitation. Nature-friendly attitudes may even result in a situation where a person is interested in property rights with the motive of protecting nature against the use or damaging influences caused by other human actors. One could state that in that case, while relationships in property still relate to human actors only, the intention is clearly to contribute to a more positive human–nature relationship.

The legal framework: property rights and water

Now for a closer look at the legal options for nature protection. Via property rights, one can – to a certain extent – protect bodies of water. However, where an object cannot be (privately) owned, nature conservation through (private) property rights is not an option. The question is whether rivers can be privately owned. Therefore, it is important to get acquainted with the (rather technical) requirements for ownership and other property rights in bodies of water, and rivers in particular. These requirements may differ between legal systems, but remarkable common features can be seen between the Netherlands and New Zealand.

Ownership

A person can own an object and can therefore 'rule' (within certain legal limits) over that object. This is because, in both New Zealand and the Netherlands, ownership is considered the most comprehensive property right one can have in an object (Art. 5:1 of the Dutch Civil Code [DCC]; Honoré, 1961). However, in both jurisdictions, the water in rivers cannot be owned: streaming water is considered *res nullius* – belonging to no one (Getzler, 2004; *Ballard v Tomlinson* (1885) 29 Ch D; *Mason v Hill* (1833) 110 ER 692; Memelink, 2011).

In the Netherlands, the riverbed can be owned, but the bed of public navigable waters is presumed to be (publicly) owned by the State (Art. 5:27 DCC). Privately owning such a riverbed is therefore unlikely. Similarly in New Zealand, the bed of a navigable river is vested in the Crown and cannot be privately owned. When it comes to non-navigable rivers, the owner of the adjacent land has an *usque ad medium filum aquae* right: ownership is presumed to extend to the midpoint of the riverbed (*Attorney-General and Southland County Council v Miller* (1906), 26 NZLR 348).

All in all, it is to a certain extent possible to acquire ownership over a river (i.e., buying a riverbed or adjacent land), for nature conservation purposes if one likes (as further illustrated later in the article). However, the fact that the water itself cannot be owned and the restrictions in both jurisdictions on privately owning riverbeds are important legal limitations.

Easement rights

Limited property rights are derived from the right of ownership, but are not as comprehensive. The advantage of limited property rights is that, once vested, they 'stick' to the property and therefore pass on to subsequent owners. This could lead to long-term nature conservation. Nevertheless, it is argued that only a few limited property rights are (at least somewhat) suited for large-scale private nature conservation.

The right of easement (Art. 5:70 DCC) is a right of enjoyment and is a relatively well-known limited property right. It implies a burden on a ('servient') land to the benefit of another party. In the Netherlands, an easement must benefit a dominant *land* and can entail a duty for the owner of the servient land to either tolerate something or to refrain from doing something on the servient land (Van der Plank, 2012; Van

Leuken, Van de Moosdijk, & Tweehuysen, 2017; Van Zeben, Du Pon, & Olthof, 1981). For example, it can entail the duty for a factory to refrain from discharging chemicals into a river to the benefit of a dominant land which might be affected (Van Zeben et al., 1981). However, the requirement of the existence of a dominant *land* makes the Dutch easement less preferable for large-scale water conservation. After all, private parties may very well have an interest in protecting waters even where it has no value for their own land. Furthermore, Dutch easement rights cannot entail a (main) duty to undertake positive action, such as a duty to instal a water treatment plant.

In New Zealand, the existence of a dominant land is not required (New Zealand Property Law Act 2007, S. p. 291). However, under New Zealand law easements can only relate to a *right for the benefited party to use* the servient land by *doing* something on the servient land (e.g., installing a water treatment plan). Unlike the Dutch easement (Art. 5:71 DCC; Asser, Bartels, & Van Velten, 2017), a plain right to restrain certain activities on the servient land cannot normally be imposed (*Phipps v Pears* [1965] 1 QB 76). For example, a New Zealand easement cannot lead to a duty to *refrain* from polluting a river, for instance by prohibiting the use of pesticides. This means that also New Zealand easements are not very well suited to protecting waters. Also, under New Zealand law, easement rights cannot oblige the owner of the servient land to undertake positive action.

Qualitative duties and conservation covenants

Under Dutch law, an alternative to an easement right is a so-called qualitative duty (*kwalitatieve verplichting*; Art. 6:252 DCC) connected to the servient land. An advantage of a qualitative duty over a Dutch easement right is that the party interested in vesting the duty does not need to own land that benefits from the qualitative duty (Asser et al., 2017; Reehuis & Heisterkamp, 2012; Van Oostrom-Streep, 2006). Like a Dutch easement, a qualitative duty can impose a negative duty on the owner and users of a (servient) land to tolerate something or refrain from doing something (Roelofs, 1991). The negative duty can include a factual act (similar to easements), but (unlike easements) also a legal act, e.g., a prohibition of giving third parties a contractual right to use waters for fishing purposes. Furthermore, qualitative duties pass on to subsequent owners, making them useful for long-term nature conservation.

According to Erp and Akkermans (2012), Dutch qualitative duties can be compared to common law covenants. 'A covenant is a legally binding agreement, "a promise contained in a deed"' (Saunders, 1996, p. 325; see also Hinde & McMorland, 2013). The type of covenant that is used most in New Zealand for the purpose of nature conservation on private lands is the so-called statutory covenant (Saunders, 1996), often referred to as a conservation covenant (Adams & Moon, 2013; Merenlender et al., 2004; Law Commission, 2014). The best-known example in New Zealand (the Queen Elizabeth II National Trust) will be discussed later.

Conservation covenants can be negotiated upon with private landowners by an authorized body. It can be tailored to individual circumstances, making it a rather flexible instrument (Adams & Moon, 2013). It can include passive duties for the owner, such as a duty to refrain from fishing in a river. It may also include maintenance duties (S. 21 (2c)). A land in proximity that benefits from the covenant is not required.

Furthermore, statutory covenants 'may exist in perpetuity or for a specified period of time' (Edwards & Sharp, 1990, p. 318). Therefore, 'depending on their duration, such agreements are binding on the current landholder and all future owners' (Iftekhar, Tisdell, & Gilfedder, 2014, p. 176). Of all property rights discussed, this makes conservation covenants the most suitable for protecting waters (insofar as the water can be owned, as discussed earlier).

Examples from practice

Now that we are familiar with the legal possibilities, let us consider whether in practice property rights are indeed used to protect the aquatic environment. The two examples below are chosen because they are very successful scale-wise. The first relates to the biggest private landowner and private nature conservator in the Netherlands (Kuindersma et al., 2002). The second relates to a key actor in the field of private nature conservation in New Zealand (Saunders, 1996; Scrimgeour & Vijay, 2017).

Nature monuments

In the Netherlands, the biggest private player in the field of nature conservation is the Nature Monuments Society (Vereniging Natuurmonumenten). Nature Monuments owns more than 100,000 hectares of nature (https://www.natuurmonumenten.nl/visie); only the Dutch state itself owns more (Kuindersma et al., 2002). Nature Monuments has contributed to a rapid increase in the amount of land that is reserved for nature and has been an important actor for the establishment of the Natuurwerk Nederland, a national network of interconnected natural areas (Friedman, 1997; Kuindersma et al., 2002).

The very existence of Nature Monuments is linked to protecting bodies of water. The society was established in 1905 to protect the Naardermeer (Lake of Naarden) from plans to start using it as a landfill (Coesèl, 2016). Nature Monuments now owns many valuable waters and wetlands; for example, it owns much of the Oisterwijkse Vennen (Lakes of Oisterwijk).[2] These lakes were acquired by Nature Monuments in response to government plans to drain and sell the area (Natuurmonumenten redde 100 jaar geleden de bossen in Oisterwijk, 2013). Together with the local authorities, Nature Monuments now takes care of the water quality of the lakes (Schmit, 1995; http://www.natuurmonumenten.nl/projecten/de-natte-parel). In wetlands where Nature Monuments is not the sole private owner, it has been cooperating with (smaller) private owners in attempts to restore water quality and nature. A nice example is the nature reserve of the Kleine Meer and Groote Meer (Small Lake and Big Lake).[3]

With respect to public waterways, which cannot be privately owned, the role of private property rights is limited. Nonetheless, being an important and well-known actor in nature conservation, Nature Monuments has joined several private–public partnerships with a view to protecting state-owned waters. One of its biggest public–private partnerships aims to restore the biodiversity in the Markermeer by artificially creating 10,000 hectares of islands. However, the lake and islands remain property of the Dutch State (Samenwerkingsovereenkomst Eerste Fase Marker Wadden 2014, Art. 7).

An important practical limitation of nature conservation through private ownership is that it is very expensive. All the land needs to be bought and maintained. For this, Nature Monuments is dependent on 700,000 members, volunteers and sponsors

(https://www.natuurmonumenten.nl/visie). These private sponsors have become all the more important now that the government has announced that it will no longer (financially) help Nature Monuments acquire land at the expense of smaller private buyers (Kamerstuk 33 576, no. 6; Interprovinciaal overleg 2014).

The Queen Elizabeth II National Trust

In New Zealand conservation covenants are said to be 'almost the sole policy measure in protecting land under private ownership' (Saunders, 1996, p. 325). The Queen Elizabeth II National Trust (QEII Trust) is a key actor in this field. It was established by the Queen Elizabeth the Second National Trust Act in 1977 to 'encourage and promote … the provision, protection, preservation, and enhancement of open space' (S. 20(1)).

The trust's main task is the negotiation and acquisition of so-called open space covenants with private landowners (S. 22), but it can also purchase (and sell) land (S. 21 (2)). The trust can agree with the landowner to protect (a part of) his land through an open space covenant (S. 22(1)).'Open space' can relate to an area of land *or body of water* (S. 2). The trust's website mentions nature conservation as one of its primary tasks, specifically also referring to wetlands (https://qeiinationaltrust.org.nz/protecting-your-land). A conservation covenant can relate to various duties, such as a prohibition of fishing in a river or a duty to prevent pests. In exchange, the trust offers landowners advice, assistance or financial compensation for maintaining the protected area.

Open space covenants enjoy increased popularity in recent years (QEII Annual Report 2017). They went from 826 covenants covering 'only' 28,529 hectares in 1995 (Saunders, 1996, p. 325), to 4,425 covenants covering more than 180,000 hectares of protected land as of December 2018 (https://qeiinationaltrust.org.nz/about-us). A clear advantage of conservation covenants is that the costs will generally be lower than acquiring full ownership (Maron, Rhodes, & Gibbons, 2013; Iftekhar et al., 2014; Law Commission, 2014; Holligan, 2018). This makes it 'a low-cost option for governments to complement public protected areas' (Adams & Moon, 2013). The QEII Trust is estimated to save the government NZD 25 million per year in maintenance costs (Scrimgeour & Vijay, 2017). In 1977–2017, this resulted in an estimated financial commitment by private landowners of NZD 1.1–1.3 billion (Scrimgeour & Vijay, 2017).

Another strong feature of the QEII Trust is that it arranges for two-yearly supervision of all protected areas (https://qeiinationaltrust.org.nz/managing-your-covenant). In 2017, it monitored 1902 covenants for compliance, of which 217 (11%) needed attention (QEII Annual Report 2017). The trust does not shy away from going to court to enforce a covenant if necessary (Briefing to the Primary Production Select Committee, 2015). It follows from a 2018 New Zealand Supreme Court ruling that (subsequent) landowners cannot easily avoid their obligations under a covenant (*Green Growth No.2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 115).

On the other hand, the weaknesses of the system have also become visible due to the rapid growth in protected land. Although conservation covenants are cheaper to obtain than full ownership, there are still substantial costs.[4] Assistance in maintenance, supervision and enforcement require a large budget. To progress a covenant costs about NZD 22,000 (Scrimgeour & Vijay, 2017). For this the trust is largely dependent on public funding, and about 50 applications for covenants are refused annually due to a lack of

financial means (Briefing to the Primary Production Select Committee). Furthermore, because the trust is established by statute and financially dependent on the government, it is not fully independent from politics. Another important weakness is that covenants are less popular for protecting wetlands. Just a small portion of the protected land (7500 hectares, 5 %) consists of wetlands (QEII Annual Report 2017).

Limitations of the use of property rights in protecting water bodies

The previous sections have shown that private property rights can provide legal tools in protecting bodies of water, but several legal and practical limitations were also mentioned. For example, in the Netherlands, one cannot impose a main positive duty on an owner by means of a qualitative duty. In New Zealand the law only grants very few organizations the power to progress conservation covenants. This may limit initiatives by other private parties. Moreover, the role of property rights is (obviously) limited with respect to navigable waterways which are fully owned by the State in both jurisdictions. The same applies to waters which are not owned by anyone, such as the water in streaming bodies of water or the high seas. Furthermore, nature protection via property rights requires sufficient funds, since they often have acquisition, maintenance, supervision and enforcement costs. They may also reduce the sales value of the property (Comerford, 2013).

Another major limitation is that private nature conservation depends on the voluntary choice of a landowner (Saunders, 1996). This may make it particularly challenging to protect rivers through property rights: rivers are usually owned by a large number of (willing and unwilling) private owners with various, often conflicting, interests. This means that (unwilling) private owners may stand in the way of protecting rivers. This is particularly so since expropriation of privately owned lands for the purpose of nature conservation is a politically sensitive measure which is little used (Jager, 2012). Moreover, subsequent landowners may not share the eco-friendly vision of the previous owner, which can be a potential obstacle to achieving nature conservation outcomes (Holligan, 2018; Fitszimons & Carr, 2014), particularly if long-term protection is aimed for. In particular, imposing positive duties on smaller landowners, such as conservation management tasks (e.g., pest control), may reduce the effectiveness of private nature conservation. A landowner may be unwilling to participate due to the (financial) burden of such duties or may be unable to fulfil positive duties due to a lack of expertise or skills (see also Moon, 2013).

These limitations mean that for their protection through property rights, water bodies and rivers depend heavily on (present and future) human owners and their priorities. Although attitudes may have become more nature-friendly over the last two centuries, water bodies are still merely an ‘object’ of property relationships between humans. The question is whether the allocation of property rights to nature itself may help overcome these limitations. This would imply a fundamental shift from inter-human relationships to true legal relationships between humans and nature. For many private lawyers this may sound like science fiction, but assigning ownership to nature itself is exactly what has been done in New Zealand.

Beyond human ownership: the Whanganui River

Largely influenced by Maori culture, the New Zealand legal system embraced the idea that nature, rather than being merely an object of human possession, can itself be a holder of (property) rights. The Te Awa Tupua (Whanganui River Claims Settlement) Act (2017) grants the Whanganui River (in Maori: Te Awa Tupua) legal personhood and establishes that it 'has all the rights, powers, duties, and liabilities of a legal person' (S. 14(1)).[5] The river acts and speaks through a representative body, Te Pou Tupua (S. 19(1)(a)), which consists of a Maori representative and a representative of the Crown (S. 20). Te Pou Tupua protects the status of the river and promotes and protects its health and well-being (S. 19(1)(b)-(c)). Furthermore, Te Pou Tupua exercises the rights, powers, and duties of Te Awa Tupua (S. 19(2)), among which are its rights as an owner.

A key feature of the act is that the river is given ownership over its own riverbed. This is a fundamentally different approach from the Western property concept discussed above, as the river is no longer considered just an object of relationships between humans. This approach connects well to indigenous human–nature perspectives: the Maori do not see nature as a commodity which they possess and which can be traded (Magallanes, 2015). They see themselves as 'users of something controlled and possessed by gods and forebears' (Waitangi Tribunal, 1999, p. 48). They consider the river a spiritual entity and refer to it as 'Te Awa Tupua': 'an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements' (S. 12 of the Te Awa Tupua Act; see also Argyrou & Chaturvedi, this issue). The Maori have long been involved in conservation management of the Whanganui lands. For example, they have joined various collective management efforts together with the (governmental) Department of Conservation, 'such as Kia Whārite, Mangapāpapa, Te Amo Taiao, the Mountains to Sea Cycle Trail Ngā Ara Tūhono, whio (blue duck) recovery and Tīeke Kāinga' (New Zealand Department of Conservation, 2012, p. 25; see also pp. 15–16, 26).

The Te Awa Tupua Act has been a major step in acknowledging the 'property claims' of the Whanganui Iwi, the Maori living in the lands of the Whanganui River. Such claims may seem to contradict their convictions regarding their position towards nature as explained above, but in Western legal systems conflicts over property rights are difficult to avoid, and claiming ownership was the most appropriate way to regain Maori control over the river. Therefore ownership of the river was said to be 'the heart, the core, and the pith' of the Whanganui Iwi claim (Waitangi Tribunal, 1999, p. 332). Allocating property rights to nature itself has been said to be as close as you can get in Western legal systems to the Moari perception of nature (Magallanes, 2015). However, others claim that the transfer of ownership to the river is in essence a compromise between two parties fighting over ownership (Sanders, 2018).

The Te Awa Tupua Act establishes a major shift in current property rights. All parts of the riverbed previously held by the Crown are now vested in Te Awa Tupua (S. 40–41). In principle, the land owned by the river cannot be sold, given away, mortgaged, charged or otherwise transferred (S. 43). If the riverbed changes, previously transferred land which has ceased to be part of the river is returned to the Crown (S. 54), while Crown-owned newly formed parts of the riverbed are transferred to Te Awa Tupua (S. 53).

With ownership comes responsibility. The river can become liable for damages in its capacity as an owner, for example if a construction it owns collapses and causes damage to

another person's property. But liability for structures, contamination and activities which already existed at the time of the transfer of ownership are excluded (S. 56 and Schedule 5, clause 1). Te Pou Tupua may apply for public funding if it lacks the means to fulfil the landowner functions for the river, e.g., to pay damages (Schedule 5, clause 3).

A major limitation to the new property regime is that already existing private property rights in the river are unaffected unless expressly provided otherwise (S. 16 (a) and 48). Private property rights can only be acquired with full consent of the right holder.[6] In addition, the transfer does not affect the Crown's right to mine for minerals (S. 44(2)). This weakens the ecological protection of the Whanganui River (likewise with respect to the overriding public right to mine and conservation covenants; see Adams & Moon, 2013). Another limitation is that only the riverbed is owned by the river. The transfer of the Crown-owned parts of the bed does not create or transfer any proprietary interest in wildlife, fish, aquatic life, seaweeds or plants (unless attached to the riverbed, S. 46). This obviously conflicts with the Maori notion that the river is an indivisible whole from mountains to the sea, incorporating all its physical and meta-physical elements (see also Magallanes, 2015).

The added value of river-held ownership in comparison to conventional property rights

In property law, water bodies are traditionally merely objects of property: they are not a legally acknowledged actor in the human relationships that are characteristic of private law. The New Zealand Te Awa Tupua Act constitutes a fundamental change in allowing a river to become 'legally relevant'. The Crown-owned parts in the riverbed are now owned by the river itself. If anything, this novel property regime sends out a clear political message: rivers have value and rights, independent from humans (see also Magallanes, 2015).

More cynically, the transfer of ownership to the river is a compromise between the Maori Iwi and the Crown, who both claimed ownership over the river (Sanders, 2018). Assigning property rights to the river implies non-ownership of both parties and a neutral platform for better future cooperation (Sanders, 2018; for a historical overview see Hsiao, 2012). Interestingly, the latter explanation is highly human-centric: the transfer of ownership to the river in this scenario would be no more than a compromise meant to solve a human conflict. A similar political result might have been reached by granting ownership to an independent party, such as an environmental NGO.

Whatever may be the main motivation for granting ownership to the river, it is not merely symbolic: there are some clear legal implications. First, all previously crown-owned parts of the river bed may no longer be alienated, which is normally not the case if a river is privately owned. Second, the Te Pou Tupua board must act in the best interest of the river. Compared to publicly owned rivers, this makes the river less vulnerable to the whims of politicians, provided that new governments respect the Te Awa Tupua Act.

On the other hand, independence from politics could have also been achieved by granting ownership to a well-meaning private party, similar to Nature Monuments or the QEII Trust. By means of a conservation covenant the owner could then be held to its duties to the river in perpetuity. Arguably, such private parties are even more

independent than Te Pou Tupua, since one of the two seats in the board is reserved for a Crown representative.

Furthermore, the transfer of ownership to the river does not eliminate many of the limitations of private nature conservation discussed above. For example, it is not necessarily cheaper. As stated earlier, one of the main disadvantages of water conservation through private property rights is the acquisition and maintenance costs. The Crown-owned parts are given to the river for free, but they could also have been given for free to a private party. Moreover, the nature maintenance costs stay the same. Where Te Pou Tupua lacks the financial means to exercise its function as an owner, it may apply for public funding (Schedule 5, clause 3). Since the Crown-owned parts already led to public expenses anyway, financially the situation has not changed. However, costs may increase with respect to privately owned parts of the riverbed which are voluntarily transferred to the river. Thus, from a financial point of view, passing on ownership to the river itself is not more beneficial for public expenditure than nature management by private owners. Rather the opposite.

Another important disadvantage of private property rights is that a river requires coordinated management, which cannot easily be achieved through multiple (willing and unwilling) private owners. The notion that the river is one living whole is useful in this regard. It requires us to think from the perspective of the river, rather than in terms of (conflicting) private interests. However, the new property regime has not changed the fact that the water in the river cannot be owned, not even by the river itself. Moreover, existing private property rights are unaffected by the new property regime. Apparently, the New Zealand government considered a large expropriation exercise a step too far, which means that coordinated management of the river may still prove challenging.

This means that the innovate property regime in the Te Awa Tupua Act does not overcome some important limitations of private conservation through conservation covenants or (full) ownership, as discussed above. However, in one way the Te Awa Tupua Act may indeed lead to more future-proof protection of the river. As mentioned, the river-owned parts can no longer be transferred to a new owner. And one important weakness of private nature conservation is that new owners may not be willing to carry out the nature conservation duties that come with the property. Future-proof private nature conservation thus calls for continuous monitoring and (where necessary) enforcement of private property rights. For the river-owned parts of the Whanganui River, these (risky) changes of ownership are no longer possible.

Conclusion

This article has argued that private property rights can be an additional tool in protecting bodies of water which is largely independent from politics. The example of Nature Monuments in the Netherlands shows that (big) private owners can protect bodies of water in a two-tier fashion: by acquiring ownership; and by public–private partnerships with a view to protecting waters. In New Zealand, the QEII Trust demonstrates that, collectively, small(er) private landowners can have a considerable positive impact through conservation covenants, although this system has been less successful with respect to wetlands.

A combination of the two systems discussed has even more potential. A large private landowner such as Nature Monuments can establish a coordinated approach to water management, which can be supplemented with limited property rights (conservation covenants or qualitative duties) in relation to smaller landowners (the QEII model). However, there are legal and practical limitations to protecting water bodies via private property rights. Among them are the high costs of acquisition, dependency on the private owner's own volition, and high supervision and enforcement costs.

The Whanganui River is a novel step in acknowledging nature as a holder of rights rather than a mere object of human ownership. Legally, the biggest practical difference is that, compared to conventional property rights held by private individuals or NGOs, the previously Crown-owned parts of the river may no longer be alienated. The new property regime is fixed and may therefore lead to more sustainable nature conservation. In practice, though, most of the other challenges noted with respect to water conservation through private property rights, persist. This is particularly so because private ownership is not affected by the new property regime. This shows how difficult it is for Western legal systems to fully depart from the human-centric nature of property law and to limit private property rights for the sole sake of nature protection.

Nonetheless, the Te Awa Tupua Act and its novel approach to property rights may prove to be an important step in changing human–nature relationships in, and beyond, property law. This novel step was taken even though most of New Zealand property law is, like Dutch property law, highly human-centric. The biggest implications are probably political and psychological, rather than legal. The notion that a river owns itself can motivate us to disentangle the interests of the river from human interests. This may lead to better ecological awareness and policies, although further research into the actual effects is required. If anything, New Zealand sets an interesting example of how a Western country can adopt an alternative perspective on ownership with a view to protecting waters and maybe even nature at large. The Whanganui River can be a source of inspiration for countries seeking alternatives to water conservation and to the inherently human-centric approach to ownership in most Western legal systems.

Notes

1. In this article, the focus is on private ownership (as a relatively unexplored tool in environmental protection) rather than public (state) ownership.
2. A more recent example is the Hostermeerpolder (https://www.natuurmonumenten.nl/natuurgebieden/horstermeerpolder).
3. https://www.natuurmonumenten.nl/natuurgebieden/kleine-meer/nieuws/metamorfose-natuurgebied-kleine-meer-en-groote-meer.
4. See also Hawes and Memon (1998) on the Forest Heritage Fund, another covenanting organization in New Zealand.
5. Similarly, the Te Urewera Forest was granted legal personhood and property rights in 2014 (S. 11-12 of the Te Urewera Act 2014). In 2017 it was decided that Mount Taranaki would also be given legal personhood (Cheng, 2017).
6. A slightly different rule applies to Maori freehold land, a form of community-held land which requires 75% of the owners or freehold beneficiaries to consent to the transfer (S. 49).

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