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Of Forests and Rivers Owning Themselves: Looking for a Place for Te Urewera and Te Awa Tupua in Constitutional Property Law and Theory

Björn Hoops*

The legislature of New Zealand has declared the former national park Te Urewera and the river Te Awa Tupua legal persons (environmental persons). It has also vested landownership in these environmental persons. Natural entities owning themselves question fundamental pillars of constitutional property law and theory, specifically the protection of property for human benefit rather than the benefit of the nonhuman objects of ownership and compensation as the standard remedy for expropriations and excessive limitations of property. This Article examines whether the ownership of Te Urewera and Te Awa Tupua can be reconciled with these pillars of constitutional property law and theory. It shows that the legislation on Te Urewera and Te Awa Tupua limits the ownership largely in accordance with the needs of Māori living on the land of the environmental person or in its vicinity. The Article demonstrates that existing property theories, specifically green property theories and the theory of human flourishing, can still explain the balance between the ownership held by these environmental persons and the interests of the human public. By contrast, as the legislation on Te Urewera and Te Awa Tupua confirms, compensation in money will generally not be an adequate or appropriate remedy for expropriations or excessive limitations of the ownership of environmental persons because money cannot equalize the harm done to the environmental person. The invalidity of the state action or suitable replacement land should be the standard remedy in such cases.

* PhD LLM (Groningen) LLM LLB (Bremen/Oldenburg) BSc (Hagen). Chair of Private Law and Sustainability at the University of Groningen. I am indebted to two anonymous reviewers, Laura Burgers, John Lovett, Hans van Willenswaard, and Tim Williams for their valuable comments on a draft version of this Article. All remaining errors are my own.

I. Introduction

Property law and theory stand on certain pillars, which are assumptions about the relationship between what is owned and the person of the owner. One of the assumptions is that the owner (in other words, the subject) and the object

of ownership are separate.[1] The object is nonhuman and does not have any rights of its own. There is a clear hierarchical relationship between subject and object in that the subject holds power over the object. Drawing on the assumption of separation of subject and object, a pillar of constitutional property law, which governs the relationship between the state's power and private property rights, is that the object can be adequately replaced by another asset of the same value, specifically money.[2] For this reason, most jurisdictions provide for equitable compensation in money as the standard remedy for expropriations and excessive limitations of property by the state.[3] A second pillar of constitutional property law and theory is that human owners (or the legal persons representing them) may use the object for the benefit of themselves or the human community.[4] The law safeguards this power through the constitutional property protection from expropriation and excessive limitations.

Recent legal developments in New Zealand question these pillars of constitutional property law and theory. As part of a global move towards "Rights of Nature,"[5] the legislature of New Zealand has declared the national park Te Urewera and the river Te Awa Tupua to be legal persons. Moreover, the fee simple of the (now former) national park was vested in the legal person Te Urewera and the fee simple of the bed of the Whanganui River was vested in the legal person Te Awa Tupua.[6] The assumption that there is a separation of subject and object, does not apply to the "environmental persons" of Te Urewera and Te

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[1] J Waldron, 'What is Private Property?' (1985) 5(3) OJLS 313, 313-4.

[2] B Hoops, *The Legitimate Justification of Expropriation* (Juta 2017) 7.2.3.4.

[3] See, for instance, the Fifth Amendment to the U.S. Constitution, which requires just compensation for takings of property. For the most part, the debate in the literature revolves around the questions of why and under what circumstances compensation should be paid. Refer to, amongst others, FI Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law' (1967) 80(6) HarvLR 1165.

[4] GS Alexander & EM Peñalver, *Introduction to Property Theory* (CUP 2012).

[5] See, for instance, S Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5(1) TEL 113.

[6] Section 12 Te Urewera Act 2014; Section 41 Te Awa Tupua Act 2017. In this Article, "ownership" will be used interchangeably with fee simple. Ownership is the civil-law equivalent of fee simple or freehold. In common law jurisdictions, there is no legal concept of ownership: JHM van Erp & B Akkermans (eds), *Cases, Materials and Text on Property Law* (Hart Publishing 2012) 306 *et seq*.

Awa Tupua. The fact that there is a separate legal person holding the property right, cannot disguise that the former national park Te Urewera and the river Te Awa Tupua are both subject and object of the property right.[7] This insight casts doubt on the suitability of compensation as a remedy under constitutional property law. Moreover, these natural entities owning themselves may preclude humans from benefitting from their natural resources. This insight calls for an examination of the extent to which constitutional property law, intended to promote human advancement, actually protects the environmental person's property right and, thereby, its right to self-determination and to manage its use.

The two described pillars of constitutional property law and theory thus create pitfalls for the constitutional property protection of the ownership held by the environmental persons Te Urewera and Te Awa Tupua. More specifically, it is the anthropocentric character of these pillars that creates these pitfalls. Anthropocentric approaches to nature put human needs and perspectives at the center of any analysis. Nature is only protected insofar as it is conducive to human society.[8] Pillars of constitutional property law and theory that are aimed at human advancement and consider parts of nature objects capable of being substituted by money are expressions of anthropocentric law and theory. Anthropocentric approaches must be distinguished from ecocentric approaches. The latter would decenter human needs and require human institutions to protect nature for its own sake.[9] Unlike anthropocentric approaches, ecocentric approaches are rare in legal systems around the world and nonexistent in property law and theory.

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[7] A De Vries-Stotijn, I Van Ham & K Bastmeijer, 'Protection through Property: from Private to River-held Rights' (2019) 44(1) Water Intl 736, 738 and 745; Borràs, (n 5) 114 *et seq*; C Clark, N Emmanouil, J Page & A Pelizzon, 'Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance' (2017) 45(4) Ecology LQ 787, 831; LP Breckenridge, 'Can Fish Own Water?: Envisioning Nonhuman Property in Ecosystems' (2005) 20(2) JLandUse&EnvtlL 293.

[8] Borràs (n 5) 128 *et seq*; J Kersten, 'Das Anthropozän-Konzept' (2014) RW Rechtswissenschaft 378, 379 *et seq*.

[9] Breckenridge (n 7) 298 *et seq* and 307; Clark et al (n 7) 836 *et seq*; GJ Gordon, 'Environmental Personhood' (2018) 43(1) ColumJEnvironL 50, 72; EL O'Donnell & J Talbot-Jones, 'Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India' (2018) 23(1):7 Ecology & Society 3 *et seq*.

An example of an ecocentric approach would be nature's fundamental rights under Chapter 7 of the Constitution of Ecuador.[10]

This Article discusses whether and how the ownership held by Te Urewera and Te Awa Tupua can be reconciled with the focus on human needs under current property law and theory and with compensation in money as the standard remedy for expropriation and excessive limitations. In addition to the legislation on Te Urewera and Te Awa Tupua, this Article considers other jurisdictions to specify the anthropocentric pitfalls facing environmental persons owning themselves. In particular, it makes reference to three major jurisdictions with a vast body of law on human-rights or constitutional property protection: Art. 1 of the First Protocol to the European Convention of Human Rights (A1P1), Art. 14 of the German Constitution, the Basic Law of 1949 (*Grundgesetz*), and the Fifth and Fourteenth Amendments to the Constitution of the United States of America. Although this comparative analysis requires the hypothetical scenario that jurisdictions other than New Zealand introduced environmental persons owning themselves, this Article goes beyond New Zealand because New Zealand does not have a constitutional property clause.[11] Having specified the pitfalls, this Article goes on to analyze the extent to which property theories, mostly originating from the United States and other common-law jurisdictions but increasingly gaining importance beyond the common-law world, are able to explain the rights and obligations of Te Urewera and Te Awa Tupua as owners in relation to human society. It thus examines the need for a separate theory of property rights held by environmental persons.

This Article shows that the legislation on Te Urewera and Te Awa Tupua does not put an end to the dominance of human needs. Their property and the balance between it and human needs can be explained through already existing green property theories and the theory of human flourishing. So far, there is thus no need for a separate theory of

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[10] cf Borràs (n 5) 134 *et seq*.

[11] On the protection from limitations of property: L Evans & N Quigley, 'Compensation for Takings of Private Property and the Rule of Law', in R Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis 2011) 233. For protection from expropriation in New Zealand, refer to the Public Works Act 1981.

property rights held by environmental persons. However, this Article does argue that, as the legislation on Te Urewera and Te Awa Tupua confirms, compensation in money should not be the standard remedy for excessive limitations and expropriations of the ownership of environmental persons because it does not adequately equalize the harm done to environmental persons.

This Article is structured as follows. In Section II, it introduces the concept of "Rights of Nature" and, in particular, Te Urewera and Te Awa Tupua as natural entities and legal persons that hold property rights in themselves. Section III sets out the rights and obligations of Te Urewera and Te Awa Tupua as owners and discusses the extent to which these arrangements still reflect current constitutional property law and theory. Section IV focuses on compensation in money as the standard remedy for expropriation and excessive limitations of property. It answers the question of whether it still has a place in the protection of environmental persons, specifically Te Urewera and Te Awa Tupua. Section 5 concludes this Article.

II. Of Indigenous Areas and Rivers Owning Themselves

In most legal systems, nature is not recognized as a person holding rights and liabilities. Nature is rather seen as an object that is in need of protection from human activities. For this purpose, legislatures and regulators adopt and administer environmental law. However, in this process, nature does not have any voice of its own.

As a response to the dominance of human needs in legal systems and the perceived failure of states to enact and/or enforce sufficient environmental-law rules to protect nature, the past five decades have seen a growing debate about "Rights of Nature."[12] This debate started

[12] K Bosselmann, 'Property Rights and Sustainability: Can They be Reconciled?' in P Taylor & DP Grinlinton (eds), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Brill | Nijhoff 2011) 23; Gordon (n 9); Borràs (n 5) 114 and 129; TE Johnson, 'Enter Sandman: The Viability of Environmental Personhood to US Soil Conservation Efforts' (2017) 20(1) Vanderbilt J Entertainment & Technology L 259. See, however, J Bétaille, 'Rights of Nature: Why it Might Not Save the Entire World' (2019) 16 JEEPL 35, 60 *et seq*.

with Christopher Stone's seminal 1972 article on giving natural entities standing in court.[13] It has since expanded to include rights of forests, rivers, and other natural entities more generally and enabling them to assert their rights through representatives.

Recently, increasingly more jurisdictions, either through legislation or court judgments, have adopted Rights of Nature in various forms.[14] The most far-reaching reform was the introduction of Nature's fundamental rights through the 2008 Constitution of Ecuador. Chapter 7 establishes the "Rights of Nature".[15] Article 71 stipulates that nature (Pacha Mama) has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes. Article 72 provides for its right to be restored.

This Article deals with another form of the "Rights of Nature." In Australia, Canada, Colombia, India, New Zealand, and Spain, legislatures or courts have assigned legal personality to natural entities with all conventional rights, for example standing in court, and liabilities attached to environmental personhood.[16] This Part and the whole

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[13] CD Stone, 'Should Trees Have Standing?—Towards Legal Rights for Natural Objects' (1972) 45 SCalLR 450.

[14] Clark et al (n 7); H White, 'Indigenous Peoples, the International Trend Toward Legal Personhood for Nature, and the United States' (2018) 43(1) AmIndLR 129; C Iorns Magallanes, 'From Rights to Responsibilities using Legal Personhood and Guardianship for Rivers' in B Martin, L Te Aho & M Humphries-Kil (eds), *ResponsAbility: Law and Governance for Living Well with the Earth* (Routledge 2019) 216; Borràs (n 5) 130 *et seq*; S Knauß, 'Conceptualizing Human Stewardship in the Anthropocene: The Rights of Nature in Ecuador, New Zealand and India' (2018) 31(6) J Agricultural & Environmental Ethics 703.

[15] cf Borràs (n 5) 134 *et seq*.

[16] Australia: Water Amendment (Victorian Environmental Water Holder) Act, No. 50 of 2010. Canada: On 16 February 2021, the regional municipality of Minganie and the Innu Council of Ekuanitshit granted the Magpie River legal personhood and, amongst nine legal rights, the right to take legal action. Colombia: Corte Constitucional 10 November 2016, Ruling T-622 of 2016, Expediente T-5.016.242. Cf L Cano Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' (2018) 7(1):13 Resources 1, 8. India: High Court of Uttarakhand at Nainital 20 March 2017, *Salim v State of Uttarakhand*, Writ Petition (PIL) No. 126 of 2014, para 19, High Court of Uttarakhand at Nainital 30 March 2017, *Lalit Miglani v State of Uttarakhand And Others*, Writ Petition (PIL) No. 140 of 2015, 66, and Punjab-Haryana High Court 2 March 2020, *Court On Its Own Motion vs Chandigarh Admn*, CWP No. 18253 of 2009 & other connected petitions. S Paul, 'River as a Legal Entity: An Analysis in the Light of Mohammed Salim vs. State of Uttarakhand' (2018) VIII(4) IUP LR 33. However, note that in the meantime, the Indian Supreme Court has suspended one of the judgments that declared that the river

Article only discuss Te Urewera and Te Awa Tupua in New Zealand because they are the only natural entities that as legal persons, hold property rights in themselves, whether by virtue of legislation or otherwise. In the following two paragraphs, this Part introduces the legal persons Te Urewera and Te Awa Tupua and indicates the extent to which they own the natural entity that they embody.

Te Urewera is home to the Tūhoe, a Māori *iwi* (tribe), located on the North Island of New Zealand. This isolated area is a mostly forested natural paradise with lakes and an abundance of animal species. To Tūhoe the area has great cultural and spiritual value because the river may be the reincarnation of an ancestor. Until 2014 Te Urewera was a national park. Based on an agreement between the iwi and the New Zealand government,[17] the Te Urewera Act 2014 repealed the status of national park and declared Te Urewera to be a legal person with all rights, powers, duties, and liabilities of legal persons.[18] Te Urewera is represented by the Te Urewera Board. Since 2017 the Board has consisted of nine members, six appointed by the iwi's trustees and three appointed by the Minister of Conservation.[19] The Board adopts a management plan on how to preserve Te Urewera and keep the adverse impact of human activity to a minimum.[20] Section 12 of the Te Urewera Act is the most intriguing to property lawyers. It divests the Crown of the fee simple estate in the land and vests it in Te Urewera.

Te Awa Tupua includes the Whanganui River on the North Island of New Zealand, which is part of a greater ancestral entity to several Māori iwi. To resolve conflicts over ownership claims to the river, the Te Awa Tupua (Whanganui River Claims Settlement) Act was adopted in 2017.[21] The Act declared Te Awa Tupua to be a legal person.[22] This legal person

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Ganges was a distinct person: G Eckstein, 'Conferring Legal Personality on the World's Rivers: A Brief Intellectual Assessment', (2019) 44(1) Water Intl 1, 3 and 6. New Zealand: Te Urewera Act 2014 and Te Awa Tupua Act 2017. And Spain: on 5 April 2022, the Spanish legislature vested legal personality in the Mar Menor Lagoon.

[17] cf K Sanders, ''Beyond Human Ownership?' Property, Power and Legal Personality for Nature in Aotearoa New Zealand' (2018) 30(2) JEL 207, 207 *et seq*.

[18] Section 11 Te Urewera Act. Cf Gordon (n 9); O'Donnell & Talbot-Jones (n 9).

[19] Section 21(2) Te Urewera Act. See Section 21(1) for its earlier composition.

[20] Sections 44 *et seq* Te Urewera Act.

[21] Clark et al (n 7) 800 *et seq*.

[22] Section 14 Te Awa Tupua Act.

is represented by the Te Pou Tupua, which office consists of two persons, one appointed by the Crown and one by the Māori iwi concerned.[23] Section 41(1) of the Act vests the fee simple estate of the Crown-owned parts of the bed of the Whanganui River in Te Awa Tupua. Under Section 53, the fee simple estate expands or shrinks depending on natural changes to the course of the river. Section 49 Te Awa Tupua Act 2017 allows Māori freeholders to request the Māori Land Court to vest their title in Te Awa Tupua.

III. Te Urewera and Te Awa Tupua in Anthropocentric Property Law

In Western-style property-law thinking, any limitation of ownership will only be valid if it is justified by other rights or the public interest. In the absence of limitations, the point of departure is that an owner can do as they please.[24] This point of departure promises natural entities that own themselves and their representatives the ability to exclude harmful human activities. Through private enforcement of their property rights, this offers the opportunity of self-management that is more isolated and insulated from decision-making in a human democracy than if nature had to rely upon human democracy to regulate the harmful acts of human owners. As, moreover, ownership has proven to be quite resilient over time, it is not surprising that advocates of environmental protection are trying to use ownership for their own advantage.[25] This is ironic because it is absolute ownership held by humans that fuels the over-exploitation of the environment.[26]

Despite this point of departure, the reality of the administrative state shows that property has been limited and expropriated to pursue public interests to a large extent.[27] The relationships of owners with the outside

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[23] Sections 18 *et seq* Te Awa Tupua Act.
[24] AJ Van der Walt, *Property in the Margins* (Hart 2009) 27 *et seq*; Iorns Magallanes (n 14).
[25] Sanders (n 17) 217 *et seq*; J Waldron, 'The Normative Resilience of Property' in J McLean (ed), *Property and the Constitution* (Hart Publishing 1999) 170.
[26] F Capra & U Mattei, *The Ecology of Law* (Berrett-Koehler 2015).
[27] WE Nelson, 'The Growth of Distrust: The Emergence of Hostility Toward Government Regulation of the Economy' (1996) 25(1) HofstraLR 3; RJN Schlössels & SE Zijlstra, *Bestuursrecht in de sociale rechtsstaat* (Kluwer 2010) 9 *et seq*, 17 *et seq* and 39 *et seq*.

world are mostly very complex because the allocation and exercise of ownership leads to the exclusion of others from the use of a resource and to various external effects, such as harm to health and nature through pollution. To prevent or alleviate the adverse impact of ownership, courts and legislatures create a web of rules governing the ownership. The mere fact that forests and rivers own themselves thus reveals little about their actual rights and obligations.

The legislation on Te Urewera and Te Awa Tupua also specifies the rights and obligations of the environmental persons as owners. For lack of a constitutional property regime in New Zealand,[28] these rights and obligations reflect what is considered appropriate protection of the environmental person's ownership from excessive limitations and expropriations in New Zealand. In many other jurisdictions, the protection of ownership from state action is the realm of constitutional property law and theory. The fact that the ownership is held by an environmental person introduces a complicating factor in these jurisdictions and property theory, creating the first pitfall for the property protection of the environmental person. Constitutional property law and theory are anthropocentric in that property is protected as a means for human beings to use nonhuman objects for human benefit.[29] By contrast, the environmental person's ownership is meant to protect nonhuman objects from human activities and may preclude human benefits.

Against this background, this section examines whether Te Urewera and Te Awa Tupua require a separate property theory on the protection of their ownership from excessive limitations and expropriations. Based on comparative law research, this section first introduces constitutional property protection with a focus on its anthropocentric features, distinguishes these features from an ecocentric approach, and points out the theoretical bottlenecks created by the environmental person's ownership (Part III.A.).[30] It then sets out the rights and obligations of Te

[28] Evans & Quigley (n 11).
[29] Alexander & Peñalver (n 4).
[30] This Part is partially based upon a more detailed examination of German law in section 3 and sub-section 4.1 of B Hoops, 'What If the Black Forest Owned Itself? A Constitutional Property Law Perspective on Rights of Nature' (2022) 11(3) TEL 475.

Urewera and Te Awa Tupua (Part III.B.). Subsequently, it examines whether the legislation on Te Urewera and Te Awa Tupua reflects an anthropocentric or ecocentric approach to their property (Part III.C.). Lastly, this section examines the extent to which already existing constitutional property theories are able to explain the rights and obligations of Te Urewera and Te Awa Tupua (Part III.D.).

A. Anthropocentric Constitutional Property Law and Theory

Constitutional property law generally distinguishes between two different types of state action affecting property.[31] These categories bear many different names in different jurisdictions. This Article calls those two types expropriation and limitations. The definition of expropriation is disputed in many jurisdictions.[32] Traditionally, expropriations are a means of the state to acquire land for a public purpose, such as railways or schools. Such expropriations can be defined as unilateral state action whereby the state acquires specific property rights to use them in the public interest or to transfer them to a third party for a use in the public interest.[33] Such expropriations are distinguished from limitations, which are mere restrictions to the disposal, enjoyment, and use of property. While compensation is always due for expropriations, the state generally does not need to pay for limitations in the public interest.[34]

There is a gray zone consisting of limitations with an excessive impact upon the holder of the property. For example, the limitations may render investments worthless[35] or preclude all beneficial economic uses.[36] In such cases, compensation will be due. Under U.S. law, for instance, this type of state action may fall under categories such as

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[31] B Akkermans, 'A Comparative Overview of European, US and South African Constitutional Property Law' (2018) 7(1) Eur Property LJ 108.
[32] See, for instance, B Edgeworth, 'When Does State Action Amount to Expropriation? Recent Australian Developments' in B Hoops et al (eds), *Rethinking Expropriation Law I: Public Interest in Expropriation* (Eleven 2015) 389.
[33] This definition of expropriation equals the definition of *Enteignung* in terms of Art. 14(3) of the German Basic Law (GG): Bundesverfassungsgericht 6 December 2016, (2017) *Neue Juristische Wochenschrift* 217, 224.
[34] Akkermans (n 31); JL Sax, 'Takings and the Police Power' (1964) 74 Yale LJ 36.
[35] European Court of Human Rights (ECtHR) 18 February 1991, *Fredin v. Sweden*, App. No. 12033/86.
[36] ECtHR 29 March 2011, *Potomska and Potomski v. Poland*, App. No. 33949/05.

inverse condemnations or regulatory takings.[37] This Article will use the term "excessive limitations."

Expropriations and limitations of property are subject to legal limits. These limits vary by jurisdiction, and this Article cannot provide a comprehensive account.[38] A common denominator seems to be that limitations and expropriations must be authorized by law and serve a public interest.[39] Moreover, particularly in European jurisdictions, an expropriation will only be lawful if it is "proportionate."[40] A limitation will be unlawful or at least attract compensation as an excessive limitation if it is disproportionate.[41] In addition to the suitability[42] and necessity[43] of the state action to pursue a public interest, proportionality

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[37] DA Dana & TW Merrill, *Property: Takings* (Foundation Press 2002) 199; JE Nowak & RD Rotunda, *Principles of Constitutional Law* (4th edn, Reuters 2010) 276 *et seq*.

[38] Refer to the comparative works of Akkermans (n 31), R Alterman, *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (ABA 2010), AJ Van der Walt, *Constitutional Property Law* (3rd edn, Juta 2011), and Hoops (n 2).

[39] On expropriation specifically: NK Tagliarino, *National-Level Adoption of International Standards on Expropriation, Compensation and Resettlement* (Eleven 2019). German law: Refer to Art. 14(1) and (3) GG. Under German law, expropriations must serve the "public good" and be authorized by legislation. A1P1: Refer to A1P1 and ECtHR 9 November 1999, *Špaček s.r.o. v. Czech Republic*, App. No. 26449/95, paras 54 and 57. Under A1P1, expropriations and limitations must serve the "public interest" and may also be authorized by case law or regulations. U.S. law: Refer to the Fifth Amendment that requires a taking to serve a "public use." Under U.S., law limitations can also be based upon common law. C Harrington, '"Penn Central" to "Palazzolo": Regulatory Takings Decisions and Their Implications for the Future of Environmental Regulation' (2002) 15(2) Tulane Envtl LJ 383.

[40] On jurisdictions in Europe generally: JAMA Sluysmans, S Verbist & EJL Waring (eds), *Expropriation Law in Europe* (Kluwer 2015). A1P1: ECtHR 21 February 1986, *James and Others v. The United Kingdom*, App. No. 8793/79, para 54, referring to an "individual and excessive burden." German law: Bundesverfassungsgericht 17 December 2013, (2014) *Neue Zeitschrift für Verwaltungsrecht* 211, 215 *et seq*.

[41] For a comparative overview: Alterman (n 38). A1P1: ECtHR, Grand Chamber 30 August 2007, *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. The United Kingdom*, App. No. 44302/02, para 75; ECtHR, Grand Chamber 30 June 2005, *Jahn and Others* v. *Germany*, App. Nos. 46720/99, 72209/01 and 72552/01, para 93. German law: Bundesverfassungsgericht 15 September 2011, (2012) *Neue Zeitschrift für Verwaltungsrecht* 429, 430; Bundesverfassungsgericht 2 March 1999, (1999) *Neue Juristische Wochenschrift* 2877, 2879.

[42] Suitability here means that the state action is capable of furthering the purported goal in the public interest. See, for instance, Bundesverfassungsgericht 17 December 2013, (2014) *Neue Zeitschrift für Verwaltungsrecht* 211, 214; and ECtHR 20 July 2004, *Bäck v Finland*, App. No. 37598/97, para 60.

[43] Necessity here means that the state action is the least invasive means to realize the purported goal in the public interest. See, for instance, Bundesverfassungsgericht 17

ensures that the public interest in the limitation or expropriation outweighs the adversely affected private and public interests, in particular the interest of the owner. Through this requirement, each limitation and expropriation is supposed to reflect an equitable balance between the interest of the property holder and the public interest.[44] While proportionality as a principle does not form part of U.S. law and the Fifth Amendment only requires expropriations (condemnations) to be suitable to contribute to the public use,[45] a rough balancing test determines whether limitations are excessive and therefore compensable.[46]

Bottlenecks for the recognition and protection of the environmental person's ownership will vary as much as the legal limits to limitations and expropriations. Without purporting to be comprehensive, this Article points to two potential bottlenecks: the recognition of the environmental person's ownership as constitutionally protected property, and its weight in a balancing of interests.

As for the recognition of its ownership as property, the environmental person could obtain property protection easily under A1P1. This provision protects the "possessions" of all "natural and legal persons." As the environmental person is a legal person and landownership is a possession, the environmental person could rely on A1P1.[47] By contrast, German law and the Fifth and Fourteenth Amendments to the United States Constitution put obstacles in the environmental person's way. The German Federal Constitutional Court

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December 2013, (2014) *Neue Zeitschrift für Verwaltungsrecht* 211, 215 *et seq*; ECtHR 21 February 1986, *James and Others* v. *The United Kingdom*, App. No. 8793/79, para 49.

[44] A1P1: ECtHR 21 February 1986, *James and Others v. The United Kingdom*, App. No. 8793/79, paras 50 *et seq*. German law: Bundesverfassungsgericht 15 September 2011, (2012) *Neue Zeitschrift für Verwaltungsrecht* 429, 430; Bundesverfassungsgericht 2 March 1999, (1999) *Neue Juristische Wochenschrift* 2877, 2879.

[45] *Kelo* v. *City of New London*, 545 U.S. 469, 478 *et seq* (2005); Hoops (n 2) 516 *et seq* and 541 *et seq*.

[46] *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922); TW Merrill, 'The Character of the Governmental Action' (2012) 36 VtLR 649, 670-671. Substantive due process under the Fourteenth Amendment requires limitations to be rationally related to, and thus suitable to pursue, a public interest: RA Cunningham, 'Inverse Condemnation as a Remedy for Regulatory Takings', (1981) 8(3) Hastings ConstLQ 517, 518.

[47] ECtHR 21 February 1986, *James and Others* v. *The United Kingdom*, App. No. 8793/79, para 61.

traditionally holds that legal persons can only rely upon constitutional property protection where the legal person is a manifestation of the free development of human beings.[48] Similarly, the U.S. Supreme Court recognizes the constitutional protection of ownership held by legal persons, but only to protect the human beings behind these legal persons.[49] As environmental persons are meant to detach nature from human influence, both courts would have to alter this anthropocentric approach to property before recognizing the environmental person's property.[50]

Provided that the environmental person holds constitutionally protected property, the legal limits to expropriation and limitations could generally adapt to ownership vested in an environmental person. Expropriations and limitations of this ownership would still have to have a legal basis and be justified by a public interest, for example economic development. Also, particularly in European jurisdictions, the expropriation or the limitation would still, as explained above, have to be proportionate. That said, this adjustment would reflect a fundamental change in the environmental character of limitations and expropriations. Consider the example of environmental regulation. With the ownership of a forest or the riverbed vested in the environmental person, polluting the forest or the river would be prohibited unless environmental regulation (or another source of limitations) permitted it. Currently, a human owner can pollute unless environmental regulation prohibits it. It would no longer be environmental protection, but pollution that would have to be justified. Instead of limiting pollution, environmental regulation would legitimize pollution.[51]

The second bottleneck for environmental persons in constitutional property law and theory is the weight that needs to be attached to the environmental person's ownership in, if it forms part of the legal order

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[48] Bundesverfassungsgericht 2 May 1967, (1966-1967) 21 *BVerfGE* 362, 369.
[49] *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906).
[50] For a more detailed account of the position under German law, refer to section 2 of Hoops (n 30). Persuasively arguing in favor of a recognition: A Fischer-Lescano, 'Natur als Rechtsperson' (2018) Zeitschrift für Umweltrecht 205, 214.
[51] Borràs (n 5) 114 and 128 *et seq*; Breckenridge (n 7), 318.

in question at all, the balancing of interests, in a proportionality or other test. The weighing of interests in constitutional property law has a distinct anthropocentric character. Under U.S. regulatory takings doctrine, environmental persons might be able to benefit from the category of *per se* takings, which are limitations that are always excessive and automatically attract compensation. This category makes the physical invasion of privately owned land by the state compensable, and this would arguably also apply to the land held by the natural entity.[52] For the rest, traditional regulatory takings doctrine largely focuses on the economic impact of a limitation,[53] disadvantaging environmental persons, which seek to be insulated from human decision-making and markets. Under A1P1, the review by the European Court of Human Rights does go beyond economic factors and considers the personal circumstances of each owner,[54] but criteria for excessive limitations such as the preclusion of all beneficial economic uses or the loss of investments are entirely stuck in the human economy and would not reflect the magnitude of the harm done to environmental persons.[55]

Due to its particularly elaborate doctrine on weighing property rights, German law best illustrates how anthropocentric constitutional property law and doctrine can create a pitfall for environmental persons owning themselves. The objective of constitutional property protection under German law is to ensure a material foundation for the exercise of economic and political rights and to enable the holder of property to shape their lives independently and responsibly.[56] The weight of the property will generally depend on the extent to which a decision affects

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[52] J Singer et al, *Property Law: Rules, Policies and Practices* (7th edn, Wolters Kluwer 2012) 692-722.

[53] See, for instance, SJ Eagle, 'The Four-Factor *Penn Central* Regulatory Takings Test', (2014) 118(3) Penn State LR 601; and SJ Eagle, '"Economic Impact" in Regulatory Takings Law', (2013) 19(2) Hastings West-Northwest J Environmental L & Policy 407.

[54] Hoops (n 2) 245-246.

[55] ECtHR 29 March 2011, *Potomska and Potomski* v. *Poland*, App. No. 33949/05; ECtHR 18 February 1991, *Fredin v. Sweden*, App. No. 12033/86.

[56] Bundesverfassungsgericht 17 December 2013, (2014) *Neue Zeitschrift für Verwaltungsrecht* 211, 214; Bundesverfassungsgericht 15 September 2011, (2012) *Neue Zeitschrift für Verwaltungsrecht* 429, 430. Cf in the South African context: Constitutional Court 30 June 2015, *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape and Others*, (CCT 216/14) [2015] ZACC 23, para 50.

the individual freedom of the owner.[57] The greatest weight is attached to houses, which safeguard the right to a home, the right to life, and the right of physical integrity.[58]

The problem is that nature, unlike under Ecuadorian law, does not hold fundamental rights of its own under German law and most other jurisdictions. Property can thus not serve to protect these rights. As the weight of the environmental person's ownership cannot be based on its fundamental rights, the rest of the legal system would have to be considered. Article 20a of the Basic Law would probably be the dominant source of inspiration. This provision obliges the state to protect the natural foundations of life and animals. The prevailing anthropocentric interpretation of Art. 20a is that the state need not protect nature for its own sake, but in the interest of human society.[59]

At the international level and in many other jurisdictions, similar obligations or a right to a healthy environment have been introduced.[60] For example, the United Nations formally recognized the right to a healthy environment in its 1972 Declaration on the Human Environment. Principle 1 establishes the fundamental right of a human being to "satisfactory living conditions in an environment whose quality allows him to live with dignity and welfare." This declaration and the other documents reflect an anthropocentric treatment of the environment in that nature is preserved not for its own sake but for the benefit of human beings.

The implications of this anthropocentric approach would be that the environmental person's property would only be protected insofar as it is conducive to human society. The intrinsic value of nature and animal life in nature would not be a relevant interest.[61] This intrinsic value could be defined as the legal status that nature and animals would

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[57] Bundesverfassungsgericht 15 September 2011, (2012) *Neue Zeitschrift für Verwaltungsrecht* 429, 430.

[58] Bundesverfassungsgericht 17 December 2013, (2014) *Neue Zeitschrift für Verwaltungsrecht* 211, 214. Regarding other jurisdictions: AJ Van der Walt, 'The Limits of Constitutional Property' (1997) 12(2) SAPL/PR 275, 318 *et seq*.

[59] R Scholz, 'Art. 20a GG', in M Herdegen & HH Klein (eds), *Dürig/Herzog/Scholz, Grundgesetz* (C.H. Beck commentary last updated July 2021) paras 32 *et seq*.

[60] Refer to Borràs (n 5) 115-28; and O'Donnell & Talbot-Jones (n 9) 2.

[61] cf Borràs (n 5) 128, from whom I borrowed the term "intrinsic value."

assign to themselves if they had a legal system, just as human societies assign a legal status to their members.[62] An anthropocentric approach would entail that far-reaching limitations to the environmental person's property would be permissible and the human interest in nature would be likely to continue dominating, due to the needs of humans and since the legal system is administered by humans.[63]

The anthropocentric approach to the weighing of an environmental person's property must be distinguished from an ecocentric approach. Such an approach would require human institutions to acknowledge the role of these natural entities in the whole ecological system, not just human society, and recognize their own kind of contribution and productivity.[64] This recognition of the intrinsic value would greatly enhance the weight of property held by environmental persons in the balancing of interests because the property would serve to protect this intrinsic value and the natural entity's life and physical integrity. In a balancing of interests, it would decenter human needs and alleviate their dominance.[65] In this way, fewer limitations and expropriations of the environmental person's property would be permissible. Without any precedents or legislative guidelines, it is impossible to predict at this point where the line would have to be drawn though.

The burning question would be whether the legislation on Te Urewera and Te Awa Tupua in New Zealand still reflects an anthropocentric approach to the environmental person's property or already an ecocentric approach. Depending on the answer to this question, the changes to anthropocentric property theory could be minor or an ecocentric property theory on environmental persons would have to be developed. To answer this question, Part III.B describes the rights and obligations of Te Urewera, and Part III.C. analyzes whether they reflect an anthropocentric or ecocentric approach. Part III.D.

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[62] cf TW Frazier, 'The Green Alternative to Classical Liberal Property Theory' (1995) 20(2) VtLR 299, 309, on the difficulties in determining the preferences of nonhuman life.

[63] Bétaille (n 12) 55.

[64] Breckenridge (n 7) 298 *et seq* and 307.

[65] Gordon (n 9) 72; Clark et al (n 7) 836 *et seq*; O'Donnell & Talbot-Jones (n 9) 3 *et seq*.

examines whether Te Urewera and Te Awa Tupua can be integrated into anthropocentric property theory.

B. Rights and Obligations of Te Urewera and Te Awa Tupua

The Te Urewera Act offers a colorful picture of the rights and obligations of Te Urewera as owner of itself. Interests in the land that preceded the acquisition by Te Urewera are not affected by the registration of the land in Te Urewera's name.[66] The Act further limits both the owner's right to dispose of the land *and* the state's power to expropriate the land to use it in the public interest. An area may only be "removed" from Te Urewera on the basis of a specific Act of Parliament and, cumulatively, if Te Urewera's Board recommends such removal.[67] Section 111 also limits the purposes for which the land can be removed, specifically

> (a) if the removal would enable a minor boundary adjustment to align Te Urewera more closely with natural boundaries or as a result of a resurvey; or
>
> (b) if land is required for the realignment of an existing formed legal road, for a new legal road, or for the legalisation of an existing public road; or
>
> (c) to facilitate the exchange of land to deal with an encroachment or to enhance the boundaries of Te Urewera; or
>
> (d) if the land does not have natural, cultural, historic, or scientific values to justify its inclusion in Te Urewera.[68]

If the removal was not included in the Board's management plan and the Board believes that the removal may be controversial, the Board must give the public an opportunity to express their views.[69] Not only does the Act limit the state's power to expropriate and the owner's power to dispose of the land, but also the right to acquire new land. The

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[66] Section 92(2) Te Urewera Act.
[67] Sections 111(1) and (2), 13(a).
[68] Section 111(2).
[69] Section 111(3).

Board may only propose the acquisition of land with an actual or potential natural, cultural, or historic value, which is then scrutinized by the Minister of Conservation and determined by the Governor-General, who represents the Crown in New Zealand.[70]

As owner Te Urewera may, in principle, exclude third parties from the use of its land and lay down rules for their conduct.[71] However, the Act gives mandatory rules on some activities of third parties and, thereby, limits the ownership and autonomy of Te Urewera. Cultural, recreational, and educational activities for no gain do *not* require a permit, provided they comply with the Act's provisions such as the prohibition of dogs in Te Urewera.[72] Business activities, by contrast, require a concession. The Board may grant leases, permits, licenses, or easements to businesses. The applicable test is whether a concession would be consistent with the Board's management plan.[73] A permit is required for activities doing harm to the environment in Te Urewera such as farming and hunting.[74]

Te Awa Tupua is owner of its riverbed. This fee simple estate does not include any proprietary interests in the water or the animals in the water.[75] Existing rights such as fishing rights remain untouched by the vesting of fee simple in Te Awa Tupua.[76] Also, existing preservation schemes under the Conservation Act 1987, the National Parks Act 1980, and the Reserves Act 1977 remain applicable to the riverbed.[77] Expropriations or other alienations of this land are banned; lesser interests than a fee simple estate, however, may be created, also by unilateral state action.[78] With respect to activities surrounding the river such as freshwater planning and management,[79] fisheries,[80] and

[70] Sections 100 *et seq*.
[71] Under Section 70 Te Urewera Act, the legal person lays down such rules in bylaws.
[72] Section 84.
[73] Sections 62(1) and (2), 13(b).
[74] Section 58 and Schedule 3.
[75] Section 46(1) Te Awa Tupua Act.
[76] Section 46(2).
[77] Section 42(1).
[78] Section 43(1) and (2).
[79] Section 34.
[80] Section 66.

customary food gathering,[81] the Te Awa Tupua Act foresees deliberations and joint rule-making or at least coordination between the stakeholders concerned. The act does not provide for any rules regarding water pollution.

C. Anthropocentric and Ecocentric Approaches to Property in the Legislation on Te Urewera and Te Awa Tupua

The rights and obligations of Te Urewera and Te Awa Tupua reflect the weight of their ownership in the legal system and whether the legislation on the property of environmental persons follows an anthropocentric or ecocentric approach. The legislation sends out mixed signals as to whether they follow an ecocentric or an anthropocentric approach to the ownership. Section 3 of the Te Urewera Act insists that Te Urewera has an "identity in and of itself." A distinct identity would be more consistent with an ecocentric approach because an identity alludes to an intrinsic value and anthropocentric approaches stress the subordination of nature to human interests. However, Section 3 for the most part sets out and stresses Te Urewera's cultural and spiritual value to the Tūhoe, the Māori iwi living in Te Urewera, which rather reflects an anthropocentric approach.[82] According to Section 4 of the Act, the purposes of the Act are to

> - strengthen and maintain the connection between Tūhoe and Te Urewera; and
> - preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage; and
> - provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all.[83]

Except for the purpose of preserving Te Urewera's indigenous ecological systems and biodiversity, all of these purposes primarily

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[81] Section 67.
[82] cf Sanders (n 17) 221.
[83] Section 4.

serve human society. It follows that the importance of Te Urewera to human society seems to be the driving force behind the environmental person and its property. Against this background, it is not surprising that the Te Urewera Act severely limits Te Urewera's property by imposing obligations to tolerate numerous activities. For instance, Section 56(a) of the Act allows non-profit cultural, recreational, or educational activities by human beings without a permit. Although these activities are not necessarily inconsistent with an ecocentric approach, this restriction matches better with an anthropocentric approach because it does not leave Te Urewera a choice to exclude human beings from the natural entity.

By contrast, in particular for harmful activities, the Te Urewera Act requires permits or concessions.[84] A deeper look into Schedule 3 of the act, which details the administrative procedures followed by Te Urewera, shows that permits or concessions must generally be consistent with Te Urewera's management plan and that the Board generally has discretion when deciding whether to grant a permit or concession. This leaves considerable leeway to the environmental person and safeguards its autonomy to decide to protect its intrinsic value where needed. This type of restriction may reflect either an anthropocentric or an ecocentric approach. In particular, as one of Te Urewera's purposes is to preserve its cultural, educational, historical, and recreational value to human beings, banning harmful activities also serves human interests and could thus be anthropocentric. A similar reasoning would apply to the ban of expropriations. On the one hand, outlawing expropriations of land seems to be ecocentric in that it recognizes Te Urewera's autonomy and, thereby, its intrinsic value. On the other hand, expropriations of landownership would detract from Te Urewera's anthropocentric purpose to provide cultural, educational, historical, and recreational value to human beings.

Arguably, the Te Urewera Act follows an anthropocentric approach because its protection and relatively light regulation are motivated by its cultural, recreational, and spiritual importance to human society, in particular the Tūhoe. This may suggest that if other, less holy natural

[84] Sections 58 and 62 Te Urewera Act.

entities were to become environmental persons, they would in all probability be subject to heavier limitations and not exempted from expropriation. Their protection would thus be weaker under an anthropocentric approach. Under an ecocentric approach, which acknowledges but decenters human needs, by contrast, the absence of cultural, recreational, and spiritual value would make it more difficult to justify heavy limitations.

The analysis of the Te Awa Tupua Act is less fruitful because it does not provide for specific rights and obligations of Te Awa Tupua regarding activities on the river. However, the facts that Te Awa Tupua is supposed to resolve competing claims to the river of human groups and that activities on the river are supposed to be regulated through deliberations with mainly human stakeholders[85] indicate that the Te Awa Tupua Act rather follows an anthropocentric approach to property.

An important caveat seems appropriate. To analyze permitting human activities in Te Urewera or Te Awa Tupua as instances of limitations of property seems somewhat odd in the Māori cultural context. The analysis views human needs as an antipode to the needs of the environmental person. In the Māori cultural context, however, Te Urewera and Te Awa Tupua not only represent the local natural entities but also the Tūhoe and other iwi as well as nature's interaction with the iwi. The needs of the iwi thus partially define and form part of property held by Te Urewera and Te Awa Tupua. Limitations are thus rather imposed to serve the needs of the outside world.

D. Te Urewera and Te Awa Tupua in Anthropocentric Property Theory

As both the Te Urewera Act and Te Awa Tupua Act arguably follow an anthropocentric approach to property, an analysis needs to be made as to whether anthropocentric constitutional property theories can accommodate the property held by these environmental persons. Constitutional property theory seeks to uncover the purpose of property and explain how property relates to the power of the state to limit and expropriate property as well as its weight compared to the public

[85] See, for instance, Section 66(1) and (2) Te Awa Tupua Act.

interest in limitations and expropriations.[86] An anthropocentric theory of property held by environmental persons needs to explain why and to what extent human needs limit the autonomy of environmental persons.

This Part examines the extent to which different anthropocentric constitutional property theories are able to explain the environmental person's ownership, where they fail to do so, and into which theories this property can be integrated most easily. A first, more general step towards integration is the following. Anthropocentric property theory assumes that it is ownership held by humans that is or needs to be limited or expropriated. The theories would thus first have to recognize the ownership held by environmental persons as property. The following paragraphs discuss further steps with regard to libertarian theories, personality theories, utilitarian theories, the theory of human flourishing, and green property theories.

1. Libertarian Theories of Property

Advocates of environmental protection could be tempted to invoke libertarian strains of thought for the protection of an environmental person's property. Libertarian property theories assume that property springs from natural rights that predate the state and its regulatory power.[87] Property is generally only limited by the property rights in other objects and the rights in the property created with the owner's consent. The regulatory power of the state is limited by property rights, and limitations to property should generally attract compensation.[88] Under this theory, vesting ownership in the environmental persons would greatly enhance the protection from pollution of the environmental person and the part of nature that it embodies because the environmental person would have the power to exclude human activities.

However, there are major objections, not only of a theoretical nature, against the use of this strain of thought. The first objection is that the

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[86] Alexander & Peñalver (n 4).
[87] J Tully, *A Discourse on Property* (CUP 1980) 35 *et seq*; Alexander & Peñalver (n 4) 36-37 and 166 *et seq*.
[88] RA Epstein, *Takings, Private Property and the Power of Eminent Domain* (Harvard UP 1985) 162.

root of the natural rights that evolved into property rights protected by the law from the state's powers lies in the very human dominance over nature that environmental personhood seeks to overcome. Libertarian theorists rely upon John Locke's labor theory to explain the origins of property. Locke argued that humans acquired land by mixing the land with their labor and generating additional value through their intellect and physical strength.[89] A libertarian theory of the environmental person's property would have to argue that it is not human labor, but the very existence or, more in line with Locke's labor theory, the contribution of natural entities to the ecosystem that justifies their property right.[90] Libertarian theories would thus have to follow an ecocentric approach, which recognizes the natural entity's unique productivity. As the legislation on Te Urewera and Te Awa Tupua follows an anthropocentric approach, such an ecocentric theory would not be suitable to explain the weight of the ownership held by the environmental persons.

The second objection would be that such a theory would insufficiently take account of the human need to rely on nature for survival, which would continue to dominate under an anthropocentric approach, because the property would not be automatically limited by this need and any such limitation would generally require some form of compensation. The third objection is that the rights and obligations of Te Urewera and Te Awa Tupua look different in practice. Their ownership is anything but unlimited by state regulation. Specifically, the regulation of Te Urewera's ownership resembles that of a national park,[91] which is hardly surprising because Te Urewera used to be a national park.

2. *Personality Theories of Property*

Under personality theories of property, property serves as a physical extension of the holder's will safeguarding the person's self-development.[92] Margaret Radin's personhood theory is an offspring of

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[89] J Locke, *Two Treatises of Government* [1690] (Yale UP, 2003) 111-112; Alexander & Peñalver (n 4) 39 *et seq.*
[90] cf ET Freyfogle, 'Ownership and Ecology' (1993) 43(4) Case W Res LR 1269, 1295.
[91] Sanders (n 17) 224 *et seq.*
[92] Alexander & Peñalver (n 4) 60 *et seq.*

this strain of thought. Her theory says that someone's personal identity is connected to things serving to develop and realize the person's potential.[93] Depending on how much pain the person would suffer if they were deprived of the object, Radin categorizes objects as personal or fungible, with these two categories being opposite extremes of a continuum.[94]

With respect to environmental persons in an anthropocentric context, the personality theories do not seem to be suitable sources. These theories see property as objects that although they are extensions of one's will and personality, are outside the person of the owner. Environmental persons, by contrast, are what they own, and what they own is what they are. Also, before they can attach weight to the ownership of a part of the natural entity, personality theories would first need to incorporate theories on the characteristics of the personal identity of a natural entity and on the importance of different parts of an ecosystem to the environmental person. Another problem would be that personality theories do not establish a strict hierarchy between private ownership and the public interest, but see them as interdependent parts of each other.[95] Personality theories thus do not include a hierarchical relationship between needs of the human public and the ownership of environmental persons, which is inherent to an anthropocentric approach and would have to be incorporated.

Finally, it is doubtful whether personhood theories could explain the balance between the environmental person's property and the public interest in New Zealand. On the one hand, they do acknowledge the need for limitations of property in the public interest. They say that it is each individual's obligation to contribute to ensuring that each member of society dispose of a material foundation for self-determination.[96] This may go a long way to explain Te Urewera's obligation to tolerate cultural, educational, and recreational human activities. On the other hand, the human community would have to recognize and protect the

[93] MJ Radin, *Reinterpreting Property* (University of Chicago Press, 1993) 153 *et seq*; MJ Radin, 'Property and Personhood' (1982) 34(5) StanLR 957.
[94] Radin (n 93) 959 and 1003.
[95] Alexander & Peñalver (n 4) 172.
[96] Alexander & Peñalver (n 4) 172 *et seq*.

environmental person's autonomy. Such recognition may resonate with how Māori view Te Urewera as a distinct entity, but would hardly explain the human activities exempt from a permit requirement and the consequent limitations of Te Urewera's self-determination.

3. Utilitarian Theories of Property

Utilitarian theories of property argue that property serves economic efficiency.[97] To utilitarian theorists, state action is justified if it increases the aggregated well-being of all members of society.[98] The well-being is not based upon objective factors, but rather the satisfaction of subjective preferences.[99] An increase in well-being equals the (positive) difference between the action's positive impact upon the well-being of some citizens and its detrimental effects upon the well-being of others.

Under an anthropocentric approach, nature serves human interests. A utilitarian theory of the environmental person's property would not have to recognize nature's intrinsic value or embark on the extremely difficult endeavor to determine nature's subjective preferences. It would only have to examine whether the protection of the property and, therefore, protection of the natural entity would contribute to aggregated well-being.[100] A utilitarian theory may thus appear equipped to explain the weight of the environmental person's property. That said, this theory is unlikely to provide a sufficient explanation. A major weak spot of the cost-benefit analysis is that it may negate vulnerable groups. While local or Indigenous communities may benefit from the protection of the natural entity, a majority of all citizens may object to the protection because they would prefer a more profitable use. A utilitarian theory would then favor substantial limitations to the environmental person's property to allow harmful economic activities

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[97] Alexander & Peñalver (n 4) 17 *et seq*.

[98] K Binmore, 'A Utilitarian Theory of Political Legitimacy' in A Ben-Ner & LG Putterman (eds), *Economics, Values, and Organization* (CUP 1998) 101-32; J Bentham, *An Introduction to the Principles of Morals and Legislation* (Dover 2007); JS Mill, *Utilitarianism* (G Sher ed, Hackett 2002).

[99] GS Alexander, 'The Public Use Requirement and the Character of Consequentialist Reasoning' in B Hoops et al (eds), *Rethinking Expropriation Law II: Context, Criteria, and Consequences of Expropriation* (Eleven 2015) 113, 122.

[100] Gordon (n 9) 73 *et seq*; and Cano Pecharroman (n 16) 3, with further references.

or even expropriation. A utilitarian theory of Te Urewera's property may therefore struggle to explain the preservation of Te Urewera, the preferential treatment of cultural, educational, and recreational activities, and why the wishes of Māori were accommodated.

4. Human Flourishing

Another anthropocentric property theory is Gregory Alexander's theory of human flourishing. This theory draws on the social-obligation norm, which justifies obligations of human owners towards human society.[101] Alexander pictures society as a web of interdependent persons. Individuals and the community depend on each other for their well-being. Human flourishing is an objective standard by which the theory measures various expressions of a "good" human life, such as autonomy, personhood, and equal dignity, but in particular the ability of a person to participate in human activities, such as cultural activities, democratic decision-making, and social gatherings.[102] The more people are able to participate in human activities, the more a society guarantees human flourishing. Among the objective prerequisites for such participation, environmental protection plays an important role. Alexander notes that a clean environment is indispensable to a well-lived life.[103] In the web of interdependent persons, property's purpose is to contribute to human flourishing by fostering personal autonomy, security, and wealth.[104] However, as holders of property depend on the community for their flourishing, the owner also has a duty to ensure the flourishing of other community members.[105] The state can limit and expropriate property to achieve that goal insofar as it promotes human flourishing in the community.[106]

Arguably, the theory of human flourishing is flexible enough to integrate the environmental person's property. As the legislation on Te

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[101] GS Alexander, 'The Social-Obligation Norm in American Property Law' (2009) 94(4) Cornell LR 745; Alexander & Peñalver (n 4) 83 *et seq*.
[102] GS Alexander, *Property and Human Flourishing* (OUP 2018) xiv *et seq* and 5 *et seq*; Alexander (n 99) 114 *et seq*.
[103] Alexander (n 102) 56 and 122.
[104] Alexander (n 102) xiv *et seq* and 5 *et seq*; Alexander (n 99) 124 *et seq*.
[105] Alexander (n 102) xv *et seq* and 40 *et seq*.
[106] Alexander (n 99) 130 *et seq*

Urewera and Te Awa Tupua follows an anthropocentric approach, a theory of flourishing on the environmental person's property need not abandon the "humanness" of flourishing. Human needs could still take center stage. Only the web of interdependent persons may have to be expanded to include natural entities. The purpose of Te Urewera's and Te Awa Tupua's property could still be to contribute to human flourishing. However, the property does not do this by fostering human personal autonomy, security, and wealth, but by guaranteeing one of the objective pre-requisites of human flourishing, which is environmental protection. The obligation to tolerate cultural, educational, and recreational human activities to the extent that they do not do significant harm to Te Urewera, could be explained by the overall contribution of these activities to human flourishing. The less prominent contribution of business activities in a former national park to human flourishing may explain the permit requirement for such activities in Te Urewera.

5. Green Property Theories

In the United States, a small movement of green property theorists gained momentum in the 1980s and 1990s. They worked on the concept of ownership and tried to re-define its content by adding obligations to preserve the environment.[107] Their goal was to ensure that human owners had a duty not to harm the environment, even in the absence of sufficient environmental regulation, and that compensation was not due for environmental regulation where ownership incorporated such duties. These theorists recognized the interdependence between humans and nature and argued that, to achieve a sustainable balance in the ecosystem, ownership had to be automatically limited by environmental protection.[108] However, this does not make this strain of

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[107] cf Breckenridge (n 7), 306 *et seq*.

[108] ET Freyfogle, 'Taking Property Seriously' in P Taylor & DP Grinlinton (eds), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Brill | Nijhoff 2011) 43, 55; RJ Goldstein, 'Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law' (1998) 25(2) Envtl Aff 347, 351 and 386; DB Hunter, 'An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources' (1998) 12(2) HarvEnvtlLR 311, 357 *et seq*; Frazier (n 62) 309 and 318 *et seq*; JG Sprankling, 'The Antiwilderness Bias in American Property Law' (1996) 63(2) UChiLR 519.

thought ecocentric. Most green property theorists primarily made an anthropocentric argument because owners owed these obligations to society in order to ensure the sustainability of human life.[109]

Although this theory does not immediately concern legislative restrictions to property but the concept of ownership itself, green property theory may be the best available theory to explain the weight of Te Urewera's and Te Awa Tupua's property. Like Māori culture,[110] this theory draws the boundaries of the community of interdependent persons wider to include nature, animals, and other living creatures. An adjusted green property theory would no longer explain why and the extent to which environmental protection limits the autonomy of human owners, but the extent to which human interests could limit the environmental person's property. The criteria would be a sustainable balance in the ecosystem and the sustainability of human life. These criteria may explain why largely harmless human activities are allowed in Te Urewera and why harmful activities are subject to a permit.

IV. Compensation as the Standard Remedy

The second pillar of constitutional property law and theory creating a pitfall for the property protection of environmental persons is compensation as standard remedy. Compensation, mostly in money, is the standard remedy for excessive limitations in many jurisdictions. Under the European Convention of Human Rights and the Fifth Amendment to the Constitution of the United States, for instance, the only available remedy for excessive limitations is compensation in money.[111] An example of a more nuanced regime on remedies is German constitutional property law. Where disproportionate regulations are imposed on an owner, the competent state body would, if possible, first

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[109] Frazier (n 62) 301, 305 and 319; Goldstein (n 108) 390 *et seq*. See, however, Hunter (n 108) 380, who argued that the owner had obligations vis-à-vis the land.

[110] cf N Tomas; 'Maori Concepts of Rangatiratanga, Kaitiakitanga, the Environment, and Property Rights', in P Taylor & DP Grinlinton (eds), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Brill | Nijhoff 2011) 219-48.

[111] Regarding A1P1: ECtHR 30 June 2005, *Jahn and Others v. Germany*, App. Nos. 46720/99, 72209/01 and 72552/01, para 116. Regarding the Fifth Amendment: *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984).

have to take measures to prevent the damage to the environmental person before resorting to compensation in money. If the relevant legislation did not prescribe preventive measures, the regulation would be unconstitutional and invalid.[112] Interestingly, if the ownership held by Te Urewera and Te Awa Tupua were excessively limited, they could not obtain any remedies because there is generally no protection from excessive limitations in New Zealand.[113]

Expropriation, the more severe sibling of limitations, is by definition excessive. The expropriatee receives compensation in money or, only by way of exception, in another form as a result of a lawful expropriation in the public interest. This is one of the fundamental principles of expropriation law in almost all jurisdictions.[114] Under the law of New Zealand, compensation would also be payable to Te Urewera and Te Awa Tupua.[115]

This section explores whether compensation in money would be an adequate and appropriate remedy in light of the goal of compensation and the specific needs of environmental persons.[116] Part IV.A. describes the main goal of compensation. Subsequently, Part IV.B. inquires whether this goal can be reached if an environmental person is the owner of the natural entity.

A. The Main Function of Compensation

Compensation for expropriation and excessive limitations performs several functions in a legal system.[117] The main goal of compensation is to equalize the burden borne by the owner for the public good.[118] As the

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[112] B Hoops, 'Taking Possession of Vacant Buildings to House Refugees in Germany: Is the Constitutional Property Clause an Insurmountable Hurdle?' (2016) 5(1) Eur Property LJ 26.
[113] Evans & Quigley (n 11).
[114] See, for instance, Tagliarino (n 39); Sluysmans, Verbist & Waring (n 40).
[115] Refer to the Public Works Act 1981.
[116] This section is partially based upon sub-section 4.2 of Hoops (n 30).
[117] TJ Miceli, *The Economic Theory of Eminent Domain: Private Property, Public Use* (CUP 2011) 71; MA Heller & JE Krier 'Deterrence and Distribution in the Law of Takings' (1998-1999) 112 HarvLR 997; JL Sax, 'Takings, Private Property and Public Rights' (1971) 81 Yale LJ 149; and Alexander & Peñalver (n 4) 164 *et seq.*
[118] H Dagan, 'Expropriatory Compensation, Distributive Justice, and the Rule of Law' in B Hoops et al (eds), *Rethinking Expropriation Law I: Public Interest in Expropriation* (Eleven 2015) 349, 351.

expropriatee has to give up their property and the restricted owner has to give up a disproportionate part of their right, expropriation and excessive limitations inflict an excessive sacrifice on the owner, which other members of society do not need to make. This sacrifice is made in the public interest and benefits all members of society. It is therefore just that all taxpayers share this burden by paying compensation to the owner or expropriatee.

B. Compensation for Environmental Persons

The prerequisite for compensation to equalize the burden is that compensation in money (or in other forms) can adequately replace the property in the estate of the expropriatee or ensure that the restricted owner's quality of life will not be compromised. This prerequisite is only met under narrow circumstances when the owner is an environmental person.

Excessive limitations lead to damage of the natural entity. To the environmental person, the invalidity of the limitation or measures preventing the harm would be preferable to compensation because permitted pollution may cause irreparable damage. Compensation in money would only be an adequate remedy to the extent that it enables the Board of Te Urewera or Te Pou Tupua, representing Te Awa Tupua, to effectively restore the ecosystem. Legislatures and courts should take this consideration into account when choosing the appropriate remedies. As the law of New Zealand does not provide rules on excessive limitations, it is not possible to test these insights against actual legislation.

When an environmental person's property is expropriated, the forest or the river literally becomes smaller. To the forest or the river, the property is not merely a tool or an asset that helps a person realize their potential. The property forms part of the person. As each part of a river or forest is a unique component of an ecosystem, compensation cannot replace the property. Therefore, compensation is not suitable to distribute the sacrifice made by the environmental person as expropriatee. Compensation could only help the Board of Te Urewera or Te Pou Tupua to acquire new land to enlarge the river or forest again

or to preserve the remaining forest or river. Instead, there should be a ban of expropriations or the provision of equally valuable land that can adequately replace the taken land.

The Te Urewera Act 2014 and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 reflect this insight to a varying extent. Section 111 of the Te Urewera Act only allows for land to be "removed" from Te Urewera where the impact on Te Urewera is minimal or the land does not have any relevant natural, cultural, historic, or scientific value. In any other case, the act does not permit any removal. Furthermore, the Minister for Conservation and Parliament may only act upon recommendation from the Board. The state's power to take the property against the owner's will thus no longer applies to Te Urewera. The explanation for this regime is the unique importance of Te Urewera to the Tūhoe iwi.[119] Any land taken from Te Urewera could not be replaced. Compensation would not be more than a little plaster on the stump of a limb after amputation. To a lesser extent, the Te Awa Tupua Act also follows this approach. Section 43(1) and (2) ban expropriations of fee simple, but do allow for the coerced creation of lesser interests.

Even if compensation were an adequate remedy and the legislation in New Zealand permitted expropriations of the environmental person, it would be unlikely to reflect the actual value of the property. The assumption in most jurisdictions seems to be that the payment of the property's fair market value is generally an equitable form of compensation. By contrast, a subjective value that only the owner attaches to the property is legally irrelevant in most jurisdictions.[120] This choice is problematic because fair market value only reflects the value of the environmental person to the human economy. The value does not take into account contributions of the environmental person to society that cannot be expressed in money, let alone its intrinsic value.[121] The awarded compensation would thus always prove to be too low in any case to equalize the burden borne by the natural subject.

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[119] Section 3 Te Urewera Act.

[120] Sluysmans, Verbist & Waring (n 40), Chapter 1, section 6.3; Tagliarino (n 39) Chapter 4.

[121] See e.g., M Sagoff, *Price, Principle, and the Environment* (CUP 2004).

V. Conclusion

Environmental personhood and ownership allow advocates of environmental protection to preserve nature where environmental regulation or its enforcement are unsatisfactory. In the traditionally anthropocentric field of constitutional property law and theory, the environmental person's property could start a new ecocentric branch.

However, Te Urewera and Te Awa Tupua in New Zealand, as of yet the only environmental persons with ownership rights on this planet, will not start this revolution because the protection of their property still primarily serves the interests of human beings. The introduction of these environmental persons is mainly motivated by the needs and belief systems of Māori. Moreover, the property is limited to meet the cultural, educational, and recreational needs of human beings. For these reasons, two anthropocentric property theories (green property theory and the theory of human flourishing) can explain, with a few twists, the weight of the property of these environmental persons in the balancing of different interests.

Also, the ban of expropriations of Te Urewera and Te Awa Tupua may seem to end the dominance of human interests and mark the beginning of a more ecocentric approach to property, but it is more probable that the human interest in preserving Te Urewera and Te Awa Tupua as integral areas explains this choice. As Māori have been living on the land as traditional owners, the ban may also be an expression of the rather anthropocentric Article 10 of the United Nations Declaration on the Rights of Indigenous Peoples, which provides

> Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.[122]

If "Rights of Nature" progress further and ownership is vested in environmental persons for nature's own sake, property law and theory

[122] Article 10 UN Declaration on the Rights of Indigenous Peoples.

may no longer be able to avert the revolution. Anthropocentric property law and theory could not recognize or measure nature's intrinsic value and its own unique productivity in the ecosystem. It would struggle to explain why nature's needs may take precedence over the needs of human beings. An ecocentric theory of constitutional property, preferably one that takes due account of human needs as part of the ecosystem,[123] would have to be developed. Possibly, this task would be virtually insurmountable because it would require human institutions to appreciate fully the functioning and preferences of ecosystems and hierarchical relationships between different parts of nature, for instance between different animal or plant species.

In conclusion, it is not only constitutional property law and theory that would have to undergo changes in that event, but also traditional norms of private property law. An example in need of reform would be acquisitive prescription in civil-law jurisdictions and its common law counterpart, adverse possession. Acquisitive prescription entails that a non-owner acquires ownership after adversely possessing somebody else's property, in particular land, for a long period of time. If the land is owned by an environmental person, one may wonder whether nature ever gives up possession of the land. Also, acquisitive prescription reflects a preference of the law for the human use of land rather than the absence of human use.[124] Punishing the owner for their lack of care for the land is one of the rationales for acquisitive prescription.[125] However, nature never neglects itself, and a preference for human use is a human preference, not the preference of nature. The ecocentric reform of property law would thus have a tedious task ahead.

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[123] Refer to M Tănăsescu, 'Rights of Nature, Legal Personality, and Indigenous Philosophies', (2020) TEL 429, for a stricter interpretation of "ecocentric."

[124] JG Sprankling, 'An Environmental Critique of Adverse Possession' (1994) 79(4) Cornell LR 816.

[125] B Hoops, 'Legal Certainty is Yesterday's Justification for Acquisitions of Land by Prescription. What is Today's?' (2018) 7(2) Eur Property LJ 182, 193 *et seq*.