

INTRODUCING WHY IT MATTERS: INDIGENOUS PEOPLES, THE LAW AND WATER

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INTRODUCTION

In 2009, Justice Joe Williams of the High Court of New Zealand opened the international Indigenous Legal Water Forum with a pertinent comment: '[I]t is hard to think of a more difficult, strategic, problematic and exciting subject going into the next generation than the subject of water and it is hard to think of a sharper test within that than the subject of the rights of Indigenous peoples to water'.¹ This special issue of *The Journal of Water Law* takes up that challenge by bringing together a group of experts from several countries to reflect on and explore Indigenous peoples' rights to water.

In recent decades, the state western legal systems have begun to accept more readily the capacity of Indigenous peoples to exert specific legal rights.² For example, since 1982, treaty and Aboriginal rights have been constitutionally recognised in Canada via section 35(1) of the Constitution Act 1982. Since 1986, New Zealand Parliament has inserted references into many statutes requiring decision-makers to have some level of regard to the principles of the Treaty of Waitangi (a document signed between Māori and the British Crown in 1840).³ Since 1993, Indigenous Australians have had the ability to pursue native title claims in accordance with the Native Title Act 1993.

In these and other countries, the courts have been developing an Indigenous peoples' recognition jurisprudence stemming from such legislative directives. For instance, the Supreme Court of Canada has stated that '[T]he Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests'.⁴ As that court has explained: '[T]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and

ambitions'.⁵ A similar jurisprudence has emerged in Aotearoa New Zealand. The Court of Appeal has stated that the statutory incorporation of the Treaty of Waitangi principles in specific instances requires 'the Pakeha (European New Zealanders) and Māori Treaty partners to act towards each other reasonably and with the utmost good faith. That duty is no light one. It is infinitely more than a formality'.⁶

Indigenous peoples have these unique rights because as Chief Justice McLachlin of the Supreme Court of Canada has stated, they 'were here when Europeans came, and were never conquered'.⁷ These rights have an historical source embedded in the British inherited common law and/or signed treaties. Some Indigenous groups entered into written contracts with the European explorers. One of the most notable is the bilingual Treaty of Waitangi, recorded in both the English and Māori languages. It purports to do what few other colonial treaties have done – recognise Māori rights of continued governance over natural resources. However, many Indigenous peoples were not given the opportunity formally to enter such a relationship. For example, no historical treaties exist in Australia and large parts of North and South America. Nonetheless, in these countries and others, the British common law doctrine of native title is now readily accepted as applicable. This doctrine holds that:⁸

On the acquisition of the territory, whether by settlement, cession or annexation, the colonizing power acquires a radical or underlying title which goes with sovereignty. Where the colonizing power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights.

While it may now be readily accepted that Indigenous peoples have certain legal rights, transposing these rights into reality can be difficult. This is becoming very clear in regard to considering the implications of Indigenous peoples' rights to potentially own, manage and govern freshwater. Part of the quandary lies in the British inherited common law perceptions of water. Doctrines such as *publici juris* characterise water as

1 To view a live recording of this talk, see the University of Otago Research Cluster for Natural Resources Law website at: www.otago.ac.nz/law/nrl/water. For a recent general discussion see M Durette 'A comparative approach to Indigenous legal rights to freshwater: key lessons for Australia from the United States, Canada and New Zealand' (2010) 27 *Environment and Planning Law Journal* 296.

2 For an overview see B J Richardson, S Imai and K McNeil (eds) *Indigenous Peoples and the Law. Comparative and Critical Perspectives* (Hart Publishing Oxford 2009) and P G McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press 2004).

3 For example, see s 9 of the State-Owned Enterprises Act 1986, s 4 of the Conservation Act 1987, s 8 of the Resource Management Act 1991, and s 4 of the Land Transport Management Act 2003.

4 *Haida Nation v British Columbia (Minister of Forests)* [2004] SCC 73 para 25.

5 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] SCC 69 para 1.

6 *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641, 667.

7 *Haida Nation v British Columbia* (n 4).

8 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 23–24. Note that other jurisdictions similarly define this doctrine. For excellent comparative commentary see references cited above (n 2).

common to all who have access to it and thus not capable of being owned by anyone.⁹ Thus, most legal systems throughout the world have developed a public domain type regime for water resource governance.¹⁰ However, the advent of modern-day agriculture, viticulture, population growth, infrastructure development and so on are all putting an unprecedented strain on water in lakes and rivers. Governments are creating legal systems that provide for strict regulation of water take. And, in amongst this clarification of rights to water is the Indigenous voice. As Alex Frame wrote in 1999 in regard to the situation in Aotearoa New Zealand:¹¹

The 'commodification' of the 'common heritage' has provoked novel claims and awakened dormant ones ... Claims to water flows, electricity dams, airwaves, forests, flora and fauna, fish quota, geothermal resources, seabed, foreshore, minerals, have followed the tendency to treat these resources, previously viewed as common property, as commodities for sale to private purchases. Not surprisingly, the Māori reaction has been: if it is property, then it is *our* property!

Indigenous peoples throughout the world are strongly voicing a right to be involved in ownership, management and governance of freshwater. The rights claimed are often stipulated as property rights, sourced in historical treaties or the doctrine of native title. However, Indigenous peoples are also claiming human and environmental rights to water. Hence, Indigenous peoples' rights to water is a hot topic in many countries including those cases studied in here in this issue.

This issue brings together a collection of seven articles that explore the contemporary avenues Indigenous peoples are using, or could use, to seek legal recognition of their rights to be involved in the governance of water. As becomes apparent in reading this work, the pathways are many; for example, seeking judicial enforcement of historical treaties, the common law doctrine of native title and international law, while remedies can also lie in political negotiation and resulting specific legislative settlements, and through better understanding the possibilities of legal pluralism.

The first two articles in this issue consider the potential of treaty-sourced rights from two distinct countries: the United States of America and Aotearoa New Zealand. Rachael Paschal Osborn writes about the judicial precedents arising out of treaties, and my article looks at the legislative directives sourced in the principles of the Treaty of Waitangi. It is fitting that this special issue begins with a consideration of the USA because it was one of the first colonial nations to recognise an Indigenous right to water. The judiciary there, in the 1908 case *Winters v United States*,¹² created a doctrine that Indigenous Americans, on reservations,

are entitled to sufficient water for agricultural, economic and development purposes. The significance of this decision was expanded in a 1963 case, *Arizona v California*, when it was held that water is 'essential to the life of the Indian people'.¹³ Osborn brings to life some of the hundreds of cases that have since been decided in the USA, including those based on the Stevens Treaty rights. As the remaining articles in this issue illustrate, few other countries have a comparable depth of judicial cases.

However, as later articles also portray, while there is depth in the USA precedents, there is little width – Indigenous Americans have few rights to influence water decision-making outside the reservations. Thus the second article is in sharp contrast with the first in that although here too the focus is on treaty rights, the Indigenous peoples of Aotearoa New Zealand have, since 1991, had some legislative avenues available to influence the issuing of resource consents to take water from any water source in the country that they regard as culturally special. The third article is similarly focused on legislative rights but in the context of south-eastern Australia. This article, by Lee Godden and Mahala Gunther, explores how contemporary water regulatory legislation, specifically the Water Act 2007, is successful in recognising Australian Indigenous peoples' rights.

The fourth article marks a shift in this issue from property rights to other types of sourced rights. Bradford W Morse explores an international legal human right to water for the purposes of domestic application to ensure a right to clean drinking water on Canadian Indian reserves. This is a powerful illustration of the contemporary articulation of the Indigenous human right to water. The following article also looks at the rights of access to water but within a distinctly different region, the Andes. Rutgerd Boelens, Armando Guevara-Gil, and Aldo Panfichi bring to life the frictions between Indigenous water rights and the interests of dominant players seeking water for agricultural purposes. This article, and the next, bring to the fore interesting issues of legal plurality. In the Andes, the official legal structure does offer some recognition and protection of Indigenous water use, and shows the importance of Indigenous communities engaging in political-strategic action to defend water access rights and define water control rights. The next article pitches legal pluralism as a solution within the Australian context. This piece, by Donna Craig and Elizabeth Gachenga, argues for legal pluralism as a more effective context for the recognition of customary law in water resource management in Australia. As these authors recognise, this is one possible way forward for better engagement with Indigenous Australians. The last article encapsulates another way forward: the success of politically negotiating a co-management solution for the longest river in Aotearoa New Zealand. Linda Te Aho writes of the groundbreaking 2010 legislation passed to restore the health and well-being of the Waikato river.

9 See *Embrey v Owen* (1851) 6 Exch 353. See also *Blackstone's Commentaries on the Law of England* (1765) 2 Wm BI 14, 18.

10 See general discussion in D Fisher *The Law and Governance of Water Resources: The Challenge of Sustainability* (Edward Elgar Publishing Cheltenham UK 2009).

11 A Frame 'Property and Treaty of Waitangi: A Tragedy of the Commodities?' in Janet McLean (ed) *Property and the Constitution* (Hart Publishing Oxford 1999) 224 at 234.

12 207 U.S. 564 (1908).

13 373 U.S. 546 (1963).

Several themes become prevalent in reading through this issue. The most notable overall is that while governments are beginning to become more willing to provide some legal space for Indigenous peoples to voice their concerns over water management, there is little evidence that this is translating into any real power sharing. Even though legislation may be recognising Indigenous peoples' interests in water, these interests and rights frequently remain vulnerable to dominant industry interests. This is true of the Water Act in Australia, the Resource Management Act in Aotearoa New Zealand, and even the heralded Waikato River co-management solution.

A related theme is one that links water protection to water use. While Indigenous peoples do have a spiritual, cultural and historical association with water and thus wish to see its health and well-being protected for future generations, Indigenous peoples also seek to participate in the economic benefit of water to nourish their communities. Most of the countries case studied here, with the exception of the United States, fail to recognise this.

The challenges and opportunities are many and varied. In some countries the crisis for Indigenous peoples is seeking access to clean drinking water (for example, Indigenous Canadians on reserve) whereas for others it is halting and remedying pollution and commercial water take. It is thus important to recognise that a solution in one place may not be the solution for

another place. Political negotiation will often play a central role in creating pathways forward for Indigenous peoples to be more closely involved in water related decision-making. But even if Indigenous peoples are successful in securing legislative rights, these rights can remain vulnerable, especially in countries that do not have entrenched constitutional Indigenous protections (such as Australia and Aotearoa New Zealand). And legislative recognition can create other problems, as Boelens, Guevara-Gil and Panfichi articulate clearly in their article when they pose the question: 'How can "fossilising" Indigenous rights systems in static, universalistic, national legislation in which local principles lose their identity and capacity for renewal, making them useless, be avoided?'

The aspiration here has been to devote an issue of this journal to highlighting the pressing concerns of Indigenous peoples with regard to water and the law. It aims to give readers an insight into the specific contemporary perils facing Indigenous peoples and the legal and political regimes in several countries. It is hoped that the combined weight of these articles will reinforce the importance, and in some cases the critical importance, of these matters. Finding enduring legal solutions is something that should be occupying legal minds throughout the world. Significant progress has been made in recent years in many countries on the domestic front and internationally, but more needs to be done to strengthen the voice of Indigenous peoples in water management.