



RECOGNISING INDIGENOUS CONCEPTIONS OF CUSTODIANSHIP IN *Environmental law*

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'The Yolngu have cared for the land and have been custodians of the land for millions of years, since time began. And everything now...you look at climate change and all those things, everything's starting to fall apart. If people would learn from us [how to look after the land] then things would be better...But it's all that materialism and industry, the pollution, gas emissions and all that. It's destroying the earth now.' Dr Raymattja Marika¹

'[I]t is the human populations that are interdependent of the natural world – and not the opposite – and that they must assume the consequences of their actions and omissions with the nature...Now is the time to begin taking the first steps to effectively protect the planet

and its resources before it is too late...' The Atrato Case²

'We learn from how to live well by giving our attention to the earth and taking direction from her.'
M Asch, J Borrows & J Tully³

Indigenous conceptions of custodianship for land and waters have found little resonance within the legal systems of the nation-states.

Following decades of Indigenous advocacy, some national governments and institutions have started to become aware of the sustainability of Indigenous understandings of the world and the potential of Indigenous practices in the context of environmental deterioration and climate change. As a result, different initiatives have been taken across the world to incorporate Indigenous cosmology and worldviews into mainstream

environmental law. What do most of these initiatives have in common?

They build on a concept developed by Christopher D Stone who, in his 1972 article 'Should Trees Have Standing?'⁴ proposed to extend the model of legal personality conferred on inanimate entities such as corporations and trusts to natural objects, such as trees and rivers. What is interesting about this model? This granting of legal status and the rights that come with it can be used as a means to reflect Indigenous conceptions of custodianship in relation to natural sites, features and ecosystems.

Thus, in 2008, Ecuador became the first country to formally implement Indigenous cosmology into law by recognising the legal personhood of *Pacha Mama* (Mother Earth) and her inherent rights to be restored and protected in its Constitution.⁵

Two years later Bolivia followed by enacting the *Law of the Rights of Mother Earth 2010* (Ley Derechos de la Madre Tierra)⁶ while the World People's Conference on Climate Change and the Rights of Mother Earth adopted the *Universal Declaration of the Right of Mother Earth*.⁷ Similarly, in 2016 and 2017, Colombian and Indian courts found for the rights of specific rivers and ecosystems in their Jurisdiction, acknowledging, in the case of Colombia, the Indigenous principle of custodianship by establishing a joint guardianship ensured by both government and Indigenous officers.⁸

The most significant breakthrough has undoubtedly come from Aotearoa New Zealand, where the *Te Urewera Act 2014*⁹ and the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*¹⁰ gave a real echo to Māori beliefs and conception of custodianship by introducing a new type of governance based on the spiritual understanding and intrinsic relationship that Māoris have with specific natural sites and ecosystems. Significantly, the *Te Awa Tupua* legislation acknowledges the Whanganui River, Aotearoa New Zealand's longest navigable river, as the embodiment of Māori ancestors and provides for it to have 'all the rights, power, duties and liabilities of a legal person' over her own catchments. These prerogatives are to be exercised by the *Te Pou Tupua*, a jointly-held (Māori and Crown) office which serves as the statutory river guardian or 'human face of the river' and is responsible for speaking and acting on her behalf according to the four intrinsic Māori values known as *Tupua te Kawa*. As a result, the Whanganui River is empowered to defend her own interest by entering into relationship with Crown agencies and local authorities concerning various matters, while holding people accountable for damage she suffered.

As for Australia, the recent passing of the *Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017*¹¹ reflects the growing sensitivity of Victoria with regard to the Aboriginal spiritual conception of stewardship. Indeed, the act describes Victoria's

most iconic river as 'one living and integrated natural entity' that has a heart and spirit, and is part of the dreaming, while stressing the obligation of the traditional owners to keep her alive and healthy for future generations. Essentially, it provides the river with an independent voice by way of the Birrarung Council, a statutory advisory body composed of 12 representatives among whom two must be chosen by the Yarra's traditional owners. Additionally, the act requires a strategic plan guiding the future use and development of the Yarra River to be established in accordance with Aboriginal cultural values, heritage and knowledge.

Admittedly, one could argue that these Guardianship models are limited in scope and have a largely symbolic character. Indeed, as *Te Pou Tupua* is not a decision-making authority, it has a limited impact on the management of the Whanganui River, merely giving an indirect voice to the Māori people that affirms its value. Regarding the Birrarung Council, it is important to stress that its main purpose is not to act as a legal guardian, the Yarra River having not been granted a legal status at common law, but rather to ensure that different community interests – including those of the traditional owners – are involved in promoting and protecting the Yarra River.

Nevertheless, these initiatives have the merit of attempting to integrate a more holistic approach to environmental matters within the western legal system, one that reflects Indigenous views on nature as an all-encompassing reality where country and its components are sensed as imbued with spirit and unique personalities living in harmony. In this respect, given the historical neglect of recognition of the complexity and benefits of the Indigenous conception of custodianship, these mixed approaches can be seen as a turning point in environmental protection. Indeed, they embody a shift from a conception of environmental law that recognises the value of nature in the context of the sovereign interests of humankind to one that regards respect and care for all living beings and their interdependencies as paramount.

- ¹ S Maddison, *Black Politics: Inside the Complexity of Aboriginal Political Culture*, Allen & Unwin, New South Wales, 2009, p. 76.
- ² *Center for Social Justice Studies et al v Presidency of the Republic et al [T-622/16] The Atrato River Case* [2016].
- ³ M Asch, J Borrows & J Tully (eds), 'Earth-Bound: Indigenous Resurgence and Environmental Reconciliation', in *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings*, University of Toronto Press, Toronto, 2018, p. 51.
- ⁴ C Stone, 'Should Trees Have Standing? – Towards Legal Rights for Natural Objects', *Southern California Law Review*, vol. 45, 1972, pp. 450–501.
- ⁵ *Constitución de la República del Ecuador 2008 [Constitution of the Republic of Ecuador 2008]*, 2008, viewed 30 December 2019, <<http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>> arts 10, 71-74.
- ⁶ *Ley de Derechos de la Madre Tierra [No. 071] [Law of the Rights of Mother Earth] Bolivia*, 2010, viewed 21 December 2019, <<http://peoplesagreement.org/?p=1651>>.
- ⁷ Global Alliance for the Rights of Nature, 'Universal Declaration of Rights of Mother Earth', 22 April 2010, viewed 21 December 2019, <<https://therightsofnature.org/universal-declaration/>>.
- ⁸ M Margil, *Press Release: Colombia Constitutional Court Finds Atrato River Possesses Rights*, Community Environmental Legal Defense Fund, 2017, viewed 30 December 2018, <<https://celdf.org/2017/05/press-release-colombia-constitutional-court-finds-atrato-river-possesses-rights/>>.
- ⁹ *Te Urewera Act 2014 (New Zealand)*, 51, 2018, viewed 30 December 2019, <<http://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html>>.
- ¹⁰ *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (New Zealand)*, 7, n.d., viewed 30 December 2019, <<http://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html>>.
- ¹¹ *Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017*, n.d., viewed 21 December 2019, <http://classic.austlii.edu.au/au/legis/vic/consol_act/yrpbma2017554/>.

