CHAPTER ONE

INTRODUCTION

In all parts of the world, the development of lands and resources and the survival of the people that inhabit them depend on adequate access to water. Yet, in a range of countries, the indigenous peoples, typically the most disadvantaged members of society, continue to be excluded from the right to use, manage, govern or control the water on their lands.

The issue of how to include indigenous peoples in legal frameworks that allocate and regulate rights to water (or, indeed, whether to do so at all) is increasingly pressing worldwide. We see this, for example, in Māori concerns about the management and distribution of water in Aotearoa New Zealand (the Māori word for New Zealand is Aotearoa, meaning 'the land of the long white cloud') in the face of Crown ignorance of treaty protections, which have been the subject of negotiations, court cases, tribunal inquiries, political debates and social protest. We see it in Aboriginal demands for an equitable share of

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1 In this book I am concerned with terrestrial water and not coastal or marine water (which is typically managed by a separate legal framework), and focus on surface water in a natural or artificial resource.

2 I interchangeably use the terms ‘indigenous peoples’, ‘indigenous groups’ or ‘indigenous communities’ to refer to groups of indigenous people regardless of their structure or status in state law, and do not capitalise the word ‘indigenous’ on the basis that it is a generic term to describe the indigenous people of any country as opposed to the name of a particular culture or nation.

3 The terms ‘water use rights’ or ‘rights to use water’ are variously used to encompass the many different types of water use rights under laws and policies of different times and jurisdictions, sometimes referred to as ‘water licences’, ‘water permits’, ‘water allocations’ or ‘water access entitlements’. In contrast, the term ‘water rights’, including in the context of ‘indigenous water rights’ and ‘commercial water rights’, is used in a generic sense to refer to a right to water regardless of whether it is recognised or provided for in a state law of any jurisdiction.
water and the right to be included in water planning processes, amidst growing frustrations about the failures of the native title model. We see it, also, in indigenous resistance to natural resource development in Chile, causing the desecration of sacred sites and the over-extraction of aquifers, and indigenous frustration about the concentration of water rights in the hands of a wealthy few at the expense of vulnerable groups. We see it in indigenous and afrodescendant agitation for the protection of rivers from extreme pollution in Colombia, and in their demands for the right to participate in water management and governance, in the context of a national peace process, an influx of immigration, and an ongoing struggle against the drug trade. Outside those countries, indigenous exclusion from water law frameworks is also well documented, including, but by no means limited to, Peru, Bolivia, Mexico, Ecuador, the United States and beyond. In all of these places, indigenous demands for rights to use and manage water must compete with increasing demand for water resources from agriculture, urbanisation and industry and must contend with decreasing water supply and quality as a result of climate change.

Indigenous rights to land and resources like water, which are usually communal in nature and may have their origins in traditional (pre-sovereignty) laws and customs or historical practices or be a creature of state law, have been altered, affected and encroached upon as a result of colonisation. Indigenous exclusion from legislation and policy regulating the governance, management and use of water (water law frameworks) is often twofold. First, indigenous peoples are typically excluded from laws establishing processes to manage or govern the use of water. Secondly, indigenous peoples are often excluded from legal frameworks

that authorise the substantive use of water, which have since colonisation been largely allocated to other users. Calls from within and beyond indigenous communities to address the first type of exclusion have in some cases led to the development of laws and policies to include indigenous peoples in the management and governance of water resources. In other situations, a perceived need to respond to the second type of exclusion has led governments to devise legal and political mechanisms for the recognition, allocation and reallocation of substantive legal rights for indigenous groups to take and use water.

This book responds to an unresolved question in legal scholarship: how are (or how might be) indigenous peoples’ rights included in contemporary regulatory regimes for water. I consider that question in the context of two key trajectories of comparative water law and policy: first, the tendency to ‘commoditise’ the natural environment and use private property rights and market mechanisms in water regulation; secondly, the tendency of domestic and international courts and legislatures to devise new legal mechanisms for the management and governance of water resources, in particular ‘legal person’ models. In doing so, I am mindful, applying Morgan’s approach, of both rights-based concerns (like questions of identity, culture, entitlement and justice) and regulation-based concerns (like efficiency, institutions, the market and the public interest). The book provides much-needed attention to the role of rights and regulation in determining indigenous access to, and involvement with, water in comparative law.

This book adopts a comparative research method to explore opportunities for accommodating indigenous peoples’ rights in contemporary regulatory regimes for water. I examine law and policy in four countries that have attempted, to one extent or another, to recognise and provide for indigenous rights to use water, in order to draw out lessons for an international audience. The four countries: Australia, Chile, Aotearoa New Zealand and Colombia exemplify a spectrum of responses to a similar problem of indigenous water injustice, representing approaches from the global north and south and distinct legal traditions in Australasia and Latin America. Two of the countries included in the study, Australia and Chile, are ‘paradigm examples’ of the use of market

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10 I use the term water ‘governance’ in a broad sense to mean the exercise of authority and control over water resources via formal and informal legal and policy frameworks. Water governance includes, but is broader than, water management.

mechanisms in water regulation, in which highly uniform water access rights may in some situations be traded independent of land in water markets. In both of these countries, there is major concern about the accumulation of water rights by powerful agricultural and industry interests at the expense of indigenous peoples, and the need for some sort of recognition or redistribution.

At the other end of the spectrum, New Zealand and Colombia have, at least until now, resisted the ‘commoditisation’ of water rights and the introduction of markets. In those countries, water continues to be allocated by central and local governments via administrative concessions and water cannot be ‘owned’, although concerns remain about the exclusion of indigenous peoples from legal frameworks distributing use rights. New Zealand and Colombia are also leading global examples of governments addressing indigenous water concerns via the recognition of rivers as legal persons. The New Zealand Government declared the Whanganui River to be a legal person in 2017 as part of a political settlement with local Māori, giving the river the right to hold property, enter into contracts, sue and be sued in its own name. The Whanganui River model inspired the recognition of the Río Atrato as a legal person by the Constitutional Court of Colombia under the guardianship of indigenous and afrodescendent communities. A similar proposal has been developed to involve indigenous people and values in the management of the Yarra River in Australia, albeit without explicitly recognising that the river is a person. In all of these countries, governments have attempted to accommodate indigenous water interests, with varying degrees of success, offering important lessons about the place of indigenous water rights in diverse regulatory approaches.

Drawing on the analysis of the four countries studied, I make a key proposition in this book. That is, that if indigenous peoples are to be finally included in water law frameworks they must have both: the jurisdiction to manage, govern or control their water resources in...
culturally appropriate ways; and a substantive *distribution* of the available consumptive pool of water to use for any purpose. Much of the scholarly or policy literature focuses on one or other of these imperatives. For example, the focus may be that indigenous peoples should be consulted about or involved in decision making on the management of water resources, or that indigenous peoples should be given some sort of substantive water allocation or right. However, all of the country studies in this book suggest dual concerns for indigenous water jurisdiction and distribution. For example, in Aotearoa New Zealand debates about Māori water rights and their reception in law and policy are pushing towards increasing, culturally appropriate, involvement in water resource management or governance, perhaps via legal person models, and also the allocation of a substantive water allocation for Māori to use for any purpose. As will be shown in this book, addressing only one or the other of these imperatives may amount to an incomplete response to indigenous water injustice.

1.1 THE COMPARATIVE STUDY

This book is an exercise in comparative law. Comparative law is the study of a foreign legal system with the purpose of understanding one’s own system a little better. Legrand calls this ‘comparing in circles’, and he likens it to the story of Odysseus going off on a long, fraught journey only to come back home and understand things there a little better.16 This is true both of studies of the laws of other countries, but also of studies of other systems within one’s own country, like indigenous systems of law. Traditionally, the functionalist approach to comparative law recommended comparing systems that were functionally equivalent: like common law with common law, English language with English language or global north with global north.17 But more recent scholarship on comparative law, like the work of Orucu, Van Hoeke, Lasser and Cotterell, encourages the researcher to ‘cast the net wider’ and consider countries beyond the usual comparators.18

This book is an attempt to assist those considering the legal treatment of indigenous rights to water around the world, via the analysis of comparative, foreign experiences. There is a nascent, yet growing body of comparative law literature on indigenous water rights, although further considerations of comparative experience are needed to answer new and challenging questions as they emerge, especially beyond the usual common law comparators. Significantly, this book provides valuable insight for an English-speaking audience into the complex, yet often inaccessible, law and experience of indigenous water rights in Latin America.

Australia, Chile, Aotearoa New Zealand and Colombia all face similar concerns around indigenous access to water and their place in water regulation, and offer important contributions to comparative domestic and international debates. There are clearly legal, political, institutional, cultural and social differences between the countries studied in this book. For example, Chile and Colombia belong to the civil law tradition, modelled on Roman law, where legislated law is supreme and the courts have a minimal interpretive role (although, as we will see in Chapter 6, Colombia may prove an exception to this general proposition). However, the Australasian and Latin American cases at times exhibit strikingly similar problems in terms of environmental conditions and indigenous disadvantage, and in some cases

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even similar governmental attempts to respond to those problems. For example, Chile has comparable water conditions to Australia and in parts of both countries water scarcity and pollution in the face of climate change and increasing water demands from agriculture, sanitation and industry are serious problems.\(^\text{22}\) In both Colombia and New Zealand, water scarcity is less of an issue with high annual rainfall, although due to climate variability and a history of poor water management, in some parts of both countries waters are reaching full or over allocation,\(^\text{23}\) and water quality has been compromised.\(^\text{24}\) In all countries, indigenous groups make up the most disadvantaged sector of society and governments have committed (at least to some extent) to reducing indigenous disadvantage, including by supporting indigenous involvement in natural resource decision making and the productive use of indigenous territories.

The country studies in this book all demonstrate similar unresolved challenges for governments engaging with both water regulation and indigenous rights. These include epistemological uncertainty about the recognition of indigenous peoples and rights in legal and political theory and the reconciliation of claims by indigenous peoples concerning natural resources. The studies demonstrate the potential for governments to take novel approaches to comparative natural resource management, including, where culturally appropriate, a tendency towards more ‘eco-centric’ regulation, pursuant to which natural resources hold inherent value in and of themselves, as opposed to being a resource for human exploitation. The studies suggest increasing recourse to constitutional law and human rights protections to further the interests of indigenous peoples in the protection of their particular water interests. And all cases allude to wider policy issues concerning


\(^\text{23}\) A water resource is considered fully allocated where with full development of water access entitlements in relation to a particular water resource, the total volume of water able to be extracted by entitlement holders at a given time reaches the environmentally sustainable level of extraction for that system. See Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory, ‘Intergovernmental Agreement on a National Water Initiative’, Sch B(i), definition of ‘overallocation’.

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the regulation of water, including whether water is a human right to which all are entitled or a commodity capable of ‘ownership’, and, if the latter, whether water should be able to be traded in markets.

This book proceeds on the basis that there is much to be learned about the ways in which law may provide for indigenous water rights from considering the experiences of other jurisdictions. As De Stefano points out: ‘[i]n a globalized world, the use of comparisons between countries is a powerful policy tool . . . it makes it possible to identify good management practices, positive supranational trends, the potential need for concerted actions at an international level, or gaps in existing supranational initiatives’.25 There are clearly risks involved in comparative research and it is difficult to understand deeply and do justice to a foreign legal system.26 In this book I pay close attention to social, cultural, political and historical context in order to avoid misinterpreting other ‘legal languages’. Unless stated otherwise, all translations have been provided by the author, and where possible, foreign language terms are retained (and italicised). The book includes a glossary of common foreign language terms at the end although, as a sad reflection on the process of colonisation in Australia and Latin America, the only indigenous language commonly used in legal documents, and therefore referenced in this book, is Te Reo Māori.

In undertaking this research I have been ‘critically reflective’,27 by acknowledging, reflecting on, and accounting for my own cultural difference, assumptions and perspectives. I do not, for example, identify as indigenous, although I was lucky to be raised in a bicultural and bilingual Māori/Pākehā (New Zealand European) family. Nor am I Latin American, and although my children are and I have for many years been linguistically and culturally immersed in Latin American society, I inevitably have my own Pākehā assumptions and perspectives.

The critical appreciation of context in this book comes not only from an analysis of law and interdisciplinary scholarship, but from extensive doctrinal and empirical research carried out in all four countries during the course of eight years. The book draws on a rich archive of primary sources collected and interviews undertaken in each country to reveal data and analysis that has until now been uncollected, untranslated and

27 Lasser, above n. 18, 198.
unpublished. This includes in-depth archival research conducted at government offices, archives and libraries across the countries studied and forty-five semi-structured interviews with government officials, former politicians, community representatives, academics, activists and legal practitioners working in the field of indigenous water rights in Chile, Colombia, Aotearoa New Zealand and Australia. Although the interviewees are all highly experienced in water law and policy and indigenous rights, and have held various senior government, community and practitioner roles in the field, all views expressed by them are interpreted as being their own and are not presented as the view of any organisation in an official capacity.

Of course, indigenous water rights, and regulatory frameworks governing their exercise, exist regardless of (and in spite of) the extent of any formal recognition or mandate by the state. Those rights can be described as ‘property’, regardless of whether they are recognised as such.28 However, they are usually understood as being distinct from the propertised (or ‘commodified’)29 rights to land and resources typically recognised or allocated by western governments.30 The task in this book is to understand what governments are doing, or may do, to provide for indigenous water rights. Because the focus of the book is on the inclusion of indigenous water rights in state law and policy, the interviews are primarily with government representatives working in water law and governance or experts on state laws, although some of these representatives and experts were in fact indigenous. The comparative experiences uncovered in the book provide new perspectives on the reasons why indigenous water rights are needed, and the role law might play to provide for them.

1.2 OVERVIEW OF THE BOOK

In Part I of the book, I consider the key conceptual challenges inherent in attempts by governments to provide for indigenous water rights, and

28 See Godden, above n. 12, 413.
to accommodate indigenous interests in legal frameworks for the regulation of water.

In Chapter 2 I explore the tensions inherent in debates about indigenous water rights in legal and political theory, setting up the key propositions for this book. I argue that legal and policy mechanisms that seek to recognise cultural relationships with water and involve indigenous peoples in water governance should strive towards recognising indigenous water relationships, but, more importantly, indigenous water jurisdiction. This argument is central to the consideration of the four country studies included in this book, in which law and policy is sometimes able to provide a space for indigenous groups to exercise jurisdiction in planning and governing their water resources. I also contend that the reason states should provide for indigenous water rights is an imperative of distribution. Such rights are needed not only to remedy the historical injustice of non-recognition, but also because indigenous exclusion from water law frameworks is ongoing.

In Chapter 3 I introduce the two key regulatory tendencies relevant to the study of indigenous water rights in comparative law. One of these developments is the idea that governments should ‘commoditise’ the natural environment and use private property rights and market mechanisms in water regulation and allocation; an approach typically counterposed with the idea of treating access to water as a fundamental human right, to which all are entitled. The other is the tendency to devise new legal mechanisms like ‘legal personality’ to protect the ‘rights of nature’ and address social or community concerns around water governance and quality. Both trajectories play out repeatedly in debates about indigenous rights to water in comparative law, and resulting legal and policy frameworks in the country studies considered in this book. I argue that most regulatory frameworks are in fact a combination of public and private interests and transactions, and suggest that both private and public mechanisms may have a place in debates about how best to provide for indigenous water rights.

Part II of the book includes the four country studies, which critically examine legal and policy mechanisms providing for indigenous water rights in Australia, Aotearoa New Zealand, Colombia and Chile, respectively.

In Chapter 4 I consider the limited recognition of traditional, cultural water rights in Australian law. In the Australian model, often put forward as international best practice for water regulation, property rights in water and water markets accompany government oversight