

THE RECOGNITION OF INDIGENOUS CUSTOMARY LAW IN WATER RESOURCE MANAGEMENT

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INTRODUCTION¹

The role and place of customary law in 'modern' statutory legal systems has been the subject of academic discourse, particularly in nations which had traditional legal systems in existence before the subsequent super-imposition of statutory systems.² The resilience of the traditional systems in some cases results in implementation challenges for the modern systems, thus necessitating the recognition of customary law by the subsequent statutory legal systems. 'Law' means a body of rules recognised by a society as binding. When a society accepts as legitimate more than one system of rules having different sources, and in some cases in contradiction with each other, the society is said to have a polycentric, pluralistic legal system.³ Customary law comprises those sets of rules, established through the process of socialisation, that enable members of a community to distinguish acceptable from unacceptable behaviour and includes conventions and usages adhered to and followed by people through generations.⁴

The primary emphasis in most Anglo-American jurisdictions has been on research, policy and laws relating to the recognition of customary law in the context of property rights and the criminal justice systems. In nations such as Australia, where there are no treaty rights or legal recognition of Indigenous sovereignty, recognising customary law in the sustainable use and management of resources, including water, provides some important strategies for Indigenous peoples. Much more research and discussion is required on this aspect of environmental law and the rights of local communities, Indigenous and tribal peoples.

This article seeks to contribute to this discourse by considering customary law in the context of international and domestic law with a particular focus on its

potential role in natural resource management (NRM) (and particularly water resource management) based sustainable livelihoods. Drawing from the experience in Australia, the article reflects on some features of Indigenous customary law for NRM and forms of recognition of customary law proposed and used in Australia. It makes a case for legal pluralism as a more effective context for the recognition of customary law in NRM.

LINKING INDIGENOUS RIGHTS, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT

The inextricable link between Indigenous rights, human rights and sustainable development is recognised in the jurisprudence of customary international law.⁵ Principle 22 of the Rio Declaration,⁶ Article 8(j) of the Convention on Biological Diversity (CBD) (1992)⁷ and Chapter 26.4 of Agenda 21⁸ specifically recognise the importance of Indigenous customary laws in environmental protection.

The appreciation of this connection in international environmental law is not novel. It is evident in the articulation of the concept of sustainable development which gained international significance in 1987 when it was adopted as the fundamental objective of the Brundtland Report.⁹ However, the basic principles behind the concept preceded this articulation. The earlier 1972 Stockholm Declaration is evidence of this. The declaration refers to the need for judicious use of natural resources:

1 The ideas in this article are the result of reflection on the results of a larger project on recognition of customary law in Australia and Melanesia funded by the Christiansen Foundation.

2 Editor 'Customary Law: Its Place and Meaning in Contemporary African Legal Systems' (1965) 9 *Journal of African Law* 82–5.

3 A Bilal, H Haque and P Moore *Customary Laws – Governing Natural Resource Management in the Northern Area* (International Union for Conservation of Nature and Natural Resources (IUCN) Law Programme 2003) xii.

4 *ibid.*

5 See Berlin Rules on Water Resources, the International Law Association's 2004 revision of the Helsinki Rules on the Uses of the Waters of International Rivers (1966).

6 Rio Declaration on Environment and Development (adopted at the United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil 3–14 June 1992).

7 UN Doc A/CONF.151/26 (vol 1); 31 ILM 874 (1992)/CBD= (signed at the United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil 5 June 1992 and entered into force 29 December 1993) 1760 UNTS 79; 31 ILM 818 (1992).

8 UN GAOR 46th Session Agenda Item 21 UN Doc A/Conf.151/26 (1992) <http://www.un.org/esa/sustdev/documents/agenda21/>.

9 Report of the World Commission on Environment and Development *Our Common Future* (Brundtland Report) 1987 Annex to UN Doc A/42/427, available at <http://www.are.admin.ch/themen/nachhaltig/00266/00540/00542/index.html?lang=en>; <http://www.un-documents.net/wced-ocf.htm>; (Oxford University Press Oxford 1987).

The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.¹⁰

While the World Commission on Environment and Development held hearings and finalised the Brundtland Report, the right to development was asserted and reaffirmed as an inalienable human right in the United Nations Declaration on the Right to Development in 1986.¹¹ The link between the right to development and the concept of sustainable development was thus recognised. In 1993, the right to development, now contextualised within sustainable development, was reasserted as a universal right and as forming an integral part of fundamental human rights.¹²

Despite the recognition of the link between Indigenous rights, human rights and sustainable development in international environmental law, its reflection in domestic environmental law is still inadequate. There is a crucial need to deal with human rights through domestic environmental law and to recognise Indigenous customary laws as part of this. Indigenous peoples have integral and unique relationships with the earth (including land, seas, resources, wildlife) and they do not fragment or compartmentalise their rights and obligations relating to their ecological, spiritual, cultural, economic and social dimensions.¹³

Experience from Australia indicates that Indigenous traditional knowledge about land and water resources can help develop the emerging theories, concepts, and methods¹⁴ that promote 'the integrated management of land, water and living resources ... [and the] strengthening [of] regional, national and local capacities'.¹⁵ As noted by Andrew Gray:

Biodiversity is the inspiration for spirituality and culture for Indigenous peoples, who through their production activities and shamanic practices contribute to the respect for and the enhancement of biodiversity ... There is no unitary notion of nature, but a set of relations between humans, spirits and clusters of species ...¹⁶

Further, Henrietta Fourmile explains:

Not only is it the land and soil that forms our connections with the earth but also our entire life cycle touches much

of our surroundings ... We feel biodiversity because it is our total existence whether we live in modern society or not.¹⁷

Although the benefits that biodiversity and ecosystems provide are widely known, they are poorly understood,¹⁸ and the richness of Indigenous traditional knowledge and high level of adaptability with ecological conditions are fundamentally important approaches for protecting the environment. Much of this knowledge will be lost if there is a continued failure to recognise the human rights and customary laws of Indigenous people.

The appreciation of the link between Indigenous rights and human rights is a necessary precondition for the achievement of sustainable development by the Indigenous communities. The protection of human life, health, and living standards is a fundamental precondition of economic development based on social participation and respect for the environment. Human rights, particularly for Indigenous people cannot be secured in a degraded or polluted environment:

[F]rom an Indigenous perspective, their health, and that of their communities, is linked to the health of their land and waters. Making sure that the environment is healthy and sustains the community is an inherent right. Land and waters must be healthy so that Indigenous peoples remain healthy. Land and waters are a living body, and water quality directly affects the Indigenous peoples' inherent rights.¹⁹

The effectiveness of adopting a social justice approach to environmental governance is argued in an Australian report on overcoming Indigenous disadvantage which observes that:

functional and resilient Indigenous families and communities with economic participation and development have been identified by the proportion of those Indigenous people with access to their traditional lands and water.²⁰

RECOGNITION OF CUSTOMARY LAW IN NATURAL RESOURCE MANAGEMENT: THE AUSTRALIAN EXPERIENCE

One of the greatest challenges posed for greater Indigenous involvement in NRM is how to give it meaning in a legal framework of narrowly defined rights-based discourse. The difficulties posed cannot justify impassivity, as to accept the incompatibility of customary law in NRM is to accept as valid the denial to Indigenous and tribal peoples of fundamental human rights.

10 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) Adopted by UNGA Res 2998 (15 December 1972) UN Doc A/CONF.48/14/Rev.1 (1973); 11 ILM 1416 (1972) Principle 5; see also Principle 13.

11 UN Doc A/RES/41/128 (4 December 1986).

12 Declaration on Human Rights UN World Conference on Human Rights (Vienna 14–25 June 1993) (Vienna Declaration) UN Doc A/CONF.157/24 (Part I) (1993) para 10.

13 D A Posey 'Introduction: Culture and Nature – The Inextricable Link' in D A Posey (ed) *Cultural and Spiritual Values of Biodiversity* (Intermediate Technology Publications/UNEP London/Nairobi 1999).

14 For example, see A Amankwah 'Traditional and Customary Land Tenure and Appurtenant Rights: Reflections on Critical Factors of an Ecologically Sustainable Australian Outback' in A Smajgl, S Larson (eds) *Adopting Rules for Sustainable Resource Use* (CSIRO Sustainable Ecosystems Townsville Australia 2006) 83–5; R Baker, J Davies and E Young (eds) *Working on Country: Contemporary Indigenous Management of Australia's Lands and Coastal Regions* (OUP Melbourne 2001).

15 Brundtland Report (n 9).

16 A Gray 'Indigenous Peoples, Environments and Territories' in Posey (ed) (n 13) 62.

17 H Fourmile in Posey (ed) (n 13) ch 4 'Voices of the Earth'.

18 S Pagiola, K Von Ritter and J Bishop 'Assessing the Economic Value of Ecosystem Conservation' (The World Bank Environment Department Paper No 101 in collaboration with The Nature Conservancy and IUCN – The World Conservation Union 2004) <http://www.iucn.org/themes/economics/Files/ecovaluation.pdf>.

19 Lingiari Foundation *Indigenous Rights to Water Report and Recommendations* (Lingiari Report to Aboriginal and Torres Strait Islander Commission 2002).

20 Steering Committee for the Review of Government Service Provision *Overcoming Indigenous Disadvantage: Key Indicators 2003* (Australian Government Productivity Commission Canberra 2003) Overview xxxv.

Contemporary legal systems have taken various approaches in their attempts to give recognition to customary law. In the broader context of property rights in natural resources, Indigenous rights are often regarded as second order rights to be assessed through broad policy objectives after others have been guaranteed or assigned their more concrete rights. This is at least a start. However, a more appropriate minimal approach would be to try to identify the range of options for statutory provisions to better recognise customary arrangements for effectively contributing to the economic livelihoods of Indigenous people, and integrated NRM strategies required to achieve sustainable development.²¹

This latter approach has been advocated in many jurisdictions including Australia. Despite its effort to ensure the recognition of customary law through the use of statutory provisions, this approach is arguably still inadequate in so far as it starts out from a one-sided perspective: the statutory one. More appropriate responses involve the recognition of customary law in the context of a pluralist legal system. Legal pluralism can be understood as a situation where two or more forms of law operate within one society. The advantage of the legal pluralistic approach is that it recognises both customary and statutory forms as legal systems. Understood in this context, customary law is not necessarily always subordinate in the process of 'reconciling' two systems of law but rather is an equal system of law that may also challenge the legitimacy of aspects of the dominant legal system. Legal pluralism allows for a situation in which customary law may actively inform the process of 'reconciliation' or 'recognition' and cause changes in the dominant legal system to make it better reflect the aspiration of sustainable development.

Aboriginal relationships with land and waters form a significant part of Indigenous cultural identity. This cultural identity is a manifestation of spiritual connection, which unites families and communities and maintains the continuity of traditional societies through ceremonies and initiation, the teachings by community elders and through religious rituals where ancestral beings of the dreamtime are worshipped and revered.

Rose further explains:²²

Responsibilities (among Aboriginal people), like rights, are differentiated in structure but not necessarily in substance. Both are held and exercised across spiritual, social and ecological domains ... Indigenous people hold these domains as integral parts of the long-term management of life on earth. Responsibilities are differentiated and complementary. They are held and exercised both locally and regionally ... the people of each country depend on others for the proper management of the relationships which sustain them all, and each group depends on others for the very pragmatic practices of land management ... Restraint is equally part of this system. There are sanctuaries where people do not hunt or fish or gather, and

places where burning is done with extra caution or not at all. There are responsibilities based on totemic relationships: the kangaroo people can forbid others to kill and eat kangaroo, for example. As a general rule, totems are linked to taboos that enforce restraint and that are managed by the appropriate people. Differentiated and complementary responsibilities sustain regional interdependencies. There are few hard and fast boundaries, but rather strong ecological, social and spiritual links that are reproduced through the generations.²³

The above description gives insight into the complexities of Indigenous culture and customary law. It is holistic, flexible and adaptive and may adopt new practices when circumstances change.²⁴ These features of Indigenous customary law are essential to their NRM governance systems and must be safeguarded in the process of recognition of customary law.

Unfortunately, statutory legal systems frequently require, as a pre-condition for recognition, that customary law and traditions are reflective of an era in the distant past without any significant material alteration since a particular moment in history, usually the imposition of sovereignty.²⁵ In Australia, the Native Title Act (1993) requires discernment of the laws and customs presently acknowledged and observed by a society, and those that were acknowledged and observed before sovereignty, and then demonstration that this connection with land and waters has continued substantially uninterrupted since sovereignty to the present day. It further requires proof of a personal entitlement flowing from that aspect of the relationship with land, encapsulated in the 'right to speak for country'.²⁶

The effect of the above provision is that under common law and statute substantial interruptions to traditional rights and customs are considered fatal to the recognition of Indigenous rights and interests, and there is no revival of rights.²⁷ New social structures created after sovereignty (or as a result of sovereignty) are not recognised, because attempts to re-establish or resurrect traditional law and customary practices would no longer represent the continuity of a traditional society.²⁸ This preoccupation of statutory systems with questions of continuity and change limits the ability of NRM customary law systems to achieve sustainable development. This is because the provision does not give adequate space to the Aboriginal systems of philosophy and ecology which accommodate the new according to the logic of country.²⁹ This condition of continuity means that the legal system not only fails to recognise customary law but effectually impoverishes it.

The dominant legal system's fear of recognising Indigenous 'property' rights has also eroded customary law as an important and positive avenue for the

21 See also L Chartrand 'Accommodating Indigenous Legal Traditions' (Paper prepared for the Indigenous Bar Association in Canada March 2005).

22 D B Rose *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission Canberra 1996).

23 *ibid.*

24 *ibid.* 40.

25 *ibid.* 42.

26 *Western Australia v Ward* (2002) 191 ALR 1 per majority at 93.

27 *Yorta Yorta Aboriginal Community v The State of Victoria and Ors* (2002) 58 HCA per majority at 53.

28 *ibid.* at 47.

management and sustainable use of natural resources. A more enlightened view was expressed by Justice Kirby in the High Court in *Ward*:

In my opinion, it would be a mistake to ignore the possibility of new aspects of traditional rights and interests developing as part of Aboriginal customs not envisaged, or even imagined, in the times preceding settlement.³⁰

However, the intertwined and often inseparable social, economic, spiritual, cultural and environmental sense of being has been interpreted in western law as a 'bundle of rights'. Although such an approach has been criticised on the basis that it doesn't adequately explain the right to property,³¹ it is an approach favoured by the court in its attempted interpretation of Indigenous relationships with land and water, notwithstanding the detrimental effects that much is lost thereby.

On the basis of this restrictive interpretation of Indigenous customary law, a commonality in all Australian jurisdictions is the failure to define clearly the substantive rights and interests of Indigenous Australians in NRM and to develop procedures for the enforcement of these rights and interests. Indigenous rights and interests within the Australian 'bundle of rights' formulation have denied the evolution of traditions to include contemporary practices.³²

Aboriginal rights to natural resources is part of a broader discourse of a right to self-determination, which is recognised in Article 1(2) of the International Covenant on Cultural, Economic and Social Rights (ICESCR)³³ which states:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.

LAW REFORM PROPOSALS

In 1986, the Australian Law Reform Commission (ALRC) released its report, *The Recognition of Aboriginal Customary Laws*.³⁴ This was the result of a nine year process involving research and inquiry to determine if it would be desirable to apply Aboriginal customary law to Aboriginal people and to determine whether and in what ways it should be recognised within the general framework of criminal law.

The ALRC concluded that the recognition of Aboriginal customary law could be within the general framework of the legal system.³⁵ It was observed that this

recognition could take a variety of forms.³⁶ It advocated recognition of customary law as a normative system, but not as a competing legal system, so as to avoid 'possibly conflicting, systems with resulting inefficiencies and inequities'.³⁷ The report proposed the adjustment of existing statutory laws to require accommodation of Aboriginal customary law and to take customary law into account in the decision making process. This provides the essential movement away from bureaucratic administrative decisions made under broad regulatory mechanisms, which may/will determine the depth and breadth of Indigenous involvement and the level of Indigenous empowerment, and allows decisions to be reviewed.³⁸

Subsequently the Law Reform Commission of Western Australia (LRCWA)³⁹ and Northern Territory Law Reform Committee (NTLRC)⁴⁰ advocated, as had the ALRC, 'functional recognition'⁴¹ of Aboriginal customary law, that is, recognition on a case by case basis, or the determination of the appropriate form of recognition depending on the context of the law's application.⁴² The reports considered that it is important that the recognition of Indigenous customary law with regard to natural resources does not become subsumed or codified⁴³ into mainstream statutory enactments. It is also necessary to avoid Indigenous loss of control over customary law,⁴⁴ the taking away of Indigenous people's own interpretations of customary law⁴⁵ and secret aspects of customary law having to be revealed.⁴⁶ To this extent, functional recognition 'avoid[s] "freezing" of customary and Indigenous rights systems in static and universalistic legislation'.⁴⁷

In the adjustment of NRM legislation to accommodate customary and traditional laws and customs for functional recognition, under the umbrella of this overall recognition, natural resources and water should be managed according to customary law and the right to speak for country when cultural norms and property concepts intersect with the objectives of NRM. For example, a proper law exception may apply to NRM legislation when Indigenous rights and interests in applying customary law are greater than state jurisdictional interest.

36 *ibid* paras 199–208.

37 *ibid* paras 125, 196, 197.

38 *ibid* paras 206–71.

39 LRCWA *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture* Project No 94 Final Report (Government of Western Australia Perth 2006).

40 Austin Asche AC QC, NTLRC 'Report of the Committee of Inquiry into Aboriginal Customary Law' (August 2003).

41 ALRC (n 34) para 116 'Loss of Control over the Law'; LRCWA (n 39) 71.

42 ALRC (n 34) paras 49 and 50.

43 LRCWA (n 39) 9; ALRC (n 34) para 49.

44 ALRC (n 34) para 27 and paras 206–71.

45 NTLRC (n 40) para 3.11

46 ALRC (n 34) ch 8 'Aboriginal Customary Laws: Recognition?' para 106.

47 R Boelens, R Bustamante 'Formal Law and Local Water Control in the Andean Region: A Field of Fierce Contestation' (Paper presented at International Workshop on African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa Johannesburg 17 May 2010) <http://www.nri.org/projects/waterlaw/AWLworkshop/BOELENRS.pdf>.

29 *ibid*.

30 *Western Australia v Ward* (n 26) at 574.

31 K Barnett 'Case Notes: One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis' (2000) 24 Melbourne University Law Review 462–77.

32 Human Rights and Equal Opportunity Commission Aboriginal & Torres Strait Islander Social Justice Commissioner *Native Title Report 2000* ch 3.

33 UN Doc A/RES/21/2200 (adopted 16 December 1966 and in force from 3 January 1976).

34 ALRC *The Recognition of Aboriginal Customary Laws* Report No 31 (3 vols) (Australian Government Publishing Service Canberra 1986).

35 *ibid* para 195.

As Justice Blackburn stated in *Milirrpum v Nabalco*:

The social rules and customs of the plaintiffs cannot be dismissed as lying on the other side of an unbridgeable gulf. The evidence shows a subtle and elaborate system highly adapted to the country in which the people lead their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is shown in the evidence before me.⁴⁸

The ALRC recommended that in the context of NRM the following hierarchy of priorities should be applied:

1. conservation and other overriding interests
2. traditional hunting and fishing
3. commercial and recreational hunting and fishing.

The LRCWA supported the ALRC's hierarchy of priorities. It considered that natural resource and conservation management programs would benefit from inclusion and engagement with Indigenous people and the application of traditional knowledge.⁴⁹ The Commission also recommended amendment of the Western Australian legislation to enable Indigenous people to harvest wild resources⁵⁰ and to 'exploit traditional knowledge of the land and its natural resources by undertaking commercial harvesting of fauna and flora in their traditional lands'.⁵¹ The NTLRC has also recommended that the Territory government should assist in the incorporation of traditional law into the Aboriginal community in a manner the Indigenous communities considered appropriate.⁵²

When governance under customary law cannot be recognised for geographical areas, a process of statutory adjustment and Indigenous accommodation should require the mandatory consideration in decision making of various weighted factors (determined by Indigenous people) reflecting core Indigenous concerns and rights and interests. This can be achieved with the use of a cultural health index⁵³ (CHI) for specific geographical areas or Protected Areas. 'The CHI is proposed as a practical, easily implemented tool that enables the collection of data specific to cultural values', and is a practical means by which agencies can recognise and provide for cultural values and practices within contemporary resource management systems.⁵⁴

EXPANDING RECOGNITION OF CUSTOMARY LAW IN NRM: OPPORTUNITY IN WATER RESOURCE MANAGEMENT

The development of world water resources has been aggressively pursued by individual states for the expansion of their centres of civic, industrial and political life. To meet the demands of development, water

infrastructure expanded rapidly under water policies that were constructed on the basis that it was a cheap and abundant resource necessary for agriculturally driven economic growth. Sax, writing about the evolution of US water law and policy, refers to this period as the 'transformative economy'.⁵⁵ Price did not reflect the costs of transmission, nor was there a system in place to assess whether supply could meet demand.⁵⁶ Rather, in this period the emphasis was on the value of transforming resources for human production and consumption.⁵⁷

Today, '24% of Earth's terrestrial surface has been transformed to cultivated systems',⁵⁸ and it has been estimated that by 2025, 1.8 billion people will live in countries or regions with absolute water scarcity.⁵⁹ This is because the total usable freshwater supply to ecosystems and humans from river system, lakes, wetlands, soil moisture and shallow groundwater is less than 1 per cent of all freshwater, and represents only 0.01 per cent of all the water on earth.⁶⁰ The unrestrained development ethos has cultivated the notion of diverting and damming water resources and the perpetuation of inefficient and unsustainable land management practices, which has resulted in even greater diversions of water to meet present needs. Therefore, 'water withdrawals from rivers and lakes for irrigation, household, and industrial use doubled in the last 40 years'.⁶¹

A shift from this transformative economy is occurring as scientific knowledge demonstrates the importance of this change for the viability of the world.⁶² Kenneth Boulding, writing four decades ago, predicted this. He observed that the world was moving from what he referred to as a 'cowboy economy' with its emphasis on production and consumption to a 'spaceship economy' which would have sustainable development as its focus.⁶³ Sax has referred to this new phase in which water law and policy is being developed as an 'economy of nature' which recognises the value of resources in their natural state and the non-renewable nature of the resources.⁶⁴

The limited understanding of the effects of today's production and consumption on tomorrow's natural processes⁶⁵ requires a rational sustainable development

55 J L Sax 'Property Rights and the Economy of Nature: Understanding *Lucas v South Carolina Coastal Council*' (1993) 45 *Stanford Law Review* 1433–55.

56 L Starke (ed) *State of the World 2006: The Challenge of Global Sustainability* (W W Norton New York 2006) 42.

57 Sax (n 55).

58 Millennium Ecosystem Assessment 'Living Beyond Our Means: Natural Assets and Human Well-being (Statement from the Board)' (March 2005) <http://www.wri.org/publication/millennium-ecosystem-assessment-living-beyond-our-means-natural-assets-and-human-we> at 10.

59 C P Kumar 'Fresh Water Resources: A Perspective (International Year of Fresh Water – 2003)' <http://www.angelfire.com/bc/nihhrrc/documents/fresh.html>.

60 *ibid*.

61 Millennium Ecosystem Assessment (n 58).

62 J L Sax 'The Limits of Private Rights in Public Waters' (1989) 19 *Environmental Law* 473–84.

63 K Boulding 'The Economics of the Coming Spaceship Earth' in H Jarret (ed) *Environmental Quality in a Growing Economy* (Johns Hopkins University Press Baltimore 1966).

64 Sax (n 55).

65 Stockholm Declaration (n 10) Principle 13.

48 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 267.

49 LCRWA 'Aboriginal Customary Law: Can it be Recognised?' background paper 9 at 77.

50 *ibid* 78.

51 *ibid* 79.

52 NTLRC (n 40) para 1.5.

53 G Tipa, L Teirney *A Cultural Health Index for Streams and Waterways: Indicators for Recognising and Expressing Māori Values* (Ministry for the Environment Wellington, New Zealand June 2003).

54 *ibid*.

methodology that seeks to protect, prevent and mitigate environmental vulnerabilities⁶⁶ for present and future generations. Hence sustainable development needs to evolve with an understanding of the relationships between land, water and ecosystems. This would help address problems of over-allocation of resources and contribute to the maintenance of water quality. What is required is a reconstructing of institutions⁶⁷ and norms that will decide the future relationships between individuals and natural resources.

Integrated catchment management as a method of sustaining healthy ecosystems and environmental flows, is, in part, to apply a system of management that has been undertaken by Aboriginal people in caring for country for over one thousand generations. In essence, it is the recognition that there is an interconnected and interdependent relationship between ecosystems and habitats that makes up an indissoluble whole.

The ecosystem approach, as defined in the CBD 1992 and advocated by the Millennium Development Goals,⁶⁸ correlates with the Indigenous concept of 'speaking for country': 'If you are doing the right thing ecologically, the results will be social and spiritual as well as ecological. If you are doing the right spiritual things, there will be social and ecological results'.⁶⁹ The Indigenous people appreciate that their holistic development is dependent on sustainable management of the ecology of water habitats and sacred sites through the maintenance of environmental flow characteristics and volume as well as the diversity of their aquatic species; that is ecosystem support and maintenance and the replenishment of species.

POTENTIAL ROLE OF INDIGENOUS CUSTOMARY LAW IN WATER RESOURCE MANAGEMENT

Indigenous inclusion in Water Resource Management (WRM) provides an opportunity to encompass a new set of values, ideas and appropriate responses to the preservation and protection of the ecological integrity of the waters (including the interconnections of surface and subsurface waters)⁷⁰ in accordance with the emerging international environmental legal norms:

Knowledge is the foundation of understanding and decision-making. Shared knowledge, and respect for different forms of knowledge, are the basis for building consensus and resolving conflicts. Decisions can only lead to effective management actions if the actors have the right knowledge and skills.⁷¹

Indigenous knowledge systems in WRM can assist in the implementation of the precautionary principle.⁷² In the absence of scientific certainty, Indigenous knowledge may help identify the scale of the impact that human activities have both directly and indirectly on ecosystem goods and services and the degree to which certain changes may be irreversible and become non-supportive of human needs. Indigenous integrated WRM, under customary law, includes restrictions on fishing at certain places or extracting water from certain wells, streams, lagoons and lakes. This may reflect seasonal variation, a spiritual or religious connection or the status of the Indigenous person under customary law.

Indigenous WRM systems would contribute to the move beyond the traditional bundle of rights paradigm in the bare shell of planning frameworks that has been devised for water allocations and natural resources in legislative provisions in most jurisdictions. If WRM legislation encompassed Indigenous rights, interests and traditional ecological knowledge, it would present an opportunity to undertake a revision of the current management strategies developed through an alternative mindset. This in turn would assist in developing the adaptive, holistic and interdependent management practices⁷³ necessary to reverse environmental degradation and support sustainable water use practices, drawing from Indigenous peoples' specialised knowledge of the environment, ecology, geography and weather patterns developed over a millennia.⁷⁴

Further, Indigenous inclusion and the application of Indigenous knowledge can assist in setting the scientific baseline for environmental and cultural flows, through the establishment of standards and targets, as well as having a role in regulatory enforcement. Customary law can assist in the development and implementation in Australia's jurisdictions of the concept of environmental flows in mainstream WRM. A determination of environmental flows is an assessment of risks to life, health, property and the environment of particular volumetric flows, and the amount of water needed for river and groundwater systems to maintain themselves and their functions, uses and benefits to people.⁷⁵

The realisation of the potential of Indigenous customary law would require the inclusion of Indigenous nations in a more active, equitable and sustainable system where decisions must be made with input from those who actually know the land and waters because:

66 Johannesburg Declaration on Sustainable Development (adopted at the UN World Summit on Sustainable Development Johannesburg 4 September 2002) UN Doc A/CONF.199/20 Annex Plan of Implementation para 37.

67 E Ostrom 'Multiple Institutions for Multiple Outcomes' in A Smajgl and S Larson (eds) *Sustainable Resource Use: Institutional Dynamics and Economics* (Earthscan London 2007) 23–50.

68 <http://www.un.org/millenniumgoals>.

69 Rose (n 22) 49.

70 Johannesburg Declaration (n 66) http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm; New Delhi Declaration (n 70) para 7; Agenda 21 (n 8) para 18.18.

71 Bonn Ministerial Declaration and Recommendations for Action (International Conference on Freshwater Water Bonn 3–7 December 2001) Recommendation 18(1).

72 Rio Declaration (1992) (n 6) Principle 15; New Delhi Declaration (n 70) Principles 4.1, 4.2, 4.3, 4.4; World Charter for Nature UNGA Res 37/7 (28 October 1982) Principle 11; Bonn Ministerial Declaration (n 71).

73 F Walsh, P Mitchell (eds) *Planning for Country: Cross-Cultural Approaches to Decision-Making on Aboriginal Lands* (Jukurrpa Books Alice Springs 2002); see also L Grenier *Working with Indigenous Knowledge: A Guide for Researchers* (IDRC Ottawa 1998).

74 L Ford 'Indigenous Voices – Clan Totem, Ngirrwat and Place. Rak Mak Mak Marranunggu, Kurrindju' (Paper presented at the 9th Conference on Hunters and Gatherers Deakin University, Victoria, Australia 9–13 September 2002).

75 M Dyson G Bergkamp and J Scanlon (eds) *Flow – The Essentials of Environmental Flows* (IUCN Gland Switzerland and Cambridge UK 2003) <http://cmsdata.iucn.org/downloads/flow.pdf>.

An adjustment or even a fundamental reshaping of decision-making, in light of country specific conditions ... is required if environment and development is to be put at the centre of economic and political decision-making, in effect achieving a full integration of these factors.⁷⁶

However, proposals for local governance and participation often neglect the need to recognise the customary laws that are inextricably part of traditional use and management of resources.

CONCLUSION

Modern approaches to sovereignty recognise the reality of multiple sources of power and responsibilities under international law as well as within national legal systems. Federal jurisdictions provide for co-existence and cooperation between governments as well as multiple sources of law. National constitutions and courts deal with issues of exclusive power, shared power and conflict of laws. Similarly, there are long-standing and practical legal principles governing conflict of laws between nations. These experiences suggest that a more expansive approach to recognition of customary law is possible and viable in the context of legal pluralism.

The United Nations General Assembly has just adopted a resolution recognising access to clean water and sanitation as a human right, strengthening further the link between water resources, sustainable development and human rights.⁷⁷ This enhances the case for the recognition of Indigenous rights in WRM in a human rights context.

It is in the interests of countries to identify the potential of customary law in the context of locally based natural resource use and management and the objectives of sustainable development and biodiversity conservation. Legal pluralism provides a more effective context for the recognition of customary law in WRM as opposed to functional recognition and other minimalist forms of recognition. However, the constitutional, legal and administrative frameworks needed for the co-existence of the two systems of law in the context of WRM continue to be a challenge. This is an area of law and practice that needs further debate, policy, legal experimentation and careful consideration of locally specific customary laws and water resource management issues.

76 Agenda 21 (n 8) Principle 8.2.

77 United Nations 'General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right' GA/10967, 28 July 2010, recorded vote of 122 in favour, 0 against, 41 abstentions.