ECO Conference, Stoke, Nelson 2017

Responsible transitions in the cross currents of change: thinking ecologically

Betsan Martin, 26 August 2017

Nga mihi ki te Tangata whenua o te Tau Ihu – me o Rangitane, Ngati Kuia, Ngati Apa and Ngati Toa, Ngati Koata, Ngati Tama and Te Atiawa

Introduction - covering law, ethics and policy on Freshwater and Climate

My references for this paper include **Law and governance**, with an interest in how we recognize interdependence in governance and in law.

Interest in the interface between Water and climate – changes to water - ice, rain, draught, water temperature, sea levels, ocean acidification are the main signs of climate impacts.

Public Trust and Responsibility

Public Trusteeship especially for water, also for climate; and the significance of **responsibility**. The theme of transitions is included – thinking of transitions to zero carbon, and also, less conventionally, of the transitional process of change towards ecological systems in governance.

Some of the thinking comes from **our book** – the Transformative Power of Law / Good Law for Water and Climate.

During a meeting of coalition partners on waterways, we were discussing governance, and a proposal was made to consider public trusteeship of water. This came from research and ongoing contact I have with Kapua Sproat, an indigenous Hawaiian legal expert who led the Public Trust litigation in Hawaii. I will mention this further below.

The proposal for public trusteeship part of our interest in looking at alternatives to the present regime and in further exploring forms of governance for public good that also respect and uphold Maori interests.

Quest for new forms of governance

The quest for new forms of governance comes in response to the failure of government to safeguard environmental interests, and in recognition of the inadequacy of elected governments for short terms to address long term and intergenerational responsibilities. We see this in NZ in the proposals for Commissions – a Commission for the Future, Commission for Waterways, Commission for Climate Change – along lines of Parliamentary Commissioner for Environment.

Commissions, like Public Trust, provide institutional and legal frameworks that are more enduring than governments, and might carry a mandate for long term interests and safeguards.

With regards to climate change, and the Conference of Parties negotiations, we also recognize that governments are mandated to negotiate in their national self interest. As I heard it said at COP21, in 2015, there is no-one here to negotiate for the planet. A step towards partially remedying this came from the Marrakesh COP where new recognition of non-state stakeholders was given form in the Marrakesh partnerships for Action on Climate Change. Fiji hosted the first Marrakesh Partnership meeting in May.

We have begun research on Public Trust and Legal Personality for our book *Responsibility and the Transformative Power of Law* (eds. Martin, Te Aho, Humphries, forthcoming). I will give some initial points of interest.

Public Trust & Legal Personality, Rights of Nature

As I look further into Public Trust, Legal Personality, and the growing interest in the 'rights of nature' I am trying to make sense of my reservations about the rights approach, and to understand why the effort to give legal standing to nature is both important, yet seems to be inadequately confined to the conceptual frameworks of liberal legal tradition.

Mention Rights of Nature – anticipating **Geoffrey Palmer**.

I see there are three forms of Law:

- The Great Law, or Law of Nature – this is a reference in the Thomas Berry, Peter Burdon work on Earth Jurisprudence
- Indigenous Law – as it was prior to European settlement and is emerging into greater public view n common law cases such as the two cases taken by Maori in respect of rivers: Huakina in 1987, and Paki vs Attorney General in 2012.
- Political law – the law of England, its development in New Zealand, and North American US law

Public Trust – the possibility of a new approach to governance of natural resources

A few points of interest.

Essentially, Public Trust is the idea that some resources are inherently the property of the public at large, and should be kept for public purposes.

Key principles

- Public trust resources cannot be alienated by government, or be transferred or controlled for private purposes only. A public purpose is required.
- The proposed use cannot materially impair the quality of the resource or its availability to the public.
- A duty is imposed on government to account for its actions or approvals of a use. Findings on the effects of a proposed use must be recorded to assure that (1) there is no unlawful alienation or transfer for private purpose, and (2) there is no material impairment of public trust resources or uses.

Historically these purposes are to protect navigation and travel, allocation of water, and to a lesser extent, fishing, and still less, recreation and public gatherings (Rose 351). You can see how this thinking was a reference in NZ for laws for Navigable Rivers and Water and Soil Conservation – in which public access and conservation in public interests were paramount.

More recent considerations for public trusteeship is the Atmosphere.

Majoritarian Government which economic development as the over-riding agenda vs minority advocacy

Since the 1970's there has been a growing need to bolster law for environmental regulation and protection, On the political aspect, we have majoritarian government that has a strong stake in economic development through exploitation of land and water resources, in which corporate interests are strongly influential – alongside weaker provisions for 'minority' environmental interests and indigenous interests.

When considering environmental governance and recourse to law, there is the pathway of claims and liability for environmental damage – the 'hard look' doctrine of environmental impacts (Rose, 355); and the more affirmative approach of protection of public interests in diffuse environmental resources,

through public trust - diffuse referring to the broader ecosystems and habitat approach to nature.

Advantages of Public Trusteeship – Democratic, public scrutiny

Advantages are that it requires public information to be provided, and it invokes public participation in decisions which are informed and accountable.

The public trust doctrine encourages the democratisation of decision making. Indeed, the doctrine equips (1) the public with broad standing to challenge government and private proposals that threaten the trust's environmental and public access purposes; and (2) courts with the ability to balance proposed development based on record title against longstanding public uses grounded on reasonable public expectations.

This greater democratizatation through trusteeship increases public scrutiny of consents and licenses and give-aways of environmental resources to private interests. We see this scrutiny in the exposure of consents for free water for bottling to private for-profit companies.

In August stuff reported that a chinese owned company, Ngongfu Spring, had applied to draw 580 million litrs of water per year from the pristine Otakiri Springs, near Whakatane, to bottle and ship overseas[1]. This is enough to give every person in new zealand a 330 ml litre bottle of water every day for a year.

Public Trust Property issues

There are important matters of property with public Trust – with tensions between the State role as public trustee with a responsibility, as a representative body, to safeguard the complex issues of environmental protection.

Alongside this, we know that the State can have over-riding economic growth interests which undermine its public trust responsibilities. However the State's responsibility can also act as a brake on claims to resources that might not be in the wider, or long term public interests.

I pause here for a moment to think of the example of Maori claims and interests. The paper by Judge Taihakurei Durie setting out a new proposal for water governance, had a particular salience and brilliance because it addressed the restitution of Maori rights and interests in water, as well as encompassing public good interests. It provided for water to Marae, for a Water Commission with provision for charging for commercial use, it included a polluter pays provision, with revenue going towards water restoration. It also included Maori with a role in governance of water. It is proving prescient, in that many of these proposals have come into the public arena for serious policy and implementation.

Public Trust as a concept for new Zealand has yet to be discussed with Maori who are leading water and environmental governance – bearing in mind, that

[1] https://www.stuff.co.nz/business/industries/95670283/Chinese-company-seeks-consent-to-draw-580-million-litres-of-pristine-spring-water

Public Trust is not so well developed in NZ – It is actively developed in US state constitutions, and its application is spreading throughout the world.

There is potential to consider public trusteeship through the RMA, via its purpose promote the sustainable management of natural and physical resources.

In the Act, sustainable management means "managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment"

Also through the Foreshore and Seabed Act 2004

The object of this Act is to "preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders in a way that enables the protection by the Crown of the public foreshore and seabed on behalf of all the people of New Zealand, including the protection of the association of whānau, hapū, and iwi with areas of the public foreshore and seabed."

Walking Access Act 2008

The Act's purpose is to "provide the New Zealand public with free, certain, enduring, and practical walking access to the outdoors

Environment Act 1996

This is an Act to (…) ensure that, in the management of natural and physical resources, full and balanced account is taken of—

(i) the intrinsic values of ecosystems;
(ii) all values which are placed by individuals and groups on the quality of the environment;
(iii) the principles of the Treaty of Waitangi;
(iv) the sustainability of natural and physical resources;
(v) the needs of future generations

Public Trust Act 2001

The Act establishes the Public Trust as a statutory corporation that is a Crown entity.

Hawaii

Public Trusteeship – the case for Water rehabilitation in Hawaii

Hawaii – Indigenous Hawaiian legal expert Kapua Sproat has led litigation for the recovery of water protected in the State Constitution of Hawaii. The legal case derives from Hawaiian custodial traditions regard water as a physical manifestation of the deity Akua Kāne, who also carries the authority of trusteeship over water for communal benefit. The Hawai'ian State constitution has an important analogous provision for water as a public trust, which allowed campaigners to seek redress in law.

With an indigenous interest in restoring Hawaii's water to ecological health the litigation was to address the massive engineering diversion of water for the sugar industry which destroyed the natural flows and quality of water. The reinstatement of the Constitutional Public Trust in water is iconic in establishing legal precedent for prioritizing the ecosystem health of water along with provision for Indigenous interests. Then commercial interests are considered once the criteria for health and indigenous interests are met.

A point of clarification - Public trusts, like national parks and other protected areas, establish a preferential legal status for specific ecosystems or attributes of ecosystems, normally for the beneficial use of humans, not necessarily for the direct and primary benefit of the ecosystem or its elements.

Legal Personality

Legal Personality:

For NZ we have the ground breaking Legal Personality concept as well as indigenous law to consider.

The claim on behalf of the Whanganui River led to settlement legislation in favour of the river. In the *Te Awa Tupua Act* the Whanganui River has been accorded legal recognition as an ancestor. *Te Awa Tupua* recognizes Whanaganui River as an integrated living whole which flows from mountains to sea, with all interests in the river to have regard to its wellbeing.

This framing recognizes the systemic nature of the river ecosystem with an added significant change of vesting the riverbed (subsoil), the plants, and air above the water in *Te Awa Tupua* (*Te Awa Tupua,* S. 7).

The historic statutory fragmentation riverbeds, riverbanks, minerals beneath the riverbed, air above the water and the water column has been of great distress to Māori and those who understand rivers as a living whole.

By statute, riverbeds were vested in the Crown for purposes of navigation and mining (NZ Coal-mines Act Amendment Act 1903), and the concept that no-one owns water is a position taken by the Crown which has been subjected to intense

scrutiny on the basis that consents for water allocation are tantamount to property and ownership interests.

Four guardians, Te Pou Tupua, are appointed to represent the River, two from the Whanganui People, and two from the Crown. *Te Awa Tupua* is a legal person and has all the rights, powers, duties, and liabilities of a legal person; it is therefore incomplete to simply claim that the river has rights.

A management strategy provides for the engagement of all stakeholders in collaborative management process to advance 'environmental, social, cultural, and economic health and wellbeing of *Te Awa Tupua*, with elaborate process of governance and management spelled out in the Act (2017).

Te Awa Tupu has strong dimensions of pubic good interests with intergenerational responsibility embedded in the Act. Above all it is a shift away from human interest to the relational and integrated attributes of the river and all associated with her.

The idea of Personality is spreading: For example, Ecuador, Bolivia and the city of Pittsburgh in Pennsylvania declared that nature is a legal person.

Pittsburg banned fracking on basis of all natural resources in the city being made a Public Trust (Skelton para 28)

In India, fllowing Whanganui, the Ganges and Yamuna rivers were given the status of legal personality.

A week after the Ganges and Yamuna case in Mohammed Salim v State of Uttarakhand (March 20, 2017) the court declared:
that the Himalayan mountain glaciers and "rivers, streams, rivulets lakes, air, meadows, dales, jungles, forests, wetlands, grasslands, springs and waterfalls" were all legal entities or persons, "with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them.

Guardians were similarly appointed to the role of upholding the status of these legal persons and to promote their health and well-being. The court [explicitly noted] that "the rights of these legal entities shall be equivalent to the rights of human beings and the injury/harm caused to these bodies shall be treated as harms/injury caused to the human beings (Iorns 2017, p. ?)

Legal personality – key element

A key element of Legal Personhood is that the *resource itself* has rights, duties and liabilities. In contrast, in the Public Trust doctrine the *public* has a right to access and use the resource.

Indigenous

Indigenous Law

Thus in Aotearoa-New Zealand a brief look at indigenous law – some of which emerges from common law claims, such as Huakina and Paki.

Mindful of some of the key policy - and what I understand of Maori interests from the Freshwater Claim and the subsequent Judge ET Durie paper Ngā Wai o te Māori. Nga Tikanga me Ngā Ture Roia. as an indigenous knowledge reference.

Several important themes in the Nga Wai paper – which was written to support the notion of Maori relationship with water for the Waitangi Tribunal case on Freshwater last year. This can be seen to turn on the matter of relationship and responsibility.

1. Maori interests are not confined to environmental ' kaitiaki' interests. An accordance with tikanga, or custom Maori have a property interest, and a governance interest in water – as per Tino Rangatiratanga provisions of the Treaty of Waitangi (Durie, Ngā Wai para. ?)

2. We are misusing, or misappropriating the traditional notion of kaitiakitanga. Showing the possibility of capturing maori knowledge within western conceptual frames (Durie, Ngā Wai para. 19).

3. Traditionally, kaitiaki were birds or fish or other creatures whose presence, absence, abundance, and appearances served as indicators of environmental conditions, or situations (Durie, Ngā Wai para. 41).

4. Rather than the 'bottom lines' standards outlined in government / Ministry for Environment policies for water standards, Maori work with the framework of top lines – with upwards reaching standards for water quality. (Durie, Ngā Wai para. 24)

5. The Maori notion of property is different from that of government/western property rights. Property for Maori encompasses both public good interests as well as private interests

6. Mana is a public right to own and a public responsibility to control resources.

7. In tribal - Maori ways of life before settlement water was the main source of livelihoods and economic management. There were no land animals such as cows and sheep – fish and birds were the sources of sustenance. (Durie, Ngā Wai para. 53).

I draw attention to two significant cases, for the way in which they have opened the law to Māori concepts and values in New Zealand law. The Huakina case was the focus of discussions at the recent symposium held at Hopuhopu, in the Waikato, to recognize the 30 year anniversary of the case. Māori and indigenous law are coming back from the brink of colonial nullification through statutes such

as Treaty Settlements and through common law such as Huakina (1986) and Paki vs the Attorney-General, 2012.

Paki was a case concerning navigable rivers. The Coalmines legislation deems a river to be navigable in its entirety. Through this legislation the riverbed was deemed to be in the ownership of the Crown. The hapü associated with Puakani block argued that the segment of the Waikato which flows through their land is not (and was not) navigable, and therefore the river in this section does not come under the Coalmines Act. Therefore the riverbed is not in Crown ownership – very simplistic summary of a complex case – which was argued in the basis of a question of riparian ownership to the midline of the river.

The Huakina case arose from a farmer, Bowater, was discharging untreated water into the Kopuera Stream, which flows into the Waikato River. Minhinnick argued for spiritual values in a river, on the basis of the river as a taonga under article two of treaty of Waitangi. This was not normally provided for in the dominant view of the river having only physical attributes (although aesthetic, and landscape values are recognized in law). Huakina was a turning point in Judge Chilwell's recognition Treaty of Waitangi as part of the fabric of New Zealand society.

A compelling insight emerged from the simple statement that Nganeko Minhinnick made before she passed away in May this year. A colleague was recognizing her groundbreaking work in the Huakina case. She said 'But the waters are still paru'.

It became clear to me that even when we have good and effective environmental legislation we cannot make headway with environmental safeguards if economic policy is not integrated.

To highlight integration we have law for environment separated from economic policy . We have Regional Councils responsible for implementing environmental policy and standards, and Local Govt Act requiring regional councils to prioritize economic development (Kevin Haig)

This therefore is my main argument for a relational, integrated approach to public policy in a framework of responsibility.

Responsibility

I turn to the approach of responsibility as an approach that strengthens integration and public good interests, – mindful of the strong current towards development of rights for the environment. I fully recognize, that the purpose of rights is to give legal standing to environmental entities, such as trees, atmosphere, rivers, land.

But –do 'Rights provide for interdependence? For the relationships between people and between humans and nature, and for the interconnected attributes of an ecological world-view?

Let us consider responsibility as a theme and a framing… and the idea that responsibility creates collective engagement and community. Responsibility is relationship – it is our response to another person, to a river, to land, to trees.

In these relationships we find recognition that my interests are interwoven with yours, that my life is drawn from reciprocal relationships, and indeed depends on reciprocal relationships. We can see this in every sphere and at every scale. A child is born of relationship, a seed grows from fertilization and from interaction with soil and water.

In our human world, our recognition of another person, is often expressed in forms of hospitality – an offer of water, of food and drink – and although we lose sight of a the source of food in our supermarket world, are living is entirely dependent on, and interdependent with earth and water.

Responsibility can be seen as a burden or liability. It is even counter-cultural to the basic liberal value of freedom because it puts a restraint on freedom.

Even if the river has a right – how will this be given effect if there is another right-holder to exploit the river – ie a consent for abstraction for irrigation. I question whether a right inclines towards commodification and ask whether this is what is in play with a consent – a consent to take water or to discharge waste into water. Indeed, a water right is specifically referred to as a commodity by the valuer Martyn Craven in his affidavit to the Waitangi Tribunal in 2016.

If I draw water or even discharge waste on the basis of responsibility, am I more inclined towards recognizing the river as a living entity with a life-force? Am I more inclined to have regard for the health of the river, and its ecology, and to appreciate the complex influences of the insects and fish and birds – the habitat associated with the river?

Transitions?

Now, for a moment I will consider transitions. We tend to associate transitions with the pathways for climate responsibility and the multisectoral changes towards net zero emissions.

However in NZ we have transitions at hand to give attention to as part of the climate transition process.

- Transitions to recognizing Maori Law
- New forms of law – trusteeship and personality.
- Transitions to integrated governance with legal frameworks to enable connected policy development.

Conclusion - Questions

Is there potential in Public Trusteeship as a framework for governance to protect public goods?

Is there more scope to extending the framework of legal personality – where the resource itself has rights and duties/responsibilities. Is this a way of recognizing the intrinsic values of ecosystems ?

Could there be more development of Maori concepts in law – ie expanded notions of property as outlined. A Taonga Law – which might provide wider scope for public good in both social and environmental spheres?

Is responsibility for a healthy environment a important dimension to be added to rights –to recognize the relational qualities between people and nature - the links between environment and economy, and to give more expression to interdependence between peoples, and between people and nature ?

We have new horizons oin thought and consciousness, such as how to join spirituality and technology, and deepen the relational dimensions of life.

One hope for transitional process is that we move towards greater harmony with Great Law, the universal living dynamics of life which are intelligent and responsive. This will require new forms of law – perhaps a Taonga Law?

Betsan Martin
President, Alliance for Responsible and Interdependent Societies
betsan@response.org.nz