

## **Personality and representation in Environmental Law**

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Jorge Vinuales from the University of Cambridge observed in his working paper on "Law and the Anthropocene" that law is founded on a series of core concepts, such as, "legal personality, representation, obligation, debt, causality or damage" (CEENRG Working Papers 2016-4, page 49). This led him to note that a "significant problem" faced by environmental law is how to flesh out these core concepts in relation to the protection of the environment (page 53). For example, should we regard natural resources (e.g. rivers or mountains) as "subjects" of environmental law with their "own interests and capacity to act (through representation)", or merely as the "objects" of environmental law – to be protected either "directly" as specific natural resources, or "indirectly" via the protection of the environment generally (page 53). This article interrogates these perspectives by reference to recent New Zealand developments.

### **The concept of personality**

New Zealand jurisprudence has been focused on the concept of personality since Sir John Salmond published his seminal work on this topic in 1893 (2<sup>nd</sup> edn Sweet & Maxwell, London, 1893). Salmond developed his theory of legal personality to address issues regarding the rights and obligations of corporations in an era before the law had been settled by the House of Lords judgment in *Salomon v Salomon* [1896] UKHL 1, [1897] AC 22. In the positivist and utilitarian tradition of Bentham and Austin (and more recently Hart), Salmond considered that attributing personality was the ultimate rule of recognition. In his view, attribution was the "significant" and "exclusive" point of difference between natural persons who were regarded by the law as possessing rights and obligations that could be recognized by the courts, and non-natural persons (page 329). He developed this theory via the "fiction" that law can attribute personality to "beings" whether

“real or imaginary” in situations where (absent fiction) there would otherwise be no attribution of personality “in fact” (page 329). However, based on the German philosophical writings of Otto von Gierke and others, Salmond was troubled by the question about whether a corporation was a “real thing” or merely a “group organism” comprising the shareholders (page 350). This question was answered affirmatively, first, by Lord Halsbury in *Salomon* where he stated:

If it was a real thing; if it had a legal existence, and if consequently the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered. ([1897] AC 22 at 33).

Secondly, by the American realist, John Chapman Gray, who stated:

It should be observed that even if a corporation be a real thing, it is yet a fictitious person for it has no real will, but it would be a fictitious person only as an idiot or a ship is a fictitious person. (John Chapman Gray, *The Nature and Sources of the Law* (2<sup>nd</sup> edn The Macmillan Co, New York, 1927) 53).

More recently, Alex Frame drew attention to the “revolutionary and imaginative” way that Salmond used “legal forms to achieve utilitarian objectives” (Alex Frame “Property and the Treaty of Waitangi” in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, Oxford, 1999) 236). For example, he made the connection between Salmond’s willingness to attribute legal personality to non-natural persons and Maori culture and traditions where it is normal to regard geographic features, such as, rivers and mountains “as tupuna, as ancestors” as a result of the close association of iwi, hapu and whanua with particular features. This dynamic conception of personality was captured by Salmond in his statement that:

A legal person is any subject-matter to which the law attributes a merely legal or fictitious personality. This extension, for good and sufficient reasons, of the conception of personality beyond the limits of fact – this recognition of persons who are not men – is one of the most

noteworthy feats of the legal imagination. (*Jurisprudence* (7<sup>th</sup> edn Sweet & Maxwell, London, 1924) 336).

Frame's insight led him to observe that extending legal personality to certain geographic features could provide a mechanism for mediating Maori grievances under the Treaty of Waitangi Act 1975 claims settlement process. For example, he stated:

The river would become not the *object* of law, but a legal *subject* in its own right and with its own rights – it would not be *owned* by anyone. The real question would of course then become “who *speaks for* the river in the assertion of its rights, and what are those rights to be?”: the answer might depend on which aspect of the river's legal personality, or which rights, were being asserted or challenged on any given occasion. The persons, or combinations of persons entitled to speak for the river on particular issues would need to be settled by careful investigation, negotiation, and statutory enactment. (page 237)

While this “suggestion” was not original (as Frame acknowledged by citing Christopher Stone's seminal article “Should Trees Have Standing? Towards Legal Rights for Material Agents” (1972) 45 *Southern California Law Review* 450), Frame's re-articulation of this theme repackaged it in a New Zealand context that transcended the divide between English common law and Maori tikanga world-views and arguably provided the catalyst for subsequent Treaty settlements. For Stone, “incorporating” geographical features (page 475) and appointing a guardian ad litem to protect and enforce the rights of “rightless” (page 453) or “incompetent” (page 464) things was critical for three reasons:

... first, that the thing can institute legal actions *at its behest*; second, that in determining the granting of legal relief, the courts must take *injury to it* into account; and, third, that relief must run to the *benefit of it*. (page 458)

In advancing this theory, he drew analogies with the appointment of guardians to litigate on behalf of minors, or to manage the affairs of humans in a vegetative state or insolvent companies, while noting that

the law sometimes uses different labels (e.g. conservator or committee) to describe the guardians (page 464). However, Stone's real focus was on the ability of the guardians to bring actions in the courts in tort (whether for damages or injunctive relief) or against public authorities for the prerogative orders in judicial review, rather than the semantic terminology that could be used to describe the guardians. Additionally, he also proposed (page 465) that where there is no special purpose legislation in place that accords legal personality to geographical features and appoints guardians - then other legal persons (e.g. an incorporated environmental NGO) should be able to petition the courts to be appointed as the guardian for a specific geographical feature.

Critically, Frame's "suggestion" that legal personality should be extended to certain geographical features also .. This linkage was an important step in legal development because the previous legislative focus on protecting geographical features had concentrated exclusively on the question of representation.

### **Representation and the environment**

Providing a representative voice for any geographical features will therefore be critical if they are to be regarded as legal subjects. For example, the Conservation Act 1987 (as amended by the Conservation Law Reform Act 1990) includes provision for the appointment of Guardians for Lakes Manapouri, Monowai, and Te Anau by the Minister of Conservation. Their functions include making recommendations to the Minister regarding the "environmental, ecological, and social effects" arising from the operation of the Manapouri-Te Anau hydro-electric power scheme, with a specific focus on the lake shorelines and the rivers flowing in and out of the lakes, and the effects of the power scheme on social, conservation, recreation, tourism, and amenity values (s 6X(2)(a)); and making recommendations to the Ministers of Conservation and Economic Development regarding the operational guidelines for the levels of the lakes that are designed to strike a balance between the "ecological ... and recreational values of their vulnerable shorelines" on the one hand, and optimizing hydro-electric

power generation on the other hand (Manapouri-Te Anau Development Act 1963, s 4A). Significantly, the establishment of the Guardians for the lakes in 1973 (originally as a non-statutory body) was the result of the Save Manapouri Campaign against raising the lake levels. Similar provision is made for the appointment of lake guardians under the Lake Wanaka Preservation Act 1973.

Similarly, the Fiordland Marine Guardians perform an advisory role under s 13 of the Fiordland (Te Moana o Atawhenua) Marine Management Act 2005 regarding "the effectiveness of management measures adopted in relation to the Fiordland Marine Area", the adverse effects of any activities occurring outside the area, and any "likely threats" to the area (e.g. from invasive pest species). Additionally, the Guardians are also required to assist with disseminating information about the area, monitoring the state of the environment, and compliance and enforcement planning. It is also for note that although Ngai Tahu are given the right to nominate one of the Guardians, the establishment of the marine Guardians appears to reflect extant informal community and sectoral interest in the management of the area. Similar provision is made for the appointment of marine guardians under the Kaikoura Marine Management Act 2014.

While the lake and marine guardians appointed under these statutes play important advisory roles, they fall short of the right to participate in proceedings before courts and tribunals relating to these geographical features. For example, the Parliamentary Commissioner for the Environment is given a general right to be heard in proceedings regarding any consent application made under the statutes pertaining to the New Zealand environment listed in the schedule to the Environment Act 1986 (s 21). Significantly, the Commissioner's functions do not expressly extend to initiating civil or criminal enforcement proceedings, and the Commissioner (like the Guardians) will therefore need to rely on any general statutory provisions regarding standing in those instances. General provision is, however, made in s 316(1) of the Resource Management Act 1991 (RMA) for any

person to commence civil proceedings for an enforcement order (akin to an injunction) to be made by the Environment Court. Likewise, the RMA contains liberal standing provisions for any person to participate in publicly notified processes before local authorities (and on appeal before the Environment Court and the High Court) regarding the preparation of policy statements and plans and the determination of resource consent applications (RMA, sch 1, cl 6, and s 96).

Proposals to establish environmental guardians have not, however, always met with success. For example, while the Waitangi Tribunal recommended that guardians should be appointed in relation to the protection of the Manukau Harbour (*Manukau Report* 1985 (Wai 8) 77-80), the subsequent discussion paper on the restoration of the harbour prepared by the Ministry for the Environment noted that guardianship was a European concept that was not appropriate for use in the context of kaitiakitanga, because guardianship was focused on environmental protection whereas kaitiakitanga was considered to be much more broadly focused on the interests of the relevant tangata whenua (Ministry for the Environment, *The Manukau Harbour: A strategy for restoration and future management* (Ministry for the Environment, Wellington, 1987) 5-6).

Generally, during the period before 2010 the settlement of Treaty claims resulted (where relevant) in statutory acknowledgements being recorded in special purpose settlement legislation and sch 11 of the RMA regarding specific relationships with particular geographical features. Local authorities are placed under a duty to have regard to the statutory acknowledgement, as a mandatory consideration, when deciding who is affected by a resource consent application under s 95E(2)(c) in relation to the possible notification of the application, and when the Environment Court on appeal decides whether a person should be allowed to participate in an appeal under s 274(6) on the ground that the person has an interest in the proceedings greater than the general public. While these provisions bring the question of Maori participation in RMA proceedings clearly into focus they are limited in their ambit because typically less than 5 per cent of applications are

notified in some way, and because they do not provide a right to represent the specific geographical features acknowledged in sch 11 across the full spectrum of environmental statutes.

Subsequent Treaty settlement statutes have departed radically from the previous pattern of statutory acknowledgements, and have included governance mechanisms in relation to specific geographical features. For example, the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010; the Nga Wai o Maniapoto (Waipa River) Act 2012; and the Raukawa Claims Settlement Act 2014 all provide for co-governance of river catchments. The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, however, provides for co-management of the river catchment. While commentary on these mechanisms (Rachael Harris, "A legal identity for the Urewera: The changing face of co-governance in the central North Island" [2015] *RM Theory & Practice* 148, 151) distinguished between the two mechanisms, with co-governance being seen as a more authoritative concept that is concerned with setting "the primary direction to achieve ... restoration" of the relevant catchments, and with co-management being seen as the "collaborative partnership that implements the direction set under the co-governance framework". However, the distinction appears to be more blurred in practice and nothing may actually turn on which label is used to describe the governance process embedded in the statute. For example, under this schema one could anticipate that the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 would be focused exclusively on implementation, whereas in practice the statute contains both governance and management mechanisms – including the vision and strategy in ss 9-21 that is given force and effect as part of the regional policy statement which sets out the resource management framework for the Waikato region.

The significance of these management mechanisms, however, lies in their ability to involve Maori in strategic decision-making that will influence both the content and implementation (via resource consent decisions) of the policy statement and plan framework, and provide the

opportunity (at both stages) to protect specific geographical features of importance to them in relation to their culture and traditions. But notwithstanding the influence of these management mechanisms and the protection given to the specific river catchments, the water bodies concerned remain the objects of the law rather than legal subjects in their own right. There is, therefore, little difference in practice between the representation and management methods used during the period 1973-2014, because under both schemas the geographic features protected are objects of the law rather than legal subjects. Interestingly, both mechanisms move beyond the RMA and also apply to the Conservation Act 1987 and the Fisheries Act 1986.

### **Geographical features as legal subjects**

The Treaty settlement process is dynamic (as noted by Frame above (page 237)) and continues to provide a catalyst for the evolution of New Zealand law. For example, s 11 of the Te Urewera Act 2014 declares the Te Urewera mountain ranges to be a legal entity and provides the mountains with "all the rights, powers, duties, and liabilities of a legal person". Effectively, s 11 incorporates Te Urewera. This position is underscored by vesting the fee simple title to the mountain ranges in Te Urewera itself. The statute also provides for the appointment of a Board (pt 2 of the statute) to represent Te Urewera by exercising the rights, powers, and duties given to the mountain ranges under s 11. The Board's functions under s 18 include the preparation and approval of a management plan, to promote and advocate for Te Urewera's interests in statutory processes and before public authorities, and to take any other action considered appropriate for achieving the purpose of the statute – namely, to preserve Te Urewera in perpetuity in its natural state (ss 4 and 5). The management plan prepared under s 46 of the statute is required (inter alia) to identify the values regarding indigenous ecosystems, cultural heritage, recreation, landform, and freshwater quality that will be used to guide how activities within the Te Urewera mountain ranges should be carried out and inform how any adverse effects should be minimized.

Similarly, s 14 of the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 declares the river to be a legal person. Again, effectively incorporating the river. In particular, s 12 of the statute recognizes that:

Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.

Statutory decision-makers are required to have regard to the status of the river, as defined by s 12, when exercising their functions, powers, and duties under sch 2 of the statute. Provision is made for the appointment of two Guardians (Te Pou Tupua), who are to act as the “human face” of the river (s 18). The Guardians are given a range of functions under s 19 of the statute, including, speaking on behalf of the river catchment, promoting and protecting its health and well-being, participating in statutory processes, and taking any action reasonably necessary to perform these functions. Specifically, the Guardians are required by s 19(2)(a) to act in the best interests of the river and its intrinsic values (Tupua te Kawa). The fee simple estate of the Crown-owned parts of the river bed were also vested in Te Awa Tupua (the Whanganui River) under s 41 of the statute.

Arguably, the principal differences between the Te Urewera and Whanganui River statutes is the more direct linguistic connection between the river Guardians and the concept of kaitiakitanga.

Interestingly, a consequence of extending legal personality to geographic features is that s 29 of the New Zealand Bill of Rights Act 1990 (NZBORA) is engaged, which provides that:

Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

This also brings into play s 27 of NZBORA that provides for the right to justice, including, the observance of natural justice concerning any

public law decisions that may affect the “incorporated” geographical feature, and the right to apply for judicial review where the “rights, obligations, or interests” of the geographical feature are adversely affected by any public law decision. These rights are important adjuncts to the general capacity of corporations to “do any act, or enter into any transaction” for the purpose of carrying out its functions (Companies Act 1993, s 16(1); Local Government Act 2002, s 12(2)), or the general powers of the Board and the Guardians to take any other action considered appropriate for achieving the statutory purpose regarding the Te Urewera ranges or the Whanganui River. For example, Stone noted that the argument on behalf of the Mineral King Valley wilderness area in *Sierra Club v Hickel* 433 F.2d 24 (9<sup>th</sup> Cir. 1970) failed because of a lack of standing to pursue judicial review (Christopher D Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (3<sup>rd</sup> edn, Oxford University Press, New York, 2010) xiii). The Court found that the Club did not mean:

... that it is ‘aggrieved’ or that it is ‘adversely affected’ within the meaning of the rules of standing. Nor does the fact that no one else appears on the scene who is in fact aggrieved and is willing or desirous of taking up the cudgels create a right in appellee. The right to sue does not inure to one who does not possess it, *simply because there is no one else willing and able to assert it.* (Emphasis added at 32).

However, under the liberal rules of standing in New Zealand, the High Court in *Moxon v Casino Control Authority* (M324 & 325/99) held that responsible public interest groups representing a relevant aspect of the public interest (e.g. Environmental Defence Society) have a strong case for standing where the decision impugned will have community impact and, more importantly, that there will be a strong case for standing if there is no other realistic prospect of addressing legal issues of significant public interest. This provides a handle for anyone to pursue judicial review on behalf of any adversely affected geographical feature absent incorporation, or in cases where the guardian is unable or unwilling to challenge the decision.

The principle of kaitiakitanga has also been an integral part of the DNA of the RMA since its enactment in July 1991 (s 7(a)). In particular, kaitiakitanga is defined by s 2(1) of the RMA to mean:

... the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources ...

It links particular people with specific geographic features through the media of genealogy and customs and traditions; and the values and practices of the iwi, hapu, and whanau associated with these features will inform decision making under the RMA (*Ngai Te Hapu Inc v Bay of Plenty Regional Council* [2017] NZEnvC 073 at [82]). Put simply, a principled approach will be required to ensure that the relationship of Maori with specific geographical features is provided for as part of the overall objective of achieving sustainable management (*McGuire v Hastings District Council* (2002) 8 ELRNZ 14 (PC)). For example, in *Ngai Te Hapu* regarding the proposal to leave the *MV Rena* wreck in situ on the Astrolabe/Otaiti reef, the Environment Court was required to ascertain the relationship of various iwi and hapu with the reef and to determine which of them exercised mana whenua (customary authority) over the reef, in order to identify the specific cultural values and practices that were (inter alia) used to assess the environmental effects of the proposed activity. This demonstrates the increasing importance of kaitiakitanga regarding the protection of specific geographical features from inappropriate use or development.

Arguably, the approach in *Ngai Te Hapu* recognises Maori tikanga as rules of law. It is an example of an emerging trend in legal method that views Maori tikanga from a Maori perspective. Writing extra-judicially, Justice Christian Whata described this method as "essential" to ensure "adherence to tikanga Maori" (Christian Whata "'Matauranga Maori" knowledge, comprehension and understanding: Reflection on lessons learnt and contemplation of the future" [2016] Resource Management Theory & Practice 21). In the same way, he also found that settlement statutes enacted to resolve Treaty of Waitangi claims are "transformative" (page 28). He focused in particular on the

Whanganui River legislation and the way that legal personality is attributed to the river and “intrinsic values which represent the essence of Te Awa Tupua” are set out in the statute. Whata stated:

... the significance here lies in ratifying or making cognisable both the cultural processes that underpin tikanga itself, so that the assessment of Maori environmental issues is not so much an assessment of other effects on proven physical or metaphysical entities ... but a question of weighing the significance of non-compliance with tikanga per se against the other matters identified by the RMA as relevant considerations.  
(page 28)

Beyond that, Whata previously observed (again writing extra-judicially) that recognition of kaitiakitanga in the RMA is merely declaratory of the fused position at common law and under Maori tikanga (Justice Christian Whata, Salmon Lecture 2012, “Environmental Rights in a Time of Crisis: The Canterbury Experience” at [56]-[58]), which implies that kaitiakitanga will potentially be relevant across the broad spectrum of New Zealand law where the relationship of Maori with geographical features is engaged in some way.

Attributing legal personality to mountains and rivers has also provided the catalyst for thinking about marine protected areas, for example, the 1.2 million hectare Hauraki Gulf Marine Park has been defined in non-statutory planning terms “as a being in its own right” and a mechanism for balancing competing interests in a holistic way (*Sea Change, Hauraki Gulf Marine Spatial Plan* (April 2017), 31). Similarly, Dr Ben France-Hudson from the University of Otago has suggested that attributing legal personality to the proposed 620,000 square kilometre Kermadec Ocean Sanctuary could provide a way to resolve the current judicial review proceedings concerning the establishment of the sanctuary and the Crown’s failure to consult with Maori fishing interests (Ben France-Hudson, “The Kermadec/Rangitahua Ocean Sanctuary: Expropriation-free but a breach of good faith” [2016] *Resource Management Theory & Practice* 55, 80-81).

Regarding certain geographic features as subjects of environmental law with their own interests and capacity to act through representation is radical. But arguably attributing legal personality to geographic features has its roots in Roman law and the influence exerted by Justinian's code on canon law and common law "ideas of corporations" that were firmly rooted in the "notion of public benefit" (John Farrar, *Corporate Governance: Theories, Principles and Practice* (3<sup>rd</sup> edn, Oxford University Press, 2008) 23-24).

### **Conclusions**

New Zealand law is dynamic and provides a philosophical foundation for attributing legal personality to "persons who are not men". It has extended "representation" mechanisms to geographical features, such as, lakes, fiords, lakes, and (potentially) harbours. More recently, Treaty settlement statutes have developed the law even further through co-management techniques, and by attributing legal personality to certain geographic features, based on concepts of guardianship (kaitiakitanga). Arguably, the Treaty settlement process has been transformative in a constitutional way by changing the lens through which guardianship and the values that underpin it are viewed. The movement toward viewing Maori tikanga from the perspective of a Maori world view has also had a significant effect on the way that kaitiakitanga is interpreted and applied at common law in cases where there is no relevant settlement legislation. Beyond that, incorporating certain geographic features also engages aspects of the general law in their defence, such as, the right for the feature itself to apply for judicial review and the potential to appoint litigation guardians. Finally, attributing legal personality to mountains and rivers has opened up the prospect of attributing personality to parts of the territorial sea and the exclusive economic zone.