SPRINGER BRIEFS IN EDUCATION

Zane Ma Rhea

Land and Water Education and the Allodial Principle

Rethinking Ecological Education in the Postcolonial Age

Springer

SpringerBriefs in Education

We are delighted to announce SpringerBriefs in Education, an innovative product type that combines elements of both journals and books. Briefs present concise summaries of cutting-edge research and practical applications in education. Featuring compact volumes of 50 to 125 pages, the SpringerBriefs in Education allow authors to present their ideas and readers to absorb them with a minimal time investment. Briefs are published as part of Springer's eBook Collection. In addition, Briefs are available for individual print and electronic purchase.

SpringerBriefs in Education cover a broad range of educational fields such as: Science Education, Higher Education, Educational Psychology, Assessment & Evaluation, Language Education, Mathematics Education, Educational Technology, Medical Education and Educational Policy.

SpringerBriefs typically offer an outlet for:

- An introduction to a (sub)field in education summarizing and giving an overview of theories, issues, core concepts and/or key literature in a particular field
- A timely report of state-of-the art analytical techniques and instruments in the field of educational research
- A presentation of core educational concepts
- An overview of a testing and evaluation method
- A snapshot of a hot or emerging topic or policy change
- An in-depth case study
- A literature review
- A report/review study of a survey
- An elaborated thesis

Both solicited and unsolicited manuscripts are considered for publication in the SpringerBriefs in Education series. Potential authors are warmly invited to complete and submit the Briefs Author Proposal form. All projects will be submitted to editorial review by editorial advisors.

SpringerBriefs are characterized by expedited production schedules with the aim for publication 8 to 12 weeks after acceptance and fast, global electronic dissemination through our online platform SpringerLink. The standard concise author contracts guarantee that:

- an individual ISBN is assigned to each manuscript
- each manuscript is copyrighted in the name of the author
- the author retains the right to post the pre-publication version on his/her website or that of his/her institution

More information about this series at http://www.springer.com/series/8914

Zane Ma Rhea

Land and Water Education and the Allodial Principle

Rethinking Ecological Education in the Postcolonial Age

Springer

Zane Ma Rhea
Faculty of Education
Monash University
Melbourne, VIC
Australia

ISSN 2211-1921 ISSN 2211-193X (electronic)
SpringerBriefs in Education
ISBN 978-981-10-7598-8 ISBN 978-981-10-7600-8 (eBook)
https://doi.org/10.1007/978-981-10-7600-8

Library of Congress Control Number: 2017961470

Printed on acid-free paper

This Springer imprint is published by Springer Nature
The registered company is Springer Nature Singapore Pte Ltd.
The registered company address is: 152 Beach Road, #21-01/04 Gateway East, Singapore 189721, Singapore

I dedicate this book to Jeane Freer, my wife and life partner, who so presciently wrote:

One of the most meaningful relationships we can make is with nature. We can make our interactions with the earth an expression of our sameness and a shared channel of healing for the world (Freer 1983, 133).

I thank Jeane for sharing her profound knowledge and wisdom with me over these last 35 years and acknowledge the continued work she does to live in harmony with the "cosmic rhythms of life," bringing the spiritual and the political into consciousness for the benefit of all sentient beings.

Preface

I hope that this monograph will provide teacher educators, teachers, academics who specialize in aspects of Indigenous, legal, and environmental education, and other interested readers with some new ideas to help them to break the colonial mindset that has shaped our relationship to land and water.

How we teach about land and water needs to change but given the profound epistemological shaping of both in human society, it is necessary to provide new pedagogical content knowledge for educators. This involves interrogating how legal systems help to codify our understanding of land and water in particular ways. The Australian legal framework, as for other previously colonized nations, was developed from English law and this approach to "Law" frames land and water as things, as property, that can be allocated for exclusive individual use and abuse. This right to use and abuse can be sold onto another through the transfer of said "property." Such an "entitled" capacity to use and abuse without accountability to the wider community is now unsustainable.

There is an urgent need for reasons of both Indigenous rights and of environmental sustainability for people living on the lands and waterways of previously colonized Indigenous Peoples to rethink how we understand land and water in geolocations such as Australia and therefore how we teach about it. I think that this requires a paradigmatic shift in the pedagogical content knowledge and curricula vision of educators—in short—that we begin from a different place in conceptualizing what we teach about land and water.

I believe that such a conceptual shift might enable the children of the colonizers to begin to make their peace with the lands and waterways of their birth through respectful, humble, and thoughtful engagement with the Traditional Owners of those lands and waterways and with their languages and knowledge. Such a shift would also enable a deeper understanding of matters of environmental sustainability into the future.

Frankston South, Melbourne, Australia — Zane Ma Rhea
2017

Acknowledgements

I acknowledge the Boonwurrung on whose lands I now live, teach, and write. I am deeply appreciative of the willingness of *Arweet* Wise Elder Carolyn Briggs, her daughter Caroline Martin, and their extended family to teach people such as myself to live respectfully on the lands of Bunjil, making two *dhumbali* promises: to obey the *wurrung* laws of Bundjil and not to harm the *bubup* children or the *biik* land of Bundjil (Briggs 2008/2014, ix). I also thank the Pitjantjatjara of Indulkana, in particular, Billy and Wendy Mungie, for bringing me into their family and teaching me about the responsibilities of caring for *nyi nyi* the little zebra finch and for teaching me *inma nyi nyi* on their country. Profound thanks also to the old women who took me together with the female students from the Centre for Aboriginal Studies in Music and taught us to dance and sing up Country as the evenings fell those many years ago. I also acknowledge and thank Professor Marcia Langton with whom I shared an intellectual journey that is reflected in the pages of this book.

I also acknowledge other people who have been part of my complex journey toward understanding of land and water that has made this book possible: to Chris Miller and all the wonderful outdoor educators who first taught me bushcraft through NSW National Fitness and then NSW Sport and Recreation all those years ago; to my camping buddies, in particular, Sophie Dwyer, Michelle Sindler, Liz Evans, Caroline Powell, Siobhan Bacon, my sisters Chrissie and Gemma, and my brother Anthony, who undertook crazy treks to "Jeanie's" out the back of Little Wobby with whom I learnt to see and feel the magnificence of the Australian bush; to 1st Willoughby Cub Pack and Ned Gill for all the bush adventures we had; to Tony Butz for teaching me how to care for this land, its beautiful animals, snakes, and spiders from a western perspective; to the descendants of Adnyamathanha, Bardi, Boon Wurrung, Cammeraygal, Gija, Kaurna, Kuring-Gai, Luritja, Jaru, Ngarrindjeri, Ngunnawal, Pitjantjatjara, Yolngu, Yorta Yorta, Wurundjeri, and Wik for their generosity in teaching me aspects of the language of their estates and waterways, of the flora and fauna, and of matters of Country over the years; to specific women and men, Gina and Janine Castelain, Craig Koomeeta, Stanley Kalkeeyorta, Gladys Typingoompa, Lesley Walmbeng, Neville Yunkaporta and

their families, Henry Atkinson and his family, Eileen Kampukuda Brown and Myra Tjumatja Watson, Davey and Trudi Inkamala and their daughters Rhonda and Jennifer, Ruby Hunter, Minnie Read, Rhonda Grosvenor, Suzi Coulthard, Vivienne Mackenzie, Andrea Khan, Delphine Geia, Diat Alferink, Bettina Djammara, Kath Gilbey, Les Wanganeen, and Rose Page.

References

Briggs, C. (2008/2014). *The Journey Cycles of the Boonwurrung* (2nd ed.). Melbourne, Australia: Victorian Aboriginal Corporation for Languages.

Freer, J. (1983). Gaea: The Earth as our spiritual heritage. In L. Caldecott & S. Leland (Ed.), *Reclaim the Earth: Women Speak out for Life on Earth*. London, England: The Women's Press.

Contents

Chapter 1
Allodial Pedagogy for Land and Water Education

Abstract This chapter introduces the *allodial principle* and provides educators with an overview of the reasons that this principle would enable a paradigmatic shift in the way that Australian specialist in environmental, Indigenous, and legal studies, teacher educators, and teachers think about land and water education. Land and water are so basic to human life and students need to grapple with matters of sustainability and Indigenous entitlement into their future. People now living on lands and waterways that have been colonized, such as Australia, are taught to regard land and water in ways that have been fundamentally shaped by English and older European legal understandings. This chapter introduces the idea of allodial pedagogy, a critical, title-based pedagogy that invites educators to examine their worldview such that there is a fundamental shift in their pedagogical content knowledge and curricula vision. In short, this pedagogical approach asks that they begin from a different place in conceptualizing what they teach about land and water. From this different starting point, decisions about how to teach the core knowledge of one's specialist areas will change and the ways of teaching it will also change.

Keywords Educator worldview · Environmental education
Indigenous education · Legal education · Teacher education
Indigenous People's rights · Colonization · Land · Water
Land and water education · Pedagogical transformation · Curricula vision

1.1 Introduction

Schools and universities are undergoing a significant transformation because of the impact of such factors and globalization and technology in both the ways that they teach and what they teach. As a human society, how we educate our young seems to be lurching from one crisis to another as we compete and collaborate with one another under new public management models applied to the provision of education services. In the minutiae of such overarching matters, the base note of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIPs 2008) sounds. Mostly

Z. Ma Rhea, *Land and Water Education and the Allodial Principle*,
SpringerBriefs in Education, https://doi.org/10.1007/978-981-10-7600-8_1

lost in the white noise of "improving education", its insistent beat challenges us to rethink our worldview, our preferred pedagogical approaches, and the content of our curricula in both universities and schools. Equally insistent are the warnings from environmental experts about the imminent ecological disaster looming over the planet because of unsustainable human practices and they are demanding that schools and universities to "do something about it" (Moroye 2005)!

The impetus for writing this monograph arises from three intersecting matters. First, nations such as Australia that have endorsed UNDRIPS now have the obligation to engage with Indigenous customary law in consideration of land and water: here the *allodial principle* I will examine exists as a fundamental relationship between communal responsibilities and individual responsibilities for "Country" (i.e. the preferred Indigenous Australian term for the geolocation of a specific people's land and water). Second, the Australian legal framework developed from English Law frames land and water as things, as property that can be allocated for exclusive individual use and abuse, and this right to use and abuse can be sold onto another through the transfer of the "property". My argument is that this capacity to use and abuse without accountability to the wider community is now unsustainable. I also highlight that traces of the *allodial principle* in English law were also transferred to some colonies. Its potential in the Australian context remains unexamined, something I partially address in this monograph. Third, and based on the argument developed from the above two points, the monograph then makes an argument for the urgent the need to rethink how we understand land and water in Australia, moving from its legal enframement into our classrooms and examining how we teach about land and water using an allodial pedagogy.

I argue that it will need a paradigmatic shift in the way that we understand land and water. This I suggest would be enabled by employing the idea of the *allodial principle*. It provides such an opening in order for Australian specialist in environmental, Indigenous, and legal studies, teacher educators, and teachers to examine their worldview such that there is a fundamental shift in their pedagogical content knowledge and curricula vision—in short, that they begin from a different place in conceptualizing what they teach about land and water. From this different starting point, decisions about how to teach the core knowledge of one's specialist areas will change and the ways of teaching it will also change.

I take as my particular starting point for this rethinking of land and water education in the contemporary world the legal underpinnings that inform pedagogical content knowledge (PCK) about land and water in the tradition of Shulman (1986, 1987) and Gudmundsdottir (1990). Building on these authors' foundational work, and similar to Cochran et al. (1993, 263), this monograph tends toward an argument for *situated* pedagogical content, as they explain:

> We emphasize the importance of teachers knowing about the learning of their students and the environmental context in which learning and teaching occur.

How educators develop such a situated pedagogical content knowledge poses a complex question of teaching style. Early work by Bennett (1976) examined the pedagogical approaches used by teachers and made the argument for 12 different

teaching styles that he later collapsed into three main approaches: Informal, Mixed, and Formal. With the emergence of Shulman's idea that there was something in teacher practice that fell between their teaching style (how they taught) and their choice of curriculum content (what they taught) that became known as pedagogical content knowledge, questions were asked about the societal factors that shaped a teacher's PCK. The intellectual work underpinning PCK has been most profoundly shaped by the field of the sociology of education. For example, as Easthope et al. (1990, 117) argue, "The teaching style adopted by any teacher is not simply a product of her choice." They identify four key aspects that influence what a teacher chooses to teach about (her curriculum choices). They are: her educational philosophy; the organizational practices of the school; the available resources; and the responses of her students, also shaped by their varied demographics (Easthope et al. 1990, 117).

I make the argument throughout this monograph that these key aspects shape how educators understand land and water. This book is developed in three parts. The first, this chapter, provides the rationale for specialist environmental, Indigenous, and legal academics, teacher educators, and teachers to develop their pedagogical content knowledge about land and water in order that they can begin to educate the next generation of students in schools and universities in new, and challenging ways.

I have then developed 5 substantive chapters (Chaps. 2–6) to present the foundational knowledge needed by an educator in order to influence their underlying epistemological understanding of land and water in the first instance. I will do this through a sustained examination of underlying colonial legal assumptions about land and water at both the international and national levels that are colliding with international environmental legal mechanisms and also with the recognized *sui generis* rights in land and water held by the world's Indigenous Peoples. The final chapter concludes this monograph with a focus on how educators might develop pedagogical content knowledge, bringing the pedagogical and curriculum implications of this rethinking to the foreground. It examines four emerging approaches being used by specialist environmental, Indigenous, and legal academics, teacher educators, and teachers to examine our worldview, undertake the pedagogical transformation of the sort described by Scholl as being where, "[Their] pedagogical repertoire has broadened to include their original transmission, didactic pedagogies and progressive, inquiring, critical pedagogies" (Scholl 2014, 100). As the final chapter observes, what is missing in this expanded pedagogical view are specific critical race and critical ecopedagogical concerns raised by such visionaries as Payne (2010) and which this monograph addresses asking educators to think deeply about how they teach about land and water, being prepared to rethink ecological education into a deimperialized and postcolonial future.

Overall, this monograph will demonstrate that curriculum and pedagogy about land and water are deeply framed by colonial legal determinations that are out of step with contemporary international environmental law and with the *sui generis* rights that are now recognized under the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIPs). Equally disorienting, much of what is being

taught about land and water in former English colonies bears little or no resemblance to geolocation, thus opening up the very real opportunity for teacher educators, other academics, and teachers to lead epistemological innovation. It does something far more powerful too. It invites us to a place of ontological transformation, away from a previously sanctioned colonial mindset about how we conceptualize land and water education into a sustainable, deimperialized, postcolonial, postmodern future as yet to become settled. This is both the challenge and the vision of this book—to consider land and water with a clear mind, a mind calm enough to hear the sounds of water and earth. Listening, sound, and meaning are the drumbeats underpinning this monograph (see also, Bastock 2001). Through providing a different starting point for land and water education over a number of chapters, I then toward the final part of this monograph make an argument for an allodial pedagogy based on recognition of Indigenous rights in land and water as a critical, title-based approach that might be most appropriate in order to undertake such a profound shift in understanding.

1.2 Starting Teaching and Learning from a Different Place

Human societies, for as long as we know, have dealt with both mundane worldly matters and esoteric matters. Within the realm of the esoteric, it has been long understood that there is a "co-relation" between the sentient planet and all other sentient life. For humans, this co-relation is most obvious in the replenishment of life itself through the air we breathe, the land that feeds us, and the water that we drink. The work of "those who could hear" was to listen to the sounds of air, land, and water, to enable human vocalization of them, and to develop rituals that would replenish the Earth as it replenished humans. In the European sphere, from where we trace the genealogy of much "Western" thought, the tribal peoples of what is now called the British Isles, and extending to the European continent, evolved highly developed relationships between place, language, and ritual. As Freer (1983, 134) observed:

> The repeated use of particular sites for honor and devotion increases the power of those places, as the repetition of songs increases their meaning. Dances too repeating patterns on the earth, especially if danced barefoot and with enthusiasm enhance life-giving energy… Ritual properly observed will put the participants in touch with the timeless universal forces which weave the magical web of life.

Of course, their cultures were also profoundly influenced by those preceding them, such as the highly ritualized Egyptian societies, whose esoteric leadership was also deeply involved in translating the sounds of the planet into human form and also, such ancient peoples as the Pelasgians and Ionians, considered the Indigenous antecedents to Greek people. At its essence, this monograph asks the question: Do these ancient forms of resonant language still speak to the colonized

world of the twenty-first century? If, as proposed above that most ancient human societies made, and in some places continue to make, strong connection between place, language, and ritual in order for co-relational, rejuvenatory, regenerative harmonization to occur, then I will opine that we need to seek a new postcolonial, postmodern, deimperialized understanding of land and water, as key examples, finding new resonant language that arises from place and is facilitated by ritual in order to understand land and water in education. In doing so, we need to tackle the contemporary legal concept that land or water are "things".

Reconfiguring the legal landscape, listening to new sounds can cause new questions to arise about the pedagogical assumptions and curriculum choices underpinning education about land and water. This is the world of emerging scholarship in linguistics called "sound symbolism" enabled by the seminal work of Saussure (1916/1983) especially in his thinking about sound, meaning, and the role of time and geographic location (Saussure 1916/1983, Chap. 3). His work has precedent in the ancient Indian text known as the Upanishads and some Stoic texts are even said to have inspired Saussure's approach. One can also learn about such matters through oral exposition by Indigenous knowledge holders, a pivotal aspect of this monograph in later chapters as we move into new understandings of land and water beyond "thingness". This chapter begins with a discussion about land, water, and education and the way that land and water have become conceptualized ontologically and epistemologically as "things" having the potential to be privately owned as property. In later chapters, I want to investigate English and European land law, in particular, *alod* titles and common rights in English and European history, especially under the Enclosure Acts and related events. I will then trace their subsumption into feudal, post-feudal, and colonial systems such as those being developed in nation states, such as Australia, that use the British legal framework as their foundation, "postcolonial" in the imagination but firmly entrenched in the colonial zeitgeist of land and water ownership.

The reason for this is simple. The approach that was taken under English law toward land and water as property enabled the powerful colonial project to become thoroughly embedded in new lands. Initially, allowing land and waterways to be "owned" by individual titles facilitated "productive" use of these "things as property". Over time, the capacity within such an "entitled" approach for use and abuse of these resources without accountability to the wider community has become deeply problematic and in many cases environmentally unsustainable. Individual right coupled with human greed is a potent force. This monograph argues that without a purposeful program of education undertaken across universities and schools that involves pedagogical leadership by specialist environmental, Indigenous, and legal academics, teacher educators, and teachers that this potent force will be difficult to change. To do this work of pedagogical leadership, educators need to rethink their pedagogical content knowledge, something to which this monograph will contribute.

The ancient ideas embedded in the phrase *allodial principle* provide one such "disruption" to the colonial legal framing of land and water as "things". The *allodial principle* has the meaning that people can be recognized as having ownership

of land and waterways without having to have this recognized by jural processes. I have employed this principle because over the years I found it to echo explanations that Australian Aboriginal people were giving me to explain their approach to such matters as sustainability and land and water management. I wanted to springboard this idea into the field of education in order to open up the opportunity to think about new ways to understand the complexity of claims that are being made about land and water and the rights held by people to its access and use. Seminal work by Langton and Palmer (2004), for example, argues that aspects of western property law in relation to land and water, specifically the right to exclude and the right to alienate have been overemphasized with regard to nonmarket systems, such as the systems of Australian Indigenous Peoples. Sutton and NNTT (1998) note that in Indigenous Australian systems of land tenure, acts of physical exclusion are rare. Sutton concluded:

1. That such a right is in many cases qualified
2. That such a right is only one aspect of the relevant exclusionary powers
3. That exclusive possession is at core an exclusive right much more than it is [a] right to exclude
4. That even when it is a right to exclude, the most important things from which the possessors may exclude others are rights of identification with land, fundamental decision-making over land, and uses or alteration of land that cause permanent and significant depletion or destruction, rather than mere physical presence on the land.

I came to the conclusion that consideration of the *allodial principle* might allow educators to reconsider how they teach about such matters where Indigenous Australian *sui generis* right to land and water that are daily contested by the overlay of colonial land and water arrangements. I proposed that if for example an *alod* title was recognized as part of the Australian title system, as *aborigineum dominium,* then it would be possible for an estate to be recognized as being owned in the full sense by a recognized community of filially related people and that filial individuals within that recognized group could alienate their individual part of this overall title in accordance with whatever rules were to be determined over time to other filial members. Sutton and NNTT (1998, 67–69) note that there have been significant transformations in communal understandings of "ownership" in the postclassical period that seem to allow for forms of exclusion and alienability arising from different groups being able to claim association depending on either ancestral affiliation or historical association. This suggests that a new form of the *alod* title might serve to deal with some of these emerging complexities as a form of *aborigineum dominium*, as full recognition of sovereign domain.

I believe that the relevance to educators of this way of thinking and writing about understanding land, water, their conceptualization, and any entitlements attached to their access and use is that it provides a way for educators to investigate and explain Indigenous Australian expressions of land and water entitlements in their own terms rather than framing them in colonial legal arrangements and western

epistemologies. To enable this *oeuvre*, I have surveyed relevant historical literature on property and tenure systems in England and Europe since pre-Roman times, and have found intriguing traces of what are conventionally called customary law titles whose nature and characteristics have interesting similarities with Indigenous Australian understandings of water and land that have been asserted consistently by Traditional Owners since colonization. Vestiges of English and European pre-feudal property systems survived conquest by invading forces and in the development of market-based societies in a number of forms. In some cases, these vestiges were acknowledged by codified law and thus reemerged as elements of feudal tenure systems. Examples include *alod*, *allegatum*, *quirtium dominium*, *folcland*, and the commons. Some vestiges even survived the enclosures, such as pathways, hedgerows, and bridle paths that remained rights of common whatever the underlying title. These will be discussed in more detail in Chap. 2.

Legal theorists such as Demsetz (1967) contend that modern property systems emerged with the evolution from pre-market to market-based societies. Such linear, colonial, progress models as identified in his work are the most common ontological enframement currently made in order to explain land and water. For Indigenous Peoples globally, such an ontologically specific epistemology is contested by Indigenous Peoples as they begin to explain their understanding of land, water, and more general systems of property ownership to the nonindigenous world. Yunupingu (1996, 1997a, b, 1998), a senior lawman of the Gumatj clan of the Yolngu people of Australia, offered his views about concepts of land, of native title asserting that "our land is our life". He explains that:

> We have our own laws, repeated in ceremonial song cycles and known to all members of our clan nations. Sung into our ears as babies, disciplined into our bodies through dance and movement – we have learned and inherited the knowledge of our fathers and mothers. We live on our lands, with our laws, speaking our language, sharing our beliefs…(Yunupingu 2015, 2–3).

In Canada, Bryan (2000, 18) explains his approach to understanding relationships between people, place, and property among Canadian Aboriginal peoples in this way:

> …English property is a social practice that enframes our relationship with our environment, and the same process occurs in our approach to Aboriginal conceptions of reality … We need to reflect on broader patterns of social practice that get us closer to a concept like "ownership". For instance, we can ask about native plant understandings (as opposed to use), the visions of territory and food, and about different practices and be told how sugar was made, how healing was done with herbs, or how what we might call "agriculture" was approached. Or we can ask about what it means to be a human being and simply let our interlocutor begin with her own way of relating what is important to remark. By deferring to the particular descriptions and insights of the particular people of the place, we get an accurate portrayal of what life is like from the inside rather than as we would describe it. Only through such deep reflection can we then understand the ontology implicit in an Aboriginal conception of ownership, should it exist.

He speaks of relationship to our environment as being enframed and challenges the conceptualization of "ownership" from an Aboriginal ontological perspective.

He also suggests that pursuing a different way of thinking about our relationship to the environment and to concepts of ownership requires us to listen to Indigenous Peoples. I have previously suggested that contemporary enframement is formed by our socialization into a colonial mindset (Ma Rhea 2015a, b) and that we need to decolonize our language as Ngugi (1986, 4) argues when he explains that:

> The choice of language and the use to which language is put is central to a people's definition of themselves in relation to their natural and social environment, indeed in relation to the entire universe.

In academia, there is an emergent literature on understandings of land and water in the field of education (for example in the *Journal of Environmental Education, Environmental Education Research, and the Trumpeter*). In striving to rethink land and water education together with colleagues in the field of environmental and sustainability education who are working to create authentic postmodern, postcolonial, deimperialized education spaces (Tuck et al. 2014; McKenzie 2005; Payne and Wattchow 2008; Nakagawa and Payne 2015; Palmer et al. 1999; Hart 1996; Reid et al. 2002; Reid and Payne 2011), I would argue that vestiges of pre-feudal property systems survived conquest as acknowledged customary law titles in parallel to feudal and even modern legal systems. Instances of surviving, codified forms of customary land, riparian, sea, and waterways laws counter the grand totalizing theory of the evolution of modern property systems offered by standard versions of legal history. Such vestigial traces also help to articulate a new relationship between Earth and all other sentient beings (Singer 1996; Bonnett 1999) in the globalized, postcolonial age, also becoming known as the Anthropocene.

Societal knowledge and the subsequent education of citizens about land and water is in a process of transition. In this context then, the emergence of a legal tool called "Native Title" in the Australian settler legal system provides an intriguing source of comparison with English and European forms of customary land law. This book seeks to go further, to examine the intersection of Indigenous-settler co-relational understandings of land and water, to bring into focus the voices of people whose words and worlds are shaped by big city life and also to those who live in rural, remote and very remote towns and communities (relative to these big cities), such as Indigenous Peoples and rural farmers. This monograph intends to explore the understanding of people, in what Appadurai (1986, Chap. 9) terms "localities", who speak different languages about such concepts as are spoken of in the English language as the "Earth", the "environment", and "sustainability", and how these "big" concepts shape and are shaped by their ontological and epistemological engagement with land and water. In particular, I want to propose how specialist environmental, Indigenous, and legal academics, teacher educators, and teachers can then construct knowledge about such elements in their classrooms into a postcolonial, postmodern, deimperialized future.

In the final part of this chapter, I would like to proffer definitional considerations as I continue to investigate the ontological and epistemological underpinnings of land and water education. I will defer a fuller discussion of the *allodial principle* for Chap. 2. Here, I would like to focus on the words and phrases "Earth", "land",

"water", and "land and water education", pointing out that the colonial settler practice of "thingifying" aspects of reality is amplified in the following discussion. The seminal works of both Appadurai (1986) who guides us in a profound understanding of the commodification of things and Kopytoff (1986) who enables a way forward beyond the colonial commodification project through the idea of employing techniques that would reveal a cultural biography of things will underpin the chapters as they unfold.

1.2.1 Earth

The Earth is the "big" concept. What is Earth? Within the fragility of locality so powerfully argued by Appadurai (1986), people in groups small and large, and even individually, have sought to express an answer to this question. Does the Earth itself have anything to say? Have we got the patience to listen? Do we have the language to then communicate what was being said out to the world? These are not fanciful questions. A Sami reindeer herder in the far north of Sweden told me many years ago that it takes a lifetime to speak with a glacier—and who has the time these days to listen for that long?

Earth in its most basic definition is a planet located in the Solar System, but this knowledge is itself a particular view that presupposes the existence of the Solar System. Even the question "*What is the Earth?*" presupposes a way of seeking knowledge that is particular to a time and place. The modern answer is usually couched in scientific terms in the classroom. The following narrative is taken from the NASA website and is written for a Grade 5–8 student:

> Earth is our home planet. Scientists believe Earth and its moon formed around the same time as the rest of the solar system. They think that was about 4.5 billion years ago. Earth is the fifth-largest planet in the solar system. Its diameter is about 8,000 miles. And Earth is the third-closest planet to the sun. Its average distance from the sun is about 93 million miles.[1]

Through the means of global communications and internet technology, such facts can be shared around the world, reinforcing particular ontological understandings of Earth, and of ourselves as humans living on this planet. For example, the World Population Clock[2] estimates there to be close to 7.6 billion people alive on the planet at the time of writing, together with myriad other sentient beings. We take for granted that it is possible to even count how many humans might be alive on the planet at this time and that there are global accounting and communication networks that are keeping everything measurable. In this age of the smartphone, with GPS tracking, satellites, and electricity, rarely would a person stop and ask

[1] *Online at:* http://www.nasa.gov/audience/forstudents/5-8/features/nasa-knows/what-is-earth-58.html.

[2] Go to: http://www.worldometers.info/world-population/.

"What is time?" or "Is time real?" Without all the previously mentioned devices and a central timekeeping organization, the United States Naval Observatory with its Master Atomic Clock, we would be unable to have synchronized time, also called Coordinated Universal Time (UTC).

As Saussure (1916/1983) reminds us in his contribution to semiotics, the English words we use to describe such aspects of the material world as land, water, earth, or time are only an abstract label; they are not the aspect itself. Together with such a cautionary reminder, there are also other worldviews of these aspects that predate the scientific worldview. It was not only in scientific "facts" or in the words chosen to describe them that differences can be noted. In many ancient societies, the Earth, stars, planets, land, water, flora, fauna, and surrounding geographical features were experienced phenomenologically and within ritual and words were given to them that had resonant meaning. In this manner, the relationship between word, materiality, and meaning was hermeneutical. For example, if one considers the Earth, there were those in the Greek world who made the hermeneutical translation of what they understood as the profound creator of all life, γαῖα (transliterated as *Gaia*), a collateral form of γῆ (*gē̄*, γᾶ *ga* and probably δᾶ *da*) meaning the Earth (Liddell et al. 1940/2016). In Latin, the phrase invoked was Terra Mater (Mother Earth). Across the planet, there are many, many names for the same idea. In metaphysical and ecological circles, the Earth is also now known as Gaia, or Gaea, or the Great Mother in the English language version, an evolving adaptation of the signifier. As Jacobson (1937, 2–3) reminds us:

> Here we are directly confronted with the mystery of the idea embodied in phonic matter, the mystery of the word, of the linguistic symbol, of the Logos, a mystery which requires elucidation.

1.2.2 Land

The most necessary level of consideration of this word, "land", is its ontological underpinnings. It would be surprising to encounter a language that did not have some concept of what is understood in English as "land". In its simplest form, it is that aspect of the Earth that is not covered by water. I will be examining the idea of "land" in its postcolonial, postmodern, deimperialized potentiality in later chapters but here we need to consider "land" in the colonial aftermath. Many formerly territorially colonized places are now trying to rethink themselves into a future that includes issues such as the redistribution of lands and waters that were taken from inhabitants during colonial rule. As Rathbone and Verhoef (2015, 150) explain in the South African context:

> In South Africa, the collusion of modernism and colonialism on the one hand, and de-colonial strategies that view 'land' as a cultural concept reflecting a holistic ontology amongst others has resulted in reductionist perspectives of land…

They further point to the "hermeneutical circle" (Verhoef and Rathbone 2015, 156, footnote) where ontological understanding of land forms a part of how humans constitute reality and how equally the understanding of reality constitutes human understanding of land, something expressed by many Indigenous People in and out of universities and schools and becoming more widely recognized by emergent scholarship of the postcolonial and land across academic disciplines (Hussain 2000; Tanner 2007; Darian-Smith et al. 2005; Verran 1998; Lilley 2000).

What is being popularly called "land education" assumes that land is the conceptual big idea in education for sustainability and in subjects such as outdoor education. Education about land under the conditions of postmodernity and postcoloniality has been taken up by geographers, environmentalists, scholars of sustainability, and scientists as they grapple with the insistent voices of Indigenous Peoples who say that as we move into the future, we will be required to rethink the colonial understanding of the land. A small but important group of teacher educator scholars are taking up the challenge to move beyond what I have called "the colonial mindset" (Hart 1990, 1996; Hickling-Hudson et al. 2004; McKenzie 2005; Nakagawa and Payne 2015; Payne and Wattchow 2008; Tuck et al. 2014; Ma Rhea 2015b).

1.2.3 Water

Water is barely considered in most research literature by specialist environmental, Indigenous, and legal academics, by teacher educators, or for teachers in teacher professional development courses. Scholarly interest in water is slowly emerging as the planet faces the global warming crisis and some parts of the planet are becoming unlivable because of drought or the rise of ocean levels. "Water" here is considered as a conceptual category that has embedded within it assumptions about its nature and the human relationship to it. Educating people about water will become more pressing as water scarcity increases with global warming. Climate change experts consider that water will be the focus of much concern and aggressive contestation. "Water as property" will need to be understood. This lens speaks back to the *sui generis* rights of Indigenous Peoples (Janke 1998) and how processes of colonization and the assertion of English land law has also "enframed" understanding of water. Scholars such as Gandy (2006) and Mark et al. (1999) offer glimpses of a postcolonial "working out" of water and how it can become understood beyond the colonial impositions that have enframed water as an object and a commodity under contemporary legal determinations.

1.2.4 Land and Water Education

Land and water education finds a place in many key learning areas of the school curriculum and in university-level specialist studies and within teacher education

programs. A concept that has been gathering momentum, providing a counterpoint to learning in classrooms, is place-based education. This pedagogical approach provides an important conceptual step outside "four walls" onto the "land", into "water", and onto "earth". Even so, it is important to unpack what "place-based" education actually means and what sorts of conceptions of earth, water, territory, Country, rivers, seas, oceans, beaches, and land are being mobilized, who is teaching in these "outdoor" spaces, whose conceptions of "place" are being used, and ultimately what underpinning ontological commitments are being expressed in these new forms of "land and water education"? In parallel, there is increasingly popular term "sustainability" that echoes around the halls of academia and in schools, and it is a word being applied to a dizzying array of concepts both tangible such as food sustainability and intangible such as sustainable leadership. How is a concept like sustainable land management or sustainable water consumption understood in the colonial classroom and university curriculum? Such questions are taken up in later chapters.

1.3 Conclusion

All of us rely on land and water for our existence and yet such topics appear hazily in the background of contemporary twenty-first century colonially founded education. The following chapters will guide the reader into a deeper consideration of the ontology and epistemology of land and water and the legal enframing that has relegated land and water to being "things" that can then become "property" and be commodified. The final chapter of this monograph will consider new ways of foregrounding education efforts around water and land as an allodial, critical, title-based pedagogy.

Quine (1948) teases out some of the more enduring complexities of how to develop an ontology of objects, saying, "Physical objects are postulated entities which round out, and simplify our account of the flux of experience … Similarly, from a phenomenalistic point, of view, the conceptual scheme of physical objects is a convenient myth, simpler than the literal truth and yet containing that literal truth as a scattered part" (Quine 1948, 10). As we move into imagining a sustainable future where land and water are released from their colonial ontological and epistemological strictures, we are reminded of the task ahead in concluding remarks by Quine (1948, 11):

> From among the various conceptual schemes best suited to these various pursuits, one—the phenomenalistic—claims epistemological priority. Viewed from within the phenomenalistic conceptual scheme, the ontologies of physical objects … are myths. The quality of myth, however, is relative; relative, in this case, to the epistemological point of view…

References

Appadurai, A. (1986). Introduction: Commodities and the politics of value. In A. Appadurai (Ed.) *The social life of things: Commodities in cultural perspective* (pp. 3–63). Cambridge: Cambridge University Press.

Bastock, M. (2001). Something from nothing: Listening and quiet places in pedagogical relationships. *English Quarterly, 33*(1), 2–11.

Bennett, N. (1976). *Teaching styles and pupil progress*. Shepton Mallet, UK: Open Books.

Bonnett, M. (1999). Education for sustainable development: a coherent philosophy for environmental education? *Cambridge Journal of Education, 29*(3), 313–324.

Bryan, B. (2000). Property as ontology: On aboriginal and English understandings of ownership. *Canadian Journal of Law and Jurisprudence, XII*(1), 3–31.

Cochran, K. F., DeRuiter, J. A., & King, R. A. (1993). Pedagogical content knowing: An integrative model for teacher preparation. *Journal of Teacher Education, 44*(4), 263–272.

Darian-Smith, K., Gunner, L., & Nuttall, S. (2005). *Text, theory, space: Land, literature and history in South Africa and Australia*. Routledge.

Demsetz, H. (1967). Toward a theory of property rights. *American Economic Review, 57*(2), 347.

Easthope, C., Maclean, R., & Easthope, G. (1990). *The practice of teaching: A sociology of education*. Sydney, Australia: Allen & Unwin.

Freer, J. (1983). Gaea: The Earth as our spiritual heritage. In L. Caldecott & S. Leland (Eds.) *Reclaim the Earth: Women speak out for life on earth*. London, England: The Women's Press.

Gandy, M. (2006). Water, sanitation and the modern city: Colonial and post-colonial experiences in Lagos and Mumbai. Human Development Report Office (HDRO), United Nations Development Programme (UNDP).

Gudmundsdottir, S. (1990). Values in pedagogical content knowledge. *Journal of Teacher Education, 41*(3), 44–52.

Hart, P. (1990). Environmental education in Canada: Contemporary issues & future possibilities. *Australian Journal of Environmental Education, 6,* 45–66.

Hart, P. (1996). Problematizing enquiry in environmental education: Issues of method in a study of teacher thinking and practice. *Canadian Journal of Environmental Education, 1,* 56–88.

Hickling-Hudson, A., Matthews, J., Woods, A. (2004). *Disrupting preconceptions: Postcolonialism and education*. EContent Management Pty Limited.

Hussain, A. (2000). Joy Harjo and her poetics as Praxis: A "postcolonial" political economy of the body, land, labor, and language. *Wicazo Sa Review, 15*(2), 27–61.

Jacobson, R. (1937). *Lectures on sound and meaning*. Cambridge, Massachusetts, USA: MIT Press.

Janke, T. (1998). Our culture, our future: report on Australian Indigenous cultural and intellectual property right. In *Australian Institute of Aboriginal and Torres Strait Islander Studies*. Canberra: Aboriginal and Torres Strait Islander Commission.

Kopytoff, I. (1986). The cultural biography of things: Commoditization as process. In A. Appadurai (Ed.), *The social life of things: Commodities in cultural perspective* (pp. 64–91). Cambridge, UK: Cambridge University Press.

Langton, M., & Palmer, L. (2004). Treaties, agreement making and the recognition of indigenous customary polities. In M. Langton, L. Palmer, M. Tehan, & K. Shain (Eds.), *Honour among nations?: Treaties and agreements with Indigenous people* (pp. 1–4). Carlton, VIC, Australia: Melbourne University Press.

Liddell, H. G., Scott, R., Jones, H. S., & McKenzie, R. (1940/2016). *A greek-english lexicon*. Oxford: Clarendon Press.

Lilley, I. (2000). *Native title and the transformation of archaeology in the postcolonial world* (vol. 50). Oceania Publications.

Ma Rhea, Z. (2015a). *Leading and managing indigenous education in the postcolonial world*. London: Routledge.

Ma Rhea, Z. (2015b). Unthinking the 200-year-old colonial mindset: Indigenist perspectives on leading and managing Indigenous education. *International Education Journal: Comparative Perspectives, 14*(2), 90–100.

Mark, D. M., Smith, B., & Tversky, B. (1999). Ontology and geographic objects: An empirical study of cognitive categorization. In C. Freksa & D. M. Mark (Eds.), *COSIT'99, LNCS 1661* (pp. 283–298). Heidelberg: Springer.

McKenzie, M. (2005). The 'post-post period' and environmental education research. *Environmental Education Research, 11*(4), 401–412.

Moroye, C. M. (2005). Common ground: An ecological perspective on teaching and learning. *Curriculum and Teaching Dialogue, 7*(1), 123–137.

Nakagawa, Y., & Payne, P. G. (2015). Critical place as a fluid margin in post-critical environmental education. *Environmental Education Research, 21*(2), 149–172.

Nations, United. (2008). *Declaration on the rights of Indigenous peoples [UNDRIPs]*. Online.

Palmer, J. A., Suggate, J., Robottom, I. A. N., & Hart, P. (1999). Significant life experiences and formative influences on the development of adults' environmental awareness in the UK, Australia and Canada. *Environmental Education Research, 5*(2), 181–200.

Payne, P. G., & Wattchow, B. (2008). Slow pedagogy and placing education in post-traditional outdoor education. *Australian Journal of Outdoor Education, 12*(1), 25.

Payne, P. G. (2010). Remarkable-tracking, experiential education of the ecological imagination. *Environmental Education Research, 16*(3–4), 295–310. https://doi.org/10.1080/13504621003613160.

Quine, W. V. (1948). On what there is. *The Review of Metaphysics, 2*(1), 21–38.

Rathbone, M., & Verhoef, A. H. (2015). The collusive power of modernism and reductionism: The need for alternative ontologies of land in the context of South African land redistribution. *Journal of Theology for South Africa, 151,* 149–161.

Reid, A., Teamy, K., & Dillon, J. (2002). Traditional ecological knowledge for learning with sustainability in mind. *The Trumpeter: Journal of Ecosophy, 18*(1), 113–135.

Reid, A. D., & Payne, P. G. (2011). Producing knowledge and (de)constructing identities: A critical commentary on environmental education and its research. *British Journal of Sociology of Education, 32*(1), 155–165. https://doi.org/10.1080/01425692.2011.527729.

Saussure, F de. (1916/1983). *Cours de linguistique générale/Course in general linguistics* (R. Harris, Trans.). C. Bally & A. Sechehaye (Eds.) London: Duckworth.

Scholl, R. (2014). "Inside-out pedagogy": Theorising pedagogical transformation through teaching philosophy. *Australian Journal of Teacher Education, 39*(6). http://dx.doi.org/10.14221/ajte.2014v39n6.5.

Shulman, L. S. (1986). Those who understand: Knowledge growth in teaching. *Educational Researcher, 15,* 4–14.

Shulman, L. S. (1987). Knowledge and teaching: Foundations of the new reform. *Harvard Educational Review, 57,* 1–22.

Singer, P. (1996). Neither human nor natural: Ethics and feral animals. *Reproduction, Fertility, and Development, 9*(1), 157–162.

Sutton, P., & National Native Title Tribunal NNTT. (1998). *Native title and the descent of rights*. Perth, WA, Australia: National Native Title Tribunal.

Tanner, A. (2007). On understanding too quickly: Colonial and postcolonial misrepresentation of indigenous Fijian land tenure. *Human Organization, 66*(1), 69–77.

Tuck, E., McKenzie, M., & McCoy, K. (2014). Land education: Indigenous, post-colonial, and decolonizing perspectives on place and environmental education research. *Environmental Education Research, 20*(1), 1–23.

Verhoef, A. H., & Rathbone, M. (2015). A theologically informed ontology of land in the context of South African land distribution. *Journal of Theology for South Africa, 152*.

Verran, H. (1998). Re-imagining land ownership in Australia. *Postcolonial Studies: Culture, Politics, Economy, 1*(2), 237–254.

Wa Thiong'o, N. (1986). *Decolonizing the mind*. London: James Currey.

Yunupingu, G. (1996). Concepts of land and spirituality. *Aboriginal Spirituality: Past, Present, Future*, *4*.
Yunupingu, G. (1997a). From the bark petition to native title. In *Our land is our life: Land rights: Past, present, future* (pp. 1–l7). Brisbane: University of Queensland Press.
Yunupingu, G. (1997b). *Our land is our life: Land rights: Past, present and future*. University of Queensland Press.
Yunupingu, G. (1998). We know these things to be true. *The Third Vincent Lingiari Memorial Lecture, 20,* 7.
Yunupingu, G. (2015). *Tradition, truth and tomorrow* (vol. 12). Black Inc.

Chapter 2
Allodial Traces

Abstract This chapter introduces educators to ancient forms of land holding, and in particular the *allodial principle*. This principle has been known by many names in many codes of law, but what remains are fragments of knowledge rather than a complete picture. This chapter will document the traces that remain, in pre-feudal and feudal literature and compare this principle to *sui generis* Indigenous titles to land and water asking educators to step back in time in order to examine the underpinning ontological and epistemological enframements that have shaped the way that 'land' and 'water' are understood and taught.

Keywords Alod · Allodial principle · Colonization · Land · Water
Indigenous rights

2.1 Introduction

This chapter asks educators to step back in time in order to examine the underpinning ontological and epistemological enframements that have shaped the way that 'land' and 'water' are understood and taught. The previous chapter gave a brief introduction to how these aspects of earth are defined in the contemporary, 'westernized' world. I place 'westernized' in quote marks to highlight that it is no longer the case that the 'west' is a territorial location if it ever neatly existed. I employ the term to mark that many places on earth have adopted westernized views of the world even though a minority of peoples in those places may still hold more locally, traditionally-established understandings. Land and water are central to the collision between ontological and epistemological viewpoints held by humans who have survived the most recent period of British and European colonization. Certainly, there are others periods of colonization both current and in the more distant past that also continue to influence the ways that land and water are understood. In short, access to land and water are commonly flashpoints in colonizing collisions where people's language and ritual engagement with the local are early casualties of war.

Z. Ma Rhea, *Land and Water Education and the Allodial Principle*,
SpringerBriefs in Education, https://doi.org/10.1007/978-981-10-7600-8_2

In this chapter, I will reach back into ancient forms of understanding land and water that turned them into 'things' or objects that could become property. First I want to introduce the idea of *alod* and the *allodial principle.* I will explore the usefulness of this concept to enable the global human population to move into the potentiality of the postmodern, postcolonial, deimperialized future, and in particular to address how *alod* might provide a fresh, but very old, way into land and water education within the global modern university and school education systems, something I will return to in the final chapter. The *allodial principle* has been known by many names in many codes of law, but what remains are fragments of knowledge rather than a complete picture. This chapter will document the traces that remain, in pre-feudal and feudal literature and compare this principle to *sui generis* Indigenous titles to land and water. This explanation provides foundational information that would support educators to build their curricula repertoire, their basic content knowledge of the subject, in order for them to engage in the process of reshaping their pedagogical content knowledge.

2.2 The Allodial Principle

> ALLODIUM, Alodium, Aleu, Allode: denotes lands which are the absolute property of their owner without being obliged to pay service or acknowledgment whatever to a superior lord (Encyclopaedia Britannica 1768/1968).

The eleventh edition of *Encyclopaedia Britannica* (1911) made the following additions:

> It is thus the opposite of fe-odum or fief. The proper derivation of the word has been much discussed and is still doubtful, though it is probably compounded of all, whole or entire, and odh, property. Allodial tenure seems to have been common throughout northern Europe. It exists in Orkney and Shetland but is unknown in England, the feudal system having been made universal by William the Conqueror.

Various traces of the concept have been recorded as *alod*, *alode*, *alote*, *allod* (Ripuarian), *allodium, allegatum, quirtium dominium* (Roman), and *folcland* (Anglo-Saxon), to give a number of variations. A detailed account of the earliest known use of the word *alod* appears in the German in the Swiss Historical Encyclopaedia.[1] The word *alod* is a compound of the words *al* (=everything, completely) and *ôd* (=property, fortune). The first record of the word appears in the Frankish *Lex Salica* around 508 and then in the early 700s in the Frankish *Lex Ribuaria*. Its meaning was as "*im vollem Eigentum stehender und unbelasteter Besitz im Gegensatz zum Lehen (beneficium, feudum) als abgeleitetem Besitz gestellt*" (English trans. "*full property standing and unloaded possession in contrast*

[1] *Online at:* www.snl.ch/dhs/externe/protect/textes/D8978.html.

to the Lehen as derived possession posed"). Thus the term '*liberium allodium*' was recognized.

In the Commentary to *The Germanic Laws and Midiaeval Documents*,[2] Chap. 11 traces the development of the Roman term *allegatum*. Here it is claimed that the term *alode* first appeared in Frankish document between 629–639 and the word *alote* in a Salic document in 709. This commentary suggests that the term emerged from Merovingian France from the Latin *allegatum* meaning donation. Nordic scholars such as the Midnott Sol Regintroth Organization suggest that the word *alod* is a concept connected to the Romans but other traces appear to suggest that the concept of *alod* was in existence prior to the Roman invasion of the Frankish lands. Even so, there may be some argument to suggest that the first 'Romans', the Quirites, preserved a concept of absolute *dominium* for themselves in the term *quiritium dominium*, meaning land held by legal right through title, the absolute right of governing.

2.3 Teaching About Pre-feudal Recognition of the *Allodial Principle*

This section will more fully examine Roman, Frankish, and English feudal evidence for the concept of the *alod* and the *allodial principle*. Traces of these understandings of land and water were put to the periphery in the development of new codification of legal understandings that, in turn, were exported across the planet during periods of colonization. Laveleye (1878, Chap. 1, p. 4) wrote of this problem, saying:

> The history of property has still to be written. Roman law and modern law grew up in a period when every recollection had perished of the collective forms of landed property-forms which, for so long, were the only ones adopted. Hence we have great difficulty in conceiving of property otherwise than as it is constituted in the Institutes or in the Civil Code. When jurists want to account for the origin of such a right, they fly to what they call the State of Nature, and from it derive directly absolute, individual ownership – or quiritary dominium. They thus ignore the law of gradual development, which is found throughout history, and contradict facts now well-known and well established.

Reconsideration of the traces of earlier understandings of how people accessed land and water for food, medicines, shelter, and such activities that predate a capitalist economy shine light on how aspects of the earth such as 'land' and 'water' became possible to think of as being 'owned' and eventually brought into the modern capitalist system as commodities. Any argument for a postmodern, postcolonial, deimperialized understanding of land and water education, as could be offered by the *allodial principle*, must be able to consider these distant traces in order to 'unthink'

[2] *Online at:* www.midhnottsol.org/lore/germaniclaw/011.html.

the consequences of the now presumptive, ontological framings of land and water with which many on the planet now live under the vestiges of colonial law.

2.3.1 Roman Approach

The concepts of private land ownership and privatized access to water, as distinct from negotiated agreement about the use of land and water by a community, have been evolving for millennia. Considering the Roman approach, the Quirites, Rome's oldest inhabitants, lent their name to a concept of law, 'ius Quiritium' and of full ownership that was termed 'quiritary dominium'. There was a differentiation between 'ius Quiritium' and 'ius Latii' in terms of the degree of ownership that could be held. These original inhabitants of Rome, the Quirites, could hold absolute, individual ownership as part of their citizenship rights. This right was not necessarily held by other types of citizenship. It is unclear whether it was a blood right but it seems to be predicated on such association.

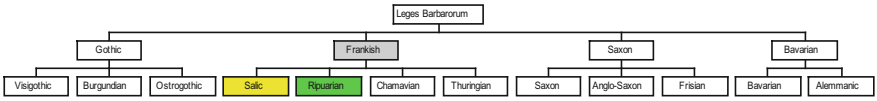
In addition to the rights of the Quirites, texts such as the Rules of Ulpian (Gaius and Ulpian 1880, XIX 8, 397) and Gaius (Gaius and Ulpian 1880, II 55–59, 91) suggest that partial rights (*possessio*) under 'ius Latii' could be converted to full *dominium* after a period of *usucapion*. Usucapion is defined as: 'The acquisition of a title or right to property by uninterrupted possession for a prescribed time' (Brown [SOED], 1993, 3533). These early peoples were doing more than formalizing private access to land and water. They were also an imperial and colonizing force whose claims to land and water ownership extended with their conquering armies. The manner in which they negotiated with conquered peoples formed the foundation for future Roman plurilegal frameworks.

During the period of the invasions by the Roman armies and the expansion of their empire, there were many discussions about how land in the colonies was to be held by Roman citizens (see, for example, Laveleye 1878, Chap. XII). Hence many soldiers and administrators who followed the Roman armies into new colonies were able to possess and then have full dominium of lands. Laveleye (1878) contends that this caused great problems because of the erosion of the *ager publicus* [*public land or territory*] through the exertion of quiritary or usucapion rights. One such example is given in the Frankish evidence.

2.3.2 Frankish Evidence

Before the Romans invaded the lands of the Germanic tribes there existed customary law codes. They are now largely unknown to the present world except through references of these Codes that were compiled by the Romans after these lands had been invaded by them. These Codes were called the *leges barbarorum* and were recorded between the 5th and 9th centuries. The Codes are usually divided

Table 2.1 Leges Barbarorum



as the table shows (Table 2.1) into four groups: the Gothic, the Frankish, the Saxon and the Bavarian.

The Codes of the Frankish tribes, the Salic and the Ripuar, are of particular pertinence to this discussion. The Frankish Salic and Ripuar were by the 3rd century BC settled along the lower and middle Rhine. According to the *Colombia Encyclopaedia* (at http://www.aj.encyclopedia.com/articles/04712.html), the Salic and Ripuarian Franks expanded independently but sometimes united to defeat a common enemy.

The Ripuarian Law, *Lex Ribuaria* of the Roman sources, exists in fragments. One such fragment concerning the inheritance of allodial land *circa* 450 confirms the existence of such land and that there were recognized laws to deal with the inheritance of such. Halsall's *Medieval Sourcebook* translates what was understood of the *allodial principle* in the Codes of the Ripuar as: "The inheritance of land under the barbarians would mean the inheritance of allodial land (freehold land)" (Halsall 1998). The fragment itself outlines the inheritance of this allodial land (Sohm 1866, Tome V, 240). Clearly, for the Romans, this idea of *alod* was familiar to them and understood to reflect the local custom of land as property inheritance.

The Salinan became allies of Rome in the 4th century. Moving south into Gaul in the 5th century they overthrew Rome under Clovis 1. Clovis 1 then united Salian and Ripuarian Franks together. The Frankish empire expanded to include most other tribes of the area (and included most of present-day France, the Low Countries, Germany west of the Elbe, Austria, Switzerland, and north and central Italy). The first empire was known as the Merovingian dynasty. Scholars have debated the extent to which the Roman conquerors were able to assert their legal approach in the places they conquered but some suggest that this was not their intention. For example, Montesquieu (1748/1914, Chap. XXVIII) observed that:

> So far were the conquerors of those days from reducing their laws to a uniform system or body that they did not even think of becoming legislators to the people they had conquered…

A number of sources point to the evolution of a legal code during this time that was named variously Merovingian multiculturalism, 'personality at law', and legal pluralism. This was the right of the people to be judged according to the law of the group of which they claimed to be part (Montesquieu 1748/1914, Chap. XXVIII). He writes that:

> … The Laws of the Barbarians were all personal. It is a distinguishing character of these laws of the barbarians that they were not confined to a certain district; the Frank was tried by the law of the Franks, the Aleman by that of the Alemans, the Burgundian by that of the Burgundians, and the Roman by the Roman law.

Thus, Montesquieu claims that the Codes recorded about conquered peoples, their *Lex Barbarorum,* existed as both personal law and territorial law within their own zone but were also held to be personal outside their zone. He further suggests that a person living in the Salic zone could choose the law under which to be tried. The Frankish laws, giving greater civil advantage than either the Roman or other barbarian laws, were often chosen.

It would appear that, at least under the Frankish laws, that the principle of *alod* was not lost under the laws of conquest of the Romans and that the concept of allodial ownership predated the Roman invasions. The following section explores the historical period that followed this, known as the feudal system. There has been much scholarly discussion about the influences of the Roman and Germanic systems of law on the feudal period. For the purposes of this monograph, the discussion will focus on the gradual but not complete erosion of the *allodial principle* during the feudalization processes.

2.3.3 English Evidence: Early Period

The Old English word 'éleð' meaning land held in allodial freehold, together with other forms such as 'geneátland', land granted for services or rent, and ancient rules suggested by the word 'geneátriht' meaning the conditions regulating the tenure of the 'geneátland', all provide traces of a way of relating to land and its use prior to the Norman invasion of the lands and waterways now known as the United Kingdom. It is commonly argued that under English law, *alod* ceased to exist, replaced instead by feudalism brought to the lands of the Anglo-Saxons by the Normans. It is commonly taught that in 1066, William the Conqueror assumed *dominium* over all the lands of England asserting his form of Frankish feudalism. He asserted this ownership very much in the spirit of the Roman legal approach. As Oxley-Oxland and Stein (1985, 3–4) suggest:

> He could do what he liked with the land. He could deny people access to it…He could use up its substances…he could grow crops and build buildings upon it… he could allow others to possess it only on his terms and conditions.

William then began to reward people for their service to him by giving them a 'fee' of land, also referred to as a 'fief' and a 'feud'. The transfer was known as a 'feoffment'. This sort of arrangement became known as a tenure by knight-service, where the one who had been 'enfoeffed' would swear an oath of service to the King.

The development of the concept of tenure in English law, and therefore the basis of tenure in all post-Commonwealth states and also Anglo-American law, is central to contemporary legal discussions in previously colonized nations such as Australia

and central also to the understanding of land and water. *Tenure* according to the SOED (Brown 1993) is more specific: 'The form of right or title by which, or conditions under which, land or buildings are held, especially not freehold'. The Colombia Encyclopaedia still includes its antithesis, *alod*, explaining that:

> (Tenure) usually implies, however, that the landholder does not have absolute possession but derives that right from some other person. This meaning of the word originates from its sense in feudalism; so used, tenure is the antithesis of alod, absolute ownership without obligation to others.

By 1085, the King William was able to send out his men to all the conquered English shires to 'find out what or how much each landholder had in land and livestock and what it was worth'. This great survey, now known as the Domesday Book, provides rich historical data about the extent of these new tenure arrangements and the nascent development of the feudal system in England.

It is better recognized in contemporary times that the development of the feudal system overlapped earlier customs of land occupation, distribution, and use, and of water distribution and complex overlapping arrangements co-existed with it in various parts of Europe. For the purposes of this discussion, what seems most at issue is that the feudal system brought with it a worldview that asserted that all lands and waters of a particular area were able to be owned exclusively by a monarch in *ius utendi, fruendi et abutendi*.[3] This was a practice that was based on the Roman law of *dominium* but arguably operated in sharp distinction from earlier Roman legal pluralism, and significant because of it. Montesquieu (1748/1914, Chap. XVIII) says: 'The Norman sovereigns regarding themselves as proprietors of the whole soil by right of conquest, made much more frequent grants of land and the greater part of the Anglo-Saxon *folcland* was converted into Terra Regis or royal domain'.

William the Conqueror established a hierarchy of nobles under him (the military class) who were often granted land after a period of service. Some were granted such land immediately after its conquest. These nobles were charged with a responsibility to protect and were given status and incentives to support them in this role. Below them were *soigneurs* who were given manorial holdings under a noble. The land was held by *soigneurs in fief* (one's sphere of control). In return for their position, they were obliged to manage the various land tenures of peasants and slaves under them, to offer homage and fealty to a noble, make provision of an army when required, and hold land in such a way as to produce a surplus for the nobles. This was known as the 'service and protect' contract.

Montesquieu (1748/1914, Chap. XVIII) observed that England had, in effect become the property of the Crown and that there was '…no longer any free allod; all lands were comprised in a network of feudal tenures'. Even so, Jolliffe (1937, 226) argues that: '… over a large quarter of England, the survey accords to the landholders of King Edward's day not the *feudum*, but the Saxon absolute property

[3]The right of using, taking the fruits of, and abusing

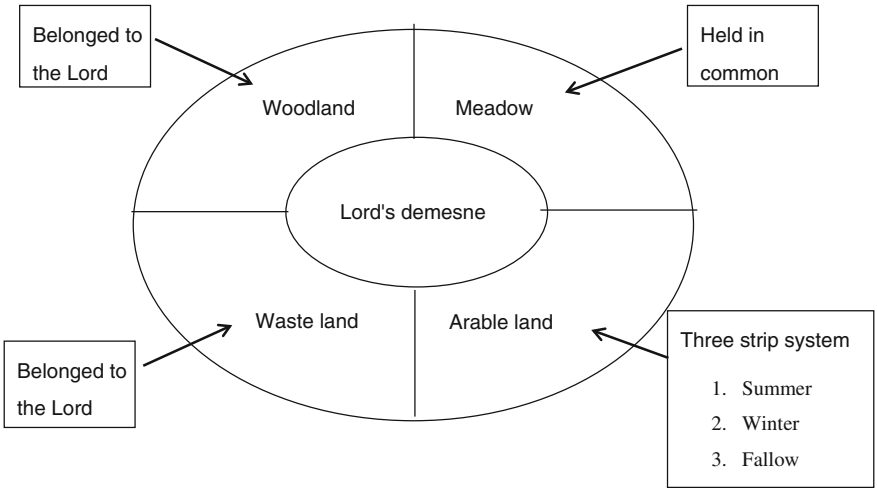


Diagram 2.2 Manorial system of land use

in alodio or *bookland'*. This suggests that not all the lands and waterways had come under feudal titles, as has been commonly asserted in legal history.

Certainly, the feudal system of monarch and nobles was large and regional. The manorial system was local; it regulated peasant land, tenure, and production, administered local justice, and collected taxes. From 11th to 15th centuries, the manor was subsistence-based as can be understood from Diagram 2.2. The worldview created by these arrangements is of particular interest into the contemporary era as the notion of 'subsistence' is revisited under the condition of the rights of Indigenous Peoples being recognized worldwide and their approach to the management of their estates causes a reappraisal of land and water in this context.

Early tenures in this manorial system established a tenant's social status and were basically of two types: free and unfree. The chart (Chart 2.3) shows the early system of tenures.

As can be seen in Chart 2.3, with respect to Free Tenures, Knight Tenures were given for military service; Frankalmoign Tenures for spiritual services; Sergeanty Tenures for official and personal services; and, Socage Tenures for the cultivation of the land. Gradually the Socage tenure became the tenure in most common use and, according to the Colombia Encyclopaedia, provides the basis for all modern

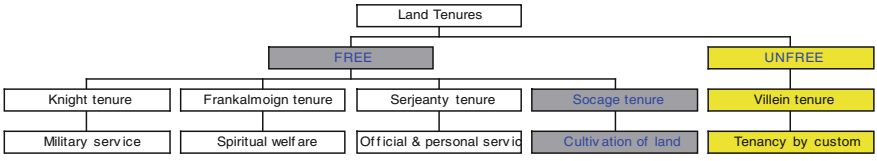


Chart 2.3 Early Norman land tenure types

estates. The Socage tenant held the land in return for performing duties for the Lord. With respect to the Unfree Tenures, there was one known as the Villein Tenure. This type of tenure was unfree or servile and required the tenant to perform menial service and was subject to the will of the Lord. This type of tenure was known as tenancy by custom and only became a permanent right in the property when such tenures were recorded. Under this sort of arrangement, peasants could own or rent a right to a part of the profits of the soil, something in sharp distinction from any modern sense of ownership of the actual land itself (Gonner 1912).

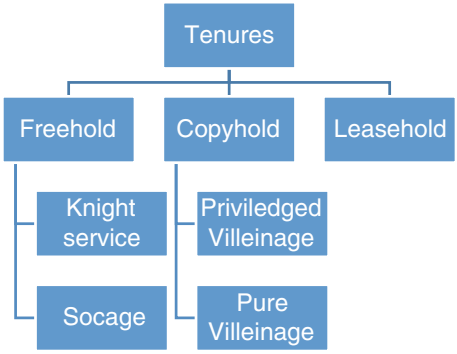
2.3.4 English Evidence: Later Period

Within these arrangements, we find traces of the old *allodial principle* at work in the complex network of strips of arable, meadow and pasture that developed among unfree tenure peasants. Montesquieu (1748/1914) and others (see, for example, Oxley-Oxland and Stein 1985) provide traces of information about the transition from allodially-held land into free tenure of the Socage tenancy as fee simple. The most common explanation is that holder of *alod* were vulnerable to encroachment and became more secure in their holding of land under the 'service and protect' contract. By holding a tenure, one's status in the developing feudal and manorial systems could be defined and one's obligations and rights were clarified. The Socage Tenure was of three types: Fee simple; Fee tail; and Life fee. The Fee simple had the freedom to alienate and was bestowable by will. The Fee tail was a gift to the donee and his issue or a class of his issue (male or female) and could therefore not be alienated outside the prescribed line of succession. The Life fee endured for the lifetime of the grantee and had no power of alienation.

These early arrangements became significantly more complicated over time. By the end of the Middle Ages, the Norman system of tenures and the structures developed to litigate them had been transformed, and with them, people's relationships to land and water usage. Unfree tenure of the Villein had come to be called copyhold tenure because a copy of the portion of the roll had recorded land having been conveyanced to the unfree tenant by another unfree tenant in the local court. Another type, leasehold tenure had also emerged. This involved simply the 'holding of land according to the terms of a lease' (Oxley-Oxland and Stein 1985, 13) (Chart 2.4).

The Freehold Tenure of Knight Service gradually became less significant because the Kings came to rely on paid mercenaries to defend their claims in addition to service they could command from Knights and those who had subinfuedated responsibilities to the Knights. By the time of the reign of Edward I, the subinfeudation system was replaced by a substitution system because it had become far too cumbersome and onerous. The Freehold Tenure of Socage also changed during this time. Increasingly those with Socage Tenure were allowed to pay a rent to the Lord rather than be required to give days of labor to the Lord as had been the earlier requirement under the Norman arrangements. It is during this time that

Chart 2.4 Post-middle ages land tenure types



money began to stand in for obligations of service and labor under the system of freehold tenure. The Copyhold Tenure of Privileged Villeinage, used by those who were unfree tenants, was eventually virtually indistinguishable from Socage tenure and money was accepted as rent instead of services with some small differences in some localities. Likewise, those unfree tenants with Pure Villeinage tenure who did the most 'lowly' forms of labor, such as cleaning latrines and caring for animals were also eventually able to pay a rent if they could afford it, instead of undertaking such labor for the Lord. The practice of Leasehold tenure strengthened during this period, formalized as the landholder becoming the lessor and the lessee paid a rent for use of part of the land or water for a term of years. As can be traced from these developments, most holders of tenure had managed to free themselves of the responsibilities associated with their form of tenure by commuting labor into rent where possible. Oxley-Oxland and Stein (1985, 21) argue that 'by the middle of the 17th century…there was really only one feudal Lord in England—the King'. And he alone enjoyed the relevant incidents of tenure, meaning the ancient and enduring responsibilities given to him by the freehold tenured Knights and Socagers of homage, fealty, escheat, and forfeiture. All other levels of 'incident' as responsibility were able to be substituted by rents.

2.4 Conclusion

While this information appears complicated, there is within this discussion a thread for educators to follow about the concepts embedded within the *allodial principle* and how this principle existed amongst the tribal peoples of Europe and the United Kingdom. It is also possible to discern a pattern in how the use and control of land and water changed during the periods of Roman colonization and later during the periods of feudalization away from a local, allodial understanding towards a regional and later national, legally framed understanding of land and water. Inasmuch as the English were undergoing a process of changing their relationship to their access to land and water, also the land itself was in a process of conceptual

change. After the Norman Conquest, the formal legal system thus imposed by the *dominium* of the conquering King began to *entitle* Knights, Frankalmoigns, Sergeanty, and Socagers who could individually hold this *entitlement* for life. Their landholding became known as a life estate. By the end of the Middle Ages, the land itself had become individually hereditable under certain conditions. In legal terms, the land became a 'corporeal hereditament' (Oxley-Oxland and Stein 1985, 33), or a corporeal 'thing', its legal status determined by the type of tenure held by the landholder and the uses to which the land was put.

Over time, all types of land tenure, freehold, copyright, and leasehold, fell under this approach and could sometimes be passed to others through wills and complicated processes of conveyancing (see, for example, Reeves 1904). Between the 16th and 18th centuries, English land law became exceedingly complicated and it was during this period that English and European colonization of the planet was also occurring. A significant aspect of the colonization processes in the 'discovered lands' of the Americas, across Asia, South Africa, the Middle East, Australia, and New Zealand was the importation of these now complicated English land laws that would form the legal foundation of the new colonies. Possibly the most important thinking on the subject was undertaken by Sir William Blackstone, contained in his *Commentaries on the Laws of England.* The Blackstone Commentaries were used extensively to allocate lands, access to resources, and settle disputes in the new colonies.

The next chapter will discuss a period of English history when land and water came under a system called 'the Enclosures' where ancient English rights to access to land and waterways held in common became recognized as being able to be held under exclusive right by individuals, to the exclusion of others (except the King). For educators, this and the following chapters provide important foundational knowledge that will inform a conceptual and philosophical reimagining of one's pedagogical approach to land and water education.

References

Brown, L. [SOED] (1993). *The new shorter Oxford English dictionary on historical principles*. Oxford, UK: Clarendon Press.

De Laveleye, E. 1878. *Primitive property* (G. R. L. Marriott, Trans.). London, UK: Macmillan and Co.

De Montesquieu, B. (1748/1914). *De l'esprit des loix [The Spirit of Laws]* (T. Nugent, Trans.). London, UK: G. Bell & Sons Ltd.

Encyclopaedia Britannica. (1768/1968). Encyclopaedia Britannica; or, A dictionary of arts and sciences, compiled upon a new plan in which the different sciences and arts are digested into distinct treatises or systems; and the various technical terms, etc., are explained as they occur in the order of the alphabet. Encyclopaedia Britannica, A society of gentlemen in Scotland (Ed.). Edinburgh: A. Bell and C. Macfarquhar.

Gaius & Ulpian. (1880). *The Institutes of Gaius and Rules of Ulpian*. (J. Muirhead, Trans.). Edinburgh: T&T Clark, Law Booksellers.

Gonner, E. C. K. (1912). *Common land and inclosure*. London: Macmillan and Co., Limited.

Halsall, P. (1998). Medieval Sourcebook: The Ripuarian Law: Inheritance of Allodial Land, c. 450. Fordham University. http://sourcebooks.fordham.edu/source/450allods.asp.
Jolliffe, J. E. A. (1937). Alod and Fee. *The Cambridge Historical Journal, 5*(3), 225–234.
Oxley-Oxland, J., & Stein, R. T. J. (1985). *Understanding land law*. Melbourne, Australia: The Law Book Company.
Reeves, A. G. (1904). *A treatise on special subjects of the law of real property: Containing an outline of all real-property laws*. Boston, USA: Little, Brown.
Sohm, R. (1866). Lex Ribuaria. In. *Weimar: Hermann Boehlau*.

Chapter 3
Educating About Enclosures and Common Lands and Waterways

Abstract This chapter undertakes a close examination of the progression of human understanding of land and water through the processes of enclosure. Enclosures are now considered a key element in the transition of England from a feudal to a modern agricultural and industrial society. The idea of enclosure relies on the development of a concept of property rights held not in common but by the individual. Enclosures are the key idea around which much colonial legal and administrative logic then developed. For educators, it is critical that we understand the implications of enclosures on contemporary pedagogical approaches to teaching about land and water, particularly in places that were colonized under English law.

Keywords Enclosures · Land ownership · English land law · Water rights
Land rights · Land titles

3.1 Introduction

This chapter examines invites educators to consider the development of English understanding of land and water throughout the processes of enclosure. Enclosures are now considered a key element in the transition of England from a feudal to a modern agricultural and industrial society. The idea of enclosure relied on someone or some system being able to fence or otherwise enclose a piece of land or waterway in such a way that they were able to use it to the exclusion of all others. This enclosure idea required either the ability to defend it from the transgression of others through individual effort or through an enforceable legal system that allowed, recognized, and supported such an activity. The focus of this chapter on the example of English law is necessary as a precursor to understanding how such laws, and their underpinning philosophical and political commitments, were literally transplanted to the colonial lands and waterways of Terra Australis with such devastating consequences, the topic of the next chapter. The subject matter to be understood is complicated. As Kenklies (2012, 268) rightly observes in his

Z. Ma Rhea, *Land and Water Education and the Allodial Principle*,
SpringerBriefs in Education, https://doi.org/10.1007/978-981-10-7600-8_3

discussion of the complexity of educational theory and, therefore, of understanding pedagogical content knowledge:

> As an empirical anthropology, educational theory has to take into account all the data of past and present of humanity—an obligation too complex to be fulfilled—or at least has to refer to a widely accepted psychology, which doesn't exist; as a speculative anthropology, educational theory aspires to describe the indescribable; as an empirical teleology it has to capitulate before the variety of morals even within one society or culture; and as speculative teleology it relies on a general theory of ethics that has yet to be created.

As an aspect of this complexity, it is pertinent for land and water educators to examine the development of the legal concept of exclusivity in property rights in England that evolved to allow that water and land could be held by the individual without any responsibility to the community who relied on access to, and use of, these valuable resources. The combination of laws developed and asserted at this time served to allow the consolidation of land and waterways for the exclusive preserve of the few who were able to assert their title.

3.2 Teaching About the Transition from Customary Access to Enclosure

Of those forced from their old lands, who could not defend their title, or who had no free tenure prior to this period, Gregg (1971, 34–35) observes that:

> The Poor Law, the Law of Settlement, the Game Laws, as well as Enclosure itself, combined with disregard of the condition of the poor to depress the agricultural laborer into virtual serfdom.

As was prefaced in the discussion in Chap. 2, the notion of enclosure of land that developed in parallel with, and which eventually outlived feudal and manorial arrangements regarding the occupancy and use of land and water, gathered momentum under a range of statutes of monarchs and enforceable Acts of Parliament. The practice in England and Europe to hold land in *alod* alongside other feudal developments became understood as "customary" practices rather than being practices that could be legally enforced. As such, the imperative to hold a tenure, whether freehold, copyhold, or leasehold, under the emerging system began to supersede customary arrangements. To be without some sort of recognized right to access to land and water heralded the devastating consequences of starvation and being forced into emerging regional centers that were becoming industrial cities. Starhawk (1982, Appendix A) provides a haunting introduction to her work on the consequences of this period of enclosure, exemplifying the devastating individual suffering it caused. She argues that the earlier centuries of the Witchhunts had weakened any "revolution that might benefit women, the poor, and those without property" (Starhawk 1982, 189). She goes on to argue that:

> …the changes that occurred benefitted the rising monied-professional classes and made possible the ruthless, extensive, and irresponsible exploitation of women, working people, and nature … (Starhawk 1982, 189).

Her thesis also brings the impact of the enclosures to the way we conceptualize land and water into the modern era, and my examination of the methods used later in the English colonies suggests that her argument has merit. The enclosure of land was "the process of inclosing (with fences, ditches, hedges, or other barriers) land formerly subject to common rights. Such land included fields cultivated by the open-field or strip systems, wasteland, and the common pasture land" ("inclosure"—encyclopedia.com). Cooke (1856, 317) heralds the growing incursion of legal determinations to the matter of land and other resource distributions. He gives us the following definitions of "land":

> …"land" shall mean and include all messuages, lands and corporeal tenements and hereditaments…

He later provides the emerging definition (amended) (Cooke 1856, 413):

> III. The word "land" shall extend to and include incorporeal as well as corporeal hereditaments, and any undivided share thereof…

This was followed by a footnote that explained that:

> By sect.167 of the original Act, the meaning of the word "land" is confined to corporeal hereditaments. Some incorporeal hereditaments were specially included within the exchange powers. Parties often want to exchange redeemed land tax for land and other things not included in the 7th sect. of the Fourth Amendment Act.

Of "inclosures," Cooke (1856, 316) offers the following definition:

> … The word "inclosure" shall extend to and include divisions and allotments; the word "inclose" and its conjugates shall include the meanings also of the words "divide" and "allot" and their respective conjugates; and the words "local act of inclosure" shall extend to and include any local act of which inclosure, division or allotment of lands shall have been one of the objects or purposes…

Gregg (1971, 23) suggests that this process of closing of particular patches of land "had been going on slowly for centuries. About 1750, however, the whole process quickened." She theorizes that the "reason for the rapid acceleration of the Enclosure movement in the second half of the eighteenth century is to be found in the threefold value of land—political, social, and economic." Early records support Gregg's contention, recording that enclosing of lands began in the 1100s. Gradually, commonly held unoccupied lands passed into the private ownership of a landlord class who began farming for profit, not for subsistence. The Statute of Merton (1235) and the Statute of Westminster (1285) permitted landlords to enclose wastelands on condition that they left sufficient land for their free tenants. The statutes did not recognize Villein tenants and provided no opportunity for Socage tenants to complain. The process of enclosures accelerated during the fourteenth and fifteenth centuries because of the financial rewards that were reaped by those

who could, for example, run sheep and deliver wool to the emerging Flemish wool market, as was the case in Wales.

There was a slight reverse of pace in the enclosures in the early 1500s because the system created so many poor landless tenants who began gravitating to the emerging "cities" and a number of statutes were declared to halt the flow. The only tenants with any protection of their subsistence livelihood were those with fee simple Socage tenancy and even then, their capacities to survive were severely curtailed by the loss of traditional access to common lands in addition to their own tenancy. Enclosures are now considered a key element in the transition of England from a feudal to a modern agricultural and industrial society. Even so, as Clark has argued:

> …enclosure was not an institutional innovation but a new choice within a known set of possible property rights, induced by changes in relative prices. Enclosing common lands required substantial investment in fencing and in administrating the reallocation of the land. It was an investment that yielded moderate profits even in the peak years of enclosure (1760–1820). Had interest rates been lower, the annual costs of enclosure would have been less. Had land rents been lower, the gains from enclosure would have been correspondingly less. The close connection between the onset of enclosure and the Industrial Revolution arose in part from the great increase in English population after 1760, which drove up the value of land relative to wages (Clark 1998, cited in Clark and Clark 2001, 1033).

Considering the opinions of both Gregg (1971) and Clark and Clark (2001), it would appear that despite considerable resistance to such enclosures, the power of exclusive land ownership, or at least individual title, became a very attractive option to all those who were able to gain such title. Hannesson (2004, 26–27) succinctly summarizes how this might be calculated, observing that, "As a resource becomes more scarce, the benefits of claiming property rights exceeds the cost of doing so and the time is ripe for enclosure."

Land ownership became connected to political power because it was a necessary qualification in order to be elected to Parliament. Hence, the Parliament of England became inclined to serve the interests of this reconfigured landed class, the so-called aristocracy. As Graham (2011, 261–262) observes, the need to have exclusive title was also associated with the emerging conviction that the alienability of exclusive use held in the title gave the individual owner ability to make a profit from this land, and this became its most important value. The land itself was becoming irrelevant; only the title of exclusive possession that could be clearly distinguished from the claims of others and their interests became the important aspect of having such title. Hence, legal arguments began to be developed that shaped the concept of enclosing land and of distinguishing boundaries around waterways.

The enclosures of land of the 1800s began with the first general Enclosure Act 1801 "applied chiefly to commons" (Gregg 1971, 28). This is important because, as was noted by Gonner (1912), most people of the medieval village accessed the commons, including wilderness, wasteland, forests, marginal lands, and waterways as a way of supporting their subsistence living. Here, they sourced food, water, herbs and other medicines, and wood for heating, cooking, copsing, building, furniture, and implements. These were the customary practices enshrined in the

allodial principle. Individuals accessed these resources were expected to be responsible in their use and care of them, but the resources themselves were held "in common." Those who gained the "superior" entitlement of free tenure were able to enclose the commons thereby denying by force those others of their leasehold, copyhold, or customary access.

While denial of access to these commonly held places and resources was significant, it was less complicated and contentious than enclosure of open fields, addressed in the Enclosure Act of 1836. Over time, open fields around villages had become complicated patchwork arrangements of intertwined access to pieces of land. As the legally developing and enforceable concept of enclosing lands and waterways to allow exclusive use gathered momentum, it became advantageous to those who had access to armies or mercenary soldiers to assert claims over consolidated pieces of open field, using force and threats of force to make it impossible for those without free tenure titles to hold onto lands wanted by squires, knights, and others with superior land titles. In parallel, the costs of these enclosures were also becoming prohibitive to all but the wealthier landholders.

The impact of the enclosures was different for the various classes of tenancy. Those without title or tenure, the laborers, cottagers, and squatters, many of them women (Starhawk 1982, Appendix A), depended on custom, on ancient agreements, and on understandings such as the *allodial principle*, not the newer legal arrangements that had evolved from the Norman Conquest into extremely complicated concepts of land ownership based on exclusive title. As Gregg (1971, 29) notes, "there were aspects of the enclosures that hit hard." All landholders had to pay a share of the expenses of the enclosure, and then for the fences and hedges. Smaller landholders had also lost access to commons that had been a mainstay of their economic survival. Combined together, the loss of access to common lands together with prohibitive costs caused many small landholders to sell the lands that had been awarded to them from older times. This served to enable those with larger holdings to increase their share of lands with estates being formed, instead of peasant farms.

3.3 The Emergence of People, Land, and Water as Things to Be Used

Even more profound in the wider sense, peoples' very conception of themselves and their relationship to society and the land was being transformed. In an early example developed in the late eighteenth century, Paley (1785/2012) provides a treatise on his development of a moral philosophy that focuses on emergent understandings of property (Paley 1785/2012, Chap. 3). He argues against the enclosure of land for hunting, for example, as being against God Almighty's intentions that the productions of the earth should be applied to "the sustenation of human life" (Paley 1785/2012, 85). Interestingly too for this monograph, his

treatise reflects the growing awareness in Europe and Britain of Indigenous and other traditionally oriented peoples across the planet whose lifeways were slowly becoming inserted into scholarly considerations "back" in England and Europe (more fully discussed in Chap. 4). In Paley's work, he makes a sustained argument against the wasting of the productions of the soil as he hears happening among Native American tribes (Paley 1785/2012, 93). His argument is that the developing approach to property law is flawed and in need of adjustments of focus rather than being ill-conceived.

In the next century, Marx (1857–1861, 190) provides a sustained critique of the history of landed property and its transformative impact, observing as that:

> The history of landed property, which would demonstrate the gradual transformation of the feudal landlord into the landowner, of the hereditary, semi-tributary and often unfree tenant for life into the modern farmer, and of the resident serfs, bondsmen and villeins who belonged to the property into agricultural day-labourers, would indeed be the history of the formation of modern capital.

By the late 1850s, Marx was undertaking research into an emergent economic condition that has been collected into a series of notebooks, known as the *Grundrisse* (Marx 1857–1861), in which he formulated his analysis and critique of the political economy of his day. It remains a significant body of work, and a notable thread of this work involves the relationship of land to capital and his analysis of what was happening to people in this process. Those people who had relied on customary access to land, water, and resources found and cultivated were forced away from their subsistence life into the market-based cash economy. They sold their labor as they could but the standard of living was dramatically reduced at this time for most people. Many died from starvation, illness, and from the cold. As Marx (1857–1861, 396) observes:

> As a totality of force-expenditure, as labor capacity, he is a thing belonging to another and hence does not relate as subject to his particular expenditure of force, nor to the act of living labor. In the serf relation he appears as a moment of property in land itself, is an appendage of the soil, exactly like draught-cattle. In the slave relation, the worker is nothing but a living labor-machine, which therefore has a value for others, or rather is a value. The totality of the free worker's labor capacity appears to him as his property, as one of his moments, over which he, as subject, exercises domination, and which he maintains by expending it. This too he developed later under wage labor.

Those people who were forced off the land were unable to find laboring work and were desperate. Many were convicted of stealing food, clothes, medicines, and other essentials that had become denied to them because of the enclosures. Some were deported to the newly established colonies. This situation was not without its protests. Chase (2010, 61), for example, undertakes a review of the reactions expressed by the Chartists in the 1840s citing the *Northern Liberator*:

> It was a political monopoly that had made possible the consolidation of the land monopoly through parliamentary enclosure: 'Robbery', according to the Northern Liberator, 'by means of Enclosure Bills, of the COMMON LANDS, consisting of MILLIONS OF ACRES, from the industrious and poorer part of the population. . . under color of legislation, filched, in the most barefaced manner.'

There were many in the late nineteenth century who were in a scholarly debate with one another about land, labor, and the emergent economic shape of capitalism. Marx (1857–1861, 694) sharply critiqued the underlying forces that shaped this:

> The forcible transformation of the greater part of the population into wage laborers and the discipline which transforms their existence into that of mere laborers correspond to the first form. Throughout a period of 150 years, e.g. from Henry VII on, the annals of English legislation contain the bloody handwriting of coercive measures employed to transform the mass of the population, after they had become propertyless and free, into free wage laborers. The dissolution of the monastic orders, the confiscation of church lands, the abolition of the guilds and confiscation of their property, the forcible ejection of the population from the land through the transformation of tillage into pasture, enclosures of commons etc., had posited the laborers is mere labor capacities. But they now, of course, preferred vagabondage, beggary etc. to wage labor, and had still to be accustomed forcibly to the latter. This is repeated in a similar fashion with the introduction of large industry, of factories operating with machines.

Proudhon (1876/2008) and Marx debated the implications of the ownership of property and the development of property law as foundational aspects of their respective critiques. While Marx maintained that the forcing the majority of people off the land and into the new economy where all they had was their labor to sell enabled the consolidation of capital into the hands of the few, Proudhon (1876/2008, 91) argued that it is because of the finiteness of land that it had become such a central concern arguing that:

> Water, air, and light are COMMON things, not because they are INEXHAUSTIBLE, but because they are INDISPENSABLE; and so indispensable that for that very reason Nature has created them in quantities almost infinite, in order that their plentifulness might prevent their appropriation. Likewise the land is indispensable to our existence,–consequently a common thing, consequently insusceptible of appropriation, but land is much scarcer than the other elements, therefore its use must be regulated, not for the profit of a few, but in the interest and for the security of all.

Proudhon like Marx argued for the regulation of land against the emerging practice of capital accumulation and for the majority of people. By 1911, Turnor (1911, 234), a Lincolnshire landlord was reflecting on the devastating consequences of the enclosures, observing that:

> For upwards of l00 years Parliament passed Acts which legalized the enclosing of common lands and gave its sanction to the systematic withdrawal of land from the people. It is not here a question of whether the land in the form of commons was put to the best economic use or no; a larger subject is before us—that of national welfare, which demands that the greatest possible number of people shall be directly connected with the land.

Consideration of the arguments put forward by Paley, Proudhon, and Marx among others suggests the need for a postcolonial critique of human engagement with land that understands the influence of agricultural settlements through land privatization. Both conservative and critical voices of the period served a role in relegating Indigenous and other traditionally oriented peoples of the world to being, "pastoral peoples (mere hunting and fishing peoples) [who] lie outside the point

where real development begins" precisely because of their still practiced understandings of land and water (Marx 1857–1861, 47). Marx goes on to explain that:

> … Certain forms of tillage occur among them, sporadic ones. Landed property is determined by this. It is held in common and retains this form to a greater or lesser degree according to the greater or lesser degree of attachment displayed by these peoples to their tradition, e.g. the communal property of the Slavs. Among peoples with a settled agriculture – this settling already a great step – where this predominates, as in antiquity and in the feudal order, even industry, together with its organization and the forms of property corresponding to it, has a more or less landed-proprietary character…(Marx 1857–1861, 47).

3.4 Conclusion

Only dimly understood by most educators, this period from the late eighteenth to the early twentieth centuries coincided with people, land, and water being turned into legal "things." It was also the period of significant global colonization by English and European powers, exporting their views of land and property and of human relations to the newly colonized world. Whether the more conservative, pro-capitalist views shaped by colonial explorations of the Americas, Australia, and New Zealand that coincided with a foundation of legal thought, the *Blackstone's Commentaries* (Blackstone 1769) or the treatise of Paley (1785/2012) or the arguments made by scholars such as Marx (1857–1861) on behalf of the emerging "proletariat," understanding of land, water, and human relationship to them both maintained and justified the emergent legal fiction that the concept of property in land and water did not exist prior to agricultural societal formation. This assertion neatly positioned preexisting Indigenous and other traditionally oriented understandings of property as being ontologically opposed to capitalism, something that continues to influence thinking into the postmodern, postcolonial, deimperialized world. This is despite the presence of traces of the *allodial principle* that existed within the foundational principles of English land law that enabled capitalism to flourish.

For educators, how we uncover our contemporary normative assumption that land and water is first determined by its use value within a capitalist economy and that the titled right for an individual to use and abuse their land and water is superior to all other considerations is an enduring challenge. Emerging voices in both sustainability and Indigenous educational spheres are challenging such assumptions and trying to provide spaces for educational transformation of these formative paradigmatic understandings that shape our world. As Greenwood (2010, 139) asked:

> In the era of climate change, economic unrest, peak oil, perpetual war, and mass extinctions, teacher educators have to begin asking each other: are our workplaces relevant to the complex realities of a changing planet? Or, do they mainly serve the bureaucracies and the unquestioned assumptions that surround and increasingly determine the culture of schooling?

Part of the emerging PCK of this new wave of educators within previously colonized nations such as Australia is predicated on critical race and ecological pedagogies. The next chapter probes this space of critical inquiry by examining how English law was established in Australia, its collision with the sui generis rights of Australia's Indigenous Peoples to this same land and water, and the implications for land and water education.

References

Blackstone, W. (1769). *Commentaries on the laws of England*, 4 vols. Oxford, England: Clarendon Press.

Chase, M. (2010). Chartism and the land: The 'mighty people's question'. In M. Cragoe & P. Readman (Eds.), *The land question in Britain, 1750–1950* (pp. 57–73). New York: Palgrave Macmillan.

Clark, G., & Clark, A. (2001). Common rights to land in England, 1475–1839. *The Journal of Economic History, 61*(4), 1009–1036. https://doi.org/10.1017/S0022050701042061.

Cooke, G. W. (1856). *The acts for facilitating the enclosure of commons in England and Wales*. London, England: V. & R. Stevens and G.S. Norton.

Gonner, E. C. K. (1912). *Common land and inclosure*. London: Macmillan and Co., Limited.

Graham, N. (2011). Owning the Earth. In P. Burdon (Ed.), *Exploring wild law: The philosophy of Earth jurisprudence* (pp. 259–269). Adelaide, South Australia: Wakefield Press.

Greenwood, D. (2010). A critical analysis of sustainability education in schooling's bureaucracy: Barriers and small openings in teacher education. *Teacher Education Quarterly, 37,* 139.

Gregg, P. (1971). *A social and economic history of Britain 1760–1970* (6th ed.). London: George G. Harrap & Co., Ltd.

Hannesson, R. (2004). *The privatization of the oceans*. Cambridge, MA, USA, London, England: MIT Press.

Kenklies, K. (2012). Educational theory as topological rhetoric: The concepts of pedagogy of Johann Friedrich Herbart and Friedrich Schleiermacher. *Studies in Philosophy and Education, 31*(3), 265–273. https://doi.org/10.1007/s11217-012-9287-6.

Marx, K. (1857–1861). *Grundrisse der Kritik der Politischen Oekonomie (Outlines of the Critique of Policial Economy)* (trans: Nicolaus, M.). New York, USA; Online: Penguin. Reprint, Marxist Internet Archives.

Paley, W. (1785/2012). *The principles of moral and political philosophy*. Indianapolis: Liberty Fund.

Proudhon, P. J. (1876/2008). *What is property? An inquiry into the principle of right and of government* (trans: Tucker, B. R.). Princeton, Mass.: B.R. Tucker. Reprint, Project Gutenberg.

Starhawk, (1982). *Dreaming the dark: Magic, sex & politics*. Boston, USA: Beacon Press.

Turnor, C. H. (1911). *Land problems and national welfare*. London and New York: John Lane.

Chapter 4
Teaching About Where Property Law Meets Customary Law

Abstract This chapter moves from how we educate about enclosures in England and more broadly across the European continent to examining how we teach about the more recent colonial period has shaped colonial legal structures that justified enclosure of the lands and waterways of colonized peoples. Despite the allodial principle being ignored and rendered almost meaningless in the latter period of English colonization of lands such as Australia, the conceptual potential of the *allodial principle* provides an important opportunity for rethinking land and water. This chapter will focus on the interdependent and relational space where English, and then Australian, property law meets Indigenous customary law enabling educators to provide pedagogical leadership into a transitional postcoloniality under the conditions of globalization.

Keywords Allodial principle · English land law · Colonial law
Indigenous customary law · "Native Title"

4.1 Introduction

This chapter provides educators with an examination of the various impacts of Anglophone and Francophone legal frameworks and scholarly debates as they were imposed in territories that were colonized by English and European powers over the last 400 years. The approaches taken to the titling of land and water for exclusive use in England and by extension across Britain and Europe became foundational in the establishment of colonial legal structures (Oxley-Oxland and Stein 1985). Previous feudal recognition of customary practices such as recognized by *alod* titles had long since been pushed to one side across Britain and Europe in the rush to enclose lands for the personal capital accumulation of the few who could establish and defend their superior free tenure title to such exclusive use. Even so, the principle of *alod* was transposed into emerging property law systems in the colonies such as the United States of America. Similarly, while the *allodial principle* had been rendered almost meaningless by the latter period of English colonization of

Z. Ma Rhea, *Land and Water Education and the Allodial Principle*,
SpringerBriefs in Education, https://doi.org/10.1007/978-981-10-7600-8_4

landmasses such as Australia, there remained vestiges of this thinking in the foundational assumptions of its transposed legal frameworks as well.

I will argue that the *allodial principle* may provide an important conceptual opportunity for specialist environmental, Indigenous, and legal academics, teacher educators, and teachers to move away from the English colonial legal gymnastics employed to develop something called "Native Title" in Australia. I will suggest that by rethinking the intersection of, for example, Indigenous Australian customary practices and English land law it might be possible for educators to do three interrelated things: first, help students to relate to, use, and access land and water in ways that are respectful to the preexisting *sui generis* rights of Indigenous Peoples; second, to teach students to recognize the complicated overlay of English land law in the colonial context and that land and water are framed by such an imported legal system; and third, to be able to address sustainability issues within a complex, postcolonial, and deimperialized modern education system. Of sharpest focus for this monograph, a significant question remains about how we might develop our PCK as specialist environmental, Indigenous, and legal academics, teacher educators, and teachers so that we can educate future generations into a world where our relationship to land and water might prove to be equally as important for the survival of humanity as for whether we can secure access and use of these precious resources.

4.2 Teaching About Indigenous Rights and Customary Law

Oxley-Oxland and Stein (1985, 87) cite Blackstone (Bk. 1, 107) in explaining the source of law under which the first English settlers claimed "New South Wales" as their own: "so much of the English law as is applicable to their own situation and the condition of an infant colony." Australia's two Indigenous populations, Aboriginal Peoples and Torres Strait Islander People, were not considered in this assertion and nor were their rights to recognition of prior occupancy recognized. Gray (1994) deftly summarizes the matters arising from a consideration of what happened during the colonization of Australia by the English and the establishment of legal overlays that ignored Indigenous practices, for example, with regards to property, land, and access to and use of resources. He first tackles the question of what entity can claim to own a landmass. His argument is framed by emerging conditions of a deimperialized postcoloniality when the colonial project is being moved away from imperial legal injunctions toward a messier working out of Indigenous *sui generis* rights. Here Gray (1994, 3) posits that:

> Indigenous land rights are based on a people's prior occupation of an area, usually before a State was even formed. In this sense, Indigenous peoples have a claim to "eminent domain" (inalienability) which a State usually considers to be its own exclusive right …

Gray raises the concept of inalienability that invokes a claim of Indigenous sovereignty, of *aborigineum dominium*. This, of course, collides with the claim that was made by the English crown at the time of English settlement of New South Wales, as explained by Blackstone (1769, Vol 1 Chap. III pp. 189, 191):

> The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen: for it matters not to which sex the crown descends, but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power; The executive power of the English nation being vested in a single person, by the general consent of the people, the evidence of which general consent is long and immemorial usage, it became necessary to the freedom and peace of the State, that a rule should be laid down, uniform, universal, and permanent; in order to mark out with precision, who is that single person, to whom are committed (in subservience to the law of the land) the care and protection of the community; and to whom, in return, the duty and allegiance of every individual are due. It is of the highest importance to the public tranquility, and to the consciences of private men, that this rule should be clear and indisputable.

In order to establish this claim, English "ownership" of the landmass that became known as Terra Australis, and then as Australia, had to be couched in property terms that were recognized by other European colonizing powers that were also fighting with England for control of territories and oceans. The English legal establishment, therefore, asserted English "sovereign power", backed up by military capacity, to have their claim recognized. Occupying powers always develop a narrative that justifies their occupation. In the case of colonized lands, legal fictions such as "sovereign power", "eminent domain", "divine right", "sovereign domain", and "manifest destiny" have been asserted to justify "ownership", thereby controlling access and use of land and waterways. As Marx (1857–1861, 37) so aptly observed:

> As regards whole societies, distribution seems to precede production and to determine it in yet another respect, almost as if it were a pre-economic fact. A conquering people divides the land among the conquerors, thus imposes a certain distribution and form of property in land, and thus determines production.

These sort of narratives were predicated on the view of those such as Paley (1785/2012, Chap. 3) in his essays on moral philosophy, and in particular, a linear "history" of property that outline the presumptively "natural" procession toward individual ownership of land away from early "Man" who found all they needed in their surrounding environment. As Paley (1785/2012, 96–97) opines:

> The first objects of property were the fruits a man plucked, and the wild animals he caught; next, to these, the tents or houses he built, the tools he made use of to catch or prepare his food; and afterwards weapons of war and offense … flocks and herds of tame animals soon became property … wells probably were next made property … Land, which is now so important a part of property, was probably not made property in any Country, till long after the institution of many other species of property, that is until the Country became populous and tillage began to be thought of.

In similar vein nearly 100 years later, and during a period of global colonization when information about societies was challenging European and English

philosophizing and theorizing of the world, Marx (1857–1861, 47) was not able to extend his analysis to those who he regarded as "…mere hunting and fishing peoples [whom] lie outside the point where real development begins…." Despite being a keen observer of the processes whereby the development of the concept of landed property was justified by the few who were able to assert and defend such claims thereby becoming controllers of the means of production and of capital accumulation, Marx was not yet able to accept that there were forms of ownership and production that did not fall into his analysis of capitalist accumulation.

Like Marx, most scholars and commentators of this most recent period of English and European colonization were unable to imagine a time on the planet when the colonial project would cease to be the predominant manner by which to regard the world. In the contemporary era, as the colonial world order has begun to disintegrate, its claims to sovereign dominium have begun to be eroded. Some of this disintegration has occurred because the English and European powers no longer have the military capability to defend their claims in such a globally totalizing fashion or the wealth to secure their interests to the same degree as could be achieved previously. Interestingly, there has also been a shift toward a more collaborative international *politique* through the agency of the United Nations (UN) and other such organizations. The UN, for example, has led the development of international standards and legal mechanisms that are being agreed to by all signatory parties, such as that recognizes Indigenous Peoples rights, and with it, the recognition of customary law as a relevant and important aspect of international legal thinking. In 2008, the preexisting rights of Indigenous Peoples of the world were, for the first time, recognized through an internationally agreed mechanism named the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIPs) (United Nations 2008). In this Declaration, signatory and endorsing nations agreed to recognize, preserve, and maintain the rights of Indigenous Peoples living within their national boundaries. In doing so, inevitable tensions have arisen about how these rights might be recognized alongside already established legal practices in these nations. Of central importance to this discussion, Articles 26 and 27 are pertinent:

Article 26

1. Indigenous peoples have the right to the lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories, and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories, and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and

> resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

As an influential scholar in the years leading up to the signing of UNDRIPs, Gray (1994, 3–4) noted something of the distinctive aspect of "ownership", "property" and the relationship of the individual to the collective that arise as issues when considering how to operationalize Indigenous rights, saying:

> Connected with the concept of inalienability is the collective responsibility which a people has for its territory. This does not mean that individual persons cannot hold lands and resources for their own use, but that personal ownership is based on collective consent. The collective rights to lands and resources of Indigenous peoples have been acknowledged by many governments of the world in their constitutions and in international provisions…

Bryan (2000, 20–21) makes a similar observation of Kwakiutl of the West coast of British Columbia and Vancouver Island, whose famous potlatch also speaks to a way of relating to land and property that is distinct from English property and land law:

> The Kwakiutl potlatch demonstrates that the relationships among people with respect to things need not simply be a matter of moral obligations, nor of 'use' and 'exclusion' … Potlatches are often referred to as ceremonies for bestowing property and rank, but there is a more significant spiritual aspect. The potlatch served as the time when a name was being changed, and hence marked the passage of a person's relationship with the community, and, more importantly, with the natural world through a ceremony which would vest certain kinds of entitlements in the person - for example to be associated with a specific set of hunting grounds or a fishing spot … the potlatch serves as the main distributional device of the society and 'property' becomes an incident of the contextualized understanding of the place of the individual in the family and in the numaym [descent group] at large. However, these 'entitlements' are simply manifestations of something deeper that we cannot penetrate, just as 'incidents of tenure' were truly incidental entitlements that occurred as offspring to the moral bond between landlord and tenant in feudal society.

So how might a nation such as Australia, shaped as it has been in its understandings and practices of land and water by English land law and the overarching imposition of English sovereign power give "due recognition to Indigenous peoples' laws, traditions, customs, and land tenure systems, to recognize and adjudicate the rights of Indigenous Peoples pertaining to their lands, territories, and resources, including those which were traditionally owned or otherwise occupied or used" (United Nations 2008, Article 27)? And how might educators working in Australia's mainstream education systems, its universities and schools, rethink their pedagogies and curricula in order to teach about land and water in profoundly and fundamentally different ways?

Interestingly, the legal concept of *quiritium dominium* embedded in English land law inherited from Roman and earlier European land has not yet been sufficiently recognized as an ancient Roman form of Indigenous clan identification with particular rights to land inside the Roman legal structures. *Quiritium dominium* was a form of *alod* title that recognized that the Quirites had a distinctive claim to exclusive use of land that could only be transferred to others who were Quirites, could be held individually, and allowed for the accumulation of private wealth

deriving from the exclusive use of said lands. Bradfield refers to something similar in the Australian context on a small island known as Norfolk Island, a place where early settlement was made by the English, lying off the coast of New South Wales on the eastern side of Australia. Bradfield (2005, 7) notes that:

> A leasing arrangement on Norfolk Island allows individuals on the territory to own houses, conduct business and pass the property on to their families but prevents them from selling the property to anyone outside Norfolk Island.

He then asks the key question (Bradfield 2005, 7):

> If such a system were introduced on Indigenous lands it could allow Aboriginal families on traditional lands or trust properties to buy their houses or businesses, operate them independently, and allow the properties and capital gain to be inherited by their families. To avoid non-Indigenous people buying land acquired under native title, the properties could be sold only to other communal landholders.

The main issue seems to be that administrators of these laws do not like dealing with communal forms of title rather than there being anything intrinsically wrong with communal titles such as *alod* as a form of title per se. Justice Blackburn in *Milirrpum* v *Nabalco Pty Ltd* (1971*, 17 FLR 141, 267–68)* was the first to articulate a positive view of the possibility saying:

> The social rules and customs of the plaintiffs [Aboriginal clan groups of the Gove Peninsula in the Northern Territory] cannot possibly 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 led their lives, which provided a stable order of society and was remarkably free from the vagaries or personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.

McIntyre (2006, 341) summarizes the various options that are available to Australian State and Territory lawmakers, and the federal Australian High Court to deal with the intersection of Aboriginal customary law with other legal regimes, explaining that:

> When land is colonized it is open to the colonizing power to 'recognize' the existence of laws of local Indigenous groups by:
>
> - subjecting itself to the Aboriginal laws of the place;
> - rejecting or refusing to recognize Aboriginal law or some aspect of it;
> - incorporation of certain aspects of the Aboriginal law, at the discretion of the colonizing power;
> - acknowledgment by the colonizing power of a pre-existing Aboriginal legal system, which operates in its own right with immunity from the legal system imposed by the colonizing power.

Other scholars such as Langton (1998), Langton and Palmer (2004), Langton et al. (2006), Pearson (1997), and Sutton and NNTT (1998) have consistently argued that the Aboriginal concept of land as "estate" is simultaneously a social, physical, and metaphysical one. Sutton and NNTT (1998, 11) explain that:

> In a society which in the past did not employ specialist administrators or government structures separate from the conduct of daily life, and employed no occupationally separate judicial and policing system like that of an industrial State, culturally prescribed kin-roles and kinship-based social organization played a central role in Aboriginal systems of customary law.

While they argue that kinship is not the "only basis for the acquisition of territorial interests…" because such a view "underplays the importance of both the individual and regional systems" (Sutton and NNTT 1998, 11), they assert that kinship is still a crucial determinant of how to understand land and water tenure systems in the Aboriginal customary law view.

Langton (2005) provides a complimentary cosmological view explaining that principal means by which Aboriginal represent their tenure system and property relations is by reference to ancestral beings residing in sacred places. She argues that these sacred places emblematize the Aboriginal idea of property and of property relations. In particular, she emphasizes the dangerous nature of sacred places, and the obligation on Wise Elders to declare the rule of exclusion that applies to such places, whether the exclusion of the other gender or of certain other kinds of people, is emblematic of the component feature of the property that it bestows exclusive rights.

Further, she highlights the obligation on Elders to protect others from that danger by excluding them or otherwise by ritually marking their own exclusive right and power to exclude and to protect is also emblematic of the feature of exclusive possession and as well of another feature of property: the prohibition of harmful use —that is, one's duty to forbear from using the thing in certain harmful ways to others. Thus a senior person is required under Aboriginal law to be able to describe precisely the extent of the group's territory and to be able to recite the line of descent through which he or she inherited rights in that land.

Langton (2005) further explains that there is another dimension to Aboriginal ownership of places because of related and interlinked groups whose connections were established in the past. These aspects, she argues, bind people together as a larger sociality across these lower level land units. Such complex, historically formed, and ongoing "connections to Country" fly in the face of those who assert that, under any circumstance, private ownership is superior to common ownership. Paley (1785/2012, 5), for example, could not conceive the superiority of such a connection to Country when he argues that:

> Upon these several accounts we may venture, with a few exceptions, to pronounce that even the poorest and the worst provided in countries where the property and the consequences of property prevail, are in a better situation with respect to food, raiment, houses, and what are called the necessities of life, than any are, in places where most things remain in common.

Such complex relationships that extended ownership of territorial rights to clans and extended family groups in the utilization of their estates and in the governance of the extended ranges that overlapped across such estates were beyond the comprehension of influential English commentators such as Paley. This is unsurprising.

Sutton and NNTT (1998, 11–12) observe that in the case of Australia, "the subject is inherently difficult, for the simple reason that Aboriginal kinship systems and the social organizational structures and processes built on them are themselves often dauntingly complex." For the English legal specialists who had never set foot on the lands and waterways of Australia and the early colonists, with all memory of their ancestral beginnings forgotten and being ill-equipped to understand the complexities of Aboriginal land and water tenure systems, all they could see was a dreadful waste of productive grazing and agricultural land and of huge repositories of untapped resources in the lands and waterways. As noted in Chap. 3, in the early part of the twentieth-century commentators such as Turnor (1911) were starting to provide commentary from their imperialistic perspective, arguing for a new nationalistic imperative for the Anglo-Saxon races to regard land as a God-given right for them to exploit. For example, Turnor (1911, 32) explains that:

> If land is one of the greatest National assets, so also is it one of the greatest Imperial assets, and we should clearly recognize that the Anglo-Saxon peoples as a whole, whether in the old or the new countries, have been so criminally negligent of this great and important asset, that in every Anglo-Saxon Country there has been a most disastrous waste of Land.

Given the social, political, and economic context of these times, the moralistic and national imperialistic vigor with which newcomers to English and European colonies were incited to seize land, waterways, and all available resources and make them productive meant that the Indigenous Peoples of places such as Terra Australis stood little chance of having their customary *aborigineum dominium* recognized by these conquering peoples. In the ensuing years, little was done to change the course of land and resource seizures and occupation until the two Indigenous Australian peoples, Aboriginal Peoples and Torres Strait Islander Peoples, began to engage with the Australian legal system and make their case to be recognized as the original owners of the Australian landmass and its surrounding territories. What Indigenous Australians found, and as Bradfield (2005, 7) surmises, "As always, the devil is in the detail, particularly when dealing with the vagaries of State land rights legislation, and the Native Title Act, as well as the often unique nature of the Indigenous estate." It is to a brief discussion of the Australian Native Title Act that we now turn.

4.2.1 "Native Title"

Most Australian educators would, by now have heard of "Native Title" but few would know its details or the implications of its formation in their pedagogical approach to teaching about land and water. Aboriginal customary owners of particular lands and waterways, in parallel with international trends in the field, began to press for their preexisting rights to be recognized within the Australian legal system. A land title concept, "Native Title", was developed to address these claims within the concept of a single legal system, within the already established

Australian legal framework of land titles, careful not to acknowledge Native Title as a form of sovereign dominion but as a lesser title.

As has been previously suggested, the *allodial principle* remains conceptually possible within this system but it was not a principle that was invoked during the development of this blunt instrument called "Native Title". This title represented a missed opportunity by the Australian legal system to recognize *aborigineum dominium* and finally to deal with the need to develop an Australian plurilegal system akin to the modern South African legal system and thereby recognizing that Indigenous Australian Peoples have preexisting *sui generis* rights that were not extinguished by the English claim.

In a parallel argument, the central thesis of the argument made by McIntyre (2006, 356) is that:

> … Aboriginal customary law can be readily recognized by a process of development of the common law. That is principally so because the common law is itself a customary form of law that has evolved from, and may include, the recognition and enforcement of local customs. The law relating to native title provides an example of the recognition of Aboriginal customary law by means of the development of the common law. In particular, it is an example of:
>
> (1) the manner in which Aboriginal customary law may be recognized by the common law;
> (2) how Aboriginal customary law relates to the Aboriginal society or societies from which it arises;
> (3) the necessary focus on a normative system in identifying laws and customs;
> (4) the analytical approach to be applied to the accommodation of change; and
> (5) how Aboriginal customary law may integrate with the statute law of the State and the common law of the State, in particular.

Here he draws on the extant capacity of common law to accommodate customary law and suggests that the title now known as "Native Title" is one such example of his general thesis. The Australian legal system, as a reflection of broader societal habits and customs, has had a significant problem with recognizing that Australia Indigenous Peoples already had a concept of property that recognized exclusivity of use and recognition of inheritability within a defined clan and family group such as is echoes in the *allodial principle*. Early attempts to incorporate Indigenous customary law into the legal framework did somersaults about how the idea of commonly held, custodially inclined land holding could be regarded as the same as other titles. Initial attempts to develop an appropriate title led to a "bundle of rights" approach that became clustered under the overall "title" called "Native Title".

4.2.2 A Bundle Rather Than a Title

This "Bundle of Rights" idea is attributed to the argument made by Hohfeld (1913) who analyzed rights into their constituent parts. Even permitting the explication of

Honoré (1961) for full liberal ownership, elements of which are now regarded as the essential "sticks" to be present within the "bundle of rights", Barnett (2000, 462) contends that the bundle of rights theory does not adequately explain the "phenomenon of proprietary rights", and "continues to be used by courts because of a lack of any adequate juristic mechanism with which to analyze property rights and the incidents of ownership". Native Title is regarded at common law as *sui generis*, a unique form of title, and one moreover that is determined in each case by the particular incidents arising from the traditions and customs of the "Native Title"-holding group. Important for this discussion, it is held to be especially fragile, to the extent that it may be extinguished piece by piece by "breaking" the various elements of the "bundle". It is regarded as a lesser title by implication than full liberal ownership, *aborigineum dominium*, because of this fragility.

As Pearson (1997), Barnett (2000), and others have noted, the "bundle of rights" theory as it is applied to "Native Title" does a great injustice to Indigenous traditions and customs pertaining to their customary titles to land and sea and the rights and interests flowing from those customary titles. Barnett argues that the lack of an adequate theory of property on which the courts could rely to analyze the nature of Native Title gives cause to find an alternative way of looking at property, and that, when looking at Native Title, "property must be viewed from a broad Indigenous perspective, rather than from the perspective of the bundle of rights theory which compartmentalizes property into artificial packages", or "artificially jural rights" (Barnett 2000, 474, 468). McIntyre (2010) and other Australian scholars of this topic (see, for example, Neate 2010; Langton and Frith 2010; Pearson 2010) have developed the argument that Native Title *is* property. This has raised the matter of individual proprietary versus nonproprietary rights, an ongoing cause of debate with regard to the evolving concept of "Native Title" in Australia.

4.3 Conclusion

It is necessary for of specialist environmental, Indigenous, and legal academics, teacher educators, and teachers to begin to grapple with how land and water is being debated and to understand that the Australian legal system has been selective in its choice of legal mechanisms. This selectivity helps to shape the contemporary PCK of educators in ways that are detrimental not just to Australian Indigenous Peoples but also fail to equip our students with the necessary skills and knowledge to develop broader Australian understanding of the sustainable use of land and water into the future.

I argue, in this chapter, that English law provided colonies such as Australia with limited options, where the principle of *alod* and the Quiritian possibility of *aborigineum dominium* were never included conceptually in foundational Australian land law-making. This has meant that there have been legal gymnastics performed to create a weak type of Indigenous Australian land tenure recognition in a concept named "Native Title". Instead, I propose that there are important elements of *alod*

that would enable communal recognition of customary ownership of land and water as recognized within Indigenous customary law (and as per *quiritium dominium*), while also recognizing individual right to sell or transfer inheritance of particular sub-estate responsibilities to family members, as is already the case with Norfolk Island. As such, this would enable those Aboriginal communities that were seeking to do so, to fully enter the Australian economy in a manner that was respectful to their allodial customs while also have an opportunity for the economic developments that could be afforded by such a plurilegal approach.

While it is beyond the scope of the chapter to make all the necessary legal arguments for a plurilegal system to be developed in Australia, it is certainly within the scope of this monograph to argue that we as educators need to reconceptualize our foundational understanding of the lands and waterways where we teach. As nations such as Australia and other previously colonized nations grapple with recognizing Indigenous customary law arrangements in parallel with imported colonial legal frameworks because of the influence of UNDRIPs, the role of educators in providing pedagogical leadership in the understanding of land and water becomes pressing. In the next chapter, I will introduce specialist environmental, Indigenous, and legal academics, teacher educators, and teachers to international debates that are trying to develop an internationally agreed approach to ecological sustainability in the intersection of property, environmental, and customary law. It points us toward fertile spaces for ecological education that might exist beyond the colonial mindset.

References

Barnett, K. (2000). Western Australia v ward; one step forward and two steps back: Native title and the bundle of rights analysis. *Melbourne University Law Review* 17 [online] (462–477).

Blackstone, W. (1769). *Commentaries on the Laws of England* (4 Vols). Oxford, England: Clarendon Press.

Bradfield, S. (2005). White picket fence or Trojan horse? The debate over communal ownership of Indigenous land and individual wealth creation. *Land, Rights, Laws: Issues of Native Title, 3* (3), 1–12.

Bryan, B. (2000). Property as ontology: On aboriginal and english understandings of ownership. *Canadian Journal of Law and Jurisprudence XII, 1,* 3–31.

Gray, A. (1994). Editorial: Territorial defence as the basis for indigenous self-development. *Indigenous Affairs (IWGIA), 4,* 2–3.

Hohfeld, W. (1913). Fundamental legal conceptions as applied in judicial reasoning. *Yale Law Journal, 23,* 16–59.

Honoré, A. (1961). Ownership. In A. Guest (Ed.), *Oxford essays in jurisprudence* (pp. 107–147). London: Oxford University Press.

Langton, M. (1998). *Burning questions: Emerging environmental issues for Indigenous peoples in northern Australia*. Darwin, NT: Centre for Indigenous Natural and Cultural Resource Management.

Langton, M. (2005). An aboriginal ontology of being and place: The performance of Aboriginal property relations in the Princess Charlotte Bay area of eastern Cape York Peninsula, Australia. PhD, Department of Human Geography, Macquarie (Alma MMS ID: 9973213310802171).

Langton, M., & Frith, A. (2010). Legal personality and native title corporations: The problem of perpetual succession. In L. Strelein (Ed.), *Dialogue about land justice: Papers from the National Native Title Conferences* (pp. 170–182). Canberra, A.C.T., Australia: Aboriginal Studies Press.

Langton, M., Mazel, O., & Palmer, L. (2006). The 'spirit' of the thing: The boundaries of aboriginal economic relations at Australian common law. *The Australian Journal of Anthropology, 17,* 307–321.

Langton, M., & Palmer, L. (2004). Treaties, agreement making and the recognition of indigenous customary polities. In M. Langton, L. Palmer, M. Tehan, & K. Shain (Eds.), *Honour among nations?: Treaties and agreements with indigenous people* (pp. 1–4). Carlton, VIC, Australia: Melbourne University Press.

Marx, K. (1857–1861). Grundrisse der Kritik der Politischen Oekonomie (M. Nicolaus Trans. Outlines of the Critique of Policial Economy). New York, USA; Online: Penguin. Reprint, Marxist Internet Archives.

McIntyre, G. (2006). Aboriginal customary law: Can it be recognised? In S. Solicitor's (Ed.), *Aboriginal customary laws: Background papers office*. Law Reform Commission of Western Australia: Perth, WA, Australia.

McIntyre, G. (2010). Native Title is Property. In L. Strelein (Ed.), *Dialogue about land justice: Papers from the National Native Title Conferences* (pp. 52–68). Canberra, A.C.T. Australia: Aboriginal Studies Press.

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141, 267–68.

Neate, G. (2010). Achieving real outcomes from native title claims: Meeting the challenges head on. In L. Strelein (Ed.), *Dialogue about land justice: Papers from the National Native Title Conferences* (pp. 198–252). Canberra, A.C.T., Australia: Aboriginal Studies Press.

Oxley-Oxland, J., & Stein, R. T. J. (1985). *Understanding land law*. Melbourne, Australia: The Law Book Company.

Paley, W. (1785/2012). *The principles of moral and political philosophy*. Indianapolis: Liberty Fund.

Pearson, N. (1997). The concept of native title at common law. In G. Yunupingu (Ed.), *Our land is our life, land rights—past, present and future* (pp. 150–161). St Lucia, Queensland, Australia: University of Queensland Press.

Pearson, N. (2010). Mabo lecture: Where We've come from and where we're at with the opportunity that is Koiki Mabo's legacy to Australia. In L. Strelein (Ed.), *Dialogue about land justice: Papers from the National Native Title Conferences* (pp. 33–51). Canberra, A.C.T., Australia: Aboriginal Studies Press.

Sutton, P., & National Native Title Tribunal (NNTT). (1998). *Native title and the descent of rights*. Perth, WA, Australia: National Native Title Tribunal.

Turnor, C. H. (1911). *Land problems and national welfare*. London and New York: John Lane.

United Nations. (2008). Declaration on the Rights of Indigenous Peoples [UNDRIPs]. Online.

Chapter 5
Beyond *Ius Abutendi*: Teaching About Relationality in Land and Water

Abstract As the world moves toward an international debate about how to approach environmental sustainability, this chapter provides a pivotal argument about *Ius Abutendi*, the right enshrined in English land law, transposed to the colonies, which is the right to "abuse" the land and waters that one owns. It examines the seemingly intractable postcolonial, deimperialized, pluricultural tensions about land and water "ownership," resource depletion, environmental sustainability, individual and communal ownership, documentation, international legal frameworks, traditional ecological knowledge, *sui generis* rights, and equality of access to benefits sharing. It provides the conceptual springboard into the field of ecological education, broadly understood, that occurs in universities and classrooms, and asks questions about the pedagogical content underpinnings of the work currently being undertaken by educators about land and water education.

Keywords *Ius Abutendi* · Environmental law · Property law · Customary law Earth jurisprudence · Sustainability

5.1 Introduction

This chapter invites specialist environmental, Indigenous, and legal academics, teacher educators, and teachers into the complicated world of international agreement making about ecological sustainability. How can we teach about land and water into an uncertain, deimperialized, postcolonial, postmodern, pluricultural future that is replete with global tensions? Of relevance to this monograph, tensions and incommensurabilities now arise between late capitalism, with its underpinning land and water tenure laws in the Anglophone and Francophone worlds, early capitalist formations in nations with developing economies that are belatedly recognizing exclusivity of use land and water titles over previously nationally owned resources, and pre-capitalist customary law arrangements. Legal instruments are now being developed to deal with pluricultural legal intersections between English and European transplanted property laws and customary law practices of Indigenous and

Z. Ma Rhea, *Land and Water Education and the Allodial Principle*,
SpringerBriefs in Education, https://doi.org/10.1007/978-981-10-7600-8_5

other traditionally oriented peoples as discussed in the previous chapter, together with internationally recognized environmental standards and what is being called broadly Earth jurisprudence. These international mechanisms now vie for a place in regional, national, and local debates about rights and access to land and water. These are difficult spaces where new and old disputes emerge and wars are being fought. Matters arising from these incommensurabilities involve the need to work out tensions between the foundational matter of land and water being regarded as "property" and as "relationship," together with the emergent consciousness of Earth sustainability, and in particular, the implications of such workings-out for educator pedagogy in land and water education spaces.

Since the period of English and European enclosures, examined in detail in previous chapters, many scholars and commentators have argued that the basis of Anglophone and Francophone property law (as the predominant colonial powers under consideration) requires re-examination. Internationally agreed environmental standards and the responsibilities of national governments to comply with such agreements are frequently at odds with local land and water management regimes, both customary and colonial. From outside and within English and European legal frameworks as they are practiced globally, international environmental law has emerged in response to, for example, growing unease with the "*ius abutendi*" clause within property laws to do with land and water. The pressure for the development of environmental law has arisen from a number of quarters; spurred on from "within" by the legacy of such scholars as Paley and Blackstone who argued that it was a God-given right and responsibility to cultivate the land and from "without" by those who assert an ecological sustainability argument that finite resources such as land and water require strict regulation to ensure their appropriate use. Of course, Indigenous Peoples have made insistent objection to the "*ius abutendi*" aspect of imposed laws that gave colonizers the right to lay waste to land and waterways, to own land and waterways privately, and to be allowed to transfer the right to destroy lands and waterways to others in the processes of property transfer. From many points of view, then, there have been sustained arguments for re-thinking the *Ius Abutendi* aspect of contemporary property law as it pertains to land and water "ownership."

Some scholars take the view that the entwinement of private land ownership and water use rights with capital accumulation needs to be separated in the interests of all humans against the exclusive claim of the few. Interestingly, property law has become so complicated that it has moved completely into the realm of symbolic exchange where it is the capacity of an individual to assert title to a piece of land or waterway to the exclusion of all others, and the potentiality for economic development of that land or waterway that is regarded as the right in property, together with the right to divest, ideally for profit, that land or water title together with whatever rights are inherent in such a title. The thing itself, the land or water, is of little interest beyond its potential value in terms of the accumulation of capital. Marx (1857–1861, 616) argued presciently that:

> The crude materialism of the economists who regard as the natural properties of things what are social relations of production among people, and qualities which things obtain because they are subsumed under these relations, is at the same time just as crude an idealism, even fetishism, since it imputes social relations to things as inherent characteristics, and thus mystifies them.

Blomley (2008) makes a different argument by observing that property law, in its need to simplify nature, needs to be understood through its "effect," explaining that:

> …one of the crucial 'effects' of the practices of property is to produce the appearance of resolution, order, certainty, and security. This should not be overlooked: despite its manifest exclusions, expulsions, and violences, it appears equitable and benign. Even though contradictory, messy, and unsettled, property presents itself as certain and secure. Property law, like any simplification, can be absurd. Yet to stop here is to risk ignoring the ways in which such absurdities organize the world for us in often brutally efficient and powerful ways.

Blomley, I think, makes a very important point that it is almost impossible to ignore the "effect" that turning land and water into property has had, moving them from nature in its ungovernable and unjustifiable form into being a "thing" that can be governed and dealt with by normative legal systems that have become foundational to the many intersecting legal systems internationally and regionally.

5.2 Teaching About Land and Water as "Objects of Property"

It is necessary to further examine the idea of land as property and/or water as property boundary. Rigsby (1998, 22), in a review of theory and concepts of property and ownership, notes that:

> In the evolutionary anthropology of the past century and its successors up into the 1950s, property was a notable concept, but with the rise of new interests in and concerns with ecology and evolution, property and tenure (or ownership) were by and large replaced by terms such as territoriality, range and use in anthropological studies of people/land relations.

As discussed in previous chapters, and by way of example to the general point, Aboriginal land tenure concepts pose various problems, chief of which is the idea of property in these societies relies on complex, customary law processes. Aboriginal customary law experts have consistently argued that sustainability of resources are embedded in customary practices but there have been significant debates among ecologists about the danger of overly romanticizing Indigenous "care for Country" as it has come to be known. Flannery (1994) has argued, for example, that many of the lifeways practiced by Australian Aboriginal and Torres Strait Islander peoples were ecologically damaging and unsustainable. While this and following chapters will draw together and analyze some of these claims and counter-claims, it is necessary first to understand the basis of thinking about land and water as objects of

property and then to think about this in the context of emerging international environmental law and also within the larger scope of Earth jurisprudence before later considering how vestigial allodiality might help to guide future thinking about land, water, and environmental education for sustainability. Tooher et al. (2008, 4) provide an introduction to the thinking behind the land and water being "objects of property" explaining that:

> Non-lawyers may conceive of property as something owned by someone. The view is that to own property is to have control, to use, the power to sell or give, the power to waste or destroy. Thus, X is the owner of a book, although Y the borrower may be using the book until Z the thief steals the book. The property lawyer describes the same situation by saying that X, Y, and Z are all owners of relative rights in the book although X's entitlements are greater than Y and Z's because the latter rights have been carved out of X's previously absolute and unencumbered right. The rights are not the same, and yet each has property rights in the book. When the physical attributes of property objects are separated from the relationships that may be generated with the object, it can be understood why more than one person can 'own' property rights in the one object. The book itself is not property, but an object of property. The attribute of property refers to the ownership of rights and one right that must be present when we speak of property is the right to security or protection. This is often understood as the right to exclude. In this sense, property is not only a set of relationships between a subject and an object but a relationship between people.

As discussed previously, Honoré (1961) in his essay simply titled "Ownership" made explicit an approach to the fullest expression of individual ownership also known as full liberal ownership that was articulated by Blackstone (1769) many centuries before. The 11 "standard incidents" of ownership by Honoré (1961) are:

> The right to possess: to have exclusive physical control of a thing;
>
> The right to use: to have an exclusive and open-ended capacity to personally use the thing;
>
> The right to manage: to be able to decide who is allowed to use the thing and how they may do so;
>
> The right to the income: to the fruits, rents and profits arising from one's possession, use, and management of the thing;
>
> The right to the capital: to consume, waste or destroy the thing, or parts of it;
>
> The right to security: to have immunity from others being able to take ownership of (expropriating) the thing;
>
> The incident of transmissibility: to transfer the entitlements of ownership to another person (that is, to alienate or sell the thing);
>
> The incident of absence of term: to be entitled to the endurance of the entitlement over time;
>
> The prohibition on harmful use: requiring that the thing may not be used in ways that cause harm to others;
>
> Liability to execution: allowing that the ownership of the thing may be dissolved or transferred in case of debt or insolvency; and
>
> Residuary character. ensuring that after everyone else's entitlements to the thing finish (when a lease runs out, for example), the ownership returns to vest in the owner (cited in Breakey 2016, 6).

The foremost condition of property, according to most sources in the literature (see, for example, Breakey 2016, for an excellent discussion), is that there must be a right on the part of the owner to exclude others from use, enjoyment, and benefits of the object, these being the rights established by the property relations between owner and the object owned. The condition of alienability is most often argued as a second but essential element of property. It seems a basic premise of any cross-cultural analysis that a "right" such as that which involves excluding others from the benefits of a thing must be bound by—and able to be extended by—cultural, social, economic, and political conditions. The conditions would include the economic and environmental limitations on ownership of land and waters, correlating with, as is so often the case in subsistence economies, joint or group property as the dominant form, perhaps for reasons of cooperation to enhance the viability of the group.

Philosophers and anthropologists have argued about the concept of property and the rights associated with property because of the existence of customary laws. They have debated the question of whether individuals have natural entitlements to property that the laws of any society ought to recognize. Some believe that there is no such natural right as proposed by, for instance, Locke. One of the reasons which scholars would put forward in a refutation of the proposition that an individual has a natural entitlement to property is that the concept of property is a social one and that the individual is granted property rights under specified conditions by an institutional entity and/or by collective consent. Pannell (1998, 247) argues, for example, in the case of the existence or not of customary marine tenure (CMT):

> …behind the single concept of CMT lies the collective reality of unsubstantiated generalisations, a multitude of often conflicting definitions, a variety of often incommensurable terms, inconsistencies in terminological usage, limited field-based research, a paucity of published sources, an ignorance of the ontology of CMT, disregard for the effects of such a discourse centred on CMT and a largely uncritical use of CMT as a concept.

Such tensions and confusion continue to exist into the early twenty-first century, even though ideas regarding Native Title have developed and changed. It is not only in international customary law or the specific example of Australian Indigenous customary law that there are problems that were referred to by Pannell. In the broader scope of international environmental law, we also find such tensions and debates. It would appear that under the condition of increased globalization, both economically and socially, that the tensions about who has the right to decide the use of particular lands and waters are increasing rather than decreasing.

5.3 Land and Water in International Environmental Law

I have so far argued that in order to teach about land and water it is necessary for specialist environmental, Indigenous, and legal academics, teacher educators, and teachers to think about how land and water are understood in land law and in its

development, property law, with water having been sometimes considered and sometimes being remarkably absent from such discussions. Given that the underlying principle of land and water ownership is the right of *ius utendi* (to use), *ius fruendi* (to take the fruits or profits from), and *ius abutendi* (to abuse or lay waste), it is perhaps not surprising that humans have had an increasingly negative impact on the environment broadly and land and water in particular. Hey (2016) notes that while the scope of international environmental law is increasingly focused on global interdependencies (dealing with such matters as international rivers, transboundary nature conservation areas), "the consequences of environmental harm manifest themselves at the most local of levels…Moreover, actions to address environmental problems ultimately depend on the decisions of individuals and groups in local situations" (Hey 2016, 3).

As has been discussed previously, the impacts of colonization and ongoing "land grabbing" makes the experiences of Indigenous and other traditionally oriented peoples far more figural. Hey (2016), for example, notes that "local populations are regularly left without access to land or water and thereby deprived of their livelihood" pointing to the ongoing North-South tensions evident in international engagements such as environmental summits auspiced by the United Nations since the Stockholm Conference (1972). Intersecting with international conferences on sustainable development such as Rio +20, nation-state level agreements about sustainable development goals (2015) continue to struggle with the incompatibility between first world perspectives, those of developing economies, and now-recognized Indigenous claimants. While international environmental law is now taking note of the "principle of common but differentiated responsibilities" (Hey 2016, 19), it remains the case that much of the planet's land and waterways are in the hands of private, corporate, and state owners who are able to use and abuse "their" property.

On consideration of the problem, many might argue that the law needs to be changed to decouple the idea of "ius abutendi" from individual property ownership. The problem is that people make laws and until people change the way they think about finite resources such as land and water, those with the greatest vested interests are also going to protect those interests through the legal mechanisms that have been developed to protect such interests. It is for this reason that this monograph highlights the role of specialist environmental, Indigenous, and legal academics, teacher educators, and teachers to support students globally to have the skills to address emerging tensions and dilemmas that are the product of recent colonization projects across the globe both in terms of territorial colonization and more recent wholesale resource colonization. What does *dominium* mean in the current era and how can we critically engage with its ontological, epistemological, and axiological importance to our understanding of land and water in such a way that the resources on which we rely as humans are not completely laid waste?

Among biblical injunctions and more venal manifestations of the injunction to recognize *dominium* and to make land productive, the human population is slowly becoming aware of what is at stake if we as the human population do not find ways to encourage people to act in an environmentally responsible manner. Scholars such as

Hey (2016) provide now-familiar narratives about the sorts of troubles facing the planet. Hey (2016) refers to the emerging acceptance of the concept that the most recent geological epoch might be known as the Anthropocene because of the profound effect that people are having on the Earth's systems. She draws attention to the sheer volume of harmful pollutants that "pollute soil, air, atmosphere, groundwater, surface waters and marine waters and as a result harm ecosystems and the Earth's systems such as the climate system" (Hey 2016, 25), to the increased volume of noise and light pollution occurring across the planet, and the harmful effects of nuclear, shipping, and industrial accidents. She asks about the limits of the environmental law to arbitrate on the carrying capacity of an ecosystem to "assimilate pollutants and accommodate disturbances" (Hey 2016, 27) especially across complex transnational and international boundaries.

It is now becoming clearer, at least in the minds of some educators that Indigenous and other traditional peoples already have forms of sovereignty and approaches to sustainability. The question of how the land has been understood and treated historically by nonindigenous people, colonizers, settlers, and more recent immigrant, to transform land and water ownership into something that enables the symbolic exchange of its benefits without the responsibilities for its degradation is becoming more insistent. Most people now accept that one of the negative consequences of private land utilization can be because of the *Ius Abutendi* aspect of ownership.

The global discussion about global warming is a good example of the problem facing those whose who want to change the way humans relate to, and use, land and water. Those who are worried about ecological sustainability and the planetary crisis they believe is being created because of human behavior face a burden of proof about a situation that is not coherent or similarly present at all places at all times. When landmasses like Australia are experiencing temperatures of over 50 degrees for days in a row, global warming policymakers of the North are in the middle of mild winters that are becoming more pleasant by comparison. When water levels are rising in the Pacific, it is hard for people living away from coasts to comprehend the dangers that rising sea levels represent, not only to those immediately affected but also to all sentient life.

The privatization of oceans, seas, and waterways has been given less attention by scholars such as philosophers and anthropologists possibly because water has been more difficult to "bound" in any way that could mark *dominium* and restrict access and ensure exclusivity of use, to its fruits, and to its abuse, the hallmarks of property law in land. Hannesson (2004) provides a useful history of the development of thinking about international laws of the sea, for example, starting with the 1500s and the attempts that were made by Spain and Portugal to claim exclusive rights of navigation on "newly discovered seas" (Hannesson 2004, 29). In beginning here, Hannesson like many others provides no insight into the far more complex customary practices developed by peoples from ancient times to regulate the use of resources of oceans, seas, and rivers. During the period of colonization, from the 1600s it became accepted that "nations" had the exclusive right to a 3–mile

territorial limit at sea, commonly overriding local customary practices while sometimes operating in parallel to them. Hannesson (2004, 31) observes that:

> …the 3-mile limit was the norm until after World War II, but the norm weakened with the waning of Britain as a world power and with the technological progress in fisheries and oil extraction that made it increasingly obsolete.

Hannesson (2004) summarizes the ongoing problem facing international attempts through the United Nations to regulate, for example, how fish are taken and who has the right to take fish stock. He says that there are at least two problems facing such attempts:

> First, these organizations do not have the power to exclude anyone from fishing on the high seas. Second, these organizations have no jurisdictional power to enforce whatever rules they may agree on (Hannesson 2004, 42).

Blomley (2008) notes, too, in his analysis that bodies of water such as rivers have traditionally been used as boundary markers rather than as specific objects of property and he has critically examined the effect of this role for rivers in contemporary disputes about rivers as boundaries. Further discussion of this point will be followed in the next chapter.

5.4 Refutation of Hardin's Thesis: Recognizing the Relationship Between the Individual and the Community in Land and Water Use

As can be surmised from previous discussions, the conceptual impact of Anglophone and Francophone property law asserted in now multitudinous forms across the planet with respect to our understanding and utilization of land and water is highly problematic. If every self-serving individual action against the environment leads humanity closer and closer to severe resource depletion, and this is happening at time when there is an exponential increase in self-serving corporate and state-sponsored land and water use, then we have moved well beyond the thesis put forward by Hardin (1968) that it is the lack of individual ownership that makes resource depletion inevitable in "the commons." The problem with Hardin's thesis where he asserts that there has been a quiet "tragedy of the commons" is that he conceptualized the "person" as the single self-interested owner who would maximize his care for the land and water that he owned (the examples given by him are commonly male). Contemporary law recognizes an expanded understanding of the concept of the "person" where many entities are now recognized as "persons" before the law; so, a very large and resource-use intensive corporation can own great swathes of land and water and do as much as it can to maximize the profits that are had from its utilization, within the limits of what it can be made to obey of any local, regional, and international legal systems and frameworks.

Hardin (1968) was also unwilling or unable to address the positive effect of customary law practices on the regulation of what he considered to be "the commons." In arguing the superiority of self-interest above all other forms of interest (with echoes of Paley), he correlates individual human greed with its "natural limitation" of caring for resources to ensure sustainability for survival. Certainly, the case can be made for irreversible resource degradation of communally held lands and waterways in some regions, or areas, at some times but such small-scale destruction pales into insignificance when one considers the global destructive potentiality of decisions being made in the contemporary era in the simple matter, for example, of technology supporting industries to be able to "mine" the ocean floor or "own" water supplies for an entire region.

Because there was never any willingness within the capitalist project to limit *dominium* in the right of *ius abutendi*, the potential tragedy of unlimited individual ownership (of people and of corporations known legally as persons for the purposes of the rights and responsibilities of ownership) is only now becoming more evident. Such potential and actual destruction, known immediately by Indigenous and other colonized peoples who saw their customary arrangements to land and water abolished, the underlying urge and indeed, responsibility, to take as much as possible for the purpose of maximization of profit or enjoyment is only now reaching its inevitable limit, and then only in some domains and spheres. It is particularly difficult to recognize the underlying patterns of overconsumption and resource depletion in land and water use in economic and social systems that do not account for such things when they add up the costs of production. Belated ameliorations such as corporate social responsibility (CSR) and triple bottom line reporting (Elkington 1997) and persuasive arguments for new forms of "natural capitalism" (Hawken et al. 2000) have had limited impact on the overall approach taken by contemporary capitalist forms (Sagoff 2007, 87).

Even so, in the intersecting fields of environmental law, Earth jurisprudence, and policy formation, scholars such as Davies (2004), Hannesson (2004), Morishima (2007), Sagoff (2007), Graham (2011), and Hey (2016) among others offer a number of possible roadmaps that move us beyond the necessarily limited, but governable and justiciable, concepts of individual *dominium* and *ius abutendi* in land and water ownership while highlighting the critical intersection of the ideas embedded in contemporary property law as it impacts customary land and water laws.

A central emerging idea is that of interdependence but there is little recognition within of how important this is to teach. Certainly, sustainability education has been aware that from the 1970s, international discussions first centered on the principle of "no harm" (Hey 2016, 58), in particular, on "physical interdependence grounded in the environment itself." Like the field of property law, more recent developments have seen the idea of interdependence itself become increasingly complex in matters such as interdependence in space and across time in, for example, intergenerational equity and distributive justice. Even so, interdependence remains at the heart of thinking about teaching the intersections of environmental law and capitalist utilization of land and water that is individually owned. The problem, of course, is that

individuals, corporations, and states have to varying degrees had recognition of their sovereignty over natural resources (*dominium*) that international mechanisms struggle to engage with to any great effect. The more complex principles embedded, for example, in "equitable and reasonable utilization of resources," "common concern for mankind," or "sustainable development" (Hey 2016) have made only a small impact in the overall willingness of nations to come to an agreement over any matter that is seen to impede their "sovereign right."

Moving from the international sphere to a regional view, there are some examples of emergent willingness to cooperate on certain matters beyond nation-state boundaries for the benefit of a larger community of users of resources under specific circumstances. Such an example can be found in the European Community (Davies 2004) that has adopted an approach to "sustainable development" that includes consideration of the environment. It is to the idea of sustainability that we now turn.

5.5 The Question of Sustainability

Davies (2004) speculates how developments in international environmental law might have an influence on how the EU approaches its commitment to "sustainable development" noting that:

> … The notion of sustainable development would suggest that the pursuit of economic growth must take due account of the need to preserve the environment; although environmental considerations should not be prioritised over the need for economic growth, resources should not be diminished to the extent that the needs of future generations cannot be sustained (Davies 2004, 28).

Davies (2004, Chapter 2) provides incisive analysis of the concepts and processes used by the European Union to develop its Community Environmental Policy. He notes that the environment was not forefront to thinking when the EU was first proposed. Rather, the main task was to develop an integrated economic community but that, "Post Maastricht the Community's activities were explicitly to include a policy in the sphere of environment" (Davies 2004, 27). Over time, the following objectives have come to be recognized and agreed by all the community member states:

- Preserving, protecting, and improving the quality of the environment;
- Protecting human health;
- Prudent and rational utilization of natural resources; and
- Promoting measures at international level to deal with regional or worldwide environmental problems (cited in Davies 2004, 36).

The ongoing discussions and debates mirror the principles outlined previously at the international level but with now a greater focus on the context of the region, the very real competing and intersecting realities of the European Union, that begin to

provide myriad examples of debate and legislation that is trying to address these objectives. With respect to the third objective, it is interesting to note that after nearly 30 years of discussion and negotiation, the approach emerges to encourage consumers and producers to modify their practices to ensure that resources are used with their capacity for renewal, employing methods such as environmental impact assessments, eco-labeling, and eco-auditing (Davies 2004, 39–40). What the discussion in this case highlights is that, similar to the international level, anything that is not governable and justiciable and that might imply a restriction to property rights whether held by individuals or sovereign nation-states is being dealt with at the level of principle, guideline, and framework to varying degrees of success. In these matters, beyond the idea to do no harm, broadly interpreted, matters of land and water ownership and utilization are still shaped by the "effect" of property. The more precautionary approach advocated by sustainability scholars and activists alike globally, regionally, and locally is still likely to have a skeptical reception if the precautionary principle is used to restrict the maximization of profit and enjoyment held in land and water by those who have the title to do so.

Of concern too is that many advocates of environmental sustainability employ a variety of interpretations of Indigenous customary law understandings of land and water to undermine the argument for individual capital accumulation in land and water ownership. For example, Koons (2011, 51) suggests that the idea of a public trust doctrine be adopted. She argues that:

> The public trust doctrine gives legal effectiveness to the notions of communion and relational responsibilities. With roots in the Magna Carta and Roman law, the ideas and values of public trust doctrine have been traced by Charles F. Wilkinson to ancient societies in Europe, Africa, East Asia, as well as to Native American and Muslim cultures.

More recently, the apparently comfortable relationship between Indigenous and conservationist concerns for the environment have been fractured by Indigenous Peoples asserting their rights to develop their *sui generis* customary land and water rights in ways that allow them to maximize their profit and enjoyment. The sense of betrayal expressed by those in the conservation movement who romanticized Indigenous Peoples as the last bastion of hope against planetary destruction needs to be examined more closely. Such romanticized notions together with normative local, regional, and international legal systems arbitrating the ownership of land and water laws have struggled, I think unnecessarily, to grant titles to Indigenous Peoples that will allow this sort of development. Sustained objections from conservationists about the need to keep pristine environments pristine, to keep nature "natural" and so on belie the ignorance with which much of the first world lives on the land it occupies. The very "pristine" and "natural" places city dwellers seek to maintain for their weekend playgrounds are the ancestral homelands of Indigenous and other traditionally oriented peoples (Langton 1998), as are the cities now transformed. This romantic view of "pristine nature" is a key concept in environmental education and one that needs to be examined in an emergent PCK that incorporates critical place-based pedagogy within its approach.

5.6 Conclusion

The matter of *Ius Abutendi* brings us to the heart of this monograph, to examine how a form of Earth jurisprudence can arise, where ancient *allodial titles* can be recognized to be held by a family and allocated individually within the broader Anglophone and Francophone property systems that have been inherited across the world.

For specialist environmental, Indigenous, and legal academics, teacher educators, and teachers in this space of intersectionality between international environmental law, regional sustainable development, and local expressions of the desire and responsibility to maximize profit and exercise exclusive enjoyment of land and water, there are many hurdles to navigate into a future more sophisticated form of pedagogical content knowledge about land and water, a critical, title—based, alod pedagogy.

Educators need to be able to teach about the underlying relational *allodial principle* inherent in the Indigenous claim to economic development of their traditional estates as *aborigineum dominium*. Both interdependence and relationality are concepts that need to be taught. First world universities and schools continue to avoid examining the foundational challenge of *ius abutendi* because educators often begin from a romantic notion of sustainability and environmental responsibility that discounts or ignores the impact of their inherited colonial practices that have become normatively destructive. Commonly, also, educators themselves do not understand relationality or interdependence sufficiently to be able to develop their pedagogical content knowledge regarding these lenses for land and water education.

The next chapter examines a number of cases of vestigial allodiality that might support the development of pedagogical content knowledge of specialist environmental, Indigenous, and legal academics, teacher educators, and teachers toward a type of Earth jurisprudence that recognizes Indigenous claim to the use of its lands and waterways to support economic development as *aborigineum dominium* while also providing insight into the customary aspects of land and water ownership that might assist the sometimes deadlocked legal processes that have relied on simplifying nature to the point of its potential destruction. Unsurprisingly, ecological educators in universities and schools seem woefully underprepared for the pedagogical leadership roles they need to assume if land and water education is to help future generations to grapple with locally complex and globally interdependent matters of environmental sustainability.

References

Blackstone, W. (1830). *Commentaries on the Laws of England* (Vol. 4). Oxford, England: Clarendon Press.

Blomley, N. (2008). Simplification is complicated: Property, nature, and the rivers of law. *Environment and Planning A, 40*(8), 1825–1842. https://doi.org/10.1068/a40157.

Breakey, H. (2016). Property. Accessed December 27, 2016.
Davies, P. (2004). *European Union Environmental Law*. Aldershot, England; Burlington, VT, USA: Ashgate Publishing Company.
Elkington, J. (1997). *Cannibals with Forks: the triple bottom line of 21st century business*. Oxford, UK: Capstone Press.
Flannery, T. F. (1994). *The future eaters: An ecological history of the Australasian lands and people*. Sydney, NSW, Australia: Reed New Holland Publishers.
Graham, N. (2011). Owning the Earth. In Peter Burdon (Ed.), *Exploring wild law: The philosophy of Earth jurisprudence* (pp. 259–269). Adelaide, South Australia: Wakefield Press.
Hannesson, R. (2004). *The Privatization of the Oceans*. Cambridge, MA, USA; London, England: MIT Press.
Hardin, G. (1968). The tragedy of the commons. *Science, 162*(3859), 1243–1248.
Hawken, P., Lovins, A. B., & Lovins, L. H. (2000). *Natural Capitalism: The next industrial evolution*. London, UK: Earthscan Publications Ltd.
Hey, E. (2016). *Advanced introduction to International.* In *Environmental Law*. Cheltenham, UK; Northhampton, MA, USA: Edward Elgar Publishing.
Honoré, A. (1961). Ownership. In A. Guest (Ed.), *Oxford essays in jurisprudence* (pp. 107–147). London: Oxford University Press.
Koons, J. (2011). Key principles to transform law for the health of the planet. In Peter Burdon (Ed.), *Exploring Wild Law: The philosophy of earth jurisprudence* (pp. 45–58). Adelaide, SA, Australia: Wakefield Press.
Langton, Marcia. (1998). *Burning Questions: Emerging environmental issues for Indigenous peoples in northern Australia*. Darwin, NT: Centre for Indigenous Natural and Cultural Resource Management.
Marx, Karl. (1857–1861). Grundrisse der Kritik der Politischen Oekonomie (Outlines of the Critique of Policial Economy). (M. Nicolaus, Trans.). New York, USA; Online: Penguin. Reprint, Marxist Internet Archives.
Morishima, A. (2007). Challenges of Environmental Law—environmanetal issues and their implications to jurisprudence. In N. J. Chalifour, P. Kameri-Mbote, L. H. Lye, & J. R. Nolon (Eds.), *Land use law for sustainable development* (pp. 6–26). New York, USA: Cambridge University Press.
Pannell, S. (1998). The promide of Native Title and the predictament of customary marine tenure. In N. Petersen & B. Rigsby (Eds.), *Customary Marine Tenure in Australia* (pp. 230–254). Sydney, NSW, Australia: Oceania Monographs.
Rigsby, B. (1998). A Survey of property Theory and Tenure Types. In N. Peterson & B. Rigsby (Eds.), *Customary Marine Tenure in Australia* (pp. 22–46). Sydney, NSW, Australia: University of Sydney.
Sagoff, M. (2007). *The economy of the earth: Philosophy, law, and the environment*. Cambridge University Press.
Tooher, J. G., Dwyer, B. M., & Teh, G. L. (2008). *Introduction to Property Law* (5th ed.). Chatswood, N.S.W., Australia: LexisNexis Butterworths.

Chapter 6
The Art of Negotiation: Teaching About Relationality and Interdependence in Land and Water

Abstract In this chapter, I examine the usefulness of the *allodial principle* to educators in their attempts to teach about competing Indigenous and colonial entitlement to land and water in postcolonial, pluricultural democracies. I pose a challenge to the Harden "tragedy of the commons" thesis through consideration of a number of vestigial examples of the *allodial principle* that demonstrate the need for modern global citizens to have exceptional skills of negotiation. The art of negotiation here focuses on two key lenses of relationality and interdependence. I posit that such lenses might assist in the development of an alod pedagogy for educators, enabling the development of their pedagogical approach to the contemporary "working out" of difficult matters to do with balancing the rights and responsibilities of nations, regions, corporations, communal, and individual owners in the access to, use of, and transferability of land and waterways.

Keywords Allodial principle · Customary title · Claimant rights
Interdependence · Relationality · Negotiation

6.1 Introduction

This chapter presents the last in the series of chapters that I have designed to provide specialist environmental, Indigenous, and legal academics, teacher educators, and teachers with material that will expand their curricular vision with respect to land and water education. In this chapter, I examine the concept of interdependence, relationality, and the art of negotiation. Negotiation skills are at the heart of international and national environmental law mechanisms where the intersection of colonial land and water titles has collided with Indigenous claims. A deep understanding of negotiation, together with relationality and interdependence as discussed in previous chapters, enables the pedagogical shift required of the educator to determine to what extent a concept of *allodiality* might facilitate their teaching about competing claims about land and water access and use between Indigenous and nonindigenous claimants, and also among Indigenous Peoples with

Z. Ma Rhea, *Land and Water Education and the Allodial Principle*,
SpringerBriefs in Education, https://doi.org/10.1007/978-981-10-7600-8_6

competing interests. I argue here that educators can use the *allodial principle*, contra Harden's tragedy thesis, to provide a way for their students to think about how societies negotiate a balance between rights and responsibilities regarding the ownership of, access to, and use of land and water.

Educators often report struggling with how to teach about Indigenous matters, especially when they contest the colonial narrative that has been so ingrained within mainstream education systems, both university and school systems. This is especially so when there appear to be competing views found among Indigenous traditional owners groups, as the following example demonstrates.

There are many Indigenous and other traditionally oriented peoples who hold to customs that are also being espoused in more recent, western-derived concepts of Earth jurisprudence. They argue against the development of their land and water resources for commercial gain and exploitation even as they argue for their *sui generis* title to be recognized by the state. They argue that the core of their claim to nondevelopment derives from their relationally derived rights. Other Indigenous and traditionally oriented communities claim that their *sui generis* rights to particular lands and waters should enable them to enter into the capitalist economy if they so choose, while still meeting the responsibilities of their customary practices. Within this view, there is a great desire to be able to economically modernize into their aspirational futures through the fair and equal utilization of their resources.

For specialist environmental, Indigenous, and legal academics, teacher educators, and teachers, this example requires a high level of understanding of relationality and interdependence and of negotiating skills in order to inform their pedagogical content knowledge. In one respect, we have to be able to teach that such "legal" titles as the Australian "Native Title" bestowed by the state should not diminish the *sui generis* rights of Indigenous Peoples as are recognized under the *UN Declaration of the Rights of Indigenous Peoples (UNDRIPs)* (United Nations 2008), and we also need to be able to teach that Indigenous opinion is not monolithic and that both views of Indigenous land and water rights are valid, and also that both "weak" titles such as Native Title and stronger titles such as would be enabled with the recognition of *aborigineum dominium* are constantly being redefined by shifting debates and understandings of relationality and interdependence. These are not easy negotiations for educators and other professionals to navigate.

There is now more accessible research to explain some of this complexity. Langton (2005), for example, undertook detailed research into Australian Indigenous systems of land tenure and property relations. She explains that law, jurisdiction, jurisprudence, and all those rule-like activities and associated acts that order human interactions by appeals to authority stem from transgenerational—or temporal—relationships with place and with the nature of place as the legacy of the ancestors, the imposition of the past on the present and future inheritors of places and ways of being-in-place. In this view, not all Indigenous Peoples need a title to their land and water for the purposes of capitalist development but such title

recognition as would be afforded by an *alod* title would recognize such complexity of ownership in important ways.

The concept of *allodiality* might also provide an important conceptual opportunity for farmers and mining companies who have inherited colonial titles but now find themselves at odds with the demands of new "sustainable development" policies with regard to how they utilize their land and water titles and also at odds with competing Aboriginal Native Title clams to those same resources. As the world moves into a deimperialized, postcolonial, postmodern time when many things are unsettled, established normative and justiciable legal structures at the local level are strained by such competing demands. Added to the complexities of such negotiations, there is increased injunction to "do no harm" in the field of international environmental law and, also, the growing understanding at the regional level that there need to be necessary restrictions on the use and abuse of land and water systems within nation-states, where these systems overlap with environmental concerns. Such restrictions on the unfettered use of land and water resources are now promulgated against what Indigenous Peoples, farmers, and miners believe are theirs by title to do with under the conditions of their title. While all actors might be in agreement with the proposition that natural resources should be used in such a way as not to exceed what the system needs in order to replenish itself, they often differ about which particular title holders should have their rights curtailed.

Ancient understandings of relational customary rights of access to land and water held by individuals and families but managed interdependently by community negotiation and assent (*the allodial principle*) are now overlayed by complex systems of power and exclusion and private ownership (and its benefits) which operate at both the nation-state and international levels. These overlays still hold a tenacious grip on the human imagination. Certainly, education has a role here as we move into teaching and learning for a sustainable future where environmental concerns, economic futures, and Indigenous preexisting rights to land and water are negotiated. This aspect will be discussed in more detail in the final chapter. In this chapter, some examples will be given that provide insight into the complexity of negotiations that are occurring about land and water ownership in the contemporary era and how the vestigial presence of the *allodial principle* might be positively brought to bear on these examples. Such examples can provide the springboard for classroom projects and curriculum developments across education systems.

There are many new ways of conceptualizing the way forward that reflect the most important aspect of this problem—Earth exists in the first instance before sentient life and humans are born into economic, social, political, and spiritual systems that precede them. It is therefore almost impossible to grapple with the ontological and epistemological structures that shape our experiences of the world as individuals. But it is us, as individuals, whose activities as "entitled" owners will need to be restricted in order for new ways of viewing land and water to emerge (Morishima 2007). Marx (1857–1861, 37) makes the argument that:

> To the single individual, of course, distribution appears as a social law which determines his position within the system of production within which he produces, and which therefore precedes production. The individual comes into the world possessing neither capital nor land. Social distribution assigns him at birth to wage labor. But this situation of being assigned is itself a consequence of the existence of capital and landed property as independent agents of production.

He makes an important point albeit framed by his analysis of class and without concern for societies where waged labor was not the norm. He (1857–1861, 29) does make reference to other forms noting that: "History rather shows common property (e.g. in India, among the Slavs, the early Celts, etc.) to be the more original form, a form which long continues to play a significant role in the shape of communal property" but he does not fully develop this argument. In this note, Marx points to the possibility of a concept of allodiality because the *alod* title system is able to recognize such communality and still enable property to exist in the individual and exclusive sense within the bounds of local customary practices.

To complete this series of *oeuvres* about the foundational aspects of how we currently understand land and water in education, in the intersectionality of sustainability and Indigenous rights, I will draw on some important ideas that have emerged in the development of the field of international environmental law, which has been prepared to examine the customary communal aspects of how individuals and communities have cared for their land and water resources. As Morishima (2007, 8) observed, "Environmental law is a unique field of law in that it covers all stakeholders whose activities have impacts on the environment … [it] is required to set up a new legal area with its own system and logic different from conventional jurisprudence that has been dealing with individual human beings and property."

In order to reframe the work of specialist environmental, Indigenous, and legal academics, teacher educators, and teachers, I have adopted the framework used by Hey (2016, 58–70) that she has developed from the field of international environmental law. Hey expounds the concept of "relations of interdependence" and its five aspects (Hey 2016, 58), something that could provide a strong foundation for the development of pedagogical content knowledge about land and water. Her phrase represents a departure point that would help students to grapple with getting individuals, communities, and nations moving beyond the "no harm" principle to be able to adjudicate "natural resources" such as land and water according to (1) equitable and reasonable utilization; (2) with a common concern for humankind; (3) based on an understanding of sustainable development; (4) addressing intergenerational and intragenerational equity; and (5) with common but differentiated responsibilities. I employ this framework in conversation with other international mechanisms such as UNDRIPs and the Convention on Biological Diversity (CBD) alongside the research being done by the Food and Agriculture Organization, for example, in its tracking of the "State of the World's Land and Water Resources" (FAO 2011).

6.2 Teaching About Interdependence: International and Local Negotiations

6.2.1 Multilateral Environmental Agreements

Beginning at the international level, the mechanism to be examined, multilateral environmental agreements (MEAs), is discussed here in terms of its capacity to provide the opportunity for specialist environmental, Indigenous, and legal academics, teacher educators, and teachers to engage with the impact of colonization at the international level. MEAs allow an exploration of the most recent period of English and European colonization that has left a legacy of constituted nation-states with now recognized official territorial and marine boundaries and recognition of their sovereign right to control and utilize all land and water resources as recognized to fall within their boundaries. MEAs are voluntary and begin from a "no harm" principle which recognizes the sovereignty of member nation-states that undertake an MEA. Employing Hey's (2016) framework, it is possible to assess the usefulness of MEAs in consideration of how nation-states are negotiating the use of common land or water resources, such as international watercourses (the Watercourses Convention), migratory species (the Bonn Convention), and negotiations about shared marine fisheries resources (the LOS Convention).

All of these Conventions have within their conceptualization the mechanisms to identify states who might reasonably be expected to share responsibility for the oversight and management of particular lands or waterways. In some cases, while states have entered into agreements that are legally binding, there are opportunities for other actors, such as NGOs, to join an agreement through the mechanism of an MOU. It is extremely difficult for individuals and small group interests to speak to these large, global MEAs even as their claims to water and land are being negotiated at the international level and even though there is an expectation of what Hey has usefully described a process of "localized decision-making" explaining that:

> MEAs that require localized decision-making structure institutional development at the localized level by identifying the states that have an interest in the shared environment or species and by determining that it is these states that should cooperate. Some MEAs also determine the tasks and functions of cooperation at the localized level (Hey 2016, 90).

The limits to such local involvement were recognized at the Rio Summit. The Aarhus Convention Compliance Committee (ACCC) was formed as an outcome of Principle 10 of the Rio Declaration, seeking to "foster transparency, public participation in decision-making, and access to justice in environmental matters" (Hey 2016, 118). The ACCC has become one, albeit limited, option for receiving communications from the public in order to facilitate "localized decision-making." Also, various People's Tribunals have been established and in some cases are well-organized to perform the function of ensuring that those at the local level with shared interests are able to get their message to the "localized decision-making" mechanisms. Even though some of these groups are very influential and able to

keep their message in the public domain, their represented interests can be ignored by "states." It is the disagreements and contestations by people who are excluded from the MEAs that highlight that states generally do not act and cannot legally act to undermine their constitutive *raison d'etre*. This includes matters relating to land and water rights to access and use.

The first aspect where there is a fundamental dispute at the level of an MEA is what can be considered equitable and reasonable utilization. The state commonly asserts sovereign control of all land and water resources within its agreed boundaries and acts in the international domain to protect those interests as much as is possible. It becomes an internal matter as to whether the preexisting claims of the Indigenous Peoples within its boundaries are recognized or not. In the second aspect, with a common concern for humankind, again it is unlikely that a state actor could legally speak against its territorial interests for the purposes of a concern for common humanity. Ongoing debates seeking to limit nation state responsibilities for climate change are shaped by those same nation state interests together with the financial interests of internationally active private companies such as mining and other extractive industries and international fishing conglomerate. Because of the interdependent nature of their competing and mutual interests, these actors appear unable to even consider the more pressing matter of planetary survival and of the quality of life for all of humanity.

Of interest to this discussion, Hey (2016) provides an example of the Watercourses Convention. She first notes that while signatory states can agree on the principle of "no harm," there have been significant disagreements in attempting to define "equitable and reasonable utilization" which saw some members stepping back from this Convention arguing that such moves would impact on their territorial sovereignty (Hey 2016, 61). In parallel, she also notes the potentially negative collusive effect of member states explaining that this Convention provides an opportunity for willing states, by agreement, to adjust the required minimum standards of the Convention. Arguably and worryingly, this allows for the negative consequence that by agreement they could avoid the responsibility of acting with a common concern for humankind. This Convention could then be considered to be a weak mechanism for protecting sustainable development principles when set against the more powerful claim of the sovereign right of access to resources and their utilization.

Such provision for the self-interest of state entities also reinforces the inter- and intragenerational rights to property in land and water of those for whom the state was probably initially constituted and for whose interests the state already acts. Conversely, bitter experience has shown that these same state arrangements and entities commonly fail to address intergenerational and intragenerational equity for people who are regarded as outside the interests of the state, for example, those impacted by but having only weak voice among the agreeing states who make such decisions, particularly women, youth, Indigenous, and local communities who were identified clearly in the Rio Declaration (UNEP 1992).

The global community is also faced with what appears to be an incommensurable challenge as it grapples to find agreed implementation processes between

states deemed to be "developed" and "developing" within MEAs. Hey (2016) notes that MEAs enshrine a developed/developing divide in its principle of common but differentiated responsibilities, observing that the principle of common but differentiated obligations "currently poses challenges in the relationship between developed and developing states, raising the question what the role of emerging economies should be in MEAs in general and the climate regime in particular" (Hey 2016, 70).

In summary, it would appear that apart from a few examples of "localized decision-making," the interests of Indigenous Peoples, and of local farmers, fisheries, and mining companies disappear at the level of international MEAs. There is no recognition of preexisting rights for actors that are internal to the nation state claim at this level. This means that the rights of Indigenous and other traditionally oriented peoples are commonly absent from MEA-level discussions because collectivities of Indigenous Peoples are not recognized as "states" with *sui generis*, nor as having allodial rights to control land and waters of their traditional estates. This is a concern reflected in all international level decision-making structures, where the preexisting rights of communities prior to the formation of recognized nation-states find no place except by the consent of the very "states" that control the ongoing colonization of Indigenous estates (see, for example, Battiste and Henderson 2000).

Unsurprisingly, MEAs are premised on accepting such aspects as land and water titles as they are recognized within nation-state boundaries at this international level, except when they are contested by another Member State. Because of the lack of any enforceable accountability or compliance measures, Hey (2016, 112) poignantly observes of MEAs:

> …it might be argued that these procedures are not well suited to resolve many issues at stake, which ultimately require interaction, negotiation, and compromise between states concerned.

6.2.2 *Teaching About Local-Level Rights and Responsibilities*

Beginning instead, at the local level, it is possible to use the same framework to examine the outcome of the intentions of international environmental law and its intersection with preexisting Indigenous *sui generis* rights to land and water by way of an example. Langton (2005) makes an argument as to the nature of Aboriginal property systems in Princess Charlotte Bay. Her argument echoes those made by myriad Indigenous and traditionally oriented communities as discussed in previous chapters. Here, though, in a specific example, it is possible to understand the need for a high level of negotiation skills in this examination of some of the intricacies of the injunction of "no harm," of relationality, and of the interdependence of communal and individual authority in matters of land and water.

With respect to the first aspect, equitable and reasonable utilization, Langton (2005) immediately raises the matter of colonization and the fact that so-called "classical" forms of land tenure in Aboriginal society have been transformed in this century under the duress of colonization. She further notes that with the application of anthropological study to the problems of land rights and native title, a variety of land tenure forms have been recognized, including clans, and other descent-based corporations, cognatic and non-descent-based types of tenure, and, as well, post-frontier tenure forms such as ethnolinguistic land-based groups and regional entities. What remains to be addressed in most cases in Australia and other previously colonized nations, she argues, is that old colonial legal arrangements regarding land titles and rights to water are proving resistant to redress in the "equitable and reasonable utilization" of ancestral lands and waterways that are now subject to private ownership. As discussed in previous chapters, the Australian attempt to develop a title called "Native Title" has been a weak mechanism. A stronger *alod* title of *aborigineum dominium* would provide part of the solution to the issues being faced.

With respect to the second aspect, with a common concern for humankind, Langton (2005) points to the fractal interconnection of the sacred with land ownership in her study. She explains that the sacralization of the past, and of places said to be imbued with the past, as in ancestral presences, legitimizes the inherited knowledge of the property system in relation to land. Their property relations, laws of property, and property itself are aspects of the sacred design of Aboriginal society and social relations, and their representations. The property-ness of the relationship between people and places can be regarded as stemming from the idea of the sacred in that relationship. The sacred endures and thus property-ness endures. Herein lies the legitimacy of a claim to property. In this way, it can be understood that the interconnection of the sacred with land and water provides the strong substructure for the commonweal. If the sacred and the land are negotiated as implicitly interconnected then there will be a common benefit for all. In converse, in this view, the separation of the sacred from the land and water would cause harm to all.

It can be understood from this example that the communal need to care for land and water can be understood as social expressions of the human experience of being-in-place, stabilized temporally through the fact of property bequests, that is, the act of bequeathing places to specifically defined descendants, and through the contingent act of defining those descendants whose relationships to particular places form part of the definition of the bequest and of the notion of property itself in Aboriginal society.

With respect to the third aspect, an understanding of sustainable development, research by Langton (2005) demonstrates an interconnected approach to the idea of sustainability. She observes, in her study, that property is a legacy that binds those who inherit rights in places with responsibilities. Principal among these is the stewardship of these places so that they can be bequeathed in turn to the future legatees of the owners. The nature of this binding responsibility as a

transgenerational duty lies at the heart of property (perceived in this way through its social arrangements) as a legal system.

In the fourth aspect, addressing intergenerational and intragenerational equity, Langton (2005) and Langton and Frith (2010) make the central argument that various rights that ownership is thought to universally bestow, as explained in standard western legal texts, such as the right to exclude and the right to alienate are subservient, in Aboriginal society at least, to the basic nature of property as an endowment, that is a bequest transmissible across generations. This, in effect, raises the matter of intragenerational equity to a higher level that has been conceptualized in Hey's schema. For people in the Charlotte Bay area, this is the defining feature of all claims to land and water. Langton (2005) explains:

> That an Aboriginal man or woman is able to assert that he or she has inherited a place or places from the ancestors establishes the pre-given, already-there characteristic of that relationship as a property relationship and that such a relationship is a transgenerational one.
>
> The relationship is therefore one which not only spatializes people, but temporalizes, because it places people with such property responsibilities in a relationship with a place or places, with the past (with those who bequeathed the property) and with the future (with the future legatees of the property).

Considering the fifth aspect, common but differentiated responsibilities, research by Sutton and NNTT (1998) and Langton (2005) would suggest that this is a superior principle in the understanding of land and water rights within Australian Aboriginal precolonial societies to its consideration in Hey's schema. The evidence gives an indication of the efforts which claimants of Native Title tribunals made to explain the differentiation between the landowning descent groups made up of groups identified by family names and the confederation of these groups, through lateral relationships, such as affinal relationships, into a regional landed entity. Extensive tribunal transcripts bear witness to the principle of common but differentiated responsibilities being held among a filial landowning group, providing the most vivid examples of governance of this principle in what can only exist as an idea at the international and regional levels.

Such governance was never straightforward and, without institutions found in state-based arrangements, the influence of individuals was great if he or she were proficient in negotiating and other skills that contributed to the oscillating political circumstances of groups. The skills involved in governance of territorial and resource use affairs were those practised by influential persons throughout history, such as oratory, hospitality, ritual exchange, marriage betrothals, and much else that might enhance one's claim of rights and responsibilities, or ambition for exercise of power and restraint over fellows, resource use, alliance, and other issues relating to the governance of territory and resource use. As Sutton and NNTT (1998) noted, with the depopulation resulting from frontier violence, Aboriginal women giving birth to children fathered by non-Aboriginal fathers, and colonial and post-Federation removals of sometimes entire populations to administered, segregated settlements, there was a rapid loss of clan nomenclature and consequent changes in descent patterns and bounding of group territory.

The insights found in Langton's thesis are echoed across the international Indigenous world as each Traditional Owner group attempts to have its preexisting rights recognized by nation-states that are a signatory to the UNDRIPs. In the specific case of Australia, it is clear that Indigenous Peoples had highly developed mechanisms for dealing with the recognition of the particular claims of clans and family groups to land and water resources. While held communally, as with other examples of *alod*, individuals were recognized as having responsibilities for particular parts of the whole, could be held accountable for these responsibilities, and could educate their children into the rights and responsibilities of their lands and waters, within the overall recognition of the rights of the Traditional Owner group. I would argue that many of the procedures used by Indigenous Peoples to negotiate rights to the access to and use of resources are precisely the sorts of procedures needed today to enable "justiciable" negotiation of competing claims as discussed previously.

6.2.3 *Teaching About Vestigial Traces of* Alod *Title in Indigenous Protected Areas*

When Langton and I were undertaking research for a composite report on the status and trends regarding the knowledge, innovations, and practices of Indigenous and local communities relevant to the conservation and sustainable use of biodiversity (Article 8j of the Convention on Biological Diversity, Langton and Ma Rhea 2003), we noted that with respect to the recognition of land and sea on which Indigenous peoples and local communities rely for their cultural survival and subsistence that:

> Several countries in the region have only very recently set up a network of protected areas and others are in the process of expanding them. In the majority of countries, Indigenous property and resource rights in protected areas are not recognized by the legal instruments of nation-states.
>
> In Australia, Indigenous people have proprietary, social, cultural and economic interests in a proportion of the Australian terrestrial and marine environments. For example, around 15 percent of the Australian landmass is held by Indigenous peoples under a variety of land tenures. The maintenance of biological diversity on lands and waters over which Aboriginal and Torres Strait Islander peoples have a title or in which they have an interest is a cornerstone of the wellbeing, identity, cultural heritage, and economy of Aboriginal and Torres Strait Islander communities. Although Aboriginal and Torres Strait Islander peoples may be willing to share some of their cultural knowledge, aspects of that knowledge may be privileged and may not be available to the public domain. Traditional Aboriginal and Torres Strait Islander management practices have proved important for the maintenance of biological diversity (Langton and Ma Rhea 2003, 15).

Like Indigenous Peoples elsewhere, Aboriginal and Torres Strait Islander peoples are concerned to promote and maintain their active involvement in the pursuit of environmental security and sustainable economic livelihoods on their ancestral lands. Having had their *sui generis* rights recognized to some extent, there are

various legal and practical reasons for the Australian government to incorporate Indigenous customary interests into the broader Australian project of land, sea and resource conservation (Langton et al. 2005). Land and water subject to Indigenous ownership and governance constitutes a significant and substantial proportion—more than 20%—of the Australian continent, particularly in northern and central Australia. Langton et al. (2014) note that in jointly managed parks where Indigenous People maintain ownership and varying degrees of control over their estates, tensions still arise between western and Indigenous ways of practicing land management.

With respect to the first and second aspects of Hey's (2016) framework, equitable and reasonable utilization and with a common concern for humankind, in this case all Australian people, as the Australian government began to examine its approach to the protection of its biodiversity in the mid-1990s, it started to develop a National Reserve System (NRS). In doing so, government officials recognized that in some instances, such as under the provisions of the Aboriginal Land Rights Act 1976 (ALRA) in the Northern Territory, Aboriginal people owned whole bioregions. Moreover, they found that the existence of native title, native title claims, and the future act regime built in the Native Title Act 1993 were all issues that would impinge upon the government's appropriation of land for the national reserve system. At the same time, there were increasing interest and initiatives by Indigenous landholders to reestablish their land management traditions and cooperate with government conservation agencies to achieve their aspirations (Smyth and Sutherland 1996, 96–97). These initiatives were complemented at the international level by a new IUCN system of protected area categories, which substantially recognized the rights, and interests of Indigenous People to own, manage, and sustainably use areas of land and sea of high conservation value.

With respect to the third aspect, based on an understanding of sustainable development, these new categories that were being developed at the international level allowed for the establishment of protected areas that linked land and associated cultural values managed through legal or other effective means. This created possibilities to enable Indigenous landowners to manage protected areas on parity with the mainstream protected area estate. These areas became known as Indigenous Protected Areas (IPAs).

With respect to the fourth aspect, addressing intergenerational and intragenerational equity, Langton et al. (2014) found that the declaration of IPAs and the provision of training and capacity building for IPA managers and annual financial assistance have in many instances had the effect of empowering communities and providing significant environmental, economic, social, and cultural benefits, not only for current recognized holders of land and water titles but also their children and grandchildren. Land management activities have included tourism management, visitor interpretative services, weed and feral animal management, and land rehabilitation.

With respect to the fifth aspect, common but differentiated responsibilities such proactive engagement between Indigenous customary practices and the interests of the nation-state of Australia have also seen even more "localized decision-making"

occur at the State/Territory government and local council levels. Indigenous landowners have also begun entering conservation agreements with state conservation agencies which provide them with additional technical advice, training capacity, and access to powers relating to permits and law enforcement on their land. They are also building relationships with other state natural resource management agencies and NGOs, establishing partnerships, and participating in joint projects and other activities which both attract additional funding and expand the capacities of landowners to pursue their land management objectives. In some cases, Indigenous groups are creating arrangements where other bodies such mining and tourism companies with interests in the region contribute funds to enable the management of IPAs and surrounding Indigenous lands.

6.3 Conclusion

In conclusion, the above discussion has examined the potential for teaching about the complex intersection of colonial, Indigenous, and environmental land and water management to help students to learn how to negotiate what are becoming increasingly contested boundary and ownership issues in land and water education and to develop their understanding of concepts such as relationality and interdependence.

I would argue that *the allodial principle* contains the conceptual sophistication needed to move forward but that specialist environmental, Indigenous, and legal academics, teacher educators, and teachers generally lack the skills and knowledge to do so. It is therefore to education and the leadership role of such educators and teachers that I now turn in this final section to contribute to thinking about the imperative for them to educate in more innovative ways to teach their students to be able to critically assess the claims and counterclaims of nation-states, Indigenous Peoples, international environmental mechanisms, conservationist oppositions, farmers, and big and small industry all of which are making claims to exclusivity, title, and rights to our precious common assets of land and water.

References

Battiste, M., & Henderson, J. Y. (2000). *Protecting indigenous knowledge and heritage: A global challenge*. Saskatoon, Canada: Purich.

FAO, Food and Agriculture Organisation. (2011). *The state of the world's land and water resources for food and agriculture—Managing systems at risk*. Rome, Italy; London, UK: Food and Agriculture Organization of the United Nations and Earthscan.

Hey, E. (2016). *Advanced introduction to International Environmental Law*. Cheltenham, UK; Northhampton, MA, USA: Edward Elgar Publishing.

Langton, M., & Ma Rhea, Z. (2003). *Traditional lifestyles and biodiversity use regional report: Australia, Asia and the Middle East*. Montreal: Convention on Biological Diversity.

Langton, M. (2005). *An Aboriginal ontology of being and place: The performance of Aboriginal property relations in the Princess Charlotte Bay area of Eastern Cape York Peninsula, Australia*. Macquarie: PhD, Department of Human Geography (Alma MMS ID: 9973213310802171).

Langton, M., & Frith, A. (2010). Legal personality and Native title corporations: The problem of perpetual succession. In L. Strelein (Ed.), *Dialogue about land justice: Papers from the National native title conferences* (pp. 170–182). Canberra, A.C.T., Australia: Aboriginal Studies Press.

Langton, M., Ma Rhea, Z., & Palmer, L. (2005). Community-oriented protected areas for indigenous peoples and local communities. *Journal of Political Ecology, 12,* 23–49.

Langton, M., Palmer, L., & Ma Rhea, Z. (2014). Community-oriented protected areas for indigenous peoples and local communities: Indigenous protected areas in Australia. In S. Stevens (Ed.), *Indigenous peoples, national parks, and protected areas. A new paradigm linking conservation, culture, and rights* (pp. 84–107). Arizona, USA: University of Arizona Press.

Marx, K. (1857–1861). *Grundrisse der Kritik der Politischen Oekonomie* [*Outlines of the critique of political economy*] (M. Nicolaus, Trans.). New York, USA; Online: Penguin. Reprint, Marxist Internet Archives.

Morishima, Akio. (2007). Challenges of environmental law—environmental issues and their implications to jurisprudence. In N. J. Chalifour, P. Kameri-Mbote, L. H. Lye, & J. R. Nolon (Eds.), *Land use law for sustainable development* (pp. 6–26). New York, USA: Cambridge University Press.

Smyth, D., & Sutherland, J. (1996). *Indigenous protected areas: Conservation partnerships with indigenous landholders*. Canberra, ACT, Australia: Environment Australia.

Sutton, P., & National Native Title Tribunal NNTT. (1998). *Native title and the descent of rights*. Perth, WA, Australia: National Native Title Tribunal.

UNEP, United Nations Environment Program. (1992). Rio 21: Report of the United Nations conference on the human environment. In *United Nations Conference on Environment and Development*, Rio de Janeiro. June 3–14, 1992.

United Nations. (2008). Declaration on the rights of indigenous peoples [UNDRIPs] (Online).

Chapter 7
Alod Pedagogy in Land and Water Education

Abstract This concluding chapter theorizes the implication for land and water education if the *allodial principle* is taken as a foundational pedagogical approach and the ideas to be found in pedagogical content *knowing* about land and water. It examines how we humans might move forward from our colonially inherited, unsustainable impasse, to consider land and water from four pedagogical standpoints. I examine these as possible conceptual departure points for specialist environmental, Indigenous, and legal academics, teacher educators, and teachers: knowledge-based, place-based, and responsibility-focused approaches to land and water education. The final section will return to *alod pedagogy* as a critical title-based approach that is intrinsically embedded in relationality and interdependence.

Keywords Alod pedagogy · Allodial principle · Land education
Water education · Knowledge-based education · Place-based education
Responsibility-focused · Critical, place-based pedagogy · Relationality
Interdependence

7.1 Introduction

This concluding chapter theorizes the potential for pedagogical leadership in land and water education if the *allodial principle* is taken as a foundational pedagogical approach, guiding curricula vision and pedagogical content knowledge about land and water. Consideration of the best ways to teach about ecology, environment, Indigenous rights, and the values and attitudes associate with land and water are now at the forefront of teacher education and other courses involved in the education of ecologists, lawyers, archeologists, biologists, engineers, land surveyors, and an array of associated professions whose work determines access to, and use of, land and water resources. Mainstream education systems across the world are also trying to find ways to help students to become more ecologically conscious. In

Z. Ma Rhea, *Land and Water Education and the Allodial Principle*,
SpringerBriefs in Education, https://doi.org/10.1007/978-981-10-7600-8_7

Russia, Biriukova (2005) examines attempts to develop "ecological consciousness". Of general education, she observes that:

> … in spite of a vast legal base, ecological education in the schools is not mandatory, inasmuch as the school discipline "Ecology" is not included in the federal component of the Basic Syllabus of the State General Educational Standards; instead, it is subject to regional jurisdiction. The situation is made worse by the absence of a unified approach to the implementation of ecological education in general education institutions. On the whole, it is sporadic, consisting of individual, poorly coordinated parts; the ecologization of the teaching and upbringing process is implemented on the basis of scattered courses, modules, and blocks. There is no coordination and continuity on the different levels. However, these problems do not diminish the vital importance of ecological education in the schools (Biriukova 2005, 39).

In the United States, Smith (2010, 47) explains the need to shift the pedagogical focus of environmental education work in universities, saying:

> I've been teaching a graduate course entitled Envisioning a Sustainable Society since 1996 that seeks to explore the possible dimensions of this transformation. Designed for future teachers, educational leaders, and counselors, the course focuses on the implications of contemporary environmental and social crises for people in schools and counseling centers and the role they might play in addressing these issues. The course considers technological changes that support the creation of a more earth-friendly and just society but focuses primarily on cultural and attitudinal shifts needed to reduce humanity's footprint on the planet and to distribute its limited resources more equitably.

There are now slowly emerging some studies about how preservice teachers, for example, develop PCK about environmental education. Burke and Cutter-Mackenzie (2010, 311) provide an insight into the work of repositioning an Environmental Education unit in a Primary teacher education course in Australia. They explain that:

> Students undertake this semester-long unit in the first year of their degree program. The unit is experientially driven and has replaced an environmental science unit devoted to an introduction to Australian ecology. The rationale for moving away from a traditional environmental science focus was to resituate the students' learning in a social-ecological framework pedagogically informed by experiential education principles. Thus, the reconceptualized unit starts from the view that personal positioning and the experience of the subject matter under study are crucial for learning to occur and accrue.

In Turkey, Çalik and Aytar focused their research preservice Primary teachers' "knowledge of curriculum, students" learning difficulties, instructional strategies and assessment before and after the teaching practice in a unit about human impacts on the environment (Çalik and Aytar 2013, 1601). In both cases, the authors assume that the teacher educator has the necessary "environmental consciousness" proposed by Biriukova. But as Biriukova observes:

> Those who work in higher education have pointed out the less-than-perfect pedagogical technologies of ecological education. The majority of schoolteachers reduce issues of ecological education to nothing more than the superficial practice of informing their students about the problems of the ecology and environmental protection that are emerging today; they have not fully mastered the method of the integral process of ecological education, and the ecologically oriented measures are very often sporadic, Expanding the

> range of pedagogical activity requires improving the system of upbringing work in the higher pedagogical educational institutions. All four areas of the standards of pedagogical education—general culture, medical and biological, psychological and pedagogical, and specialized areas—ought to be ecologized without regard to the subject specialization (Biriukova 2005, 43–44).

Beyond the problem posed by Biriukova, Moroye (2005) argues that a focus on how we teach about the environment is not only for the benefit of the environment but also for education itself. She argues that ecological considerations could shape our engagement with the conceptualization of pedagogy and curriculum:

> I believe that as long as we continue to argue that environmental education primarily benefits the environment, it will have a limited place in the schools. We must make environmental education about human beings and about children, not just about the environment. Are there ecological practices that enhance all learning, not just that of earth-centered/environmental learning? (Moroye 2005, 136)

In addition to the above considerations about how specialist environmental, Indigenous, and legal academics, teacher educators, and teachers might develop their ecological consciousness and indeed their pedagogical content knowledge of environmental matters to do with land and water education, this monograph adds a layer of complexity by interrogating how land and water have come to be viewed in nations such as Australia as a consequence of English colonization. I have shown that with territorial colonization came legal imposition of English laws and rules to govern access to, use of and disposal of land and water through a complex system of titles. In bringing these perspectives together, I hope to have provided some pointers to teacher educators and teachers, amongst others, about how to start including other views of land and water beyond the usual normative assumptions.

My analysis is underpinned by the acknowledgment that Australian Indigenous Peoples have never ceded their claim to sovereignty over their land and water resources. Their estates were forcibly taken from them through a declaration by the English Crown of sovereign domain. The application of English land law provides a key to rethinking how we teach about and understand, the lands and waterways that surround us. As Pearson (1997, 150) so wryly observed:

> Of all the miserable cargo that ever left the shores of England for the Antipodes, there are three I celebrate as amongst the finest imports: that sublime game cricket, Earl Grey's tea, and the common law of England.

In Australia, with its government having endorsed UNDRIPs, it is now necessary for all those in public service to be educated about the complex interplay of land and water management for matters of justice for Indigenous Australians and also to enable negotiation among all Australians about a sustainable approach to the use and care of our land and water resources employing such lenses as relationality and interdependence. All these future hopes rest in a change in the way that land and water education occur in schools and universities.

In reflection on the Bicentennial "celebration" of England claiming Terra Australia as its own, Snow and Arenovic (1988) captured something of the

importance of this matter for "Aboriginal-white relations" and the pivotal role played by teachers in schools across Australia, saying:

> With the Bicentennial on our doorstep, it is crucial that teachers possess some understanding of the issue of land rights and the debate which will undoubtedly occur throughout 1988. Such debate may at best become an issue raised in classroom discussion or at worst jeopardize Aboriginal-white relations in their own schools. This paper seeks to highlight some of the critical points necessary for an understanding of the basic issues involved in land rights in the specific context of Aboriginal-white relations.

This final chapter now moves into consideration of contemporary challenges facing Australian specialist environmental, Indigenous, and legal academics, teacher educators, and teachers, and others trying to move forward from such a colonially inherited impasse, to undertake a paradigmatic shift in how we think about land and water and how this might influence the development of our pedagogical content *knowing*. An insistent challenge for educators and teachers is to plan a lesson from a different beginning. The pressure to rely on past learning and to simply reproduce it in the classroom becomes increasingly likely when professional course, in particular, are pressured by performance metrics that reward students reproducing the status-quo.

Disrupting the colonial framing of land and water that I have discussed in detail in previous chapters, I here want to foreground Indigenous matters in the examination of the broader challenge of land and water education. To do this, I will consider four standpoints as possible pointers to the inclusion of concepts of relationality and interdependence such as are found in the *allodial principle*: knowledge-based, place-based, and responsibility-focused as departures for teacher educators and teachers in development of their pedagogical content knowledge. The final section will return to *alod* as a critical title-based approach to land and water education.

7.2 Knowledge-Based PCK: The Authority to Speak for "Country"

Indigenous Peoples are the knowledge holders of ancestral understandings of land and water in the places where they have authority. Indigenous academics in schools and universities have begun to describe their approach to understanding Indigenous perspectives on land and water as "Land Pedagogies" and their close parallel "Land-based Pedagogies". These pedagogies are only able to be taught by recognized knowledge holder, hence my view that they should be differentiated as "Knowledge-based" pedagogies. Such knowledge-based pedagogies can be put forward in the mainstream formal education systems of the colonized world because nation-states have recognized Indigenous Peoples as having *sui generis* rights as discussed in previous sections.

There are many examples where a classroom teacher or teacher educator will bring in an Indigenous person to give a "special" lesson or talk. Unfortunately, given the ignorance of many teachers and teacher educators, it is commonly the case that they do not understand the importance of inviting an Aboriginal person with authority to speak about Country; in the minds of most nonindigenous people any Indigenous person will do to tick this box. It must be noted that not all Indigenous people have authority to speak about a particular geolocation because they do not have the knowledge that would give them such authority. Nonindigenous people have commonly made the mistake of assuming that all Indigenous people can speak about all matters to do with Indigenous lifeways, histories, languages, and cultures. In the general sense it might be arguable that this is so, but in the particular sense discussed here, the right to speak about land and water are specific to recognized Traditional Owners of specific places and only those recognized by their clan have the authority to speak about these matters in their specificity. In the rarer times when the appropriate knowledge holder has agreed to come into university and school classrooms to teach about Country, the knowledge-holder does the translation of her or his knowledge into these situations, making a range of pedagogical and content decisions appropriate to the context.

In a specific example of such knowledge-based authority, the recognized Arweet Elder of the land and waterways that surround me as I write this book says:

> … My name is Caroline Briggs. I am the recognized elder of the Boonwurrung as the elder spokesperson and I am very privileged to be able to give voice to my ancestors. You are welcomed in the language of the people of this landscape…Wominjeka mirambeek beek boon wurrung nairm derp bordupren uther willam (Briggs 2010; Port Phillip 2013).

In this example from a city now known as Melbourne, Australia, there are elements of Brigg's narrative that speak back to the discussions found in earlier sections of this monograph. First Arweet Caroline Briggs gives her clan association as being of the Yalukit Willam clan of the Boonwurrung language speaking group. She then gives her role within her clan as being recognized as an *Arweet* Elder (one with knowledge) and one having the authority to speak. She then gives us, the listeners, a welcome to the lands and waterways of her people in both English and Boonwurrung languages (please refer to the YouTube video link in the references to hear this *Wominjeka* shared by Caroline Briggs [Briggs 2010]).[1] In her *Wominjeka* Welcome to Country, she is asserting both her relationship with her Country and also the interdependent nature of this relationship (Fig. 7.1).

The markers of her authority are her Arweet Elder status, that she has recognition by her clan as having authority, her naming of the bay surrounding what is now known as Melbourne by its Yalukit Willam clan name as Nairm, and speaking the Boonwurrung language of her ancestors. This claim is also recognized by the

[1]This map is reproduced with permission of City of Port Philip and is a broad representation of boundaries. It is not intended to be used for Native Title purposes but rather as an indication of languages, names for places, and the knowledge held by the Yalukit Willam clan of the Boon Wurrung nation prior to British colonization.

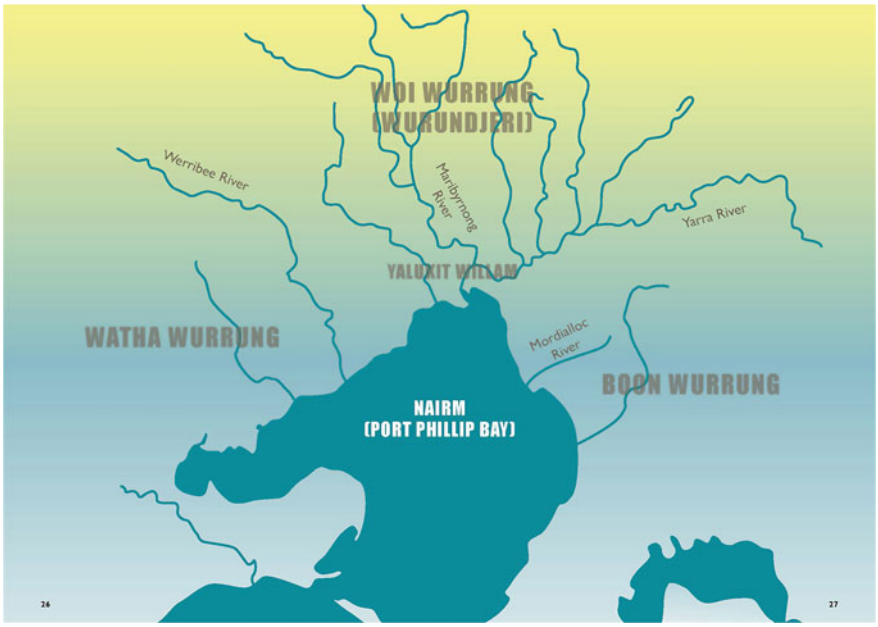


Fig. 7.1 Map of Nairm (Port Phillip Bay)

City of Port Phillip Bay and is included in their "Indigenous Protocols" brochure (reproduced here with permission). Such markers of knowledge and authority to speak, while commonly recognized in the protocols of Indigenous Peoples across the world, are still unfamiliar to the majority of nonindigenous descendants of colonizers and immigrants. These markers are the foundation of the right to allodial entitlement and form the foundation of alod pedagogy to be discussed in the final section.

Most academics and teacher educators in colonized nations such as Australia come from colonizer or immigrant stock. Ancestrally they hold knowledge of lands far away, bringing their stories and views from those places. Even teachers whose ancestors have been here for five generations still trace their knowledge of the world back to their British or European ancestry. Descendants of more recently arrived immigrants from such regions of the world as Asia, Africa, and Oceania bring with them their knowledge of such places too, bringing diversity to the classroom, about land and water but not necessarily finding it any easier to connect to Indigenous people and their knowledge of the landmass once known as Terra Australia and the waterways that cross and surround it. Those producing knowledge and teaching knowledge about land and waterways and its resources, Australian specialist environmental, Indigenous, and legal academics, teacher educators, and teachers sometimes struggle to understand the import of the Indigenous Welcome to Country, spoken with authority and knowledge, because the fundamental *sui generis* rights of Indigenous Peoples are not yet recognized in many previously

colonized places, especially in school and university classrooms. Nonindigenous understanding of the lands and waters that surround them are enframed by colonizer and immigrant views that have come from other places.

In her analysis of the ontology of property in the Pama culture, Langton (2005, 289) explains that:

> To be in one's own place is to have originated in that place and to share the essence of the creative Being, existing and existent in the "everywhen" of that place (e.g., Stanner 1966). One returns to that place just as the ancestors did, rejoining this spatial, temporal, sentient force. One's self is spatialized and temporalized in this Pama ontology of place.

This is something that most nonindigenous people barely glimpse as they pass their days being what I describe as "surface dwellers", having no experience of the connection between the human and the sacred in the sentient force of a place. Until relatively recently, this was not considered to be a problem. Until the *sui generis* rights of Indigenous Peoples were formally recognized by nation-states such as Australia (United Nations 2008), the rights to land and water, the need to preserve the knowledge pertaining to those rights for future generations, and the need to educate the wider population about Indigenous rights to, and understandings of, land and water were not considered a priority. In the intervening 10 years, Indigenous scholars, and some Australian specialist environmental, Indigenous, and legal academics, teacher educators, and teachers have begun to formalize and communicate their knowledge into university courses, school classrooms, and early-years centers across the world. Events such as the *World Indigenous People's Conference: Education* (WIPCE 2017) and organizations such as the *World Indigenous Higher Education Consortium* (WINHEC 2017) provide a focus for these developments, where the authority of knowledge holders of traditional estates comes to the fore and their ways of choosing to develop pedagogies for learning about their lands and waterways are being more widely discussed and shared.

Indigenous scholars in North America such as Betasamosake Simpson regard their approach of "Land as Pedagogy" as a fundamental expression of Indigenous "political cultures, governance, and nation-building" (Simpson 2014, 1). Ballantyne (2014) also points to the importance of the "knowledge-base" for the work done by Indigenous educators to provide a restitution for the claims to land and water being asserted by Indigenous Peoples. She argues that in taking a land-based approach, she is:

> …mobilizing land-based knowledge and learning within a comprehensive strategy of resistance to settler capital. Through the production of a knowledge economy intervention, the pedagogical and political strategies of Dechinta are explored as a proven example of multi-scalar transformational decolonization that has far-reaching personal, collective, institutional, political and economic impacts.

Ndé Indigenous knowledge holder Tamez (2012) explains of her work that she:

> …foregrounds Ndé memory, knowledge, rights, and remembering. Current-day forms of violence, juridical dispossession, and hostile removals targeting Ndé in Texas and north-eastern Mexico—also Ndé traditional territory—signify the entrenchment of settler colonialism.

From Oceania, Meyer (2014) explains her approach to land education in Hawaii. At the foundation of the work is her authority as an ancestral knowledge holder, with the right to speak and teach about Hawaiian food sovereignty, land education, and Hawaiian rights to land and water. First and foremost, her focus is the education of the children of traditional knowledge holders into their ancestral rights to land and water in order to preserve and maintain the lines of authority that are required to be a knowledge holder of the future.

These examples show the central importance of those Wise Elders with the recognized ancestral right to hold knowledge of the land and waterways are first developing pedagogies which blend old and new in order to teach their children. They are also developing culturally appropriate curriculum resources for their children and the wider community in order to ensure the preservation of the basis of their claim—knowledge—to ensure the ability of future generations of Indigenous People to be able to continue to make claim to the right to those lands and waterways. These examples also provide insights into how Indigenous knowledge holders are recognized as the rightful people to teach with authority about such matters as their traditional lands and waters.

The challenge for educators who are not descended from the lands and waterways on which they teach is that they do not commonly have access to professional development from Indigenous people who are the expert knowledge holders. In the absence of this sort of professional development, they have flailed around, often drawing on curriculum resources from distant places and having little confidence in their locally derived pedagogical content knowledge. The next section moves to examine what is being promoted as "Place-based education" that has sought to resolve this dilemma of nonindigenous people being virtually disconnected from the lands and waterways on which they live.

7.3 Place-Based Pedagogies: Starting "Local"

Place-based education has emerged from multiple concerns facing teacher educators and teachers. The most significant have, arguably, been concern for students who have been stuck in classrooms with teachers relying on chalk and talk pedagogies, concerns about the relevance of curriculum content developed as generically relevant to all students of the world, societal concern for the degradation of the environment, and more recently the need to acknowledge the *sui generis* rights of Indigenous Peoples. There are many places in the modern globalized university and school curricula where these matters come to the fore. Most obviously this occurs in subjects concerned with geography, science, environmental sustainability, and creativity but these concerns have, together, brought to the fore the need for universities and schools to place greater emphasis on what is being called "place-based education" employing "place-based pedagogies".

Bartholomaeus (2013), for example, makes the argument for a more locally relevant curriculum content that supports the promotion of literacy and general

education. She provides a useful summary of the main influences for the development of place-based education (Bartholomaeus 2013, 18) arising from long expressed concerns of foundational education theorists such as Dewey and Piaget that student learning is more satisfying if the student can find a connection with their life and surroundings. Blenkinsop (2012), like Bartholomaeus (2013), provides a useful historical analysis of the development of environmental education, citing three types of influence on its development: first, the Platonian impetus that suggests that if people have the knowledge to do good than they will do good; second, the impetus given in response to the call for action coming from concerned environmental activists in the early 1960s; and third, the recognition that only with a fundamental change of paradigm toward one that is ecologically grounded will all life on earth be able to avoid the inevitable ecological disasters being caused by humanity. He makes the case for the need to change values in the example he provides and gives some insight into the processes that one school has undertaken to achieve that goal. Smith (2002) raises a more general concern that students need to learn to be where they are. While he makes an important point and provides some ideas of how to achieve this, his suggestions about engagement are somewhat superficial and naïve in their understanding of land and water. His idea of "being where you are" is limited to a narrow understanding of what that can potentially mean. Molyneux and Tyler (2014) provide an example from India, another previously colonized country. The approach to "place-based" education in their example raises the complexities of cross-cultural education service provision, focusing on inclusive education. Their approach found that using their approach to "place-based" education in their teaching:

> …honoured the children's lives and the funds of linguistic, cultural, and experiential knowledge they brought to their learning. It avoided a deficit view of children living in poverty, instead seeing the local community and the children's interests and lifeworlds as catalysts for learning (Molyneux and Tyler 2014, 884).

This desire of first world educators to engage in the "places" of their students has led to some important and interesting pedagogies beginning to emerge. Molyneux and Tyler (2014, 885) refer to this as "third space pedagogies", and their work provides an interesting and important evolution of the idea of "place-based" education.

7.3.1 Environmental-, Sustainability-, and Responsibility-Based Pedagogical Considerations

Within the field of "place-based" education and its emerging pedagogies, environmental, sustainability, and responsibility-based approaches to the problem of understanding "place" have been trialed. Global, societal concerns about environmental degradation together with the belief that humans must take responsibility for stopping its destructive activities, caused national governments to demand of

teachers and teacher educators that they "do something" in education to teach students about sustainability and greater ecological awareness. Previous attempts at addressing these matters through environmental education were seen to be too narrow and limiting and Sobell (2013) attributes the emerging popularity of "place-based" education to be found in is its capacity to speak to the perceived limitations of "environmental education". Sobell (2013, 13) make the argument in this way:

> Place-based education takes us back to basics, but in a broader and more inclusive fashion. Desirable environmental education, or what we're calling place-based education, teaches about both the natural and built environments. The history, folk culture, social problems, economics, and aesthetics of the community and its environment are all on the agenda. In fact, one of the core objectives is to look at how landscape, community infrastructure, watersheds, and cultural traditions all interact and shape each other.

The idea of sustainability education is also important to consider here. Teacher educators and educators are expected to be able to integrate "sustainability" perspectives into their pedagogical approaches and curriculum content as part of the new national Australian Curriculum. Sustainability has been identified as one of three cross-curriculum priorities by the Australian government. Such a focus is being required, with little or no concurrent professional guidance, as global and national debates about such issues as climate change, sustainable energy sources, the importance of clean water and air, how to stop environmental degradation, how to deal with massive human migration because of climate change swirl around teachers and teacher educators. It is interesting that to deal with such potentially overwhelming issues, "place-based" pedagogy has become a very useful handle for teachers. Globally pressing issues can be made intelligible to students, and student teachers, though the pedagogical approach made popular by political activists: "Think global, act local". Bringing sometimes overwhelming issues into local focus can support students in the navigation of the complexity of these issues, providing important connections to their lives together with supporting them to connect to their local community, and to the context of their formal learning needs such as literacy, numeracy, and critical thinking skills development.

Important, too, have been initiatives to use "place-based" pedagogies to help students connect their predominantly metropolitan lives with the lives of farmers and others living in rural communities. Santelmann et al. (2011) provide an example of this work connecting land management issues facing a group of landowners with a curriculum that was examining local geography and farm and forest enterprises giving the students what the authors described as a "sense of place". While the importance of these innovative pedagogies should not be discounted, more research is needed to examine what are the learning outcomes over the longer term and how teacher educators and teachers are engaging with the critical aspects of such work where the competing claims to land and water are played out in such global contestations as Standing Rock. How are students to understand the argument between the rural "landowners" and recognized

"Traditional Owners"? Can they identify spaces of overlap between potentially competing claims?

Recent work by Graham (2011, 262–265) brings attention to the concept of "responsibility" as an important aspect of caring for the earth. Working in the field of Earth jurisprudence, her work reminds educators that the actions of humans impact on all sentient life and that there are responsibilities that people need to learn in order that they begin to act responsibly. Similar to the Platonian view, her work fails to address what happens if people who believe they own land and water also believe it is their right to do with it as they choose (*ius abutendi*). The pedagogical challenge here cannot be underestimated.

It is also interesting that in all these examples, the focus has stayed firmly within the ecological perspective about "place" without referring to anything that might be construed as engaging with the complex political dimensions of "place": who owns it, who has access to it, who has the right of use of its resources, and who has the right to sell it? Without these dimensions, the possibility of a deimperialized, postcolonial pedagogy of "place" and the recognition of Indigenous "entitlement" become hard to achieve. Sagoff (2007, Chap. 8) offers important insights into the concept of "place" in environmental ethics. In education, certainly, Sobell (2013, 17) observes that:

> What's emerging here is a "pedagogy of place," a theoretical framework that emphasizes the necessary interpenetration of school, community, and environment, whether it's urban, suburban, or rural.

This emergence is important but limited unless it can embrace the critical elements of "place" as will be discussed in the next section.

7.4 Critical, Place-Based Pedagogies

A complex interaction of Indigenous and nonindigenous pedagogies are emerging in the field of "critical, place-based pedagogies" as Indigenous expert knowledge holders, Australian specialist environmental, Indigenous, and legal academics, teacher educators, and teachers are turning their attention to how universities, teachers colleges, and schools are teaching about such important matters as land and water. Great care needs now to be taken because the level of trust now required to negotiate this complexity remains fragile. For example, research by authors such as Friedel (2011) highlights the complex interface where young Indigenous knowledge holders are confronted in western classrooms with information about their lands and waterways that are in conflict with what they are being taught by their knowledgeable, authoritative Elders.

Persuasive examples of such cross-culturally conflicting views have encouraged academics and teachers who approach their pedagogy through such lenses as postcolonial, antiracist, and critical race theory to start to develop critical place-based pedagogies that acknowledge the *sui generis* rights of Indigenous

Peoples. New work in this field reveals an important shift where nonindigenous scholars have taken on the challenge from Indigenous scholars to address "place" and such struggles as those over land and water rights as fundamental to any new pedagogy of place (Payne 2018; Ma Rhea 2018).

Foundational theoretical work by Gruenewald (2003a), for example, demonstrates efforts to re-think land and water education using a framework for place-conscious education. He (2003a, 3) brings together the work of "critical pedagogy" to "place-based education" arguing that while critical pedagogy has a strong and extensive tradition of scholarship, the practice and purposes of "place-based education" can:

> …be connected to experiential learning, contextual learning, problem-based learning, constructivism, outdoor education, indigenous education, environmental and ecological education, bioregional education, democratic education, multicultural education, community-based education, critical pedagogy itself, as well as other approaches that are concerned with context and the value of learning from and nurturing specific places, communities, or regions.

More recently, analysis of the epistemological underpinnings of "place-based education" by Seawright (2014, 569–570) challenges academics and teachers using place-based education pedagogies to interrogate their "dominant understanding of place". He argues that the dominant view "is a product of how the settler-self is constituted within white settler epistemology". Ultimately, he believes that:

> An effective place-based education not only reshapes abstract understandings of nature and land but provides a pathway for the tearing down and reconstruction of oppressive ontological relationships with the natural world.

There are other challenges posed by scholars in this field. For example, the Reinertsen (2016) *Becoming Earth: A Posthuman turn in educational discourse collapsing nature/culture divides* collection, asks educators and students to consider the rights and perspectives of the nonhuman in a post-human world, also incorporating perspectives from Indigenous and other marginalized peoples about their approaches to these matters. While theoretically profound and heartfelt, such an approach relies on the willingness of teachers, academics, and students to change their views, something also noted by Gruenewald (2003b), McInerney et al. (2011) and Seawright (2014).

This work and the growing body of work by other scholars highlights an emerging practice of nonindigenous teachers and teacher educators being invited to learn from Indigenous knowledge holders. The reasons for this are complex. As discussed previously, many Indigenous communities globally are keen to focus their energies on ensuring that their children stay grounded in their ancestral knowledge of their Country, their place of belonging, and the history, language, rights, and responsibilities they have toward those places. In some cases, and in some places, Indigenous people have been open to teaching aspects of their knowledge of the local to nonindigenous academics and teachers, to ensure that there is an accurate curriculum that recognizes Indigenous rights to that place. A common thread of narratives about such work highlights the importance of trust,

of sincerity, of humbleness and that the task for nonindigenous educators is to acknowledge and learn from Indigenous knowledge holders, not to take over their knowledge and try to reproduce it as their own. Even though it is something that is ontologically, epistemologically, and axiologically impossible, many Indigenous educators tell of nonindigenous people trying to copy their pedagogies in their classrooms as a way of ticking boxes such as: "I have incorporated Indigenous perspectives in my XYZ lesson".

Scholars such as Ngai and Koehn (2010, 604) employ a mix of pedagogical approaches to their work. Framing it as intercultural work, they employ some of the tools now familiar to cross-cultural education while also working with Native American Indian expert knowledge holders, explaining that:

> The power of the place-based intercultural approach is that K-5 students can acquire cultural knowledge, break stereotypes, and develop a new appreciation for, and interest in, diverse peoples and issues by directly experiencing the local context in which diversity resides. Connecting face-to-face with different local people and situations is meaningful to young learners. At L&C, teachers and students learned from five Wise Elders and eight tribal members who came to classrooms regularly to share stories based on an indigenous worldview, to teach what they learned from their ancestors, to speak in their Native language, to bring humor and wisdom, to open their hearts for new relationships that heal old wounds, and to bridge current gaps between Indians and Whites.

Nonindigenous scholars such as Irlbacher-Fox (2014) uses her position in a university to negotiate a "land-based education" approach. She adopts a somewhat translational approach where she, as a non-knowledge holder, describes her journey to being recognized as someone trusted to communicate Dene understandings of the world to her students, saying that:

> Drawing on examples of land-based education experiences and working with Dene Elders, the author analyzes ways in which settler colonialism manifests and can be explored through actions, self-reflection, and relationships. The author draws on the Dene understanding as co-existence as a basis for understanding the significance and implications of self-decolonization for ensuring respectful relationships between Indigenous and non*i*ndigenous people (Irlbacher-Fox 2014, 145).

A special edition of *International Education Journal: Comparative Perspectives* (McLaughlin and Ma Rhea 2013) brought together scholars from Africa, Canada, Japan, Australia, and Oceania, to examine this space of intersection between Indigenous rights and the education of professionals in universities. The intention of this collection is summarized by McLaughlin (2013, 261) when she writes that:

> Educating future culturally competent professionals to work with Indigenous peoples and communities, and other traditional and formerly colonized peoples across the globe places an expectation on those who educate to demonstrate what it means to be culturally competent. Indigenous knowledges and perspectives provide us with the framework of what it is to know; it is our ethical and professional responsibility to know.

7.5 Alod Pedagogy: A Critical, Title-Based Pedagogical Approach

The concluding view arising from this monograph is that the ancient *allodial principle* provides specialist environmental, Indigenous, and legal academics, teacher educators, and teachers with a pedagogical device to interrupt and interrogate the practices that are being used to silence marginalized voices in ecological education and to subsume Indigenous Peoples' rights into neocolonial epistemological framings. Alod pedagogy enables an approach to pedagogical content knowing that encourages educators to foreground the relationality and interdependence of all sentient beings on this planet, to be confident to address the *sui generis* rights of Indigenous Peoples and to help future generations to develop their ecological consciousness.

As was discussed in Chap. 2, the *allodial principle* rests on the concept of "lands which are the absolute property of their owner without being obliged to pay service or acknowledgment whatever to a superior lord" (Encyclopedia Britannica 1768/1968, 123). Now recognized in some national legal frameworks, the views of Australia's Indigenous Peoples would certainly reflect the *allodial principle* and the intentions of the *alod* title that was given to those with a claim to *alod* in ancient times in England, Scotland, and parts of Europe. The remanent legal artifact, the *allodial principle*, is recognized as a form of title. The particularity of *quirtium dominium* is easily seen in *aborigineum dominium*.

In this last section, I want to consider how we might begin to educate about land and water in ways that reflect this complexity of understanding and acknowledge Indigenous claims to the recognition of their unextinguished title to the lands and waterways of Australia. In consideration of the above discussion, it is clear that only particular Indigenous people of a particular place have the authority to speak of that Country, of its land and waterways. The knowledge that has been entrusted to them through their ancestral connections is *their* responsibility to preserve and protect. In the first instance, this knowledge must continue to be passed on to rightful inheritors. Because Indigenous rights have to greater or lesser extent now been recognized across the world that was previously territorially colonized by the English and by other European powers, Indigenous Peoples' rights to their lands and waters are subject to much discussion and concern.

I argue in this monograph that the *allodial principle* provides a disruption to settler colonial assertions about land and water, by using a critical, title-based approach. What happens to our pedagogical approach, our choice of curriculum materials, and our methods of assessment when we begin to speak of the lands and waters where we live as being "the absolute property of their owners"? As has been argued in previous chapters, the foundational premise of English land laws, transposed to colonized lands and waterways was that there is no possibility of sovereign or absolute ownership other than the claim of the English Crown. Given the fundamental rethinking of the colonial in this time "beyond the colonial", how can we develop deimperialized, postcolonial pedagogies that do justice to the

reemergence of Indigenous claims to their lands and waterways, the existing title rights of farmers, miners, and fisherfolk, and the contemporary food security needs of national populations?

I have suggested that by recognizing the *allodial* "en*title*ment" of Indigenous Peoples, nonindigenous teachers and teacher educators could begin to bridge the pedagogical gap in their professional skills, knowledge, and understanding of land and water in colonized places by employing alod pedagogy as a form of critical, title-based pedagogy. I am calling this "title-based" rather than "place-based" in order to emphasize that geolocations are in relation to, and interdependent with, humans and other sentient beings and that ancient customary laws and more recent colonial legal framings are being contested over "en*title*ments" rather than the "places" in the abstract. The right to exclusive access, use, and abuse forms the heart of these negotiations.

7.6 Conclusion

Langton (1998) argued persuasively that what nonindigenous Australians often regard as "wild", and "natural" are in fact landscapes that have been culturally managed and shaped by Australian Aboriginal and Torres Strait Islander people since time immemorial (see also, Pascoe 2014). Education in both mainstream and Indigenous-controlled systems is considered vital for preservation and recognition efforts of the entitlements of First Peoples but as yet little is being discussed about what pedagogies might further such aims. Education is also charged with educating students for an ecologically sustainable future.

In this monograph, I have asked a series of "What if?" question to specialist environmental, Indigenous, and legal academics, teacher educators, and teachers. They are deeply pedagogical questions. In general, I have asked questions about how authoritative Indigenous knowledge holders are brought into mainstream education systems and how their knowledge of their estates is brought into teaching and learning about land and water in the global classroom.

For educators who are persuaded by the "place-based" approach, what causes them to begin to question the foundational aspects of their pedagogy such that they might ask: "Whose land? Whose water?" To simply mobilize an argument that children are too classroom-bound and need to be outside to learn, this minimalist pedagogy can easily reinforce into a colonial mindset that what students see is in its "natural" form, untouched by human hand and therefore "wild".

Critical place-based pedagogues attempt to ameliorate colonial, "romantic savage" views to some extent by ensuring that they have been taught by knowledgeable Indigenous people and have been given explicit permission about what information is appropriate to teach to students about local land and water matters. Even so, most specialist environmental, Indigenous, and legal academics, teacher educators, and teachers struggle to speak with authority in their classes because they lack the fundamental mastery of this subject.

Those educators who take a Gaian or Earth jurisprudence approach to teaching about land and water might include Indigenous perspectives on earth conservancy but may not acknowledge that the final authority on matters of land and water rests with emplaced, alodially titled knowledge holders. The entitled claims of Indigenous people can easily be relativized in earth conservancy approaches through the soft lens of "sustainability" and appeal to rights to land and water can continue to be articulated through the normative jural lens of colonially inherited property laws.

Land and water are not property per se. They have been reduced to this form. Indigenous Peoples' entitlement and the power of the *allodial principle* to recognize this potentiality to pedagogically disrupt, allows specialist environmental, Indigenous, and legal academics, teacher educators, and teachers to plan and establish a teaching and learning environment that can engage with what Langton (2005, 431–432) so profoundly prosecutes when she writes:

> The object of property in Aboriginal society is not the land (or water, etc.) alone, but the sacred source of one's own affiliation to the land. This ontological phrasing brings the idea of property relations into the social realm before the idea of property can be enunciated. It is from the sacred genealogy of the relationship itself that the property-ness of the spirit-person-place emerges. That relationship implies, in Aboriginal society, as previously explained, that the authority of the elder inscribes the relationship as legitimate. This second feature of the ontology of Aboriginal property brings the connotations of legitimacy to bear as forms of governance. Thus, it would be a sociological deceit to write of Aboriginal land tenure as property relations in the absence of some reference to the domain of sacred and human governance of places.

To this end, this monograph offers, I hope, a critical, title-based pedagogy that I am calling alod pedagogy as a method by which to conceptualize land and water education in classrooms and lecture theaters across the world, enabling the next generation of teachers and their students to examine their relationships with the lands and waterways where they live, their interdependence with these lands, together with higher order negotiating skills. They will need to find urgent local solutions to globally very complicated problems, to respect the *sui generis* claim of Indigenous Peoples, to balance the domains of "sacred and human governance", to understand that *aborigineum dominium* can be justiciable within the concept of sovereign domain, and, ultimately, to embrace the spirit of the *allodial principle* in ways that enable humans to live on the planet less destructively of our precious land and water resources, and with responsibility for our shared future.

References

Ballantyne, E. F. (2014). Dechinta Bush University: Mobilizing a knowledge economy of reciprocity, resurgence, and decolonization. *Decolonization: Indigeneity, Education & Society, 3*(3), 67–85.

Bartholomaeus, P. (2013). Place-based education and the Australian curriculum. *Literacy Learning: The Middle Years, 21*(3), 17–23.

Biriukova, N. A. (2005). The formation of an ecological consciousness. *Russian Education & Society, 47*(12), 34–45. https://doi.org/10.1080/10609393.2005.11056938.

Blenkinsop, S. (2012). Four slogans for cultural change: An evolving place-based, imaginative and ecological learning experience. *Journal of Moral Education, 41*(3), 353–368.

Briggs, C. (2010). *Wominjeka (Welcome to Country)—Caroline Briggs*.

Burke, G., & Cutter-Mackenzie, A. (2010). What's there, what if, what then, and what can we do? An immersive and embodied experience of environment and place through children's literature. *Environmental Education Research, 16*(3–4), 311–330. https://doi.org/10.1080/13504621003715361.

Encyclopaedia Britannica. (1768/1968). *Encyclopaedia Britannica; or, A dictionary of arts and sciences, compiled upon a new plan in which the different sciences and arts are digested into distinct treatises or systems; and the various technical terms, etc., are explained as they occur in the order of the alphabet*. Encyclopaedia Britannica. edited by A society of gentlemen in Scotland. Edinburgh: A. Bell and C. Macfarquhar.

Çalik, M., & Aytar, A. (2013). Investigating prospective primary teachers' pedagogical content knowledge of "effect of human on environment" subject in the process of teaching practice. *Kuram Ve Uygulamada Egitim Bilimleri, 13*(3), 1599–1605.

City of Port Phillip. (2013). Aboriginal and Torres Strait Island protocols framework. In *City of Port Phillip Council*. St Kilda, Victoria: City of Port Phillip.

Friedel, T. L. (2011). Looking for learning in all the wrong places: Urban native youths' cultured response to western-oriented place-based learning. *International Journal of Qualitative Studies in Education, 24*(5), 531–546. https://doi.org/10.1080/09518398.2011.600266.

Graham, N. (2011). Owning the Earth. In P. Burdon (Ed.), *Exploring Wild Law: The philosophy of Earth jurisprudence* (pp. 259–269). Adelaide, South Australia: Wakefield Press.

Gruenewald, D. A. (2003a). The best of both worlds: A critical pedagogy of place. *Educational Researcher, 32*(4), 3–12.

Gruenewald, D. A. (2003b). Foundations of place: A multidisciplinary framework for place-conscious education. *American Educational Research Journal, 40*(3), 619–654.

Irlbacher-Fox, S. (2014). Traditional knowledge, co-existence and co-resistance. *Decolonization: Indigeneity Education & Society, 3*(3), 145–158.

Langton, M. (1998). *Burning questions: Emerging environmental issues for indigenous peoples in Northern Australia*. Darwin, NT: Centre for Indigenous Natural and Cultural Resource Management.

Langton, M. (2005). *An Aboriginal ontology of being and place: The performance of Aboriginal property relations in the Princess Charlotte Bay area of eastern Cape York Peninsula, Australia*. PhD, Department of Human Geography, Macquarie (Alma MMS ID: 9973213310802171).

Ma Rhea, Z. (2018). "Towards an Indigenist, Gaian pedagogy of food: Deimperializing foodscapes in the classroom". *Journal of Environmental Education, 49*(2).

McInerney, P., Smyth, J., & Down, B. (2011). 'Coming to a place near you?' The politics and possibilities of a critical pedagogy of place-based education. *Asia-Pacific Journal of Teacher Education, 39*(1), 3–16. https://doi.org/10.1080/1359866X.2010.540894.

McLaughlin, J. (2013). 'Crack in the pavement': Pedagogy as political and moral practice for educating culturally competent professionals. *International Education Journal: Comparative Perspectives, 12*(1), 249–265.

McLaughlin, J., & Ma Rhea, Z. (2013). Editorial: Global 21st century professionals: Developing capability to work with indigenous and other traditionally-oriented people. *International Education Journal: Comparative Perspectives, 12*(1).

Meyer, M. A. (2014). Hoea Ea: Land education and food sovereignty in Hawaii. *Environmental Education Research, 20*(1), 98–101. https://doi.org/10.1080/13504622.2013.852656.

Molyneux, P., & Tyler, D. (2014). Place-based education and pre-service teachers: A case study from India. *International Journal of Inclusive Education, 18*(9), 877–887. https://doi.org/10.1080/13603116.2013.855265.

Moroye, C. M. (2005). Common ground: An ecological perspective on teaching and learning. *Curriculum and Teaching Dialogue, 7*(1), 123–137.

Ngai, P. B., & Koehn, P. H. (2010). Indigenous studies and intercultural education: The impact of a place-based primary-school program. *Intercultural Education, 21*(6), 597–606. https://doi.org/10.1080/14675986.2010.533039.

Pascoe, B. (2014). *Dark Emu, Black Seeds: Agriculture or accident?*. Broome, WA: Magabala Books.

Payne, P. (2018). Special Edition: Ecopedagogy in Scapes. *Journal of Environmental Education, 49*(2).

Pearson, Noel. (1997). The concept of native title at common law. In G. Yunupingu (Ed.), *Our land is our life, land rights—Past, present and future* (pp. 150–161). St Lucia, Queensland, Australia: University of Queensland Press.

Reinertsen, A. B. (2016). Sustainable eco-justice placemaking. In A. B. Reinertsen (Ed.), *Becoming Earth: A post human turn in educational discourses collapsing nature/culture divides* (pp. 163–175). Rotterdam, Netherlands: Sense Publishers.

Sagoff, M. (2007). *The economy of the earth: Philosophy, law, and the environment*. Cambridge: Cambridge University Press.

Santelmann, M., Gosnell, H., & Meyers, S. M. (2011). Connecting children to the land: Place-based education in the Muddy Creek Watershed, Oregon. *Journal of Geography, 110*(3), 91–106. https://doi.org/10.1080/00221341.2011.534172.

Seawright, G. (2014). Settler traditions of place: Making explicit the epistemological legacy of white supremacy and settler colonialism for place-based education. *Educational Studies, 50*(6), 554–572. https://doi.org/10.1080/00131946.2014.965938.

Simpson, L. B. (2014). Land as pedagogy: Nishnaabeg intelligence and rebellious transformation. *Decolonization: Indigeneity, Education & Society, 3*(3), 1–25.

Smith, G. A. (2002). Place-based education: Learning to be where we are. *Phi Delta Kappan, 83* (8), 584.

Smith, G. (2010). Teaching about sustainability. *Teacher Education Quarterly, 37,* 47.

Snow, D., & Arenovic, R. (1988). Conflicting views on land rights: Towards an understanding of the issues. *Aboriginal Child at School, 16*(1), 45–52.

Sobell, D. (2013). Reconceptualizing environmental education. In *Place-based education: Connecting classrooms and communities*, pp. 13–18. MA, USA: Orion Society.

Tamez, M. (2012). Dáanzho ha'shi 'dał'k'ida', 'áá'áná', 'doo maanaashni': Welcoming 'long ago', 'way back' and 'remember'—as an Ndé decolonization and land recovery process. *InTensions Journal, 6,* 1–23.

United Nations. (2008). *Declaration on the Rights of Indigenous Peoples [UNDRIPs]*. Online.

WINHEC. (2017). *World indigenous higher education consortium*. http://winhec.org/.

WIPCE. (2017). World indigenous people's conference: Education. https://www.facebook.com/groups/8994396179/.