

JUSTICE AT THE EDGE: HEARING THE SOUND OF SILENCE

ABSTRACT

This article examines a novel emerging trend in the access to justice movement. This latest trend is best seen as a counter-wave — or rip current — that seeks to incorporate knowledge and experience found at the periphery of the legal system in order to advance the theory and practice that underpins access to justice. Drawing on recent legal developments pioneered in Aotearoa/New Zealand that grant personhood status to natural objects, we report on the Māori world view that treats natural objects in much the same way as respected family members. This new perspective is indicative of the counter-wave in action and illustrates how legal principles derived from the periphery — in this case rooted in the First Law of the Māori people — are being recognised and incorporated into the mainstream legal system, holding the potential to advance access to justice for First Nations peoples whilst also bringing other benefits to the wider society. Focusing primarily on Australia, Brazil and Canada,

* Professor Emeritus, Flinders University, Honorary Professor of Law at University of Southern Queensland, Adjunct Research Fellow, Law Futures Centre, Griffith University, Australia and Visiting Professor, Department of Law, University of Cyprus (kim.economides@usq.edu.au).

** Lecturer in Law at University of Southern Queensland, Australia (<https://orcid.org/0000-0002-4910-6100> | aaron.timoshanko@usq.edu.au).

*** Post-Doctoral Fellow at the Graduate Program on International Relations ('PPGRI') at Federal University of Bahia ('UFBA') and empirical research consultant for organisations such as Institution for Economic Applied Research ('IPEA'), the Brazilian Ministry of Justice and the United Nations Development Program ('UNDP') (leslie.ferraz@gmail.com).

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our aim is to highlight common signs of receptivity for granting natural objects personhood status, and to show how this converging trend could enrich both the quality and accessibility of justice in these and other jurisdictions.

I INTRODUCTION

The access to justice movement has been described as evolving in cumulative ‘waves’.¹ The wave metaphor is apt as it captures what Mauro Cappelletti referred to as ‘converging trends’ in civil procedure and constitutionalism common to Western society.² Cappelletti’s three waves represent not only the basic idea that legal systems must stay within reach of communities having poor access to justice, but also that we accept ongoing responsibility to identify new approaches and forces that can translate legal ideals connected with equality before the law into reality. However, communities denied access to general legal systems frequently have created their own norms, customs and traditions for resolving disputes, which in some instances predate modern legal systems by centuries. Moreover, these local forms of social organisation and dispute resolution produced by First Nation peoples³

¹ For an account of the Florence Access to Justice Project and its component ‘waves’ see Mauro Cappelletti and Bryant Garth, ‘Access to Justice and the Welfare State: An Introduction’ in Mauro Cappelletti (ed), *Access to Justice and the Welfare State* (Sijthoff, 1981) 1. For a summary of subsequent and latest developments see: ‘Access to Justice – A New Global Survey’, *Global Access to Justice Project* (Web Page) <<http://globalaccesstojustice.com>>.

² Mauro Cappelletti, ‘The Mighty Problem of Judicial Review and the Contribution of Comparative Analysis Symposium: Conference on Comparative Constitutional Law’ (1979) 53(2) *Southern California Law Review* 409, 412; Sabino Cassese, ‘In Praise of Mauro Cappelletti’ (2016) 14(2) *International Journal of Constitutional Law* 443, 446. But see Philip SC Lewis, ‘Comparison and Change in the Study of Legal Professions’ in Richard L Abel and Philip SC Lewis (eds), *Lawyers in Society: Comparative Theories* (University of California Press, 1989). Lewis criticises the metaphor, stating ‘Discussion of “waves” or “tendencies” is unsatisfactory not just because comparative lawyers assume changes fulfil similar needs but also because they assume that we have given a satisfactory account merely by showing the existence of apparently similar developments in different countries, whereas this only begins the inquiry into the circumstances underlying those similarities’: at 71.

³ It is problematic to refer to these culturally, spiritually and linguistically diverse peoples by a collective noun or acronym. First Nation peoples’ experiences, cultures and attitudes to many issues, including First Law, will vary between ‘individuals, communities, gender and age groups, and are influenced by a range of social factors such as the degree of urbanization’, however, a degree of commonality does exist between First Nations peoples in Australia, Brazil and Canada, which we draw upon when using the term ‘First Nations peoples’: see National Alternative Dispute Resolution Advisory Council, ‘Indigenous Dispute Resolution and Conflict Management’, (Research Paper, January 2006) 6 <<https://webarchive.nla.gov.au/awa/20191107002237/https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACPublications-A-Z.aspx>>. See also Bruce Debelle,

are often displaced through the imposition of the general legal system, particularly in colonial settings. Our aim in this article is to redress this imbalance by highlighting important and original contributions that indigenous perspectives have to offer in challenging dominant definitions and understandings of access to justice.

We have chosen to focus on Australia, Brazil and Canada due to their similar physical geography (each is a very large country where distance alone constitutes a physical barrier to the justice system) and the fact that their First Nations peoples share a common history of colonialism. These jurisdictions were also selected to highlight contrasting differences in how First Nations peoples' legal traditions, hereinafter 'First Law', are protected and recognised. The variations between these States that share a common struggle to recognise First Law strengthens our claim that the counter-wave can promote access to justice, even where legally pluralist roots may initially be denied. For eventually, and through different means, we see that suppressed voices begin to be heard and new perspectives start to influence and challenge legal orthodoxy.

In Part II, we examine the content and context of this counter-wave more closely. We also report on recent efforts to meet legal service needs through itinerant courts, community legal clinics ('CLCs') and the use of technology. While these efforts may

'Aboriginal Customary Law and the Common Law' in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2nd ed, 2008) 85, 85, 86; Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (ALRC Report No 31, December 1986) [32], [37] <<http://www.alrc.gov.au/publications/report-31>>; Australian Law Reform Commission, 'Traditional Aboriginal Society and Its Law' in WH Edwards (ed), *Traditional Aboriginal Society* (Macmillan Education Australia, 2nd ed, 1998) 213, 213; Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 20, 34; Miguel A Bartolomé, 'La Diversidad de Las Diversidades: Reflexiones Sobre El Pluralismo Cultural En América Latina' (2008) 28 *Cuadernos de antropología social* 33; Kim Economides, 'On Liberating Law from the Tyranny of the City' in Leslie S Ferraz (ed), *Repensando o Acesso à Justiça: Estudos Internacionais* (Evocati, 2016) 151, 158 <ppg.unit.br/ppgd/wp-content/uploads/sites/5/2016/12/Repensando-a-Justiça_Volume-2-correto-1.pdf>. See also John Borrows, 'Indigenous Legal Traditions in Canada' (2005) 19(167) *Journal of Law and Policy* 58, 174–5, 193; Ministério da Educação, 'Índios no Brasil 1', *Livrosgratis* (2016) <<http://livros01.livrosgratis.com.br/me001985.pdf>>. On a shared worldview between many Indigenous cultures, see David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press, 2017) 132 <<http://ebookcentral.proquest.com/lib/usq/detail.action?docID=5180621>>; Reinaldo Matias Fleuri and Lilian Jurkevicz Fleuri, 'Learning from Brazilian Indigenous Peoples: Towards a Decolonial Education' (2017) 47(1) *The Australian Journal of Indigenous Education* 8, 14. Our use of the collective term, 'First Nations peoples', is not intended to diminish the unique personal, social and cultural qualities found amongst the First Nations peoples, wherever they reside: see David A Freedman, *The Ecological Fallacy* (Web Page, 2002) <<http://www.stat.berkeley.edu/~census/ecofall.txt>>; David Lubinski and Lloyd G Humphreys, 'Seeing the Forest from the Trees: When Predicting the Behavior or Status of Groups, Correlate Means' (1996) 2(2) *Psychology, Public Policy, and Law* 363.

improve physical access to justice, arguably, their true value as conduits through which the counter-wave may flow is yet to be fully realised. We also note the risk that these innovative delivery initiatives may have negative impacts. Part II introduces the unfamiliar perspective of First Nations communities as a novel and rich source of law at the legal periphery which is increasingly being formally recognised in Australia, Brazil and Canada.⁴ In particular, we highlight an emerging common viewpoint that nature should be seen as a person and respected accordingly.

Part III examines further the evolution of granting personhood status to natural objects in Aotearoa/New Zealand where explicit reference is made to principles of First Law in expanding the boundaries of the general legal system.⁵ Finally, Part IV examines how the counter-wave could benefit societies that embrace it. The counter-wave may improve access to justice by making the whole legal system more culturally accessible and inclusive. Granting natural objects personhood status could also improve access to justice by allowing relevant First Nations communities standing to represent interests of the natural object to which they hold a deep spiritual connection in court. In addition, the counter-wave (as it applies to First Law) will bring several jurisdictions, including Australia, Brazil and Canada, into greater alignment with their obligations under international law. Our counter-wave may also help identify solutions to long-term policy challenges, such as the unsustainable exploitation of natural resources and, significantly, could also open up new pathways for reconciliation between First Nations and non-First Nations peoples.

⁴ See Paul Babie, 'A New Narrative: Native Hawaiian Law Book Review' (2016) 39(1) *University of Hawai'i Law Review* 233, 235–6. Babie advances the First Nations' 'comeback' narrative, initially propounded by John Ralston Saul. According to Babie, this emerging narrative will be evident in three trends or phenomena: greater recognition of Aboriginal peoples in the legal order, the political order, and in the scholarship of Aboriginal experts on how the dominant legal and political structures can better recognise Aboriginal peoples contribution to these spheres. The present article contributes to Babie's 'new narrative' by arguing for greater incorporation of First Law principles within the legal order in order to improve access to justice.

⁵ This approach departs from earlier approaches pioneered in Ecuador and Bolivia by naming specific guardians and not granting nature itself positive rights, as in art 72 of the Constitution of Ecuador of 2008: see Georgetown University, 'Ecuador: 2008 Constitution in English', *Political Database of the Americas* (Web Page, 31 January 2011) ch 7 on 'Rights of Nature' <<http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>>. As Mihnea Tanasescu explains, '[i]f the Whanganui had the right to flow in a certain way, for example, then any change to its course would be a violation of its rights. Absent this kind of right, the river is simply empowered to stand for itself in court; its legal guardians determine the positive content of its rights. It is thus theoretically conceivable that the river might one day argue for its course be changed because that change is necessary for its long-term survival (say, as an adaptation to climate change)': see further Mihnea Tanasescu, 'When a River Is a Person: From Ecuador to New Zealand, Nature Gets Its Day in Court', *The Conversation* (online, 19 June 2017) <<https://theconversation.com/when-a-river-is-a-person-from-ecuador-to-new-zealand-nature-gets-its-day-in-court-79278>>.

II THE NEXT (COUNTER) WAVE IN ACCESS TO JUSTICE

In the late 1970s, the international access to justice movement was launched with the publication of the *Florence Access to Justice Project* ('Florence Project'), now replicated by a new *Global Access to Justice Project*.⁶ Since its inception, the access to justice movement has been represented as evolving through a series of cumulative waves, the first three identified by Cappelletti and Bryant Garth.⁷

The 'wave' metaphor has been used to characterise a series of global converging trends in the access to justice movement that capture the idea of formal law flowing outwards to peripheral marginalised communities.⁸ The first wave represented reforms inspired by the welfare state designed to better address the legal needs of the underprivileged or socially excluded through legal aid (or *judicare*).⁹ Legal aid brought access to courts and lawyers within reach of poorer, underprivileged people living in the cities and to regional, rural and remote communities, provided they could physically access a lawyer. The second wave further extended legal representation by providing better protection for collective and diffuse interests, primarily through class actions and public interest litigation.¹⁰ Yet, 'justice' still remained defined by the legal norms and traditions of the prevalent legal system. The third wave turned towards alternative dispute resolution and a simplification, or even avoidance, of formal law in order to widen access to justice.¹¹ This outward expansion of the boundaries of the formal legal system has in several jurisdictions been matched by internal reviews that now incorporate more informal methods of dispute resolution, such as mandatory mediation and arbitration, as standard practice inside the general legal system, thus making it problematic to continue describing such methods as truly 'alternative'.

Other scholars have identified subsequent waves as the access to justice movement matured and evolved. Christine Parker, for example, claimed the existence of

⁶ Cappelletti and Garth (n 1) 2–3. See also Marc Galanter, 'Access to Justice in a World of Expanding Social Capability' (2010) 37(1) *Fordham Urban Law Journal* 115, 116.

⁷ Cappelletti and Garth (n 1).

⁸ *Ibid* 4; Kim Economides, 'Mauro Cappelletti's Legacy: Retrospect and Prospect' [2016] *Annuario Di Diritto Comparato E Di Studi Legislativi* 245. See also Galanter (n 6) 116; Mark Blacksell, Kim Economides and Charles Watkins, *Justice Outside the City: Access to Legal Services in Rural Britain* (Longman Scientific & Technical, 1991); Yash Ghai and Jill Cottrell (eds), *Marginalized Communities and Access to Justice* (Routledge, 2010). For US developments: see Lisa R Pruitt et al, 'Legal Deserts: A Multi-State Perspective on Rural Access to Justice' (2018) 13(1) *Harvard Law and Policy Review* 15.

⁹ Cappelletti and Garth (n 1) 4, 7–8; Kim Economides, 'Reading the Waves of Access to Justice' (1999) 31(1) *Bracton Law Journal* 58, 66.

¹⁰ Cappelletti and Garth (n 1) 4; Economides, 'Reading the Waves of Access to Justice' (n 9) 66.

¹¹ Cappelletti and Garth (n 1) 4; Economides, 'Reading the Waves of Access to Justice' (n 9) 66.

a fourth wave of reform that advocated the use of competition policy in order to promote a more efficient distribution of resources leading towards greater access to justice.¹² Roderick A MacDonald categorised five waves in the access to justice movement — with proactive legal services being the latest.¹³ Kim Economides turned the inquiry inwards towards the ethical motivation of lawyers to pursue justice and found a fourth wave concerning lawyers' (and others involved in the legal services industry) access to justice.¹⁴ Economides' fourth wave 'seeks to expose the ethical and political dimensions to the administration of justice and, at the same time, establish new links between professional responsibility and legal education.'¹⁵ By improving lawyers' knowledge and understanding of professional responsibility and the challenges facing underprivileged and under-represented clients, it was hoped that lawyers would be inspired to better serve these sectors of the population.

Based on our latest observations of legal service delivery and the reach of the legal system, the next wave in the access to justice movement is best understood as a counter-wave or a rip current that draws legal knowledge and services *centripetally* from the periphery inwards towards the centre in order to improve access to justice. The resulting dual flow of legal knowledge is represented in Figure 1 below.

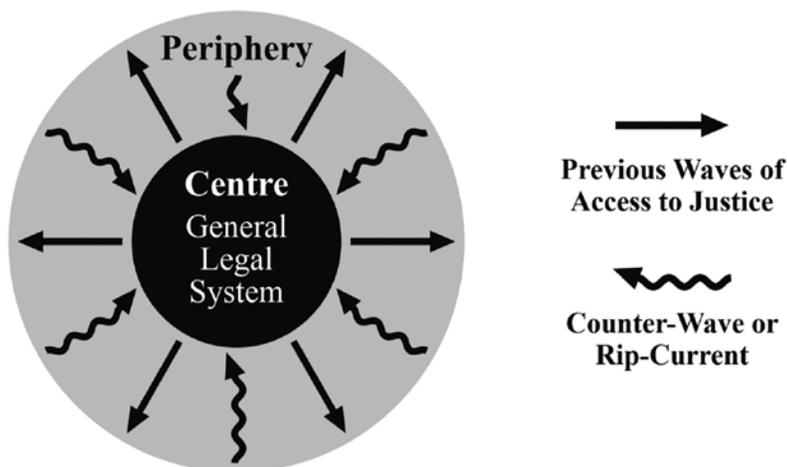


Figure 1: The Counter-Wave (Rip-Current)

¹² Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999) 35. See also Ronald Sackville, 'Some Thoughts on Access to Justice' [2003] *Federal Judicial Scholarship* 22.

¹³ Roderick A MacDonald, 'Access to Justice in Canada Today' in Julia Bass, WA Bogart and Frederick H Zemans (eds), *Access to Justice for a New Century: The Way Forward* (Law Society of Upper Canada, 2005) 19, 19.

¹⁴ Economides, 'Reading the Waves of Access to Justice' (n 9) 67; Kim Economides, '2002: A Justice Odyssey' (2003) 34(1) *Victoria University of Wellington Law Review* 1, 12–13 ('2002: A Justice Odyssey').

¹⁵ Economides, '2002: A Justice Odyssey' (n 14) 12–13; Economides, 'Reading the Waves of Access to Justice' (n 9) 67.

Law at the ‘centre’ or *the* legal centre refers to the general law or ‘official’ legal system that operates in and is enforced by the State. The centre is where statutes are normally created and amended by democratically elected representatives (or their delegates) in parliament. Particularly within common law jurisdictions, formal law includes judicial decisions made in court. The legal epicentre, therefore, is not one place, but many. Although, geographically speaking, the legal centre is generally found in urban capitals and major metropolitan cities.

In contrast, the legal periphery (which can be defined both in terms of physical and social space) may also be found within, or on, the outskirts of large cities, such as those living in the favelas of Rio de Janeiro.¹⁶ However, the periphery is usually physically located outside major cities,¹⁷ somewhere in regional, rural and remote communities. For the purpose of this article, we focus on regional, rural and remote areas due to the high proportion of First Nations peoples that typically reside there.¹⁸

¹⁶ See Boaventura de Sousa Santos, ‘The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada’ (1977) 12(1) *Law and Society Review* 5 (*‘The Law of the Oppressed’*); Boaventura de Sousa Santos, ‘Law against Law: Legal Reasoning in Pasargada Law.’ (JSD Thesis, Yale, 1973) (*‘Law against Law’*). The validity of the term ‘favela’ has been questioned and frequently is replaced by ‘communities’. That said, some inhabitants argue in favour of retaining favelas. ‘Residents of favelas active in campaigns to integrate these communities into the city proudly use the term to represent a range of community qualities and to insist on the recognition of their historic role in building the city of Rio de Janeiro’: Catalytic Communities, ‘Why We Should Call Them Favelas’, *CatComm* (Web Page, 2020) <<https://catcomm.org/call-them-favelas/>>.

¹⁷ The periphery may also exist within major cities, where citizens are beyond the reach of the state. For example, in Rio de Janeiro, itinerant justice programs were only able to access urban communities with the assistance of the Pacifying Police Unit due to organized crime gangs and drug trafficking. See Instituto de Pesquisa Econômica Aplicada, *Democratização do Acesso à Justiça e Efetivação de Direitos: Justiça Itinerante no Brasil*, (Research Report, 2015) <http://www.ipea.gov.br/agencia/images/stories/PDFs/relatoriopesquisa/150928_relatorio_democratizacao_do_acesso.pdf>; Leslie S Ferraz, *Democratization of the Access to Justice in Brazil: The Itinerant Courts of Amapá and Rio de Janeiro* (forthcoming).

¹⁸ According to 2011 Australian census data, Indigenous people comprise one per cent of the population in major cities, four per cent in inner regional, seven per cent in outer regional, 16 per cent in remote and 45 per cent in very remote communities in Australia: ‘The Little Book of Rural Health Numbers: Demography’, *National Rural Health Alliance Ltd* (Web Page, 31 July 2017) <<https://ruralhealth.org.au/book/demography>>. See also Law Council of Australia, *The Justice Project: RRR Australians* (Final Report, 2017) 7 <https://www.lawcouncil.asn.au/files/web_pdf/Justice%20Project/Consultation%20Papers/RRR%20Australians.pdf>. In respect of Brazil, see Fleuri and Fleuri (n 3) 1, 3. In Canada, between eight to 43 per cent of people in the Northern census divisions have Aboriginal ancestry: see Jamie Baxter and Albert Yoon, ‘No Lawyer for a Hundred Miles? Mapping the New Geography of Access to Justice in Canada’ (2014) 52(9) *Osgoode Hall Law Journal* 50. By comparison, 19 per cent of non-Indigenous Canadian live in rural environments: see Government of Canada, ‘Population, Urban and Rural, by Province and Territory

Law, or forms of social organisation that exist at the periphery include:

- (i) First Law, as practiced by First Nations peoples;
- (ii) a limited and purpose-orientated incorporation or recognition of First Law within the general legal system. This is not the same as the counter-wave, which seeks to more broadly learn from the legal periphery; and
- (iii) other forms of social organisation that reflect the needs of the local community.

First Law refers to forms of social organisation that regulate relations among First Nation peoples, and between First Nation peoples and the natural environment.¹⁹ First Law has many names and variations among First Nations peoples.²⁰ It may also be referred to as ‘customary law’ or ‘Raw Law’ in the literature.²¹ This is a rich, complex and growing area of law in which we do not claim particular expertise. Our understanding of First Law is limited to secondary sources and we draw upon some truly inspirational scholarship that has informed our work.

Australia, Brazil and Canada all have large areas of their interior land mass that are regional, rural or remote and/or sparsely populated. Paradoxically, the interior (or geographical centre) of each State is remote while their peripheral borders, and

(Canada)’, *Statistics Canada* (Web Page, 4 February 2011) <<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo62a-eng.htm>>; Canadian Forum on Civil Justice, *Rural and Remote Access to Justice: A Literature Review* (Rural and Remote Access to Justice Boldness Project, November 2015) 56.

¹⁹ On the use of ‘First Laws’: see Jacinta Ruru, ‘Why First Laws Must Be In’ in Hossein Esmaeili, Gus Worby and Simone Ulalka Tur (eds), *Indigenous Australians: Social Justice and Legal Reform: Honouring Elliott Johnston* (Federation Press, 2016) 288, 290. See Marilyn Poitras and Norman Zlotkin, *An Overview of the Recognition of Customary Adoption in Canada* (Final Report, Saskatchewan First Nations Family and Community Institute, 15 February 2013) 7 <[http://www.sfnfci.ca/ckfinder/userfiles/files/Custom%20Adoption%20Final%20Report%202013\(2\).pdf](http://www.sfnfci.ca/ckfinder/userfiles/files/Custom%20Adoption%20Final%20Report%202013(2).pdf)>; Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Federation Press, 2000) 35. Mantziaris and Martin review the academic debate on whether customary law meets the definitional criteria of the ‘western’ conception of ‘law’: at 36. For the purposes of this article we leave this debate to other scholars and use the term ‘First Law’ to recognise the social ordering that existed prior to colonisation.

²⁰ See Watson (n 3) 22; Mantziaris and Martin (n 19) 39; Australian Law Reform Commission, ‘Traditional Aboriginal Society and Its Law’ (n 3) 219.

²¹ See Watson (n 3) 22, which uses ‘Raw Law’. On the use of ‘customary law’: see Australian Law Reform Commission, ‘Recognition of Aboriginal Customary Laws’ (n 3); Debelle (n 3); Jeremy Webber, ‘The Grammar of Customary Law’ (2009) 54(4) *McGill Law Journal* 579; Mark Finnane, ‘“Payback”, Customary Law and Criminal Law in Colonised Australia’ (2001) 29(4) *International Journal of the Sociology of Law* 293; Tom Calma, ‘The Integration of Customary Law into the Australian Legal System’ (2007) 25(1) *Law in Context* 74.

their hinterlands, are where the centres of legal, social and economic activity exist. It is this remoteness that presents a continuing challenge for the access to justice movement in these States.

Much of Australia is classified as remote, as is evident in Figure 2.²² The vast distances between remote townships and communities, major cities and established infrastructure mean that it is difficult to provide adequate legal institutional support mechanisms, such as courts and lawyers, which are seen as a prerequisite to maintaining the rule of law.²³

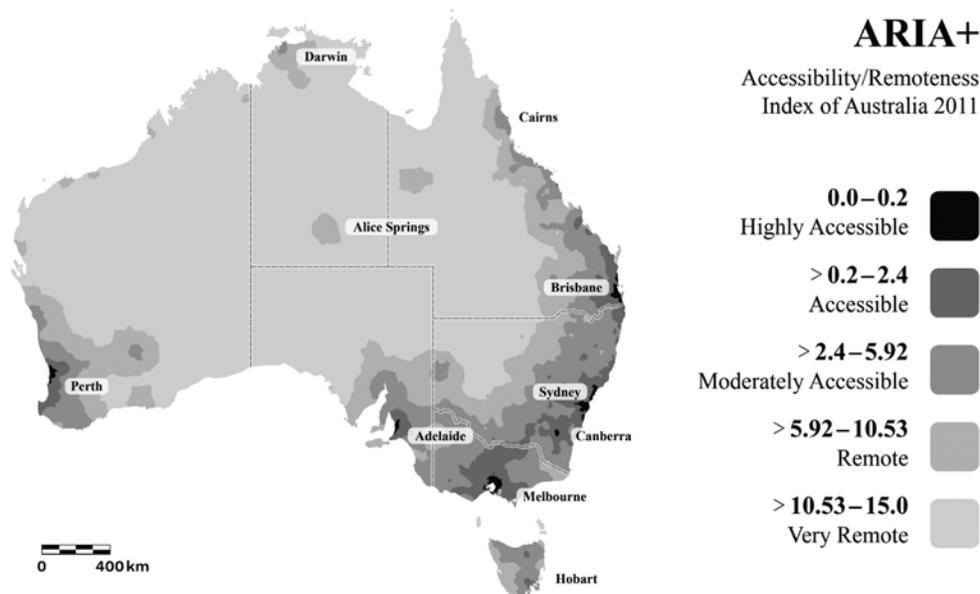


Figure 2: Accessibility and Remoteness Index of Australia²⁴

Brazil's population is unevenly distributed over its territory, concentrated mainly around the coast and in the south-southeast regions (see Figure 3).²⁵ The northern region, where the Amazon basin is located, has the lowest demographic density in

²² University of Adelaide, 'ARIA+ 2011', *Hugo Centre for Population and Housing Research* (Web Page, April 2020) <<https://services.spatial.adelaide.edu.au/giscaportal/apps/webappviewer/index.html?id=cc785550a33a4651a72921c2a6cda8c1>>.

²³ Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation, 2012) vol 8, 245; Law Council of Australia (n 18) 4.

²⁴ University of Adelaide (n 22).

²⁵ National Aeronautics and Space Administration, 'Population Density (2000): Brazil', *Socioeconomic Data and Applications Center* (Web Page, 5 March 2020) <<https://sedac.ciesin.columbia.edu/maps/gallery/search?facets=region%3Asouth+america&facets=theme%3Apopulation&facets=country%3Abrazil>>.

the country.²⁶ The huge distances to the main cities and the lack of airports, suitable roads and waterways, combined with the population's low income, make physical distance a significant barrier to the general legal system for most residents.²⁷

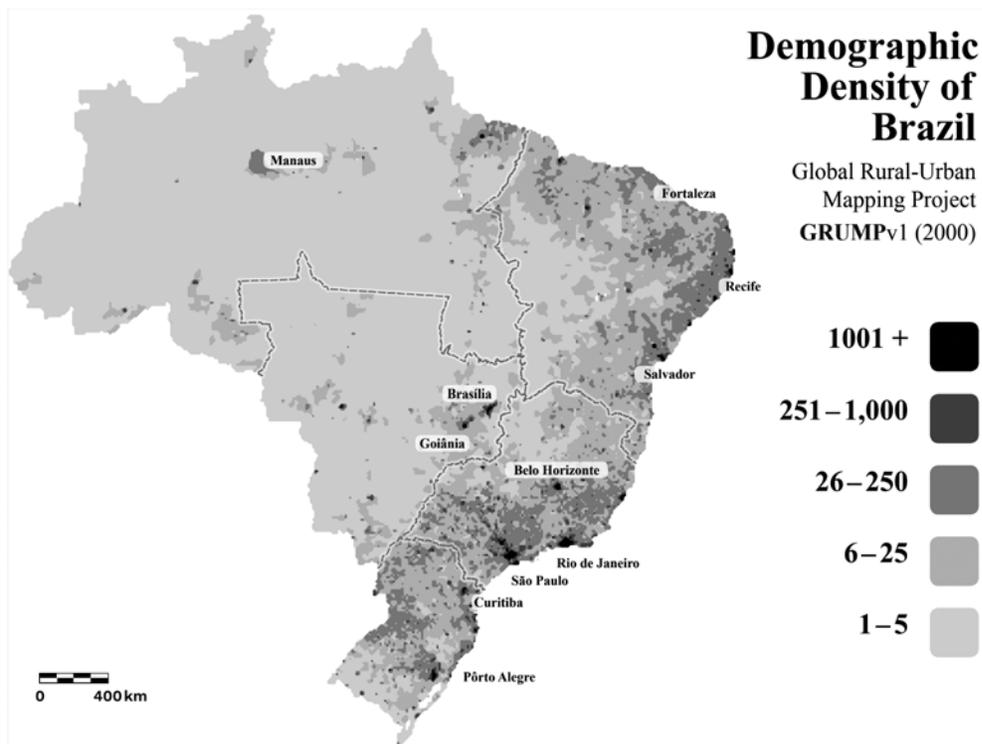


Figure 3: Demographic Density of Brazil (inhabitants/km²)²⁸

Vast areas of Canada are also classified as remote and have poor access to legal services. As a result, the ‘most significant obstacle’ that clients face in accessing general legal services in Canada is physical distance.²⁹ As seen in Figure 4, much

²⁶ Ibid.

²⁷ Lisa Valenta, ‘Disconnect: The 1988 Brazilian Constitution, Customary International Law, and Indigenous Land Rights in Northern Brazil’ (2003) 38(3) *Texas International Law Journal* 643, 653.

²⁸ National Aeronautics and Space Administration (n 25).

²⁹ Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada* (Web Page, 29 September 2014) 21 <<http://flsc.ca/wp-content/uploads/2014/10/services6.pdf>>; Canadian Forum on Civil Justice (n 18) 28. See also an earlier study by Laureen Snider, *Legal Services in Rural Areas* (Department of Justice (Canada), Evaluation Report, 1982).

of the interior has either low level access (as indicated by dark shades) or no direct access at all to legal services.³⁰

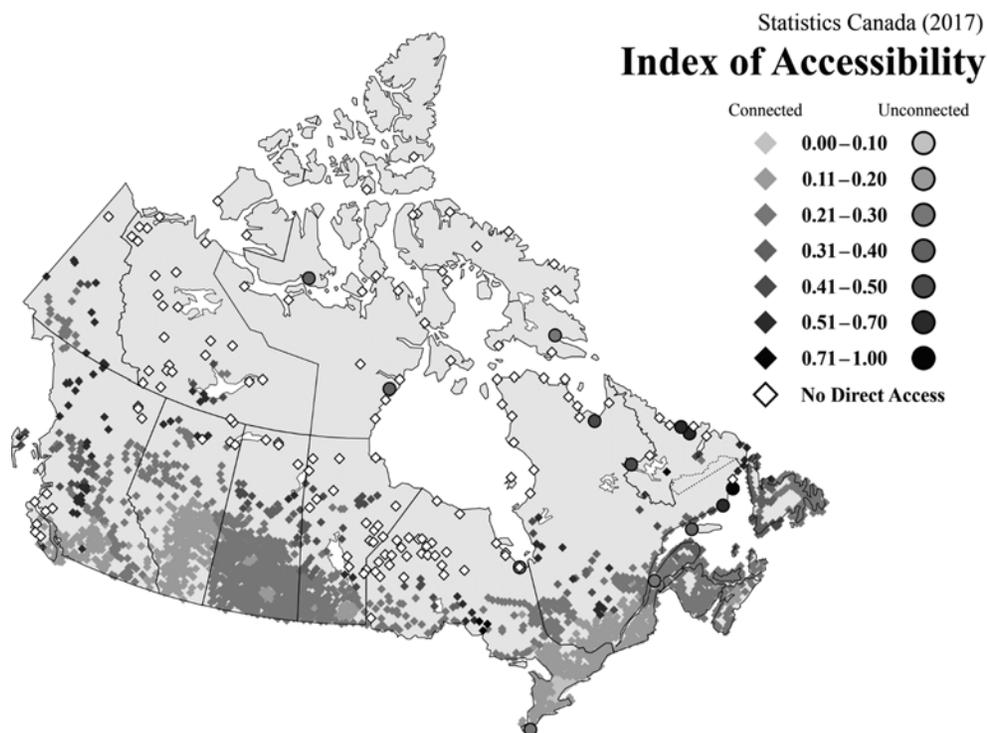


Figure 4: Accessibility Index to Legal Services in Canada³¹

Previous waves in the access to justice movement have attempted to address the challenges of poor or inadequate access in regional, rural and remote areas by pushing general law from the centre out towards the periphery. Despite decades of well-intentioned efforts, large gaps remain. In regional Australia there are less than three law firms for every 10,000 people over the age of 18.³² The situation in remote

³⁰ Alessandro Alasia et al, *Measuring Remoteness and Accessibility — A Set of Indices for Canadian Communities* (Report, 9 May 2017) 38, 43.

³¹ *Ibid* 39.

³² Albin Smrdel, 'Equitable Access to Justice' (Conference Paper, National Access to Justice and Pro Bono Conference, 14 November 2008) 3 <<http://www.nationalprobono.org.au/page.asp?from=3&id=199>>. See generally Pruitt et al (n 8) 31 on the utility of counting lawyers in a given area to measure access to justice. For an approximate comparison, in 2018, 41,203 solicitors were employed in city locations and the estimated resident population living in the capital cities was 17,160,368. This equates to 24 solicitors per 10,000 people. See Urbis, *2018 National Profile of Solicitors* (Final Report No ESA12418, 17 July 2019) 29 <<https://www.lawsociety.com.au/sites/default/files/2019-07/2018%20National%20Profile%20of%20Solicitors.pdf>>;

Australian communities is predictably even more severe, where people may have to travel several hours to the next town to find a lawyer that can represent them without a conflict of interest.³³ According to the Indigenous Legal Needs Project, remote areas of the Northern Territory, Western Australia, and Queensland have high levels of need across a broad range of civil legal work, much of which is likely to go unaddressed.³⁴ In Brazil, the majority of the indigenous population lives in rural areas.³⁵ Many of these communities can only be reached by boat or airplane.³⁶ The time and cost associated with travelling to the capital or major cities puts the general legal system beyond the reach of most Brazilians living in isolated and sparsely-populated communities.³⁷ In Canada, clients from rural areas have reported walking for more than an hour, or hitchhiking, in order to attend a legal appointment, or administrative or legal proceeding.³⁸ Like Australia and Brazil, poor physical access to justice disproportionately affects Canada's First Nations peoples, who are more likely to live in regional, rural and remote areas.³⁹

This centrifugal pushing out of general law to the legal periphery has been assisted through the use of itinerant courts, CLCs and, more recently, through the use of technology. Going forward, their role in the access to justice movement is relevant as conduits through which the counter-wave can flow.

Australian Bureau of Statistics, *Regional Population Growth, Australia, 2018–19* (Catalogue No 3218.0, 25 March 2020) <<https://www.abs.gov.au/ausstats/abs@.nsf/PrimaryMainFeatures/3218.0?OpenDocument>>.

³³ Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (Report, 8 June 2004) 96–100 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2002-04/legalaidjustice/report/contents>; National Pro Bono Resource Centre, 'Regional, Rural and Remote Pro Bono: Models and Opportunities' (Research Paper, University of New South Wales, May 2006) 17 <http://www.nationalprobono.org.au/publications/documents/RRR_Paper.pdf>; Jeff Giddings, Barbara Hook and Jennifer Nielsen, 'Legal Services in Rural Communities: Issues for Clients and Lawyers' (2001) 26(2) *Alternative Law Journal* 57, 57, 61. See also Economides, 'On Liberating Law from the Tyranny of the City' (n 3) 158.

³⁴ Law Council of Australia (n 18) 8, 14.

³⁵ Fleuri and Fleuri (n 3) 3.

³⁶ Leslie S Ferraz, 'Brazilian Itinerant Justice: An Effective Model to Improve Access to Justice to Disadvantaged People?' in Leslie S Ferraz (ed), *Repensando o Acesso à Justiça: Estudos Internacionais* (Evocati, 2016) 65, 70 <ppg.unit.br/ppgd/wp-content/uploads/sites/5/2016/12/Repensando-a-Justiça_Volume-2-correto-1.pdf>. See Shawn Blore, 'Justice Aboard' (2006) 58(3) *Américas* 12.

³⁷ Blore (n 36) 14.

³⁸ Baxter and Yoon (n 18) 20.

³⁹ *Ibid* 14, 50; Canadian Forum on Civil Justice (n 18) 17–18.

A *Itinerant Courts*

The first itinerant experience in public legal service delivery is often credited as occurring at the University of Oslo, Norway, in 1971.⁴⁰ The *Jussbuss* was created with a dual purpose: to provide legal advice to the underprivileged in urban Oslo and to enhance the clinical legal skills of law students.⁴¹ Since then, itinerant justice programs have spread far and wide – although not directly connected to *Jussbuss*. In Africa, mobile justice programs were developed with the support of the United Nations in Sierra Leone, the Democratic Republic of the Congo, the Central African Republic and Somalia to provide support and legal advice to suit local needs. In Uganda, itinerancy has been creatively attempted through a program called UGANET.⁴² Local paralegals, trained on basic principles of law and conflict resolution, ride their bikes to solve general community problems and inform people living with HIV about their rights.⁴³ Still in Uganda, the United Nations Human Rights Committee, in conjunction with the Ugandan Government, created a mobile court to service victims of crime living in refugee areas.⁴⁴

In Pakistan and the Democratic Republic of Timor-Leste, ‘Justice on Wheels’ programs funded by the United Nations focus on the rural poor, remote populations or conflict-affected areas.⁴⁵ The Philippines also have an itinerancy program

⁴⁰ Jon T Johnsen, ‘Progressive Legal Services in Norway?’ (1999) 6(3) *International Journal of the Legal Profession* 261, 286. For a discussion of the itinerant model for legal service delivery, including courts, see Kim Economides, ‘Strategies for Meeting Rural Legal Needs: Lessons from Local, Regional and International Experience’ (2011) 16(1) *Deakin Law Review* 47, 50–52. For an analysis of the early operation of the English circuits and circuit judges, which Henry Bracton called ‘*itinerantes*’ and who were later known as ‘*justices in eyre*’ see J S Cockburn, *A History of the English Assizes 1558-1714* (Cambridge, 1972) 13–62.

⁴¹ Johnsen (n 40). See also, ‘Welcome to Jussbuss’, *Jussbuss* (Web Page, 12 March 2020) <<https://foreninger.uio.no/jussbuss/english/>>.

⁴² Uganet Network on Law Ethics and HIV/AIDS, ‘Access to Justice’, *UGANET* (Web Page, 2016) <<http://uganet.org/index.php/access-to-justice/>>.

⁴³ *Ibid.*

⁴⁴ United Nations High Commissioner for Refugees, ‘Mobile Court Scheme Launched in Uganda’s Nakivale Refugee Settlement’, *UNHCR* (Briefing Note, 16 April 2016) <<http://www.unhcr.org/news/briefing/2013/4/516d29359/mobile-court-scheme-launched-ugandas-nakivale-refugee-settlement.html>>; United Nations, ‘Uganda: UN Launches First of Its Kind Mobile Court Initiative in Refugee Settlement’, *UN News* (online, 16 April 2013) <<https://news.un.org/en/story/2013/04/437332-uganda-un-launches-first-of-its-kind-mobile-court-initiative-refugee-settlement>> (‘*Uganda Mobile Court Initiative*’).

⁴⁵ ‘Pakistan’s Justice on Wheels’, *United Nations Development Programme* (Web Page, 2020) <https://www.undp.org/content/undp/en/home/ourwork/ourstories/pakistan_s-justice-on-wheels-.html>. In relation to Timor-Leste see: United Nations Development Programme, *Global Programme on Strengthening the Rule of Law in Conflict and Post-Conflict Situations* (Annual Report, 2009) 51 <<http://www.undp.org/content/dam/undp/library/crisis%20prevention/undp-cpr-global-prog-strength-rule-law-conflict-post-ann-report-2009.pdf>>.

developed by the judiciary, called the ‘Enhanced Justice on Wheels’ program, which operates formal adjudication services.⁴⁶

For some remote communities in Australia, the only access to the judicial system is through the operation of so-called bush courts.⁴⁷ The term ‘bush court’ refers to the Magistrates ‘circuit court’ that services remote and isolated towns.⁴⁸ A Magistrate, two court orderlies and, possibly, a prosecutor, defence counsel and Community Liaison Officer, may arrive via road or air for court.⁴⁹ The frequency in which the bush court sits varies between monthly and quarterly, depending on weather and travel conditions.⁵⁰ The court room itself is generally housed within the local police station, although in the Daly River, Northern Territory, the court has been known to convene in the kindergarten library, or in Maningrida ‘around a plastic breakfast table in a hotel’.⁵¹

In Brazil, buses, vans and vessels were converted into mobile courts to deliver justice to communities living on the periphery. The first informal experiences of itinerancy began in 1992 on boats.⁵² This was the initiative of individual judges from the northern region of Brazil who were concerned about the isolation of riverside populations.⁵³ One such project was the *Tribuna: a Justiça vem a bordo* (trans: Tribune: Justice Comes on Board), which was a court boat converted to provide a range of

⁴⁶ ‘Enhanced Justice on Wheels’, *Office of the Court Administrator* (Web Page) <http://oca.judiciary.gov.ph/?page_id=507>; Philippine Information Agency, ‘Enhanced Justice on Wheels Goes to South Cotabato’, *PIA* (Web Page, 7 September 2017) <<http://pia.gov.ph/news/articles/1000110>>.

⁴⁷ Natalie Siegel, ‘Bush Courts of Remote Australia’ (2002) 76(10) *Australian Law Journal* 640, 640; cf Natalie Siegel, ‘The Reign of the Kangaroo Court?’ (2002) 1 (Spring) *Indigenous Law Journal* 113, 114. For example, the Northern Australian Aboriginal Justice Agency ‘travels to 36 Aboriginal communities and remote circuit “bush courts”’, with a substantial amount of travel by air to service these communities: Email from David Woodroffe, Principal Legal Officer, Northern Australian Aboriginal Justice Agency to Aaron Timoshanko, 15 August 2018.

⁴⁸ Siegel, ‘Bush Courts of Remote Australia’ (n 47) 640.

⁴⁹ Ibid 640; Siegel, ‘The Reign of the Kangaroo Court?’ (n 47). Cf Peter O’Brien and RDT Woodroffe, ‘Bush Courts and the Katherine Regional Aboriginal Legal Aid Service’ (2003) 5(27) *Indigenous Law Bulletin* 20, 20. See also Anna Bulman and Emily Sims, ‘The Fight for Justice in Remote Indigenous Communities’ (2013) 35(7) *Bulletin* 24, 24.

⁵⁰ Siegel, ‘Bush Courts of Remote Australia’ (n 47) 640; Siegel, ‘The Reign of the Kangaroo Court?’ (n 47) 122.

⁵¹ Siegel, ‘Bush Courts of Remote Australia’ (n 47) 642. See also Siegel, ‘The Reign of the Kangaroo Court?’ (n 47) 123.

⁵² Ferraz (n 36) 69. See also Philippe Cunha Ferrari, *Justiça Itinerante: De Barco, de Ônibus e de Avião Em Busca Da Justiça* (Editora Multifoco, 2017).

⁵³ Ferraz (n 36) 69.

non-legal and legal services,⁵⁴ including adjudication, to the riverside communities in the archipelago of Bailique (see Figure 5). In 2012, the *Tribuna* decided over 291 cases in five separate journeys.⁵⁵ The matters most frequently dealt with by the *Tribuna* in 2012 were family law matters, civil disputes and criminal special court cases.⁵⁶ After the formalisation of these floating courtrooms by the Court of Justice of Amapá in 1996, several other state courts created their own programs inspired by the *Tribuna*'s success.⁵⁷ Nowadays, Brazilian Itinerant Justice programs are amongst the most comprehensive in the world.



Figure 5: The *Tribuna*

The program's success may be partially attributed to the procedural flexibility adopted by some judges, which allows, for example, service of a summons on the same day as the hearing.⁵⁸ This enables the majority of matters to be decided on the same day they were filed.⁵⁹ However, this flexibility has been compromised in recent years where, for example in Bailique, new and relatively inexperienced judges have been assigned to the court.⁶⁰

⁵⁴ The non-legal service provided by the *Tribuna* includes health and dental services, issuing of documents, culture, education and water treatment: *ibid* 82.

⁵⁵ *Ibid* 85.

⁵⁶ *Ibid* 85–6; Ferraz (n 17) 23.

⁵⁷ Instituto de Pesquisa Econômica Aplicada (n 17) 17–19.

⁵⁸ Ferraz (n 17) 22; Ferraz (n 36) 88.

⁵⁹ Ferraz (n 17) 22.

⁶⁰ *Ibid* 88.

Almost all Brazilian State Courts now have itinerant programs (Figure 6) of various modalities (vans, buses, boats and one plane) and specialisations (issuing documents, domestic violence, family law, special courts, rights of prisoners, traffic accidents, consumer cases, special events, etc).⁶¹ Some programs have been developed to address the specific needs of the indigenous people in Brazil. For example, the Justice Court of Amazon State and the State of Roraima have developed a program to issue birth certificates and other documents to the isolated group, *Waimiri Atroari*.⁶² Similarly, the Justice Court of Mato Grosso do Sul developed a program to reach 20 indigenous villages to officiate local marriages.⁶³ Itinerant justice is no longer an informal and isolated initiative of some judges in Brazil but has become enshrined in legislation and the *Federal Constitution* (Articles 107, § 20 [Federal Courts]; 115, § 30 [Labour Courts]; 125, § 20 [State Courts]).

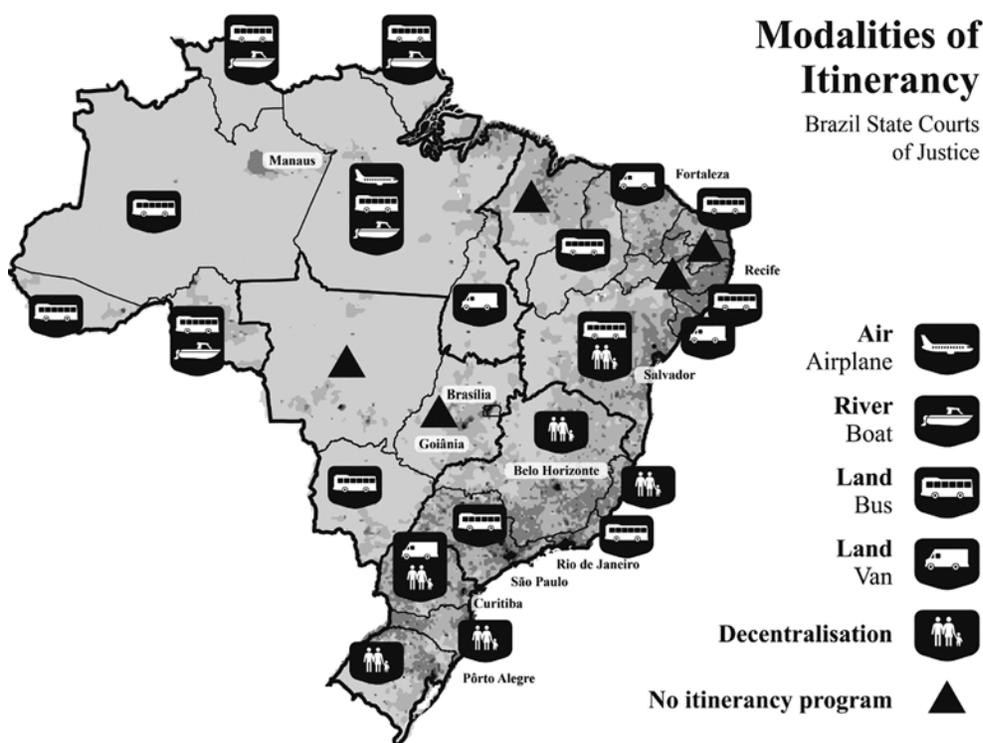


Figure 6: Modalities of Itinerant Courts in Brazil⁶⁴

⁶¹ Ferraz (n 36) 70–1.

⁶² ‘Judiciário Leva Cidadania a Índios Isolados do Norte do Brasil’, *Conselho Nacional De Justiça* (Web Page, 1 March 2018) <<http://www.cnj.jus.br/noticias/cnj/86261-judiciario-leva-cidadania-a-indios-isolados-do-norte-do-brasil>>.

⁶³ ‘Justiça Itinerante: Indígenas de 20 Aldeias são Atendidos no MS’, *Conselho Nacional De Justiça* (Web Page, 27 June 2018) <<http://www.cnj.jus.br/noticias/judiciario/87064-justica-itinerante-indigenas-de-20-aldeias-sao-atendidos-no-ms>>.

⁶⁴ Ferraz (n 36) 70–1; National Aeronautics and Space Administration (n 25).

In Canada, aircraft are commonly used to fly-in lawyers and a judge to service the remote communities in the country's northern provinces.⁶⁵ Among the proactive outreach services available in Canada are the circuit courts of the Provincial and Supreme Courts of British Columbia and the Nunavut Court of Justice. For the Nunavut Court of Justice, infrequent flights mean that counsel and the rest of the court may have to travel together, raising client concerns about perceived independence.⁶⁶ Reliance upon aircraft also affects the Court's frequency and duration of its circuit due to severe Arctic weather fronts.⁶⁷

As these courts are situated, albeit temporarily, in communities at the legal periphery, they nevertheless could become significant sites of receptivity and openness to local laws, customs and traditions. The itinerant courts thus have a potential and, if realised, valuable role in transmitting and legitimising legal knowledge from the periphery to the centre.

B *Community Legal Clinics*

In Australia and Canada, CLCs have been funded to deliver legal services to regional, rural and remote communities, among other under-served populations.⁶⁸ CLCs may provide general advice, and possible representation, to people living in their catchment area, or they may specialise in an area of law or client demographic.⁶⁹ Where CLCs are located in urban centres, many perform outreach services to regional, rural and remote areas using an itinerant model.⁷⁰

⁶⁵ Economides, 'Strategies for Meeting Rural Legal Needs: Lessons from Local, Regional and International Experience' (n 40) 51.

⁶⁶ 'Nunavut Legal Services Study', *Department of Justice (Canada)* (Web Page, 6 October 2004) <http://www.justice.gc.ca/eng/rp-pr/aj-ja/rr03_la14-rr03_aj14/pr3.html>.

⁶⁷ *Ibid.*

⁶⁸ Law centres have proven cost effective and efficient solutions to addressing the 'gap' in legal services for regional, rural and remote communities. As not everyone employed by the centre is a qualified lawyer, organisational costs are reduced. CLCs also employ salaried lawyers who, unlike lawyers in private practice, do not bill the client according to the time taken to complete a task. The use of salaried lawyers enables legal services to be provided to communities that may otherwise be too small, underdeveloped, or subject to seasonal fluctuations, to sustain a private practice. Another benefit of salaried lawyers in CLCs is their ability to specialise in uneconomic areas of legal work that may be in high demand in the population they serve. However, this ability to specialise means that CLCs are not a substitute for other forms of legal service delivery. Rather, CLCs must be seen as a complement to other modes of delivery, such as the use of legal aid to fund lawyers in private practice. CLCs also have an educational role that may help to address underlying structural problems in the community, ultimately reducing the number of disputes brought to the centre: see Economides, 'Strategies for Meeting Rural Legal Needs: Lessons from Local, Regional and International Experience' (n 40) 48–9.

⁶⁹ *Ibid.* 48.

⁷⁰ Smrdel (n 32) 5. Other potential models for delivery of legal services to remote and rural areas include: (a) the 'private model' (b) the 'secondment' model (c) the 'urban' model (d) the 'technological' model; and (e) the 'satellite' model: Kim Economides, 'Legal Services and Rural Deprivation' (1982) 15(1) *Bracton Law Journal* 41, 61–5.

In Australia, aircraft may be used to fly lawyers into remote communities.⁷¹ Normally, such visits are timed to coincide with the circuit court. The Northern Australian Aboriginal Justice Agency (which subsumed the Katherine Regional Aboriginal Legal Aid Service in 2005) also uses aircraft during the wet season to provide continuous legal assistance and representation to remote communities including Pine Creek in the north, Kalkaringi and Larramah in the south, Ngukurr in the east, and Timber Creek in the west.⁷²

In Canada, due to extreme Arctic weather, part-time satellite legal clinics have been established in rural and remote communities.⁷³ Interdisciplinary partnerships between CLCs and intermediary groups are also being explored. One such initiative is the Halton Community Legal Services Legal Health Check-Up Project, which helps staff within seven intermediary groups to ‘problem spot’ client legal issues and refer them to the CLC when appropriate.⁷⁴ According to one early evaluation of the project, the Halton Community Legal Service has increased its clientele by one-third through the use of the Check-Up tool, which indicates that this may be an effective strategy for targeting inaccessible populations.⁷⁵

The situation is different in Brazil, where CLCs almost exclusively exist in the southern states. CLCs are more appropriate in the smaller southern states as there is relatively good coverage of courts there.⁷⁶ However, in the northern states, where

⁷¹ For example, the Northern Australian Aboriginal Justice Agency ‘travels to 36 Aboriginal communities and remote circuit bush courts’, with a substantial amount of travel by air to service these communities: Email from David Woodroffe, Principal Legal Officer, Northern Australian Aboriginal Justice Agency to Aaron Timoshanko (n 47). See also, the Carnarvon Flying Duty Solicitors Service operated from August 2005 until 2011–12 to service the Carnarvon magistrates’ circuit: Legal Aid Western Australia, *Annual Report 2005–2006* (Report, 2006) <https://www.legalaid.wa.gov.au/sites/default/files/Annual_Report_2005-06.pdf> (*Annual Report 2005–2006*). A former Chief Justice of the High Court of Australia took part in a similar flying lawyer service in the 1970s operated by the Law Society of Western Australia: Robert French, ‘Law and Justice Outside the CBD’ (2011) 16(1) *Deakin Law Review* 1, 6; ‘Court Up North’, 7:30 *Northern Territory* (Australian Broadcasting Corporation, January 2013) 0:02:46 <<http://www.abc.net.au/news/2013-10-08/court-up-north/5009438>>. This circuit covered Paraburdoo, Tom Price, Onslow and Exmouth, all of which are classified as remote or very remote communities in Western Australia: Legal Aid Western Australia, (n 71) 15. The Flying Duty Solicitors Service was decommissioned with the establishment of a satellite office by Legal Aid Western Australia in 2011–12: Legal Aid Western Australia, *Annual Report 2011–2012* (Report, 27 August 2012) 26 <https://www.legalaid.wa.gov.au/sites/default/files/Annual_Report_2011-12.pdf> (*Annual Report 2011–2012*).

⁷² O’Brien and Woodroffe (n 49) 20.

⁷³ Five County Connecting Region Project, *Paths to Justice: Navigating with the Wandering Lost* (Report and Recommendations, March 2011) 1, 9.

⁷⁴ Canadian Forum on Civil Justice (n 18) 47.

⁷⁵ *Ibid* 47–8.

⁷⁶ Instituto de Pesquisa Econômica Aplicada (n 17) 22.

there are fewer permanent courts, efforts have mainly focussed on developing itinerant justice programs.⁷⁷

CLCs located at or frequenting communities at the legal periphery can play a similar role to itinerant courts in the next access to justice wave. One point of difference, however, is that CLCs can be more strategic and advocate for structural reform. CLCs are uniquely placed to agitate for reform as they understand the underlying issues faced by their clients and how local forms of social organisation may be adapted to overcome these challenges.

C Technology

In Australia, information technology may be used for ‘directions hearings, pre-trial conferences, chamber applications, and applications for special leave to appeal’, or as an alternative to circuit hearings.⁷⁸ Video-conferencing has also been used to deliver interpreter services.⁷⁹ Under the National Broadband Network (‘NBN’) Regional Legal Assistance Program, the Attorney-General’s Department provided grants to enable ‘legal assistance providers to trial NBN based initiatives that strengthened and increased legal assistance delivery in regional areas’.⁸⁰ For example, a program grant allowed the Welfare Rights Centre (South Australia) Inc to extend its Housing Legal Clinic to regional, rural and remote communities through a program grant and NBN enabled webcam communication.⁸¹ It is also anticipated that online access to alternative dispute resolution is likely to increase with the proliferation of information technology.⁸²

In Canada, technology is helping address the lack of legal service delivery in some areas.⁸³ The Ontario Government’s Justice Video Network has 200 videoconferencing sites and has been used for ‘everything from case conferencing and sign language interpretation, to solicitor-client hearings and training sessions’.⁸⁴ Videoconferencing has also been used by the Western Canada Society to Access Justice organization to operate several CLCs in remote areas of British Columbia.⁸⁵ It is hoped that these tele-legal initiatives will reduce the costs of legal service delivery or enable lawyers to expand their practice into a broader geographical area, or both,

⁷⁷ Ibid.

⁷⁸ Anne Wallace, “‘Virtual Justice in the Bush’: The Use of Court Technology in Remote and Regional Australia” (2008) 19(1) *Journal of Law, Information and Science* 1, 3.

⁷⁹ Ibid 4.

⁸⁰ National Association of Community Legal Centres, ‘Working Smarter: Community Legal Centres Using Innovation and Technology’ (Newsletter, 2015) 8 <http://www.naclc.org.au/resources/NACLCLC_TECH_WEB2.pdf>.

⁸¹ Ibid 9.

⁸² Giddings, Hook and Nielsen (n 33) 61.

⁸³ See Baxter and Yoon (n 18) 13, 26, 51.

⁸⁴ Canadian Forum on Civil Justice (n 18) 49.

⁸⁵ Ibid.

thereby helping to reduce some of the barriers to access to justice in regional, rural and remote communities.⁸⁶

The use of technology in the Brazilian judicial system has been growing recently, but remains in its infancy. The *Civil Procedural Code 2015* (Brazil) provides that ‘the practice of procedural acts through videoconference or other technological resource for transmitting sounds and images in real time is allowed’.⁸⁷ Similarly, the *Criminal Procedure Code 1941* (Brazil) – with the alterations given in 2009 by Law n 11.900 – also permits hearings via videoconference,⁸⁸ but only in exceptional cases (for example, highly dangerous criminals or inmates in federal prisons). Further, the National Council of Justice has now ruled that videoconferencing is not permitted for the first hearing of an arrested defendant (*audiência de custódia* or ‘custody hearing’).⁸⁹ This decision by Minister Toffoli (President of the Supreme Federal Court of Brazil and the National Council of Justice) suggests that, given the restrictive interpretation of the *Criminal Procedure Code*, use of videoconference technology will be more limited in criminal cases, at least for the foreseeable future.

Looking further ahead, the use and proliferation of technology in law and legal service delivery may also serve as a means through which law at the periphery can be communicated to the legal centre. Previously the tyranny of distance kept the two legal spheres separate and technology facilitated the extension of the general legal system to the periphery. The counter-wave could leverage the same technology to enable the dual flow of legal principles and knowledge between the centre and periphery.

D *Legal Pluralism and Current Recognition of First Law*

The counter-wave we identify asks, what may the general legal system learn from the legal customs and traditions at the periphery? The counter-wave, however, is not synonymous with legal pluralism as the latter envisions a co-existence of two or

⁸⁶ Baxter and Yoon (n 18) 13; Canadian Forum on Civil Justice (n 18) 49.

⁸⁷ *Código de Processo Civil* [Civil Procedure Code] 2015 (Brazil) art 236(3) [tr author]. See generally Katia Balbino de Carvalho Ferreira, ‘The Electronic Process in the Brazilian Judicial System: Much More Than an Option; It Is a Solution’ in Karim Benyekhief et al (eds), *EAccess to Justice* (University of Ottawa, 2016) 337.

⁸⁸ *Código de Processo Penal* [Criminal Procedure Code] 1941 (Brazil) art 185 [tr author].

⁸⁹ ‘Pauta de Julgamento da 58ª Sessão do Plenário Virtual: 05/12/2019 a 13/12/2019’ [Judgment of the 58th Session of the Virtual Plenary Session: 05/12/2019 to 13/12/2019], *Conselho Nacional de Justiça* [National Council of Justice] (Web Page, 29 November 2019) [34] <<https://www.cnj.jus.br/pauta-de-julgamento-da-58a-sessao-do-plenario-virtual-05-12-2019-a-13-12-2019/>> [tr author]. Prior to the COVID-19 pandemic videoconferencing was limited, though some states such as the State of Rio de Janeiro had a group of public defenders specially assigned for videoconferencing hearings. However, this has totally changed as a result of the pandemic and all ‘custody hearings’ in the State of Rio de Janeiro are now held by videoconference, as will be all criminal hearings after 15 May 2020: Email from Diogo Esteves (Public Defender in the State of Rio de Janeiro) to Kim Economides, 1 May 2020.

more normative orders, with neither being subservient nor dominant over the other, or even assuming that they are connected.⁹⁰ By contrast, the counter-wave is more limited in scope and focuses just on the recognition, if not integration, of specific legal principles and practices whose source originates from the periphery. Such legal principles and practices may improve, *inter alia*, mainstream access to justice by offering reformers an untapped resource for finding new ways to overcome barriers to justice, or even re-defining the justice problem itself by raising the question of what it is that citizens are able to access.

Legal pluralism may confront a number of other challenges, some quite serious, by reinforcing a perception of preferential or differential treatment which potentially undermines the notion of equality before the law, if not the rule of law itself. Non-First Nations peoples, for example, may consider some forms of traditional punishment as either too lenient or too extreme when evaluated against Western values. This was evident in the early Australian case law on *inter se* cases discussed below. There is also the temptation to romanticise legal pluralism as a form of ‘fireside equity’; specifically, the notion that pluralism is a progressive force for good.⁹¹ This is not always the case.⁹² First Law may seek to apply traditional values, which may be discriminatory, oppressive or offend basic human rights.⁹³ McRae et al cite a case where several Indigenous youths were banished for life from their community by the Aboriginal Community Council.⁹⁴ This is a very severe punishment in Aboriginal communities, which was handed down without a hearing, due process, or a lawyer being present.⁹⁵ The decision of the Aboriginal Community Council is also not subject to appeal or otherwise reviewable.⁹⁶ In Brazil, First Law in some groups expect mothers of ‘twins, sick children or children from unwed mothers’ to commit infanticide or face excommunication.⁹⁷ However, this particular concern is premised on First Law remaining frozen in time. In truth, First Law can be and is updated to reflect the changing needs of communities that use First Law and international human rights.⁹⁸

⁹⁰ See Borrows (n 3) 175.

⁹¹ Marc Galanter, ‘Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law’ (1981) 19 *Journal of Legal Pluralism* 1, 25; MDA Freeman, *Lloyd’s Introduction to Jurisprudence* (Thomson Reuters, 8th ed, 2008) 1095. See also Mitra Sharafi, ‘Justice in Many Rooms Since Galanter: De-Romanticizing Legal Pluralism Through the Cultural Defense’ (2008) 71(2) *Law and Contemporary Problems* 139, 139–40.

⁹² Freeman (n 91) 1095.

⁹³ David Pimentel, ‘Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law’ (2010) 32(2) *Harvard International Review* 32, 35.

⁹⁴ Heather McRae et al, *Indigenous Legal Issues, Commentary and Materials* (Thomson Reuters, 4th ed, 2009) 111.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Vozes Indigenas, ‘Breaking the Silence 1/3’, (YouTube, 4 May 2010) 00:02:32 <<https://www.youtube.com/watch?v=IKFpcQB-qzo>>.

⁹⁸ Pimentel (n 93) 35; Australian Law Reform Commission, ‘Traditional Aboriginal Society and Its Law’ (n 3) 225; Webber (n 21) 586. See generally Jeremy Webber, ‘Legal Pluralism and Human Agency’ (2006) 44(1) *Osgoode Hall Law Journal* 167, 169.

This has occurred in the Brazilian example cited above, where in spite of the protests of the conservative *caciques* (Indigenous political leaders),⁹⁹ the groups that practise infanticide are calling for a change to First Law.¹⁰⁰

Another more serious challenge to legal pluralism comes from legal institutions denying or ignoring other legal orders that exist in their jurisdiction. For example, successive Australian Governments (State and Federal) have explicitly denied the proposition that Australia is a legally pluralist State.¹⁰¹ The Australian Governments' rejection of legal pluralism has attracted much criticism as it ignores the reality that Australia is, and has been, a legally pluralist State since colonisation in 1788.¹⁰²

This was not always the case. In the early 19th century, there was greater willingness to acknowledge First Law, as practiced by Aboriginal and Torres Strait Islander peoples. Early Australian case law saw some members of the judiciary unwilling to apply the general law for offences committed by one Indigenous person against another (referred to as '*inter se*').¹⁰³ Beginning in 1829, the Supreme Court of New

⁹⁹ Vozes Indigenas, 'Breaking the Silence 2/3', (YouTube, 3 May 2010) 00:03:13 <<https://www.youtube.com/watch?v=mPxHwbtloUs>>.

¹⁰⁰ Vozes Indigenas (n 97) 00:07:43; Vozes Indigenas (n 97) 00:04:44; Vozes Indigenas, 'Breaking the Silence 3/3', (YouTube, 3 May 2010) 00:02:22 <<https://www.youtube.com/watch?v=dEvps2xdw2E>>.

¹⁰¹ Australian Law Reform Commission, 'Recognition of Aboriginal Customary Laws' (n 3) [166]–[168]; McRae et al (n 94) 111–12, 122, 124.

¹⁰² See, eg, Megan Davis and Hannah McGlade, *International Human Rights Law and the Recognition of Aboriginal Customary Law* (Background Papers No 10, Law Reform Commission of Western Australia, January 2006) 381 <https://www.lrc.justice.wa.gov.au/_files/P94_Background_Papers.pdf>. See also McRae et al (n 94) 111–12.

¹⁰³ Justice Cooper of the Supreme Court of South Australia advised the Government in 1841 that it was not consistent with English law to apply the general law to people who have not had any contact with colonists and who have not submitted themselves to the dominion of the British Empire: Alex C Castles, *An Australian Legal History* (Law Book Co, 1982) 524–5. 'The Case of the Native Larry', *Law and Police Courts, The South Australian Register* (Adelaide, 28 November 1846) 383 reported that Cooper J discharged the accused, stating that legislative direction was required before crimes between Aboriginal people would be justiciable: Debelle (n 3) 94. By 1848, Cooper J had accepted that the Court had jurisdiction over Indigenous people; although prior to hearing another case he stated that he would stay any execution and refer the matter to the Governor if the accused were found guilty: Australian Law Reform Commission, 'Recognition of Aboriginal Customary Laws' (n 3) [45]. However, attempts to relax the rules relating to the administration of oaths for Indigenous people, the admission of evidence, and enabling Magistrates to award summary punishment for some offences were defeated by hostile legislatures or disallowed by British law officers. The denial of these measures was justified under the rule of law and the concern it would foster prejudices: at [46]. Similarly, Willis J in *R v Bonjon* (Supreme Court of New South Wales, Willis J, 16 September 1841) ('*Bonjon*') noted that there was 'no express law ... that makes the Aborigines subject to our Colonial Code': Bruce Kercher, 'R v Ballard, R v Murrell and R v Bonjon' (1998) 3(3) *Australian Indigenous*

South Wales advised the Attorney-General that it would not apply English law to an Indigenous person accused of killing another Indigenous person because it would be unjust to do so.¹⁰⁴

The issue was considered settled in 1836 when the Full Court of the Supreme Court of New South Wales held in *R v Jack Congo Murrell* ('*Jack Congo*') that English law was to apply where one Indigenous person killed an Indigenous person from another group.¹⁰⁵ The judgment reflects their Honours' concerns about the rule of law and the perception that Indigenous people could otherwise murder with impunity.¹⁰⁶

The decision in *Jack Congo* remains valid law even today, and was reaffirmed 158 years later by the High Court of Australia in *Walker v New South Wales* ('*Walker*').¹⁰⁷ In *Walker*, the High Court of Australia refused to extend the rejection of terra nullius from *Mabo v Queensland [No 2]* ('*Mabo [No 2]*') to the criminal law.¹⁰⁸ The Court held that the criminal law must apply equally to everyone.¹⁰⁹ The official denial of more than one normative order in Australia is also reflected in the Australian Federal Government's refusal to provide wider recognition to First Law, as recommended by the Council for Aboriginal Reconciliation in 2000.¹¹⁰ The Australian Federal Government stated that it believed 'all Australians are equally subject to a common set of laws'.¹¹¹

Law Reporter 410, 425. The potential for causing injustice by applying the general law in *inter se* cases is evident in cases as recent as 1933: Philip Batty, 'Murder, Infanticide and the Moral Certainty of Ernest Kramer' (2013) 37(1) *Journal of the Anthropological Society of South Australia* 107, 123; see also 109, 116, 117–18. The hardship and injustice caused by the imposition of the general law on Indigenous people also led to an unofficial policy of not charging Indigenous offenders for *inter se* killings: Finnane (n 21) 303, 304.

¹⁰⁴ Australian Law Reform Commission, 'Recognition of Aboriginal Customary Laws' (n 3) [39].

¹⁰⁵ (1836) 1 Legge 72 ('*Jack Congo*'); Castles (n 103) 526; Debelle (n 3) 93; Australian Law Reform Commission, 'Recognition of Aboriginal Customary Laws' (n 3) [40].

¹⁰⁶ *Jack Congo* (n 105) 73; Australian Law Reform Commission, 'Recognition of Aboriginal Customary Laws' (n 3) [40].

¹⁰⁷ (1994) 182 CLR 45 ('*Walker*'). Despite the *Jack Congo* judgment, some members of the judiciary continued to express reservations in imposing the general law in *inter se* cases.

¹⁰⁸ (1992) 175 CLR 1 ('*Mabo [No 2]*'). For an analysis of the High Court of Australia's decision in *Mabo [No 2]*: see Watson (n 3) 42.

¹⁰⁹ *Walker* (n 107) 49–50. See also McRae et al (n 94) 117.

¹¹⁰ McRae et al (n 94) 115, 121, 124.

¹¹¹ *Ibid* 121.

This is problematic as it ignores incontrovertible evidence that First Law exists and still governs some traditionally orientated Indigenous people in Australia.¹¹² First Law provides rules of conduct that govern all aspects of Indigenous social interactions, backed by sanctions and dispute resolution mechanisms,¹¹³ and is therefore another functioning normative order.¹¹⁴ First Law, for Australian Indigenous peoples, is the understanding that ancestral beings gave legal instructions during the ‘Dreaming’ (the creation of country): a period of time that has many names.¹¹⁵ These legal instructions came in the form of ceremonial language and common symbols.¹¹⁶ First Law is a way of living conceived when the First Nation peoples walked across the land, now known as Australia, and sung it into creation.¹¹⁷ For the Aboriginal peoples of the Central Desert Region of Australia, First Law, or *Tnangkarra*, is represented in three layers of law: Traditional *Altjirra* law; Cultural *Tjurunga* Law; and Customary Kinship Law (see Figure 7).¹¹⁸



Figure 7: *Tnangkarra*/Dreaming Structural Law

¹¹² Mantziaris and Martin (n 19) 35. See generally Watson (n 3) 12. See also Babie (n 4) 236 who states that failing to recognise and understand the pluralistic legal order ‘is to misunderstand the nature of law itself’.

¹¹³ Australian Law Reform Commission, ‘Recognition of Aboriginal Customary Laws’ (n 3) [37], [98]; Calma (n 21) 75.

¹¹⁴ Borrows (n 3) 175.

¹¹⁵ Watson (n 3) 22; Mantziaris and Martin (n 19) 36, 40; Ronald M Berndt and Catherine H Berndt, *The World of the First Australians: Aboriginal Traditional Life Past and Present* (Aboriginal Studies Press, 5th ed, 1988) 364; Australian Law Reform Commission, ‘Traditional Aboriginal Society and Its Law’ (n 3) 219.

¹¹⁶ Kenneth Lechleitner, ‘What Does Sanctioned Traditional Punishment Look Like?’ (2013) 8(7) *Indigenous Law Bulletin* 7, 8; Watson (n 3) 22.

¹¹⁷ Watson (n 3) 30.

¹¹⁸ Lechleitner (n 116) 7–8.

Vicki Grieves explains the creation of First Law:

The creation ancestors thus laid down not only the foundations of all life, but also what people had to do to maintain their part of this interdependence—the Law. The Law ensures that each person knows his or her connectedness and responsibilities for other people (their kin), for country (including watercourses, landforms, the species and the universe), and for their ongoing relationship with the ancestor spirits themselves.¹¹⁹

While the principles of First Law vary between Indigenous Australian nations, there are some common core concepts that are shared, such as the principle of connectedness.¹²⁰ This sense of interconnectedness means that ‘people, the plants and animals, landforms and celestial bodies are interrelated’.¹²¹ The land is considered a family member, as reflected in the following explanation by Knight:

We don’t own the land, the land owns us. The land is my mother, my mother is the land. Land is the starting point to where it all began. It’s like picking up a piece of dirt and saying this is where I started and this is where I’ll go. The land is our food, our culture, our spirit and identity.¹²²

Uncle Bob Randall, a Yankunytjatjara Elder of Uluru, explains how living an interconnected life means that all beings have a ‘vast family’ and that individuals must take responsibility ‘for this family and care for the land with unconditional love’.¹²³

This denial of legal pluralism in Australia has meant that, to date, First Law has very limited recognition in Australia’s general legal system.¹²⁴ In criminal law, First

¹¹⁹ Vicki Grieves, *Aboriginal Spirituality: Aboriginal Philosophy – The Basis of Aboriginal Social and Emotional Wellbeing* (Discussion Paper No 9, Cooperative Research Centre for Aboriginal Health, December 2009) 7.

¹²⁰ Bob Randall, *Songman: The Story of an Aboriginal Elder of Uluru* (ABC Books, 2003) 16, 17. See Debelle (n 3) 85, 86; Australian Law Reform Commission, ‘Recognition of Aboriginal Customary Laws’ (n 3) [32], [37]; Australian Law Reform Commission, ‘Traditional Aboriginal Society and Its Law’ (n 3) 213; Watson (n 3) 20, 34. See also Jens Korff, ‘What Is Aboriginal Spirituality?’, *Creative Spirits* (Web Page, 8 February 2019) <<https://www.creativespirits.info/aboriginalculture/spirituality/what-is-aboriginal-spirituality>>.

¹²¹ Korff (n 120).

¹²² S Knight, ‘Our Land, Our Life (Poster)’ (Conference Paper, Office of Public Affairs, ATSIC, 1996) <<https://trove.nla.gov.au/version/41296663>>. See also Korff (n 120); Randall (n 120) 223.

¹²³ Global Oneness Project, ‘The Land Owns Us’ (Youtube, 26 February 2009) <https://www.youtube.com/watch?time_continue=281&v=w0sWIVR1hXw>. See also Korff (n 120).

¹²⁴ See Davis and McGlade (n 102) 382.

Law may be recognised in some courts when sentencing an offender,¹²⁵ or in the application of defences such as provocation, duress or a claim of right.¹²⁶ Some recognition of First Law in the general legal system can also be seen through the use of sentencing circles, for example those in Nowra and Dubbo in New South Wales and the Australian Capital Territory, and in Indigenous Courts, such as the Murri (Queensland), Koori (Victoria) and Nunga (South Australia) Courts.¹²⁷ Australian courts have also recognised First Law in accepting the loss of traditional status and privilege as a compensable injury in *Napaluma v Baker*¹²⁸ and *Dixon v Davies*.¹²⁹ Some statutory recognition of First Law is reflected in the legislation that confers land rights based on traditional claims.¹³⁰ Traditional marriage, based on First Law, has also been recognised in adoption legislation (although, not universally).¹³¹

By comparison, Canada is considered multi-juridical due to the constitutional recognition of the common law, civil law and Indigenous legal traditions as valid sources of law within the state.¹³² The acknowledgment of First Law within Canada comes from the constitutional recognition and affirmation of existing treaty rights and the rights for First Nations peoples to implement their unique laws.¹³³

¹²⁵ Calma (n 21) 83. But note, *Crimes Act 1914* (Cth) s 15AB(1)(b) was subsequently passed to prevent customary law and cultural practices from being taken into consideration when determining whether to grant bail and the conditions of any such bail. See Debelle (n 3) 110. See also *Northern Territory National Emergency Response Act 2007* (NT); Jonathon Hunyor, ‘Custom and Culture in Bail and Sentencing: Part of the Problem or Part of the Solution?’ (2007) 6(29) *Indigenous Law Bulletin* 8, 8.

¹²⁶ Australian Law Reform Commission, ‘Recognition of Aboriginal Customary Laws’ (n 3) [70], [72], [76]–[83]. On the relevance of an offender’s background of profound social deprivation, as it relates to Australian First Nations peoples, see generally: *Bugmy v The Queen* (2013) 302 ALR 192. See also *R v Gladue* [1999] 1 SCR 688; *R v Ipeelee* [2012] 1 SCR 433.

¹²⁷ Mark Harris, ‘From Australian Courts to Aboriginal Courts in Australia — Bridging the Gap?’ (2004) 16(1) *Current Issues in Criminal Justice* 26, 33, 38, 39; Calma (n 21) 84. See also John Borrows, ‘With or Without You: First Nations Law (in Canada)’ (1996) 41 *McGill Law Journal* 629, 655–6 on the Canadian use of sentencing circles as providing some recognition of First Law.

¹²⁸ (1982) 29 SASR 192.

¹²⁹ (1982) 17 NTR 31; Australian Law Reform Commission, ‘Recognition of Aboriginal Customary Laws’ (n 3) [70], [73].

¹³⁰ Australian Law Reform Commission, ‘Recognition of Aboriginal Customary Laws’ (n 3) [76]–[83].

¹³¹ *Ibid* [74]–[75]. See also Terri Libesman, *Decolonising Indigenous Child Welfare: Comparative Perspectives* (Routledge, 2013) comparing child welfare delivery frameworks across Australia, Canada, New Zealand and the US.

¹³² Borrows (n 3) 174, 198; Borrows (n 127) 633, 641.

¹³³ Canada Act 1982 (UK) c 11, sch B (‘Constitution Act 1982’) s 35(1). See also Borrows (n 3) 206; Borrows (n 127) 636.

This act of recognition in the Canadian *Constitution* has entrenched the continuing existence of First Law within Canada's legal order.¹³⁴ Although this recognition has only existed since 1982, it is readily acknowledged that 'First Nations laws, legal perspectives and other indigenous frameworks have been present throughout the entire span of the treaty-making process in Canada'.¹³⁵ This formally recognises First Law that originated

in the political, economic, spiritual and social values expressed through the teachings and behaviour of knowledgeable and respected individuals and elders. Their principles are enunciated in the rich stories, ceremonies and traditions of the First Nations.¹³⁶

One such principle recognised by the First Nations people of Canada is 'the idea of a living Earth, with a set of rights and responsibilities to govern relationships between humans and the natural world'.¹³⁷ Under Mi'kmaq law, for example, animals, plants, insects and rocks are considered persons, and therefore Mi'kmaq persons have legal obligations and duties to these beings.¹³⁸ Similarly, the Haudenosaunee of the Great Lakes have 'maintained a sophisticated treaty tradition about how to live in peace that involved all of their relations: the plants, fish, animals, members of their nations, and members of other nations'.¹³⁹ Many other First Nations in Canada developed similar laws through treaty and agreement, which regulated their interactions throughout their lands.¹⁴⁰ At present, however, the First Nations rights-based approach to natural objects has not been recognised in Canada's general legal system.¹⁴¹

As in Canada, First Law has achieved a measure of formal recognition in Brazil.¹⁴² Brazil's 1988 *Constitution* enshrines the right for indigenous people to live in an

¹³⁴ Borrows (n 3) 180.

¹³⁵ Ibid.

¹³⁶ Borrows (n 127) 646.

¹³⁷ Letter from Lisa Gue, 'Standing Committee on Environment and Sustainable Development', *David Suzuki Foundation* (Letter, 14 March 2017) 4. <<http://www.ourcommons.ca/Content/Committee/421/ENVI/Brief/BR8834774/br-external/DavidSuzukiFoundation-e.pdf>>. See also Borrows (n 127) 632.

¹³⁸ Gue (n 137) 4.

¹³⁹ Borrows (n 3) 178.

¹⁴⁰ Ibid 178–9.

¹⁴¹ See *ibid* 174; Borrows (n 127) 637.

¹⁴² Although the current Brazilian President, Jair Bolsonaro, appears openly opposed to the interests of Indigenous nations, see 'What Brazil's President, Jair Bolsonaro, has said about Brazil's Indigenous Peoples' *Survival International* (Web Page) <<https://www.survivalinternational.org/articles/3540-Bolsonaro>>. On the existence of legal pluralism in Brazil generally: see Arnaldo Moraes Godoy, 'Globalization, State Law and Legal Pluralism in Brazil' (2004) 36(50) *The Journal of Legal Pluralism and Unofficial Law* 61, 66. For more information about peripatetic programs in Brazil: see Ferraz (n 36). See also Gláucia Falsarella Foley, 'Justiça Comunitária:

ecologically balanced environment,¹⁴³ to have communal standing in court, to allocate and use subsoil resources, rivers and lakes, and the ‘inalienable and indisposible’ right to their traditional lands.¹⁴⁴ Article 231 of the Brazilian Constitution states ‘Indians shall have their social organisation, customs, languages, creeds and traditions recognised, as well as their original rights to the land they traditionally occupy’.¹⁴⁵

Such constitutional protection, including the communal right of standing in court, could be used to protect or enforce principles of First Law within the Brazilian general legal system. However, this has been called into question by art 1 of the *Statute of the Indian 1973* (Brazil), which treats Brazil’s indigenous population as legally incapable of managing their affairs and has integration as its stated goal.¹⁴⁶ While other articles in this statute may have provided some limited recognition of First Law,¹⁴⁷ its overall effect has been to undermine self-determination and autonomy granted under the 1988 *Constitution*.¹⁴⁸

Today, the tutelary regime established under the *Statute of the Indian 1973* (Brazil) no longer has effect since it contravenes higher constitutional provisions. However, because the statute has not been repealed and technically remains in force, some judges have used it to restrict the legal capacity of so-called ‘Indians’ in court.

Uma Realidade’, Tribunal de Justiça do Distrito Federal e dos Territórios (Web Page) <https://www.tjdft.jus.br/informacoes/cidadania/justica-comunitaria/publicacoes/arquivos/uma_experiencia.pdf>.

¹⁴³ Moraes Godoy (n 142) 66.

¹⁴⁴ Valenta (n 27) 645.

¹⁴⁵ Ibid 651. But see, President Bolsonaro has refused to recognise more indigenous lands (as determined by the Constitution of Brazil): Survival International (n 142). See also, Bolsonaro’s speech to UN General Assembly: Ministry of Foreign Affairs, ‘Speech by Brazil’s President Jair Bolsonaro at the Opening of the 74th United Nations General Assembly’ (24 September 2019) <<http://www.itamaraty.gov.br/en/speeches-articles-and-interviews/president-of-the-federative-republic-of-brazil-speeches/20896-speech-by-brazil-s-president-jair-bolsonaro-at-the-opening-of-the-74th-united-nations-general-assembly-new-york-september-24-2019-photo-alan-santos-pr>>.

¹⁴⁶ Valenta (n 27) 647.

¹⁴⁷ Article 56 of the *Statute of the Indian* states that ‘in case of conviction of an Indian for criminal infraction, the sentence shall be attenuated and, in its application, the court must take into account the degree of integration of the Indian’: ibid 648. Article 57 of the *Statute of the Indian* also provides formal recognition to First Law by recognising the penalties handed down by the *cacique/paje* of the tribe, except where the punishment is death: see *Statute of the Indian 1973* (Brazil).

¹⁴⁸ Orlando Villas Bôas Filho, ‘Os Direitos Indígenas No Brasil Contemporâneo’ in Eduardo Bittar (ed), *História Do Direito Brasileiro: Leituras Da Ordem Jurídica Nacional* (Atlas, 2003) 282; Gabriel de Oliveira Silva, ‘O Estatuto Do Índio Frente à Constituição Federal de 1988’, *Jusbrasil* (online, 2016) <<https://gabriel2052.jusbrasil.com.br/artigos/237423120/o-estatuto-do-indio-frente-a-constituicao-federal-de-1988>>; Valenta (n 27) 647.

Therefore, this statutory regime has become, ‘one of the most significant roadblocks to enforcement of any of the ideals afforded to indigenous peoples in the 1988 Constitution’.¹⁴⁹

From a formal point of view, it may appear that there has been a significant shift in policy from an ‘integrationist’ (*Statute of the Indian*) to a ‘protectionist’ (1988 *Constitution*) approach. However, Valenta observes

the fact that the Congress has not been able to repeal ... the Statute of the Indian ... is a good indication of the political and social atmosphere in which the 1988 Constitution operates. [This statute is] representative of the discriminatory practices prevalent in Brazil toward the Indians. The discrepancies in the legal standing of Indians between the Constitution and the relevant statutes are essential to the discussion of indigenous lands, because without a basis for independent legal standing these indigenous peoples are without one of the fundamental purposes of the rule of law: legal redress for enforcement of the rules.¹⁵⁰

To sum up: ‘rule of law problems, political pressures on the executive as well as the judiciary, and societal attitudes have contributed to a hostile environment for indigenous peoples’ in Brazil.¹⁵¹

Despite this hostility, the First Nations peoples of Brazil would appear to share a similar worldview to that of other First Nations peoples, namely that humans and the environment should coexist in harmony.¹⁵² This is encapsulated in the concept of *buen vivir*, (*tekó porã* in Guarani), which means ‘good way of being and living and learning in coexistence with nature.’¹⁵³ *Buen vivir* ‘is sustained in a way of living reflected in daily practices of respect, harmony, and balance with existence. It understands that in life everything is interconnected, interdependent, and interrelated.’¹⁵⁴ For the Guarani people (Indians of Southern Brazil), their conception of *buen vivir* occurs when ‘there is harmony with nature and with members of the community, when there is sufficient food, health and tranquillity, when the ‘divine abundance’ allows reciprocal economy, *jopói*, which translates to, ‘open hands’ of one person to the other.’¹⁵⁵ According to Fleuri and Fleuri, this principle of living in balance and sustainably with the natural world is present in most Amerindian cultures.¹⁵⁶

In addition to highlighting the current levels of domestic recognition in Australia, Brazil and Canada, the above analysis evidences a strong First Nations legal tradition

¹⁴⁹ Valenta (n 27) 648.

¹⁵⁰ Ibid 648; Bôas Filho (n 148) 282; de Oliveira Silva (n 148).

¹⁵¹ Valenta (n 27) 644.

¹⁵² See Fleuri and Fleuri (n 3) 1, 7.

¹⁵³ Ibid 1, 6.

¹⁵⁴ Ibid 6.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

at the periphery from which learning by the legal centre can occur. While Brazil and Canada may provide greater levels of recognition and protection of First Law, these States have not adopted specific legal principles from First Law and adapted them for use within their general legal systems. As discussed, a common principle across Australian, Brazilian and Canadian First Nations is a rights-based approach towards natural objects, which has not been formally recognised in any of these States.

In contrast, the legal system in Aotearoa/New Zealand has demonstrated both alacrity and receptiveness to granting legal personhood to natural objects. This recognises and introduces (albeit imperfectly) an autochthonous worldview into the general legal system through legislation.¹⁵⁷ We focus on this legal principle (granting natural objects personhood status) as it presents a potential partial solution to the over-exploitation of natural resources. This is discussed in more detail in Part IV, along with general benefits associated with the counter-wave. Aotearoa/New Zealand is particularly instructive given the shared history of colonialism and the signing of the *Treaty of Waitangi* with the Māori peoples, which has some similarity to the Canadian experience.

In conclusion, this section has explored how previous ‘waves’ of the access to justice movement have pushed the general law out to the legal periphery through itinerant courts, CLCs and through the use of technology. While providing valuable historical context, the true relevance of these centrifugal forces is as conduits through which the next counter-wave in the access to justice movement can draw legal principles from the periphery into the general legal system. The new counter-wave has also been distinguished from traditional legal pluralism and existing forms of recognition of First Law in Australia, Brazil and Canada. In so doing, the aim has been to avoid known limitations of each approach in order to embrace lessons that can be learnt from First Law. Next, instances are identified where this learning process is already underway.

III EVIDENCE OF AN EMERGING COUNTER-WAVE

In support of our argument that a new access to justice counter-wave has already emerged, we show how the legal fiction of personhood is being applied to natural objects based explicitly on the principles of First Law. Other jurisdictions are also considered, although their reasons for granting natural objects personhood are not founded on First Law. The willingness to extend personhood to natural objects demonstrates the need and utility of this legal principle. Looking to the future, we evaluate the willingness of Australia, Brazil and Canada to grant personhood status to natural objects, and note that Australia appears the most open to change and comes closest to grounding such a development in First Law.

In 2014, the *Te Urewera*, designated as a national park in Aotearoa/New Zealand in 1954, was declared a ‘legal entity’ with ‘all the rights, powers, duties, and liabilities

¹⁵⁷ See Boyd (n 3) xxxii and heralded as ‘almost’ a celebration of First Law: at xxxv.

of a legal person' in an Act of the Aotearoa/New Zealand Parliament.¹⁵⁸ Significantly, the Board that is responsible for acting on behalf of, and in the name of, *Te Urewera* is statutorily required to give effect to First Law and values.¹⁵⁹ In the words of Aotearoa/New Zealand's former Attorney-General, Chris Finlayson, the Act encapsulates the Māori worldview: 'I am the river and the river is me.'¹⁶⁰ Not unlike other First Nations peoples, Māori 'see themselves as being part of nature, and their own welfare and health being reflected back by that of their environment.'¹⁶¹ In Māori culture, all the elements of nature are viewed as kin.¹⁶²

Then, in early 2017, the Whanganui river in Aotearoa/New Zealand was granted the same legal rights, duties and liabilities as a legal person through legislation.¹⁶³ This was the culmination of 140 years of work by the local Whanganui *iwi* (trans: tribe) to have Whanganui legally recognised as their living ancestor.¹⁶⁴ According to the chief negotiator for the Whanganui *iwi*, Gerrard Albert,

[w]e have fought to find an approximation in law so that all others can understand that from our perspective treating the river as a living entity is the correct way to approach it, as [an] indivisible whole, instead of the traditional model for the last 100 years of treating it from a perspective of ownership and management.¹⁶⁵

¹⁵⁸ *Te Urewera Act 2014* (NZ) s 11(1); Jacinta Ruru, 'Tūhoe-Crown Settlement – Te Urewera Act 2014', *Māori Law Review* (Web Page, October 2014) <<http://maorilawreview.co.nz/2014/10/tuhoe-crown-settlement-te-urewera-act-2014/>>; Boyd (n 3) 134, 148, 150. See also Earth Law Centre, 'New Zealand', Earth Law Center (Web Page, 16 August 2016) <<https://www.earthlawcenter.org/international-law/2016/8/new-zealand>>. The Māori term Aotearoa refers to New Zealand, and usually translates as 'land of the long white cloud'.

¹⁵⁹ *Te Urewera Act 2014* (NZ) ss 17(a), 18(2); Ruru (n 158); Boyd (n 3) 153.

¹⁶⁰ Bryant Rousseau, 'In New Zealand, Lands and Rivers Can Be People (Legally Speaking)', *The New York Times* (online, 13 July 2016) <<https://www.nytimes.com/2016/07/14/world/what-in-the-world/in-new-zealand-lands-and-rivers-can-be-people-legally-speaking.html>>; Boyd (n 3) 131.

¹⁶¹ Thom Mitchell, 'In New Zealand, The Land Can Be A Person. Meanwhile, in Australia...?', *New Matilda* (online, 8 September 2016) <<https://newmatilda.com/2016/09/08/new-zealand-land-can-person-meanwhile-australia/>>.

¹⁶² Boyd (n 3) 133.

¹⁶³ *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 14; Eleanor Ainge Roy, 'New Zealand River Granted Same Legal Rights as Human Being', *The Guardian* (online, 16 March 2017) <<http://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being>>; Boyd (n 3) 134, 138, 139.

¹⁶⁴ Roy, 'New Zealand River Granted Same Legal Rights as Human Beings' (n 163).

¹⁶⁵ *Ibid.*

Under the legislation, two guardians were appointed to represent the interests of the river; one guardian was appointed from the Crown and the other from the Whanganui *iwi*.¹⁶⁶

Most recently, the Aotearoa/New Zealand government agreed in a Record of Understanding to grant Mount Taranaki, on the west coast of the North Island, personhood status, giving eight Taranaki *iwi* shared guardianship over the mountain.¹⁶⁷ This recognition acknowledges the status of the mountain as an ancestor and *whanau* (trans: family member) for the Taranaki *iwi* within Aotearoa/New Zealand's general law.¹⁶⁸

Aotearoa/New Zealand is not the only State to have drawn upon First Law when granting natural objects rights. Ecuador has granted the natural environment, in general, the 'right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes'.¹⁶⁹ This gives all Ecuadorians the ability to demand the government take action to enforce the rights of nature, including the right to restoration.¹⁷⁰ According to the majority of actors involved in the granting of rights to nature in Ecuador, this development had its 'intellectual origin in indigenous tradition.'¹⁷¹ A similar approach was also subsequently adopted in Bolivia.¹⁷² In both States, the legal texts make specific reference to their First Nations peoples and clearly imply that they are the 'intended guardians of the nations' natural treasures.'¹⁷³

¹⁶⁶ Boyd (n 3) 141; Roy, 'New Zealand River Granted Same Legal Rights as Human Beings' (n 163).

¹⁶⁷ Ngā Iwi o Taranaki and The Crown, 'For Mount Taranaki, Pouākai and the Kaitake Ranges' (Record of Understanding, 20 December 2017) <<https://www.govt.nz/treaty-settlement-documents/taranaki-maunga/>>; Eleanor Ainge Roy, 'New Zealand Gives Mount Taranaki Same Legal Rights as a Person', *The Guardian* (online, 22 December 2017) <<http://www.theguardian.com/world/2017/dec/22/new-zealand-gives-mount-taranaki-same-legal-rights-as-a-person>>; Derek Cheng, 'Mt Taranaki Will Be Granted Special Legal Status Similar to Te Urewera and the Whanganui River', *NZ Herald* (online, 21 December 2017) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11963982>.

¹⁶⁸ Boyd (n 3) 134; Roy 'New Zealand Gives Mount Taranaki Same Legal Rights as a Person' (n 167); Cheng (n 167).

¹⁶⁹ Georgetown University (n 5) Art 71; Mihnea Tanasescu, 'The Rights of Nature in Ecuador: The Making of an Idea' (2013) 70(6) *International Journal of Environmental Studies* 846, 855.

¹⁷⁰ Tanasescu (n 169) 12; Tanasescu (n 5); Georgetown University (n 5) art 72.

¹⁷¹ Tanasescu (n 169) 2.

¹⁷² 'Law of Mother Earth: The Rights of Our Planet. A Vision from Bolivia', *World Future Fund* (Web Page, 7 December 2010) <<http://www.worldfuturefund.org/Projects/Indicators/motherearthbolivia.html>>. See also Tanasescu (n 5).

¹⁷³ Tanasescu (n 5).

Other states have also granted natural objects personhood status, although in the following cases no reference was made to First Law. In the northern Indian State of Uttarakhand, the Ganges river and its main tributary, the Yamuna, were granted legal personhood in 2017.¹⁷⁴ This ruling is significant for Hindus, who consider the River Ganges sacred.¹⁷⁵ The ruling, designed to redress the lack of government cooperation and inaction, means that government representatives will act as the legal custodians of the river.¹⁷⁶ In Toledo, Ohio, United States of America, a lake's ecosystem was granted personhood status, which enables local residents to sue when the ecosystem's right to flourish has been contravened.¹⁷⁷ Numerous other counties in the USA have also granted natural objects rights.¹⁷⁸ In Colombia, part of the Amazon rainforest was granted rights, which allowed 25 residents to sue the government for failing to protect their right to a healthy environment due to the 44 percent increase in deforestation.¹⁷⁹ While these developments are not the result of centripetal forces drawing First Nations legal principles towards the centre, they nevertheless demonstrate the capacity and utility of legal personhood to provide greater protection to the environment, which is considered further in Part IV.

Australia, Brazil and Canada appear to be becoming more receptive to the granting of personhood status to natural objects. Although no natural object has been granted personhood status in these States yet, there are signs this could occur in the near future. In Australia, a 2017 report by the Australian Panel of Experts on Environmental Law recommended an in-depth exploration of granting natural objects

¹⁷⁴ Michael Safi, 'Ganges and Yamuna Rivers Granted Same Legal Rights as Human Beings', *The Guardian* (online, 21 March 2017) <<http://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings>>; *Mohd Salim v State of Uttarakhand* (High Court of Uttarakhand, Rajiv Sharma J and Alok Singh J, 20 March 2017) 11 [19].

¹⁷⁵ See *Mohd Salim v State of Uttarakhand* (High Court of Uttarakhand, Rajiv Sharma J and Alok Singh J, 20 March 2017) 4 [11].

¹⁷⁶ *Ibid* 2 [3], [4]; Safi (n 174).

¹⁷⁷ Sigal Samuel, 'Lake Erie Just Won the Same Legal Rights as People', *Vox* (online, 26 February 2019) <<https://www.vox.com/future-perfect/2019/2/26/18241904/lake-erie-legal-rights-personhood-nature-environment-toledo-ohio>>.

¹⁷⁸ Kevin Stark, 'How Community-Led "Rights of Nature" Initiatives Are Protecting Ecosystems', *Shareable* (31 August 2017) <<https://www.shareable.net/blog/how-community-led-rights-of-nature-initiatives-are-protecting-ecosystems>> discusses the initiatives in Lincoln county in Oregon, Tamaqua Borough in Pennsylvania and Pittsburgh in Pennsylvania. See also Tanasescu (n 169) 9.

¹⁷⁹ Samuel (n 177); Anastasia Moloney, 'Colombia's Top Court Orders Government to Protect Amazon Forest in Landmark Case', *Reuters* (online, 7 April 2018) <<https://www.reuters.com/article/us-colombia-deforestation-amazon/colombias-top-court-orders-government-to-protect-amazon-forest-in-landmark-case-idUSKCN1HD21Y>>. It is also worth noting the landmark decision of the Peruvian court that has ruled in the language of the Incas: BBC News, 'Peruvian Court Rules in Language of the Incas' (online, 19 July 2019) <<https://www.bbc.com/news/blogs-news-from-elsewhere-49046742>>.

legal personhood.¹⁸⁰ In the same year, the *Yarra River Protection (Wilip-Gin Birrarung murrn) Act 2017* (Vic) was passed, which grants the Wurundjeri people a ‘legislatively-enshrined voice in the formal custodianship of the Birrarung’, also known as the Yarra river.¹⁸¹ Although the Act does not grant the river personhood, the Act recognises the river as a ‘living and integrated natural entity’ and ‘set[s] out principles to which responsible public entities must have regard when performing functions or duties or exercising powers’ on or near the river.¹⁸² The Act also creates the Birrarung Council of which at least two (out of twelve) seats must be nominated by the Wurundjeri Tribe Land and Compensation Cultural Heritage Council (‘WTLCCHC’).¹⁸³ According to the Planning Minister, ‘this would give Wurundjeri elders a ‘central role’ in decisions around development within 500 metres of the river banks.’¹⁸⁴ Assuming the WTLCCHC is able to play a ‘central role’ in the governance and regulation of the river when their representatives may only constitute 16 per cent of the seats on the Birrarung Council, this is likely to improve outcomes for the river and river banks due to the statutory focus on the river as a living and integrated natural entity. This statutory focus aligns with the Wurundjeri’s personification of the river as a person with ‘a heart’ and a ‘spirit’.¹⁸⁵ A similar arrangement is being proposed for the Margaret River, south of Perth, Australia. One important distinction is that if the proposal discussed in the media is successful, the River will be granted personhood status.¹⁸⁶ More recently, a Bill was introduced by a member of the Greens party in the Western Australian Legislative Council that would grant enforceable rights to nature, including all ecosystems, ecological communities and native species.¹⁸⁷ The Bill proposes to grant nature the rights to: naturally exist, flourish, regenerate and evolve; recovery, rehabilitation and restoration; a healthy and stable climate system;

¹⁸⁰ Australian Panel of Experts on Environmental Law, ‘Democracy and the Environment’ (Technical Paper No 8, April 2017) 30–3 <https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e6018e6a496356f02631c0/1491468697413/APEEL_democracy_and_environment.pdf>. See also Jane Gleeson-White, ‘It’s Only Natural: The Push to Give Rivers, Mountains and Forests Legal Rights’, *The Guardian* (online, 1 April 2018) <<http://www.theguardian.com/australia-news/2018/apr/01/its-only-natural-the-push-to-give-rivers-mountains-and-forests-legal-rights>>.

¹⁸¹ Calla Wahlquist, ‘“The Dream of Our Ancestors”: Victorian Bill Gives Indigenous Owners Custodianship of Yarra’, *The Guardian* (online, 22 June 2017) <<http://www.theguardian.com/australia-news/2017/jun/22/the-dream-of-our-ancestors-victorian-bill-gives-indigenous-owners-custodianship-of-yarra>>. See also Gleeson-White (n 180).

¹⁸² *Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017* (Vic) s 1.

¹⁸³ *Ibid* s 49.

¹⁸⁴ Wahlquist (n 181).

¹⁸⁵ The preamble to the *Yarra River Protection (Wilip-Gin Birrarung murrn) Act 2017* (Vic). See also address by Wurundjeri Elders in Victoria, *Parliamentary Debates*, Legislative Assembly, 22 June 2017 (Aunty Alice Kolasa).

¹⁸⁶ Gleeson-White (n 180); ‘Margaret River’, *Australian Centre for the Rights of Nature* (Web Page) <<https://rightsofnature.org.au/communities/margaret-river/>>.

¹⁸⁷ Rights of Nature and Future Generations Bill 2019 (WA).

and a vibrant and biodiverse community of life.¹⁸⁸ First Nations peoples are also given standing to join any proceeding commenced under the Act as custodians of the land.¹⁸⁹ At the time of writing, the Bill has not passed the Legislative Council. Given the Bill's ambitious scope, which could see individuals fined up to \$500,000 or imprisoned for five years, or both, and bodies corporates fined up to \$5,000,000 for violating the rights recognised by the Act,¹⁹⁰ it is unclear whether the Bill will ultimately be successful. In the Northern Territory, First Law and the personhood status of a natural object was recognised for the first time in a negotiated instrument between the Kimberley Traditional Owners in Australia in 2016.¹⁹¹ The Fitzroy River Declaration 'recognises the river as a living ancestral being with a right to life, and includes traditional owners' obligation to protect the river for current and future generations.'¹⁹²

In São Paulo, Brazil, a 2015 draft amendment to the *Lei Orgânica* [Organic Law] (Brazil) was introduced into Parliament that recognises that nature has an 'intrinsic right to life and maintenance of their ecosystem processes.'¹⁹³ Such an amendment, if successful, is not limited to one natural object, such as a river or mountain, but the whole of nature.

While no natural objects have been granted personhood status in Canada, over 140 municipal governments, representing over 15 million Canadians have passed environmental rights declarations.¹⁹⁴ The previously discussed developments in Aotearoa/New Zealand garnered some media attention in Canada,¹⁹⁵ with some questioning whether similar reforms are possible in Canada in the near future.¹⁹⁶

¹⁸⁸ Ibid cl 6(1).

¹⁸⁹ Ibid cls 3(1)(b), 13(2).

¹⁹⁰ Ibid cl 10(2).

¹⁹¹ Gleeson-White (n 180); Kimberley Land Council, 'Kimberley Traditional Owners Unite for the Fitzroy River', *Kimberley Land Council* (Web Page, 15 November 2016) <<https://www.klc.org.au/kimberley-traditional-owners-unite-for-the-fitzroy-river>>.

¹⁹² Gleeson-White (n 180).

¹⁹³ Projeto de Emenda à Lei Orgânica [Draft Amendment to the Organic Law] 04-00005/2015 do Vereador Eduardo Tuma (PSDB) (Brazil) 18 September 2015 [tr author]; Lidia Cano Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' (2018) 7(1) *Resources* 13, 5.

¹⁹⁴ Gue (n 137) 5.

¹⁹⁵ See, eg, Roshini Nair, 'Giving Legal Rights to Nature, Animals Would Help Protect the Environment, Says UBC Legal Expert', *CBC News* (online, 14 September 2017) <<http://www.cbc.ca/news/canada/british-columbia/giving-legal-rights-to-nature-animals-would-help-protect-the-environment-says-ubc-legal-expert-1.4289285>>; Supriya Tandan, 'How Extending Personhood to Canada's Rivers Could Help Reconciliation', *National Magazine* (online, 18 April 2017) <<http://nationalmagazine.ca/Articles/April-2017/How-extending-personhood-to-Canada-s-rivers-could.aspx>>.

¹⁹⁶ Tandan (n 195).

This section has examined the inclusion of First Law principles into Aotearoa/New Zealand's general legal system through granting personhood status to natural objects. Aotearoa/New Zealand is not the only State to have granted personhood to natural objects. However, it is one State where this legal development was made with explicit reference to First Law. Part III then evaluated whether Australia, Brazil or Canada would grant natural objects personhood status and found all three States open to the prospect. It is therefore possible that Australia, Brazil and Canada could soon enjoy the benefits associated with increased recognition of First Law in the general legal system.

IV BENEFITS OF EMBRACING THE COUNTER-WAVE

Greater recognition of First Law in general legal systems, through embracing the counter-wave, offers at least four main potential benefits for both the centre and periphery. The first benefit relates specifically to access to justice, while the remainder advance broader social and political goals.

First, the counter-wave can improve access to justice by making the legal system more inclusive and meaningful to First Nations people. Access to justice could also be improved by increasing the range of individuals able to represent the interests of natural objects in court.

To understand how the counter-wave could improve access to justice for First Nations peoples, one should first examine how previous waves failed to preserve the autonomy and integrity of First Law. In some cases, well-intentioned efforts to improve access to justice may have been counterproductive by undermining traditional authority structures that support First Law. This is highlighted in the independent report by the Honourable Frank Iacobucci, who found that 'First Nations people observe the Canadian justice system as devoid of any reflection of their principles or values, and view it as a foreign system that has been imposed upon them without their consent.'¹⁹⁷ This statement is made in relation to Canada, a multi-juridical State that constitutionally recognises First Law. It is not unlikely, therefore, that other First Nations people could feel the same or worse in Australia, Brazil or elsewhere. This feeling that the general legal system is 'foreign' makes the legal system less accessible to First Nations people.¹⁹⁸

¹⁹⁷ Frank Iacobucci, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (Final Report, Ministry of the Attorney-General, February 2013) [26] <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html>. See also Trevor CW Farrow, 'What Is Access to Justice Special Issue: Symposium in Honour of John McCamus, Teaching and Scholarship' (2013) 51 *Osgoode Hall Law Journal* 957, 981.

¹⁹⁸ Human Rights Council, *Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples: Restorative Justice, Indigenous Juridical Systems and Access to Justice for Indigenous Women, Children and Youth, and Persons with*

In contrast, Jacinta Ruru (New Zealand's first Māori law professor) writes in relation to the granting of legal personhood to *Te Urewera*, that the legislation granting personhood is a 'new bi-cultural way of articulating the importance of national park lands for multiple reasons ranging from science to *cultural*.'¹⁹⁹ The legislation recognises the importance of the national park and the First Law that protected it prior to colonisation. The David Suzuki Foundation, relying on the Supreme Court of Canada's acknowledgment 'that reconciliation efforts require integration of indigenous legal concepts into Canadian law', argues that '[a]dding environmental rights and responsibilities to federal statutes could have the powerful effect of weaving indigenous law with common and civil law within our legal system.'²⁰⁰ This weaving or flow between the two legal traditions would make the general legal system more accessible to First Nations peoples,²⁰¹ thereby improving access to justice.²⁰²

Increased recognition of First Law in the general legal system also has the potential to improve access to justice by granting some individuals, as representatives of a tribe or nation, standing to appear in court in order to represent a natural object's interests. The granting of personhood to corporations was a significant development in the regulation of business, which helped drive economic growth in the late 19th century.²⁰³ This gave an artificial non-human entity, a duly registered company, rights and obligations, including the right to sue and be sued in its own name. Companies, as separate legal entities from their owners and/or directors, could be represented in court to defend and represent their own interests. Nevertheless, while corporations have rights, human representatives are still required to enforce these rights. In practice, this means the rights of a company are protected only where the company's rights align with the interests of a human individual (for example, a director or shareholder) who also has standing to appear in court.

The same is true of natural objects granted legal personhood. From an access to justice perspective, it is not the legal entity's own rights that are of interest.²⁰⁴ Rather, it is the overlap between the interests of the legal entity (in this case, a river, mountain or some other natural object) and the interests of First Nations people to defend these interests,²⁰⁵ which improves access to justice. It is the overlapping interests and the

Disabilities (Agenda Item No A/HRC/27/65, United Nations General Assembly, 7 August 2014) 4 [8]. On alienation within the Australian criminal law and marginalisation: see Davis and McGlade (n 102) 382.

¹⁹⁹ Ruru (n 158) (emphasis added).

²⁰⁰ Gue (n 137) 4.

²⁰¹ Human Rights Council (n 198) 7 [20].

²⁰² *Ibid* 22 [6], 23 [17].

²⁰³ See Walter Lippmann, *The Good Society* (Routledge, 2017) 13, quoting Nicolas Murray Butler, President of Columbia University in 1911. See generally Christopher D Stone, 'Should Trees Have Standing — Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450, 452.

²⁰⁴ Cf, for example, Stone (n 203) 456, 458, 473–80.

²⁰⁵ See generally *ibid* 459, 475.

standing in court that the granting of personhood status facilitates, which improves access to justice.

This anthropocentric view is a point of departure from previous scholarship on the granting of personhood to the environment, which considers the intrinsic rights of natural objects.²⁰⁶ In 1972, Stone put forward what was, and still is, a radical proposition: should trees be granted legal standing?²⁰⁷ In that seminal article, Stone argued that departing from the enlightenment worldview that nature is a collection of senseless objects would result in ‘[a] new radical conception of man’s [sic] relationship to the rest of nature would not only be a step towards solving the material planetary problems; there are strong reasons for such a changed consciousness from the point of making us far better humans.’²⁰⁸

In contrast, we argue that by recognising First Nations’ personification of natural objects by granting such objects personhood status, a new legal avenue is created in the general legal system for *individuals with overlapping interest to enforce these rights*. This could improve access to justice by ‘enabl[ing] people to protect their environment, to resolve conflicts that impeded other rights, and to proactively secure rights, all of which contribute to strong natural resource governance.’²⁰⁹ It would also improve access to justice as ‘[i]ndividuals and communities must have the ability and a means through which they can effectively challenge the harmful effects of the dominionist perspective on nature and establish a new legal and moral ethos that protects the environment.’²¹⁰ Without personhood status, the requirement for standing is likely to preclude First Nations people from taking action to protect the environment.²¹¹

Second, the counter-wave could also assist Australia, Brazil, Canada, and other States with First Nations peoples, to comply with their relevant treaty obligations under the *International Covenant on Civil and Political Rights* (‘ICCPR’) and the *United Nations Declaration on the Rights of Indigenous Peoples* (‘UNDRIP’).²¹²

²⁰⁶ Ibid 473–80.

²⁰⁷ Stone (n 203).

²⁰⁸ Ibid 495. See also Gleeson-White (n 180).

²⁰⁹ Nigel Crawhall and Allison Silverman, ‘Access to Justice and the Right to Sustain Nature’ (Working Paper, International Union for Conservation of Nature: Commission on Environmental, Economic and Social Policy, December 2016) 33, 6.

²¹⁰ Ibid 7. See also Stone (n 203) 493.

²¹¹ See, eg, *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516; *Onesteel Manufacturing Pty Ltd v Whyalla Red Dust Action Group Inc* (2006) 94 SASR 357. But see *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *North Coast Environmental Council Inc v Minister for Resources* (1994) 55 FCR 492.

²¹² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, 107th pen mtg, Agenda Item 68, UN Doc A/RES/61/295 (2 October 2007)

The ICCPR and UNDRIP provide some protection to First Law through provisions regarding the right to self-determination and minority rights.²¹³ Australia ratified the ICCPR in 1980, whereas Brazil and Canada accessioned in 1992 and 1976 respectively. Article 1 of the ICCPR contains the right to self-determination, stating:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.²¹⁴

Article 27 of the ICCPR provides implicit protection for First Law, if one considers its practice of First Law to be an expression of culture or religion. The Article states:

[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.²¹⁵

The UNDRIP contains several provisions that grant First Nations peoples a right to live autonomously and according to their culture and traditions, which includes their legal institutions.²¹⁶ The most relevant provisions state:

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.²¹⁷

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

(‘UNDRIP’). See generally Babie (n 4) 237 who states that the ‘new legal narrative emerging globally around Aboriginal law ... is part of supranational, sub-national, and trans-national legal relations’.

²¹³ See also Watson (n 3) 38; Human Rights Council (n 198) 5 [11] on UNDRIP affirming the ‘right of indigenous peoples to maintain and strengthen their own juridical systems’, citing arts 34, 5, 27 and 40.

²¹⁴ ICCPR (n 212).

²¹⁵ Ibid.

²¹⁶ Human Rights Council (n 198) 5 [11], 21 [2], [5].

²¹⁷ UNDRIP (n 212); Megan Davis, ‘Putting Meat on the Bones of the United Declaration of the Rights of Indigenous Peoples’ in Hossein Esmaeili, Gus Worby and Simone Ulalka Tur (eds), *Indigenous Australians: Social Justice and Legal Reform: Honouring Elliott Johnston* (Federation Press, 2016) 265.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give *due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned* and international human rights.²¹⁸

Australia, Brazil and Canada have all approved the UNDRIP.²¹⁹ Therefore, all three States support the international framework that aspires to give greater expression and recognition to First Law. As noted above, all three States (to a lesser or greater extent) can improve the formal recognition and protection granted to First Law. Depending on how States implement the above obligations domestically, it is possible that greater compliance with the ICCPR and UNDRIP will improve access to justice. If the States' general legal system is open and receptive to the counter-wave, greater compliance with the relevant provisions of the ICCPR and UNDRIP will make the general legal system more accessible and increase standing for First Nations.

Third, one of the most significant existential questions facing humanity is the over-exploitation of resources in our biosphere. This is enabled by 'today's dominant culture and the legal system', which supports the pursuit of endless growth and the assertion of 'human superiority and universal ownership of all land and wildlife'.²²⁰

This worldview is leading to the sixth mass extinction in Earth's 4.5-billion-year history.²²¹ Every year, more species are declared extinct or in danger of extinction.²²² The Great Barrier Reef, for example, is deteriorating due to 'climate change, pollution from land- and marine-based human activities, shipping and excessive tourist traffic'.²²³ The deteriorating condition of the reef led the United Nations Educational, Scientific, and Cultural Organization ('UNESCO') in 2012 to threaten to downgrade the Reef's World Heritage status to 'at risk' if immediate steps were not taken.²²⁴ In Brazil, almost 20 per cent of the Amazon rainforest has been cleared due

²¹⁸ UNDRIP (n 212) (emphasis added).

²¹⁹ Initially, Australia and Canada voted against adopting the declaration in 2007 (along with New Zealand and the United States of America), but later reversed their position demonstrating their support for the declaration. See United Nations, 'United Nations Declaration on the Rights of Indigenous Peoples', *UNDESA Divison for Inclusive Social Development — Indigenous Peoples* (2018) <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>>.

²²⁰ Boyd (n 3) xxxiv.

²²¹ *Ibid* xxi.

²²² *Ibid*.

²²³ *Ibid* 203.

²²⁴ *Ibid*.

to deforestation since 1970.²²⁵ Whereas in Canada, in 2006, threats to 488 species categorised as ‘extinct, extirpated, endangered, threatened, or of special concern’ were quantified by researchers.²²⁶ Habitat loss caused by human activities was the most significant threat (84 percent) to these species, however, overexploitation (32 percent) was a ‘particularly important’ threat.²²⁷

According to environmental lawyer and scholar David Boyd, ‘[h]umans are damaging, destroying, or eliminating entire ecosystems, including native forests, grasslands, coral reefs and wetlands. Ancient, complex, and vital planetary systems — the climate, water, and nitrogen cycles — are being disrupted by our actions.’²²⁸ Alarming, ‘humanity’s collective ecological footprint is estimated to be 1.6 Earths, meaning we are using natural goods and services 1.6 times faster than they are being replenished.’²²⁹ The current dominant worldview creates an insatiable drive for economic growth for governments and businesses alike, which ‘consistently trumps concerns about the environment.’²³⁰ Nature is viewed as a ‘thing’ to be ‘dominated, appropriated and commoditised.’²³¹ So-called ‘development’ and ‘modernisation’ are premised on the overexploitation of natural resources and unsustainable consumption,²³² creating an irreconcilable conflict between industry and environmental protection.²³³

What is required is a different ‘approach rooted in ecology and ethics’,²³⁴ which First Law offers. The autochthonous worldview is ‘the opposite of the dominant perspective in the capitalist mode of production, which seeks to exploit the land and turn it into property and its products, into merchandise.’²³⁵ In Guarani cosmology, the notion that land is an object to be owned and traded is inconceivable because the Earth has its own life because it ‘cannot move to anywhere and cannot be

²²⁵ As of 2019: Rhett Butler, ‘Calculating Deforestation in the Amazon’, *Mongabay* (Web Page, 14 September 2019) <http://rainforests.mongabay.com/amazon/deforestation_calculations.html>.

²²⁶ Oscar Venter et al, ‘Threats to Endangered Species in Canada’ (2006) 56(11) *BioScience* 903.

²²⁷ *Ibid.*

²²⁸ Boyd (n 3) xxi–xxii. See also Stone (n 203) 492.

²²⁹ Boyd (n 3) xxii.

²³⁰ *Ibid* xxiii.

²³¹ Fleuri and Fleuri (n 3) 6.

²³² *Ibid.*

²³³ See Boyd (n 3) xxxiv.

²³⁴ *Ibid* xxxiv. In a similar vein, Babie (n 4) 261 considers what can be learnt from Native Hawaiian law to help promote more productive relationships with land and resources. See also John Alder, ‘Fundamental Environmental Values and Public Law’ in Kim Economides et al (eds), *Fundamental Values* (Hart Publishing, 2000) ch 13 for a discussion of anthropocentric, ecocentric and individualistic non-anthropocentric ethical perspectives on the environment.

²³⁵ Fleuri and Fleuri (n 3) 5.

transported by humans.²³⁶ As the planet sustains human life, humans need to care for and respect nature to promote their survival.²³⁷ According to Eliel Benites, a former Kaiowá-Guaraní student and current Professor in the Federal University of Grande Dourados (UFGD), Brazil, ‘a very important dimension in the autochthonous way of life is the holistic ecological worldview: the world is a living being and the human being is a living part of this world.’²³⁸ The Earth is often seen as a mother in Brazilian indigenous cultures, which ‘protects and nurtures life through a practice of giving and reciprocity. Just as nature cares for and makes human life possible, human beings, by reciprocity, are invited to care for and protect nature.’²³⁹

As described earlier, for many First Nations people the relationship between humans and the environment (including animals and natural objects, such as rivers and mountains) is one characterised by reciprocal rights and responsibilities.²⁴⁰ The *Haida* people, whose territory spans between British Columbia, Canada, and Alaska, United States of America, conceptualise nature in familial terms. Terri-Lynn Williams-Davidson, a *Haida* lawyer and artist, stated that in the *Haida* worldview, a ‘cedar tree is known as ‘every woman’s sister,’ providing for and sustaining our existence.’²⁴¹ If non-First Nations societies were to adopt greater respect for nature this would result in dramatic changes in human attitudes towards natural objects, such as forests, rivers and lakes.²⁴² This would likely result in the environment being used in a more sustainable way,²⁴³ which would help address some of the challenges faced by the overexploitation of the natural environment. According to anthropologist, Eduardo Viveiros de Casto:

[w]e must learn from indigenous people ‘how to live in a country without destroying it, how to live in a world without demolishing [it] ... The original peoples have much to contribute to a more democratic and diverse country.’²⁴⁴

This approach is also advanced by conservationist and writer Aldo Leopold, who stated ‘[c]onservation is getting nowhere because it is incompatible with our Abrahamic concept of land. We abuse land because we regard it as a commodity belonging to us.’²⁴⁵ Leopold offers, as a solution: ‘[w]hen we see land as a community to which

²³⁶ Ibid 6, citing Eliel Benites, *Fronteiras Etno-Culturais e Fronteiras da Exclusão: Desafio da Interculturalidade e da Equidade* (Unpublished Report, September 2002).

²³⁷ Ibid.

²³⁸ Ibid 5.

²³⁹ Ibid 6.

²⁴⁰ Boyd (n 3) xxx.

²⁴¹ Ibid.

²⁴² See *ibid* xxxi.

²⁴³ Ibid 143 on the Māori’s ‘special relationship with the natural world’, including the Māori’s guardianship of the Whanganui river. See also Babie (n 4) 261.

²⁴⁴ Quoted in Fleuri and Fleuri (n 3) 5.

²⁴⁵ Aldo Leopold, *A Sand County Almanac and Sketches Here and There* (Oxford University Press, 1972) viii. See also Boyd (n 3) xxxv.

we belong, we may begin to use it with love and respect.’²⁴⁶ This is how First Nations people view the natural world, as enshrined in First Law. First Law offers a radically different and much-needed approach to conceptualising society’s relationship to the natural world. It is this worldview that we argue the legal centre may learn and benefit from through the counter-wave.

The fourth benefit of the counter-wave is that through greater recognition of First Law within the general legal system a new path to reconciliation may be possible.²⁴⁷ Greater receptivity of the legal centre to First Nations perspectives could be ‘used as a genuine move towards reconciliation.’²⁴⁸

To facilitate reconciliation, however, proper acknowledgment and restitution must be made for past wrongs.²⁴⁹ Previous attempts to address access to justice issues through proactive legal service delivery have also deepened the trauma caused by colonisation and dispossession experienced by First Nations peoples. This is especially true in States where inadequate legal protections exist for the continuation of First Law. According to the Expert Mechanism on the Rights of Indigenous Peoples, ‘[t]he traditional justice systems of indigenous peoples have largely been ignored, diminished or denied through colonial laws and policies and subordination to the formal justice systems of States.’²⁵⁰ In Australia’s First Nations communities, for example, traditional authority and First Law was ‘markedly affected by the process of settlement and dispossession’,²⁵¹ which included the reception of the general law from Britain through the defunct declaration of terra nullius. The imposition of the general law into traditionally orientated Aboriginal and Torres Strait Islander communities undermined (and continues to undermine) traditional authority structures, affecting long standing cultural norms.²⁵² This effect has been noted by the National Alternative Dispute Resolution Advisory Council in Australia, which states that although some customary forms of dispute resolution are still practiced in some communities, colonisation ‘has weakened many traditional ways of resolving disputes’.²⁵³ Similarly, in Canada, First Laws ‘have often been ignored or overruled by non-indigenous laws. [First Law’s] influence has thus been eroded within indigenous

²⁴⁶ Leopold (n 245) viii. See also Boyd (n 3) xxxv. See generally Bawaka Country et al, ‘Co-Becoming Bawaka: Towards a Relational Understanding of Place/Space’ (2016) 40(4) *Progress in Human Geography* 455.

²⁴⁷ Ruru (n 19) 290. See also Human Rights Council (n 198) 17 [74] on the use of restorative justice processes, informed by customary law, to facilitate greater indigenous self-determination.

²⁴⁸ Gleeson-White (n 180), quoting Erin O’Donnell, who was discussing the collaboration between First Nations representatives and other stakeholders of the Yarra river working together for the conservation and preservation of Birrarung (Yarra) river.

²⁴⁹ Ruru (n 19) 289, quoting Canadian indigenous Professor Taiaiake Alfred.

²⁵⁰ Human Rights Council (n 198) 4 [8].

²⁵¹ Australian Law Reform Commission, ‘Recognition of Aboriginal Customary Laws’ (n 3) [30].

²⁵² Watson (n 3) 5.

²⁵³ National Alternative Dispute Resolution Advisory Council (n 3) 3.

communities.²⁵⁴ One example of this is the application of Crown title, which has dispossessed First Nations people of their lands.²⁵⁵

In spite of this, First Law survives and is practised by some First Nations peoples. The Expert Mechanism on the Rights of Indigenous Peoples notes that ‘[d]espite the historical injustices that indigenous peoples have faced, the values and ideals of their legal systems have survived thanks to the resilience of the peoples themselves, and the close relationship between indigenous law and the land.’²⁵⁶ This is affirmed by Irene Watson, a Tanganekald, Meintangk-Bunganditj woman and scholar, who writes that ‘[o]ur Nunga law ways are still with us but they are suppressed by the Australian state.’²⁵⁷ The Australian Law Reform Commission also acknowledged that ‘Aboriginal customary law [has] demonstrated a capacity for survival and modification’,²⁵⁸ with behavioural norms changing in response to colonisation, rather than the laws. In Canada, ‘indigenous peoples stories, ceremonies, teachings, customs and norms often flow from very specific ecological relationships, and [therefore remain] interwoven with the world around them.’²⁵⁹

The capacity for the counter-wave to promote reconciliation is evident in the words of First Nations peoples when discussing the general legal system’s recognition of their relationship with the land. In relation to Aotearoa/New Zealand, Ruru states that ‘[i]f settler legal systems wish to realise aspirations for legal reconciliation with indigenous peoples, then an important component of this is to recognise indigenous peoples’ laws.’²⁶⁰ Similarly, Wurundjeri Elder, Aunty Alice Kolasa, acknowledged in her historic address to Parliament the ‘shared path of recognition, rights and repatriation and reconciliation’ that the passing of the *Yarra River Protection (Wilip-gin Birrarung murrong) Act 2017* (Vic) represented.²⁶¹ By recognising areas where the general legal system may learn from First Law and First Nations perspectives, colonising communities demonstrate their respect for the ancient legal traditions and help forge meaningful pathways for reconciliation.

The recognition of First Nations peoples’ personification of nature through the granting of personhood status in the general legal system is just one example of the centripetal action of the counter-wave. There are, no doubt, other principles in First

²⁵⁴ Borrows (n 3) 196.

²⁵⁵ Ibid.

²⁵⁶ Human Rights Council (n 198) 4 [6].

²⁵⁷ Watson (n 3) 16, 29. Some anthropologists claim that the songs (including law songs, which transfer customary law to new generations) have been lost, however, Watson states that the law continues to remain omnipresent in Indigenous communities and cannot be eradicated: at 32–3, 40.

²⁵⁸ Australian Law Reform Commission, ‘Traditional Aboriginal Society and Its Law’ (n 3) 225–6.

²⁵⁹ Borrows (n 3) 196.

²⁶⁰ Ruru (n 19) 290.

²⁶¹ Victoria (n 185) 2018.

Law that may benefit both the centre and periphery if they were incorporated into the general law.²⁶² However, given the experience of many First Nations peoples in Australia, Brazil and Canada, it is understandable that there is a reluctance to share culturally sensitive information with non-First Nations peoples.²⁶³ Historic abuse by settlers in these States and their failure to acknowledge past wrongs has contributed to an environment of distrust.²⁶⁴ Reluctance to share principles from First Law may also be borne from a fear of losing control over one's own traditions and of cultural appropriation of their Law.²⁶⁵ This knowledge and wisdom, stripped of its cultural context, could be seen as another attempt at cultural assimilation.

In fact, the very expectation that the centre should have access to First Law in a form that is accessible and understandable to settler societies is itself an exercise of privilege. Even if concerns of cultural appropriation can be overcome, to properly understand First Law 'require[s] immersion in the ... environment, language, world view, deliberation, and practices of a society'.²⁶⁶ Some have expressed concern that the meaning of First Law may be distorted when it is interpreted outside of those communities.²⁶⁷ Furthermore, intimate knowledge of the culture required to properly understand First Law is unlikely to be acquired merely through academic study. Due to First Law's oral tradition, combined with concerns about cultural appropriation, First Law is both difficult and elusive to research.²⁶⁸ In many First Nations commu-

²⁶² On the potential for First Law to answer 'many of the contemporary challenges Canadian courts encounter', see generally Borrows (n 127) 653–5.

²⁶³ See, eg, Alastair Nicholson, 'Customary Law and Family Law' (1995) 42 (Spring/Summer) *Family Matters* 24.

²⁶⁴ See Farrow (n 197) 982; Nicholson (n 263).

²⁶⁵ See, eg, Australian Law Reform Commission, 'Traditional Aboriginal Society and Its Law' (n 3) 214; Human Rights Council (n 198) 9 [29]–[30].

²⁶⁶ Webber (n 21) 625 proposes a framework for understanding how legal orders are related to their various societies. The article builds upon the pragmatist conception of law developed by Lon Fuller and Gerald Postema, but it goes well beyond their accounts, arguing that their predominantly functionalist approaches are inadequate. Although law does serve to coordinate social interaction, it does so through specific conceptual languages, through particular grammars of customary law. Law can only be understood if one takes those grammars seriously. The article pursues this argument by drawing comparisons between indigenous and non-indigenous legal orders, both to expand the comparative range and to explore what indigenous legal orders can reveal about law generally. It explores the limitations of functionalist accounts (including law and economics).

²⁶⁷ Franz von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' (2002) 47 *Journal of Legal Pluralism and Unofficial Law* 37, 64. See also Pimentel (n 93) 35.

²⁶⁸ See generally Watson (n 3) 22, 32; Mantziaris and Martin (n 19) 41–2; Borrows (n 127) 648; Human Rights Council (n 198) 4 [7] acknowledges First Law's oral tradition but notes that it 'may also be legislated through existing traditional institutions'.

nities, certain knowledge and customs are only passed on to select individuals.²⁶⁹ Thus, attempts to codify First Law for the purposes of incorporation into the general legal system could threaten to undermine the authority structures that support it.²⁷⁰

The above risks are significant and understandable. Yet, the granting of personhood to a park, river and mountain in Aotearoa/New Zealand has shown that there is a path that can carefully navigate these risks, resulting in benefits for First Nations people, including improved access to justice. However, there are important historical and cultural differences between Aotearoa/New Zealand and Australia, Brazil and Canada. It is therefore naïve to assume that what has worked in Aotearoa/New Zealand will work, for example, in Australia, which still does not have a treaty with the Aboriginal and Torres Strait Islander peoples. As previously stated, preparatory work may be required to acknowledge past wrongs and create an environment of trust and mutual respect.

V CONCLUSION

This article has highlighted the potential and need for incorporating and recognising First Law within the general legal system in order to directly improve access to justice and indirectly promote other benefits. We describe this centripetal flow of legal knowledge from the periphery to the centre as a counter-wave. While our focus has been on the First Law principle that natural objects should be treated as persons, the counter-wave may also impact on other legal principles and practices found at the periphery.

The counter-wave demands greater receptivity and openness at both the legal epicentre and periphery. First Nations peoples forcibly dispossessed of their ancestral lands and pushed to the legal periphery due to colonisation are understandably reluctant and distrustful of the centre. If First Nations communities can become more open to dialogue (once trust and sufficient protections are in place to protect the ownership and integrity of First Law), increased recognition and reception of First Law into the general legal system could improve access to justice for First Nations people.

Other forms of social organisation at the periphery may also enhance access to justice, assuming that the centre and periphery remain both receptive and open. Further research is required, however, to determine what effect, if any, the imposition of the general law has had on other forms of social organisation existing at the periphery.

²⁶⁹ Watson (n 3) 43; Mantziaris and Martin (n 19) 42. See also Berndt and Berndt (n 115) 338–9; Australian Law Reform Commission, ‘Traditional Aboriginal Society and Its Law’ (n 3) 214.

²⁷⁰ Harris (n 127) 35. See Watson (n 3) 2, 14, 43; Mantziaris and Martin (n 19) 42–3; Paul Chantrill, ‘The Kowanyama Aboriginal Community Justice Group and the Struggle for Legal Pluralism in Australia’ (1998) 40 *Journal of Legal Pluralism and Unofficial Law* 23, 53.

If the proposed counter-wave is fully embraced, an important logical corollary to the two-way flow of legal knowledge engendered by the counter-wave is the gradual erosion and eventual disappearance of the centre-periphery distinction. Increased sharing of legal principles and practices via the counter-wave should eventually make the very distinction between the centre and the periphery redundant and ultimately strengthen the rule of law through making the legal system both more accessible and equal. This is not to suggest that First Law would be subsumed within the general legal system, or vice versa. First Law would continue to be practiced by the First Nations communities as it has been for thousands of years. But rather, the counter-wave would mean First Law is no longer seen as a separate entity entirely divorced from the general legal system. Common principles and practices shared by parallel legal systems could help forge a new vision that brings citizens and the environment closer together thus promoting greater sustainability, social cohesion and, ultimately, justice.

