

LEGAL RIGHTS FOR RIVERS

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First, I'd like to thank the Dean Rusk International Law Centre - Melissa Durkee and Sarah Quinn - for inviting me to be a part of this panel. My name is Katie O'Bryan, and I am a lecturer at Monash University in Melbourne, Australia.

I am speaking to you from the land of the Boon Wurrung People of the Kulin Nation, the Indigenous owners of the land on which I currently live and work. I'd like to pay my respects to their Elders, thank them for their custodianship of this lovely part of the country, and acknowledge that this always was and always will be Aboriginal land.

The title of my presentation is *Legal Rights for Rivers*. In the context of this Symposium on the Stockholm Declaration, which had a human rights focus in terms of protecting the environment, my focus is on the rights of nature, the rights of the environment itself, manifested in the rapidly expanding field of river rights. In my presentation, I will give a brief background of the genesis of this idea and then outline some of the main issues.

What struck me when re-reading the Stockholm Declaration was its anthropocentric focus, epitomised in the sentence: "Of all things in the world, people are the most precious."¹ Legal rights for nature, and by extension, rivers, turns that approach on its head, or at least elevates nature to an equal position in the rights framework—i.e., an ecocentric approach.

I am not sure how familiar you all are with this idea of a river having legal rights, so I will give you a brief background.

This concept of giving legal rights to nature, and by extension, legal rights to rivers, really started in earnest back in 1972, the same year as the Stockholm Declaration, with a seminal paper by Christopher Stone called *Should Trees have Standing?—Towards Legal Rights for Natural Objects*.²

What did he mean by giving legal rights to natural objects? I am going to refer to rivers because although Stone did not limit the concept to just rivers, rivers have been the main focus of recent developments.

Stone outlined three criteria that would be necessary for a river to be a holder of legal rights. First, the holder of legal rights, that is, the river, must be able to have standing to appear in court. Therefore, the river would need a guardian to institute such proceedings much like we have guardians to represent children, for example.

Second, Stone also noted that any injury must be to the river itself, not to human interests in the river. Finally, he said that any relief granted must

¹ Declaration of the United Nations Conference on the Human Environment, in *Report of the United Nations Conference on the Human Environment*, UN Doc A/Conf.48/14/Rev.1 3-5 at 3.

² Christopher D. Stone, *Should Trees Have Legal Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. R. 450 (1972).

be for the benefit of the river, not as compensation to humans for the injury or damage done to the river.

Stone's article was, in fact, cited in the dissenting judgment of Justice Douglas in the US Supreme Court in a decision you're probably familiar with, although regarding a mountain not a river, called *Sierra Club v. Morton*,³ handed down that same year.

Despite this judicial endorsement, albeit by a dissenting Justice, of giving legal rights to nature, the concept was still thought of in legal circles as somewhat fanciful.⁴

But a lot happened in the last 50 years, and we have clearly moved on.

This concept of giving legal rights to rivers really started to take off in 2017 when Aotearoa New Zealand enacted the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ).⁵ It made headlines around the world, and from then we've seen a steady increase in the number of rivers which have been given legal rights in one form or another.

But they are not all the same. There are a number of different manifestations in various different contexts, with the legal rights given to rivers differing from nation to nation, depending on the context. There are currently at least 17 rivers, or river systems, that have been given legal status across the world.⁶

We've seen it in western nations such as New Zealand, the US and Canada, but also in Central and South America, as well as Asia. In one instance, the rivers of an entire country, Bangladesh, have been given legal rights.⁷

Have we seen any examples in my country, Australia, of rivers being given legal rights? Well not exactly, but we do have the *Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017* (Vic)⁸ here in Victoria, which recognises the Yarra River as an indivisible living entity and provides for an independent body to advocate on its behalf. But in contrast with the

³ 405 U.S. 727, 742 (1972).

⁴ This is illustrated by a poem written by John M. Naff, Jr., *Reflections on the Dissent of Douglas, J.*, in *Sierra Club v. Morton*, 58 AM. BAR ASS'N J., 820 (1972).

⁵ *Te Awa Tupua (Whanganui River Claims Settlement) Act of 2017* (N.Z.).

⁶ Ruby Harrigan, *Law Faculty and Monash Sustainable Development Institute Project: "Advancing Indigenous Rights: Learning from Recent Australian Experience to Support Sustainable Water Governance in Indonesia" - Rights of Nature, River Rights and the Role of Indigenous People* (unpublished report, July 2021); see also CYRUS R. VANCE CENTER FOR INT'L JUST. ET AL., *Rights of Rivers: A Global Survey of the Rapidly Developing Rights of Nature Jurisprudence Pertaining to Rivers* (2020).

⁷ Mohammad Sohidul Islam & Erin O'Donnell, *Legal Rights for the Turag: Rivers as Legal Entities in Bangladesh*, 23 ASIA PAC. J. OF ENV'T L. 160, 161 (2020).

⁸ *Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017* (Vic) (Austl.).

other rivers I've just mentioned, it does not involve any legal rights for the river itself.⁹ However, it is the first of its kind in Australia.

Described as “revolutionary”¹⁰, and “innovative”¹¹, various issues have started to emerge with giving legal rights to rivers.

One thing to be borne in mind is how the recognition of rights came about because this will have an impact on the effectiveness of that recognition.

Some of the recognition has come about by way of legislation. And the Aotearoa New Zealand legislation in relation to the Whanganui River is the main example of that.

Other recognition has come about because of litigation. The Atrato River in Colombia,¹² the Ganges and Yamuna Rivers in India,¹³ and the Turag River (and subsequently all rivers) in Bangladesh¹⁴ are examples of that.

Flowing from this is the issue of enforcement. If the river has the ability to go to court to enforce its rights, then it needs someone to represent it. Stone referred to this person (or entity) as a ‘guardian’.¹⁵

But guardians can take different forms, depending on how legal recognition came about. For example, the guardian for Te Awa Tupua, the Whanganui River, is Te Pou Tupua, referred to as ‘the human face’ of the river in the legislation.¹⁶ Te Pou Tupua is made up of two members, one nominated by the Crown and one nominated by Iwi (tribes) with interests in the Whanganui River.¹⁷

Once nominated, the guardian acts on behalf of the river not on behalf of those who nominated the members. It is independent and that independence is enshrined in the legislation.¹⁸

However, it does not always work like that. The Ganges and Yamuna Rivers from India is a case in point. The recognition of legal rights for these rivers came about as a result of litigation, not legislation. The court ordered

⁹ Katie O'Bryan, *The Changing Face of River Management in Victoria: the Yarra River Protection (Wilip-gin Birrarung murron) Act 2017 (Vic)*, 44 WATER INT'L 769, 778 (2019).

¹⁰ In particular, in relation to the Whanganui River in New Zealand, see, e.g., Jacinta Ruru, *Indigenous Restitution in Settling Water Claims: The Developing Cultural and Commercial Redress Opportunities in Aotearoa, New Zealand*, (2013) 22 PAC. RIM L. & POL'Y J. 311, 340 (2013).

¹¹ Linda Te Aho, *Ruruku Whakatupua Te Mana o te Awa Tupua – Upholding the Mana of the Whanganui River*, MĀORI L. REV. (2014).

¹² Elizabeth Macpherson & Felipe Clavijo Ospina, *The Pluralism of River Rights in Aotearoa New Zealand and Colombia*, 25 J. OF WATER L. 283 (2018).

¹³ *Salim v. Uttarakhand*, WPIL 126/2014 (High Court of Uttarakhand) 20 Mar. 2017.

¹⁴ Islam, *supra* note 7, at 160.

¹⁵ Stone, *supra* note 2, at 464-67.

¹⁶ *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (N.Z.)* § 18(2).

¹⁷ *Id.* § 20.

¹⁸ *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (N.Z.)* § 19(1)(a), § 19(2)(a).

senior public servants to be the guardian of the river.¹⁹ But these public servants are not independent, and being the guardian is just one of many responsibilities they have as public servants.

What are they supposed to do when their responsibilities conflict? The case is still on appeal, so the implementation of the court orders has been put on hold which is clearly an issue. Whoever has the role of guardian must be independent, otherwise competing interests may get in the way.

Related to this is the question of who would fund a court case if a river decided to bring one against someone who caused damage to it? The river, or most likely, the river guardian, would need the resources to run the case. And if the guardian is a public servant with competing priorities, then running a court case on behalf of a river may not be a priority.

Another issue relates to transboundary rivers: what happens when a river flows from one jurisdiction into another? For example, the Indian case applies to a particular stretch of the Ganges and Yamuna rivers which fall within the state of Uttarakhand in India, but the rivers flow beyond that one state.

In fact, the Ganges River flows into Bangladesh, which recently granted legal rights to all of its rivers including that part of the Ganges River that flows through Bangladesh. Additionally, there is a different guardian for the rivers in Bangladesh (the National River Conservation Commission) than in India. One can see how complicated it quickly gets.

Another important issue is the role of Indigenous people. Notably, the Stockholm Declaration made no mention of Indigenous people.²⁰

In any event, a number of these examples of legal rights for rivers involve Indigenous people, First Nations people.

Again, the New Zealand example of the Whanganui River is a case in point. The legislation in this example was the culmination of settlement negotiations with the Whanganui Iwi for breaches of the Treaty of Waitangi. The Atrato River case in Colombia also involved the Indigenous people of the region,²¹ and the Klamath River in the US²² and the Magpie River in Canada²³ were initiated by Indigenous peoples.

¹⁹ *Salim, supra* note 13, at 19-20.

²⁰ Declaration of the United Nations Conference on the Human Environment, in *Report of the United Nations Conference on the Human Environment*, UN Doc A/Conf.48/14/Rev.1, 3-5.

²¹ Macpherson, *supra* note 12, at 290.

²² Erin O'Donnell et al., *Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature*, 9 *TRANSNAT'L ENV'T. L.* 403, 416 (2020).

²³ Morgan Lowrie, *Quebec River Granted Legal Rights as Part of Global 'Personhood' Movement*, CBC (Feb. 28, 2021, 9:10 AM), <https://www.cbc.ca/news/canada/montreal/magpie-river-quebec-canada-personhood-1.5931067>.

But some Indigenous, and indeed some non-Indigenous scholars, have queried whether granting legal rights to rivers is an appropriate way of recognising the rights and role of Indigenous people in river management.²⁴ Does it shoehorn Indigenous views into a western legal construct? May it in fact further marginalise Indigenous people from their country?

One answer could be that it is less likely to marginalise Indigenous people when the recognition of the river as having legal rights has been initiated by Indigenous people themselves. Such recognition is therefore likely to take a more holistic view of the river, a view that doesn't separate Indigenous people from their country - where the recognition of legal status for the river and associated governance arrangements reflects the world view of the relevant Indigenous community. This is sometimes referred to as bicultural governance.

Again, and I keep coming back to the New Zealand example, the legislation granting legal rights to Te Awa Tupua, the Whanganui River, recognises four river values to be upheld by the Guardian (Te Pou Tupua), all of which are distinctly Māori. The two most well-known go like this:

'[T]he great River flows from the mountains to the sea. . .

...I am the River and the River is me[.]'

It then goes on to explain: "The iwi and hapū of the Whanganui River have an inalienable connection with, and responsibility to, Te Awa Tupua and its health and wellbeing."²⁵

To some extent, the New Zealand example could be seen as the high point, or gold standard, when it comes to legal rights for rivers and the rights of Indigenous people. But this is only because of the wider settlement context. If you look at just the legal rights for the river aspect, there are some issues, because Māori, even though they are guaranteed a position on the river Guardian, are essentially one step removed from having a role in protecting the river.²⁶

It is only in the context of the whole settlement, the entire Act and associated agreements, that Indigenous water rights are recognised and given effect. Under the legislation, Te Pou Tupua, the Guardian, doesn't have a direct role in the management of the river.

²⁴ Virginia Marshall, *Removing the Veil from the 'Rights of Nature': The Dichotomy Between First Nations Customary Rights and Environmental Legal Personhood*, 45 AUSTL. FEMINIST L. J. 233, 238 (2020); Gabrielle Eckstein et al., *Conferring Legal Personality on the World's Rivers: A Brief Intellectual Assessment*, 44 WATER INT'L 804, 807-810, 815-18 (2019).

²⁵ *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (N.Z.) § 13.

²⁶ Katie O'Bryan, *Giving a Voice to the River and the Role of Indigenous People: The Whanganui River Settlement and River Management in Victoria*, 20 AUSTL. INDIGENOUS L. REV. 48, 63 (2017).

It doesn't even have a role in developing the strategy to deal with issues relevant to the health and well-being of the River.²⁷ However, the Whanganui Iwi and other Iwi with interests in the river DO have a role in developing the strategy.

Another point to note is that the settlement involved vesting the ownership of the Whanganui River in the Whanganui River, which means that the river owns itself. However, what it really owns is the riverbed,²⁸ it does not own or have any rights to the water in the river.²⁹ This is common to several rivers which have been granted legal rights,³⁰ and here are a couple of issues with this.

First, if a river does not have any legal rights to its water, this will make it more difficult for the river to protect itself, that is, to protect the river's water quality and flow.

The second issue relates to liabilities, and whether the river, and therefore the river guardian, could be held liable for damage caused by a naturally occurring flood.³¹ And that is an interesting question, and is one of the reasons why the case relating to the Ganges and Yumana Rivers is on appeal. Additionally, could the river guardian be held liable for not doing its job in protecting the River? We don't yet have any answers to these questions, but they highlight the complexities of giving legal rights to rivers.

So just to sum up, there's been a lot of talk about how innovative it is to give legal rights to rivers as a way of protecting them, a clear departure from the anthropocentric focus of the Stockholm Declaration. But I hope I have been able to show that it is a much more complex concept than one might be first led to believe, and in that regard, I have really only scratched the surface when it comes to the issues that it raises.

²⁷ *Id.* at 64.

²⁸ *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (N.Z.) § 41.

²⁹ *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (N.Z.) § 46(1).

³⁰ Erin O'Donnell, *Rivers as Living Beings: Rights in Law, But No Rights to Water?*, 29 GRIFFITH L. REV. 643, 651-3 (2020); see also, Patrick Barkham, *Should Rivers Have the Same Rights as People?*, THE GUARDIAN (July 25, 2021, 6:00 AM), <https://www.theguardian.com/environment/2021/jul/25/rivers-around-the-world-rivers-are-gaining-the-same-legal-rights-as-people> (explaining that the Magpie river was apparently given the right to flow).

³¹ Laurel Stowell, *Whanganui River Rises High – But Stops Short of Flood*, WHANGANUI CHRONICLE (Mar. 7, 2018, 11:02 PM), <https://www.nzherald.co.nz/whanganui-chronicle/news/whanganui-river-rises-high-but-stops-short-of-flood/EZJCM5YQJZIGKD4TNEMBVZPSU4/> (referencing the last time the Whanganui [nearly] flooded, which was before this legislation [in 2015], a number of roads were closed and a tourist farm was cut-off and canoes were said to have washed away).