



# Rights of Rivers: Learning from the River Whanganui Case

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## 1. Background

Generally, laws meant to protect nature usually suffer setbacks with respect to either their provisions or their mechanisms of enforcement. While certain laws have no enforceable right to a clean environment, others lack sufficient deterrence or require strict proof of causation to ground action. Consequently, suggested reforms include addressing the constitutional challenge of justiciability, improving sanctions, creating compensation guidelines, and amending laws on proof of causation. The enforcement mechanisms of the laws can benefit from strengthening good governance, building the capacity of the judiciary to be able to effectively adjudicate on conservation-related matters, and generally encouraging hybrid enforcement mechanisms.

The wordings of any legal regime on the conservation of nature usually reflect how a particular society interacts with nature. For regimes that are strictly anthropocentric, legal regimes on nature conservation are hinged on the impact of environmentally harmful activities on humans (and not necessarily nature) rather than ecological restoration, making the regimes reactive rather than proactive. Environmental Impact Assessment Acts, which should have the most proactive or precautionary objectives, have fallen short in the sense that they prioritise economic development over conservation – a trend that is averse to everything that sustainable development stands for. For instance, an average Environment

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Impact Assessment Act does not contemplate a key precautionary principle – the prevention of unforeseen environmental damage.

It is in the light of this that a change in ideology is constantly being explored across the globe, to one which is less exploitative of nature – giving personhood rights to nature. The Rights of Nature ideology (RON) reckons man is a part of nature and not apart from nature. Thus, human desires are not morally superior.<sup>1</sup> Through the incorporation of this viewpoint, nature is entitled to exist and flourish. This rights of nature approach are largely beneficial for the natural environment, and it is equally an approach that in the long-term will promote the survival of generations of human existence, which ultimately relies on the natural environment to survive in the past, present and future.<sup>2</sup>

An apt recognition of the RON approach can be seen in long practised indigenous laws, which are focused on the understanding that humans constitute an integral part of nature. As a result, any harm done to nature is suffered by humans.<sup>3</sup> However, implementing the rights of nature can be complex, and it would require a holistic approach, such as incorporating a broader institutional system into an existing legal framework. This includes taking contributions of indigenous knowledge and financial support for guardians seriously.

## **2. The Importance of Rivers**

Humans, through generations, have consistently depended on rivers. They are a vital source of food and water. Rivers provide fresh, safe drinking water and are home to several species of fish,

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<sup>1</sup> Solon, P. (2018). The rights of mother earth. The climate crisis. South African and global democratic eco-socialist alternatives, 107-130.

<sup>2</sup> Satgar, V. (2018). The climate crisis: South African and global democratic eco-socialist alternatives (p. 372). Wits University Press.

<sup>3</sup> Justine Townsend Rights of Nature: How Granting a River ‘Personhood’ Could Help Protect it, Blog: America & Canada, Smart Water Magazine, Access At: <https://smartwatermagazine.com/blogs/justine-townsend/rights-nature-how-granting-a-river-personhood-could-help-protect-it>. (Last Visited June 4, 2022)

birds and other wildlife that depend on them for food. In addition to connecting ecosystems to one another, wetlands and rivers are home to migratory birds and migrating wildlife, respectively.<sup>4</sup> Additionally, rivers promote agriculture, transportation of goods and services and the generation of renewable energy.<sup>5</sup> Renewable energy is becoming even more relevant as the world moves away from fossil fuel dependence.<sup>6</sup>

The protected rivers shield riverside communities from flood and are critical infrastructure for them. They are also vital in the provision of safe, clean, and dependable water sources to local communities. Through moderation of water temperatures and filtration of nutrients and sediments, protected watersheds and riverside lands are utilized by local communities as dependable water sources, significantly reducing the cost of water supply and treatment facilities.<sup>7</sup>

However, river biodiversity is in a state of crisis, mostly owing to increased anthropogenic activities. This has contributed to endangering freshwater species significantly.

### **3. The Imperative of Rights of Nature**

When all these conventional environmental laws restrict human interference with the environment, it results in permitting rather than preventing environmental harm. Consequently, they undermine the resilience of ecosystems and sustainability objectives generally.

Nature is hardly presented as a stakeholder during decision-making on land or other ecosystem use. Thus, decisions about what happens to forests, rivers, lakes etc., are determined by humans

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<sup>4</sup> Dana Romanoff, Benefits of River Protection, Reformer, American Rivers, Access At: <https://www.americanrivers.org/conservation-resources/rrformer/benefits-of-recreation-focused-river-protection/> (Last Visited June 4, 2022)

<sup>5</sup> The Importance of Rivers [Past, Present, and Future], IMPOFF, March 20, 2020, Access At: <https://impoff.com/importance-of-rivers>. (Last Visited June 4, 2022)

<sup>6</sup> Romanoff, *supra* note 3.

<sup>7</sup> Romanoff, *supra* note 3, 4.

and human institutions. The extent to which nature and its resources are exploited is determined wholly by the decisions of humans and human institutions. As nature itself can only be a silent observer in this decision-making process, several international and municipal laws on the protection of nature are set in place to take this factor into consideration. However, economic interest is usually prioritised over ecological interest, leading to the effectiveness of these protection mechanisms being minimal.

The “precautionary principle” is a principle of international environmental law<sup>8</sup> that encourages pre-emption of harm by acting proactively even where information on the harm or extent thereof is unavailable. Literature on environmental impact assessment suggests that assessments barely end up impacting development plans.

From the perspectives of approaches such as “sustainable development”, “blue economy”, and the human right to a healthy environment, the focus is on striking a delicate balance between conservation and economic development. However, the attempts to achieve this have been minimal.<sup>9</sup>

On the other hand, from the perspective of the Rights of Nature (RON) approach, the focus is that nature has inherent rights to exist, evolve and fulfil ecological functions. The objective of the RON perspective is to promote ecological integrity by developing governance systems that project nature as a bearer of rights and not an object.<sup>10</sup> RON approach is therefore premised on the assumption that human interference with biotic and abiotic nature must be subject to the latter’s rights to exist, evolve and fulfil ecological functions. These rights are increasingly being recognised at different levels – national and sub-national. Such laws often vary in reflection and scope; however, a common denominator to them is

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<sup>8</sup> Hickey Jr, J. E. & Walker, V. R., 1994. Refining the precautionary principle in international environmental law. *Va. Env'tl. LJ*, 14, p. 423.

<sup>9</sup> Harden-Davies, H., Humphries, F., Maloney, M., Wright, G., Gjerde, K. & Vierros, M. (2020). Rights of nature: perspectives for global ocean stewardship. *Marine Policy*, 122, 104059.

<sup>10</sup> Id.

that they recognise humans as a part of the natural community and not apart from it. Consequently, humans are meant to be stewards of nature, given that any harm done to nature would result in self-harm.

In the late 1960s, the concept of giving rights to nature originated in its current form in the United States (U.S.). Particularly, in the 1965 case of *Sierra Club v. Morton*,<sup>11</sup> the plaintiff sued to stay the development of a resort in a valley, as they considered such a development to be injurious to nature which, in their opinion, was entitled to a right to exist or flourish.<sup>12</sup> Although, five years later, the U.S. Supreme court rejected the argument about nature possessing such rights, the cause of action provoked several debates on whether or not nature was entitled to rights.<sup>13</sup> Aligning with the original reasoning in *Sierra Club v. Morton*,<sup>14</sup> a United State Supreme Court Judge – Justice William Douglas, argued for a ‘Bill of Rights’ in one of his books – *A Wilderness Bill of Rights*.<sup>15</sup> He argued that there should be a Bill of Rights “to protect those whose spiritual values extend to the rivers and lakes, the valleys and the ridges, and who find life in a mechanized society worth living only because those splendid resources are not despoiled.”<sup>16</sup>

Christopher Stone, a University of California Law Professor, was also inspired by the original reasoning in the *Sierra Club* case. This led to his publication of a collection of essays in 1974 titled, *Should Trees Have Standing? Towards Legal Rights for Natural Objects*.<sup>17</sup> In his book, Stone argued that an environmental entity should have

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<sup>11</sup> *Sierra Club v. Morton* 405 U.S. 727.

<sup>12</sup> Adam Sowards, *Can a Woodchuck Sue*, *Columns & Letters*, INLANDERS, February 05, 2015, Access At: <https://www.inlander.com/spokane/can-a-woodchuck-sue/Content>. (Last Visited June 4, 2022)

<sup>13</sup> *Id.*

<sup>14</sup> *Sierra Club v. Morton* 405 U.S. 727.

<sup>15</sup> Douglas, W. O., 1965. *Wilderness Bill of Rights*.

<sup>16</sup> Mcrobert, David & Salive, Bianca. (2019). *Granting Lake Erie Environmental Rights: Will it work?* 10.13140/RG.2.2.31863.47527.

<sup>17</sup> Moore, T. R. (1974). *Should Trees Have Standing? Toward Legal Rights for Natural Objects*. *Florida State University Law Review*, 2(3), 672-675.

a legal personality that should entitle it to appear in court as a right.

The RON ideology is growing globally – in some cases, and rights are being granted to nature, while in others, proposals are launched to that effect.<sup>18</sup> There are currently about 369 initiatives bordering on granting Rights to Nature. By these initiatives, one or more entity of nature is granted a right to exist or flourish. These initiatives indicate that the time to promote stewardship for nature is now.<sup>19</sup>

#### **4. The Rights of Rivers in Practice: A Trajectory**

Using the RON ideology will serve as a good water governance approach if it is properly integrated into existing legal regimes. According to Eckstein et al., integrating the philosophies of the Māori indigenous group into existing conservation legal frameworks in New Zealand took up to 8 years.<sup>20</sup> Whanganui River was granted legal rights through legislation, and this was prompted by the need to resolve the existing financial and ownership challenges among the Whanganui Iwi (the local Maori tribe), the New Zealand government and other river users.<sup>21</sup> To resolve this, all stakeholders interfaced to co-develop an inclusive framework – one that integrates tradition and knowledge (spiritual

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<sup>18</sup> Nash, R. F. (1989). *The rights of nature: a history of environmental ethics*. Univ of Wisconsin press.

<sup>19</sup> Dr Tineke Lambooy, Nature needs legal rights to really protect biodiversity, January 28, 2021, Open Access Environment, Access At: <https://www.openaccessgovernment.org/protect-biodiversity/102506/>. (Last Visited June 4, 2022)

<sup>20</sup> Gabriel Eckstein, Ariella D'Andrea, Virginia Marshall, Erin O'Donnell, Julia Talbot-Jones, Deborah Curran & Katie O'Bryan, *Conferring legal personality on the world's rivers: A brief intellectual assessment*, 44(1) WATER INT'L (2019) 1, 3.

<sup>21</sup> Erin O'Donnell & Julia Talbot-Jones. (2018). *Creating legal rights for rivers: Lessons from Australia, New Zealand, and India* 23(1) Ecology and Society 7, 10.

ecology) into decision-making on the rights of the Whanganui river and incidental matters.<sup>22</sup>

In 2017, the Te Pā Auroanā Te Awa Tupua framework emerged because of stakeholder interactions.<sup>23</sup> The framework addressed issues such as guardian responsibilities, catchment boundaries, conflict management and so on.<sup>24</sup> With this framework, enforcing the rights, duties, and liabilities of the Whanganui River as a juristic person has relatively become a practical reality.<sup>25</sup>

Precisely two days after the Whanganui River decision, in the case of Mohammed Salim v. State of Uttarakhand & others<sup>26</sup>, the Uttarakhand court in Northern India granted legal personhood to the Ganges and Yamuna rivers. Although the decision of the court was premised on the RON ideology and the need to effectively manage the rivers, there remains a vacuum on how this right can be implemented. For instance, jurisdictional issues arising from the transboundary nature of the rivers are yet to be addressed by the court. Further, there is no framework on who could likely be the guardians and what would be their assigned responsibilities. The case is, however, pending in the Supreme Court for reconsideration.

Another river granted legal personhood was the Turag River in Bangladesh in February 2019.<sup>27</sup> The court based its decision in this

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<sup>22</sup> Eckstein et al. *supra* note 14 at 3.

<sup>23</sup> Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, New Zealand Government, Access At: <https://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html>.

<sup>24</sup> Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, §§ 14, cl. 1 & 2.

<sup>25</sup> Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, §§ 12 & §§ 20.

<sup>26</sup> Mohammed Salim v. State of Uttarakhand & others December 5, 2016, and March 20, 2017, Writ Petition (PIL) No. 126 of 2014.

<sup>27</sup> Islam, M. S. & O'Donnell, E. (2020). Legal rights for the Turag: rivers as living entities in Bangladesh. *Asia Pacific Journal of Environmental Law*, 23(2), 160-177.

case on the Public Trust Doctrine.<sup>28</sup> The decision of the court was a reaction to the construction of illegal structures at the riverbanks, which were obstructing the free flow of the river. Consequently, the court removed the river from the realm of privately owned natural resources and grouped it under government-owned resources. The court cited and relied on the precautionary and polluter pays principles under International Environmental Law.<sup>29</sup>

In all the examples cited above, the rivers are now being represented with the rivers now recognized as legal subjects and no longer legal objects. The three examples discussed adopt a common approach to the management of rivers. The courts are now more inclined to emphasise ecological integrity by preserving ecological values.<sup>30</sup>

## **5. The Integrated Framework and the Rights of Rivers: Learning from the Whanganui Example**

Eckstein et al. have rightly argued that an important reference for policymakers and judicial experts that are willing to drive the rights of rivers approach is the integrated Te Awa Tupua framework.<sup>31</sup> An express framework to implement the legal personhood of rivers is crucial because there is a limit to which a court of law can issue specific directives on the modalities for implementation. For instance, it is not in the character of a court to address the potential consequences of its decisions. Moreover,

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<sup>28</sup> Jacobs, D. F. (1993, February). The public trust doctrine and river conservation. In *Riparian Management: Common Threads and Shared Interests: A Western Regional Conference on River Management Strategies: February 4-6, 1993, Albuquerque, New Mexico* (Vol. 226, p. 85). US Department of Agriculture, Forest Service, Rocky Mountain Forest and Range Experiment Station.

<sup>29</sup> Human Rights and Peace for Bangladesh and others v. Secretary of the Ministry of Shipping and others, (2016) Writ Petition No. 139896 Court Judgment (Supreme Court of Bangladesh).

<sup>30</sup> Allen, *supra* note 13.

<sup>31</sup> Rodgers, C. (2017). A new approach to protecting ecosystems: The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. *Environmental Law Review*, 19(4), 266-279.



though the decisions would bestow benefits on a wide range of stakeholders such as industries, professionals, communities and so on, it also presents the risk of politicising the courts. The courts remain saddled with discharging the responsibility of upholding moral authority and confidence in the system.<sup>32</sup> This has been reflected in events that have been a sequel to granting rights to the Ganges and Yamuna rivers.

When legal personhood is granted to rivers, the responsibility of representation is placed on the appointed guardians rather than on the elected officials. The implication of this is that without broad institutional and financial support, only representatives able to bear the financial burdens of costly litigation can institute actions on behalf of 'aggrieved' rivers.<sup>33</sup>

To buttress the need for an integrated institutional framework for the effective enforcement of the legal personhood of rivers, the examples from Ecuador are also instructive. Despite the express granting of rights to nature under Articles 71-74 of the Ecuadorian Constitution of 2008,<sup>34</sup> only three cases have been successfully instituted by civil society. This is fundamentally due to the financial burden involved in the proceedings. One of the three cases was instituted by two Americans who were part-time residents in a property along the Vilcabamba River.<sup>35</sup> They instituted an action against the Government of Loja to stay the construction of a road along the river – an act that tended to cause flooding and obstruct sustainable use of the river by residents.<sup>36</sup> The enormous costs of proving the claims of cause and effect were privately borne by the plaintiffs.

The New Zealand integrated framework has circumvented the financial burden challenge by creating a NZ \$30 million fund for instituting actions to protect the right of the Whanganui River to

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<sup>32</sup> Eckstein et al. supra note 16 at 5.

<sup>33</sup> Id.

<sup>34</sup> ECUADOR CONST., 2008, Republic of Ecuador, Art. 71- 74.

<sup>35</sup> Re: Vilcabamba-Quinara highway, Judgment, Provincial Court of Loja, Case NO. 11121-2011-0010.

<sup>36</sup> Eckstein et al. supra note 16 at 7.

exist, flow, and flourish.<sup>37</sup> This is a model that should be emulated to effectively implement the decisions of the court in India and Bangladesh. Moreover, it should also be enforced in express constitutional provisions like those of the Ecuadorian Constitution.

The New Zealand model integrated framework on enforcing the personhood of rivers has given credence to the fact that enforcing the rights of rivers and other elements of nature is highly practicable and surmounts financial and systemic hurdles if properly co-developed by relevant stakeholders. The model is a major step in the direction of changing the narrative of global water governance<sup>38</sup> and wider social implications.<sup>39</sup>

This integrated framework approach is holistic and therefore sets a strong precedence for countries that are on the path of giving rights to rivers and other natural elements. In Nigeria, the Rights of River Ethiope is currently being strongly advocated by the River Ethiope Trust Foundation (RETFON), supported by the Earth Law Foundation (ELF).<sup>40</sup> In line with the integrated framework, RETFON is currently drafting the rights of River Ethiope in broad terms to give stakeholders and policymakers the opportunity to adapt them to local needs.

It is important at this point to emphasise that giving personhood to natural elements like rivers does not denote that all biodiversity can and will be preserved. Rather, the overall objective of the RON paradigm shift is to limit human property rights with nature's right to exist and flourish; that is, human property rights and the rights of rivers would be exercised in a relational context.<sup>41</sup> So essentially, humans are meant to utilise the rivers to the extent that the rivers

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<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> River Ethiope secures rights recognition, *Enviro News Nigeria*. March 11, 2018, Access At: <https://www.environewsnigeria.com/river-ethiope-secures-rights-recognition/>. (Last Visited June 4, 2022)

<sup>41</sup> Hallowes, D. (2019). *The Climate Crisis: South African and global democratic eco-socialist alternatives* ed. by Vishwas Satgar. *Transformation: Critical Perspectives on Southern Africa*, 98(1), 88-94.

would still be able to maintain their vital functions. For instance, adopting an example given by Peter Burdon, a law granting rights to a river would naturally conflict with the property rights of landowners, farmers and so on, raising questions of conflict of interests and dispute settlement.<sup>42</sup> However, where the right is implemented in a relational context, social and environmental factors are taken into consideration.<sup>43</sup> The logical outcome of such considerations would be an acknowledgement of the human need for water, but with a mindful consideration of the role it plays in the larger ecosystem, giving rise to a balanced decision that the river should be used to the extent that its vital functions are maintained.<sup>44</sup>

## 6. Conclusion

The ethos of the peaceful co-existence between humans and nature is gradually becoming accepted as a preferred narrative – humans are increasingly being perceived as being a part of nature and not apart. Thus, both humans and nature have the right to existing thrive and grow. Aligning with Peter Burdon, the legal act of granting rights to nature empowers and strengthens the process of developing new norms and structures, such as in schooling systems and workers' instructions. Rethinking humanity's relationship with nature and the cosmos at large is currently being considered by various groups around the world.<sup>45</sup>

The key to effective implementation of the rights of rivers is that a river can be exploited to the extent that its vital functions are maintained. Although the meaning of the phrase 'vital functions' is a subject for further research, the obvious implication of the rights of nature ideology for the preservation of natural ecosystems is profound. Where broader institutional systems on nature preservation are integrated into existing conservation legal frameworks, such as in the Wanganui River case, implementing the Rights of rivers (and by extension, nature) would be highly practicable, effective, and entrenched.

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<sup>42</sup> Burdon, P. D. (2010). The rights of nature: Reconsidered. *Australian Humanities Review*, 49, 69.

<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> Allen, *supra* note 13.