

The River that became a Person – Giving Rights to Nature

by Michael Towsey and Dieter Dambiec

On 5 August 2014 a deed of settlement¹ (Deed) was signed between the Crown in right of New Zealand and the Whanganui Iwi (Tribe) under which the Whanganui River in the north island of New Zealand is declared a *legal person* with rights and interests². The name of the legal person is “Te Awa Tupua” which is described in the Deed as “an indivisible and living whole comprising the Whanganui River from the mountains to the sea, incorporating its tributaries and all its physical and metaphysical elements”³.

In the parlance of lawyers, the Whanganui River acquired *legal standing* before the courts and for other legal matters that affect it. In the Deed the River also has a set of intrinsic values⁴ (Tupua te Kawa) which represents the essence of Te Awa Tupua (the legal person). In particular, the values of Te Awa Tupua are that it supports and sustains life and natural resources and the health and wellbeing of the people of the River, and it is a spiritual entity – a living whole that is indivisible incorporating all its physical and metaphysical elements. Te Awa Tupua also has a human face (Te Pou Tupua) to exercise rights, powers and duties on behalf of and in the name of Te Awa Tupua and in its interests consistent with its values.

How is it possible, you may ask, for a river to become a person? And what kinds of rights does a river have? This question is a familiar one for animal rights activists, and can also be approached from that perspective.

Activists argue that animals have rights by virtue of their *sentience*⁵, that is, their ability to perceive, feel and experience *subjectively*, including both pleasure and pain. At least all vertebrates, they argue, are sentient. Although even invertebrate animals with some kind of nerve structure also have ability to sense their environment and respond through use of some organ of their body. Note that sentience is distinct from rationality.

Various animal welfare organisations around the world have declared that animals have five rights⁶:

1. Freedom from hunger and thirst;
2. Freedom from pain, injury, disease;
3. Freedom from discomfort;
4. Freedom from fear and distress;
5. Freedom to express normal behaviour.

¹ The Deed is entitled RURUKU WHAKATUPUA - TE MANA O TE AWA TUPUA:

<http://nz01.terabyte.co.nz/ots/DocumentLibrary/140805RurukuWhakatupua-TeManaOTeAwaTupua.pdf>. The settlement legislation for the Deed is to be introduced in 2015 and enacted sometime in 2015-16 by the New Zealand Parliament.

² Clauses 2.2 and 2.3 of the Deed.

³ Clause 2.1 of the Deed.

⁴ Clauses 2.6 and 2.7 of the Deed.

⁵ See: <https://www.voiceless.org.au/the-issues/animal-sentience>.

⁶ Developed from the UK Government *Report of the Technical Committee to Enquire into the Welfare of Animals Kept under Intensive Livestock Husbandry Systems* in 1965 chaired by Professor Roger Brambell and adopted by World Organisation for Animal Health and Royal Society for the Prevention of Cruelty to Animals and other organisations. See:

http://msue.anr.msu.edu/news/an_animal_welfare_history_lesson_on_the_five_freedoms.

Note that number 5 goes beyond absence of harm. It implies that each animal has the right to express its species *nature*.

However, for animal rights activists, providing only for the welfare of animals is not enough. What is really needed is that sentient animals be regarded as legal persons having legal rights and *standing* before the law. This could be done either individually or collectively.

In a recent case (December 2014⁷) in the New York State Supreme Court (Appellate Division), an animal rights group brought habeas corpus proceedings against a man keeping a pet chimpanzee in a cage. The group argued that the chimp was an “autonomous self-determining being”⁸ and was being held captive against his will. Presiding Justice Karen Peters (as part of the five-judge panel) rejected this argument and allowed the man to keep the chimp. The court considered that apes have a “lackadaisical approach to civic life”⁹ and therefore do not qualify for human rights. “Legal personhood”, she wrote, “has consistently been defined in terms of both rights *and* duties.”¹⁰

In short, no responsibility, no rights. Except that children and the mentally ill have human rights even though they cannot exercise full responsibility. And entities such as corporations, universities and nation states are legal persons even though they are not sentient. Indeed there is a ground swell of resentment against corporations having the status of legal persons because their single-minded pursuit of profit encourages them to behave with pathological irresponsibility.

In another recent case (again in December 2014¹¹) in Argentina, concerning an orang-utan in a zoo, the opposite conclusion was reached to that of the New York court. The Argentinian court recognised the ape as a “non-human person” unlawfully deprived of her freedom. Accordingly, she should be freed and transferred to a sanctuary.

Just what does it mean for an entity to be a “person” and holder of legal rights? There are at least five consequences:

1. The rights are defined, although this can be very general, such as a corporation having the legal capacity and powers of an individual as well as other commercial powers, or in the case of the Whanganui River its legal personhood (Te Awa Tupua) simply has the rights, powers, duties and liabilities of a legal person.
2. A body of laws and procedures exists (and likely continues to develop) pertaining to those rights.
3. Legal proceedings must be in the entity's *own* name, not that of another human (although human representatives are required in the case of inanimate legal persons).
4. When granting legal relief, the court considers the harm done or potential harm to the entity, and in some cases this can include economic loss.
5. Relief is given or awarded to the “legal person”.

⁷ <http://www.nonhumanrightsproject.org/wp-content/uploads/2014/12/Appellate-Decision-in-Tommy-Case-12-4-14.pdf>.

⁸ http://www.nytimes.com/2014/12/05/nyregion/chimps-dont-have-same-rights-as-humans-court-says.html?_r=0.

⁹ http://www.nytimes.com/2014/12/05/nyregion/chimps-dont-have-same-rights-as-humans-court-says.html?_r=0.

¹⁰ Page 4 of the Court's decision.

¹¹ <http://www.reuters.com/article/2014/12/21/us-argentina-orangutan-idUSKBN0JZ0Q620141221>.

At this point we should note that there is nothing to stop trees from having legal standing, e.g. if the legislature so desired, and indeed as far back as 1972 legal scholar Christopher Stone made just such a proposal¹². There are two motivations to extend legal rights beyond individual humans, animals and indeed plants to include natural objects such as forests, rivers, catchments etc. These are:

1. The welfare of human beings, animals and plants is inextricably linked to the health of the ecosystems in which they live. In this regard, there is little point endowing an animal with rights and then destroying its habitat. The recognition that life on Earth is indivisible encourages a belief in the rights of natural entities – such is the case with the Whanganui River having the status of a legal person.
2. Triple Bottom Line Accounting (TBA), now known as Integrate Reporting (IR), has failed to live up to its promise of making governments and corporations accountable for damage done to society and nature. Free-market obsessed developed countries have co-opted TBA/IR to engage in pollution offsetting – a corporation may burn coal if it plants trees; developers may destroy one habitat if they rehabilitate another. Endowing a forest with rights protects it *prior to* economic considerations. Or in the case of a river, such as the Whanganui River, the intrinsic value of it being a source of health and wellbeing has priority and is recognised as part of its legal personhood, as are its spiritual, metaphysical and physical aspects.

In 2008, Ecuador became the first nation in the world to grant rights to nature (Pacha Mama) when its citizens approved a new constitution that included such rights¹³. In the Ecuadorian Constitution nature in all its forms has the right to exist, maintain and regenerate its vital cycles, structure, functions and evolutionary processes, and to be restored. The people generally have the legal authority to call upon public authorities to enforce these rights on behalf of ecosystems. In a 2011 constitutional case, the Provincial Court of Loja ruled in favour of the immediate protection and legal tutelage of the rights of nature¹⁴, particularly for the Vilcabamba River, granting an injunction against the Provincial Government from carrying out road-widening works along the River, as no remediation and rehabilitation plans or environmental permits were evident.

In 2012¹⁵, Bolivia passed¹⁶ the world's first law recognising Mother Earth as sacred. It is based on the earlier "short law"¹⁷ under which Mother Earth is considered a "dynamic living system comprising an indivisible community of all living systems and living organisms, interrelated, interdependent and

¹² Stone, Christopher D. (1972), 'Should Trees Have Standing? – Toward Legal Rights for Natural Objects', *Southern California Law Review* 45: 450–87. See also: Stone, Christopher D. (2010), *Should Trees Have Standing? Law, Morality, and the Environment* (3rd ed.), Oxford University Press.

¹³ See particularly, Title II: Rights, Chapter seven: Rights of nature, Articles 71, 72, 73 and 74, and also Title VI: Development Structure, Chapter one: General principles, Articles 275 (third paragraph), 276.4 and 277.1. Download the Constitution of the Republic of Ecuador at:

<http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

¹⁴ Constitutional Injunction 11121-2011-0010. See: <http://therightsofnature.org/first-ron-case-ecuador/>.

¹⁵ The Framework Law on Mother Earth and Integral Development for Living Well has been in effect since 15 October 2012; <http://www.lexivox.org/norms/BO-L-N300.xhtml>; <http://www.ipsnews.net/2014/05/bolivias-mother-earth-law-hard-implement/>.

¹⁶ http://www.huffingtonpost.com/peter-neill/law-of-mother-earth-a-vis_b_6180446.html;

<http://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights>.

¹⁷ Law of the Rights of Mother Earth.

complementary¹⁸, and as a sacred entity having the following rights:¹⁹ to life, to the diversity of life, to water, to clean air, to equilibrium, to restoration, and to pollution-free living. This includes the right to maintain vital cycles of water, nutrients and energy without human alteration. The law emphasises that humans should relate to Mother Earth in a manner that is deeply respectful and not merely as an inanimate resource that has to be managed.

On a similar basis, in New Zealand, the Whanganui River is recognized as an “indivisible and living whole from the mountains to the sea”²⁰. No one owns the River, as it is a being (Te Awa Tupua) of itself²¹. Any person utilising the River should seek to protect and promote the River’s “health and wellbeing”²², and for resource consent purposes recognise its human face (Te Pou Tupua) as a possible “affected person”²³. The concept has similarities in ancient Roman Law to that of the usufruct (the right to enjoy but not damage or waste) and to P R Sarkar’s principle of collective property set out in the Progressive Utilization Theory (PROUT) in which people have usufructuary rights, but no one has the right to misuse collective property²⁴.

For indigenous peoples, such as the New Zealand Maori, the sacredness of Mother Nature is not a legal fiction. They already recognise Her expression of the natural world as having some kind of *sentience*, with the Earth being a holistic breathing, living organism that can respond to what is being done to it. Though that recognition is subtle and subjective it is an essential understanding for external or objective balance in pursuing the affairs of life and society.

These examples demonstrate that people around planet Earth are gradually embracing a realisation of what the Indian philosopher, Prabhat Ranjan Sarkar, calls *Neohumanism*²⁵. Neohumanism is the synthesis of two great civilising traditions, European humanism and the South Asian spiritual tradition. Neohumanism recognises natural entities as having two kinds of value, *existential value* and *utility value*. Europe’s last 3000-4000 year history can be understood as the struggle to accept and extend the embrace of existential value to ever widening circles of people. The inexorable trend to grant rights to animals and plants and even to Mother Earth is likewise a momentous step, for it recognises that the *non-human world* has existential value, which is intrinsic and not derivative of utility to humans. The planet is moving beyond humanism.

Does this mean that TBA/IR is obsolete? Certainly not! Our approach to the sacredness of Mother Earth must be practical. TBA/IR gives us an objective understanding of our impact on the planet and permits us to make adjustments accordingly. In the language of Neohumanism, subjective approach through objective adjustment. Together, in balance there is equilibrium.

¹⁸ See Article 3 (Mother Earth) in Law of the Rights of Mother Earth. Download the Law at:

<http://www.worldfuturefund.org/Projects/Indicators/motherearthbolivia.html> and <https://makanaka.wordpress.com/2011/06/06/the-law-of-mother-earth-by-bolivia/>.

¹⁹ See Article 7 (Rights of Mother Earth) in the Law of the Rights of Mother Earth.

²⁰ Part 2 of the Deed.

²¹ However, the river bed will be vested in Te Awa Tupua (at least, for the present, that part of the river bed owned by the Crown).

²² Clause 1.3.4 of the Deed.

²³ Clauses 9.5.2 and 9.10.1 of the Deed.

²⁴ Sarkar P.R. (1962), Chapter 5, Purport to verse 5-12 in *Ananda Sutram*, Ananda Marga Publications.

²⁵ Sarkar P.R. (1981-82), *The Liberation of Intellect: Neohumanism*, Ananda Marga Publications.

Two helpful books to read:

- *Six Capitals* by Jane Gleeson-White, Allen & Unwin, 2014,

<https://www.allenandunwin.com/default.aspx?page=94&book=9781743319161>

- *Liberation of Intellect: Neohumanism* by Prabhat Ranjan Sarkar, Ananda Marga Publications, 1982,

<http://anandamargabooks.com/portfolio/neohumanism-in-a-nutshell-volume-1/gallery/social-philosophy/>

<http://anandamargabooks.com/portfolio/neohumanism-in-a-nutshell-volume-2/gallery/social-philosophy/>