Whanganui River Agreement – Indigenous Rights and Rights of Nature

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Whanganui River Agreement

– Indigenous Rights and Rights of Nature –

by Elaine C. Hsiao*

Environmental law has long sought to protect the interests of nature and all of its elements. Sometimes this has been framed as beneficial to human health and wellbeing. Sometimes it has involved commodification of natural resources or systems in the form of market mechanisms. Rarely has it involved a recognition of an aspect of nature as a living entity with rights of its own equivalent to human rights. This is what a recent agreement between the Maori of the Whanganui River and the government of New Zealand pledged to do on 30 August, 2012. This essay recounts the history behind the agreement of an indigenous struggle for environmental sovereignty amounting to the longest-standing legal battle in New Zealand. Then it highlights the accomplishments of that agreement, namely recognition of the Whanganui River in its entirety as a living being and legal entity. It also recognises the enduring indigenous struggle by Maori tribes in New Zealand to maintain control of their lands and rights, representing the rights of nature, and of a continual process to decolonise both nature and peoples.

Decolonisation of a River and its People

One of the most pervasive legacies of colonisation remains the civilising mission of European imperialism of "uncivilised" wilderness and peoples the world over.[1] The project of "improving" non-European or non-Western peoples and forms of nature through imposition of a predetermined order on all levels of political, socio-cultural, legal and economic life, characterised European imperialism and continues on today in projects of modernisation, globalisation and international aid for both development and conservation. This involved establishing colonial systems of administration that disrupted traditional and customary forms of governance, and converting wild lands over to colonial land preferences, such as agricultural production and decorative gardens.

A strategy of resistance to colonisation on the part of peoples whose very cosmology refuses to recognise nature as merely a set of resources for human use and commodification, involves an assertion of environmental sovereignty. Indigenous peoples, whose culture, identity and socio-political organisation co-evolve from and with their natural environment may find that assertion of their own self-determination and cultural preservation are linked to rights, decision making and control over the lands and resources to which they are connected.[2] In such cases, relocating indigenous sovereignty simultaneously evokes an assertion of environmental sovereignty. Through a process of reclaiming environmental rights, indigenous sovereignty itself can also be restored.

The story of the Whanganui Iwi and Te Awa Tupua is one of so many narratives of intertwined struggle for decolonisation of both peoples and nature. The Whanganui Iwi share two ancestors, Paerangi and Ruatipua. It is said that Ruatipua "draws lifeforce from the headwaters of the Whanganui River on Mount Tongariro and its tributaries which stretch down to the sea". The river itself mirrors the extension of the descendants of Paerangi and Ruatipua. "*Ko au te awa, Ko te awa ko au* – I am the river and the river is me".[3] As such, the Whanganui Iwi recognise the Whanganui River as their ancestor, as a treasured thing (*taonga*), and as a living being, Te Awa Tupua.[4]

Te Awa Tupua is the whole of the Whanganui River, which includes all of its physical and metaphysical elements extending from its tributaries and the mountains to the sea.[5] The Whanganui River is the longest navigable river in Aotearoa/New Zealand and the provider of transport, sustenance, water, energy and enjoyment. For the people of the river, the Whanganui Iwi, Te Awa Tupua is integral to health and wellbeing.[6] They have long organised their *hapū* (sub-tribes) around guardianship (*kaitiakitanga*) of this *taonga* (treasure/treasured place), so as to protect the *mauri* (life-force) of every extent of the river for generations to come.[7] It is this "enduring concept of Te Awa Tupua – the inseparability of the people and River – [which] underpins the desire of Whanganui Iwi to care, protect, manage and use the Whanganui River through the *kawa* and *tikanga* maintained by the descendants of Ruatipua and Paerangi".[8] Protecting the River is equivalent to protecting the people, and in this case, protecting the (Maori) people could also lead to better protection of the River.

A History of Systemic Rights Deprivation

The desire of the Whanganui Iwi to protect this sacred river has endured for over a century, with multiple petitions and protests raised over generations. "Recent" events listed in the timeline of the Whanganui River Maori Trust Board's website date back to 1849 when

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certain Maori groups managed to preserve eel fishing rights in specific streams.[9] In 1860, the Maori enforced a toll against Pakehas (New Zealanders of European descent) travelling upstream.[10] In 1873, the Whanganui Iwi petitioned Parliament against the Timber Floating Bill and again throughout the 1880s for eel weirs that were destroyed to allow for steamer traffic on the River.[11] In 1895, the Whanganui Iwi finally brought a claim to the

The Whanganui River. Courtesy: Wikipedia

Supreme Court of New Zealand asserting customary fishing rights. In response, the Whanganui River Trust Board was created, placing control of the River in the hands of the colonists. In 1898, the Whanganui Iwi brought a claim seeking compensation for gravel that had been removed from the River (largely to construct roads), only to have the 1903 Coal Mines Act vest riverbeds in the Crown.[12]

Over the next century the Crown would continue to pass legislation that infringed upon the customary rights of the Whanganui Iwi, relying on this very legislation to assert its position in its courts. In 1903, the Whanganui Iwi petitioned the Aotea Maori Land Court to stop the Crown from taking riparian lands, which the Crown justified under the Scenic Reserves Act.[13] Meanwhile, the Crown continued to remove gravel, release invasive species (*e.g.*, salmon and trout), destroy fishing weirs, and even proposed an entire system of hydro-electric dams up and down the River in 1920.[14] The Whanganui Iwi tried to petition for damages to their native rights in 1927, but Parliament was unsympathetic.[15] In 1931, they began to raise funds for legal battles to protect their customary rights.[16] In 1936, they brought a challenge against Crown ownership of the River and, in 1938, contentious litigation over parts of the riverbed (and lands adjacent) began.[17] The riverbed litigation would continue for 24 years, ultimately vesting ownership of the riverbed in the Crown.[18] Negotiations on compensation for gravel that was removed from the River would follow until 1988, the same year that the Whanganui River Maori Trust Board was established in order to negotiate customary rights claims on behalf of the Whanganui Iwi.[19]

Meanwhile, the Whanganui Iwi had been battling the government's scheme of hydro-electric dams. In 1959 and 1962, they objected repeatedly to the diversion of Whanganui headwaters.[20] When they petitioned the Queen regarding their treaty rights over the River in 1977, it took four years for the Minister of Maori Affairs, Ben Couch, to suggest that their petition be ignored.[21] A big year, 1988 would also mark the beginning of the minimum flows litigation, which involved the Whanganui River Maori Trust Board as a representative of the Whanganui Iwi.[22] This lasted four years before being halted by an application by the Royal Forest and Bird Protection Society for a water conservation order.[23] It was at this time that the Whanganui River Maori Trust Board brought a case to the Waitangi Tribunal concerning their customary and treaty rights (under the 1840 Treaty of Waitangi) to the Whanganui River, settling once and for all the issue of Maori *mana* (authority) in the River.[24]

The Whanganui River has been the longest-standing legal battle in New Zealand's history. As the events above regale, ever since the Treaty of Waitangi in 1840, the Whanganui Iwi have asserted their customary rights time and again on behalf of the Whanganui River. Over a hundred years of protest and petitions against attempts by the government or Pakeha to appropriate elements or portions of the River exhibit great violence executed by the law against Maori people. The customary rights of the Whanganui Iwi were repeatedly whittled away through government legislation (*e.g.*, the Coal Mines Act of 1903), vesting different river interests (*e.g.*, riparian lands, the riverbed) in the Crown and then relying on those laws to argue against the Maori in various government-instituted tribunals (*e.g.*, Native Land Court). These systemic abuses continued against due recognition for the rights of the Whanganui Iwi for over 150 years.

Wai 167: Maori Rights Unextinguished (Even by Law)

As the Waitangi Tribunal noted in its 1999 Whanganui River Report, statutory and institutional limitations over the last century prevented the Whanganui Iwi from bringing a claim on the issue of the River as a whole. The Tribunal states, for example, that the Native Land Court and the Native Lands Act were "adverse to large tribal claims", forcing the Maori "to fit in with that process" by "break[ing] things down into small blocks".[25] Domestic legislation and courts were just not appropriate for a case concerning the whole of the River in the Te Awa Tupua sense that the Whanganui Iwi and the wellbeing of the River required. It would take the Waitangi Tribunal and a resort to the Waitangi Treaty in Wai 167 to finally clarify the issue of what ultimately was a "question of recognition and *mana*" (authority/power).[26] The claims were heard in 1994 and followed by a biocultural process, in essence a fact-finding mission that involved site visits and extensive public hearings by members of the Tribunal with Whanganui Iwi and other stakeholders.

Wai 167 produced an extensive report by the Waitangi Tribunal in 1999 recognising Maori interests in the river, including their authority (*mana* and *rangatratanga*) over the whole of the River as represented by the Whanganui River Maori Trust Board.[27] The Tribunal was of the view that "unless the Maori right in the river is settled, properly acknowledged, and provided for, the people will be always

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on the back foot, responding, without sufficient resources, to complex planning proposals by which others assume control".[28] In accordance with the Waitangi Treaty and its principles, the Waitangi Tribunal found for each of the Maori claims provided below:

- *that Atihaunui-a-Paparangi have the customary authority, possession, and title to the lands, waters, and fisheries of the Whanganui River;*
- *that these were guaranteed to them by the Treaty of Waitangi and have not been willingly relinquished;*
- *that the claimed authority, possession, and title have been eroded or displaced by Crown laws, policies and practices inimical to the Treaty; and*
- *that they continue to be eroded or displaced by current Crown laws, policies and practices*.[29]

These findings were argued primarily on Treaty principles. Most prominently that the "Maori gift of governance to the Crown" is a "qualified sovereignty" that requires a duty on the part of the Crown to actively protect Maori *rangatiratanga* (sovereignty, self-determination) and *taonga*, like the Whanganui River.[30] This means that Crown acts and omissions, including legislation that had the effect of denying Maori rights to self-determination and protection of their *taonga*, violated this duty unless conceded or consented to by the Maori. History, as briefly outlined above, shows that the Maori had not willingly ceded any of their rights or interests in the River to the Crown, in fact they had fought vehemently against such acts for over a century. The Tribunal proceeded to outline specific Crown laws and policies that violated the Waitangi Treaty and its principles, and concluded that the Whanganui Iwi "has been, and is likely to be, seriously prejudiced by such Treaty breaches".[31]

As the Waitangi Tribunal is a commission that makes recommendations, it could only report its findings and propose recommendations to guide future settlement negotiations between the Whanganui Iwi and the Crown.[32] In its concluding comments, the Tribunal suggest: (1) recognition of the Atihaunui (Whanganui Iwi) authority in and ownership of the Whanganui River as an entity and a resource (not just in terms of riverbeds and other English legal concepts) in legislation; (2) negotiation by the Crown with the Whanganui River Maori Trust Board for a final settlement, including compensation for presumptive uses of river resources that belong to the Atihaunui; and (3) that the Crown create a joint body consisting of an equal number of Crown and Atihaunui representatives to equally share in the ownership of the riverbed or watercourse.[33] It proposes two options for future planning or decision making which allow for either "owner approval", whereby the river is entirely vested in the Whanganui Iwi and any resource consent application requires their approval, or "consent authority", whereby the Whanganui River Maori Trust Board is added as a "consent authority" under the Resource Management Act of 1991, requiring Whanganui Iwi approval along with that of other recognised consent authorities.[34] These institutional and legal arrangements are still to be settled in negotiations between the Whanganui Iwi and the Crown.

Tūtohu Whakatupua: Personhood for the Whanganui River

Since Wai 167, negotiations have taken place between 2002–2004 and again in 2009 (currently on-going).[35] Recently, two statements have been codified: (1) a Record of Understanding in 2011, which sets forth an agreed framework for negotiations between the Whanganui Iwi and the Crown, and (2) Tūtohu Whakatupua in 2012, capturing areas of agreement as further negotiations continue. Key aspects of both the Record of Understanding and Tūtohu Whakatupua have been recognition of the Whanganui River as Te Awa Tupua, a living being and entity in its own right, and the unique status of the Whanganui River in relation to Te Awa Tupua and its governance.[36] These are expressed as the following principles:

- Te Awa Tupua mai i te Kahui Maunga ki Tangaroa – *an integrated, indivisible view of Te Awa Tupua in both biophysical and metaphysical terms from the mountains to the sea*;[37]
- Ko au te awa, ko te awa ko au – *the health and wellbeing of the Whanganui River is intrinsically interconnected with the health and wellbeing of the people*;[38]
- Te Mana o Te Awa – *recognising, promoting and protecting the health and wellbeing of the River and its status as Te Awa Tupua; and*
- Te Mana o Te Iwi – *recognising and providing for the* mana *and relationship of the Whanganui Iwi in respect of the River*.[39]

These principles clearly demonstrate the relationship between the Whanganui River and its people, but also the interconnectedness of their sovereignty. Recognition of Maori authority in the River has correlated with recognition of the River's own *mana*.

One of the many maori *marae* along the Whanganui River Courtesy: Wikipedia

The recent Tūtohu Whakatupua agreement surfaced in the public media as the first-ever recognition of personhood for a river.[40] The 2011 Record of Understanding defined two negotiation objectives, to recognise the status of Te Awa Tupua and to provide for the *mana* of Whanganui Iwi.[41] Status of the River meant statutory recognition as Te Awa Tupua.[42] Tūtohu Whakatupua reaffirms this and

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furthermore, calls for "statutory recognition of Te Awa Tupua as a legal entity with standing in its own right".[43] It then goes on to vest parts of the riverbed that were considered to be owned by the Crown in Te Awa Tupua.[44] The salient point here is that the riverbed was returned to the River itself, not to the Whanganui Iwi. This reflects genuine intent to recognise the Whanganui River as an entity in and of itself – complete, or as the suggested statutory wording suggests "as an indivisible and living whole, from the mountains to the sea, incorporating its tributaries and all its physical and metaphysical

Kayaking is a very popular sport on the river Courtesy: Wikipedia

elements".[45] As a legal entity, the River has standing and cannot be owned, especially not in any sense that common law property laws would understand.[46] Like women and slaves, the Whanganui River has undergone a transformation from property interests to a legal being in its own right. It is a story of the emancipation of nature through a continuous process of decolonisation.

Conclusion

Although much remains to be negotiated still, legal recognition of Te Awa Tupua is undoubtedly a Maori victory for the Rights of Nature movement. Other famous proponents of this movement have included Christopher Stone (author of "Should Trees Have Standing?"), deep ecologists, Earth First, Cormac Cullinan and other Wild Lawyers, the Pachamama Alliance, and all who have extended the human concept of rights to apply to other living beings, nature, ecological systems and the environment so as to free them from objectification, commodification and proprietisation. The international legal movement to recognise rights of nature has been advanced by other nations like Bolivia, who have constitutionally enshrined the Rights of Mother Earth and pioneered the Universal Declaration on the Rights of Mother Earth. In Aotearoa, it remains to be seen how legal standing for a river and legal personhood of the Whanganui River will ultimately be codified in domestic law and how the final settlement of this protracted struggle for Maori rights will be resolved.

Statutory recognition of the River is only a beginning. Its guardianship, Te Pou Tupua, must still be appointed (one by the Crown and the other by all Iwi with interests in the River) and once installed, must begin the real work of representing the River in human decision-making processes.[47] It is still undecided what shared values will guide such representation and unknown whether a human proxy for nature will ever be able to sufficiently represent a river's interests.[48] Tūtohu Whakatupua provides for the development of a Whole of River Strategy to provide for integrated management of the Whanganui River.[49] According to the agreement, this means the "future environmental, social, cultural and economic health and wellbeing of the Whanganui River".[50] Although the focus is on the River, it is all of the aspects of the River which are of anthropocentric interest (*e.g.*, economic, social, cultural). Arguably, the environmental interests could stand alone and be considered to be purely in the interests of nature itself, but as the entire Whanganui River case demonstrates, environmental interests are also strongly in the interest of human beings.

In the principles of Earth Jurisprudence as elucidated by Thomas Berry, "Every component of the Earth Community has three rights: The Right to Be, The Right to Habitat, The Right to fulfill its role in the ever-renewing processes of the earth community".[51] Within this projection of rights to other living beings and systems is a recognition that people, as the creators of legal systems, institutions and even terms like "rights", have a responsibility to speak on behalf of nature to enforce those concepts.[52] As the River values are negotiated, we will see whether the Whanganui Iwi will manage to "colonise" Pakeha thinking, institutions, laws and politics with River Values that will truly represent the Whanganui River as a complete, separate and living entity. In this respect, the use of traditional knowledge will be important – not merely in the sense that traditional knowledge is absorbed and used in Western science and understandings, but as far as shaping the entire way that Western thought and power are conceived and exercised.

It also remains to be seen how far personhood for a river will go. Some have likened the River's standing as comparable to the legal status of a corporation, but the River's legal standing could potentially extend further.[53] Thus far, negotiations have involved the Whanganui Iwi and the Crown, but future negotiations and decision-making processes could include a third party, the Whanganui River itself. This would appropriately recognise the *mana* of the Whanganui River as separate from the *mana* of the Whanganui Iwi, which seems to be one of the intentions of the River negotiations. There is Whanganui Iwi *mana* represented by the Whanganui River Maori Trust Board (whether the Maori agree with this or not is another issue) and then there is Whanganui River *mana* represented

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by Te Pou Tupua (the "human face of Te Awa Tupua" whose duty is to Te Awa Tupua and not its appointers, the Whanganui Iwi and the Crown).[54] This distinction could serve to place the River's personhood status as comparable to that of aboriginal peoples, a sovereign entity whose rights to self-determination extend beyond those of a corporate entity.

Once Te Awa Tupua has legal standing and Te Pou Tupua to speak on its behalf, it will be interesting to see what types of cases or legal actions it may initiate. It could potentially bring claims against the Crown and private entities for damages to its physical and spiritual wellbeing. Compensation to the River would likely require ecological restitution and restoration of a different sort – mere monetary compensation would be meaningless in the eyes of the River. The possibilities that recognition of Te Awa Tupua represent for the Rights of Nature movement are abundant, as are its potential influences in other jurisdictions outside of Aotearoa. Also in September 2012, the 5th World Conservation Congress of the International Union for Conservation of Nature (IUCN) passed a resolution on "Incorporation of the Rights of Nature as the organizational focal point in IUCN's decision making".[55] This resolution calls for IUCN to incorporate Rights of Nature into all of its planning and decisions as well as to support development of a Universal Declaration on the Rights of Nature. Integral to that process will be the sharing of national experiences in promoting Rights of Nature, including the Maori experience in Aotearoa. The Whanganui River case has been a story of indigenous struggle, environmental sovereignty for both nature and people, and a progressive contribution to the Rights of Nature movement.

Notes

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27 *Supra*, note 4.
28 *Ibid.*, at para. 1.3.6.
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30 *Ibid.*, at para. 9.1.3.
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32 Treaty of Waitangi Act 1975, para. 5(1).
33 *Supra*, note 4, at paras 11.7–11.10.
34 *Ibid.*, at para. 11.7.
35 *Supra*, note 3, at paras 1.7–1.9, 1.15–1.16.
36 *Ibid.*, at paras 2.1–2.9.
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38 *Supra*, note 8, at para. 1.18.2; *supra*, note 3, at para. 1.8.2.
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42 *Ibid.*, at para. 3.4.
43 *Supra*, note 3, at para. 2.1.
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Kawana flour mill on Whanganui River, 1854 (restored) Courtesy: Wikipedia

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