

Regulation,
Regulators, and
the Crisis of Law
and Government

Rights, Interests, and the Water Resource: Crossing the Rubicon?

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Policy Brief

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Regulation, Regulators, and the Crisis of Law and Government

This programme examines the regulatory system in the wake of the global financial crisis, assessing its current weaknesses, the role of legislative and judicial bodies, and identifying measures for future reform of both markets and regulatory regimes. It aims to shed light on the recent failures of regulators, often captive of the very industries they are meant to regulate, and examine ways to improve the accountability and effectiveness of the regulatory system.

Executive Summary

This policy brief discusses the fitness for purpose of rights-based approaches to the freshwater resource.

- Efforts to develop effective and sustainable governance for the global freshwater resource must account for not only the existing stresses on this resource, but also emerging and future challenges in this area caused by climate change and population growth.
- The central point for consideration here is the vexed question of the application of rights discourse that has traditionally characterized the common law approach to the governance of the freshwater resource. This type of approach typically and contentiously sees individual rights pitted against one another and/or the wider public interest.
- Substantive consideration of current rights-based aspects of water governance must begin by examining the nature and (often quite constrained) content of long-established rights claims at common law between individuals in respect of conflicting uses of the water resource.
- The nature and implications of the relationship between individual rights claims and the public interest are comparatively underarticulated. The entry into force of the Human Rights Act 1998 has both revitalized individual rights claims and added an additional element of complexity to the legal landscape, yet while individual rights claims will continue to be significant for affected individuals, they will, for the most part, be secondary to that of regulatory law.
- The future of rights claims and the water resource may be characterized by much more radical thinking, specifically in the emerging field of wild law or rights for nature (specifically rivers), which may offer useful new approaches to developing a sustainable legal regime for freshwater governance.
- The relationship between individual rights-based claims and the broader public interest in respect of environmental claims remains fraught with difficulties and inconsistencies. Whilst we are yet to reach the point of no return, the search for a holistic and sustainable approach to managing our use of, and relationship with, the water resource is an increasingly pressing one.

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The state of water law in the UK at the present time, characterized as it is in large part by a complex and under-articulated interplay between common law and statute, gives cause for concern in areas ranging from principle to practicalities. The problems in this area seem likely to become even more apparent as the toxic cocktail of climate change, escalating population growth, and pollution is placing the freshwater resource and indeed the whole hydrological cycle under ever greater pressure. The central question explored in this policy brief is the relevance of rights-based claims to governance of the freshwater resource.

Property rights, environmental claims, and the freshwater resource

Water scarcity is becoming a chronic or acute issue (or indeed a combination of both) at all levels from the local to the global. These problems are exacerbated by the fact that the water cycle is one of the most complex and least understood elements of the biosphere. Water is by no means unique in being subject to unprecedented multidimensional anthropogenic and systemic pressures, as indicated by broader ongoing work on the nine planetary boundaries,¹ but it is certainly acknowledged to be in the vanguard² here both in its own right and in combination with other global systems and subsystems. To use just one example, according to Professor Will Steffen of the Planetary Boundaries Project, the safe global boundary for blue water consumption (defined as fresh surface and groundwater)³ is 4,000 km³/year, yet we are already consuming in excess of 3,000 km³/year, with water scarcity set to develop at 5-6,000 km³/year.⁴ Thus, while we are not yet at the point of no return in this area, this is definitely in prospect, unless we make profound changes in how we view and interact with the freshwater resource. It would seem clear that it is incumbent upon us to ensure that water use and the entitlements to it are organized in a principled and sustainable fashion. Nonetheless, at an international level, it is signally evident that water law (on both an institutional and a substantive level) has failed to keep pace with rapid developments in our understanding of anthropogenic impacts on the biosphere and in cognate areas of law, notably

environmental law and human rights law.⁵ As will become apparent below, domestic law in England and Wales cannot really lay claim to particularly convincing credentials in these areas either, the law in this area being, as is the case in many states,⁶ fragmented, opaque, and (in some parts) archaic. The focal point for the discussion that follows is the inadequacy of current law in reflecting our modern understanding of the closely interconnected complex web of individual, public, and commercial interests and environmental boundaries in this ultimately vulnerable and highly contested resource.

Current legal approaches towards water resources in England and Wales

Private rights and the water resource: extraction

Drawing on an approach rooted in Roman law, landowners cannot own flowing water at common law, and enjoy only use rights in it, although historically the difference between these two approaches would, to all intents and purposes, only have been apparent to lawyers. Insofar as individuals' rights to use water were concerned, the court's approach was initially entirely rooted in property law. This owed much to the sources of water rights, notably: riparian rights (defined as use rights in water courses held by those with proprietary interests in adjoining land) and easements (defined as the right to use another's real property for a specific purpose, which in this context allowed water use rights to be acquired by non-riparian owners in certain circumstances).

Holders of riparian rights are, according to *Young & Co. v. Bankier Distillery Co.* [1893] AC 691, entitled to protection of both the quality and quantity of water in watercourses flowing adjacent to their land, in order to enjoy their use rights over it. The terms upon which riparian rights were enjoyed were definitively stated by Lord Cairns in *Swindon Waterworks Co. Ltd v. Wilts & Berks Canal Navigation Co. Ltd* L.R. 7 H.L. 697.⁷ Under this approach, riparian rights claims took one of three guises, the first of which relates to what were termed 'ordinary or primary purposes', which extended to the use of water for domestic purposes and watering livestock. The individual's use here was without restriction, and based on the traditional 'appropriation' model of the interaction between humans and environmental resources.⁸ While this appears to be highly favourable to individual rights claims at the expense of other rights holders downstream, this class of riparian right was soon to become a fairly limited category. Thus, it did not necessarily extend to cover the expanded demand for water imposed by the emergence of industrial agriculture (e.g., spray irrigation — see *Rugby Joint Water Board v. Walters* [1967] Ch 397). This type of use was interpreted to fall into the second category of riparian rights claims, i.e., those involving 'extraordinary or secondary purposes'. Such claims would only be upheld if they were reasonable, connected with the riparian land, and the water was ultimately (and without unreasonable delay) returned to the watercourse 'substantially undiminished in volume and unaltered in character'. Interestingly though, if these (in essence quite demanding) conditions were fulfilled, no explicit limit was placed on the amount of water that could be abstracted. The third class of riparian claim saw even less favourable treatment for individual landowners as use for 'purposes foreign to or unconnected with the riparian tenement' gave rise to no rights at common law.

However, the common law on individual extraction rights is now hedged around with statutory provisions, as seen in *Cargill v. Gotts* [1981] 1 WLR 441, where an easement to extract water was asserted. The court here was primarily concerned with the claimant's use of his neighbour's land to access a water resource, rather than the water resource itself, but nonetheless the case fell to be determined in line with the Water Resources Act

1963, which made all but minor extraction unlawful unless permitted by licence. Thus while the claimant's easement was upheld, he could only exercise his common law rights lawfully in compliance with the strictures imposed by the statute.⁹

The case of *Ettrick Trout Company Ltd v. Secretary of State for the Environment and the NRA* [1995] Env LR 269 provides another interesting example of the interplay between the common law and statute in respect of abstraction. In 1981 the Ettrick Trout Company (ETC) took out a twenty-year lease that included a private law right to extract water from a river for their fish farm. The lease did not stipulate a limit on the amount of water that could be extracted and statute did not, at the time, require them to hold an extraction licence. ETC also held a 1978 discharge consent authorizing the release of 10 million gallons/day (mgd) of fish farm effluent. Their lease included a covenant to comply with this consent. ETC had the capacity to take 20 mgd of water from the river and did so from commencement of its operations in 1981, resulting in a 20 mgd discharge and breaching its discharge consent. Under the Water Act 1989 the extraction licence exception that ETC had benefitted from ended, though they were allowed to apply to continue to extract 'as a matter of right'. When they did so, the regulator would only authorize abstraction to the level stipulated in the discharge consent. The ETC appealed to the Secretary of State, who upheld this position, and the ETC failed to convince the court to quash this decision.

The Draft Water Bill 2012 outlines the beginning of some long-awaited modernization in regard to abstraction. One interesting development is the mooted expansion of the environmental permitting regime to cover (amongst other things) abstraction and impounding licences.¹⁰ While on the face of it this move appears to strengthen the environmental credentials of water law, furthering, in practical terms, its integration with environmental law, the rationale for adopting the changes actually rests on securing greater administrative coherence,¹¹ which seems to represent a missed opportunity for more principled change. Nonetheless, where abstraction is concerned, individual rights have long been constrained in the name of other riparian owners

and the general public interest in managing the water resource. The governance changes that are afoot do, however, suggest that environmental considerations may finally make an impact in this area, though arguably by default rather than design.

Pollution

The common law can also come into play in respect of pollution through actions to protect riparian rights from unreasonable interference by upstream users. Interference with riparian rights in such a way as to cause damage to the natural characteristics of the water will constitute an actionable nuisance (a further individual common law right enjoyed by those with a proprietary interest in land). We can see an example in *Pride of Derby and Derbyshire Angling Association Ltd v. British Celanese Ltd* [1952] 1 All ER 1326. The angling societies, in their capacity as riparian owners, complained of an alleged pollution nuisance, which had resulted in fish kills affecting their sport. Three sources were implicated: inadequately treated sewage discharged by a Local Authority; hot water discharged by British Electricity Authority; and chemical pollution discharged by British Celanese. All of the defendants were found liable. Thus, in this case, individual rights were vindicated at the expense of the operation of public utilities and industry.

The pollution of groundwater too has attracted the attention of the courts, notably in the case of *Cambridge Water (CW) v. Eastern Counties Leather (ECL)* [1994] 1 All ER 53, which involved historic pollution of the claimant water company's aquifer by past spills of perchloroethylene (PCE) from the defendant's neighbouring tannery. This became problematic when the Drinking Water Directive 80/778 came into effect, as it prohibited the presence of PCE at the levels present in CW's supply for potable water. CW was therefore forced to find an alternative supply. CW brought proceedings against ECL under a number of heads, including nuisance, but failed at first instance. However, CW succeeded in nuisance in the Court of Appeal under the rather obscure authority of *Ballard v. Tomlinson* (1885) 29 Ch D 115, which the Court deemed to provide a natural right to abstract uncontaminated groundwater. The House

of Lords allowed ECL's appeal, refusing to impose liability on ECL for damage that was not reasonably foreseeable in the 1970s when the last spillages of PCE occurred. This approach gave considerable latitude to polluters and seriously curtailed the utility of the common law of nuisance in cases involving historic pollution.

Human rights claims

Another high-profile area in which individual rights claims come into play in water cases is under the Human Rights Act 1998 (HRA), which incorporated the European Convention on Human Rights 1950 (ECHR) into domestic law. An early example is found in *Marcic v. Thames Water Utilities* [2003] UKHL 66, which involves the intersection between common law, regulatory law, and the HRA. Marcic owned a house and garden that had, since 1992, been subject to repeated flooding from sewers that had become inadequate. Marcic eventually took measures to prevent his house from being inundated, but the garden was still flooded regularly.

Thames Water Utilities (TWU) was responsible (under Water Industry Act [WIA] 1991) for these sewers and had a limited budget and many such problems to address. It therefore employed a points system to determine priorities, with cases in which houses were subject to flooding prevailing. These were so numerous that there was no realistic prospect of Marcic's situation being remedied. Marcic had a right of complaint about this to the director general of Water Services (DGWS) under the WIA, but instead he took TWU to court. His case involved civil proceedings on a number of grounds, including nuisance, all of which failed at first instance. He also used the HRA, and this was successful with reference to alleged breaches of his rights under Article 8 (privacy and family life) and Article 1 to the First Protocol (property) of the ECHR. However, Marcic was only eligible for damages from the point when the HRA came into force, leaving most of his damage uncompensated. TWU appealed and Marcic cross-appealed. The Court of Appeal upheld the HRA claim but also found TWA liable in nuisance, entitling Marcic to damages for the full duration of the interference. Furthermore, the Court viewed the statutory remedy under the WIA as unsuitable to address Marcic's needs. In considering how to arrive at a 'fair balance' between the rights of the individual and the public interest, the

Court intimated that compensation was central. The Court of Appeal's approach was extremely controversial, not least in allowing the common law and Convention rights to displace a specific statutory regime and in raising the spectre of civil liability for statutory undertakers on an enormous scale, with the potential to divert scarce resources away from their operational responsibilities. TWU appealed successfully to the House of Lords, which deemed the WIA regime, together with the courts' supervisory judicial review jurisdiction, adequate to protect the individual's rights. They saw a parallel common law right to sue, effectively supplanting the statutory regime, as highly undesirable. Furthermore, the Law Lords deemed the DGWS better placed than the courts to determine the appropriate balance between someone in Marcic's position and TWU's other customers.

In essence, in *Marcic* the Lords were returning to the orthodox position, largely settled in the nineteenth century, that the common law should not impose obligations (including those of nuisance) on a statutory undertaker that were inconsistent with the specific statutory regime that Parliament had put in place governing their activities. The primacy of the statutory context was underlined by Lord Nicholl, who pointed out that, in so far as nuisance claims were concerned, TWU was 'no ordinary occupier of land', as the sewers were vested in it by statute, and that had to be the starting point for considering claims. Lord Hoffman added the distinction that, in situations involving statutory undertakers, the broader impacts that would result from any determination required that the courts not treat the matter as a simple *inter partes* dispute. Thus, we can conclude from *Marcic* that it remains the case, even in the context of the HRA which in some ways brings individual rights more squarely to the fore than hitherto, that individual rights claims operate in a complex context in which public (and indeed commercial) interests compete, which makes determining cases a sensitive and highly nuanced matter.

A (much) more radical rights approach: rights for nature?

In marked contrast to the fairly mainstream discussion of rights thus far, we will conclude by taking an unorthodox direction in a brief consideration of one strand of broader Earth Jurisprudence/Wild Law

thought that espouses extending rights-based approaches to nature itself. This type of approach seeks to establish an alternative to the established exploitative Earth/human paradigm by according intrinsic value to nature with a view to achieving functional sustainability. This type of thinking is already making its presence felt in law, for example in Ecuador's provision for the rights of nature in its 2008 Constitution and Bolivia's 2010 Law of the Rights of Mother Earth.¹² Civil society too has been active in this area, launching the Universal Declaration of the Rights of Mother Earth¹³ at the World People's Conference on Climate Change and the Rights of Mother Earth. Wild law influenced elements also appeared in the official UN Rio+20 process¹⁴ and in the civil society People's Sustainability Treaties initiative¹⁵ that emerged alongside it.

Rights for rivers? The Whanganui river, New Zealand

Espousing legal rights for nature/natural entities is not limited to South American states or the international arena, as evidenced by the decision in 2012 to accord legal rights to New Zealand's Whanganui River. This involved an historic agreement, under the Treaty of Waitangi, between the New Zealand government and the Whanganui River Maori trust, which accords legal personality to the river. Though full details are yet to be finalized, a member of the government negotiating team specifically referred to what was envisaged as placing the river in a position akin to that of a company. Its rights are to be secured through the offices of two guardians, one from each party to the agreement. Significantly for present purposes, the agreement does not create water rights or affect the rights of private riparian owners (and wild lawyers might argue that its effectiveness is set to be significantly hampered as a result), though it does ensure that the river cannot be owned hereafter.¹⁶ This creative approach offers food for thought in allowing a dimension of rights talk that relates to the interests of the river in its own right and not only to those of the humans using its waters. Such a view arguably allows for a systemic approach to be taken to decisions about the river, considering its well-being and finding a route to holism that is absent in the atomistic common law view of the freshwater resource.

Conclusions

Private rights, the public interest, and regulation

While the need to map the contours of the interplay between modern regulatory law and private law rights might seem almost too obvious to state, the reality is that this is an area that has generated relatively little case law. Carnwath LJ, in *Barr v. Biffa Waste Services Ltd* [2012] EWCA Civ 312 suggests that this is because these issues are ‘relatively straightforward’,¹⁷ but this is debatable. The Court here was hearing an appeal from Coulson J’s decision dismissing a group action¹⁸ in respect of nuisance caused by smell from a licensed waste tip operated by Biffa. Despite licence conditions, the application of various technical fixes, and a prosecution, problems persisted, and the claimants brought an action in nuisance arguing that their common law rights subsisted in the face of both the regulatory regime and Biffa’s permit under it. Allowing the appeal, Carnwath LJ reiterated that:

*The common law of nuisance has co-existed with statutory controls, albeit less sophisticated, since the 19th century. ... Short of express or implied statutory authority to commit a nuisance ... there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights.*¹⁹

Thus, the continued importance of the common law as the guarantor of redress for individuals whose individual rights are adversely affected by environmental pollution has, for now at least, once again been underlined.

Policy implications

In summary, it appears to be the case that the relationship between individual rights-based claims and the broader public interest in respect of environmental claims remains fraught with difficulties and inconsistencies. Thus *Marcic* demonstrates that, in the context of the HRA, which draws on the ECHR regime where the conflict between individual rights and the broader public interest arises repeatedly, states are entrusted with providing statutory regimes that

arrive at an appropriate accommodation between individual rights and the public interest. This is, however, problematic where these decisions cause individuals to bear the brunt of pollution in this regard — although compensation does offer a potential means to address this. The *Biffa* case shows the common law of nuisance being employed in order to deal with a like issue. This case in principle also raises the question of how to arrive at an apt accommodation between protecting these private rights and giving effect to the broader public interest in managing the impacts of anthropogenic pollution. In the instant case Biffa was actually pioneering a new disposal methodology on this site that would subsequently be rolled out nationwide, though arguably the teething troubles that would emerge as a result were not fully anticipated or addressed in the regulatory process. In fact the nuisance problem had been addressed, albeit after a number of years, before the case came to court, and so this case too came down to offering compensation for the interference that had taken place — although significantly, had the problem still been an ongoing one the claimants would have been entitled to seek an injunction that could have curtailed or even ceased disposal operations — a very different outcome in terms of achieving an apt accommodation between individual rights and the public interest — and it would have required a creative exercise of the court’s discretion in order to achieve this. This perspective would apply equally well to a nuisance case involving an individual’s user rights in the freshwater resource being pitted against the broader public interest in the regulation of that resource. This is an area where the question of apt accommodation, always a nuanced one in the history of the law, will require careful recalibration as we reach the blue water planetary boundary. Here we are yet to reach the point of no return, but it is a very real prospect that needs to be addressed in the search for a holistic and sustainable approach to managing our use of, and relationship with, the water resource. There is, it would seem, still time to rethink this complex area — but it is not unlimited, and the problem is an increasingly pressing one.

Notes

1. See, for example, Stockholm Resilience Centre, 'The Nine Planetary Boundaries' at www.stockholmresilience.org/research/researchnews/tippingtowardstheunknown/thenineplanetaryboundaries.4.1fe8f33123572b59ab80007039.html (accessed 1 August 2012).
2. See The Stockholm International Water Institute (SIWI) (2009) 'Water: At the Tipping Point?', *Stockholm Water Front: A Global Forum for Water Issues* No. 3-4 (December) at http://www.siwi.org/documents/Resources/Water_Front/WF_3-4_2009.pdf.
3. See www.waterfootprint.org/?page=files/Glossary (accessed 27 March 2013).
4. Steffen, W. (2009) 'Tipping Elements, Planetary Boundaries and Water', *Stockholm Water Front: A Global Forum for Water Issues* No. 3-4 (December) at www.siwi.org/documents/Resources/Water_Front/WF_3-4_2009.pdf, pp. 10-12 at p. 11 (accessed 24 February 2013).
5. See, for example, Cullet, P. (2011) 'Water Law in a Globalised World: the Need for a New Conceptual Framework', *Journal of Environmental Law* 23.2: 233-54.
6. See Hodgson, S. (2004) 'Land and Water — The Rights Interface', FAO Legislative Study 84, at www.fao.org/docrep/007/y5692e/y5692e00.htm (accessed 28 February 2013).
7. At p. 703. This approach was endorsed by the House of Lords in *McCartney v. Lough Swilly Railway Co. Ltd* [1904] AC 301.
8. Coyle, S. and K. Morrow (2004) *The Philosophical Foundations of Environmental Law*. Oxford: Hart.
9. *Cargill v Gotts* [1981] 1 WLR 441 at p. 446.
10. Draft Water Bill Clauses 26-27 and Schd 6 at www.official-documents.gov.uk/document/cm83/8375/8375.pdf (accessed 28 March 2013).
11. Draft Water Bill, Explanatory Notes, paras 90-96.
12. See Adelman, S. (2012) 'Rio+20: Sustainable Injustice in a Time of Crises', *Journal of Human Rights and the Environment* 4.1: 6-31.
13. 'Universal Declaration of the Rights of Mother Earth' (2010) at <http://therightsofnature.org/universal-declaration/> (accessed 3 August 2012).
14. See Morrow, K. (2012) 'Rio +20, the Green Economy and Re-orienting Sustainable Development', *Environmental Law Review* 14.4: 166-297.
15. See Morrow, K. (forthcoming 2013) 'Peoples' Sustainability Treaties at Rio+20: Giving Voice to the Other'. In: P. Burdon (ed.) *Wild Law – In Practice*. Oxford: Routledge.
16. Shuttleworth, K. 'Agreement entitles Whanganui River to legal identity', *The New Zealand Herald* (30 August 2012), available at www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10830586 (accessed 22 February 2013).
17. At para 5.
18. There were 152 claimants in total, thirty of whom were defined as 'lead claimants'.
19. At para 44.



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