



**LIVING**LAW

## Giving Nature a Voice

Legal rights and personhood for Nature – an analysis of progressive legal developments in other jurisdictions where Nature Rights have been recognised in national constitutions, other domestic laws and litigation proceedings.



## Executive Summary

With the progressive evolution of international law in the field of the environment towards a broader inclusion and recognition of rights-based thinking, the debate on Rights *of* (and *for*) Nature, as a legal extension of more traditional rights and the rights to Nature, has gradually been gaining traction and interest. Globally, an increasing number of national jurisdictions, particularly within the Southern Hemisphere, where recognitions of the natural environment are often rooted in ancient traditions and customs from indigenous peoples, and thereby an awareness of the need to achieve balance with the natural world, are seeing trends emerge where Nature has been granted rights of legal personhood and its own rights. Or equally, existing such rights are being acknowledged formally within the current legal systems; for example, as part of dispute settlement and resolutions with indigenous communities.

In view of these emerging trends, this paper aims to provide a timely, comparative overview of some of the most prominent national legal developments in this area, by analysing judicial case law, constitutions and pieces of legislation which have been creating the path towards new legal approaches and innovations to protect, enhance and balance rights relating to the natural environment; albeit not free from any practical limitations and difficulties.

At a time when environmental degradation and contaminations are increasingly well understood, yet increasingly prevalent, and legal and policy frameworks have (or should be, in theory) re-orientating to overcome them, it is clear why the debate surrounding Nature Rights is topical and gaining traction. This is not only in terms of increasing environmental protection and preservation, but also as an additional legal instrument to advance and safeguard the enjoyment of fundamental Human Rights, which are dependent also on a safe, clean and healthy environment.

Today, there can be no doubt that Governments require, and are legally required, to act to protect the natural environment. This position is underscored also by the recent work of the UN Special Rapporteur on Human Rights and the Environment, John Knox, who has recently stressed, in his 'Framework Principles', that environmental rights and human rights are effectively two sides of the same coin. Drawing on requirements of already *existing* concepts, principles and detailed requirements of international human rights laws, as well as prior international law in the field of the environment, the first two such principles underscore that –

- **Principle 1:** *“States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights”*
- **Principle 2:** *“States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.”*

Already in 1998, the need for more clearly structured and clarified affirmations, as now consolidated by the recommendations of the UN Special Rapporteur, were already found in thinking of the International Court of Justice, which recognised that –

***“... the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”<sup>1</sup>***

At a time when the plurality of actors, including transnational actors, is increasing at a global scale, and it is well understood that partnerships with the private sector are also essential to fulfil international visions to address key challenges in the Anthropocene, such as those under the Paris Agreement, it still ultimately remains the responsibility of States to actually deliver and balance such obligations, notwithstanding a softening of traditional legal contours of ‘public’ and ‘private’ international law. This fact remains closely linked to, and essential also for, vital notions of legitimacy and self-determination.

In this period of high-innovation and change, it is unquestionable that transformative shifts in thinking and further creativity are mandated to ensure our laws, including domestic laws, are correctly orientated towards, and capable of delivering in real-world terms, the Sustainable Development Goals, as well as more broadly societies within Planetary Boundaries. Rather than the end, the Paris Agreement may be viewed as merely the start of this ‘planetary conversation’, with the need for similar transformative measures in other areas remaining to be tackled in coming years (such as chemical regulation and plastic, amongst others).

Despite renewed momentum and these landmark achievements in recent years, which have catalysed ground-breaking and progressive legal outcomes that are shaping the path towards new pillars within the international or global arena towards harmony with Nature, notions of Rights for Nature may initially appear too radical, extreme or unworkable. This dismissive conclusion may thereby lead decision-makers to disregard the potential role of Nature Rights without an informed and more complete analysis. Yet, when taking a historical view from other legal fields, legal rights and recognitions that at first appeared completely revolutionary demonstrated over time to be widely accepted and able to respond to key challenges and disputes, as well as illustrating the evolving character of law itself to address them: from the abolition of slavery, to rights for women or minority groups, there are numerous examples which pushed the boundary a hundred years ago to deliver mainstream, universal rights and entitlements today. Equally, it is important to recognise that there is also a school of thought which considers that Nature Rights do not even go far enough – and that we need to move beyond such concepts towards system-level ‘Earth-law’ perspectives, which would require a complete re-framing of existing structures.

Moreover, it is important to highlight that legal personhood of and for entities that are not characterised by human nature are also already mainstreamed in our legal systems and the need for this recognition is well-understood as a protection from, amongst others, arbitrary decision-making. This increasingly leads many environmental scholars to question what the real difference between corporations and Nature is in terms of the ability to be afforded legal rights-based protections and feature in proceedings before a court. What is it that makes Nature less worthy of protection from arbitrary decision-making?

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<sup>1</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1998, para 29.

As developed later, why should, for example, a corporation be able to claim its ‘Human Rights’ have been infringed by a ban on fracking without a balancing right of and for Nature?

At this point in time, it is beyond dispute that environmental regulations alone have also not delivered a sufficiently preventative approach to protect and uphold even existing rights, including within the UK context, with clear challenges remaining especially in relation to diffuse and aggregate impacts across multi-jurisdiction scales: from the bleaching of coral reefs due to ocean acidification, to mass deforestation to support short-term and/or narrow economic interests, or alarming rates of plastic and chemical contamination of major rivers and lakes across the world, they all illustrate the urgency of the remaining challenge ahead and the need for *transformative* and *innovative* approaches in law, science and policy to collectively re-orientate towards the Earth-system.

In our view, when history reflects, the ‘environmental challenge’ of today will be recognised as the challenge of our generation requiring such creative thinking and new optics to achieve balance and prevent conflict. And, whilst the scale of the challenge may often seem overwhelming, images such as the Pasig River in the Philippines, defined as being “biologically dead”, but then successfully responding to restoration activities, also illustrate the benefits of changes in direction and the ability for Nature, in some circumstances, to recover.

If on the one hand, the main purpose of this report is to stress that these phenomena require new perspectives and to underscore that these *are* possible and with legal precedent, on the other we illustrate the signs of progression towards the recognition of legal Rights of Nature which can already be seen to be emerging across the world. More structured and concrete attempts to acknowledge Nature legal personhood and legal rights are already found within visionary domestic jurisdictions that have enriched their legislative and constitutional texts by recognising the concept of harmonic human development (even if/where catalysed by dispute or conflict). In this way, the gifts of the natural world are, at least on paper, respected and protected *per se*. Despite being referred to by different names – ‘Pacha Mama’ (in Ecuador), ‘Mother Earth’ (in Bolivia) or ‘Te Awa Tupua’ (in New Zealand)<sup>2</sup> – all these countries have already expressly recognised Nature’s own legal right to subsist and regenerate in its dynamic life cycles, free from irreparable anthropogenic damage, and to be represented before courts.

As explored in this paper, legal personhood for the Whanganui River, Te Urewera and Mount Taranaki in New Zealand have been specifically recognised in legislative measures; rather than in case law. These three case studies are particularly insightful examples of highly innovative measures catalysed by the need to resolve long-running disputes and Treaty claims with indigenous communities. It is fair to say they have thus far proven highly successful in achieving this balancing objective.

Other recognitions which we have analysed have been derived from equally revolutionary national legal cases, that have confirmed and, in some cases, further developed the domestic written laws. In this sense, the Vilcabamba River in Ecuador, the Atrato River in Colombia, the Colombian Amazon

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<sup>2</sup> It is worthwhile clarifying the meaning of ‘Te Awa Tupua’, as provided by the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*. The 2017 Act clearly defines ‘Te Awa Tupua’ as the legal personhood recognised to the “*indivisible*” and comprehensive system of the Whanganui River (Sections 12 & 14). It therefore incorporates all the river’s “*physical and metaphysical elements*” (Section 12) but it does not encapsulate a broader identification of Nature.

rainforest, the Himalayan glaciers Gangotri and Yamunotri and the Ganges and Yamunotri rivers in India have all been officially recognised by national courts and legislatures as living entities with their own legal rights. It is highly noteworthy that this included *ex proprio motu* recognition in the case of the Atrato River and Amazon Rainforest in Colombia (where the pleadings centred on human rights considerations).

This does not, however, mean the path towards the consolidation of these innovative legal recognitions is linear or without challenge. The unexpected reversal by the Indian Supreme Court in recognising the legal personhood of the Gange and Yamunotri River, or the unsuccessful attempt in the US to invoke Nature Rights for the Colorado River, confirm that the shift is far from being complete or universal when looking at the global landscape. Moreover, as we begin to illustrate in this paper, several questions still need to find adequate solutions and deserve further thinking and attention, particularly in terms of the practical enforcement of such rights and court judgments; for example, which Nature Rights should most appropriately and realistically be afforded protections?

As this paper will highlight, mega projects for the exploitation of natural resources, such as those relating to mining or deforestation, still also represent major pillars of economic development within Latin American countries which cannot simply be dismissed, yet continue to exacerbate conflict between different interests. With that and other reasons in mind, the purpose of this paper is also not to suggest that Nature Rights are an end in themselves. Self-evidently, as with pre-existing Human Rights, clear regulatory and planning frameworks are essential to ensure such rights can be respected and fulfilled in practice. We rather argue that appropriately framed Nature Rights may provide a complementary part of the future legal structures needed to address key planetary challenges facing humanity in this field and that this deserves further attention.

By providing a much-needed shift in direction at the national level through the introduction of a strategic and balancing norm, we suggest that Nature Rights have the potential to advance greater harmony and respect for the natural world – the Earth-system – on which we all depend. It is indeed easy to understand the direct consequences for human survival (including specifically, the enjoyment of the fundamental right to water, food, and life itself) when rivers and oceans on which we rely are reduced to dead zones because of profound levels of chemical and plastic pollution. And the urgency of the need for changes cannot be over stressed as we approach, and in some cases are already crossing, tipping points in the Earth-system, according to world-leading planetary boundary scientists.

Further, the recent scientific study finding that the most polluted river *in the world* in terms of microplastic contamination is not in one of the above mentioned economically developing countries, but rather within UK borders, may also come as a surprise to the ‘person in the street’. But perhaps may not to those working more closely with current UK environmental law and policy. Considering the current challenges that the UK natural environment has been experiencing and, indeed, being declared as one of the most nature depleted countries in the world (*State of Nature Report 2016*), the case of the River Tame may represent only the tip of understanding our true impacts on our (UK) ecosystems.

Moreover, the increasing pressures which the UK institutions charged with protecting Nature are faced with, such as deep spending review budgetary cuts in the current austerity context, combined with ongoing high-levels of Brexit uncertainty, create serious concern within civil society for the direction of future travel.<sup>3</sup> Regrettably, the EU (Withdrawal) Act still leaves much unfinished business to ensure our environmental laws in the UK are not diminished after Brexit in real-world terms.

Whilst the debate surrounding Nature Rights may at first seem for some too distant to the UK's existing or traditional approach to environmental regulatory frameworks, a deeper analysis illustrates why the formal recognition of Nature Rights may provide an appropriate part of the solutions needed to ensure our environmental laws in the UK fit the challenges of the Anthropocene and also catch-up with emerging developments in international legal thinking. Indeed, why this thinking may already find its way into national court cases in view of emerging international developments and trends, as it has previously in other fields.

The increasingly complex and often diverging interests in transformative policies brought forward in the name of delivering the Sustainable Development Goals – which may, or may not, be at first apparent (for example, cobalt mining in the electric vehicle revolution or precious minerals needed in renewable energy projects, or of the sources of funding of different actors) – also illustrate the merit of a balancing norm in favour of Nature *in its own rights*. Recent examples emerging of developers seeking to exploit the environment for their own narrower and short-term interests and attempting, even if ultimately misdirected in law, to invoke their 'Human Rights' as justifications to support them in doing so, also create further risks of a chilling effect in environmental regulation, as well as consuming time and valuable resources of regulators and public participatory actors.<sup>4</sup>

When rights of such corporations are already able to be invoked before courts, it is clear why a balancing Right for Nature may actually be viewed as an aid for Governments to protect people and planet. Rather than erroneously being interpreted as a barrier to future development, where (depending on how such rights are designed) informed trade-offs may ultimately still be arrived at, it is suggested that these examples make clear how recognition of Nature Rights *per se* may actually assist Governments to navigate complexity. And furthermore, also promote responsible individual conduct, environmental corporate stewardship and level the playing-field amongst corporate actors. We suggest that more detailed consideration around the resolution of conflicting rights would also be merited.

Rather than suggesting inappropriate legal transplantation from other legal systems, this Report aims to catalyse a discussion and debate amongst UK (and wider European) Green Groups based on shared international experiences and provide more food for thought as to how legal Rights for Nature may help re-direct our approaches to date. Translating Nature Rights into appropriate and workable regulatory frameworks admittedly represents a demanding task, with a number of different permutations conceivable. As such, this Report also aims to acknowledge the challenges that would require to be

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<sup>3</sup> <https://www.theguardian.com/commentisfree/2018/jul/04/britain-wildlife-cuts-brexite>

<sup>4</sup> In Scotland, this is illustrated by a recent fracking case where developers sought to rely on Article 1 of the First Protocol to the European Convention on Human Rights ('ECHR') to challenge the moratorium on fracking in Scotland. Further examples can be found across Europe also in relation to the regulation of water abstraction, even if again ultimately often mis-directed in law.

overcome in successfully operationalising Nature Rights. Yet, with various examples to draw on of previous national successes of Ombudsperson(s) or figures similar to that of *curator ad litem* charged with representing Nature Rights before courts, we do not believe these challenges are in any way insurmountable.

In time, we believe Courts may eventually also give recognition to such rights given international legal developments and the ways in which these rights have already been increasingly recognised in constitutions, legislation and case-law across the globe. Rather than waiting for piecemeal judicial decisions and developments to emerge which may recognise such when confronted with new challenges (often on an after-the-event basis), there is a clear case for, and merit in, seeking to develop holistic, forward-looking, and visionary regulatory approaches at this juncture in pursuit of a balance between people and the natural world in this changed context.

## Acknowledgements

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We are particularly grateful to the following colleagues who also generously took the time to meet and share their respective experiences and expertise in more detail with us, including Kevin Hille (Counsel, Crown Law Office New Zealand), Lisa Mead (Director, Earth Law Alliance), Ecological Law & Governance Association. We look forward to continuing these insightful discussions with others as interest grows in this subject to refine the initial analysis presented in this paper. Any errors or omissions, however, remain ours alone.



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## Legal Recognition for the Environment in its Own Right

The concept of nature legal personhood according to some of the most recent legislative and national judicial views

### 1. Introduction

During the last decade, an increasing number of countries (Ecuador, Bolivia, Colombia, New Zealand and India, to name the most prominent examples) have started embracing legal rights for Nature through their written laws or within their visionary courtrooms. This situation, showing the path towards an early shift from an anthropocentric approach (rights *to* Nature), where Nature is protected and valued only to maximise short-term human needs, to a more right-based recognition (rights *of and for* Nature itself), is gaining increasing traction and debate globally.

In this paper, we present some of the main arguments which have led certain national jurisdictions to recognise Nature in its own legal right within their current legal system. In following this aim, the specific national examples that will be mentioned below, and the progressive achievements included in their legislative and constitutional texts, but also judicial cases, could be used as a guide to develop best practice, or at least to further implement, building through a system of precedents, the concept of a safer, healthier and cleaner environment as strictly related to Human Rights, as recently stressed also

by the UN Special Rapporteur on Human Rights and the Environment, John Knox.<sup>5</sup>

In this vein, this paper will also specifically question the legal implications of equating Human Rights and Nature Rights for humans but also non-human beings.

Despite being characterised by different cultural and socio-economic backgrounds, all the national examples referred to in this analysis share the progressive awareness, even if / where stimulated by conflict resolution, that national short-term choices oriented to maximise pure economic profits at the expenses of Nature have not only been rapidly deteriorating the natural environment, but also hindering, infringing and frustrating the enjoyment of fundamental Human Rights dependent thereon. Equally, this paper aims to dispel the myth that the formal recognition of Nature Rights and resulting shift in optic will prevent informed policy choices as a fundamental prohibition or barrier to development.

Other similarities that appear evident among the national legal contexts analysed also rely on the formal subjects of recognition of legal personhood and the category of states heading for these recent legislative and jurisprudential changes.

Starting with the first point, rivers and damages caused to them, appear to be a common trigger point within several jurisdictions (such as Ecuador, India, New Zealand and Colombia) for rights-based interventions and thereby strengthening broader environmental protection frameworks. Due to the religious, and in some cases sacred, meaning that local and indigenous people often recognise in them, it is not surprising that most of the welcomed judicial cases have formally adapted the current legal framework or been rooted in

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<sup>5</sup> Report of the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/HRC/37/59).

Available online at:  
[http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/37/59](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/37/59)

indigenous customary rules, which are generally far from an anthropocentric vision of rights.<sup>6</sup> This aspect will be discussed further in this paper.

Secondly, it is interesting to note that the most visionary recognitions of legal personhood for Nature to date have originated in countries with economies in transition, where the intensive extraction of natural resources on the one hand, and the strong presence of local communities on the other, have required a clear shift in the legal framework. This could be easily explained in the biased nature of the law, generally used to respond, more or less timely, to people's or corporation's specific requests in a given period of time. For example, where corporations have attempted to (usually, erroneously) argue that environmental regulations have infringed *their* 'Human Rights' in favour of development.

This should not, however, lead us to conclude that the reach of such progressive approaches should be, or is, restricted and relevant only to the 'Southern Hemisphere'. We rather argue that more economically developed countries, such as the UK, could also take advantage of this emerging trend and try to incorporate and adapt such achievements into their national jurisdictions as a means of 'bending the curve to societies within Planetary Boundaries' and achieving the Sustainable Development Goals.<sup>7</sup>

Equally, we caution that these progressive developments should not erroneously direct policy-makers towards a perception of legal Rights for Nature as an end-point in itself. As emphasised later in this paper, it is acknowledged that there are still limitations in the actual enforcement and implementation of some of the visionary judicial and legislative recognitions and settlements. The high competition in using natural resources among

different stakeholders, given the various kind of interests related to their usage and the cumulative impacts eventually deteriorating the environment, still hinder a full enjoyment of the Rights of Nature in the jurisdictions examined. Notwithstanding, we suggest this is the result of the sometimes piecemeal approach to implementation in other jurisdictions of Nature Rights thus far, together with failures in the wider legal framework which they are part of; as opposed to an insurmountable or intrinsic feature of Nature Rights *de facto*.

Moreover, some legal consequences deriving from the formal recognition of Nature Rights still remain nebulous, requiring specific space in the future discussions. Key issues include: 'How might we implement judgments or legislative acts recognising rights in favour of Nature?' 'Who might represent such Rights of Nature before courts?' 'Who will be the beneficiary of future compensations and other such remedies?' 'How might Nature Rights be framed to take a forward-looking perspective to environmental protections?' 'How would Nature Rights be balanced with other pre-existing rights in the event of conflicts between different rights?'

As part of an evolving legal process, the intention of this paper is to present both the achievements to date through comparative legal analysis and to inspire decision-makers of the possibilities for progress, but also to highlight notable drawbacks and limitations which have emerged in the national jurisdictions analysed. We suggest this could be used to learn the lessons from others and prevent replicating any perceived short-comings in existing approaches.

For the avoidance of doubt, we do not suggest, and caution against, any suggestion of direct 'legal transplantation'. This paper is also intended as a

6 <https://www.theguardian.com/global-development-professionals-network/2017/apr/21/rivers-legal-human-rights-ganges-whanganui>

7 Available online at: <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>

building block and equally does not represent an exhaustive or definitive analysis within the current confines of our present consideration.

Yet, through this learning approach, we can already readily discern how existing and imperfect systems which are failing in fact to actualise Sustainable Development and strike an appropriate balance between people and the natural world could not only be reframed, but also progressively improved through a stimulus for more efficient and outcome focussed regulatory controls which are essential in the actual realisation of Nature Rights. In this way, we can see how the pathway towards better enhancement of Nature Rights and also the attainment of Human Rights dependent thereon could be set, particularly in relation to strategic planning and policy decisions.

## 2. The Rights of Nature at the International Level

Before exploring the approaches embraced by national jurisdictions towards legal Rights for Nature, it seems appropriate to start from the broader path and set the context that has led the international community to progressively recognise the Rights of Nature, particularly during the last two decades.

Together with the 2000 Earth Charter, the General Assembly adopted its first resolution on “*Harmony with Nature*” in 2010, as part of the Assembly’s agenda on Sustainable Development, before formally mentioning the “Rights of Nature” in 2011.

A further step in the international legal framework is also found in the Universal Declaration of the Rights of Mother Earth (“the Earth Rights Declaration”), adopted, on the model of the U.N. Universal Declaration on Human Rights in 2010 at the “*World Peoples’ Conference on Climate*

*Change and the Rights of Mother Earth*” in Bolivia. Recognising Nature as an independent subject (rather than merely an object for human purposes), the Declaration represents the first international legal document to state clear rights for all the interrelated and interdependent beings part of ‘Mother Earth’ to exist, maintain and regenerate its vital cycles.

The following year, the IUCN Report – “*recommends to the Director General to initiate a process that considers the Rights of Nature as a fundamental and absolute key element for planning, action and assessment at all levels and in all areas of intervention*”. In the same year also the Rio Declaration + 20 Outcome, “*The Future We Want*”, expressly referred to the recognition by some countries of Nature Rights (paragraph 39).

It is also worthwhile to mention the International Tribunal on the Rights of Nature, established in 2014 by the members of the “*Global Alliance for the Rights of Nature*” and formally constituted in 2015. Officially established in the Peoples’ Convention for the Establishment of the International Rights of Nature Tribunal, the Tribunal was structured as an ethic tribunal, in charge of investigating and deciding about significant violations of the Rights of Mother Earth, according to the best interests of the earth community as a whole. It has also contributed to the development of Earth Jurisprudence, while increasing, through the enforcement of the rights and duties included in the Earth Rights Declaration, the harmonious co-existence of the whole earth community (Article 2 of the Peoples’ Convention).

Two other aspects make the Tribunal a remarkable attempt to boost nature protections. First, the reference, included in the Convention, to establish a Mother Earth Defender’s Office inside the Tribunal. Secondly, the participation of indigenous peoples, as internal experts of the Tribunal or

witnesses of Nature's harm, represents an additional value of the Tribunal, which have assisted it to move away from a purely anthropogenic approach in favour of the application of the universal "laws" of Nature. In this sense, exploitations of natural resources such as gas extraction are defined as "*false solutions*" that "*breaks the bones of the Earth*".

Despite condemning ecological injustice and suggesting remedial actions to restore Mother Earth from deterioration, the language used in its judgment and recommendation, however, still seems quite vague; for example, in the reference to phase out coal mining "*as soon as possible*".<sup>8</sup>

At the same time, from an international criminal perspective, efforts led by the organisation "*End Ecocide on Earth*" ("EEE") are also steadily advancing the discussion on the need for the introduction of a new international crime to be prosecutable before the International Criminal Court in the Hague<sup>9</sup>: the crime of Ecocide, defined as "*an extensive damage or destruction of the Earth's ecological systems in such a way that exceeds its natural planetary boundaries of resilience*".<sup>10</sup>

Examples of what might fall to be considered as 'Ecocide', as advocated by EEE, might include –

- the construction of huge dams or complex systems of dams on rivers, such as the ones built on the Xingu River in Brazil (and also failures to maintain them leading to catastrophic disasters);
- deforestation and plantation of palm oil trees; and
- oil exploitation from rivers (such as in the Niger Delta),

to mention some key examples.<sup>11</sup>

<sup>8</sup> <https://therightsofnature.org/rights-of-nature-tribunal/>; <https://therightsofnature.org/a-tribunal-for-earth-why-it-matters/> ; <https://seedfreedom.info/it/events/rights-for-the-earth-towards-new-international-standards/>

## 3. The Rights of Nature within National Jurisdictions

### i – ECUADOR

The first national case to be analysed is the approach embraced by Ecuador: the first state to formally include a Right of Nature within its written constitution.

The Ecuadorian Constitution, which entered into force in 2008, includes an entire chapter (Chapter 7) which is specifically dedicated to the Rights of Nature. Here, a positive Right for Nature, so-called 'Pacha Mama', is designed to ensure "*integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes*", (Article 71). Notably, it also includes an explicit recognition to be restored (Article 72).

All the Rights for Nature in the constitution are kept in clear separation from the rights for people to benefit from a healthy environment. In this way, referring to as the concept of the "*good way of living*", Article 74 introduces, at least in a formal way, an alternative to the traditional and commodity mindset aimed at a mere exploitation of the natural ecosystem, with a view to boost a better harmony between human beings and the environment.

The innovation generated by the constitutional text also concerns the wide range of people identified as 'Nature Defenders': "*all persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature*" (Article 71), independently of an actual link with the area whose protection is invoked.<sup>12</sup>

<sup>9</sup> <https://www.icc-cpi.int/>

<sup>10</sup> <https://www.endecocide.org/ecocide/>

<sup>11</sup> <https://www.endecocide.org/examples/>

<sup>12</sup> <https://theconversation.com/when-a-river-is-a-person->

At the other side of the coin, we find also the Ecuadorian State, which has the formal duty to enforce those rights and is bound to precautionary evaluations on the activities undertaken, which require to be in harmony fully with the ecosystem.

As constitutional principles these provisions are, of course, formulated in broad terms. Therefore, reference to legal cases is important to better understand their contours and how courts have interpreted and applied them in a real-world context.

The case of *Wheeler et al. v. Director de la Procuraduria General del Estado en Loja*<sup>13</sup> is seen globally as one of the most remarkable judgments in favour of the constitutional Right of Nature, especially for being the first to have applied such rights.

The plaintiffs of the lawsuit were two American residents, Eleanor Geer Huddle and Richard Frederick Wheeler who, supported by local NGOs, brought a case before the Provincial Justice Court of Loja in the name of the Vilcabamba River, as a consequence of the detrimental impacts suffered by the activities undertaken by the Provincial Government of Loja. They claimed in proceedings that the Provincial Government of Loja, by allowing a project to enlarge the Vilcabamba-Quinara road without any prior environmental impact assessment, had detrimentally impacted the river due to the massive transportation of residual material from the road working into the riverbed.

The continuous dumping of waste materials into the river and the further diversion of its course was, in the plaintiff's submission, contrary to the Rights of the River to maintain its own natural course, as stated in the constitutional text: a right that requires to be considered in addition to, rather than in

replacement of, the violation of the Human Right to a healthy environment for the population relying on the river water.

The defendant, the Provincial Government of Loja, counter-argued the need for the local population to have an enlargement of the road.

On March 30<sup>th</sup> 2011, the judge, Guzman Ordonez, in contrast with the previous 2010 decision by the Interim Judge of the Third Civil Court, which did not recognise the plaintiffs' legal standing, ruled about the lawfulness of the claim raised by the two American citizens, who were, in accordance with Article 71 of the Constitution, recognised as having rights to stand before a court to enforce the Rights of Nature. Moving to the evaluation of the level of degradation of the River, the Provincial Justice Court of Loja applied, in accordance with Article 397 of the Constitutional text, the precautionary principle that, for environmental cases, expressly admits a reverse burden of proof. This implies that it was the defendant's duty (the Provincial Government of Loja) – and not the plaintiffs' obligation – to demonstrate the lack of environmental damage.

Given the evident process of the river deterioration, the Court eventually concluded that the Provincial Government of Loja had violated the River's Right to *"to exist, to be maintained and to the regeneration of its vital cycles, structures and functions"*, enforcing in this way the constitutional Rights of Nature.

The remedies imposed by the Court are also noteworthy. The judge required the Government to present a rehabilitation plan in favour of both the area contaminated and the people affected. Given the *"generational damage"* afflicting both present and future generations, it also imposed a cleaning

<sup>13</sup>[https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/560841a5e4b02ca27d3490ac/1443381669464/Vilcabamba+River+Decision+3\\_31\\_11.pdf](https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/560841a5e4b02ca27d3490ac/1443381669464/Vilcabamba+River+Decision+3_31_11.pdf); Lidia Cano Pecharroman Rights of Nature: Rivers That Can Stand in Court, Earth Institute, Columbia University, New York, 2018

<sup>13</sup>[https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/560841a5e4b02ca27d3490ac/1443381669464/Vilcabamba+River+Decision+3\\_31\\_11.pdf](https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/560841a5e4b02ca27d3490ac/1443381669464/Vilcabamba+River+Decision+3_31_11.pdf)

up of the zone and moreover a restoration of the river bed as in its origins.

## ii – BOLIVIA

Following the far-reaching recognition of a legal personhood for Nature in Ecuador, the nearby Bolivia accomplished similar achievements in 2009, when the views of the indigenous communities were formally included in the Bolivian Constitution and the following legislative texts.

Similar to the approach embraced by the Ecuadorian Constitution, the constitutional text in Bolivia expressly recognises individuals, groups, and also all living things as having “*the right to a healthy, protected, and balanced environment*”, in order for them to “*develop in a normal and permanent way*” (Article 33). As with Ecuador, in Bolivia any person, standing “*in his own rights or on behalf of a collective*”, is also allowed to request a stronger enforcement of these rights before a court (Article 34).

This far-reaching provision also clearly illustrates the sense of collectivity and cultural unity on which it bases the Nation, that, together with its indigenous people, consists of “*every human collective that shares a cultural identity, language, historic tradition, institutions, territory and world view, whose existence predates the Spanish colonial invasion*” (Article 30).

In addition, within the Bolivian legal frameworks, one of the most remarkable steps adopted by the country can be identified in its prompt implementation of the constitutional Right of Nature into two pieces of subsequent national legislation –

- i) the Law of the Rights of Mother Earth (Bolivia Law no. 071/2010) in 2010; and
- ii) the Framework Law of Mother Earth and Integral Development for Living Well (Bolivia Law no.300/2012), in 2012.

These two legislative documents have been playing a fundamental role in clarifying what rights are granted to ‘Mother Earth’. In the same way as human beings, also Nature has been recognised as having the ‘right to life’ (Art.7, para 1 Law of Mother Earth), the ‘right to water’ (Art.7, para 3 Law of Mother Earth), the ‘right to clean air’ (Art.7, para 4 Law of Mother Earth). Furthermore, all these rights need to be respected with reference to its whole dynamic processes (Art.7, para 5 Law of Mother Earth). Specific rights for restoration and preservation from anthropogenic pollutants are further included in Article 7, paras. 6 and 7 respectively. In other words, human activities need to respect the delicate and dynamic interconnections at the basis of ‘Pacha Mama’, defined as the “*undivided community of all living beings*” by posing themselves in full harmony with it (Article 3 Law of Mother Earth). Only in this way will the indigenous concept of *living well*, intended as living in harmony with Nature, be totally respected.

It is also relevant to mention the creation of institutional governance arrangements that speak on behalf of Nature: the Ombudsperson for the Rights of Mother Earth (*Defensoría de la Madre Tierra*), which was officially established in 2010 by the *Law of the Rights of Mother Earth* (Article 10) and further confirmed by the following legislative act. These mechanisms, that also contributed to increase democratic participation in decision making in the whole of Latin America,<sup>14</sup> should strengthen, at least on paper and together with the

<sup>14</sup> <http://www.corteidh.or.cr/tablas/R08066-5.pdf>



Agro-environmental Court<sup>15</sup>, the defence of ‘Mother Earth’ from any violation of its rights.<sup>16</sup>

It is clear that these revolutionary eco-oriented results have been heavily influenced, together with the strict closeness with Ecuador, by the appointment of the first indigenous president in 2009, Evo Morales, who has pushed for a clear recognition into legislative measures of the basic values of its people through what he has defined as a “*process of change*”.

The results agreed during the World People’s Conference on Climate Change and the Rights of Mother Earth, hosted also in Bolivia in 2010, may also have catalysed a further push towards specific nature entitlements.<sup>17</sup> This is evident in the words included in the Bolivia Law no. 071/2010, which highlights that natural processes, as “*part of the private heritage of everyone*” (Article 2 para 5), cannot be commoditised.

On the other hand, as discussed in further detail later in this paper, the absence of any judicial enforcements of the Nature Rights by the national courts in Bolivia, as well as the continuing unsustainable exploitation of natural resources in the country, admittedly still witness current and serious infringements of these legal rights.

### iii – COLOMBIA

In line with the progressive approach characterising most Southern American Countries,<sup>18</sup> Colombia has also been playing a pivotal and enlightened role in the formal

recognition of Rights of Nature, even though limited at its national judicial level.

Two key legal cases which have led the Colombian courts to formally recognise legal personhood for i) the Atrato River and ii) Amazon forest within the Colombian borders each deserve specific discussion.

#### - The Case of the Atrato River

Starting with the first case, the severe levels of mercury contamination affecting the Atrato River and its tributaries, as a consequence of frequent illegal mining, led the Colombian NGO “*Tierra Digna*” to petition the Colombian Constitutional Court that the massive degradation of the river entailed an infringement of fundamental Human Rights, such as the right to water, for the local community living in its proximity.

The far-reaching contribution coming from the 2016 judgment has not to be restricted to the recognition of the state’s “*serious violation of the fundamental rights to life, health, water, food security, the healthy environment, the culture and the territory*” towards the local community living near the River (Para. 2.10), whose protection is invoked by the judge through the express reference, despite not being formally included in the Colombian Constitution, of the Human Right to water. But the innovative approach embraced by the Colombian Constitutional Court is to be seen in the so-called ‘bio-cultural rights’, by which the Court stressed the strict relationship between the natural resources and the cultural pillars of the local communities living in proximity with the river.

15 Article 38, Bolivia Law no. 300/2012

16 Lidia Cano Pecharroman Rights of Nature: Rivers That Can Stand in Court, Earth Institute, Columbia University, New York, 2018.

17 <https://celdf.org/rights/rights-of-nature/>

18 Although, for reasons of limited space, it is not possible to map in details the progressive alignments in terms of legal rights for nature coming from all the states which are part of the Latin American continent, it seems appropriate to mention at least their main achievements. In this sense, the reference

is to Brazil and its recent amendment (2017) of the local law in the State of Pernambuco (in the municipality of Bonito), that formally recognised rights for nature; Argentina, which proposed in 2015 the official inclusion of nature rights within a national regulation and the near Mexico, which has officially included legal rights for nature both in its federal state (2014 amendment of the State of Guerrero) and its Federal District Constitution (2017 Constitution of Mexico City but entering into force in September 2018).

Starting from the assumption that a full preservation of the environment would be dependent on a consequent conservation of the basic Human Rights and cultures, the Court granted the River Atrato, its tributaries, and its basin “*the right to be protected, preserved, and restored by the State and the communities*” (Para 5.9).

If on the one hand the Colombian Court also recognised legal personhood to a river, in alignment with the Ecuadorian judgment (aforementioned), on the other, the differences in the legal argumentations used to reach that conclusion are evident.

Far from being equated to human life, the Atrato River has become a legal person on the basis of the benefits that it provides *for human life*. However, some similarities with other national jurisdictions can be outlined; for example, the designation of two custodians for the protection of the River’s Rights: 1) a custodian from the local community living near the river basin; and 2) one from the Government, further inspiring the 2017 New Zealand legislative acts (mentioned below) to develop the same kind of institutional arrangements. However, the delineation of its right to stand before the Court remains unclear and requires a detailed case-by-case analysis.

Among the measures that the Constitutional Court requires the Government to adopt are the elimination of illegal mining activities, while finding alternative solutions able to actively involve its communities, through free prior informed consent. The judgement also required protective measures for the River *per se*.<sup>19</sup>

<sup>19</sup> <https://news.mongabay.com/2017/05/colombias-constitutional-court-grants-rights-to-the-atrato-river-and-orders-the-government-to-clean-up-its-waters/>  
<sup>20</sup> *Oposa et al. v. Fulgencio S. Factoran, Jr. et al* (G.R. No.

## - The Case of the Colombian Amazon Rainforest

Equally illustrative is the reference to the very recent and ground-breaking Colombian Supreme Court judgment that, on 5 April 2018, formally recognised the area of the Amazon rainforest within its national borders as an “*entity subject of rights*”.

Shaped on the earlier *Oposa* case<sup>20</sup> in the Philippines and similarly to the Latin American case, the plaintiffs were a group of young individuals who invoked the violation of their right to a safe environment, life, food and water, which were jeopardised, according to their claim, by the Government’s inability to reduce the massive deforestation of the Amazon rainforest and, as a direct consequence, the climate change threat which they faced.

Although the highest court judgment was mainly focused on enforcing the constitutional provision on Human Rights (requiring the national Government to, therefore, take immediate actions), what it is important to stress for present purposes is the extended protection granted by the Court, that recognised the inner value that an effective protection of the natural ecosystem has also itself, not only for a better enjoyment of Human Rights. In other words, granting the Amazon forest the same legal rights that individuals have, has been translated by the Court into a formal order for both the national and local Government to protect, maintain and restore the Colombian forest.

These obligations, requiring a direct involvement of the local community, have been identified in the development of immediate and actionable plans to

101083). Available online in English at: [https://www.lawphil.net/judjuris/juri1993/jul1993/gr\\_101083\\_1993.html](https://www.lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html)

be implemented in the short and long-term, to reduce the level of deforestation in the Amazon. The approach embraced by the Colombian Supreme Court reinforces, therefore, the progressive path started by the previous Colombian judgment, which granted the Atrato River similar legal rights. It also clearly shows how the Rights of Nature can be interpreted as an effective legal mechanism to enforce the implementation of the right to a safer environment and, consequently, the wider spectrum of Human Rights dependent thereon.

This can be easily deduced also in the Colombian Supreme Court judgment that concludes that the anthropogenic deterioration and transformation of the natural ecosystem (in this case the deforestation of the Colombian Amazon) eventually causes serious and imminent damage for both present and future generations, in terms of GHG emissions and degradation of water quality.

Stressing that *“nature is a community to which we belong, and not a commodity for us to exploit”*, which evokes the words of the previous Ecuadorian and Colombian Courts, this legal case represents a visible example of the process of mutual reference and influence at the basis of the current judicial system, as well as the building process characterising the implementation of the Rights of Nature.

## iv – NEW ZEALAND

In 2017, two formal recognitions for rivers with legal personhood attracted much enthusiasm from environmental activists and scholars alike. That is, i) the Uttarakhand High Court decision in India on the Ganges and its tributary the Yamuna river; and ii) the New Zealand legislative act regarding the Whanganui River.

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21 Note: the *“Whanganui Iwi”* are delineated for these purposes by section 8 of the 2017 Act. The term ‘Iwi’ in the Māori language equates broadly to *“people”* or *“nation”*

### - The Whanganui River legislation

Considering in this section the latter case, it is important to correctly distinguish that the development in New Zealand is the product of an innovative approach to dispute settlement: the first attempt to reconcile Crown and Māori interests. This resulted in the formal, universal recognition for the Whanganui River of its own legal rights as a mechanism in balancing these conflicting interests.

Within the national context, the first specific legal text worth referencing is the Whanganui River Claim Settlement Bill (draft legislation from 2014). This marked the end of a long-standing conflict on the ownership of the river between the Government and the indigenous people, *“the Whanganui Iwi”*,<sup>21</sup> who consider themselves as an integral part of the river on the basis of their customary laws.

When read together, Clause 12, 14 and 15 of the Whanganui River Claims Settlement Bill have the effect of developing legal personhood to the so-called *“Te Awa Tupua”*, which the Whanganui River is expressly part of, meaning that the watercourse is recognised *“all the rights, powers, duties, and liabilities of a legal person”* (Clause 14). However, the express reference to the broader ecosystem composing the Whanganui River (*“incorporating all its physical and metaphysical elements”*), as precisely stressed in Clause 12, could lead one to conclude that the Bill did not intend to limit the recognition of legal rights to the mere river itself, but rather extends the legal protection to a wider *“indivisible and living whole”*, as the definition of Te Awa Tupua clarifies (and as affirmed by Section 12 of the 2017 Act aftermentioned).

associated with a distinct territory and is often translated as *“tribe”*. For convenience here, we use the terms interchangeably with the broad term indigenous.

In March 2017 the draft settlement as outlined in the Bill was formalised by the ‘Te Awa Tupua (Whanganui River Claims Settlement) Act’, where the river has permanently been recognised its own legal rights. Building on the framework designed in the Bill, the 2017 Act universally acknowledges the Whanganui River’s right to be represented in court through a committee (“Te Pou Tupua”), the formal ‘representatives’ of the River.<sup>22</sup> Albeit that, in the view of the indigenous groups, such a right already existed on the basis of the previous customary laws and Treaty Rights,<sup>23</sup> the Act clarifies governance arrangements to be applied going forwards.

The Committee, Te Pou Tupua, is equally composed by one representative of the indigenous community (directly nominated by the ‘Whanganui Iwi) and one of the Government (following nomination by the Crown) to represent the River’s interests. Following their nomination by the Crown and Whanganui Iwi respectively, they are appointed jointly by the parties to represent the River (see Section 20 of the Te Awa Tupua 2017 Act).

Among its main functions, the Committee is responsible “to act and speak for and on behalf” of the River (intended in its wider ecosystem), and “promote and protect (its) health and well-being” (Section 19). With reference to this latter point, it is therefore evident how the 2017 Act aligns to paragraph 1.8.2 of the Whanganui Iwi and The Crown, Tūtohu Whakatupua Agreement (30

August 2012), which expressly states that the “*health and wellbeing of the Whanganui River is intrinsically interconnected with the health and wellbeing of the people*”.

In other words, the Committee not only has all the powers necessary to protect and perform as if it was the River, but actually represents the “*human face of Te Awa Tupua*” (Section 18 of the 2017 Act). In this sense it is possible to mark the difference between the Ecuadorian and Bolivian approach, which both granted positive rights to their rivers, but without identifying in precise terms their representatives, and the New Zealand case, which clearly specifies this on the face of the legal text. Sharing with the Colombian judgment on the Atrato River a specific appointment of its representatives, the legislative framework in New Zealand is designed in a way that it is for the Committee to identify, on a case-by-case basis, the positive legal contents of the River’s Rights.<sup>24</sup> In practice, this might mean that rather than formally protecting the River against any variation of its flow, a full empowerment of the River’s Rights may lead its representatives to invoke before a court a flow change, whenever that is necessary to ensure its survival in the long-term.<sup>25</sup>

### - The Te Urewera Act 2014

Other agreements between the Government and indigenous groups were also reached in 2014: this

22 The original reference to “*custodianship of Te Awa Tupua*” as included in the 2014 Whanganui River Deed of Settlement Ruruku Whakatupua - *Te Mana o Te Awa Tupua* (Para. 8.33) – which is then incorporated in the 2014 Te Awa Tupua Bill, has been then removed in the final 2017 legislative Act. For these reasons, the paper will generically refer to river’s representatives, rather than mentioning the concept of custodianship or guardianship, which is not incorporated into the final legislative text.

23 The rooted interconnection between the Whanganui Iwi and the River can be summarised in the well-known expression “*Ko au te awa, Ko te awa ko au* – I am the River and the River is me”, expressly incorporated in several national documents. To exemplify, they include the 2012 Whanganui Iwi and The Crown, Tūtohu Whakatupua

Agreement (Para. 1.1); the 2014 Whanganui River Deed of Settlement Ruruku Whakatupua - *Te Mana o Te Awa Tupua* (Para. 3); the 2014 Whanganui River Claims Settlement Bill (Clause 13 (c)); the 2017 Act (Section 13(c)). Considering that the two main indigenous groups’ predecessors were settled alongside the River’s flow and tributaries, this inevitably reinforces the indigenous recognition of the Whanganui River as part of their ancestors.

24 <https://theconversation.com/when-a-river-is-a-person-from-ecuador-to-new-zealand-nature-gets-its-day-in-court-79278>

25 However, refer to the discussion in practical limitations below vis-à-vis the position of existing consents and the fact that this remains subject to the overall functioning of the Resources Management Act 1991.

time, between the Tūhoe tribe<sup>26</sup> and the National Government, with reference to the national park located in the central part of the North Island, which, in a similar way to the Whanganui River, received recognition as a legal entity in its own right and protected status (“Te Urewera”).<sup>27</sup> In this case the legislative power, through the Te Urewera Act 2014,<sup>28</sup> has also entrusted a board (the “Te Urewera Board”) the right and duty to act in the best interests of Te Urewera land. Initially the Board was composed of 8 members, appointed in equal number by the local community and Government. However, “*from the third anniversary of the settlement date*”, the composition of the Board predominantly reflects the preferences of the indigenous community (which have the power to appoint 6 representatives); compared to 3 representatives appointed by the Crown (Section 21 of the 2014 Act).

### - Mount Taranaki Settlement

More recently, in December last year (2017), the country has moved towards a third recognition of legal personhood to Nature, bringing to a conclusion a 140-year long dispute with indigenous communities. Mount Taranaki is an active but quiescent stratovolcano located in the Taranaki region on the west coast of New Zealand’s North Island.<sup>29</sup> The negotiations culminated on 12 March 2018 with the landmark accomplishment of the signing of the Deed of Settlement (and earlier Record of Understanding, dated 20 December 2017) between the Crown and the Taranaki indigenous people over Egmont

National Park<sup>30</sup>, in this way leading the mountain towards the same broader recognitions now in place for the Te Urewera and Te Awa Tupua Whanganui River. The signing is a significant step forward in the negotiations relative to the historical Treaty of Waitangi.

In due course, it is anticipated that the Deed of Settlement will similarly be formalised in an Act. Thereby Mount Taranaki will not only be recognised the same or equivalent legal rights as New Zealand private citizens, but the creation of a joint Crown-Taranaki Iwi governance arrangement will ensure Taranaki’s interests are protected and legally represented before courts.

Needless to say, the future recognition of legal personality to lands previously owned by the Crown is widely interpreted as a landmark achievement in the debated issue of land ownership, as well as an evident progress by the New Zealand Government towards the inner spiritual values of Māori culture.<sup>31</sup>

## v – INDIA

### - The Case of the Gange and Yamuna Rivers<sup>32</sup>

Moving to the Indian case law, the ruling of March 2017 has been positively welcomed by a specific recognition of legal personhood for the Ganges and its tributaries, especially given the importance that it holds within the Indian community: not only for being considered by millions of people as a

26 Note: Tūhoe is delineated for these purposes by section 7 of the 2014 Act by reference to section 13 of the Tūhoe Claims Settlement Act 2014. For convenience, we again use the term ‘Tūhoe’ and tribe interchangeably with indigenous peoples.

27 It is worthwhile mentioning that the formal recognition of Te Urewera as a legal entity in 2014 has brought, as a consequence, the disestablishment of the national park in the area in the same year (replacing the National Parks Act 1980).

<http://www.ngaituhoe.iwi.nz/Te-Urewera-the-national-park-that-isnt>

28 [www.legislation.govt.nz/act/public/2014/0051/latest/DLM6](http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6)

[183601.html](http://www.gns.cri.nz/183601.html)

29 <https://www.gns.cri.nz/Home/Learning/Science-Topics/Volcanoes/New-Zealand-Volcanoes/Volcano-Geology-and-Hazards/Taranaki-Egmont-Volcano-Geology>

30 Note: Mount Taranaki has two official names recognised by the New Zealand Geographic Board, with Egmont the alternative conferred by Captain Cook in 1770. In ancient times it is said the mountain was also called Pukehaupapa.

31 [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11963982](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11963982)

32 Mohd. Salim vs. State of Uttarakhand & others, THE HIGH COURT OF UTTARAKHAND AT NAINITAL, 20 March 2017.

highly sacred river, but also given its fundamental role in the surrounding communities' survival.

Due to the vast amounts of hydro-electrical and mining activities which have been using, diverting and polluting the Ganges River, and consequently, its tributaries, the need for urgent, specific protection was clearly recognised.<sup>33</sup>

The instant case was brought before the Uttarakhand High Court after a non-cooperative attitude was demonstrated by the administrations of two Indian States, Uttarakhand and Uttar Pradesh, for the creation of a panel to protect the Ganges river set by the federal Government. The reasoning of the Court in its judgment, which also cross-refers to developments in other jurisdictions (as mentioned below,) is central to its innovative reach.

The explicit reference to the existence of the (then recent) Te Awa Tupua (Whanganui River Claims Settlement) Act in New Zealand, led the High Court to formally recognise the Ganges, the Yamuna and also "*all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers*" as legal persons, at least as long as they maintained their sacred nature for the majority of Indian people (para. 19). The High Court recognised that the "*Rivers Ganga and Yamuna are breathing, living and sustaining the communities from mountains to sea*" (para. 17). Furthermore, Justice Rajiv Sharma and Justice Alok Singh formally relates to the concept of legal personhood invoked by the Indian Supreme Court for Hindu deities.<sup>34</sup>

Moving from the constitutional duty imposed on every single Indian citizen to "*protect and improve the natural environment*" (Art. 51A(g) of the Indian Constitution), the Court granted those rivers the

same rights, duties and liabilities as human beings. Therefore, this is officially the first time globally when rivers have been recognised as a living entity with its own rights by a national court. (As aforementioned, the developments in New Zealand are a result of legislative provision).

Following the path traced by the legislative acts in New Zealand, another important achievement reached by the Uttarakhand High Court was the designation of three representatives to formally "*protect, conserve and preserve*" the referred rivers; namely – 1) The Director NAMAMI Gange, 2) the Chief Secretary of the State of Uttarakhand; and 3) the Advocate General of the State of Uttarakhand (para 19). However, the choice to limit the identification of the Guardians of the rivers only at the State-level remains highly debated and controversial, given the economic-oriented interests that often guide their decision-making process and insufficient commitment to combat the alarming levels of pollution affecting the rivers.

Despite some weaknesses (such as the aforementioned identification of the Rivers' Guardian/representatives or the use of vague terms in the Court judgment), the overall progressive approach embraced by the High Court was set aside by the Indian Supreme Court in July 2017. The appeal filed by the State Government of Uttarakhand claimed the High Court decision was "*unsustainable in law*". The legal arguments invoked by the Indian Supreme Court to justify its decision – namely the potential interference in rights with other Indian provinces and the uncertain identification of responsibility for compensation in case of disastrous natural events – clearly confirms how the path towards a steady recognition of legal Rights for Nature still requires further consolidation and development as part of a

<sup>33</sup> <https://www.theguardian.com/global-development-professionals-network/2017/apr/21/rivers-legal-human-rights-ganges-whanganui>

<sup>34</sup> The Court referred in this regard to the case of Yogendra Nath Naskar v. Commission of Income Tax, Calcutta, 1969 (1) SCC 555, para 12.

broader functioning normative framework for environmental protection and improvement.

At the same time, considering the deep interdependence and mutual reference among current legal cases, the risks of regressive rulings should not be underestimated, as dangerous precedents able to potentially influence future judgments at the national but also international level, as well as other jurisdictions which may consider them persuasive authority.

### - The Case of Gangotri and Yamunotri

A further confirmation of judicial progress in India can be observed also with reference to the recognition of legal personhood of the Himalayan glaciers Gangotri and Yamunotri.

Almost coterminously with the Indian ruling on the Ganges and Yamuna, the Uttarakhand High Court strengthened the protection given to the Himalayan glaciers Gangotri and Yamunotri by recognising that they represent a fundamental water source for the rivers and their living status was evocatively confirmed by the judgment which describes that the “[r]ivers are grasping for breath”.

Although also in this case the sacred nature of the glaciers represented a triggering point for leading the Court to reach that conclusion, together with the alarming level of pollution that such a contamination may cause for the enjoyment of Human Rights and the alarming and accelerating rate of their recession, the direct or indirect references to the close in time recognitions achieved for the Ganges, Yamuna and the Whanganui River in New Zealand, testifies the potential cross-fertilisation that progressive legal developments may also have on future rulings and judicial approaches.

<sup>35</sup> <http://glacierhub.org/2017/04/27/two-glaciers-in-india-granted-person-status-court-rules/>

The relevance of this judicial decision is to be identified in the formal declaration for both the glaciers, but also the surrounding “*rivers, streams, rivulets, lakes, jungles, air, forests, meadows, dales, wetlands, grasslands and springs*” as “*legal entity/ legal person/juristic person/judicial person/ moral person/artificial person having the status of a legal person*” (Direction no.2).

The court further clarifies that this status implies for the ecosystem to have “*corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them*” (fundamental rights included), which have to be claimed and invoked through their Guardian. (Here the reference is to similar guardians as for the Ganges and Yamuna rivers). This approach confirms, as suggested also by some legal scholars, the intention of the Indian High Court to actually preserve “*India’s remaining water resources*”,<sup>35</sup> constantly under threat from chemical contamination or burning of black carbon.<sup>36</sup>

## 4. PRACTICAL LIMITATIONS

Notwithstanding the formal but still evolving and innovative recognitions of the Rights of Nature described above, the limitations in the concrete enforcement of these rights requires specific attention. By identifying which limitations or barriers the national jurisdictions have encountered to translate such rights into real-world changes, this analysis may assist in preventing any short-comings from being replicated elsewhere through an evolutionary approach.

Before considering the importance that adequate enforcement tools within the national context play in order to ensure that Nature Rights can be upheld, (such as the legal and financial resources available to be deployed by institutional authorities and participatory groups), it is necessary to

<sup>36</sup> <https://www.the-cryosphere.net/9/1105/2015/tc-9-1105-2015.html>

highlight the fact that, although emerging more consistently only in the last few years, eco-oriented approaches are not totally novel.

Already in the 1970s, William O. Douglas in his dissenting opinion in the case of *Sierra Club v. Morton* about the construction of a ski resort in the sequoia National Forest in California, expressed the idea to extend to the real affected party, which was the environment in its components, valleys, rivers, lakes, beaches, ridges, standing before courts.

Although his opinion did not prevent the Court from rejecting the case in that instance, his visionary view, supported also by the work of the US scholar, Christopher Stone, eventually inspired environmentalists and indigenous communities to fight to further the Rights of Nature *per se*. For example, in the 2004 case of *Cetacean Community v. Bush*<sup>37</sup>, the Ninth Circuit of the United States Court of Appeal admitted the possibility to grant “*standing to an animal by statutorily authorizing a suit in its name*” according to Article III of the Constitution (when its requirements are met), even though the Court concluded that such recognition could not be granted in the specific case of the Cetacean complaint.<sup>38</sup>

Moving to the practical limits within the national jurisdictions, court orders and legal underpinning in the national legislation have, however, not always been sufficient to combat the cumulative impacts that ‘Mother Earth’, to quote Bolivian legislation, has been facing, and is continuing to, face.

This paper will therefore move towards some brief state-by-state specific considerations of these

barriers and limitations to progress in the case-study jurisdictions.

## i – Ecuador

Despite being regarded as a revolutionary decision for the country, the first obstacle to an effective protection of the Vilcabamba River in its own rights and, consequently, the Human Rights of the population relying on the water of the River, can be identified in the lack of clear and timely regulatory controls, which are fundamental to deliver upon those rights.

On the one hand, the fact that the Court did not recognise the enlargement of the road as an inner violation of constitutional rights *per se* could be understood in the attempt to balance the public interest that the road could generate for the local population with the obligation to respect the River’s Rights. The order thus imposed on the Government the obligation to align with environmental guidelines released by the Ministry of Environment.<sup>39</sup> As a result, as the road works were not prohibited themselves, the activities were only temporarily stopped – in accordance with the precautionary principle – “*until it is objectively demonstrated that there is no likelihood or danger*” of environmental damage.

On the other hand, concrete implementation of the remedies imposed by the Provincial Justice Court of Loja, such as the rehabilitation plan put in place and restoration of the river bed, remains unimplemented. The Government still has to remedy the damages caused to both the River and the population affected (costs which have thus far been on the contrary born directly by the plaintiffs). The operations of removal of the waste materials from the river also needs to be completed.<sup>40</sup>

37 <https://caselaw.findlaw.com/us-9th-circuit/1459189.html>

38 <https://www.hcn.org/issues/47.1/should-nature-have-standing-to-sue>; <https://theconversation.com/when-a-river-is-a-person-from-ecuador-to-new-zealand-nature-gets-its-day->

[in-court-79278](https://www.therightsofnature.org/first-ron-case-ecuador/)

39 <http://web.unep.org/stories/story/indigenous-people-and-nature-tradition-conservation>

40 <http://therightsofnature.org/first-ron-case-ecuador/>



Other unanswered questions make the Ecuadorian context even more complicated. The cumulative impacts that different interests may have on the delicate environment (and specifically to the Vilcabamba River) require to find precise legislative or judicial regulation relative to the conflict among different anthropogenic activities (for example between economic purposes, such as those claimed by the plaintiffs to build an eco-tourism centre for foreigners, or the public purpose as invoked by the Defendants). Equally important is also finding a balance and specific prioritisation between humans and non-human natural areas, as all are part of the '*Pacha Mama*' umbrella.

These concerns commonly afflict all Latin American countries, where massive projects for the exploitation of natural resources represent a major pillar of continuing economic development which cannot be simply dismissed without precise consideration.

## ii – Bolivia

As with Ecuador, Bolivia has also similarly been facing several difficulties in the implementation of the legal subjectivity for Nature Rights.

Although the creation of a specific Ombudsperson for the Rights of Mother Earth (legally underpinned by the 2010 legislative Act) is widely welcomed as an important step forwards in the concrete protection of Nature Rights, the lack of specific details in the identification of its Guardians/representatives, as it is specified on the contrary within the Colombian and New Zealand contexts, may create nebulous spaces and uncertainty. In turn, this may lead to an inadequate enforcement of their mandate.

Moreover, the attempt to balance enforcing provisions in defence of the legal personhood for Nature with the right for people to keep exploiting the natural resources can also be identified in the Bolivian legislative framework (as previously highlighted in the Vilcabamba River case in Ecuador) in cases where the Government has already granted the necessary permissions.<sup>41</sup> If on the one hand these provisions can be positively welcomed as at least a first legislative step to combine the numerous interests surrounding the natural resources, on the other the current state of the Bolivian environment demonstrates that these provisions have not yet been fully realised. Or worse still, that the Government continues to grant permissions to support economic activities that heavily deteriorate the environment and are not sustainable, whilst paying only lip-service to the aforementioned legal requirements.

In other words, the praised and progressive concepts of 'living well' and 'in harmony with nature' are, as yet, not realised in real-world terms in the Bolivian context: both civil society, represented in great part by indigenous peoples and the environment itself, have been suffering from the detrimental impacts of anthropogenic pressures. These are mainly caused, on the one hand, by the mining industry, which still represents one of the biggest economic sources for the country, and on the other the sizeable investments in hydrocarbon exploration, gas exploitation, electric power and so forth.<sup>42</sup>

Perhaps facilitated by the opposition that large-scale corporations have demonstrated on occasion towards ecologically framed national laws (especially considering the political and economic dominance they are able to exert), a confirmation of the current difficulty to step away from nature commodification can be identified in

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41 Lidia Cano Pecharroman Rights of Nature: Rivers That Can Stand in Court, Earth Institute, Columbia University, New York, 2018.

42 <https://theconversation.com/when-a-river-is-a-person-from-ecuador-to-new-zealand-nature-gets-its-day-in-court-79278>

the sadly long list of the irreparable environmental disasters characterising the Bolivian landscape. For example, Lake Poopó, Bolivia's second-largest lake, completely dried up in 2015 as a consequence of both the massive reduction of the glaciers and the simultaneous over-exploitation of its main tributaries for short-term economical purposes (mainly related to mining and large-scale agriculture).<sup>43</sup>

In addition, recent investigations for shale gas deposits in the country by national oil and gas corporations, that are in fact protected by facilitating pieces of legislation, and the recent intention declared by the Bolivian Government to build a highway in the middle of a Bolivian protected area – the Isiboro Sécore Indigenous Territory and National Park (also known as 'TIPNIS') – may only exacerbate the delicate natural balance characterising the country, as well as fading the legal revolutionary protection of the Rights of Mother Earth.

The high level of concern on the actual impacts that the construction of the highway is going to cause on the TIPNIS area (both in terms of deforestation<sup>44</sup> and infringement of fundamental Human Rights of indigenous communities), have brought the indigenous leaders of TIPNIS to present the case before the International Tribunal on the Right of Nature.

In its Decision no. 1/2018, the Tribunal concluded that the highly exploitative attitude shown by the Bolivian Government, aimed at maximising the economic interests of coca producers, *"inevitably results in violations of the rights of the Amazon as a whole and of the members of that community of*

*life and is incompatible with the Universal Declaration of the Rights of Mother Earth".*<sup>45</sup> This re-iteration, together with its recommendation to temporarily halt the road works (as a precautionary measure until the Tribunal has completed its work), are facts which clearly represent a dark spot in the Bolivian progressive contribution to the Universal Declaration of the Rights of Mother Earth, as well as its formal championing role towards Nature Rights.<sup>46</sup>

### iii – Colombia

In line with the previous states which have been analysed, similar concerns arise also for Colombia, where again the economically-oriented choices taken by the State have caused detrimental consequences both for the natural ecosystem, defined to be one of the richest in the world, and for the well-being of its local communities.

Data attesting that Colombia, and the Atrato River in particular, is sadly known globally for its high levels of mercury pollution, together with the declaration of a humanitarian and environmental emergency in 2014 by the National Ombudsperson, represent clear examples of the ongoing seriousness of the current situation.<sup>47</sup>

In Colombia, serious doubts also relate to the State's inefficiency in assuring adequate protection of Human Rights, especially in light of the increasing number of victims trying to defend the environment from contamination. Furthermore, the degree of difficulty would reasonably increase for the protection and restoration of the Atrato River, where i) its remote location, ii) the precarious human conditions for the people living near its basin; and iii) the lack of sufficient

<sup>43</sup><https://www.theguardian.com/world/2016/jan/22/bolivia-second-largest-lake-dries-up-and-may-be-gone-forever-lost-to-climate-change>

<sup>44</sup> The 2011 study from the Program of Strategic Research in Bolivia (PIEB) has predicted a 64.5% loss of the TIPNIS forest in the following 18 years in case the highway project is actually completed.

<sup>45</sup> Para 32, lett. c.

<sup>46</sup><https://www.theguardian.com/environment/andes-to-the-amazon/2015/feb/23/bolivia-frack-mother-earth>  
<http://www.coha.org/eleven-years-of-the-process-of-change-in-evo-morales-bolivia/>

<sup>47</sup><https://celdf.org/2017/05/el-heraldo-rights-nature-granted-atrato-river-colombia/>; <http://innove.com.co/atrato-river-legal-rights/>

alternative economical resources by the State, could encourage the illegal markets while increasing the already conspicuous doubts about realistic changes.

Notwithstanding, it is undeniable that the prescriptive orders directed by the Court to the Government can be read as concrete steps to assure the implementation of its decisions. As emerged above, the creation of clearly identified Guardians/representatives, precise prohibitions in the use of toxic substances (such as mercury) and the designation of collaborative governance arrangements (reinforced through prior consultations with NGOs and members of the community and the constitution of an advisory team), makes a clear connection with the system designated within the New Zealand legislative provisions. A precise mechanism of supervision and verification of compliance is also detailed by the Court.<sup>48</sup>

On the other hand, this does not mean that open questions are totally absent. Firstly, the central role of the Court in setting specific criteria for environmental protection and implementation is questionable, especially for future environmental cases; as opposed to specific underpinning in the national legislation.

On the basis of previous judicial experiences, governments have often demonstrated to be quite sceptical on conforming and complying fully with such decisions when they are not approved by the political/Executive branch of power, especially in the absence of legislative approved measures. Arguing around violation of the principle of separation of powers, also economically developed countries, such as the Netherlands (in the famous *Urgenda* case) and the US (in *Juliana vs. the United States* cases) have indeed experienced serious difficulties in aligning their

contexts with forward-thinking courts, that have given voice to stronger environmental protections and rights-based considerations.

Moreover, the central role that indigenous communities have had in achieving the progressive ruling, may give rise to questions as to whether the legal rights granted to the River are directly dependant on the proximity and presence of such local communities.

#### iv – New Zealand

The fact that practical limitations in the New Zealand approach have not been so evident as in the other national jurisdictions (which are distinguishable as emerging economies) does not mean that ongoing concerns on the use and exploitation of natural resources are not present within the Māori indigenous populations.

While the very recent nature of the legislative acts examined in the New Zealand context means that their provisions have not yet been judicially tested, some key elements already raise questions in terms of a full implementation and realisation of Nature Rights.

Starting with Mount Taranaki, the ongoing negotiation process towards formal recognition of its legal personhood and the absence, at this stage, of a requirement to apply ‘personhood’ to *existing* policy-making represents a notable gap.

With reference to the 2017 Te Awa Tupua (Whanganui River Claims Settlement) Act, it is worth mentioning the lack of any formal recognition of a right to ecosystem restoration. Although the “*health and well-being of Te Awa Tupua*” is supported through the allocation of specific funds by the Crown as part of the settlement<sup>49</sup>

48 [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0007/2516479/Legal-rights-for-rivers-Workshop-Report.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0007/2516479/Legal-rights-for-rivers-Workshop-Report.pdf); <https://www.abcolombia.org.uk/constitutional-court-sets-global-precedent/>

49 Section 57(2) refers to clause 7.1 of Ruruku Whakatupua – Te Mana o Te Awa Tupua, which “contains a new legal framework for the settlement of historical claims by Whanganui Iwi about the Whanganui River. This included the duty for the crown to pay the sum to the fund.

arrangements (Te Korotete - Section 57(3)), and through collaborative planning approaches and strategies,<sup>50</sup> the absence of clear entitlements may create loopholes in future claims before courts. Moreover, a further source of uncertainty can be identified also in the role that Te Pou Tupua will have, for example, with reference to future decisions on drinking water treatments.

Regarding this latter issue, there is concern of a contradictory inclination shown by the New Zealand Government, with reference to the access and use of natural resources. The high level of contamination characterising major lakes and rivers in the country, due to intensive dairy practises and large-scale tourism,<sup>51</sup> has been exacerbated recently by clear support for water chlorination and fluoridation (including for drinking water), as recently expressed by the current CEO of Water New Zealand, John Pfahlerl.<sup>52</sup>

Given the previous political roles Pfahlerl has performed, such as CEO of the Petroleum Association and perceived association with the encouragement of unsustainable and detrimental practises for the environment (such as deep sea oil drilling, fracking and mining rights for the industry sector), it is therefore understandable the importance of avoiding any watering down of the current and progressive legislation on Nature Rights, which is further endangered by current risks of water privatisation.

Fundamentally, Te Awa Tupua remains subject to existing property rights, consents and the overall functioning of the Resource Management Act 1991. There is no ability conferred by the 2017 Act to unsettle existing consents. In practice, legal personhood must be recognised and provided for

in planning decisions. But at the consenting stage, only particular consideration requires to be given. As the precise contours of the 2017 Act are untested judicially at present, it will be interesting to monitor developments in this area going forward.

## v – India

Looking at the Indian context, and specifically to the Ganges and Yamuna case, it is first necessary to mention that, considering the sacred nature attributed to the rivers, the need to balance religious interests with other types of interests connected to the water use represents also here one of the main frequently cited problems that could affect, in concrete terms, the recognition of legal personhood for the water courses. Directly linked to this concept, and within the perspective of potential exporting of such recognition abroad, the question on the direct connection between Nature Rights and religious/sacred beliefs is highly debated. Would, for example, the High Court have reached similar innovative achievements if the river in contention was not linked to such deeply rooted religious interests?

Another important aspect that, within the Ganges and Yamuna case, certainly complicates the development of adequate governmental implementation is given by the vague definition of harm adopted by the Court which, together with its limited jurisdiction and inability to generate the financial support needed to develop efficient mechanisms in the protection of Nature Rights, further feed enforcement challenges.<sup>53</sup> In this sense, a clear delineation, within the national legislative framework, of the main criteria

50 We specifically refer in this case to Te Heke Ngahuru, which is aimed at identifying, preventing and strategically dealing with Whanganui River 's detrimental effects (Sections 35-38 of the 2017 Te Awa Tupua Act).

51 <https://www.wsj.com/articles/in-the-land-of-milk-and-money-dairy-boom-feeds-environmental-fears-1502708406>; [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&obje](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&obje)

[ctid=11907801](https://www.stuff.co.nz/the-press/news/104367892/the-man-behind-water-new-zealand--and-oil-mining-and-everything-else)

52 <https://www.stuff.co.nz/the-press/news/104367892/the-man-behind-water-new-zealand--and-oil-mining-and-everything-else>

53 [https://law.unimelb.edu.au/data/assets/pdf\\_file/0007/2516479/Legal-rights-for-rivers-Workshop-Report.pdf](https://law.unimelb.edu.au/data/assets/pdf_file/0007/2516479/Legal-rights-for-rivers-Workshop-Report.pdf)

identifying the exact definition of the concept of harm to the River, or to the environment in general, could be useful to fill that judicial gap.

Further, within the Indian setting, these innovations have not yet prevented high levels of contamination that severely affect not only the Ganges but the whole water courses linked in some ways to the River. This context, exacerbated by the recent hostility shown by the Indian Supreme Court to a formal recognition of legal personhood to the River, undoubtedly requires further steps to deliver environmental protection. Thereby, usefully also illustrating the imperative to link Nature Rights within a well-functioning environmental protection framework (in this example, this would include River Basin Catchment Planning and the regulation of abstraction, impoundment and point-source discharges, as well as monitoring activities and so forth).

## 5. ENFORCING NATURE RIGHTS

From the above national analyses, it is possible to outline some common trends that, given certain similarities within the economic and social context (especially equating states with economies in transition) and the strong common presence of indigenous people or communities, could lead us to reflect on possible improvements in the studied countries, as well as patterns that might be capable of being exported or elevated to the global and other national scales.

As a preliminary point, it is necessary to stress that, beyond those commonalities, the peculiarities characterising every single country prevent generic conclusions that all or some of the

advantages and limitations aforementioned will be automatically replicated in other countries trying to design Rights of and for Nature. And in this regard, we re-emphasise caution in any attempts at direct legal transplantation without regard to specific social, cultural and wider legal contexts and frameworks.

Starting with the lessons to take home, most of the countries analysed have demonstrated, even though to differing degrees (and founded in dispute settlement contexts), to progressively shift from an anthropocentric to a more eco-centric approach. Thereby, witnessing a shift in acknowledging human beings simply as one component of the whole natural equilibrium. However, from the analysis above it is evident how the frequent reference to Human Rights, well-being and present and future generations as possible beneficiaries of such recognitions, eventually still grounds the environmental protection from a more traditional anthropogenic perspective.

*“Human rights, such as the rights to water and to life, are empty political promises unless we honour our duty to respect and protect the whole hydrological cycle, including the rights of rivers to flow, and of the forest to grow”.*<sup>54</sup>

Recognising legal personhood to Nature itself, and progressively incorporating that recognition into constitutional and legislative provisions, is, however, an unequivocal first innovative step towards a step-change in normative focus, especially in terms of re-shaping a functioning concept of sustainable development.

Given the ongoing difficulty for some groups and vested interests to accept such a radical change of legal perspective and orientation, the concept of

<sup>54</sup> <https://therightsofnature.org/a-tribunal-for-earth-why-it-matters/>; Tabios Hillebrecht, Anna Leah and Berros, Maria Valeria (Eds). "Can Nature Have Rights? Legal and Political

Insights," RCC Perspectives: Transformations in Environment and Society 2017, no. 6.

Rights for Nature will unquestionably retain several critics. Yet, one must seriously question whether such critics are not often simply those groups who would otherwise dismiss or attempt to circumvent the importance of environmental protection efforts in favour of narrower, short-term considerations.

In response to such criticism, legal scholars such as Stone<sup>55</sup> and Wise<sup>56</sup> instructively highlight that in the past also *“women, children, and slaves were once considered “legal things”*”,<sup>57</sup> as such deprived from any rights but simply “used” according to the interests, before recognising their legal personhood with their own rights.

As a further confirmation, though from a different perspective, the well-established recognition, in the economic context, of the legal personhood also to non-being subjects, such as corporations, municipalities and other legal entities, testifies that, as for Nature, the physical human attribute is not a necessary pre-condition or pre-requisite to obtain legal personhood and the consequent legal rights-based protections, including to stand before courts. In legal terms, there is nothing which inherently prohibits a river, or a forest, from being able to be represented before a court in its own rights.

This point is particularly acute when one considers, as mentioned at the outset of this paper, that Governments have been confronted in recent years by corporations attempting to argue (most often without substantive basis, but nonetheless intended to create a profound regulatory chill effect) that environmental protection measures have violated their Human Rights (such as in the regulation of water abstraction for hydropower or fracking bans impacting on property rights). Thus,

the imbalance in favour of short-term economic considerations is evident without a formal recognition of Rights of Nature.

Why should a court, as a matter of principle, be faced with deciding a claim that such a corporate entity’s rights have been breached without balancing correlative Rights of and for Nature?

Relevant to mention is also that most of the countries taken into account have successfully based their legal recognitions for Nature on the concept of Guardianship or representatives, that radically differs from the traditional western approach based on the ownership of natural resources.<sup>58</sup> In the same way as women, children and African slaves achieved in the past, also Nature has been progressively acquiring independent legal status that allows it not to be owned, used, exploited, or destroyed by humans for the sake of their own interests on an unfettered basis.

The concept of legal tutelage for Nature, already stressed by leading scholars such as Stone in the 1970s, bases its justification on the assumption that a holder (or more holders) for Nature would be fundamental not only to legally represent rivers or Nature in general before courts, but also to state potential injuries suffered and seek remedies for its own benefits.

Given the evolutionary characteristics of law and its abilities to adapt to emerging circumstances, the development of institutional governance arrangements, able to speak with independent status on behalf of Nature Rights (as an addition to broader public participatory engagement), appears of fundamental importance. Such a development

55 Stone, C.D. Should Trees Have Standing? Towards Legal Rights for Natural Objects. *South. Calif. Law Rev.* 1972, (45).

56 Wise, S. Animal rights, one step at a time. In *Animal Rights: Current Debates and New Directions*; Oxford Scholarship Press: Oxford, UK, 2005.

57 Lidia Cano Pecharroman *Rights of Nature: Rivers That*

*Can Stand in Court*, Earth Institute, Columbia University, New York, 2018.

58 Again however, note that in the New Zealand contexts, for example, there is no ability to unsettle extant consents. Changes may be anticipated when time-limited consents, such as those for hydro-power, are due for review.

has the potential to become quickly mainstream, despite the strong initial opposition and resistance that this concept would be anticipated to receive at first from some quarters.

This view can find further legal support within the UK national legal jurisdictions, where innovative and progressive visions in family law and the mental health field have also been contributing to develop a 'changing attitude' in the traditional concepts of law and who has the right to be heard before our courts. The merits for that progression are to be identified also in the active role played by Lady Hale, the first female president of the Supreme Court in the UK since October 2017. A "long standing champion of diversity in the judiciary"<sup>59</sup>, she is also known for her leadership and acting as a role model also in openness to consider (rather than simply dismiss) new and more novel ways of thinking on a merits basis.

Lady Hale's attention to the most vulnerable, sometimes with limited ability to speak on their own behalf, has been translated in the course of her legal career to a complete transformation in the areas of child law and mental health, resulting in the institution of the figure of the *curator-ad-litem* (in Scotland) or *guardian ad litem* (in England) – usually a lawyer appointed by the Court to independently represent the legal interests of children or disabled people affected by mental health impairments and lacking full capacity to make decisions independently and communicate those.

This now mainstream procedure – but initially considered revolutionary and somewhat radical

within some branches of the profession – has been more recently reinforced by Lady Hale's endeavours to ensure children's active participation in the courtroom when considered necessary for the purposes of the judgment (and after his/her guarantor's authorisation on the basis of a detailed evaluation of the possible disadvantages for the minor). Also insightful are the words used by then Baroness Hale in 2007 when she already recognised that –

*"These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views."*<sup>60</sup>

In other words, to prevent a consideration of children as a mere "object of the proceedings"<sup>61</sup>, Lady Hale stressed the importance of an actual involvement of the most vulnerable in decision-making. And the presence of the guarantor *ad litem*, who acts in the best interests of the child, despite being highly debated for several years, is now normalised within court procedures.<sup>62</sup>

These considerations are, in our view, highly analogous with two key aspects of the present debate and also emerging international developments in the environmental field. Whilst forests obviously cannot stand before a court, it illustrates the requirement to develop better institutional governance arrangements to ensure the protection of the Rights of Nature. And these might well be shaped on the examples of a Nature Ombudsman or the figure of *curator ad litem*.

59 <https://www.theguardian.com/law/2017/jul/21/brenda-hale-appointed-as-uk-supreme-court-first-female-president>

60 Re M (Abduction: Zimbabwe) [2007] UKHL 55, [2008] 1 FLR 251

61 <https://www.supremecourt.uk/docs/speech-151120.pdf>

62 The reference is to Re E (A Child) (Evidence) [2016] EWCA Civ 473, [2017], para. 48 where the panel stated 'I make no apology for quoting so extensively from Baroness Hale's judgment, which would seem to have gone unheeded in the five or more years since it was given. The need to give

appropriate consideration to a child giving evidence in a case where that issue arises will soon be given further endorsement by amendments to the FPR 2010 and Practice Directions in accordance with recommendations from the President's working group on children and other vulnerable witnesses. In the meantime the decision in this case should serve as a firm reminder to the judiciary and to the profession of the need to engage fully with all that is required by Re W and the Guidelines.'

Thinking further about means of exporting the progressive achievements reached by national countries in Nature Rights, while equally ensuring simultaneous enforcement, the appointment of a figure similar to the *curator ad litem* to represent Nature's interests in court proceedings could play a pivotal role also in developed countries such as the UK. It would also remain aligned and in keeping with the adversarial legal system in the UK and can be distinguished from, and is distinct to, the role of third party interveners in proceedings (who, without diminishing their contribution, are not independent before the court in representing Nature).

Secondly, the precise attention for the most vulnerable in the context of the environment, in particular children, is also now further recognised at the international level, including through the other key report recently finalised by the current UN Special Rapporteur on Human Rights and the Environment, John Knox, regarding children and the environment.<sup>63</sup>

Anchoring national legislative provisions on environmental protection to the children's perspective, considering their higher vulnerability from environmental degradation, could also assist in furthering greater efficiency and weight to legal Rights of Nature (and, although outwith the scope of this specific paper, also future generations through an enhanced and carefully constructed inter-generational equity perspective).

Moving forward on the lessons to be exported from national jurisdictions, a successful example of the reconciliation of Nature Rights is given by dispute settlement arrangements in New Zealand, where the concession of legal Rights for Nature and more harmonic concept of representatives have been

anchored into highly detailed legislative provisions that not only regulate in details the establishment, powers and nominations of the representatives of, for example, the Whanganui River, but also guarantee participatory involvements of a plurality of stakeholders in the choices affecting the River.

This is precisely the case of the strategy group (also called 'Te Kopuka na Te Awa Tupua') that, in collaboration with an advisory group, is responsible for approving, reviewing and monitoring the activities undertaken, "*to advance the health and well-being of Te Awa Tupua*" (Section 29 of the Te Awa Tupua Act). Whilst again underscoring that the context for this is as part of a settlement of claims for historic Treaty breaches and redress, it remains an inspirational and innovative approach for lessons to be drawn from.

Collaborative governance, participatory decision-making and clear legislative provisions could therefore represent, together with the recognition of legal personhood for Nature within the legislative framework, a good compromise to progressively acknowledge eco-centric principles coming from the indigenous or local communities, the fulfilment of fundamental Human Rights and adequate enforcing mechanisms.<sup>64</sup>

Moreover, also the financing support to maintain the guardianship/representatives, that are a central question for an effective implementation of the Nature Rights, especially in the countries with their economies in transition, seems to be effective within the New Zealand context. Despite being rooted in the traditional values at the basis of the Māori culture,<sup>65</sup> and as a consequence of settlement of the claims for historic Treaty breaches, both central and local authorities are bound to periodically allocate funding for national

63 [http://srenvironment.org/wp-content/uploads/2018/02/A\\_HRC\\_37\\_58\\_AdvanceEditedVersion.pdf](http://srenvironment.org/wp-content/uploads/2018/02/A_HRC_37_58_AdvanceEditedVersion.pdf)

64 [https://law.unimelb.edu.au/data/assets/pdf\\_file/0007/2516](https://law.unimelb.edu.au/data/assets/pdf_file/0007/2516)

<479/Legal-rights-for-rivers-Workshop-Report.pdf>

65 <http://www.mfe.govt.nz/publications/environmental-reporting/environment-new-zealand-2007-chapter-2-our-environment-and-1>



environmental purposes. As a clear example, the direct payments to financially support new institutional arrangement (such as Boards and Committees) representing Nature Rights can be mentioned.

To assure meaningful recognition of legal personhood for Nature and long lasting practical outputs, such measures require to be supported by adequate legislative recognition of Nature Rights and participatory decision-making.<sup>66</sup> The pivotal importance that the broader legislative framework plays, as well as Rules of Court within which Nature Rights operate, are clearly fundamental to ensure their effective enforcement; for example, in considering the ability for injunctions/interdicts to be sought in order to *prevent* the breach of threatened rights would represent fundamental components in the affirmation of nature recognition in its own rights.

Moreover (and again, outwith the scope of detailed consideration of this paper) it is worth mentioning that the option for mediation and other forms of Alternative Dispute Resolution mechanisms to be deployed for the resolution of rights infringements (actual or threatened) could also play key elements in the development of well-functioning frameworks intended to uphold Nature Rights in future. Again, similar such mechanisms can be found in the New Zealand context.

## 6. Conclusions

We (humanity) have reached a crucial juncture when the path for the transition to societies within Planetary Boundaries is increasingly urgent to prevent further key thresholds in the Earth-system from being transgressed, with the consequence of potential non-linear feedbacks. An effective implementation of Rights for Nature may offer one

means of assisting in making the required normative shift in the value attributed to the natural world on which we all depend, to promote balance and provide for conflict resolution. Significant steps forwards and inspirations have already been made through creative judicial applications and legal argumentation when courts have been faced with emerging, once unforeseen, new facts and circumstances. However, a conscious and creative recognition of the Rights of Nature has the potential to take a holistic approach.

As illustrated in this paper, the first stages of legal recognition in courts of legal personhood for Nature has been progressively spreading within different national jurisdictions as the law attempts to respond to profound deficiencies in Governmental regulatory approaches to prevent harm to people and planet from environmental degradation: harms that will, sooner or later, be inescapable.

The recognition that legal Rights for Nature on its own should not be considered as legal concessions granted by humans, but rather they deeply relate to the inner Nature's existence, is a remarkable achievement for the international community (even where grounded in dispute settlement). Moreover, the consistent awareness that a healthier environment *per se* is fundamental to the better enjoyment of basic Human Rights, including also the Rights of the Child, further bolster the call for new progressive evolutions of international and national environmental laws.

In the same way as other key international pillars, such as the sustainable development principle or the green economy, the legal personhood for Nature requires progressive thinking. We also aim to clarify that this would not mean an opening of 'the flood-gates' – far from it. And whilst such changes will not be universally embraced, in part, that may be seen as clear justification

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[https://law.unimelb.edu.au/data/assets/pdf\\_file/0007/2516](https://law.unimelb.edu.au/data/assets/pdf_file/0007/2516)

[479/Legal-rights-for-rivers-Workshop-Report.pdf](#)

underscoring the need for further legal intervention.

As part of a broader legislative framework and court rules to secure environmental protection, Rights for Nature could re-connect and complement environmental protections with the social, economic and cultural aspects of national frameworks. Whilst initially seen as radical or revolutionary, it is clear how legal and judicial evolution in other analogous fields readily support more concrete thinking in this direction.

And whilst some may also argue that Nature Rights should be prioritised for a later stage in transitions, as illustrated, it is equally evident how they are a further side of the coin to protecting and upholding existing fundamental Human Rights, thereby meriting attention already at this juncture during a period of transformative decision-making.

Finally, to those who may entirely dismiss the idea of Nature Rights without a proper, detailed analysis, as Einstein once famously said, *“If at first the idea is not absurd, then there is no hope for it”*.

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30/05/2018

## **7. Preliminary Recommendations for Nature Rights in a UK Law and Policy Setting**

With a new UK Environment Act mooted at Westminster and similar opportunities anticipated in Scotland to respond to Brexit, the present juncture would seem to offer an exciting possibility to begin to concretely develop and shape new thinking around the recognition of Nature Rights in the UK context, together with mechanisms for their enforcement, learning lessons from other jurisdictions, such as those aforementioned.

Based on the above comparative legal analysis, it is clear how the UK Government and Devolved Administrations could begin to develop a world-leading approach to assure the protection of Nature and thereby also provide another means of advancing respect for wider Human Rights, in line with the work of the UN Special Rapporteur on i) Human Rights and the Environment; and ii) the Rights of the Child – through a clearer and more broadly framed rights-based approach.

As mentioned earlier, recognising such rights does not – and would not – represent a definitive end-point in itself in terms of environmental protections. Rather, it may be seen how Nature Rights might substantively assist Governments to deliver a managed normative shift towards the Sustainable Development Goals and societies within planetary boundaries. Furthermore, in the management and weighing of many differing interests in the sphere of environmental policy and regulation towards focusing on the outcome sought: a harmonious and sustainable balance between people and nature.

Living Law, along with others active in understanding this area, aims to catalyse and prompt further debate towards progressive and visionary thinking that can help equip Governments with the legal tools needed to rise to the challenges facing us today in the environmental sphere. Whilst further, more detailed, analysis is undoubtedly required to begin to shape these matters into meaningful options for the development of future regulatory frameworks incorporating also Nature Rights, we start this discourse by proposing in this paper five key initial overarching principles or aspects which may help to guide and underpin the future discussion in relation to Nature Rights.

### **🌱 Principle One: Recognition for Nature Rights is not contrary to Sustainable Development and Human Rights**

The need to protect and preserve Nature Rights is not contrary to Sustainable Development or Human Rights. By recognising Nature Rights in UK environmental law and policy, we can help ensure that a high-level of protection for the environment is realised in practice – existing stated Government Policy across all the UK Administrations. There are a number of existing legal areas which could be drawn and built on in the recognition of legal personhood for non-human entities. Nature Rights can be designed in such a way as not to open the ‘flood-gates’ to remedy immediately all the harms of the past and could, at first, be framed in terms of forward-looking agendas, such as their role in informing planning, policy decisions and permit reviews. Overall, Nature Rights may be seen to promote harmony and prevent conflict.

## ☞ **Principle Two: Correlative Duties are Needed for Legal and Natural Persons to Uphold Nature Rights**

The need to protect and uphold Nature Rights could be bolstered through the introduction of general and overriding citizenship duties applying to both natural and legal persons based in the UK through

- i) **A general environmental duty** – not to carry out activities that may cause harm without taking measures to prevent, minimise and reduce that harm. In practice, this duty may link to authorised activities (e.g. water abstraction licensing) and requirements to follow best practice guidelines;
- ii) **A duty to notify of environmental harm** – to inform an appointed relevant authority should environmental harm occur or might reasonably be foreseen with appropriate *de-minimis* thresholds. While this duty exists in certain sectoral situations, it is not universal at present.

These correlative duties for citizens are widely occurring in other jurisdictions and represent the other side of State responsibilities. Their introduction could progressively assist Governments in fulfilling their existing and emerging responsibilities in the environmental sphere.

## ☞ **Principle Three: Nature Rights are Merely One Part of a Fully Functioning Regulatory Framework**

Recognition for Nature Rights should be clearly recognised as *additional to*, and not in substitution of, clear existing regulatory frameworks. It is through such regulatory frameworks that we can achieve an optimal balancing of rights (and competing rights) more fully; for example, Nature Rights and Human Rights considerations. However, Rights for Nature can be seen to provide an optic shift towards a high-level of protection for the environment which would also help restore equilibrium. Further examination of the most appropriate ways to balance conflicting rights requires to be undertaken.

## ☞ **Principle Four: Court Procedures for Nature Rights**

Procedures could be considered to develop and recognise Rights for Nature in UK Court Proceedings. These might be based on the model of the appointment of a *curator ad litem* type figure or alternatively through the creation of an Ombudsperson(s) to independently represent the Rights of Nature. Such a body could additionally provide initial guidance to the ‘public concerned’ regarding Nature Rights.

In order to improve the existing position towards non-prohibitive costs in access to justice, an Ombudsperson could also receive complaints from the ‘public concerned’ (to be pursued where the Ombudsperson determined by reference to criteria) and thereby broaden, in an appropriate manner, access to environmental justice. This would be additional, and without prejudice, to existing participatory rights and rights of access to justice for the ‘public concerned’. This would also allow a triaging of the most important cases to be prioritised within the Ombudsperson’s remit and resources.

A broader consideration might also include inter-generational rights within its remit. The Ombudsperson would clearly serve a distinct purpose to the proposed Watchdog function currently mooted to replace the European Institutions in a Brexit context for England and Wales. Its creation would further provide a useful boost to polycentric governance approaches in the UK context.

### **🌿 Principle Five: Preventative as well as Remedial**

There are numerous approaches and models which could be developed and adopted. However, related procedural requisites could facilitate UK Courts to more clearly respond in a timely way to breaches (actual or potential) of Nature Rights; for example, through the issue of injunctions / interdicts to prevent harm prior to its occurrence. Or additionally, set the requirement to institute management or restoration plans and the parties to be engaged.

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