

# Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance

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*In 2017, multiple claims and declarations from around the legal world appeared to signal a tipping point in the global acceptance of a new and evolving legal status for nature. Whether it was litigation in the United States, India, and Colombia, or legislation emanating from New Zealand and Australia, the law seems to be grappling with a new normative order in relation to the legal status of nature. However, this shift has been a long time coming, being at least forty-five years since Christopher Stone famously asked whether trees should have legal standing.<sup>1</sup>*

*This Article explores what this emerging Ecological Jurisprudence means for the legal personhood of rivers. Nature, the environment, and even single complex ecosystems, are seldom easily quantifiable as bounded entities with geographically clear borders. Within the complex spectrum of establishing where a legal subject ends and another begins, however, rivers are more easily identifiable. A river's very being is premised on historicized boundaries that measure its watery ambit from riverbed to riverbank. Still, rivers elude a final, clearly defined, and uncontroversial description. As a result, they inhabit a liminal space, one that is at the same time geographically bounded, yet metaphorically transcendent, physically shifting, and culturally porous.*

*Drawing on comparative case studies from Ecuador, Colombia, India, New Zealand, the United States, and Australia, this Article explores the deep and often murky bond of the river and us. This relational, ancient, and ultimately environmentally urgent bond forms the prism through which the rich story of*

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1. Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 450 (1972).

*legal personhood, ontological change, and the consequential nitty-gritty of river governance is told. Indeed, this complex story is best heard through the metaphor of song, since “[i]f we are to take metaphor seriously, we must explore its poetic dimension, the persuasive power of its rhetoric, coupled with its aesthetic appeal.”<sup>2</sup> In seeking to discern a river’s legal personality, we ask, can we hear the rivers sing?*

Introduction .....	788
I. Vilcabamba River, Ecuador .....	795
II. Whanganui River, New Zealand.....	800
III. Atrato River, Colombia .....	805
IV. Ganges and Yamuna Rivers, India .....	811
V. Colorado River, United States .....	818
VI. Yarra River, Australia .....	823
VII. Reflections .....	828
A. Who is the River? The Subjects and Objects of Legal Relations....	830
B. Water Rights and River Duties.....	835
C. A Confluence of Legalities.....	837
Conclusion: Of Songs, And Listening.....	843

#### INTRODUCTION

In 2017, multiple claims and declarations under legislation and case law from around the world appeared to signal a tipping point in the global acceptance of a new and evolving legal status for nature. In March 2017, the High Court of Uttarakhand, India, handed down two judgments granting legal personhood to the Ganges and Yamuna Rivers and their tributaries,<sup>3</sup> and to their glaciers, lakes, air, meadows, dales, jungles, forests, wetlands, grasslands, springs, and waterfalls.<sup>4</sup> These cases were followed in May by the coming into effect of the *Te Awa Tupua* (Whanganui River Claims Settlement) Act 2017 (N.Z.), which formally granted legal personhood to the Whanganui River in Aotearoa New Zealand.<sup>5</sup> In September 2017, the NGO Deep Green Resistance commenced litigation in the name of the Colorado River Ecosystem in the U.S. District Court in Denver, Colorado, seeking to have the Ecosystem declared a juridical person

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2. Gary Watt, *Comparison as Deep Appreciation*, in *METHODS OF COMPARATIVE LAW* 82, 91 (Pier Giuseppe Monateri ed., 2012).

3. *Mohd. Salim v. State of Uttarakhand & Others*, (2017) Uttarakhand HC 126 (India) [hereinafter *Ganges and Yamuna case*].

4. *Lalit Miglani v. State of Uttarakhand & Others*, (2017) MCC 139/2017 (India) [hereinafter *Glaciers case*].

5. *Te Awa Tupua* (Whanganui Claims Settlement) Act 2017, s 14 (N.Z.).

capable of possessing rights.<sup>6</sup> In December 2017, a memorandum between the local Māori community and the Crown proposed to extend legal personality to the sacred Mount Taranaki on the west coast of New Zealand's North Island.<sup>7</sup> Finally, also in December, the Yarra River Protection (Wilip-gin Birrarung murrong) Act 2017 (Vic.) came into effect in the Australian state of Victoria, and declared the Yarra River (or *Birrarung* in the Woi-wurrung language) “one living and integrated natural entity.”<sup>8</sup>

Although this explosion of claims and declarations in 2017 seems to herald a new normative order in relation to the legal status of nature, in reality this shift has been a long time coming. Forty-five years ago, when Christopher Stone famously asked whether trees should have standing,<sup>9</sup> his suggestion was met with near deafening silence. Even though his question challenged long-held ontological assumptions about the position of humans within the cosmos and raised important juridical questions about the legal categorization of nature as merely an inert object of other legal persons' rights, the proposal was not immediately followed by any legal initiative or judicial response.<sup>10</sup>

However, Stone's biocentric argument was to be further advanced, well over twenty years later, by the emergence of ecocentric legal arguments,<sup>11</sup> first

6. See Complaint for Declaratory Relief at 3–4, *Deep Green Resistance v. Colorado*, No. 1:17-cv-02316-NYW (D. Colo. Sept. 25, 2017), <https://www.documentcloud.org/documents/4112637-Deep-Green-Resistance-Filing.html#document/p1/a382597> [hereinafter *Colorado River Complaint*].

7. Eleanor Ainge Roy, *New Zealand Gives Mount Taranaki the Same Legal Rights as a Person*, *GUARDIAN* (Dec. 22, 2017), [https://amp.theguardian.com/world/2017/dec/22/new-zealand-gives-mount-taranaki-same-legal-rights-as-a-person?CMP=share\\_btn\\_tw&\\_\\_twitter\\_impression=true](https://amp.theguardian.com/world/2017/dec/22/new-zealand-gives-mount-taranaki-same-legal-rights-as-a-person?CMP=share_btn_tw&__twitter_impression=true).

8. *Yarra River Protection (Wilip-gin Birrarung murrong) Act 2017* (Vic) s 5(b) (Austl.).

9. Stone, *supra* note 1, at 450. Shortly after publication, Stone's article was republished in book form. See generally CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?* (1974).

10. It is, however, worth noting the dissenting opinion of Justice William Douglas in *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting), where His Honor powerfully, as well as poetically, wrote that

[t]he critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced . . . . Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. . . . Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole—a creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases. The ordinary corporation is a 'person' for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes. So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life.

*Id.* at 741–43. Stone's book was also hailed on the Senate floor, and reprinted in the Congressional Record. See Holly Doremus, *Environmental Ethics and Environmental Law: Harmony, Dissonance, Cacophony, or Irrelevance?*, 37 U.C. DAVIS L. REV. 1, 3 (2003); Garrett Hardin, *Foreword* to CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?*, at xvi (1974).

11. The distinction between *biocentrism* and *ecocentrism* focuses on the emphasis placed either on the ecosystem as a whole (*ecocentrism*) or on individual components, generally identified within the biotic sphere, of the environment (*biocentrism*). Although it is undoubtable that Stone's argument already

in the writings of eco-theologian Thomas Berry,<sup>12</sup> and later by South African anti-apartheid activist and environmental lawyer Cormac Cullinan. After authoring *Wild Law* in 2002,<sup>13</sup> Cullinan described this emerging “Earth Jurisprudence” as

a philosophy of law and human governance . . . based on the idea that humans are only one part of a wider community of beings and that the welfare of each member of that community is dependent on the welfare of the Earth as a whole. From this perspective, human societies will only be viable and flourish if they regulate themselves as part of this wider Earth community and do so in a way that is consistent with the fundamental laws or principles that govern how the Universe functions[.]<sup>14</sup>

The legal world, this time, responded to Cullinan’s ideas with gusto. The invitation to include Nature<sup>15</sup> within the realm of legal subjects was soon picked up by a number of jurisdictions. The Community Environmental Legal Defense Fund in the United States began to include local ecosystems as legal subjects within municipal ordinances as early as 2006.<sup>16</sup> In 2008, Ecuador granted Nature intrinsic rights guaranteed by four constitutional provisions.<sup>17</sup> Bolivia followed, first tentatively in its 2009 Constitution,<sup>18</sup> and then more vigorously with two laws of Mother Earth enacted in 2010 and 2011.<sup>19</sup> More recently, New Zealand recognized legal personhood for two distinct geographical features, the Te

contained ecocentric tones, it is Berry and Cullinan’s writing that wholly and explicitly embraced a whole-of-system approach that did not distinguish between biotic and abiotic components. *See infra* notes 12 and 13.

12. *See generally* THOMAS BERRY, *THE DREAM OF THE EARTH* (1988); THOMAS BERRY, *THE GREAT WORK: OUR WAY INTO THE FUTURE* (1999).

13. CORMAC CULLINAN, *WILD LAW: A MANIFESTO FOR EARTH JUSTICE* (2002).

14. Cormac Cullinan, *A History of Wild Law*, in *EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE* 12, 13 (Peter Burdon ed., 2011).

15. In order to recognize the special ontological and legal position inhabited by “nature” as a result of these many legal initiatives, we shall henceforth capitalize the term *Nature* throughout the entirety of the present paper, unless in quotations where the term is explicitly not capitalized.

16. Since the first ordinance recognizing Nature as a subject of rights, drafted by the small community of Tamaquah Borough, in Schuylkill County, Pennsylvania in 2006 with the assistance of the Community Environmental Legal Defense Fund (CELDF), CELDF has assisted more than thirty communities to follow suit, the most prominent of which is likely the one passed unanimously by the City Council of Pittsburgh, Pennsylvania. *See Advancing Legal Rights of Nature: Timeline*, CMTY. ENVTL. LEGAL DEF. FUND, <https://celdf.org/rights/rights-of-nature/rights-nature-timeline/> (last updated Jan. 31, 2010); *Press Release: Pittsburgh Bans Natural Gas Drilling*, CMTY. ENVTL. LEGAL DEF. FUND (Nov. 16, 2010), <https://celdf.org/2010/11/press-release-pittsburgh-bans-natural-gas-drilling/>.

17. In addition to the Preamble, the Ecuadorian Constitution of 2008 recognizes the rights of Nature, or Pacha Mama, in articles 71 through to 74. *See* CONSTITUCIÓN DE 2008, Oct. 20, 2008, Ch. 7, art. 71–74 (Ecuador).

18. CONSTITUCIÓN DEL ESTADO PLURINACIONAL DE BOLIVIA, 2008, art. 33–34.

19. Ley de Derechos de La Madre Tierra, Ley N 71, 21 diciembre, 2010, and Ley marco de La Madre Tierra y Desarrollo Integral Para Vivir Bien, Ley N 300, 15 octubre, 2012.

Urewera forest in 2014 and the Whanganui River in 2017,<sup>20</sup> and is currently negotiating the same recognition for a third, Mount Taranaki.<sup>21</sup>

In addition to these constitutional and legislative initiatives, a series of cases have now been successfully litigated in numerous civil and common law jurisdictions around the world, making it apparent that the emergence of an Ecological Jurisprudence<sup>22</sup> is not an isolated event. The ontological challenge to an anthropocentric view that identified human beings as the measure and end of all existence, which Roderick Nash had already masterfully begun to map in 1989,<sup>23</sup> and which Thomas Berry and Cormac Cullinan had fully embraced with their ecocentric arguments at the turn of the century, is now fully realized.<sup>24</sup>

A nuanced analysis of this emerging jurisprudence is necessary to avoid the risk of “occupy[ing an] indeterminate terrain, . . . one already inscribed by humanist precepts of what ‘rights’ and ‘nature’ might consist of.”<sup>25</sup> More importantly for the present Article, it is also readily apparent that, in the words of Christopher Stone, Nature makes for a “shifty client,”<sup>26</sup> or, paraphrasing Kate Soper, a “promiscuous subject.”<sup>27</sup> Nature, the environment, or even single complex ecosystems are seldom easily quantifiable as bounded entities with geographically clear borders. Within the complex spectrum of establishing where a legal subject ends and another begins, however, rivers are somewhat more easily identifiable, their very being premised on historicized boundaries that measure their watery ambit from riverbed to riverbank. And yet, rivers still elude a final, clearly defined, and uncontroversial description. As a result, rivers inhabit a liminal space, one that is at the same time somewhat geographically bounded and yet metaphorically transcendent, physically shifting, and culturally porous.

It is thus deeply emblematic that rivers constitute a particularly promising medium for the ontological shift mentioned above. Rivers and life share a profound bond, one that Justice Douglas already articulated in 1972:

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20. Te Urewera Act 2014, s 4 (N.Z.); Te Awa Tupua (Whanganui Claims Settlement) Act 2017, s 10 (N.Z.).

21. Derek Cheng, *Mt Taranaki Will Be Granted Special Legal Status Similar to Te Urewera and the Whanganui River*, N.Z. HERALD (Dec. 21, 2017), [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).

22. The term Ecological Jurisprudence is considered by some as more inclusive than that of an Earth Jurisprudence, with its semantically inscribed planetary boundaries. See, e.g., Alessandro Pelizzon, *Earth Laws, Rights of Nature and Legal Pluralism*, in WILD LAW – IN PRACTICE 176, 177 (Michelle Maloney & Peter Burdon eds., 2014).

23. RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* (1989).

24. See *supra* notes 12–13 and accompanying text.

25. Anne Schillmoller & Alessandro Pelizzon, *Mapping the Terrain of Earth Jurisprudence: Landscape, Thresholds and Horizons*, 3 ENVTL. & EARTH L.J. 1, 3 (2013).

26. CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT* 34 (3d ed. 2010) (noting that “‘the climate’ makes for a shifty client”).

27. See KATE SOPER, *WHAT IS NATURE? CULTURE, POLITICS AND THE NON-HUMAN 1* (1995) (noting that nature is “at once both very familiar and extremely elusive”).

The river, . . . is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.<sup>28</sup>

Fast-forward again forty-five years, and the sentiment remains identical, albeit the scale of destruction has intensified. “Rivers are the arteries of the earth, and lifelines for humanity and millions of other animals and plants. It’s no wonder they have been venerated, considered as ancestors or mothers, and held up as sacred symbols.”<sup>29</sup> Paradoxically, and tragically, “we have also desecrated them in every conceivable way.”<sup>30</sup>

This Article thus focuses on rivers—in South and North America, India, and the Antipodean South—to tell a story of rights of Nature, of the emergence (or not) of legal personhood, and of the paradigmatic change that re-orientes the law away from anthropocentrism to something else. Our river case stories are told in a relatively diachronic order. We start in Part I with the Vilcabamba River in Ecuador, a relatively short, although internationally well-known judgment that interprets the extent of the early constitutional guarantees afforded Nature, centering on an environmentally degraded river system. In Part II, the focus shifts to the intimately contextual and cultural narrative of the Whanganui River in New Zealand, a river song heard with astonishing clarity by that country’s Parliament—with its passage of a statute that sings the soaring rhetoric of ontological change yet prescribes the necessary nitty-gritty detail of governance. Part III returns to South America, and the more voluminous, ontologically sophisticated judgment of the Atrato River.<sup>31</sup> In this case, the Colombian Constitution was successfully interpreted by the Colombian Constitutional Court to vindicate the Atrato’s standing as a subject of legal rights. Part IV explores the yet-to-be-enforced decisions of the High Court of the Indian State of Uttarakhand, which sought to protect two of India’s most iconic and sacred rivers—the Ganges and the Yamuna—from the ongoing onslaught of pollution and degradation. These two judgments underline that judicial ambition needs to be matched by a commensurate political willingness to enact paradigmatic change. In Part V, the unsuccessful attempt to protect the Colorado River through

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28. *Sierra Club v. Morton*, 405 U.S. 727, 743 (1972).

29. Ashish Kothari et al., *Now Rivers Have the Same Legal Status as People, We Must Uphold Their Rights*, *GUARDIAN* (Apr. 21, 2017), <https://www.theguardian.com/global-development-professionals-network/2017/apr/21/rivers-legal-human-rights-ganges-whanganui>.

30. *Id.*

31. Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 2016, Decision T-622 (Colom.) [hereinafter *Atrato case*].

a “first-in-the-nation”<sup>32</sup> rights of Nature lawsuit sings the sad song of an iconic yet diminished U.S. river—now more an “industrial project”<sup>33</sup> than a natural waterway, a river long stripped of its wildness and freedom. Part VI ends our river case studies with the Yarra River/*Birrarung* in the Australian state of Victoria. In an Australian first, the Victorian state government legislated an Act that gives voice to the river as “one living and integrated natural entity,”<sup>34</sup> yet curiously denies it its legal standing. Part VII concludes with a discursive review of these many river cases—and their legal, social, and cultural implications.

As implied by the above structure, this Article employs a comparative methodology. Contrary to Henry Lawson’s famous assertion that comparative law is “bound to be superficial,”<sup>35</sup> this paper will instead follow Pierre Legrand’s recognition that law is profoundly and inextricably inscribed in culture,<sup>36</sup> aware that “it is never possible to carry out a wholly ‘meaningful’ transplant of law from one culture to another, because law is never limited to rules,” as Gary Watt writes in articulating Legrand’s position.<sup>37</sup> Although we do not share Legrand’s somewhat pessimistic view in relation to the almost titanic complexity of contextualizing different legal *formants*<sup>38</sup> within distinct cultural milieus,<sup>39</sup> we also, at the same time, wish to resist the uncontrolled urge toward harmonization and transnational convergence of rules through apparent, and inevitably superficial, similarities. As Watt suggests:

[o]ur understanding of law will remain superficial so long as we fail to appreciate that law is neither a doctrinal science that will produce predictable outcomes as laboratory experiments might, nor merely an empirically quantifiable sociological fact or an economic construct, but that it comprises arts of imaginative reading, persuasive speech, creative writing and practical performance engaged in as living arts by living people.<sup>40</sup>

The effort to navigate the difficult waters of a legal comparison of seemingly similar and yet culturally unique river cases is guided by the use of a specific metaphor, that of the *song* of each river. We are inspired, in doing so, by Peter Goodrich’s insightful suggestion that “[t]he comparative takes hold in the

32. Will Falk, *Time to Escalate? First-Ever Rights to Nature Lawsuit Dismissed*, SAN DIEGO FREE PRESS (Dec. 7, 2017), <https://sandiegofreepress.org/2017/12/time-to-escalate-first-ever-rights-of-nature-lawsuit-dismissed/#.XJv7x-tKiuU>.

33. Will Falk, *Colorado River Dispatch #5: The River’s Ghost*, WILL FALK BLOG (NOV. 17, 2017), <http://willfalk.org/Colorado-river-dispatches-5-7/>.

34. *Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017* (Vic) s 5(b) (Austl.).

35. F. Henry Lawson, *The Field of Comparative Law*, 61 JURID. REV. 16, 16 (1949).

36. Pierre Legrand, *The Impossibility of ‘Legal Transplants’*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 115–16 (1997).

37. Watt, *supra* note 2, at 82.

38. This Article adopts the term *formant* as introduced by Rodolfo Sacco to dissect any legal rule into distinct and discrete components that articulate each rule within the larger cultural context. *See generally* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 21–34 (1991) (examining “legal formants” as a system of law in various countries).

39. *See, e.g.*, M. M. Siems, *The End of Comparative Law*, 2 J. COMP. L. 133, 139–40 (2007).

40. Watt, *supra* note 2, at 84.

precise moment of the dissipation of the juridical, in the instance of non-law,<sup>41</sup> and thus the analysis of both statutory provisions and judicial decisions will be balanced against a host of cultural expressions, narratives, and apparently non-legal imagery. Of course, to focus on rivers is to highlight what these geographically and culturally distinct watery bodies share in common. However, in doing so, we need also to be mindful of difference, that each and every river sings its own unique song. We should not ignore the grounded facts, the nuanced and not so nuanced contexts—geographic, cultural, social, historical, and legal—that shape each river’s course. What we ultimately explore in this Article are the multiple songs of many rivers—some share converging melodies, others perhaps are discordant. This attention to the cultural context will emphasize the focus on both the ontic and epistemic dimensions of the cases analyzed. This approach is taken in order to properly inscribe their comparative appraisal within the shift toward an Ecological Jurisprudence introduced above.

Lastly, the very idea of the river highlights an anthropocentric ambivalence, an inconsistency in how humans conceive of and implement the legal personhood of Nature, and legal personhood of non-human entities more generally.<sup>42</sup> In parliamentary debates preceding the passage of the Whanganui bill, New Zealand legislators exhorted “do not talk about the river, but rather to it.”<sup>43</sup> Yet, in countless debates, Members of Parliament spoke at length *about* the river, their shared histories of learning to swim before walking, of crossing bridges on the way to school, or halcyon childhood memories of summer adventures on rapids.<sup>44</sup> From a Māori worldview, speakers told Parliament how the river “runs through their veins: a river of *whakapapa*, of sacred significance, a river that brings together the genealogies and legacies of a people who have swum, washed, played, prayed, dived, paddled and travelled *Te Awa Tupua* as the central artery of their tribal heart.”<sup>45</sup> This deep and often murky bond of the *river and us* is the prism through which we explore the rich story of legal personhood, ontological change, and the consequential nitty-gritty of governance. After all, we ask, can we hear the rivers sing?

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41. Peter Goodrich, *Interstitium and Non-law*, in *METHODS OF COMPARATIVE LAW* 213, 213 (Pier Giuseppe Monateri ed., 2012).

42. See, e.g., Edward Mussawir & Connal Parsley, *The Law of Persons Today: At the Margins of Jurisprudence*, 11 L. & HUMAN. 44, 44–46 (2017).

43. Marama Fox, Co-leader Māori Party, Te Awa Tupua (Whanganui River Claims Settlement) Bill – First Reading, Hansard Debates (May 24, 2016), [https://www.parliament.nz/en/pb/hansard-debates/rhr/document/51HansD\\_20160528\\_00000012/te-awa-tupua-whanganui-river-claims-settlement-bill](https://www.parliament.nz/en/pb/hansard-debates/rhr/document/51HansD_20160528_00000012/te-awa-tupua-whanganui-river-claims-settlement-bill).

44. *Id.*

45. Marama Fox, Co-leader Māori Party, Te Awa Tupua (Whanganui River Claims Settlement) Bill – Second Reading, Hansard Debates (Dec. 6, 2016), [https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb\\_20161206\\_20161207\\_08](https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20161206_20161207_08).



## I. VILCABAMBA RIVER, ECUADOR

The legal journeys along the rivers discussed in this Article begin with the case of the Vilcabamba River in Ecuador. The Vilcabamba River case was the first historical case involving a river, albeit somewhat indirectly, as a plaintiff in one of the first rights of nature cases ever to be litigated. As this Article is organized diachronically, each subsequent section will be dedicated to a temporally subsequent river story. As this Article progresses, it will also become apparent how the arguments first introduced in the Vilcabamba case further reverberated across a number of distinct jurisdictions, leading to an almost exponential increase of increasingly more nuanced and complex legal arguments.

Articles 71–74 of the Ecuadorian Constitution of 2008<sup>46</sup> constitute the first international example of constitutionally enshrined rights of Nature.<sup>47</sup> Article 71 refers to “nature or the Pacha Mama” as holding the right to have its “existence, maintenance and regeneration of vital cycles, structure, functions and evolutionary processes” respected, as well as a right to legal restoration independent of any restoration due to individuals or groups depending on the natural processes being damaged.<sup>48</sup> As a result of this provision, any natural and legal person—including people of any nationality—as well as any community, can demand that the Ecuadorian government respect and actualize such rights.

Since the introduction of these constitutional provisions, more than thirteen cases were litigated in less than eight years, ten of which were successfully decided in favor of Nature on the grounds of those same constitutional provisions.<sup>49</sup> Furthermore, in 2015 the Constitutional Court ruled that rights of Nature are to be interpreted as transversally crossing the entirety of the Ecuadorian Constitution, thus affecting all other constitutionally enshrined rights.<sup>50</sup> In line with the constitutional mandate to promote sustainable development based in the Andean concept of *sumak kawsay*, or *buen vivir*,<sup>51</sup> the court articulated a “biocentric vision that prioritizes Nature in contrast to the classic anthropocentric conception in which the human being is the center and

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46. See CONSTITUCIÓN DE 2008, Oct. 20, 2008, Ch. 7, art. 71–74 (Ecuador).

47. CRAIG M. KAUFFMAN & PAMELA L. MARTIN, TESTING ECUADOR’S RIGHTS OF NATURE: WHY SOME LAWSUITS SUCCEED AND OTHERS FAIL 4 (Mar. 18, 2016), <https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/5748568c8259b5e5a34ae6bf/1464358541319/Kauffman++Martin+16+Testing+Ecuador+RoN+Laws.pdf>.

48. See CONSTITUCIÓN DE 2008, Oct. 20, 2008, Ch. 7, art. 71 (Ecuador). In the original: *La naturaleza o Pacha Mama, donde se reproduce y realiza la vida, tiene derecho a que se respite integralmente su existencia y el mantenimiento y regeneracion de sus ciclos vitales, estructura, funciones y procesos evolutivos. Id.*

49. See KAUFFMAN & MARTIN, *supra* note 47, at 5.

50. *Id.* at 7.

51. Literally translated as “living well,” to be interpreted as “living in harmony with Nature.”

measure of all things, and where Nature was considered a mere provider of resources.”<sup>52</sup>

The most well-known of all Ecuadorian rights of Nature cases is, arguably, that of *Wheeler v. Director de la Procuraduría General del Estado en Loja* (the “Vilcabamba case”),<sup>53</sup> litigated in 2010–2011, and internationally heralded as the first successful case where Nature had rights upheld in court.<sup>54</sup> Although this is slightly incorrect,<sup>55</sup> it is undeniable that the Vilcabamba case constitutes the first complete articulation of rights of Nature legislation by a court of law.

The case emerged as a result of the widening of the Vilcabamba-Quinara road, without a prior environmental impact study, by the provincial government of Loja. Debris had been dumped into the Vilcabamba River, located in the southernmost Ecuadorian province of Loja near the Peruvian border.<sup>56</sup> The Vilcabamba River had been rich in geographical and historical significance since pre-Colombian times, and the construction debris altered the river’s path and caused an increase in flow.<sup>57</sup> These geophysical alterations, in turn, led to an upsurge in flooding, particularly in the ever-more frequent periods of heavy rains, with consequent damages both to local ecosystems and to local landowners’ properties.<sup>58</sup> In 2010, two of those landowners, Richard Fredrick Wheeler and Eleanor Geer Huddle, sued the provincial government of Loja.<sup>59</sup> However, rather than suing the provincial government for damages caused to their property, the plaintiffs invoked constitutional rights of Nature and sued on behalf of the river.<sup>60</sup> While the judge dismissed the action on the ground that the river lacked standing, on appeal, the Loja Provincial Court of Justice ruled in favor of Nature in this case instantiated in the Vilcabamba River.<sup>61</sup> As a result

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52. KAUFFMAN & MARTIN, *supra* note 47, at 16.

53. *Wheeler et al. v. Director de la Procuraduría General del Estado en Loja*, Corte Provincial de Justicia de Loja, 31 marzo 2011, Judgment 11121-2011-0010 [hereinafter *Vilcabamba case*].

54. Natalia Greene, *The First Successful Case of the Rights of Nature Implementation in Ecuador*, GLOBAL ALLIANCE FOR RIGHTS OF NATURE, <http://therightsofnature.org/first-ron-case-ecuador/> (last visited Jan. 28, 2018).

55. The first successful case explicitly referring to constitutional rights of Nature in Ecuador, the Biodigestor case, was litigated in 2009. In the case, a collection of sixteen community members from the region of Santo Domingo de los Colorados complained to national government ministries about large scale contamination caused by a pork processing plant. Although the claimants did not directly invoke rights of Nature, the Constitutional Court did refer to articles 71–72 of the Ecuadorian Constitution, suggesting potential violations of rights of Nature in need of protection, and consequently ordering the creation of an independent commission to audit the plant. The case is particularly relevant in that it indicates the willingness of the court to invoke rights of Nature even where the claimants themselves did not. See KAUFFMAN & MARTIN, *supra* note 47, at 16.

56. See *Vilcabamba case* at 1; KAUFFMAN & MARTIN, *supra* note 47, at 12; Greene, *supra* note 54.

57. See *Vilcabamba case* at 1; KAUFFMAN & MARTIN, *supra* note 47, at 12; Greene, *supra* note 54.

58. See *Vilcabamba case* at 1; KAUFFMAN & MARTIN, *supra* note 47, at 12; Greene, *supra* note 54.

59. See *Vilcabamba case* at 1; KAUFFMAN & MARTIN, *supra* note 47, at 12–13; Greene, *supra* note 54.

60. See *Vilcabamba case* at 1; KAUFFMAN & MARTIN, *supra* note 47, at 12–13; Greene, *supra* note 54.

61. See *Vilcabamba case* at 1; KAUFFMAN & MARTIN, *supra* note 47, at 13; Greene, *supra* note 54.

of the ruling, the court ordered the provincial government to restore the riparian ecosystems through measures to be later specified by the Ministry of the Environment.<sup>62</sup>

As the first articulated rights of Nature judgment, the Vilcabamba case is of particular interest for a number of reasons: in relation to standing, in articulating Nature as the plaintiff, in inverting the traditional burden of proof, and because of its resonance both domestically and, possibly more importantly, internationally.

Firstly, in relation to standing,<sup>63</sup> the court accepted that it was *Nature* who had standing in the case, thus implementing the dictate of article 71, whereby actions on behalf of Nature are deemed to be vested in any individual, in this case the aforementioned couple.<sup>64</sup> Interestingly, the court seemed less concerned with the correct identification of Nature as a plaintiff than the correct identification of the entity *causing* the damage as the correct subject against whom the judgment was to be handed.<sup>65</sup> In identifying this subject as the provincial government of Loja as represented by its Prefect, the court showed that it is not only Nature that makes for a “promiscuous subject”<sup>66</sup> and an ultimately nebulous concept, but also the clear identification of those who are the alleged perpetrators of damages to it.

Secondly, in the identification of the subject suffering those damages, the judgment is relatively silent about the river itself, implicitly considering it as an instantiated representation of an undifferentiated Nature considered as a whole.<sup>67</sup> That the river was damaged appears less relevant, in the court’s argument, than that Nature as a whole was. As a result, the precise identification of boundaries—of what constitutes the river in this case, but, by extrapolating, of what constitutes any bounded natural entity, such as a forest, or a network of differentiated ecosystems—appears diminished in importance, as the court argued that it was sufficient to prove that Nature in its pristine—or, at least, pre-existing—state had been damaged.<sup>68</sup> As reflected in subsequent cases, this re-emerging issue has been further articulated, in a more nuanced manner, in other jurisdictions.

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62. See *Vilcabamba case* at 5–6; Greene, *supra* note 54.

63. Or, *legitimación en la causa* in the original. The judge articulated standing by explicitly referring to the concept of *legal personhood*, in the original as follows: *La Enciclopedia Jurídica Omeba dice: “Personería. Según COTURE (Vocabulario Jurídico), calidad jurídica o atributo inherente a la condición de personero o representante de alguien. Es un americanismo que el Derecho processual se emplea en el sentido de personalidad o de capacidad legal para comparecer a juicio, así como también de representación legal y suficiente para litigar, Trátase, pues, no solo de la aptitud para ser sujeto de derecho, sino también para defendirse en juicio.” Como se nota, la personería o legitimación ad processum es un presupuesto procesal referido única y exclusivamente a la capacidad para comparecer al proceso. Vilcabamba case* at 2.

64. In the original: *Toda persona, comunidad, pueblo, o nacionalidad podrá exigir a la autoridad pública el cumplimiento de los derechos de la naturaleza. Id.*

65. *Id.* at paras. 2–6 (*segundo-sexto*).

66. See SOPER, *supra* note 27, at 1.

67. *Vilcabamba case* at 3, para. 8 (*octavo*).

68. See *id.*; Greene, *supra* note 54.

Furthermore, even though the river *per se* might not take center stage in the judgment, the litigation occurred during two international declarations on the right to water,<sup>69</sup> thus casting a light on the emerging relevance given to water within the legal ecological zeitgeist.

Thirdly, the judgment addresses, in section ten, the issue of evidence, with a clear inversion of the burden of proof in line with article 397 of the Constitution and, in the words of the court, with other legal systems such as Brazil, Chile, Costa Rica, Colombia, Germany and other European Union members:

based on the precautionary principle, until it is objectively demonstrated that the probability of certain danger that a project undertaken in an established area does not produce contamination or lead to environmental damage, it is the responsibility of the constitutional judges to incline towards the immediate protection and the legal tutelage of the rights of nature, doing what is necessary to prevent contamination or call for remedy. Note, that we consider in relation to the environment that one act not only under the certainty of damage but its probability.<sup>70</sup>

An implicit corollary of the inversion of the burden of proof expressed in the Ecuadorian Constitution is that claimants do not have to prove damages to themselves and/or their property, but rather they only have to indicate that environmental damages have occurred. The defendant thus has the burden to prove that damages were not caused by its actions. Furthermore, the court identifies the type of action to invoke rights of Nature as an *acción de protección*, a protective—and inherently reactive—action against further damages and for the consequent reparation of pre-existing ones.

Fourthly, the case resonated more profoundly at an international level than it did domestically. While the case was cited rather rarely in subsequent—even successful—Ecuadorian rights of Nature cases,<sup>71</sup> its impact on the world was more significant, as many of the cases analyzed in this Article explicitly refer to its symbolic power. The narrative that emerged from the first vindication of rights of Nature in a court of law thus began a flow of increasingly more nuanced arguments articulating Nature as a legal subject in other jurisdictions.

Overall, in the Vilcabamba case, the importance awarded to Nature as a whole is undeniable: references to the Vilcabamba River alone are overshadowed by the text's focus on Nature.<sup>72</sup> Nature is explicitly indicated as possessing

69. See generally G.A. Res 64/292 (July 28, 2010); H.R.C. Res. 15/9 (Sept. 30, 2010).

70. In the original: *Los accionantes no debían probar los perjuicios sino que el Gobierno Provincial de Loja tenía que aportar pruebas ciertas de que la actividad de abrir una carretera no afecta ni afectará el medio ambiente. See Vilcabamba case at 4, para. 10 (decimo).*

71. See KAUFFMAN & MARTIN, *supra* note 47, at 8, 17.

72. The judgment cites directly the words of Alberto Acosta, President of the Constitutional Assembly of Ecuador: *Urge entender que el ser humano no puede sobrevivir al margen de la naturaleza que por cierto contiene cadenas alimentarias indispensables para la vida de la humanidad. El ser humano forma parte de ella, no a tienen shí como si fuera una ceremonia en la que el ser humano resulta el espectador . . . Como declara la famosa ética sobre la tierra de Aldo Leopold, “una cosa es correcta cuando tiene a preservar la integridad, estabilidad y belleza de la comunidad biótica. Es incorrecta*

intrinsic and inherent worth, independent of any human need, use, or intervention.<sup>73</sup> Notwithstanding the unquestionable ecocentric argument, the language used, however, is at this stage certainly anthropo-inclusive, not suggesting a subordination of human rights to the rights of Nature. However, the judgment later takes a different turn. After introducing the issue of harmony of institutional principles and mandates, and suggesting that the provincial government ought to have respected the rights of Nature in the first instance, given its function as Provincial Environmental Authority, the court states that, in case of possible conflict of constitutional provisions, the resolution of such a conflict must clearly be vested in the Constitutional Court.<sup>74</sup> At this point, and contrary to the anthropo-inclusive language used above, a more traditional dichotomy between *humans* and *Nature* as two etiologically distinct categories is introduced. While bypassing the argument advanced by the provincial government as to the population's needs for a road, the court does not suggest an absence of guidelines in resolving such conflicts where they may arise. Indeed, the court explicitly asserts that the rights of some members of the community are inferior to the rights of a healthy ecosystem that sustains larger numbers of people, including, in a slightly circular argument, the rights of those very people individually disadvantaged by a decision in favor of the environment.<sup>75</sup> The court's concluding argument thus seems to reassert a distinction between humanity and Nature, where the rights of humans are depicted as being in conflict with the rights of Nature. It is worth noting how different such a narrative is from the much more nuanced language found in the subsequent Bolivian formulation of rights of Nature.<sup>76</sup>

Albeit a powerful introduction, one that certainly placed "Ecuadorian RoN [Rights of Nature] activists . . . at the forefront of global efforts to establish RoN in international law,"<sup>77</sup> the Vilcabamba song is somewhat muted, one where the voice of the river is subsumed in the overall chorus of Nature as a newly found legal *subject*. The specific voice of the river does not feature in the court proceedings, nor does it truly appear in any of the subsequent reporting. The Vilcabamba River is, to the parties in the case as to all those who spoke about it, just *a* river, an instantiated permutation of an almost platonic idea of Nature, one whose individuality was less relevant in its concrete existence than what it came

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*cuando hace lo contrario" . . . a) Los derechos humanos individuales y colectivos deben estar en armonía con los derechos de otras comunidades naturales de la Tierra. b) Los ecosistemas tienen derecho a existir y seguir sus propios procesos vitales c) La diversidad de la vida expresada en la Naturaleza as un valor en si mismo d) Los ecosistemas tienen valores propios que son independientes de la utilidad para el ser humano. See Vilcabamba case at 3–4.*

73. See *id.*; Greene, *supra* note 54.

74. See *Vilcabamba case* at 10; Greene, *supra* note 54.

75. In the original: *Aun tratandose de uno conflict entre dos intereses colectivos, es el medio ambiente el de mayor importancia. Vilcabamba case* at 5.

76. Ley de Derechos de La Madre Tierra, Ley N 71, 21 diciembre, 2010, and Ley marco de La Madre Tierra y Desarrollo Integral Para Vivir Bien, Ley N 300, 15 octubre, 2012.

77. KAUFFMAN & MARTIN, *supra* note 47, at 17.

to represent. And yet, it is within this silent song of the Vilcabamba River as nothing more than *a* river that the very idea of a river as a metaphorically powerful subject began to emerge.

## II. WHANGANUI RIVER, NEW ZEALAND

In Aotearoa New Zealand, the metaphor of the river as a powerful subject—first established in the Vilcabamba River case—is given explicit form and force by legislation of the nation’s parliament. The Te Awa Tupua (Whanganui Claims Settlement) Act 2017 (N.Z.) gave effect to a deed of settlement made in 2014 between the New Zealand Crown and the Whanganui *iwi* (the local Māori community).<sup>78</sup> The statute recognized a Māori entity, Te Awa Tupua, as the Whanganui River, an entity that reflected the *iwi*’s unique ancestral relationship with the river. The Act declared Te Awa Tupua to be a legal person, created the office of Te Pou Tupua as the river’s “human face” to deal with everyday governance, established a hierarchy of consultative bodies, and mandated a fund to support the river’s legal framework.<sup>79</sup>

Upon the third reading of the Act, Whanganui *iwi* sang a *waiata* in the parliamentary chamber in celebration.<sup>80</sup> The *waiata* is a traditional Māori song, sung at ceremonial or commemorative occasions, or as songs of love, lament, or mourning.<sup>81</sup> As *Te Ara*, or the Encyclopedia of New Zealand, explains, “[t]he emotionally charged circumstances under which *waiata* [are] composed are reflected in their highly poetic language, . . . rich with allusion, metaphor and imagery.”<sup>82</sup> While such scenes may, at first blush, seem alien to Western notions of law making,<sup>83</sup> in profound ways the common law has surprisingly similar parallels. Carol Rose, for example, suggests that the common law of property occasionally departs from its orthodox song sheet with a “striking turn” to narrative.<sup>84</sup> Predictive analysis and rational logic are left behind as images of

78. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, ss 3, 7(b), 57 (N.Z.).

79. *Id.* ss 14, 18, 27, 29, 57–59.

80. Te Awa Tupua (Whanganui River Claims Settlement) Bill – Third Reading, Hansard Debates (Mar. 14, 2017), [https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb\\_20170314\\_20170315\\_12](https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20170314_20170315_12).

81. Rawinia Higgins & Arini Loader, *Story: Waita Tawhito – Traditional Māori Songs*, TE ARA: THE ENCYCLOPEDIA OF N.Z., <https://teara.govt.nz/en/waiata-tawhito-traditional-maori-songs/page-1> (last visited Feb. 13, 2018).

82. *Id.*

83. In this instance, the term “Western” is used to apply to the legal traditions born out of Europe, primarily (though not exclusively) the civil law and the common law. The term is found extensively throughout the comparative legal literature. *See, e.g.*, RENÉ DAVID & JOHN E. C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (3d ed. 1985); KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 3d ed. 1998); ANTONIO GAMBARO & RODOLFO SACCO, SISTEMI GIURIDICI COMPARATI (2nd ed. 2002); H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD (5th ed. 2014).

84. Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 38 (1990) (noting that “their discussions of property at some point take a striking turn towards a narrative or ‘diachronic’ explanatory mode”).

“fertile octogenarians” or “magic gravel pits” enliven the common law with rhetorical flourish.<sup>85</sup> Rose argues these turns to poetic fancy are necessary to smooth out inconvenient gaps in orthodox doctrine or theory, imaginative leaps of narrative, not logic, that (curiously) make the law plausible.<sup>86</sup> Such stories are also, in Rose’s view, morality tales, accounts that “give[] us a smooth tale of property as an institution that could come about through time, effort, and above all through cooperative choices.”<sup>87</sup> Indeed in themselves, these narratives “constitut[e] a kind of moral community,” one that “urg[es] that community to change its ways.”<sup>88</sup>

The Whanganui Claims Settlement Act *is* a legal instrument that sings a powerful narrative, a song strangely at one with both the Māori waiata, and the common law’s occasional turn to narrative. Its protagonist is the Whanganui River, the nation’s third longest and most navigable river, which flows from the volcanic Mount Tongariro in the central North Island to the Tasman Sea at its mouth.<sup>89</sup> Its tale is a statutory one—that works as Rose envisages—to make the seemingly implausible plausible, and to urge the community to change its ways. Hence, the hitherto unimaginable notion that things of the natural world, “physical and metaphysical,”<sup>90</sup> could assume legal personality is enacted in section 14(1) of the Whanganui River Claims Settlement Act, such that *Te Awa Tupua*, is declared to be a legal person, with “all [attendant] rights, powers, duties, and liabilities.”<sup>91</sup> Likewise, the Act urges the community to change its ways with a song of “mutual trust and cooperation, good faith, and respect[.]”<sup>92</sup> As sections 69 and 70 make clear, the Act is a tale of apology, compromise, and the spirit of generosity, constituting in itself a “kind of moral community.”<sup>93</sup>

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85. See Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1876–77, 1879 (1986) (describing creative and remote possibilities that may violate property law’s rule against perpetuities, including the “fertile octogenarian”—“one of the strangest aberrations of the legal mind”—and the “magic gravel pit”—another possibility “well-known among perpetuities buffs”).

86. See Rose, *supra* note 84, at 48–57.

87. *Id.* at 52–53.

88. *Id.* at 57.

89. See David Young, *Story: Rivers*, TE ARA: THE ENCYCLOPEDIA OF N.Z., <https://teara.govt.nz/en/table/14687/new-zealands-longest-rivers> (last visited Feb. 18, 2019); Diana Beaglehole, *Story: Whanganui Places*, TE ARA: THE ENCYCLOPEDIA OF N.Z., <https://teara.govt.nz/en/whanganui-places/page-5> (last visited Feb. 18, 2019).

90. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 12 (N.Z.).

91. *Id.* s 14(1).

92. *Id.* s 70(f).

93. *Id.* ss 69–70; Rose, *supra* note 84, at 57. In contrast, where an apology “rests on the [sole] concept of Crown sovereignty, [it] frames [and distorts] the entire settlement process.” CARWYN JONES, *NEW TREATY, NEW TRADITION: RECONCILING NEW ZEALAND AND MĀORI LAW* 148 (2016). Jones argues that stories of apology and atonement need to be “re-storied,” to reflect new stories premised on “a treaty relationship that respects Indigenous and state forms of political authority” on equal terms. *Id.* In the Whanganui Claims Settlement Act, this apology is said to “mark[] the beginning of a renewed and enduring relationship between Whanganui Iwi and the Crown that has Te Awa Tupua at its centre and is based on . . . respect for the Treaty of Waitangi[.]” Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 70(f) (N.Z.). Elsewhere, the Crown acknowledges that past laws were “required to be framed

Te Awa Tupua lies at the heart of this narrative, an amorphous, all-encompassing entity, described in simultaneously mystical and prosaic terms as an “indivisible and living whole, comprising the Whanganui River from the mountains to the sea, [and] incorporating all its physical and metaphysical elements.”<sup>94</sup> The Act defines it as “a spiritual and physical entity,” one “that supports and sustains both the life and natural resources within the Whanganui River and the health and well-being of the iwi, hapū, and other communities of the River.”<sup>95</sup> Te Awa Tupua is likewise many and one, “the small and large streams that flow into one another [to] form one River” and “a singular entity comprised of many elements and communities[.]”<sup>96</sup> Above all, as the Act universally declares, “I am the River and the River is me.”<sup>97</sup>

Te Awa Tupua is represented in the physical world by “the office of Te Pou Tupua,” the self-described “*human face* of Te Awa Tupua,” which “act[s] in [its] name[.]”<sup>98</sup> As section 19 outlines, Te Pou Tupua’s functions are many and diverse, including acting and speaking on behalf of Te Awa Tupua, upholding and protecting Te Awa Tupua’s status, values, health, and wellbeing, and overseeing Tu Awa Tupua’s lands.<sup>99</sup>

Te Pou Tupua variously “act[s],” “speak[s],” “promote[s],” “protect[s],” and “perform[s]” for the river, not technically as its agent, but as its human face, a recognizable visage for what is otherwise an ethereal, almost supernatural being.<sup>100</sup> Te Pou Tupua thus interacts with the apparatus of the state: the regulations of government agencies, the private property rights of riparian and riverbed owners, customary rights of Māori, claims of public rights of access, and the ambulatory boundaries of erosion and accretion. Despite its otherworldliness, this human face is bound by the matter of fact rights of others, the nitty-gritty of existing fishing and navigation rights, the rights of State-owned enterprises, and “existing resource consents and other existing statutory authorisations[.]”<sup>101</sup>

Te Pou Tupua comprises two natural persons, one nominated by the New Zealand Crown, and one by local iwi.<sup>102</sup> Below Te Pou Tupua lies a hierarchy of descending power and influence, an advisory group, *Te Karewao*,<sup>103</sup> a strategy group, *Te Kōpuka*,<sup>104</sup> and finally a looser “collaboration of persons with interests

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in terms of English law as a claim for a title to the riverbed, rather than to the River as an indivisible whole[.]” *Id.* s 69(14)(b).

94. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 12 (N.Z.).

95. *Id.* s 13(a).

96. *Id.* s 13(d).

97. *Id.* s 13(c).

98. *Id.* s 18(1)–(2) (emphasis added).

99. *Id.* s 19(1)(a)–(d).

100. *Id.*

101. *Id.* s 46(2)(d).

102. *Id.* s 20(1)–(4).

103. *Id.* ss 27 & 28.

104. *Id.* ss 29–34.



in the Whanganui River,” *Te Heke Ngahuru*.<sup>105</sup> This architecture is financed by a separate fund, *Te Korotete*,<sup>106</sup> initially established with thirty million New Zealand dollars from the Crown, the remit of which is to “support the health and well-being of Te Awa Tupua.”<sup>107</sup> As a statutory scheme, Te Awa Tupua sings a song that is hierarchical, comprehensive, and prescriptive, a tale of soaring rhetoric set amidst arcane detail.

Te Awa Tupua is deeply rooted in the time and place of modern Aotearoa New Zealand—a post-colonial setting comprising contested histories and competing sovereignties. From this fertile source new legal personalities have arisen. In 2014, the former Urewera National Park was de-gazetted, and title to Te Urewera<sup>108</sup> statutorily vested in itself—as an entity encompassing and supervening the traditional distinctions between the land and its owner. In December 2017, a memorandum made between iwi and the Crown proposes to extend legal personality to the country’s third geographical feature, the sacred Mount Taranaki on the North Island’s west coast.<sup>109</sup> This very New Zealand song, this paradigm shift, is one of gathering volume and pace.

As the Minister for Treaty of Waitangi Negotiations explained in his first reading speech to the Whanganui Claims Settlement Act, the songs of the Whanganui were never silenced during its brief colonial interregnum:

The constant position of Whanganui iwi for well over 150 years was that they never willingly relinquished possession or control of the Whanganui River and all things that give the river its essential life. For generations they have pursued justice in respect of the river. Their claim has been persistently maintained and advanced since the first petitions to Parliament in 1873 and 1887. Numerous further petitions and submissions followed over the next 125 years.<sup>110</sup>

As the Minister notes, iwi were ceaselessly vigilant in protecting the rights of the river. In 1887, Paora Tutaawha and sixty-six other petitioners complained

105. *Id.* ss 35–37.

106. *Id.* s 57.

107. *Id.* s 57(3); See David Young, *Story: Whanganui Tribes*, TE ARA: THE ENCYCLOPEDIA OF N.Z., <https://teara.govt.nz/en/whanganui-tribes/page-3> (last visited Feb. 18, 2019). It is anticipated the Crown will make further financial contributions over time.

108. Te Urewera is described in its organic Act as “ancient and enduring, a fortress of nature, alive with history[,] its scenery . . . abundant with mystery, adventure, and remote beauty . . .” Te Urewera Act 2014, ss 3(1), (8) (N.Z.).

109. Roy, *supra* note 7.

110. (24 May 2016) 714 NZPD 11220. The Minister for Treaty of Waitangi Negotiations is charged with oversight of the treaty settlement process, and is a member of the N.Z. Cabinet. See *Treaty of Waitangi Negotiations*, N.Z. Dep’t of the Prime Minister and Cabinet, <https://dpmc.govt.nz/cabinet/portfolios/treaty-waitangi-negotiations> (last updated Oct. 12, 2017). The Treaty was signed in 1840 between the British Crown and over 500 (but not all) Māori iwi. See *The Treaty in Brief*, N.Z. HISTORY, <https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief> (updated May 17, 2017). The Treaty of Waitangi Act 1975 (N.Z.) was enacted to address long-standing grievances arising from Crown breaches of Treaty principles. See *id.*; Treaty of Waitangi Act 1975, preamble, s 4 (N.Z.).

to the legislature that steamers were destroying “their fisheries and eel weirs.”<sup>111</sup> In 1990, fifteen years after the Waitangi Tribunal was created to redress colonial-era grievances, the original Treaty claim by the Whanganui iwi was lodged, and was heard in 1994.<sup>112</sup> Final progress was made in 2011 and 2012 when the Crown and iwi reached agreement on Te Awa Tupua.<sup>113</sup> The final deed of settlement was signed in September 2014, symbolically sealed by both parties on the banks of the river.<sup>114</sup> The legislation came into effect in March 2017—following the ceremonial imprimatur of the common law’s Royal Assent, and preceded by the Māori singing of a waiata resonating throughout the parliamentary chamber.<sup>115</sup> As Marama Fox, then co-leader of the Māori Party observed in her second reading speech, “the legacy is with us today in every word. . . . [O]ne can truly feel the river flowing through . . . and the synergy created by many voices coming together as one. One of the truly awe-inspiring features of this bill is to bring so many often contrary voices into one unified chorus.”<sup>116</sup> Later, Fox continues this melodious theme: “This bill reflects the voices of women . . . the grandmothers, wives, mothers, and daughters who stood alongside their men, who gave instructions in subtle and bold ways, . . . who sang of the spirit of Te Awa Tupua[.]”<sup>117</sup>

Indeed, while the Act may have been formally necessary to vest legal personhood in the Whanganui River, at another level, it was superfluous, a surplus restatement of what Māori had always known. As Adrian Rurawhe, Labour Member of Parliament observed, “[n]ot that we ever needed a law for the Te Awa Tupua. Te Awa Tupua is ingrained in our hearts and in our minds.”<sup>118</sup> Such is the power of song, of its lyrical force that we are left with the question that turns Carol Rose’s notion on its head—do we need narrative to smooth out the law’s implausibility, or does it work the other way around? After all, at the end of the Aotearoa New Zealand day, it is only the waters that flow on.

The Whanganui Claims Settlement Act is ground breaking in its *legislative* declaration of a river as a legal person. The Act not only embodies in law what Māori have always known, but it does so in a way that seamlessly melds the everyday prosaic with the otherworldly sacred. In its administrative and

111. WAITANGI TRIBUNAL, THE WHANGANUI RIVER REPORT 184 (1999).

112. Treaty of Waitangi Act 1975, s 4 (N.Z.); (24 May 2016) 714 NZPD 11220.

113. (24 May 2016) 714 NZPD 11220.

114. *See id.*

115. *See generally* Te Awa Tupua (Whanganui River Claims Settlement) Act 2017; *The Royal Assent – Turning Bills Into Law*, N.Z. PARLIAMENT (July 5, 2018), <https://www.parliament.nz/en/get-involved/features/the-royal-assent-turning-bills-into-law/>.

116. Marama Fox, Co-leader Māori Party, Te Awa Tupua (Whanganui River Claims Settlement) Bill – Second Reading, Hansard Debates (Dec. 6, 2016), [https://www.parliament.nz/en/pb/hansard-debates/rhr/document/HansS\\_20161206\\_126900000/fox-marama](https://www.parliament.nz/en/pb/hansard-debates/rhr/document/HansS_20161206_126900000/fox-marama).

117. Marama Fox, Co-leader Māori Party, Te Awa Tupua (Whanganui River Claims Settlement) Bill – Third Reading, Hansard Debates (Mar. 14, 2017), [https://www.parliament.nz/en/pb/hansard-debates/rhr/document/HansS\\_20170314\\_125100000/fox-marama](https://www.parliament.nz/en/pb/hansard-debates/rhr/document/HansS_20170314_125100000/fox-marama).

118. (24 May 2016) 714 NZPD 11220.

regulatory detail, the Whanganui River legislation serves as a useful model for paradigmatic change—away from the vicissitudes of judicial interpretation seen in the preceding and following case studies. Above all, the Act is grounded in cultural and physical context, the unique relationship of particular peoples with their particular river.

### III. ATRATO RIVER, COLOMBIA

The Atrato River's song is certainly an inspiring one, one that parallels the powerful narrative articulation of the Whanganui River as a living—and legal—relative by the Māori iwi described in the previous section. However, what denotes this particular case as distinct from the New Zealand approach is the emphasis not on local stories, but rather on history as a whole. Historical accounts and overarching diachronical justifications feature prominently in the Atrato judgment, a clear testimony to the relevance that history plays in the civil legal tradition, which is much more focused on grand narratives than the common law. That notwithstanding, the inscription of the judgment within the course of history inevitably represents both a point of departure and a point of confluence for the international arguments that see rivers as the focal intersections of rights of Nature and human rights, as inevitably flowing in the same direction.

The Atrato River is one of the most extensive, economically significant, and culturally relevant of all Colombian rivers.<sup>119</sup> Born at almost 4000 meters in the Andean region of the Cerro de Caramanta, in the Chocó department,<sup>120</sup> the river is navigable for nearly 500 kilometers, providing a vibrant commercial route for the entire department.<sup>121</sup> The overall riparian region, extending for over 40,000 square kilometers,<sup>122</sup> is home to one of the most biodiverse ecosystems of Colombia,<sup>123</sup> is particularly rich in minerals,<sup>124</sup> and is home to a number of communities, both Indigenous and afro-Colombian.<sup>125</sup>

119. *Atrato case* at 58.

120. A department (or *departamento* in the original) is one of the thirty-two regional political units in the republic of Colombia.

121. *Atrato case* at 3.

122. See SUSTAINABLE DEVELOPMENT GOALS FUND, CASE STUDY: INDIGENOUS AND AFRO-COLOMBIAN COMMUNITIES IN THE CHOCÓ DEPARTMENT PROMOTE THEIR FOOD SECURITY AND NUTRITION IN COLOMBIA 2 (2017), <http://www.sdgfund.org/sites/default/files/Case%20Study%20-%20Colombia%20Nutricion%20-%20EN.pdf> (noting that the Chocó department “has an area of 46,530 km<sup>2</sup>”).

123. See Lain Efrén Pardo Vargas et al., *The Impacts of Oil Palm Agriculture on Colombia's Biodiversity: What We Know and Still Need to Know*, 8 TROPICAL CONSERVATION SCI. 828, 833 (2015), <https://researchonline.jcu.edu.au/40703/1/40703%20Pardo%20Vargas%20et%20al%202015.pdf> (Chocó is included in “one of the most important biodiversity hotspots in the world”).

124. See Louise Winstanley, *The Devastating Environmental and Social Impact of Gold Mining in Chocó, Colombia*, INST. OF LATIN AM. STUD. (Oct. 31, 2016), <https://latinamericandiaries.blogs.sas.ac.uk/2016/10/31/the-devastating-environmental-and-social-impact-of-gold-mining-in-choco-colombia/> (“Chocó is also rich in mineral resources, particularly gold and platinum.”).

125. Miguel A. Medina-Rivas et al., *Chocó, Colombia: A Hotspot of Human Biodiversity*, 6 REVISTA BIODIVERSIDAD NEOTROPICAL 45, 47 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5033504/>

Due to extensive mining, primarily illegal, in the region, the Tierra Digna Center, on behalf of a congress of various community councils and Indigenous and afro-Colombian organizations,<sup>126</sup> filed in 2016 an *accion de amparo*—or *accion de tutela*—an action guaranteed by section 86 of the Colombian Constitution for the protection of constitutional rights, against both the local and national institutions, for failing to protect a number of constitutionally enshrined fundamental rights. The plaintiffs initiated the action to stop intensive, large scale, and largely illegal mining and logging practices, with their related use of industrial machinery and highly toxic substances, such as mercury.<sup>127</sup> These practices were causing highly negative and irreversible impacts on local ecosystems, threatening the very survival of the river itself, and in turn, impacting the fundamental rights of the local Indigenous and afro-Colombian communities.<sup>128</sup>

The Administrative Tribunal in Cundinamarca initially denied the action, which was directed to the protection of constitutionally enshrined rights to life, health, water, food security, to a healthy environment, to culture, to physical, cultural and spiritual survival, and to the protection of the territory for the local ethnic communities.<sup>129</sup> The action was also opposed by a number of Ministries and by the municipality of Carmen de Atrato.<sup>130</sup> The action was further denied on appeal by the Council of State (*Consejo de Estado*, the supreme administrative tribunal of Colombia) on the basis of an alleged lack of standing on the part of the plaintiff, of unsatisfactory justification that collective rights had been impinged by mining practices, and of the alleged opportunity of alternative means of judicial protection of said rights.<sup>131</sup>

The Constitutional Court of Colombia, however, overturned the previous decisions, arguing that standing indeed existed.<sup>132</sup> First, standing existed in terms of legitimate representation and, second, because the right to a healthy environment has inevitable repercussions over a host of other rights acknowledged as fundamental both by the Constitution and by the jurisprudence

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(“The vast majority of the population is Afro-Colombian (82.1%) but there are also substantial numbers of Native Americans (12.7%)”).

126. *Centro de Estudios para la Justicia Social ‘Tierra Digna’*, on behalf of the *Foro Interétnico Solidaridad Chocó (FISHC)*, and the *Consejo Comunitario Mayores de la cuenca del Atrato (Consejo Comunitario Mayor de la Organización Popular y Campesina del Atrato – COCOMOPOCA, Consejo Comunitario Mayor de la Asociación Campesina Integral del Atrato – COCMACIA, Asociación de Consejos Comunitarios del Bajo Atrato – ASCOBA)*. See *Nosotros*, TIERRA DIGNA, <http://tierradigna.org/nosotros/> (last visited Jan. 21, 2018).

127. *Atrato case* at 4–5.

128. *Id.* at 5–7.

129. Decision of Feb. 11, 2015 by the Tribunal Administrativo de Cundinamarca, Sección Cuarta, Subsección B. See also *Atrato case* at 12.

130. *Atrato case* at 7–12.

131. Decision of Feb. 11, 2015 by the Tribunal Administrativo de Cundinamarca, Sección Cuarta, Subsección B. *Atrato case* at 13.

132. *Atrato case* at 158.

of the Constitutional Court.<sup>133</sup> The court also recognized the omission on the part of local and national authorities in failing to provide sufficient protection of these constitutionally enshrined rights.<sup>134</sup>

The court began its argument by stating that the Colombian Constitution is one informed by the concept of *social rule of law*,<sup>135</sup> a democratic state in which the rule of law guarantees the social welfare of all its people,<sup>136</sup> a state in which material—not just formal—equality is to be pursued. Such a principle has been seen by the court as compelling the State to ensure both material equality and the effective protection of fundamental rights through a series of corollary principles, such as social and distributive justice, autonomy of territorial entities, social and cultural pluralism, human dignity, solidarity, preeminence of collective interests, and general welfare and wellbeing.<sup>137</sup>

Even more significantly, the court inscribes its judgment within a jurisprudential tradition that, for well over two decades, has articulated a so-called Ecological Constitution,<sup>138</sup> whereby the protection of the environment is a primary collective interest, seen as superior to other fundamental rights, and guaranteed by over thirty constitutional provisions.<sup>139</sup> In addition to inscribing the decision within this Colombian jurisprudential tradition of an Ecological Constitution, the court also refers to the main international legal instruments for the protection of bio-cultural diversity,<sup>140</sup> thus gesturing toward the international emergence of highly proactive environmental legislation.<sup>141</sup>

The court argued that the pursuit of a social rule of law is primarily realized through the protection of the environment in general, and of rivers, forests, food sources, and biodiversity specifically, through their conservation, restoration,

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133. *Id.* at 8, 10–11.

134. *Id.* at 141, 158.

135. *Estado Social de Derecho*, derived from the German articulation of a *sozialrechtsstaat*. As the Court acknowledges, the concept informs a number of Constitutions, both in the civil law traditions (such as Italy, France, and Spain in Europe, and Peru, Brazil, and Ecuador, among others, in Latin America) and the common law tradition (such as India and South Africa). *Atrato case* at 23.

136. The concept of an *estado social de derecho* is articulated in direct opposition to a more classical liberal state, one in which material equality, rather than formal equality and freedom, is the fundamental principle that guides the State in the attempt to address pre-existing inequality and disadvantages. *Id.*

137. *See id.* at 22–35. This is in parallel to the European tradition of a welfare state.

138. The concept originates with the Decision T-411 of 1992 and is found within a broad range of decisions, from T-411 in 1992 to C-035 in 2016. *See* Corte Constitucional [C.C.] [Constitutional Court], junio 17, 1992, Sentencia T-411/92 (Colom.); Corte Constitucional [C.C.] [Constitutional Court], febrero 8, 2016, Sentencia C-035/16 (Colom.).

139. *Atrato case* at 37–43.

140. *See* Convention concerning Indigenous and Tribal Peoples in Independent Countries, INT'L LABOR ORG. (June 27, 1989), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169); U.N. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818; UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, *opened for signature* Oct. 17, 2003, 2368 U.N.T.S. 3 (entered into force Apr. 20, 2006), U.N. General Assembly, G.A. Res. 61/295, (Sept. 13, 2007); Organization of American States, American Declaration on the Rights of Indigenous Peoples.

141. *Atrato case* at 48–50.

and sustainable development.<sup>142</sup> Environmental protection is elevated because of the necessary preeminence of a constitutionally enshrined right to a healthy environment, seen as superior to all other fundamental rights.<sup>143</sup> The court expressly acknowledged similar arguments as embodied in the 2008 Ecuadorian Constitution, the 2009 Bolivian Constitution, and the more recent recognition of legal personhood to the Whanganui River in New Zealand.<sup>144</sup> Similar to the argument advanced by the Ecuadorian court in the Vilcabamba case, the court further describes Nature, or the environment, as a transversal element of the Colombian Constitutional framework.<sup>145</sup> Furthermore, the court argued that:

the protection and conservation of biodiversity is necessarily connected to the preservation and protection of the ways of life and cultures that interact with such biodiversity . . . the protection and preservation of cultural diversity is [thus] an essential premise for the conservation and sustainable usage of biological diversity, and vice versa.<sup>146</sup>

As a result, the protection of the environment is intrinsically, inherently, and inextricably connected to a series of biocultural rights. Kabir Bavikatte and Tom Bennett state that “biocultural rights affirm the bond between indigenous, tribal and other communities with their lands, together with the floral, faunal and other resources in and on the land.”<sup>147</sup> Central to the very paradigm of biocultural rights is the concept of *community*, intended as “[a] group[] of people with a way of life that is determined by the ecosystem.”<sup>148</sup> In other words, “‘biocultural rights’ make the link between . . . ‘peoplehood’ and ‘ecosystems.’”<sup>149</sup> Such rights are not merely a “pure property claim . . . in the typical market sense,” in which they can be conceived of as “alienable” resources, but rather they are “collective rights” of communities who carry out roles of traditional governance in accordance with Nature, as well as with Indigenous and traditional ontologies.<sup>150</sup>

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142. *Atrato case* at 36–37. In the original: *[L]a defensa del medio ambiente no solo constituye un objective primordial dentro de la estructura de nuestro [Estado Social de Derecho] sino que integra, de forma esencial, el espíritu que informa a toda la Constitución Política.*

143. *Id.* at 36–37.

144. *Id.* at 41–42 & n.87. See also *id.* at 140 n.315.

145. *Id.* at 42–43.

146. *Id.* at 43–44. In the original: *la conservación de la biodiversidad conlleva necesariamente a la preservación y protección de los modos de vida y culturas que interactúan con ella . . . la protección y preservación de la diversidad cultural se convierte en un supuesto esencial para la conservación y uso sostenible de la diversidad biológica y viceversa.*

147. Kabir Bavikatte & Tom Bennett, *Community Stewardship: The Foundation of Biocultural Rights*, 6 J. HUM. RTS. & ENV'T 7, 8 (2015).

148. *Id.* at 8 n.3.

149. Kabir Bavikatte & Daniel F. Robinson, *Towards a People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing*, 7 L., ENV'T & DEV. J. 35, 50 (2011).

150. *Id.* at 49, 50.

As a result, the court asserted that the central premise of biocultural rights is a relationship of profound unity between Nature and the human species.<sup>151</sup> Therefore, the protection of the environment is inherently intertwined with the effective enjoyment of the right to territory guaranteed to both Indigenous and afro-Colombian communities. This led the court to the recognition of the cultural biodiversity of Indigenous and afro-Colombian ethnic communities, whose ontologies articulate a sense of interconnectedness to place.<sup>152</sup> Furthermore, the court recognized the special position occupied by Indigenous and ethnic communities in relation to the environment, as affirmed by long-standing jurisprudence.<sup>153</sup> Indigenous communities are further described as collective legal subjects that transcend the sum of individual subjects sharing diffused and collective interests.<sup>154</sup> Moreover, the court argued that the jurisprudential development of a Cultural Constitution (paralleling the development of an Ecological Constitution described above) guarantees that biocultural rights are to be protected.<sup>155</sup> That is, rights where biological protection and cultural rights are seen not as separate, but as profoundly intertwined and ultimately inseparable.<sup>156</sup>

The court then presented a highly nuanced argument about mining, recognizing its cultural, social, economic, and historical relevance. While offering a highly detailed categorization of mining practices, the court asserted that only some of the most invasive mining practices, conducted through the use of industrial machinery, are deemed capable of causing the deterioration of water sources, the ensuing risks for human and environmental wellbeing, and the loss of biocultural diversity that follows.<sup>157</sup> With this in mind, the court ruled in favor of the plaintiff, acknowledging the environmental and social damages alleged, as well as the responsibility, by omission, of the relevant state authorities in failing to protect the fundamental rights invoked.<sup>158</sup> Consequently, the court ordered a series of actions devoted to definitively stopping illegal mining activities,

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151. *Atrato case* at 41, 47–48.

152. *Id.* at 47–48.

153. *Id.* at 51–56.

154. Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 1993, Sentencia T-188/93 (Colom.). In the original: *Se resalta la especial relación de las comunidades indígenas con los territorios que ocupan, no solo por ser éstos su principal medio de subsistencia sino además porque constituyen un elemento integrante de la cosmovisión y la religiosidad de los pueblos aborígenes*. Furthermore, in Decision T-380 in 1993: *La comunidad indígena es un sujeto colectivo y no una simple sumatoria de sujetos individuales que comparten los mismos derechos o intereses difusos o colectivos*. Corte Constitucional [C.C.] [Constitutional Court], septiembre 13, 1993, Sentencia T-380/93 (Colom.). Decision T-955 in 2003 extended the interpretation to Afro-Colombian communities. Corte Constitucional [C.C.] [Constitutional Court], octubre 17, 2003, Sentencia T-955/03 (Colom.). *See also Atrato case* at 51–52.

155. *Atrato case* at 43–48.

156. *See id.* at 73–75.

157. *See id.* at 92–94.

158. *Id.* at 158.

decontaminating the river, and recuperating traditional ways of life and food production.<sup>159</sup>

Furthermore, and more importantly, the court inscribed the protection of those fundamental biocultural rights within a clearly defined ontological spectrum. As a result, the court argued that in order to protect those rights, an *ecocentric* perspective is to be preferred.<sup>160</sup> The court articulated very explicitly an ontological spectrum marked by three distinct positions within which any argument to ensure the protection of a healthy environment is to be located.<sup>161</sup> The first position is a classical anthropocentric perspective, whereby the environment is seen as exclusively instrumental to human survival.<sup>162</sup> The court then moved to the second position, a biocentric perspective, where Nature is to be protected in order to prevent an environmental catastrophe.<sup>163</sup> Such a perspective, although not yet identifying Nature as a legal *subject*, nonetheless recognizes that the environmental patrimony is not exclusive to a geographically, jurisdictionally, and temporally bounded human community, but rather belongs to humanity in general, including all future generations.<sup>164</sup> The final, third position, marked by an ecocentric perspective, is one where “the earth does not belong to humans, but rather it is humans who belong to the earth,”<sup>165</sup> with the consequence that Nature is articulated as a legal subject recognized and protected by the State through its legal representatives. The result of the court’s argument is the explicit recognition of the Atrato River as a legal entity and a subject of rights, to be represented by a “commission of guardians of the Atrato River” (*comisión de guardianes del río Atrato*), composed of both a representative of the Colombian government and a representative nominated by the local Indigenous and afro-Colombian communities.<sup>166</sup>

Although the court makes no direct reference to it, echoes of an Earth—or Ecological—Jurisprudence are undeniable. The court acknowledges that “only an attitude of profound respect for and humility toward nature, its component elements, and its integrated cultures allow[s] . . . engage[ment] with them in just and equal terms, abandoning all concepts limited to the utilitarian, the economic or the efficient.”<sup>167</sup> Even more explicitly, the court inscribed this ontological spectrum within pre-existing jurisprudence of the Constitutional Court, whereby the court previously established that “[c]onstitutional jurisprudence has

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159. *Id.* at 159.

160. *Id.* at 41–42.

161. *Id.* at 40–43.

162. *Id.* at 41.

163. *Id.*

164. *Id.*

165. *Id.* at 41–42.

166. *Id.* at 139–40.

167. *Id.* at 43. In the original: *[S]olo a partir de una actitud de profundo respeto y humildad con la naturaleza, sus integrantes y su cultura es posible entrar a relacionarse con ellos en términos justos y equitativos, dejando de lado todo concepto que se limite a los implemente utilitario, económico o eficientista.*



acknowledged ancestral knowledges and alternative currents of thoughts, asserting that nature cannot be exclusively conceived as the environment surrounding human beings, but rather as a subject with its own rights, which, as such, must be protected and guaranteed.”<sup>168</sup>

The court’s argument in recognizing the Atrato River as a legal entity is interesting in being ontologically motivated, while strategically employing rights of Nature. This represents a clear example of the tension between the transcendence of an ontological anthropocentric worldview and the inevitability of a normative anthropocentric approach.<sup>169</sup> In this particular case, the court suggested that fundamental rights are better served by the *strategic* recognition of the river as a legal entity in and of itself, thus not necessarily altering the constitutional fabric of Colombia by recognizing the entirety of Nature as a legal subject. Naturally, the question as to the juridical definition of Nature as a whole is now to be observed with care, and future decisions will determine the extension of the Atrato principle to future cases.

#### IV. GANGES AND YAMUNA RIVERS, INDIA

Some five months after the Atrato judgment was decided, in March 2017, the High Court of Uttarakhand granted legal personhood to the Ganges and Yamuna Rivers and their tributaries (the “Ganges and Yamuna case”),<sup>170</sup> and to their glaciers and surrounding environmental features (the “Glaciers case”).<sup>171</sup> The court’s reliance on existing legal theory around the recognition of corporate personhood was safely uncontentious, but both judgments raised controversy for their emphasis on the religious significance of the rivers to Hindu people and for their characterization of the rivers as living entities.<sup>172</sup> The parallels with the Atrato are compelling, not only for their simultaneity, and (superficially) like outcomes, but also their dissonance. Like the Atrato, the mighty Ganges and Yamuna are economically and culturally significant. However, unlike the Atrato, the cultural meaning of these Indian rivers is contested. Such disharmony illustrates that cultural or religious differences may muddy the waters of a river’s legal personality as much as clarify them.

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168. Two almost identical decisions are C-449 and T-080, both in 2015. See Corte Constitucional [C.C.] [Constitutional Court], julio 16, 2015, Sentencia C-449/15 (Colom.); Corte Constitucional [C.C.] [Constitutional Court], febrero 20, 2015, Sentencia T-080/15 (Colom.). The second states: *la jurisprudencia constitucional ha atendido los saberes ancestrales y las corrientes alteras de pensamiento, llegando a sostener que “la naturaleza no se concibe únicamente como el ambiente y entorno de los seres humanos, sino también como un sujeto con derechos propios, que, como tal, deben ser protegidos y garantizados.*

169. See generally Alessandro Pelizzon & Aidan Ricketts, *Beyond Anthropocentrism and Back Again: From Ontological to Normative Anthropocentrism*, 18 AUSTRALASIAN J. NAT. RESOURCES L. & POL’Y 105, 105 (2015) (offering this theoretical perspective).

170. See *Ganges and Yamuna case* at para. 19.

171. See *Glaciers case* at 64–65.

172. See *infra* notes 192–193, 198–200, 209–214 and accompanying text.

The Ganges or Ganga River flows for over 2500 kilometers across the northeast of India into Bangladesh from the Gangotri Glacier in the eastern Himalayas, in the Indian state of Uttarakhand, through the Gangetic Plain of North India, before splitting into two rivers in West Bengal—the Adi Ganga and the Padma—and finally emptying into the Bay of Bengal.<sup>173</sup> The Yamuna (also known as the Jumna) is the longest tributary of the Ganges.<sup>174</sup> It originates from the Yamunotri Glacier in the lower Himalaya in Uttarakhand, and travels over 1000 kilometers before merging with the Ganges at Triveni Sangam, Allahabad—one of the four sites of the *Kumbha Mela*.<sup>175</sup>

The Ganges and Yamuna are important to the spiritual lives of millions of Indians due to their sacred status in Hinduism. The Ganges is revered as *Ganga Mata* or *Ganga Maa*—the divine mother—who sustains and nurtures life, while the Yamuna is worshipped as *Yami*—the Lady of Life—daughter of the sun god *Surya* and twin sister of *Yama*, Lord of Death.<sup>176</sup> Both rivers are believed to have miraculous cleansing powers—“[a]ccording to Hindu beliefs, a dip in River Ganga can wash away all the sins.”<sup>177</sup> The rivers are also believed to be self-purifying, a belief that somewhat paradoxically encourages their pollution.<sup>178</sup>

Beyond Hinduism, these rivers make an essential contribution to the livelihood of around 40 percent of the Indian population, who rely on them for water, agriculture, industry, and navigation.<sup>179</sup> In the case of the Yamuna, this contribution includes providing around 70 percent of Delhi’s water supplies.<sup>180</sup> Despite their economic and cultural importance (and, perhaps, in part, because of them) both rivers have been heavily polluted by domestic sewerage, industrial

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173. Gerald R. Pitzl, *Ganges River*, in *ENCYCLOPEDIA OF ENVIRONMENT AND SOCIETY* 722–23 (Paul Robbins ed., 2007).

174. See Nishat & Dhruv Sen Singh, *The Yamuna River: Longest Tributary of Ganga*, in *THE INDIAN RIVERS: SCIENTIFIC AND SOCIO-ECONOMIC ASPECTS* 123, 123 (Dhruv Sen Singh ed., 2018).

175. See generally Anil Kumar Misra, *A River about to Die: Yamuna*, 2 *J. WATER RESOURCE & PROTECTION* 489, 489 (2010) (discussing pollution and need for cleanup of the Yamuna). See also Basant Rai, *Pollution and Conservation of Ganga River in Modern India*, 3 *INT’L J. SCI. & RES. PUBLICATIONS* 1, 3 (2013). The Kumbh Mela is a mass pilgrimage in which Hindus gather to bathe in the Ganges. It takes place every three years and rotates between four sites—including the confluence of the Yamuna and Ganges rivers. See Michael Safi & Kakoli Bhattacharya, *Kumbh Mela: Hindus Converge for Largest-Ever Human Gathering*, *Guardian* (Jan. 15, 2019), <https://www.theguardian.com/world/2019/jan/15/kumbh-mela-hindus-converge-for-largest-ever-human-gathering-prayagraj-festival>.

176. DEANNA J. CONWAY, *MAIDEN, MOTHER, CRONE: THE MYTH AND REALITY OF THE TRIPLE GODDESS* 64 (1994).

177. *Ganges and Yamuna case* at para. 11.

178. Many Indians reportedly believe that there is nothing wrong with dumping waste into the Ganges and Yamuna, because the self-purifying powers of the rivers are able to cleanse away any contamination. See, e.g., George Black, *What It Takes to Clean the Ganges*, *NEW YORKER* (July 25, 2016), <https://www.newyorker.com/magazine/2016/07/25/what-it-takes-to-clean-the-ganges>.

179. See generally Dilip Kumar, *River Ganges – Historical, Cultural and Socioeconomic Attributes*, 20 *AQUATIC ECOSYSTEM HEALTH & MGMT.* 8, 8–9 (2017) (discussing the symbolism and the influence of the Ganges River).

180. Misra, *supra* note 175, at 491.

waste, agricultural run-off, and excessive abstraction.<sup>181</sup> In this sense, the rivers sing a complex song—one of competing cultural and spiritual identities, of development and survival, and of neglect.

In 1986, the ambitious Ganga Action Plan (GAP) was launched by then-Prime Minister Rajiv Gandhi to reduce pollution and clean up the Ganges.<sup>182</sup> The GAP was then replicated for the Yamuna as the 1993 Yamuna Action Plan.<sup>183</sup> However, both Action Plans have failed to reverse the deteriorated status of the rivers due to a range of issues, including population growth; increased industrialization; poor public participation; a lack of financial and technical capacity at local government levels; and a lack of commitment from subsequent governments at all levels.<sup>184</sup>

In 2014, frustrated by this failure, Mohammad Salim, a resident of the Hindu holy town of Hardwar, initiated public interest litigation in the High Court of Uttarakhand seeking the court's intervention to protect the rivers from further illegal encroachment and to compel the State of Uttarakhand to take positive action to reduce pollution and restore the health of the rivers.<sup>185</sup> In response to Salim's petition, the court held that every citizen has a right to clean water under article 21 of the Constitution, and banned mining in the riverbed of Ganga and its highest flood plain.<sup>186</sup> The court also directed the State of Uttarakhand to clear government land bordering the rivers,<sup>187</sup> and to constitute a Ganga Management Board within three months.<sup>188</sup> More than three months later, the management board had not yet been constituted and the evictions had yet to be carried out,<sup>189</sup> so the court handed down two follow-up judgments in March 2017 granting legal

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181. See Rai, *supra* note 175, at 3; R. C. Trivedi, *Water Quality of the Ganga River – An Overview*, 13 AQUATIC ECOSYSTEM HEALTH & MGMT. 347, 348, 349–50 (2010) (analyzing results of water quality monitoring); Saba Hasan, *Water Quality of River Ganga – Pre and Post GAP: A Review*, 2 INT'L J. ADVANCED RES. SCI., ENGINEERING & TECH., 361, 361–62 (2015) (discussing water quality); Papiya Mandal et al., *Seasonal and Spatial Variation of Yamuna River Water Quality in Delhi, India*, 170 ENVTL. MONITORING & ASSESSMENT 661, 665–69 (2010) (discussing historic pollution of the Yamuna).

182. Trivedi, *supra* note 181, at 348–49.

183. See *id.*

184. See Priyam Das & Kenneth R. Tamminga, *The Ganges and the GAP: An Assessment of Efforts to Clean a Sacred River*, 4 SUSTAINABILITY 1647, 1648 (2012); Hasan, *supra* note 181, at 362–64; Trivedi, *supra* note 181, at 348–50.

185. Dipankar De Sarkar, *Rights of Rivers, Hard to Enforce*, MINT (Mar. 24, 2017), <https://www.livemint.com/Opinion/gsttRTScpluLTXreHqwvkN/Rights-of-rivers-hard-to-enforce.html>.

186. *Ganges and Yamuna case* at para. 4 (banning mining in the river bed and flood plain area of Ganga).

187. The judgment does not elaborate on the nature of activity that needs to be cleared from the land bordering the rivers, but news reports mention poorly regulated crematoriums, and industries, hotels, and ashrams with inadequate sanitation facilities. See *After Ganga, Yamuna, Uttarakhand HC Says Glaciers, Forests Are 'Living Human Entities'*, OUTLOOK (Apr. 1, 2017), <https://www.outlookindia.com/newswire/story/after-ganga-yamuna-uttarakhand-hc-says-glaciers-forests-are-living-human-entities/967591>; Shivani Azad, *Crematoriums Along Ganga Go Eco-Friendly*, TIMES OF INDIA (June 19, 2017), <https://timesofindia.indiatimes.com/city/dehradun/-green-crematoriums-along-ganga-to-offer-ecologically-responsible-means-of-cremation/articleshow/59208443.cms>.

188. *Ganges and Yamuna case* at para. 4.

189. See *id.* at paras. 3–7.

personhood to the Ganges and Yamuna and their tributaries (the “Ganges and Yamuna case”),<sup>190</sup> and to their glaciers, lakes, air, meadows, dales, jungles, forests, wetlands, grasslands, springs, and waterfalls (the “Glaciers case”).<sup>191</sup>

In granting legal personhood to the Ganges and Yamuna rivers and the surrounding natural environment, the court relied on existing theories of legal personhood, including corporate personhood, which grant legal personality, rights, and obligations to “any subject matter other than a human being”<sup>192</sup> Justice Sharad Sharma argued:

A juristic person can be any subject matter other than a human being to which the law attributes personality for good and sufficient reasons. Juristic persons being the arbitrary creations of law, as many kinds of juristic persons have been created by law as the society require[s] for its development.<sup>193</sup>

Erin O’Donnell argues the court also expanded the traditional “definition of *legal* person significantly by conflating it with *living* person.”<sup>194</sup> In the Ganges and Yamuna case, for example, the court described the rivers as “breathing, living and sustaining the communities from mountains to sea.”<sup>195</sup> This characterization led the court to the conclusion that the rivers were not only entitled to the right to private law remedies, but also to “fundamental rights.”<sup>196</sup> In the Glaciers case, the court also appears to equate these fundamental rights with human rights.<sup>197</sup>

The conflation of rivers with living persons was one of the most controversial elements of the court’s findings. George Dvorsky submits that these “acts diminish what it means to be an actual person—a conscious, self-reflective and emotional being—while at the same time undermining efforts to endow those who are truly deserving of this special status.”<sup>198</sup> He argues that “[a]dvocates of animal personhood take great pains to point out the remarkable cognitive and emotional capacities of animals, while conservationists are simply trying to pull off a clever legal trick.”<sup>199</sup> However, Dvorsky’s objections focus heavily on the assertion that rivers and other kinds of non-animal natural subjects are lifeless inanimate objects—an argument grounded in a specific ontological

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190. *See id.* at para. 19.

191. *See Glaciers case* at 64–65.

192. *Id.* at 63.

193. *Ganges and Yamuna case* at para. 16.

194. Erin L. O’Donnell, *At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India*, 30 J. ENVTL. L. 135, 138 (2018).

195. *Ganges and Yamuna case* at para. 17.

196. *Glaciers case* at 64.

197. *See generally Glaciers case.*

198. George Dvorsky, *India and New Zealand Were Wrong to Recognise Rivers as Persons*, GIZMODO (Mar. 25, 2017), <https://www.gizmodo.com.au/2017/03/india-and-new-zealand-were-wrong-to-recognise-rivers-as-persons/>.

199. *Id.*

worldview that is not shared by many Indigenous communities or those who adopt an approach more consistent with ecophilosophy.<sup>200</sup>

A more nuanced critique of the court's reasoning is the question of whether the analogy with *human* rights might lead to an overly anthropocentric interpretation of the kind of rights that will be asserted on behalf of Nature. However, this remains speculative given that an ecocentric interpretation of these fundamental rights would appear to be consistent with the judgment in that it speaks of an "intrinsic right not to be polluted" and "to exist, persist, maintain, sustain and regenerate their own vital ecology system"<sup>201</sup> rather than more anthropocentric conceptions of rights. The judgment highlighted the interconnected nature of the rivers with the people of India, "that the fundamental human rights on which human survival depends are Nature's rights,"<sup>202</sup> because the community relies on the rivers for physical and spiritual survival. The court emphasized that due to this interdependence, as well as the intrinsic rights of Nature, the rivers have a right as living entities not to be polluted,<sup>203</sup> and all citizens have a fundamental duty to protect Nature.<sup>204</sup>

In the *Glaciers* case judgment<sup>205</sup> the court quoted extensively from Kenyan environmentalist Wangari Muta Maathai's 2010 essay on the role of culture, song, and stories in helping to conserve and protect Nature.<sup>206</sup> In the essay, Maathai quotes from the lessons she learned from her mother, Wangari:

One of the ways through which communities conserve their biodiversity and their resources is through culture, and I want to emphasise that for me culture is very important, very enriching, because culture influences who we are. Festivals, rituals and ceremonies are all a part of our culture as well, and can you imagine how much we conserved because we incorporated nature into our festivals, into our religions, into our dances, into our songs, into our symbols, into our stories? And they define who we are. When they are destroyed, our environment too is destroyed. And very often when we forget

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200. See generally ARNE NAESS, *ECOLOGY, COMMUNITY AND LIFESTYLE: OUTLINE OF AN ECOSOPHY* 36 (David Rothenberg trans., 1989) (describing ecophilosophy, a portmanteau of ecology and philosophy, as a philosophy of ecological harmony or equilibrium). See also William Grimes, *Arne Naess, Norwegian Philosopher, Dies at 96*, N.Y. TIMES (Jan. 14, 2009), <https://www.nytimes.com/2009/01/15/world/europe/15naess.html>.

201. *Glaciers case* at 61.

202. *Id.* at 8 (quoting Vikram Soni & Sanjay Parikh, *Nature has Rights Too*, in *THE SECRET ABODE OF FIREFLIES: LOVING AND LOSING SPACES OF NATURE IN THE CITY* 158, 158 (Nanni Singh ed., 2010)). In this judgment, Justice Sharma also cites the Stockholm Declaration (1972) and the Rio Declaration (1992) to support this underlying right to a healthy environment. See U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, 3–5, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972); U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992).

203. See *Glaciers case* at 61.

204. See *id.* at 42, 59.

205. See *id.* at 6.

206. Sri Wangari Muta Maathai, *Foresters without Diplomas*, in *THE SECRET ABODE OF FIREFLIES: LOVING AND LOSING SPACES OF NATURE IN THE CITY* 148, 148 (Nanni Singh ed., 2010).

who we are, we lose all our wonderful associations, our values that we've brought from the past generations. Once this gets translated into resources, it is converted into money . . . but in life everything is not money!<sup>207</sup>

Justice Sharma also quotes from another essay in the same collection, entitled "Nature has Rights too":

Violations against nature can be equally appalling [as human rights violations] despite being viewed through the filter of 'environmental damage'. . . . We only need a simple law that provides absolute protection to all valuable natural resources, be it forests, rivers, aquifers or lakes. The law could be a public trust doctrine, which has its basis in the ancient belief that Nature's laws impose certain conditions on human conduct in its relationship with Nature.<sup>208</sup>

In the Ganges and Yamuna case, the justification for this moral duty to protect the Ganges and Yamuna was further bolstered by the sacred status of these rivers within the Hindu religion, with the court emphasizing that both rivers are revered as deities by Hindus and considered sacred.<sup>209</sup> "All the Hindus have deep Astha [conviction/faith] in rivers Ganga and Yamuna and they collectively connect with these rivers."<sup>210</sup> It is here the court entered controversial territory. O'Donnell cautions that "the relatively weak line of legal argument and over-reliance on specifically Hindu religious beliefs may undermine the impact of these cases."<sup>211</sup> Ashish Kothari and Shrishtee Bajpai also argue that the High Court "appears to leave out the fact that for people of several other faiths too the Ganga and Yamuna are culturally and in other ways important."<sup>212</sup> They also warn that "[t]he singular focus on Hinduism can be misused by right-wing nationalist organisations, to hijack the order for their own cynical agenda."<sup>213</sup> This concern is shared by Vrinda Narain, who states:

[T]he centrality of Hindu religious faith to the directions issued is worrying. In the context of rising Hindu right wing rhetoric, the Court's linking of the Hindu faith with national identity and the corresponding casting out of religious minorities implied by this method of argumentation by the court is cause for concern. Indeed, while this decision and its mandatory directions bode well for environmental protection, the premise of such protection is troubling for the future of minority rights and India's democratic secular consensus.<sup>214</sup>

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207. *Id.* at 151.

208. Vikram Soni & Sanjay Parikh, *Nature has Rights Too*, in *THE SECRET ABODE OF FIREFLIES: LOVING AND LOSING SPACES OF NATURE IN THE CITY* 158, 161–63 (Nanni Singh ed., 2010).

209. *See Ganges and Yamuna case* at paras. 11, 17.

210. *See id.* at para. 17.

211. O'Donnell, *supra* note 194, at 141.

212. Ashish Kothari & Shrishtee Bajpai, *Rivers and Human Rights: We Are the River, the River Is Us*, 52 *ECON. & POL. WKLY.* 103, 108 (2017).

213. *Id.*

214. Vrinda Narain, *Indian Court Recognizes Rivers as Legal Entities*, *INT'L J. CONST. L. BLOG* (June 13, 2017), <http://www.iconnectblog.com/2017/06/indian-court-recognizes-rivers-as-legal-entities>.

Besides harming minority rights, Kothari and Bajpai also raise a further concern that the judgment will be misused “against communities that use these rivers and their catchment areas” by “overzealous officials.”<sup>215</sup> This concern around the imposition of an “exclusionary model of wildlife . . . conservation” being “used to displace or dispossess forest-dwelling communities” is well-founded given the widespread nature of such practices within the field of environmental protection.<sup>216</sup> Fortunately, the court’s emphasis on the importance of ensuring ongoing community participation in the governance of the rivers may offer some degree of protection from such an exclusionary approach—so long as the participation is both inclusive and effective.

In the *Glaciers* case, the court relied on what it described as the “New Environment Justice Jurisprudence”—an echo of what this Article terms Ecological Jurisprudence—and in both the *Glaciers* and the *Ganges and Yamuna* cases the court utilized the principle of *parens patriae* to justify its intervention, claiming, especially in the *Glaciers* case, that these principles created an obligation for the court to take proactive steps to protect the environment from the serious risk posed by pollution and climate change.<sup>217</sup> The *parens patriae* jurisdiction is grounded in the common law concept of the royal prerogative, and includes “the right or responsibility to take care of persons who are legally unable . . . to take proper care of themselves and their property.”<sup>218</sup>

Drawing on the principle of *parens patriae*, and Articles 48-A and 51A(g) of the Constitution of India,<sup>219</sup> the court appointed the Director of the NAMAMI Gange Project,<sup>220</sup> the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand as “*persons in loco parentis* as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries,”<sup>221</sup> and held, “[t]hese Officers are bound to uphold the status of Rivers Ganges and Yamuna and also to promote the health and well being of these rivers.”<sup>222</sup> Similarly, in the *Glaciers* case, the court ordered the Chief Secretary of the State of Uttarakhand, together with a range of legal advisors, academics, and judges to act as “the *persons in loco parentis* as the human face to protect, conserve and preserve all the *Glaciers* including” “forests[,] wetlands, grasslands, springs and waterfalls in the State of Uttarakhand.”<sup>223</sup>

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215. Kothari & Bajpai, *supra* note 212, at 108.

216. *Id.*

217. *Ganges and Yamuna case* at para. 19; *Glaciers case* at 42 (noting that “[t]he Courts are duty bound to protect the environmental ecology under the ‘New Environment Justice Jurisprudence’ and also under the principles of *parens patriae*”).

218. *Glaciers case* at 45.

219. See *Ganges and Yamuna case* at para. 18.

220. The National Mission for Clean Ganga (NMCG) is also known as the NAMAMI Gange project. See *Namami Gange Programme*, NAT’L MISSION FOR CLEAN GANGA, <https://nmcg.nic.in/NamamiGanga.aspx> (last visited Feb. 16, 2019).

221. *Ganges and Yamuna case* at para. 19.

222. *Id.*

223. *Glaciers case* at 64–65.

While the court's use of *parens patriae* to protect the environment sits comfortably within an existing tradition of the Indian judiciary taking a proactive approach in this area,<sup>224</sup> the specific orders do impose a significant burden on the state government officials who were expected to take care of the rivers (and their surrounding natural environment) and be held accountable for their maintenance and preservation. In contrast to the office of Te Pou Tupua, which was carefully created to represent the Whanganui River discussed in Part II, responsibility for the Ganges and Yamuna was not sought by the state government of Uttarakhand, and no additional funding has been made available for it to carry it out. As such, it is not surprising that the state government appealed the Ganges and Yamuna case to the Supreme Court of India.<sup>225</sup>

As a result of this appeal, the Supreme Court stayed the High Court of Uttarakhand's orders in the Ganges and Yamuna case in July 2017.<sup>226</sup> The initial orders, that the state officials are "bound to uphold the status of these bodies and also to promote their health and well being,"<sup>227</sup> imposed a fairly nebulous responsibility on the state government. Even if the Supreme Court ultimately upholds the High Court's orders, there may be ongoing enforcement challenges unless the requirements of the allocated responsibilities are further clarified.<sup>228</sup> While the recognition of legal personhood for the Ganges and Yamuna Rivers by the High Court of Uttarakhand was significant, the subsequent legal challenges and incomplete delegation of responsibility demonstrate the practical difficulties of implementing such dramatic legal changes.

#### V. COLORADO RIVER, UNITED STATES

While the concept of the river as legal person has been (more or less) successfully adapted in Ecuador, New Zealand, Colombia, and India, a recent case in the United States illustrates the practical and legal difficulties faced by groups striving to navigate the thresholds of river personhood. These difficulties reflect not only how well-entrenched doctrine can relegate arguments of legal personhood to the periphery, but they also speak to a river so subsumed to human needs that its very personality as a river becomes moot.

In November 2017, Will Falk, environmentalist, blogger, and one of several proposed *next friends* (or *amicus curiae*) of the Colorado River, spoke to supporters on the steps of a Denver federal courthouse. Falk had learned that the hearing date of their historic first-in-the-nation lawsuit—seeking legal

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224. O'Donnell, *supra* note 194, at 139 (citing Lavanya Rajamani, *India and Climate Change: What India Wants, Needs, and Needs to Do*, 8 INDIA REV. 340, 364 (2009)).

225. See *Supreme Court Stays Uttarakhand HC Order Declaring Ganga, Yamuna a 'Living Entity'*, OUTLOOK (July 7, 2017), <https://www.outlookindia.com/website/story/supreme-court-stays-uttarakhand-hc-order-declaring-ganga-yamuna-a-living-entity/299507>.

226. See *id.*

227. *Glaciers case* at 65.

228. See, e.g., O'Donnell, *supra* note 194, at 141; Kothari & Bajpai, *supra* note 212, at 105–06.



personhood for the Colorado River—had been postponed again. Initiated in September of that year, the action sought a declaration “that the Colorado River is capable of possessing rights similar to a ‘person,’” and that the river therefore had “certain rights to exist, flourish, regenerate, and naturally evolve.”<sup>229</sup> Disappointed, Falk vented, describing the past several weeks he had been “traveling with the Colorado River,” and the conversations he had shared:

For going on four weeks now, I’ve pestered her [the river] with two questions. Who are you? And, what do you need? . . . I recounted the violence I witnessed in La Poudre Pass where the Grand Ditch lies in wait to steal the Colorado River’s water moments after the union of snowpack, sunshine, and gravity gives her birth. I reported the energy expended pumping the river’s water uphill from Lake Granby reservoir to Shadow Mountain reservoir and then into Grand Lake before the Alva B. Adams tunnel drags the water 13 miles across the Continental Divide and beneath Rocky Mountain National Park to meet Front Range demands. I described the view from Palisade, CO where peaches are grown in the middle of the desert and criss-crossing canals, seen from the mountains, appear as vast, mechanical tattoos sewn into the flesh of the land.<sup>230</sup>

Falk had been listening to the Colorado’s lament: a song he realized with a sudden perspicacity was no longer the song of a living river, but tragically, that of a “ghost.”<sup>231</sup> Famous for its over-exploitation, diversions, and nation-building dams, such as Lake Mead, the Colorado had (in Falk’s words) morphed into “an industrial project, as a series of tunnels, concrete channels, and canals[.]”<sup>232</sup> Falk raged—how could he hear the song of a ghost?

The Colorado River is an icon of the American West, passing through seven states, supplying water to around forty million people in boom cities such as Phoenix, Tucson, Las Vegas, and Los Angeles, and fructifying millions of acres of irrigated and industrialized farmland in what is otherwise arid lands.<sup>233</sup> Over millions of years, the Colorado had carved out the Grand Canyon.<sup>234</sup> It is a powerful symbol, a folkloric setting for western can-do-ism—the likes of John Wesley Powell’s epic river rafting voyage of the late 1860s.<sup>235</sup> As the *New York*

229. Bob Unruh, ‘Personhood’ Demanded for Colorado River, WND (Sept. 27, 2017), <http://www.wnd.com/2017/09/personhood-demanded-for-colorado-river/>.

230. Falk, *supra* note 33.

231. *See id.*

232. The river had become “another tortured corpse stretched across civilization’s rack.” *Id.*

233. The farmlands have been described as “monocultures scalped of even the scantiest cover and lacking any vestiges of fencerow vegetation[.]” ALDO LEOPOLD’S SOUTHWEST 238 (David E. Brown & Neil B. Carmony eds., 1990).

234. *Geology*, U.S. NAT’L PARK SERV. (Apr. 27, 2018), <https://www.nps.gov/grca/learn/nature/grca-geology.htm>.

235. *See, e.g.*, WALLACE STEGNER, BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST (1992) (describing Powell’s adventures, including such voyage).

*Times* observed at the launch of the legal personhood litigation, “[the Colorado River] is as famous for its power and beauty as it is for overuse.”<sup>236</sup>

The Colorado’s agricultural and urban overuse is best measured by how the river ends. Fed by winter snowfalls in the Rocky Mountains,<sup>237</sup> the river once met the ocean at its delta-head on the Gulf of California.<sup>238</sup> In the 1920s, pioneering conservationist Aldo Leopold shared a canoeing expedition in the Colorado Delta with his brother Carl.<sup>239</sup> As captured by his biographer Curt Meine:

There followed ten days of immersion into the delta wilds. . . . Gliding their canoe over the green lagoons, Aldo and Carl noted, above all, the unexpected abundance of the fertile delta. . . . Leopold wrote, from a perspective of two decades, that, “we all reveled in a common abundance and in each other’s well-being. I cannot recall feeling, in a settled country, a like sensitivity to the mood of the land.”<sup>240</sup>

Less than a century later, indeed within two decades of Leopold’s visit, the Colorado Delta was no more, its waters having been “dammed, diverted, used and reused[.]”<sup>241</sup> The river’s diminished and saline flow “now never reach[es] the Gulf of California, but die[s] in the sands miles from the sea[.]”<sup>242</sup>

The death of the river in nondescript “sands miles from the sea,” and as witnessed by the failure of existing U.S. environmental laws, epitomized to Deep Green Resistance, a so-called radical environmental group, the need to take drastic action.<sup>243</sup> Joined by five named individuals (including Will Falk),<sup>244</sup> Deep Green Resistance commenced litigation in the name of the *Colorado River Ecosystem* in September 2017. Filed in the U.S. District Court in Denver,

236. Julie Turkewitz, *Corporations Have Rights. Why Shouldn’t Rivers?*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/us/does-the-colorado-river-have-rights-a-lawsuit-seeks-to-declare-it-a-person.html>.

237. “Scientists expect that increased temperatures brought on by climate change will cause it to shrink further, leaving many people anxious about its future.” *Id.*

238. See Sandra Postel, *A Sacred Reunion: The Colorado River Returns to the Sea*, NAT’L GEOGRAPHIC (May 19, 2014), <https://blog.nationalgeographic.org/2014/05/19/a-sacred-reunion-the-colorado-river-returns-to-the-sea/> (discussing recent Mexican-United States efforts to reunite river and sea through the use of pulse flows).

239. CURT MEINE, ALDO LEOPOLD: HIS LIFE AND WORK 207–08 (2010).

240. *Id.* at 208.

241. Wallace Stegner, *The American West as Living Space*, in WALLACE STEGNER’S WEST 92 (Page Stegner ed., 2008).

242. *Id.*

243. See *id.*; *About Deep Green Resistance*, DEEP GREEN RESISTANCE, <https://deepgreenresistance.org/en/who-we-are/about-deep-green-resistance> (last visited Feb. 19, 2019). See generally César Cuauhtémoc García Hernández, *Radical Environmentalism: The New Civil Disobedience?*, 6 SEATTLE J. SOC. SCI. 289, 291 (explaining that mainstream environmental actions “are not sufficient for many environmentally conscious individuals,” leading to demands for “drastic action”).

244. Deanna Meyer of Sedalia, Colorado; Jennifer Murnan of Longmont, Colorado; Fred Gibson of Colorado Springs, Colorado; Susan Hyatt of Moab, Utah; and Will Falk of Heber City, Utah. See Amended Complaint for Declaratory Relief at 10, *Deep Green Resistance v. Colorado*, No. 1:17-cv-02316-NYW (D. Colo. Nov. 6, 2017), <https://www.documentcloud.org/documents/4254483-Colorado-River-Ecosystem-v-Colorado-11-7-17.html#document/p1/a391117> [hereinafter Amended Complaint].

Colorado, the pleadings cited precedent from Ecuador, Colombia, and New Zealand, and the analogous recognition of corporate personhood, to claim that the state of Colorado had violated the river's right to flourish by polluting and draining it and threatening endangered species.<sup>245</sup> The litigation sought confirmation of the river's several *amicus curiae* statuses, and the designation of the Ecosystem as a juridical person, capable of possessing rights, and securing those rights through their enforcement and defense.<sup>246</sup>

While the amended complaint conceded the arbitrariness of defining something as amorphous as the Colorado River Ecosystem, it offered up the following:

the Colorado River Ecosystem is best understood as a complex collection of relationships. These relationships are nearly infinite. The most fundamental include the attraction between hydrogen and oxygen; the liquid, ice, and gas that water and heat create together; the irresistible paths fashioned by the interplay of mountain and gravity; and the climate born from the intercourse of the Sun's energy and Earth's atmospheric gasses. If we begin with water, we see—high in the sky—water dancing as vapor on wind currents. When the dance brings enough water together, clouds form. As clouds pass over the high Colorado Rockies, water freezes and falls as snow. Over the course of Winter, clouds contribute their stores of water and snowpack builds. In Spring, snowmelt forms creeks and streams who are guided by mountains through canyons and valleys. Rare summer rains do what they can to join the snowmelt.<sup>247</sup>

The pleadings then lyrically referred to the river's "springs," "gravity," "stone faces," "tree roots," "red rock," "deserts," and moving "waters" as comprising part of the geographically unbounded plaintiff-entity.<sup>248</sup>

The proceedings were resisted vigorously by the state of Colorado, the named defendant. Ultimately, this first-in-the-nation action fizzled. The plaintiffs' complaint was dismissed one month after Will Falk's speech on the steps of the Denver courthouse, the Colorado River Ecosystem's lawyer folding under the threat of a personal costs' sanction brought by the state's Attorney General for prosecuting a vexatious complaint.<sup>249</sup> Unlike precedents set in South

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245. Turkewitz, *supra* note 236.

246. See Amended Complaint, *supra* note 244, at 32–33.

247. *Id.* at 5–6. See also Unruh, *supra* note 229 (citing the original complaint); Colorado River Complaint, *supra* note 6, at 3–4.

248. See Amended Complaint, *supra* note 244, at 6.

249. See Order, Deep Green Resistance v. Colorado, No. 1:17-cv-02316-NYW (D. Colo. Dec. 4, 2017), ECF No. 25, <https://www.documentcloud.org/documents/4321289-Judge-Wang-s-Order-to-Dismiss-Colorado-Suit.html#document/p1/a391426>; Unopposed Motion to Dismiss Amended Complaint with Prejudice, Deep Green Resistance v. Colorado, No. 1:17-cv-02316-NYW (D. Colo. Dec. 3, 2017), <https://www.documentcloud.org/documents/4321089-DGR-Motion-to-Dismiss-Own-Case.html#document/p1/a391422>; Will Falk, *Time to Escalate?: First-Ever Rights of Nature Lawsuit Dismissed*, WILL FALK BLOG (Dec. 14, 2017), <http://willfalk.org/time-to-escalate-first-ever-rights-of-nature-lawsuit-dismissed/>.

America, New Zealand, or India, not only did the plaintiff fail at first base, but it also faced potential recriminations for the temerity of filing suit.

The present failure of legal personhood to gain foothold in the United States is perhaps unsurprising for various countervailing reasons. First, several states within the United States have adopted a rich public trust doctrine jurisprudence and its putative protection of environmental resources, including water resources, as exemplified in cases such as *Mono Lake*.<sup>250</sup> Indeed, personhood is seen by some as a pale version of the public trust, a nascent doctrine that may work best where it “mirror[s] public trust law as needed.”<sup>251</sup> The second reason, in the West at least, is the prior appropriation doctrine and the claim that it is sufficiently “flexible” to safeguard environmental concerns.<sup>252</sup> This is because all upstream diversions of scarce water resources must meet well-entrenched beneficial use tests.<sup>253</sup> Thus, Emilie Blake argues that “[w]hen compared to rights of personhood, water management through prior appropriation might be the *better option* because of the uncertainty a new doctrine brings,”<sup>254</sup> and the “slew of unanswered questions” particularly around the definition of “injury” to a river that it opens up.<sup>255</sup> Moreover, the possible erasure of prior appropriator rights would mean that “existing property rights could vanish into thin air.”<sup>256</sup> The third reason is a 1998 decision of the U.S. Supreme Court affirming that Indian tribes enjoy equal standing with states on water quality issues under the Clean Water Act;<sup>257</sup> a decision that forestalled the imperative to resort to personhood claims to protect rivers passing through tribal lands.

Ultimately, invoking the song of the Colorado River equated to nothing more than a tuneless tale of vexatious litigation, a song gone wrong. Unlike the soaring chorus of *Te Awa Tupua* in New Zealand, the constitutional protections of Ecuador or Colombia, or the hopeful pronouncements of Indian state High Court judges, the song of the Colorado could not be heard above the interlocutory

250. See *National Audubon Society v. Superior Court*, 658 P.2d 709, 712–13 (1983). In *Mono Lake*, the California Supreme Court, recognizing the public trust interest in the water, reversed the long-standing diversion of freshwater to the Los Angeles Aqueduct, which had implications for water levels, salinity, and water quality in the lake. *Id.* at 711. *Mono Lake* is said to have “spawned a quiet legal revolution in public trust ideals” for both environmental flows of water, and more generally, the protection of environmental resources. Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of National Audubon Society v. Superior Court*, 45 ENVTL. L. 561, 561 (2015).

251. Emilie Blake, Note, *Are Water Body Personhood Rights the Future of Water Management in the United States?*, 47 TEX. ENVTL. L.J. 197, 205 (2017).

252. See A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 777 (2001) (noting that “prior appropriation can function as a flexible doctrine that allows the creation of new rights and allows courts to temper its harsh edges to facilitate new uses in situations where priority does not work well”).

253. See *id.* at 770.

254. Blake, *supra* note 251, at 203 (emphasis added).

255. *Id.* at 214.

256. *Id.* at 203.

257. See Jason Lenderman, *A Tiny Tribe Wins Big on Clean Water*, HIGH COUNTRY NEWS (Feb. 2, 1998), <https://www.hcn.org/issues/123/3922>.

chatter. Perhaps, as others have described, the Colorado is a river no more,<sup>258</sup> a ghost forever haunting the sands of its waterless delta, a network of canals and concrete tunnels incapable of song.

## VI. YARRA RIVER, AUSTRALIA

Inspired by legal developments across the Tasman Sea in New Zealand, Australian jurisdictions are taking tentative steps to recognize the legal personhood of rivers.<sup>259</sup> One pertinent example is the recently enacted Yarra River Protection (Wilip-gin Birrarung murrong) Act 2017 (Vic.) (the Yarra Act) in the state of Victoria, which recognizes the Yarra River as “one living and integrated natural entity.”<sup>260</sup> This case invokes elements of the other successful river cases, demonstrating a localized expression of Ecological Jurisprudence that allows people-place relationships to guide the development of protective statute.

The Yarra River begins its journey at its source in the Central Highlands of the Great Dividing Range, in southeastern Australia.<sup>261</sup> From there, it flows over 240 kilometers through a protected water catchment, farmlands, suburbs, inner city Melbourne, and the industrial Port of Melbourne, before entering Port Phillip Bay.<sup>262</sup> Like the Colorado River, the Yarra River has morphed over time, reflecting contested cultural meanings. The river was first and is still known to *Wurundjeri (Woi-wurrung)* Traditional Owners<sup>263</sup> by the name *Birrarung*, taking on the physical and metaphysical forms of a river and *songline*: a single entity and pathway in which stories, songs, and law are emplaced, through the creative journeys of ancestral beings.<sup>264</sup> Early European colonization saw the river taking on a different meaning. It became the Yarra River, a reliable source of freshwater for settlement, agriculture, and industry, supporting a settler-

258. See, e.g., PHILIP L. FRADKIN, *A RIVER NO MORE: THE COLORADO RIVER AND THE WEST* (1981).

259. There are campaigns to recognize the legal rights of several rivers, including the Fitzroy River (Mardoowarra), Murray River, and Margaret River, however, these efforts have not yet been translated into such legal protection. See Jane Gleeson-White, *It's Only Natural: The Push to Give Rivers, Mountains and Forests Legal Rights*, *GUARDIAN* (Mar. 31, 2018), <https://www.theguardian.com/australia-news/2018/apr/01/its-only-natural-the-push-to-give-rivers-mountains-and-forests-legal-rights>.

260. *Yarra River Protection (Wilip-gin Birrarung murrong) Act 2017* (Vic) s 1(a) (Austl.).

261. See *Melbourne's Yarra River—A Lifetime of Change*, COOL AUSTRALIA, <https://www.coolaustralia.org/part-1-melbournes-yarra-river-a-lifetime-of-change-primary/> (last visited Feb. 19, 2019).

262. See *id.*; VICTORIA STATE GOVERNMENT, *PROTECTING THE YARRA RIVER (BIRRARUNG): DISCUSSION PAPER 16–17* (2016), [https://www.planning.vic.gov.au/\\_\\_data/assets/pdf\\_file/0034/99763/DELWP0032\\_YarraRiverProtection\\_v22\\_web\\_lowres.pdf](https://www.planning.vic.gov.au/__data/assets/pdf_file/0034/99763/DELWP0032_YarraRiverProtection_v22_web_lowres.pdf) [hereinafter YARRA PAPER].

263. The Wurundjeri-balluk and Wurundjeri-willam are First Peoples clans of the Woi-wurrung, whose ancestral estates (Country) encompass the Birrarung. *Woi-wurrung* refers both to the land and language spoken by these and two other clans in the Port Phillip region of Victoria, who are part of the larger Kulin Nation confederacy. See YARRA PAPER, *supra* note 262, at 8, 12, 58.

264. See, e.g., MAYA WARD, *COMFORT OF WATER 22* (2011) (describing a Woi-wurrung story about how the Birrarung was formed).

colonial village and later the metropolis of Melbourne.<sup>265</sup> As with rivers across the industrialized world, the Yarra morphed into a sewer and drain for industrial waste, and in recent times, into a place of recreation and refuge within a growing city.<sup>266</sup> The development of the Yarra Act, like the Ganges and Yamuna cases and the Whanganui case, marks an ontological turn: it demonstrates the morphing of the river back into a “living being,” Birrarung, yet in this instance, one without legal rights. As expressed by Wurundjeri Elder Aunty Alice Kolasa, “[t]he state now recognises something that we, as the First People, have always known[:] that the Birrarung is one integrated living entity.”<sup>267</sup>

Co-named in both English and Woi-wurrung languages, the Woi-wurrung name for the Act, *Wilip-gin Birrarung murrong*, means “keep the [Birrarung or] Yarra alive.”<sup>268</sup> While its focus is the protection of the Yarra River/Birrarung<sup>269</sup> as a single living and integrated natural entity, it stops short of recognizing the river as a legal subject, and as such, does not afford the river the rights, power, duties, and liabilities of a legal person as does the Te Awa Tupua (Whanganui Claims Settlement) Act 2017 (N.Z.).<sup>270</sup> Instead, the objects and purposes of the Yarra Act recognize the intrinsic, ecological, “cultural, social, environmental and amenity values of the Yarra River and the landscape in which the Yarra River is situated[.]”<sup>271</sup> This legislative move, although not resulting in legal status for the river, marks an important shift from an anthropocentric towards an ecocentric approach to river governance, and an ontological shift in how settler society identifies the river. Recognizing rivers as “living beings” in Australia is significant, given a deep-rooted epistemological and ontological blindness to First Peoples’ realities, initiated and perpetuated since early colonization. In contrast to the New Zealand case discussed in Part II, where biculturalism is well established, settler institutions in Australia have been slow to acknowledge First Peoples’ languages, cultures, and laws, and reflect Indigenous legal principles in law, policy, and practice.

Atomization of rivers into segmented waterways with banks, riverbeds, and aquatic species of flora and fauna, and water allocations may reflect biophysical, geomorphological, and economic understandings of rivers, but it has also led to fragmented management approaches and governance arrangements, as

265. See YARRA PAPER, *supra* note 262, at 9–11.

266. See *id.*

267. Aunty Alice Kolasa, Wurundjeri Elder, Address at the Parliament of Victoria (June 22, 2017), [https://www.wurundjeri.com.au/wp-content/uploads/pdf/Wurundjeri\\_parliamentary\\_speech\\_download\\_a.pdf](https://www.wurundjeri.com.au/wp-content/uploads/pdf/Wurundjeri_parliamentary_speech_download_a.pdf).

268. Katie O’Bryan, *New Law Finally Gives Voice to the Yarra River’s Traditional Owners*, CONVERSATION (Sept. 25, 2017), <http://theconversation.com/new-law-finally-gives-voice-to-the-yarra-rivers-traditional-owners-83307>.

269. Both names for the river—the Yarra and Birrarung—are presented to reflect the co-naming of the Yarra Act and co-identification of the river in both Woi-wurrung and English languages.

270. *Yarra River Protection (Wilip-gin Birrarung murrong) Act 2017* (Vic) s 14(1) (Austl.).

271. *Id.* s 5(a)(i).

stunningly demonstrated in the Murray-Darling Basin.<sup>272</sup> Up until this most recent legislation, the Yarra River/Birrarung has been perceived, to varying degrees, as a water body separate from the land in which the river is emplaced.<sup>273</sup> The Act responds to past fragmentation in three key ways. Firstly, it adopts an integrated landscape approach, identifying the river as “one living and integrated natural entity,”<sup>274</sup> which includes not only the river itself but the surrounding watershed.<sup>275</sup> With the legislation having only recently come into effect in December 2017, important governance and management (and essentially ontological) questions remain about what it will mean for the State, responsible public entities,<sup>276</sup> and communities (Indigenous and non-Indigenous) to recognize the river as a single entity.

Secondly, the Yarra Act introduces overarching Yarra Protection Principles<sup>277</sup> that guide the governance and management of the river by the many responsible public entities. These principles closely reflect community values in relation to the river, signalling that the Act has been co-created with input from both legislators and communities along the river. While responsible public entities “must have regard” to these principles when performing their “functions or duties or exercising powers in relation to Yarra River land,”<sup>278</sup> it is yet unknown both how these principles will become operational and the strength of the clause in relation to the protection principles.

Thirdly, the Yarra Act provides for “the declaration of an area of land as a state significant urban natural entity to be known as the Greater Yarra Urban Parklands,”<sup>279</sup> which in effect, re-replaces the Yarra River/Birrarung into its surrounding landscape. The Act applies to the waterway, riverbed, soil, banks, and surrounding land.<sup>280</sup> While the river is allowed to escape its banks, it is still

272. See AUSTL. HUMAN RIGHTS COMM’N, 2008 NATIVE TITLE REPORT 269–99 (2009) (analyzing such fragmentation and its impact on First Peoples’ management practices).

273. See generally YARRA PAPER, *supra* note 262, at v (describing the evolving attitudes to the uses of the Yarra River throughout Melbourne’s and the larger region’s history).

274. *Yarra River Protection Act* s 1(a).

275. See *id.*

276. The Act identifies a number of responsible public entities that play a role in the management of the river, including: Melbourne Water Corporation; Parks Victoria; Victorian Planning Authority; Port Phillip and Westernport Catchment Management Authority; Roads Corporation; Victorian Rail Track; eight municipal councils (inner city, urban, and rural); committee of management or trustees under the Crown Land (Reserves) Act 1978 in relation to any Yarra River land; and, any Traditional Owner Land Management Board established under Part 8A of the Conservation, Forests and Lands Act 1987. See *id.* s 3.

277. The six sets of protection principles are comprised of: general principles, environmental principles, social principles, recreational principles, cultural principles, and management principles. See *id.* ss 7–13.

278. *Id.* s 1(d).

279. *Id.* s 1(e).

280. Land that is eligible to be declared “Yarra River Land” by the Governor in Council includes land that is adjacent to the Yarra River, or any part of which is within 500 meters of a bank of the Yarra River. *Id.* s 14(3)(a). The Yarra River Strategic Plan can also be applied to land that is “located more than one kilometre from a bank of the Yarra River[.]” See *id.* s 15(3).

bounded by metric definition and atomized by the Yarra Act and not solely for the purpose of defining what the river “is.” Close examination of excised spaces—exclusions to what can be deemed “Yarra River Land” and to what the Act applies<sup>281</sup>—leads to questions about the “dark spaces,” as Roger Cailliois calls them,<sup>282</sup> within the Act. What becomes apparent are development zones (existing and future), and an ongoing politics of place in the face of recognizing the Yarra River as Birrarung, “one living and integrated natural entity.”<sup>283</sup> Perhaps most stunning in their exclusion from the reach of the Act, are the source of the river and the river mouth,<sup>284</sup> proving that atomization is difficult to overcome.

The Act establishes the Birrarung Council,<sup>285</sup> a new independent statutory body with the capacity to advise the responsible minister and advocate for the protection and preservation of the Yarra River/Birrarung.<sup>286</sup> While government media statements make liberal reference to the Birrarung Council representing a “voice for the river,”<sup>287</sup> there are questions over the type of authority vested in such voice, as the Council remains without legal authority or guardianship. Regardless of such tensions, the Council may gain authority elsewhere, in particular through community expectations of its function and mandate to speak for the River, even if its powers are not legislated.

In June 2017, at the Second Reading of the Yarra River Protection (Wilipgin Birrarung murrong) Bill, Wurundjeri Elder Aunty Alice Kolasa was the first Wurundjeri person to speak from the floor of the Victorian Parliament as a local Traditional Owner.<sup>288</sup> Kolasa, part of a delegation of Wurundjeri Elders, spoke about the importance of the Birrarung Council and the recognition of the Wurundjeri as Traditional Owners and custodians:

When passed, this Bill will guarantee that the Birrarung will be protected by law and benefit from the custodianship of a body known as the Birrarung Council. As the First Nations people, our place in this new governance structure is also enshrined into law.<sup>289</sup>

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281. The Act does not apply to land that is privately owned, land that is owned by a municipal council, land that falls within the Port of Melbourne (within the meaning of the Port Management Act 1995), nor to “any land within a special water supply catchment area listed in Schedule 5 to the Catchment and Land Protection Act 1994.” *See id.* ss 3(1)(a)–(b), 14(3)(c)(i)–(iii).

282. PAUL CARTER, *DARK WRITING: GEOGRAPHY, PERFORMANCE, DESIGN* 256 n.10 (2009).

283. *Yarra River Protection Act* s 1(a).

284. Situated in a special water supply catchment area and the Port of Melbourne respectively. *See generally* YARRA PAPER, *supra* note 262, at 9, 16–17.

285. The Birrarung Council is comprised of representatives from the Wurundjeri Tribe Land and Compensation Cultural Heritage Council, environment groups, agriculture industry groups, local community groups, and skills/expertise-based members. *See Yarra River Protection Act* s 49.

286. *Id.* s 48.

287. THE HON. RICHARD WYNNE MP, *LANDMARK LEGISLATION TO PROTECT THE YARRA RIVER* (June 22, 2017), <https://www.premier.vic.gov.au/wp-content/uploads/2017/06/170622-Landmark-Legislation-To-Protect-The-Yarra-River.pdf>.

288. *Kolasa, supra* note 267.

289. *Id.*



For now, it is yet to be seen if the recognition of Traditional Owners—through their own organizations and the Birrarung Council—as custodians of and a voice for the Birrarung goes beyond symbolism.

Cultural anthropologist Veronica Strang maintains that human-river relationships are a “perfect example of a recursive relationship in which nature and culture literally flow into each other.”<sup>290</sup> Stories, values, and visions, shared by Traditional Owners and communities along the Yarra River/Birrarung during the drafting of the bill, flow like tributaries into the Yarra Act, and perform therein, as the Yarra Protective Principles.<sup>291</sup>

For the people who live with the Yarra River/Birrarung, their relationships are bound in story, as Wurundjeri Traditional Owner Brooke Wandin shares, “from here [Warburton] to Melbourne, everybody would have a story about the Yarra. People connect with the Yarra and they have a connection with that body of life. Whether people realise it or not, we are all connected through that river.”<sup>292</sup> Relationships between Birrarung-people-Country<sup>293</sup> come to life in the preamble to the Act through the invocation of Woi-wurrung language, culture, and story, which describes the Woi-wurrung’s creation story and the Birrarung as “alive, has a heart, a spirit and is part of our Dreaming.”<sup>294</sup>

As a story with normative capacity, this preamble reveals Birrarung as an entity with agency, and tells of the important associations and responsibilities that exist and are performed between (and as) Birrarung-people-Country. As such, Birrarung is defined not as an individual, but rather as a relational entity, bound into reciprocal relationships. For people who are unfamiliar with Birrarung, this story makes the unseen visible. How this story might resonate across legal orders in the long term, particularly for the State, is yet to be demonstrated. However, it has already, in this initial phase, inspired new relationships and governance approaches towards the Yarra River/Birrarung that are based on relational understandings.

Translation of community stories, values, and visions for the river into the Act as protective principles, and the explicit inclusion of the Birrarung story in the preamble, appear to be only the first steps in capturing the stories and songs of river-people-Country. The Act provides for the creation of a co-designed, long-term, fifty-year community vision for the river that “identifies . . . the

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290. VERONICA STRANG, *THE MEANING OF WATER* 5 (2004).

291. See *supra* note 277 and accompanying text.

292. Interview with Brooke Wandin, Wurundjeri Traditional Custodian, in Warburton, Victoria (Oct. 12, 2017).

293. “Country” is a place-based, multi-dimensional entity that exists for Indigenous Australians, with which a person can experience reciprocity, and which they have a responsibility to maintain and enliven. See, e.g., DEBORAH BIRD ROSE, *NOURISHING TERRAINS: AUSTRALIAN ABORIGINAL VIEWS OF LANDSCAPE AND WILDERNESS* 7–8, 41 (1996). According to Pelizzon and Kennedy, the physical and spiritual recognition of Country acknowledges “relatedness, reciprocal duties and responsibilities, and specific authority.” Alessandro Pelizzon & Jade Kennedy, *Welcome to Country: Legal Meanings and Cultural Implications*, 16 *AUSTL. INDIGENOUS L. REV.* 58, 64 (2012).

294. *Yarra River Protection (Wilip-gin Birrarung murrnong) Act 2017* (Vic) pmb. (Austl.).

unique characteristics of Yarra River land; and community values, priorities and preferences in relation to that land or specific areas or segments of that land, including preferences for future land uses, protection and development of that land.”<sup>295</sup> This vision will inform the development of a Yarra Strategic Plan that will further articulate the definition of the Yarra River/Birrarung and the Yarra Protection Principles and in doing so, “guide the future use and development of the Yarra Strategic Plan area; and, identify areas for protection within the Yarra Strategic Plan area.”<sup>296</sup> By mandating active community participation and co-design processes in the development of the vision and facilitating ongoing engagement in the protection of the river,<sup>297</sup> the Act sings a song of perpetual co-creation. People-river narratives continue to emerge through the work of a Yarra River Community Assembly,<sup>298</sup> and the Imagine the Yarra community storytelling project.<sup>299</sup> Such mandates include an explicit recognition of the importance of storytelling in the governance of the river, raising questions about community expectations, and ownership in relation to the protection of the river.

The Yarra Act sings a song of relationality and inter-subjectivity. It values people’s stories and places them at the heart of the Act. While it may not (yet) sing a song that recognizes the legal personhood of the Yarra River/Birrarung, it intones the river as more than either a biophysical or cultural entity. Stories become powerful legal actors that make visible relationships and dimensions of Birrarung that hold the potential for deeper ontological shifts.

## VII. REFLECTIONS

The sense of environmental urgency that acts as the backdrop for these river stories discussed in Parts I–VI is undeniable. The fifth *Intergovernmental Panel on Climate Change Report*, published in 2014,<sup>300</sup> uncontroversially identifies the impact of human activities—in particular, although not exclusively, industrial—on current climatic changes. The relationship between the cultural constructs that

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295. *Id.* s 17(2)(a)–(b).

296. *Id.* s 16(a)–(b). The Yarra Strategic Plan, once it has been developed, will articulate the sections of the Plan that will be binding on responsible public entities. *See id.* s 20(2)(h).

297. *See id.* s 17(3). The Act stipulates the ongoing engagement of communities in the protection of the Yarra River/Birrarung. Under section 10(2), “Social principles,” the Act specifies that “[c]ommunity consultation and participation should play an essential and effective role in the protection, improvement and promotion of Yarra River land.” Also, under section 12(2), “Cultural principles,” the Act acknowledges the custodian role of traditional owners and the need for their involvement in policy planning and decision making, through partnerships and representation.

298. This Assembly is comprised of twenty-four citizens who will write a fifty-year vision for the future of the Yarra River. *See Yarra River Community Assembly*, IMAGINE THE YARRA, <https://imaginetheyarra.com.au/yarra-river-community-assembly> (last accessed Feb. 13, 2018).

299. *See Progress Report for the Yarra Strategic Plan*, IMAGINE THE YARRA, <https://imaginetheyarra.com.au> (last accessed Feb. 13, 2018).

300. CLIMATE CHANGE 2014 SYNTHESIS REPORT, IPCC V, 4–5 (Rajendra K. Pachauri & Leo Meyer eds., 2014), <https://www.ipcc.ch/report/ar5/syr/>. The latest IPCC Report can be retrieved at <https://www.ipcc.ch/reports/> (last accessed Mar. 31, 2019).

underpin such industrial activities and the events that are caused by them has been discussed by numerous authors,<sup>301</sup> and, in the last few decades, has come to the forefront of many popular narratives.<sup>302</sup> The dystopian dictatorship of Gilead depicted in *The Handmaid's Tale*<sup>303</sup> is but one of the many dark reflections of the fears that grip our global society in the face of the unpredictable, and yet inevitable, social changes that will follow the environmental changes prevised by scientists. Donna Haraway has recently, and provocatively, described the current times as the *Chthulucene*<sup>304</sup> (an evolution of, rather than an opposition to the more common *Anthropocene*),<sup>305</sup> an interstitial and transitional phase, a “boundary event” that “marks severe discontinuities; what comes after,” Haraway writes, “will not be like what came before.”<sup>306</sup>

One of the most interesting reactions to this sense of environmental urgency has been, as this Article states at its beginning, the emergence of an Ecological Jurisprudence over the past two decades. Nature as a legal *subject* has been seen as a powerful legal narrative to counterbalance the fear of cultural and environmental collapse.<sup>307</sup> The question inevitably emerges as to why rivers appear to occupy such a special place within this narrative. These river songs, naturally, do not provide a complete overview of current ecological jurisprudential pursuits, not even in relation to rivers. In 2013, for example, Earthjustice, acting as legal counsel for Po‘ai Wai Ola/West Kaua‘i Watershed Alliance, petitioned the State of Hawai‘i Commission on Water Resource Management to increase flow standards for the Waimea River system.<sup>308</sup> The

301. See generally MARVIN HARRIS, *CANNIBALS AND KINGS* (1977); JOSEPH A. TAINTER, *THE COLLAPSE OF COMPLEX SOCIETIES* (1988); JARED DIAMOND, *GUNS, GERMS AND STEEL: THE FATES OF HUMAN SOCIETIES* (W. W. Norton & Co., 1st ed. 1997); JOHN BELLAMY FOSTER, *MARX'S ECOLOGY: MATERIALISM AND NATURE* (2000); JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* (2d ed. 2011).

302. See, e.g., *MAD MAX: FURY ROAD* (Kennedy Miller Mitchell 2015); JOHN CHRISTOPHER, *THE DEATH OF GRASS* (1956); HARRY HARRISON, *MAKE ROOM! MAKE ROOM!* (1966); JAMES BRADLEY, *CLADE* (2015).

303. See generally MARGARET ATWOOD, *THE HANDMAID'S TALE* (1985); *THE HANDMAID'S TALE* (Hulu 2017).

304. Haraway is explicit in morphing the original spelling to differentiate her concept from its apparent source, the cosmically horrific creature created by Howard P. Lovecraft at the beginning of the twentieth century. Donna Haraway, *Anthropocene, Capitalocene, Plantationocene, Chthulucene: Making Kin*, 6 *ENVTL HUMAN.* 159, 160 (2015).

305. As popularized by atmospheric chemist Paul Crutzen and biologist Eugene Stoermer in the early 2000s. See Paul J. Crutzen & Eugene F. Stoermer, *The “Anthropocene”*, *GLOB. CHANGE NEWSL.*, May 2000, at 17, 17–18 (arguing that Earth had recently crossed a threshold into a new epoch).

306. Haraway, *supra* note 304, at 160.

307. See, e.g., Alessandro Pelizzon, *Transitional Justice and Ecological Jurisprudence in the Midst of an Ever-Changing Climate*, in *CURRENT ISSUES IN TRANSITIONAL JUSTICE* 317, 321–22 (Natalia Szablewska & Sascha-Dominik Bachmann eds., 2015).

308. See Petition to Amend the Interim Instream Flow Standards for Waimea River and its Headwaters and Tributaries, and Complaint and Petition for Declaratory Order Against Waste (July 24, 2013), [https://www.slideshare.net/slideshow/embed\\_code/24630440?fbclid=IwAR0IEGFV0SHxwfkpM](https://www.slideshare.net/slideshow/embed_code/24630440?fbclid=IwAR0IEGFV0SHxwfkpM)

dispute was resolved in mediation when, in 2017, the Commission agreed to amend the current interim instream flow standards of the Waimea River.<sup>309</sup> Meanwhile, during the demonstrations at the Oceti Sakowin Camp against the proposed construction of an oil pipeline partly crossing under Lake Oahe, near the Standing Rock Indian Reservation in North Dakota, protesters adopted the slogan *Mni Wiconi*—meaning “water is life” in Lakota—to denote how the proposed development affected the most basic of human needs.<sup>310</sup> Examples such as these abound. However, the cases selected in this Article for discussion are arguably the most significant in terms of legal outcomes, allowing us to provide a relatively comprehensive comparative legal analysis, to focus on the a cappella chorus of distinct river voices flowing into a single comparative legal song.

Part VII reflects on this confluence, and the special place of rivers in this narrative. It begins, logically, at the source, with an exploration of two foundational questions: *who* is the river, and *who* speaks on its behalf? Such threshold notions—those of legal personhood and agency—require critical re-appraisal in the context of the profound ontological shifts this Article maps. Paradigm change, however, does not escape an obligation for the law to keep its house in order—to understand the nature and extent of a river’s rights, duties, and liabilities—the corollary of a river’s juristic personhood. The discussion then identifies the fertile sediments created by the convergence of distinct and distant legalities around these rivers, while also cautioning against the risks that under-theorization poses to divert (and subvert) the law’s flow. The relational nature of river and place, the murky bonds that emplace the river and us form the subject of this Part’s penultimate discussion, before it concludes with the significance of the metaphor of song, and the ways in which song connects the ethereal to the lived world. Indeed, Part VII is its own river-story, a journey from the juridical to the ethereal, one made clearer by the songs of comparison this Article explores.

#### *A. Who is the River? The Subjects and Objects of Legal Relations*

In common law orthodoxy, as exemplified by the jural analyses of Wesley Hohfeld,<sup>311</sup> natural features, such as rivers, are the objects of legal relations

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31eQ9rnoLC\_yi9Qmqz8rr\_5f8WWXWcO0str\_Fu1A4; Darin Moriki, *Earthjustice Files Waimea River Complaint*, GARDEN ISLAND (July 25, 2013), <https://www.thegardenisland.com/2013/07/25/hawaii-news/earthjustice-files-waimea-river-complaint/>.

309. Mediation Agreement for the Waimea Watershed Area (Apr. 18, 2017), [http://earthjustice.org/sites/default/files/files/20170418\\_Agreement-CWRM.pdf](http://earthjustice.org/sites/default/files/files/20170418_Agreement-CWRM.pdf).

310. See Cheryl Crazy Bull, *Woonspe—Education Gives Meaning to Mni Wiconi—Water is Life*, INDIAN COUNTRY TODAY (Sept. 22, 2016), <https://newsmaven.io/indiancountrytoday/archive/woonspe-education-gives-meaning-to-mni-wiconi-water-is-life-O6BHGj9MI0aaiojBRp2pTQ/>.

311. See generally Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 20–24 (1913) (discussing, in the property law context, the ambiguities inherent in legal versus non-legal conceptions).

between juristic persons. In the common law, a river is at best peripheral to the propertied equation, simply a thing capable of being exploited, even owned.<sup>312</sup> To make the river a legal *subject* is thus unthinkable in the traditional paradigm. Yet this perceived legal reality is perverse when we consider many of the river songs this Article has heard so far, the grounded stories of formal constitutional recognition, Indigenous worldviews, Hindu goddesses, or indeed, the occasionally implausible turn to narrative of the common law. These songs sing to the centrality of rivers, as entities far removed from the conceit of human object-ness. Yet, where the river's song could not be heard, as in the Colorado River case discussed in Part V, claims of legal personality were impugned as vexatious, a conclusion the law all too readily accepted as inevitable.<sup>313</sup>

In arguing the shift from *object* to *subject*, advocates for rivers sometimes draw on the powerful yet arguably superficial analogy of corporate personhood, a legal state of affairs where an abstraction metamorphizes into a robust subject capable of suing and being sued. As the Colorado case study shows, however, the analogy of the corporation is not always helpful.<sup>314</sup> Perhaps, more fundamentally, the analogy is inapt, in that it muddies the river's waters. After all, the corporation is both a human construct *and* a fictionalized human person. By contrast, rivers are natural features that exist independently of human construction and imagination.

Edward Mussawir and Connal Parsley submit that modern doctrine around legal personhood is “in thrall to a naturalized image of the human in whose service it curtails its own potential operations.”<sup>315</sup> Mussawir and Parsley seek inspiration, rather, in the “juridical art” of Roman jurisprudence, where the legal person was:

not simply an entity, a norm, a pre-existing individual, a subject that the law simply recognises—if not as a totality “in itself,” then at least with this or that condition or attribute which qualifies it or doubles it—but rather a distinct legal *operation* with a definite juristic function.<sup>316</sup>

Legal persons in Roman jurisprudence were thus untainted by notions of problematized human identity or self, but were in essence, cruder juridical outlines that often served “pragmatic transactional purpose[s].”<sup>317</sup> The authors give the example of an abandoned monastery, where the death of the last surviving members of the monastic order risked the building reverting to

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312. The *medium filum* rule, for instance, permits the ownership of riverbeds to the middle line of non-tidal streams. See *Survey Definition of Natural Boundaries*, NSW LAND REGISTRY SERVS., [http://rg-guidelines.nswlrs.com.au/deposited\\_plans/natural\\_boundaries/survey\\_definition](http://rg-guidelines.nswlrs.com.au/deposited_plans/natural_boundaries/survey_definition) (last accessed Jan. 21, 2019).

313. See *supra* pp. 135–36.

314. See generally *supra* notes 10 and 236 and accompanying text.

315. Mussawir & Parsley, *supra* note 42, at 46.

316. *Id.* at 47.

317. *Id.* at 48.

Rome.<sup>318</sup> Instead, canon lawyers constructed a non-human person based on the “very walls of the monastery,”<sup>319</sup> which enabled the building to pass to a new order, and avoided what common lawyers call a gap in seisin. By contrast, Mussawir and Parsley argue that modern legal decision makers prefer a mode of reasoning “that tends to naturalize the person . . . ahead of one that might hold instead to the jurisprudential register.”<sup>320</sup> By confusing and conflating the flesh and bones of a human with the abstract mask of the legal person, legal rigor seems to diminish.

While this debate may seem esoteric, in practice it has nitty-gritty consequences for rivers in their implementation of governance rules and schemes. Taking the “wrecking-ball” to the “strict juridical conception of the person” has deprived us of what Mussawir and Parsley call the “technical terrain” around legal persons.<sup>321</sup> This loss of “the full range of tools and techniques at hand for ‘working’ on the person”<sup>322</sup> represents not only a procedural impoverishment, but also a “deep crisis or lack of *faith* in the law itself and its power.”<sup>323</sup> In New Zealand, there is no apparent loss of faith in the law, or in its technical capabilities. There, legislation crafted a legal personhood for Te Awa Tupua that is a blend of the sacred and the prosaic, an ancestral entity faithful to Māori values, yet given a human face—not to confuse the legal person with its flesh and blood—but to present a recognizable façade capable of dealing with the pragmatic world of state agencies and private law.<sup>324</sup> In Ecuador, the Vilcabamba avoids the trap of the humanized legal person by being constitutionally divined as part of Nature, not a person.<sup>325</sup> In India, courts premised the moral duty to protect the Ganges and Yamuna on the basis of their divine status, as Hindu goddesses “sacred and revered . . . central to the existence of half of Indian population [sic] [.]”<sup>326</sup> Justice Sharma was expansive in the language he used, variously quoting other justices or describing the rivers as “juristic entit[ies],”<sup>327</sup> “juridical person[s],”<sup>328</sup> “juristic person,”<sup>329</sup> “legal

318. *Id.* at 62.

319. *Id.*

320. *Id.* at 56.

321. *Id.* at 61.

322. *Id.*

323. *Id.* (emphasis added).

324. *See supra* pp. 114–119.

325. *See supra* pp. 109–114.

326. *Ganges and Yamuna case* at paras. 11, 17. *See O’Donnell, supra* note 194, at 140.

327. *Ganges and Yamuna case* at para. 12 (noting “their Lordships of Hon. Supreme Court in ‘*Yogendra Nath Naskar v. Commission of Income-Tax, Calcutta*’ have held that a Hindu idol is a juristic entity capable of holding property and of being taxed through its Shebaites who are entrusted with the possession and management of its property”).

328. *Id.* at para. 13 (noting that “their Lordships of Hon. Apex Court” have “held that the deity/idol are the juridical person entitled to hold the property”).

329. *Id.* at n.14.

persons/living persons,”<sup>330</sup> and, “juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person[.]”<sup>331</sup>

Although the latter descriptions are potentially problematic on Mussawir and Parsley’s analysis, conflating the legal with the “living person,” it is worth noting the pragmatic transactional purpose evident in a number of the above cases, such as the Indian and Colombian judgments. In the *Glaciers* case, for example, the court expanded on this designation of the rivers by incorporating the surrounding natural environment within their protective ambit, finding: “[p]olluting and damaging the rivers, forests, lakes, water bodies, air and glaciers will be legally equivalent to harming, hurting and causing injury to person. . . . The rivers are not just water bodies. These are scientifically and biologically living.”<sup>332</sup> The hubris of equating the living with the merely human would simplify the historically informed and culturally rich approach of Justice Sharma.

Meanwhile in the Colorado, a deeply Green, yet intrinsically atheist claim by the River’s Ecosystem failed to reach first base. There is a curious interplay between the rational and the otherworldly in the legal personhood of rivers, one best undistracted by needless human conflation or imitation. An irrational *faith* coupled with the law’s juridical artifices seems a strangely effective combination—to facilitate both ontological change and to give rivers the legal tools necessary to sort their nitty-gritty. The latter is seen, for example, in the time and effort expended in constructing Te Awa Tupua’s functional, multi-layered toolbox.<sup>333</sup> The former manifests in lawmakers’ references to the otherworldly (as in India or New Zealand) that shifts the paradigm from *object* to *subject* and beyond, such that a relational one-ness transcends, where “[we are] the River and the River is [us].”<sup>334</sup> Where this leaves the nascent legal concept of the Yarra River/Birrarung, as a “living and integrated natural entity”<sup>335</sup> consciously deprived of legal personhood, remains to be seen. It is interesting to note that the shift from legal personhood to living entity was considered by some to be a controversial element in the Indian river cases.<sup>336</sup> In contrast, the Victorian government was quite comfortable with defining the Yarra River/Birrarung as a living entity, but hesitated in taking the dive into full legal personhood—seeing this as a step to be negotiated later.<sup>337</sup> Perhaps to

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330. *Id.* at para. 16 (“A juristic person, like any other natural person is in law also conferred with rights and obligations and is dealt with in accordance with law. . . . Thus, to protect the recognition and the faith of society, Rivers Ganga and Yamuna are required to be declared as the legal persons/living persons.”).

331. *Id.* at para. 19.

332. *Glaciers case* at 61.

333. *See supra* pp. 116–119.

334. *See* Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 13(c) (N.Z.).

335. *Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017* (Vic) s 1(a) (Austl.).

336. *See* O’Donnell, *supra* note 194, at 140; Dvorsky, *supra* note 198.

337. Telephone Interview with Fiona De Preu, Dir., Places & Precincts, Dep’t of Env’t, Land, Water & Planning, Victoria (Dec. 18, 2017).

confer on a river the status of legal personhood, or to describe it merely as a living, integrated entity, may be a moot conundrum whilst ever we lack what Mussawir and Parsley term the requisite “juridical art.”<sup>338</sup>

If we are unclear as to who is the legal person, then logically, the river’s agent is likewise open for re-conceptualization. Indeed, as the preceding discussion posits, is the technical intervention of principal and agent apt, a humanized go-between that merely treads water? In both the Ganges and Yamuna and Glaciers cases, the court relied on the doctrine of *parens patriae* to intervene on behalf of the rivers and to declare the Chief Secretary of the State of Uttarakhand, along with a number of other officials, the *persons in loco parentis*.<sup>339</sup> However, this issue of agency proved problematic, as the State of Uttarakhand was unwilling to accept the responsibilities associated with the role and appealed the judgment in the Supreme Court of India.<sup>340</sup> Even if the decision is ultimately upheld, this lack of political will raises serious questions about the sustainability and enforceability of the judgment.

The Vilcabamba case, which opened this Article, is eerily silent in regard to the issue of agency on behalf of the river. The general constitutional provision contained in article 71 of the Ecuadorian Constitution states that “[a]ll persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature.”<sup>341</sup> When the action was advanced by two private individuals, their claim to agency was not problematized, either by the defendant or the court. Nor were issues raised about potential conflicts of interest on the part of the plaintiff, not necessarily in this particular case, but more in general where agency on behalf of Nature is vested upon any undescribed agent. This was not lost to some international commentators, such as David Suzuki, who observed that the constitutional provision enabled the actions of the American couple, describing it as the “kind of [] tool” available to citizens that makes it “incumbent on the developers to consider the ecological impact of what they’re doing[.]”<sup>342</sup>

Several years later, the legal discourse evolved: both the Constitutional Court of Colombia, in the Atrato case, and the New Zealand legislature presented a more nuanced approach, with the development of specific agency to determine the future of rivers vested in corporate bodies, comprised both of State and Indigenous representatives, in equal numbers.<sup>343</sup>

Finally, the Yarra Act makes it clear that agency and representation are not commensurable —just because a river is recognized as a “living being” does not

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338. Mussawir & Parsley, *supra* note 42, at 47.

339. See *Glaciers case* at 42, 64–65; *Ganges and Yamuna case* at para. 19.

340. See *India’s Ganges and Yamuna Rivers Are “Not Living Entities,”* BBC (July 7, 2017), <https://www.bbc.com/news/world-asia-india-40537701>.

341. See CONSTITUCIÓN DE 2008, Oct. 20, 2008, Ch. 7, art. 71 (Ecuador).

342. *Constitutionalize Our Right to a Clean Environment: David Suzuki*, INDEPENDENT (Sept. 24, 2014), [theindependent.ca/2014/09/24/constitutionalize-our-right-to-a-clean-environment-david-suzuki/](http://theindependent.ca/2014/09/24/constitutionalize-our-right-to-a-clean-environment-david-suzuki/).

343. See *Atrato case* at 153–57; Te Urewera Act 2014, pt 2 (N.Z.); Te Awa Tupua (Whanganui Claims Settlement) Act 2017, pt 2 (N.Z.).



necessarily mean that a river has legal rights. By stopping short of recognizing the Yarra River/Birrarung as a legal person, the Act does not require that agency be issued on the river's behalf. The establishment of a new independent statutory body, the Birrarung Council—to advise the responsible Minister, advocate for the Yarra River/Birrarung, and act as a “voice for the river”<sup>344</sup>—raises interesting questions about who speaks for the river and under what authority. Furthermore, speaking for the river implies a particular type of relationship that infers a listening to the river, otherwise, representatives may likely be speaking for themselves. If “[we] are the River and the River is [us],”<sup>345</sup> then where does the river's presumed agent belong?

### B. Water Rights and River Duties

The Ganges and Yamuna case started with a recognition of the human right to water under article 21 of the Indian Constitution before morphing into the recognition of the rights of water—specifically the rights of the Ganges and Yamuna.<sup>346</sup> This progression from an anthropocentric to an ecocentric perspective mirrors a shift that can be observed in the wider global discourse around the right to water. While early grassroots campaigns for the right to water focused largely on access to water for human consumption,<sup>347</sup> the interrelationship between the right to water and the right to a healthy environment quickly became apparent.<sup>348</sup> Recognition of this interrelationship is reflected in the Indian judgments, with the court noting:

Rivers Ganga and Yamuna are central to the existence of half of Indian population [sic] and their health and well being. The rivers have provided both physical and spiritual sustenance to all of us from time immemorial. Rivers Ganga and Yamuna have spiritual and physical sustenance. They support and assist both the life and natural resources and health and well-being of the entire community. Rivers Ganga and Yamuna are breathing, living and sustaining the communities from mountains to sea.<sup>349</sup>

The roots of this kind of legal justification for the protection of the rivers are grounded in the public trust doctrine. This doctrine can be traced back to the *jus publicum* of Roman law and the English common law, before the public trust

344. WYNNE, *supra* note 287. See *Yarra River Protection (Wilip-gin Birrarung murrong) Act 2017* (Vic) s 49 (Austl.).

345. Te Awa Tupua (Whanganui Claims Settlement) Act 2017, s 13(c) (N.Z.).

346. See *supra* pp. 127–128.

347. See, e.g., Cristy Clark, *Of What Use is a Deradicalized Human Right to Water?*, 17 HUM. RTS. L. REV. 231, 238–40 (2017).

348. See, e.g., CTR. ON HOUS. RIGHTS AND EVICTIONS, LEGAL RESOURCES FOR THE RIGHT TO WATER AND SANITATION: INTERNATIONAL AND NATIONAL STANDARDS 18, 110–17 (2008); Inga Winkler, *Judicial Enforcement of the Human Right to Water – Case Law from South Africa, Argentina and India*, 1 L., SOC. JUST. & GLOBAL DEV. J. 1, 2–4 (2008), [http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2008\\_1/winkler/winkler.pdf](http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2008_1/winkler/winkler.pdf).

349. *Ganges and Yamuna case* at para. 17.

doctrine's reception in the United States in *Illinois Central Railroad Company v. Illinois*.<sup>350</sup> In this case, the U.S. Supreme Court upheld Illinois's repeal of a land grant comprising foreshores and submerged lands of the Chicago waterfront on the grounds that these lands were public trust resources.<sup>351</sup> In the 1960s, the public trust doctrine was adopted by environmental activists and used to protect natural resources from exploitation.<sup>352</sup> Most recently, the public trust doctrine has been used in the high-profile Atmospheric Trust Litigation campaign in an attempt to compel U.S. government action on climate change.<sup>353</sup> This focus on collective interests was also seen in civil law cases discussed in Parts I and IV of this Article, the Vilcabamba and Atrato cases. Both those judgments recognized that the greater interest to a healthy environment transcends and surpasses the importance of competing individual, more parochial interests.

But this emerging jurisprudence has also moved beyond a focus on the collective interests of humanity. The Indian judgments, for example, quickly shift their gaze from protecting the rivers for the sake of those communities who rely on them, to the legal protection of Nature for its own sake. This move towards an ecocentric understanding of rights has also taken place within the discourse around the right to water, with calls for an approach that protects the intrinsic rights of water bodies, rather than one that remains grounded in human interest.<sup>354</sup> In this context, the recognition of legal personhood for water is a natural progression of modern rights discourse and reflects a growing appreciation of the interdependence and indivisibility of rights—human or otherwise.

Of course, as rights discourse expands to incorporate the rights of non-human life, it raises important questions about the nature and normative content of these newly recognized rights. What does it mean for a river to have rights? What is the nature of these rights claims? In the *Glaciers* case, the court held:

Rivers and Lakes have intrinsic rights not to be polluted. Polluting and damaging the rivers, forests, lakes, water bodies, air and glaciers will be legally equivalent to harming, hurting and causing injury to [a] person.

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350. 146 U.S. 387, 389 (1892). See, e.g., Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475–78 (1969) (discussing public trust doctrine).

351. See *Illinois Central*, 146 U.S. 387 at 389.

352. See, e.g., Denise Antolini & Clifford Rechtschaffen, *Common Law Remedies: A Refresher*, in CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 43–47 (Clifford Rechtschaffen & Denise Antolini eds., 2007). See also *Nat'l Audubon Soc'y v. Super. Ct.*, 658 P.2d 709, 711–13 (1983).

353. In this case, the organization Our Children's Trust filed cases against all of the U.S. state governments, arguing that they held the atmosphere in trust for the public and, therefore, have a duty to avoid causing a substantial impairment of the environmental system—including through the creation of an enforceable climate recovery plan. See, e.g., Mary Christina Wood & Charles W. Woodward, IV, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. ENVTL. L. & POL'Y 634, 673–84 (2016) (discussing the judiciary forcing governments to confront greenhouse gas emissions).

354. See, e.g., Clark, *supra* note 347, at 240, 253–55.

Rivers, Forests, Lakes, Water Bodies, Air, Glaciers and Springs have a right to exist, persist, maintain, sustain and regenerate their own vital ecology system.<sup>355</sup>

This language was later and independently echoed in the Colorado claim, where the claimants pleaded that the State of Colorado had “deprived” the Colorado River Ecosystem of “its inherent right[] . . . [to] flourish[.]”<sup>356</sup>

In the Atrato case, the court emphasized the relational nature of rights and that the river was part of a larger community to which humans also belonged.<sup>357</sup> This ecocentric approach virtually erases the distinction between the historically anthropocentric rights to water or a healthy environment and the ecocentric rights of the Nature itself. From within this ontological worldview, these approaches are one and the same, because humans and Nature are indistinguishable.

It is not possible to discuss rights of Nature without being reminded of Hohfeld’s jural correlatives.<sup>358</sup> The rights of Nature are necessarily connected to all other legal subjects having a duty to prevent damages to it. Nature’s rights are both negative (in the sense that all other legal subjects have a duty not to harm it) and positive (in the sense that all other legal subjects must actively respect and fulfil those rights). This is particularly visible in the case of the Vilcabamba River discussed in Part I, where the Court recognized the active duty on the part of the Loja’s *Procuraduria*.<sup>359</sup>

These jural correlatives inevitably raise another question, of whether Nature as a legal person has a number of duties as well. In other words, would it be possible to pursue legal action against Nature for environmental damages? Would it be possible to seek compensation for a flood from the legal agents of a river? This was a real question for the State of Uttarakhand in relation to its new responsibility to represent the Ganges and Yamuna rivers. In early pleadings in its appeal against the Ganges and Yamuna case, the State expressed concern that it might now be held liable (on behalf of the rivers) for damages caused by flooding. These unanswered questions about legal personhood, representation and agency, and rights and duties, highlight the complex theoretical challenges that Ecological Jurisprudence must face.

### C. A Confluence of Legalities

The diachronical analysis of the cases presented above shows a clear and consistent increase in both the volume and depth of theorization of many of the more nuanced issues that flow from these cases. The few pages of the Vilcabamba judgment have morphed, in a little over five years, into the more than one hundred pages of the Atrato judgment, a significant and profound

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355. *Glaciers case* at 61.

356. *See* Amended Complaint, *supra* note 244, at 23.

357. *See, e.g., Atrato case* at para. 5.2.

358. *See generally* Hohfeld, *supra* note 311, at 28–59.

359. *See Vilcabamba case* at 5–6; Greene, *supra* note 54.

change reflective of the intellectual refinement that occurred in such a relatively short time across the two cognate legal systems of Ecuador and Colombia. This undeniable intellectual refinement notwithstanding, however, even more recent cases, such as the Ganges and Yamuna and the Glaciers cases in India, demonstrate the challenges of grappling with the specific demands of the kind of governance structures that need to flow from the ontological shifts involved in categorizing rivers as juristic persons. As discussed above, key agents (or persons *in loco parentis*) selected in India to represent the rivers proved to be unwilling and perhaps ill-equipped to take up their positions, raising the question of how well-placed the court was to establish such a governance structure in the first place.<sup>360</sup> While courts can clearly play an important role in shifting the legal, as well as ontological, approach to Nature, the polycentric decisions that flow from this shift are potentially less suited to judicial intervention.

Furthermore, while the very explicit cross-fertilization of most of the jurisdictionally diverse cases discussed above is a testimony to the symbolic power that rivers have developed as legal *subjects* within the emerging rights of Nature discourse, it is also important to be reminded of the risks of superficially adopting institutional responses developed in radically distinct contexts while expecting identical results. David Nelken writes that “a legal transplant cannot be expected to engineer a determined solution but will take on a life of its own in its new host.”<sup>361</sup> The debate between Alan Watson’s concept of *legal transplants* as a form of inter-jurisdictional trade of legal models through the interaction of legal professionals<sup>362</sup> and Pierre Legrand’s assertion that law only exists “as interpreted and applied ‘within an interpretive community’”—and can thus be, at best, only marginally approximated—must be considered.<sup>363</sup> While Watson’s insight is undeniable in the readings of many of the judgments presented in this Article, with their explicit cross references, all cases equally present their readers with a host of narratives embedded in endemic culture and tradition distinct from the colonial legal traditions in which the laws are written. In all these instances, law is also undeniably “a matter of myth and narrative,” as one of Legrand’s critics wrote.<sup>364</sup>

Indeed, beyond the issue of institutional capacity, the time required to enact legal change of the magnitude described in these river cases raises challenges for the creation of a sustainable regulatory response exclusively vested upon either

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360. See generally *supra* Part IV.

361. Introduction to ADAPTING LEGAL CULTURES 3 (David Nelken & Johannes Feest eds., 2001).

362. See Alan Watson, *Legal Transplants and Law Reform*, 92 L.Q. REV. 79, 79–84 (1976) (theorizing that laws are borrowed from other societies, so most law operates in a society from the one in which it was created).

363. John W. Cairns, *Watson, Walton, and the History of Legal Transplants*, 41 GA. J. INT’L & COMP. L. 637, 680 (2013) (discussing the impact of Alan Watson’s *Legal Transplants*). See Alan Watson, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21–30 (Univ. of Ga. Press, 2d ed., 1993) (1974). See also Legrand, *supra* note 36, at 115.

364. Nelken, *supra* note 361, at 3.

the judiciary or the legislature. In this sense, it is possible to see both resonances and comparative distinctions between the Te Awa Tupua Act in New Zealand and the Yarra Act in Australia. While both pieces of legislation identify the respective rivers as living, whole, integrated, and indivisible entities, the former does so in order to justify the attribution of legal personality to the river, while the latter does not.<sup>365</sup> Further examination of the broader political context of settler-First Nations<sup>366</sup> relations in Aotearoa New Zealand and Australia draws attention to the politically and historically contextual involvement of First Peoples in the creation of legislation and recognition of their integral relationships with and custodianship of the two rivers. While the Te Awa Tupua Act was the result of more than a decade of treaty negotiations between the Crown and Whanganui iwi, the Yarra Act emerges at a time when the State of Victoria is taking a series of tentative steps towards entering into treaty negotiations with First Nations.<sup>367</sup>

The influence of pre-colonial legalities<sup>368</sup> is, indeed, apparent in the majority of the cases analyzed in this Article. In Ecuador, although Indigenous communities did not feature in the decision itself, the Indigenous *Pachakutik* movement was instrumental in drafting the relevant rights of Nature constitutional provisions.<sup>369</sup> The special position occupied by both Indigenous and afro-Colombian communities is explicitly recognized in the Atrato case in Colombia. At the same time, the High Court of Uttarakhand's reliance on Hindu beliefs around the sacredness of the Ganges and Yamuna Rivers certainly helped to ground the court's two judgments in local culture.<sup>370</sup> The relevance given to

365. See Te Awa Tupua (Whanganui Claims Settlement) Act 2017, ss 12–13, 14 (N.Z.); *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) ss 1(a), 14(1) (Austl.).

366. The terms First Nations and First Peoples are here adopted to identify pre-colonial Indigenous communities in both New Zealand and Australia, as the terms are often used in both domestic contexts.

367. See, e.g., *Treaty*, ABORIGINAL VICTORIA, <https://www.vic.gov.au/aboriginalvictoria/treaty.html> (last accessed Feb. 13, 2018) (describing actions taken by Victoria for treaty negotiations).

368. Said legalities include, but are certainly not limited to, many of the legal systems that Edward Goldsmith called *chthonic*, to describe people who “knew how to live in harmony with the natural world.” EDWARD GOLDSMITH, *THE WAY: AN ECOLOGICAL WORLD-VIEW* xv (1992). Although adopted by a number of comparative legal scholars, such as H. Patrick Glenn, the authors of this Article also acknowledge that the term is contested, and these legal traditions are often alternatively referred to as Indigenous and First Nations. See generally H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* (5th ed. 2014).

369. See generally MARC BECKER, ¡PACHAKUTIK! INDIGENOUS MOVEMENTS AND ELECTORAL POLITICS IN ECUADOR (2011); KENNETH J. MIJESKI, PACHAKUTIK AND THE RISE AND DECLINE OF THE ECUADORIAN INDIGENOUS MOVEMENT (2011). The Pachakutik Plurinational Unity Movement – New Country (*Movimiento de Unidad Plurinacional Pachakutik – Nuevo Pais*) is an Ecuadorian Indigenist political party founded in 1996 and focused on the advancement of political claims and aspirations by a range of Indigenous organizations.

370. See, e.g., *Ganges and Yamuna case* at paras. 11, 17. However, some authors also warn against a superficial reliance on such arguments, as they argue they raise the risk of fuelling divisive political agendas. Hindu nationalism or Hindutva, for example, has been on the rise in India, particularly since the election of Prime Minister Narendra Modi in May 2014, and has led to rise in vigilante attacks and other acts of violence on religious minorities, especially Muslims. See Apoorvanand, *Umbrella Politics of Hindutva*, AL JAZEERA (Apr. 23, 2017), <http://www.aljazeera.com/indepth/opinion/2017/04/umbrella->

cultural and social pluralism, as well as the recognition of traditional cultures, in the majority of this Article's cases is undeniable.

This deep influence of pre-colonial legalities seems to point to a newly forming hybridization of multiple legalities. Although it is the iwi's song that forms the justificatory basis of the Te Awa Tupua Act, the Act is nonetheless written in the juridical language of New Zealand's common law. And while the voices of the Atrato and of the Yarra Rivers may be conveyed in terms that are familiar to their civil law and common law audiences, their songs are nonetheless sung in languages that far predate such traditions. It thus appears that these watery examples of an emerging Ecological Jurisprudence constitute a comparative platform, one that allows the concept of Nature to be the comparative tool for a multi-legal dialogue, one that points toward the possibility of place-based legal pluralism.

Of special significance is the fact that the pre-colonial legalities influencing the normative shift toward an Ecological Jurisprudence described above are place-based and have developed a cosmology that is indivisible from the local, natural landscape. Thomas Berry wrote that:

[o]ne of the most striking things about indigenous peoples is that traditionally they live in conscious awareness of the stars in the heavens, the topography of the region, the dawn and sunset, the phases of the moon, and the seasonal sequence. They live in a world of subjects, . . . not a world of objects.<sup>371</sup>

Abrams also notes that many authors:

have come to recognize that long-established indigenous cultures often display a remarkable solidarity with the lands that they inhabit, as well as a basic respect, or even reverence, for the other species that inhabit those lands. Such cultures, much smaller in scale (and far less centralized) than modern Western civilization, seem to have maintained a relatively homeostatic or equilibrational relation with their local ecologies for vast periods of time, deriving their necessary sustenance from the land without seriously disrupting the ability of the earth to replenish itself.<sup>372</sup>

A place-based ontological shift in considering Nature—whether strategically, as in the case of the Atrato River, or ontologically,<sup>373</sup> as in the case

politics-hindutva-170417091306518.html; Michael Safi, *Rise of Hindu 'Extremist' Spooks Muslim Minority in India's Heartland*, GUARDIAN (Mar. 25, 2017), <https://www.theguardian.com/world/2017/mar/26/modis-man-flexes-muscular-hinduism-shock-election>.

371. THOMAS BERRY, *THE SACRED UNIVERSE* 88 (2009).

372. DAVID ABRAM, *THE SPELL OF THE SENSUOUS* 93–94 (1996).

373. In the case of the Atrato river, the court appears very aware of the strategic importance of inscribing the river's legal personhood within a well-defined ontological framework that justifies the *strategic* adoption of a rights-based approach in securing the protection of Nature (as opposed to a more regulatory one, such as that proposed by the idea of Ecocide). We can see that recognizing rivers as legal entities is certainly *ontologically* motivated (and sometime focused), but often rights of nature are *strategically* employed. Alessandro Pelizzon and Aidan Ricketts write that:

[f]ar from being contained exclusively in any particular example of more or less radical normative proposals (such as, for example, rights of nature or the discourse of legal personhood

of the Yamuna, Ganges, and Yarra/Birrarung Rivers—as a legal entity is undeniably at play in all cases considered above, and it is equally apparent the influence that pre-colonial legalities have exerted, and continue to exert. However, such a shift requires a re-interrogation of previously unquestioned categories. Amongst others, Deborah Bird Rose, Marcia Langton, and William Cronon<sup>374</sup> notably call into question the Western notion of *wilderness* that erases Indigenous people from place and renders invisible the people-place relationships in which inhere reciprocity and enlivenment.<sup>375</sup> According to this wilderness trope, ecologies are kept pristine by *managing out* people.<sup>376</sup> William Cronon uses his essay, *The Trouble with Wilderness*, to disrupt assumptions that are associated with this term, stating:

For many Americans, wilderness stands as the last remaining place where civilization, that all too human disease, has not fully infected the earth. It is an island in the polluted sea of urban-industrial modernity, the one place we can turn for escape from our own too-muchness. Seen in this way, wilderness presents itself as the best antidote to our human selves, a refuge we must somehow recover if we hope to save the planet.<sup>377</sup>

As indicated by Cronon, powerful metaphors are at work when we speak about wilderness: “island,” “escape,” “antidote,” and “refuge.”<sup>378</sup> These idealized conceptions of Nature are amplified against the ills of modern society, which is defined as “disease[d],” “polluted,” and “too-much[.]” of itself.<sup>379</sup> A contradictory double-move is performed through the rendering of place, or Nature, as wilderness: the wild space is construed as untouched by human interference, while at the same time the same wild space is charged with offering us a refuge from ourselves. This schism that is performed between people and place is not only foreign to First Nations peoples’ conceptions of people-place, it is also a form of erasure, and symbolic of displacement and removal from their

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for nature), the proposal of Ecological Jurisprudence pierces legal theory at its very core and pervades a much wider normative terrain than it may appear at a first glance. By inviting legal theorists and practitioners alike to interrogate and transcend a number of *ontological* anthropocentric assumptions that inform the existing dominant legal systems, Ecological Jurisprudence provides a theoretical space in which to interrogate the dialogue between a post-anthropocentric awareness of the ontological interconnectedness and inter-dependence of all of existence and an inherently anthropocentric human normativity.

Pelizzon & Ricketts, *supra* note 169, at 124.

374. See generally DEBORAH BIRD ROSE, REPORTS FROM A WILD COUNTRY: ETHICS FOR DECOLONISATION (2004); MARCIA LANGTON, BURNING QUESTIONS: EMERGING ENVIRONMENTAL ISSUES FOR INDIGENOUS PEOPLES IN NORTHERN AUSTRALIA (1998); William Cronon, *The Trouble with Wilderness: A Response*, 1 ENVTL. HIST. 47 (1996).

375. Paddy Roe & Frans Hoogland, *Black and White, a Trail to Understanding*, in LISTEN TO THE PEOPLE, LISTEN TO THE LAND 11 (Jim Sinatra & Phin Murphy eds., 1999).

376. See William Cronon, *The Trouble with Wilderness: Or, Getting Back to the Wrong Nature*, 1 ENVTL. HIST. 7, 11 (1996).

377. *Id.* at 7.

378. See *id.*

379. See *id.*

ancestral lands. When people and their reciprocal relationships with place cease to exist, ontological politics and colonization fill the void in a process that some authors have described as *environmental colonialism*.<sup>380</sup>

The interdependence between cultural ontologies and normative projects highlights not only the very real risk of environmental colonialism, but also the fundamental flaw in any exclusionary approach to protecting Nature, or of any discourse that seeks to assert an inherent tension between human rights and sustainability. Such an approach assumes a false dualism between humans and Nature, forgetting that not only are we as humans dependent on Nature for our very survival, but also that we are an agentic part of Nature. In contrast, the Preamble to the Declaration on the Rights of Mother Earth starts with the following acknowledgement: “We, the peoples and nations of Earth: considering that we are all part of Mother Earth, an indivisible, living community of interrelated and interdependent beings with a common destiny . . .”<sup>381</sup> Such an understanding is also reflected in the words of Gerrard Albert, lead negotiator for the Whanganui iwi:

We can trace our genealogy to the origins of the universe. And therefore rather than us being masters of the natural world, we are part of it. We want to live like that as our starting point. And that is not an anti-development, or anti-economic use of the river but to begin with the view that it is a living being, and then consider its future from that central belief.<sup>382</sup>

The Yarra Act represents a successful negotiation of these dangers in its attempt to actively *manage in* both First Nations and settler peoples. Community visions for both the river and its people are explicitly allowed to create new narratives that imagine a healthy river in which people are once again swimming in the river’s deep waterholes in inner-city Melbourne, and walking the length of the river as a pilgrimage from the river’s mouth to its mountainous source.<sup>383</sup> In doing so, the Act explicitly identifies the central importance of both First Nations’ traditional custodians and settler communities in the future protection of the river through the perpetuity of river-people relationships. The ontological possibilities created by the emerging hybrid legalities that inhabit these riverbeds, both physical and symbolic, reminisce of Emmanuel Melissaris’s intuition that “legality rests on shared normative experiences.”<sup>384</sup>

380. Robert H. Nelson, *Environmental Colonialism: “Saving” Africa from Africans*, 8 INDEP. REV. 65, 65–67 (2003).

381. *Universal Declaration of the Rights of Mother Earth*, WORLD PEOPLE’S CONFERENCE ON CLIMATE CHANGE AND THE RIGHTS OF MOTHER EARTH, <https://pwccc.wordpress.com/programa/> (last visited Mar. 31, 2019).

382. Eleanor Ainge Roy, *New Zealand River Granted Same Legal Rights as Human Being*, GUARDIAN (Mar. 16, 2017), <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being>.

383. See *supra* notes 298–299 and accompanying text.

384. EMMANUEL MELISSARIS, UBIQUITOUS LAW: LEGAL THEORY AND THE SPACE FOR LEGAL PLURALISM 124 (2009).



However, while multiple ontological horizons are increasingly observed, interrogated, and negotiated, a distinction still remains between the ontological dimensions underpinning the recognition of legal subjectivity for a river—and, by extension for Nature in general—and the epistemological tools employed to actively and inter-subjectively engage with these novel legal subjects.

#### CONCLUSION: OF SONGS, AND LISTENING

This Article ends where it began, with the metaphor of song, and the lingering question—can we hear the rivers sing? At one level, the six case studies canvassed in this Article are highly procedural and regulatory. Legislation has been carefully drafted, constitutional provisions meticulously construed, and cases robustly argued before courts, or not. Yet, to varying degrees, each river song is also highly imaginative, at times invoking the language of the poetic or the sacred to impart the song in question.

In its playful moments, this Article intimates that river songs work to bridge the gulf between the rational and the mystical—and its otherworldly. More realistically, they are the conduits that link the law to people and place, carving out—within both the physical and legal landscape—a body of water, place, and laws from headwaters to mouth. Or, tragically, in the case of the Colorado, the river dies—stranded in its silent, waterless delta, its abstract and concrete realities stuck in parallel, never-intersecting channels.

In this Article, we have employed the song as a metaphor. In choosing the device of the song, we do not underestimate its figurative power. As jurist Gary Watt surmises, “[m]etaphor constitutes our thought. Metaphor is the essential methodology of our cognitive capacity when it comes to translating abstract ideas into concrete reality. If we are to take metaphor seriously, we must explore its poetic dimension, the persuasive power of its rhetoric, coupled with its aesthetic appeal.”<sup>385</sup>

In the first, second, and third reading speeches preceding the passage of the Te Awa Tupua Act of 2017, parliamentarians across the New Zealand political divide debated as one on the Act and its significance to river, place, and people.<sup>386</sup> Green Member of Parliament, David Clendon observed:

I think it is true to say that any person who sits alongside a river or sits quietly in a forest will hear the voice of that river, will hear the voice of that forest. . . . When we are making decisions—I shall call them the mundane but critically important decisions—about resource allocation, about land use, and about policy, the river will have a very powerful voice directly in those

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385. Watt, *supra* note 2, at 91.

386. See *supra* notes 43–45, 116–117 and accompanying text.

negotiations, in those discussions, and in that decision making. It will be a Māori voice and a Pākehā voice, and that is as it should be.<sup>387</sup>

In asking this Article's headline question, *can you hear the rivers sing*, we must be careful not to over-burden the river with our humanizing proclivities, the baggage of agency, critiques of theoretical immaturity, and so on. While such questions are all worthy of thoughtful reflection, and indeed, this Article seeks to provoke ongoing debate on these and other questions, nonetheless we might do well to emulate Clendon's quiet, intuitive observer. Let us sit beside the river and wait patiently for its song.

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387. Te Awa Tupua (Whanganui River Claims Settlement) Bill – Third Reading, Hansard Debates (Mar. 14, 2017), [https://www.parliament.nz/en/pb/hansard-debates/rhr/document/HansS\\_20170314\\_126900000/clendon-david](https://www.parliament.nz/en/pb/hansard-debates/rhr/document/HansS_20170314_126900000/clendon-david).

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