

ARTICLE

CAN PERSONHOOD PROTECT THE ENVIRONMENT? AFFORDING LEGAL RIGHTS TO NATURE

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I am quite seriously proposing that we give legal rights to forests, oceans, rivers and other so-called “natural objects” in the environment - indeed, to the natural environment as a whole.

As strange as such a notion may sound, it is neither fanciful nor devoid of operational content. In fact, I do not think it would be a misdescription of recent developments in the law to say that we are already on the verge of assigning some such rights, although we have not faced up to what we are doing in those particular terms. We should do so now, and begin to explore the implications such a notion would hold.¹

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II. PERSONHOOD: SYMBOLIC GESTURE OR A POWERFUL
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I. ENVIRONMENTAL PERSONHOOD

In 2021, the Intergovernmental Panel on Climate Change (“IPCC”) found that the global surface temperature increased faster between 1970 and 2020 than during any other fifty-year period over the last 2,000 years.² Between 2011 and 2020, annual average Arctic sea ice area reached its lowest level since at least 1850, and global mean sea level has risen faster since 1900 than over any preceding century in the last 3,000 years.³ The IPCC also found that it is virtually certain that hot extremes have become more frequent and intense across most land regions since the 1950s.⁴ In 2020, the United Nations Secretary-General wrote that the climate emergency demanded an urgent collective global response.⁵

Commentators have identified the conferral of legal personality or rights on the environment, often referred to as environmental personhood, as one legal avenue to improve environmental outcomes.

At common law, legal persons are defined by reference to their capability to exercise rights and owe duties.⁶ Legal persons include natural and juristic persons.⁷ The civil law equivalent of the juristic person is the moral person.⁸ Early twentieth century jurist and judge of the Supreme Court of New Zealand, the Hon. Sir John

2. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS: FULL REPORT 9-10 (2021).

3. *Id.*

4. *Id.* at 10-11.

5. UNITED NATIONS FRAMEWORKS CONVENTION ON CLIMATE CHANGE, *United Nations Climate Change Annual Report 2020* 6 (2020), https://unfccc.int/sites/default/files/resource/UNFCCC_Annual_Report_2020.pdf [<https://perma.cc/A6BL-F8YL>] (last visited Oct. 7, 2021).

6. See *Legal Person*, BLACK’S LAW DICTIONARY (9th ed. 2009); Alexandre Lillo, *Is Water Simply a Flow?: Exploring an Alternative Mindset for Recognizing Water as a Legal Person*, 19.2 VT. J. ENV’T L., 164, 181 (2018) (citing Alexis Dyschkant, *Legal Personhood: How We Are Getting It Wrong*, 2015 U. ILL. L. REV. 2075, 2079-80 (2015)); Erin O’Donnell, *Competition or Collaboration? Using Legal Persons to Manage Water for the Environment in Australia and the United States*, 34 ENV’T & PLANNING L.J. 503, 507 (2017).

7. Lillo, *supra* note 6, at 181.

8. *Id.* at 183.

W. Salmond, conceived of the juristic person as an entity, whether real or imaginary, to whom personality has been attributed by way of fiction,⁹ such as a corporation or trust.¹⁰ In common and civil law orthodoxy, natural entities are merely the objects of relations between legal persons.¹¹ Proponents of environmental personhood propose that the environment should be made a subject in its own right through recognition as a legal person or being granted rights as if it were such a person.¹²

Concepts akin to environmental personhood are featured in many systems of First Nations customary law.¹³ For example, Dr Kura Paul-Burke and Dr Lesley Rameka describe the Māori worldview as follows:

A Māori perspective of the natural world encapsulates a holistic epistemological world view. Our ways of knowing, being and doing are connected with Papatūānuku (earth mother), Ranginui (sky father) and their many children, including Tangaroa (oceans). All of whom act as guardians of the natural world and its domains. As ira tangata (humans) our role is that of kaitiaki (caretaker) and it is our obligation to nurture and protect the physical and spiritual well-being of the natural systems that surround and support us. Kaitiaki are agents that perform the task of active guardianship. They are charged with the responsibility to safeguard and manage natural resources for present and future generations.¹⁴

9. Akshita Jha & Adrija Ghosh, *Is Being a 'Person' Essential for the Environment to Hold Rights?: Assessing the Legitimacy of Environmental Personhood and Alternative Approaches*, 11 NUJS L. REV. 469, 474 (2018) (citing JOHN W. SALMOND, JURISPRUDENCE 541 (4th ed. 1913)).

10. Lillo, *supra* note 6, at 182.

11. Cristy Clark et al., *Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance*, 45 *ECOLOGY L. Q.* 787, 830-31 (2018).

12. Joshua C. Gellers, *Earth System Law and the Legal Status of Non-Humans in the Anthropocene*, 7 *EARTH SYS. GOVERNANCE* 1, 2 (2021).

13. THE CYRUS R. VANCE CENTER FOR INTERNATIONAL JUSTICE, EARTH LAW CENTER & INTERNATIONAL RIVERS, *Rights of Rivers* 13 (2019), <https://3waryu2g9363hdvii1ci666p-wpengine.netdna-ssl.com/wp-content/uploads/sites/86/2020/09/Right-of-Rivers-Report-V3-Digital-compressed.pdf> [<https://perma.cc/RAT3-UD7B>] (last visited Oct. 7, 2021) [hereinafter *Rights of Rivers*].

14. Dr. Kura Paul-Burke & Dr. Lesley Rameka, *Kaitiakitanga - Active Guardianship, Responsibilities And Relationships With The World: Towards A Bio-Cultural Future In Early Childhood Education* (2015), <https://researchcommons.waikato.ac.nz/bitstream/handle/10289/11216/Kaitiakitanga%20-%20FINAL.pdf?sequence=11&isAllowed=y> [<https://perma.cc/2LYM-LNWX>] (last visited Oct. 7, 2021).

Conversely, in Western jurisprudence the emergence of the concept of environmental personhood can be traced to Christopher Stone's seminal 1972 essay "Should Trees Have Standing?" in which the American professor argued that the natural environment as a whole should be granted rights¹⁵ and be empowered to institute legal proceedings in its own right through a guardian entity.¹⁶ This would enable courts to take injury to the environment into account and to award relief that would directly benefit the environment.¹⁷

Stone emphasized that environmental personhood was not as radical as it initially appeared, noting that the legal world is populated by inanimate rights-holders: "trusts, corporations, joint ventures . . . to mention just a few."¹⁸ Stone further drew a parallel between granting rights to nature and the history of the conferral of rights on oppressed or minority groups in ways "theretofore, a bit unthinkable."¹⁹

The emergence of Earth jurisprudence has reinvigorated calls to provide rights to nature. At a 2001 conference, Thomas Berry, cultural historian, presented an influential set of principles for that movement. These included that, "no living being nourishes itself. Each component of the Earth community is immediately or mediately dependent on every other member of the community for the nourishment and assistance it needs for its own survival."²⁰ Another leading scholar of Earth jurisprudence, Cormac Cullinan, later wrote that society must overcome the "falsehood . . . that we humans are separate from our environment and that we can flourish even as the health of the Earth deteriorates."²¹

In the past two decades, several jurisdictions have executed Stone's vision and conferred rights on nature. In 2006, the first environmental personhood regime was implemented in

15. Stone, *supra* note 1, at 456; *see also* Lillo, *supra* note 6, at 165.

16. Stone, *supra* note 1, at 467. Stone argues that unlike the liberal standing approach, the guardianship approach would secure an effective voice for the environment even where federal administrative action and public lands were not involved. A representative approach would also allay concerns of a flood of un-meritorious claims.

17. *Id.* at 462.

18. *Id.* at 452.

19. *Id.* at 453.

20. David Takacs, *We Are the River*, 2 U. ILL. L. REV. 545, 556 (2021).

21. *Id.* at 557.

Pennsylvania by way of a local government ordinance.²² In 2008, the rights of nature were recognized in the *Constitution of the Republic of Ecuador*.²³ In 2010, Bolivia enacted laws recognizing the rights of Mother Earth²⁴ and the *Universal Declaration of the Rights of Mother Earth* was adopted at the World People's Conference on Climate Change and the Rights of Mother Earth.²⁵ In 2014, the International Rights of Nature Tribunal ("IRNT") was first convened in Ecuador by the Global Alliance for the Rights of Nature.²⁶ Since then, legislation has been introduced in New Zealand (Aotearoa) granting legal personhood to the Te Urewera protected area²⁷ and the Whanganui River.²⁸ New Zealand has also entered into a Record of Understanding with Ngā Iwi o Taranaki that confers legal personhood on Ngā Maunga, which includes Mt Taranaki on the North Island.²⁹ In September 2017, the Australian State of Victoria enacted legislation creating the Birrarung Council to act as the independent voice for the Yarra River, although the river itself was not granted legal personhood.³⁰ In 2019, Uganda enacted legislation conferring rights on nature,³¹ and the Mexican State of Colima amended its constitution to recognize such rights.³²

Courts in several jurisdictions have also upheld the rights of nature. In 2017, the High Court of Uttarakhand in India handed

22. Tamaqua Borough, Schuylkill County, Pa., Ordinance 612 (Sept. 19, 2006) [hereinafter Tamaqua Borough Ordinance].

23. CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008.

24. Law of the Rights of Mother Earth, Law 071 (2010) (Bol.).

25. World People's Conference on Climate Change and the Rights of Mother Earth, *Universal Declaration of the Rights of Mother Earth*, in GLOBAL ALLIANCE FOR THE RIGHTS OF NATURE (Apr. 22, 2010).

26. Hannah White, *Indigenous Peoples, the International Trend toward Legal Personhood for Nature, and the United States*, 43 AM. INDIAN L. REV. 129, 138-39 (2018).

27. Te Urewera Act 2014 (Act No. 51/2014) (N.Z.).

28. Te Awa Tupua (Whanganui River Claims Settlement) Act, 2017 (Act No. 7/2017) (N.Z.).

29. Deena Coster, *Taranaki Maunga: Settlement Looms on Horizon, with Changes in the Wind*, STUFF (Dec. 12, 2020), <https://www.stuff.co.nz/pou-tiaki/123597917/taranaki-maunga-settlement-looms-on-horizon-with-changes-in-the-wind>

[<https://perma.cc/7GU8-72A4>]; see also Record Of Understanding for Mount Taranaki, Pouakai and the Kaitake Ranges (Dec. 20, 2017), <https://www.govt.nz/assets/Documents/OTS/Taranaki-Maunga/Taranaki-Maunga-Te-Anga-Putakerongo-Record-of-Understanding-20-December-2017.pdf>.

30. Yarra River Protection (Wilip-gin Birrarung murrong) Act (Vic), 2017 (Act No. 49/2017) (Austl).

31. National Environment Act, 2019 (Act No. 5/2019) (Uganda).

32. *Rights of Rivers*, *supra* note 13, at 42.

down two decisions granting personhood to major rivers and the ecosystems supporting them.³³ Similar decisions exist in Colombia³⁴ and Bangladesh.³⁵

These developments have prompted some scholars to proclaim that a watershed moment for the rights of nature is underway.³⁶ However, the efficacy and impact of recognizing the existence of such rights remain contestable³⁷ due to a scarcity of empirical evidence assessing the practical impact of conferring rights on nature.³⁸ Notwithstanding the nascent nature of these rights, this article will seek to explore the question of whether personhood can protect the environment.

This article is structured in four substantive parts. Section A identifies the rationale underpinning environmental personhood by analyzing the merits of various arguments in support of conferring rights on nature. Section B evaluates the types of rights of nature that have been entrenched and the corresponding standing mechanisms. A consideration of the methods by which rights of nature have been conferred, and the respective advantages and limitations of each mechanism, is provided in Section C. Finally, Section D provides a summary of curial decisions upholding the rights of nature and a discussion on the role of domestic courts in expanding rights of nature jurisprudence.

A. *The Rationale Behind Granting Legal Rights to Nature*

Proponents of environmental personhood argue that granting rights to nature may challenge flawed anthropocentric environmental protection legislation and regulation, improve environmental outcomes, and enhance the recognition of First

33. *Salim v. State of Uttarakhand* LNIND 2016 UTTAR 990 (India); *see also* *Lalit Miglani v. State of Uttarakhand* 2016 UTTAR 885 (India).

34. *Ctr. for Soc. Just. Stud. et al. v. Presidency of the Republic* (Constitutional Court of Colombia, T-622/16, 10 November 2016) (Colom.). The authors have relied on an English translation of this case completed by Dignity Rights Project, Delaware Law School.

35. *See Nishat Jute Mills, Ltd. v Hum. Rts. and Peace for Bangladesh* (Supreme Court of Bangladesh, No. 3039 of 2019, 17 February 2020) (Bangl.).

36. Takacs, *supra* note 20, at 548.

37. Dana Zartner, *Watching Whanganui & the Lessons of Lake Erie: Effective Realization of Rights of Nature Laws*, 22 VT. J. ENV'T L. 1, 1 (2021); Takacs, *supra* note 20, at 601-02.

38. *See Rights of Rivers*, *supra* note 13, at 7.

Nations concepts of stewardship. The merits of these arguments are considered in this Part.

1. Challenging Anthropocentrism

While an increasing number of environmental protection laws have been promulgated globally since the mid-twentieth century, these have generally reinforced the notion that nature exists as an object of possession or to provide recreational space for humans.³⁹ Berry first labeled the perceived primacy of humans over all other entities inhabiting the Earth system as “anthropocentrism.”⁴⁰ According to Berry, anthropocentrism is the root cause of the current environmental crisis.⁴¹ Lillo considers that disrupting the anthropocentrism of traditional environmental law is the most significant benefit of conferring rights on nature.⁴²

The anthropocentric focus of environmental protection laws remains commonplace. For example, in Australia, the *Environment Protection and Biodiversity Conservation Act 1999* is guided by “principles of ecologically sustainable development” including “inter-generational equity,” that is, the concept that “the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.”⁴³

Stone considered that the adoption of a rights discourse was essential to ensure the protection of the environment because until an entity received rights, humans failed to see it as anything but a “thing” for exploitation.⁴⁴ He also considered that the language of rights was a powerful tool because when a right is conceptualized it changes the legal language—and therefore subtly shifts the jurisprudence—available to advocates. This encourages the development of a viable body of law, thereby changing how the

39. Kaitlin Sheber, *Legal Rights for Nature: How the Idea of Recognising Nature as a Legal Entity Can Spread and Make a Difference Globally*, 26 *HASTINGS ENV'T L.J.* 147, 151 (2020).

40. Matija Zgur, *All the Earth's Legal Children: Some Sceptical Comments About Nature's Legal Personhood* 2 *DIRITTO & QUESTIONI PUBBLICHE* 87, 90 (2020) (citing THOMAS BERRY, *THE GREAT WORK. OUR WAY INTO THE FUTURE* (1999)).

41. *Id.*

42. Lillo, *supra* note 6, at 168.

43. Environment Protection and Biodiversity Conservation Act, 1999 (Cth) (Act No. 91/1999), § 3A(c) (Austl.).

44. Stone, *supra* note 1, at 455.

new rights-holder is viewed.⁴⁵ In other words, rights offer an enduring value to advocacy as normative jurisprudential constructs.⁴⁶

Notwithstanding that the philosophy of environmental personhood is deeply concerned with challenging anthropocentrism, the extent to which rights of nature frameworks achieve this goal varies. For example, in Colombia, curial decisions conferring rights on nature have largely emphasized the ability of ecosystems to support human communities now and into the future, rather than the value of those ecosystems in and of themselves.⁴⁷

2. The Enhancement of Environmental Outcomes

Another rationale that underpins environmental personhood is to enhance environmental outcomes. Present state and non-state measures to combat climate change are inadequate to meet the challenges posed by the climate emergency.⁴⁸ A “silver lining” of the Anthropocene age may be its facilitation of innovative legal models such as environmental personhood.⁴⁹ Environmental law scholars Louis J. Kotzé and Paola Villavicencio Calzadilla argue that to achieve enhanced environmental outcomes, “lawyers, politicians and academics, among many other role players” need to be open to “alternative, potentially progressive, and possibly more effective juridical framings that focus on preserving Earth system integrity.”⁵⁰

45. Stone, *supra* note 1, at 488-89. See also Hope M. Babcock, *A Brook With Legal Rights: The Rights of Nature in Court*, 43 *ECOLOGY L.Q.* 1, 4 (2016).

46. Paola Villavicencio Calzadilla & Louis J. Kotzé, *Somewhere Between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador*, 6 *TRANSNAT'L ENV'T L.* 401, 407 (2017) [hereinafter Calzadilla & Kotzé, *Somewhere Between Rhetoric and Reality*]; see also Meg Good, *The River as a Legal Person: Evaluating Nature Rights-Based Approaches to Environmental Protection in Australia*, 1 *NAT'L ENV'T L. REV.* 34, 35 (2013); Stefan Knauß, *Conceptualizing Human Stewardship in the Anthropocene: The Rights of Nature in Ecuador, New Zealand and India*, 31 *J. AGRIC. ENV'T ETHICS* 703, 705 (2018).

47. *Rights of Rivers*, *supra* note 13, at 32.

48. United Nations Environment Programme and Sabin Center for Climate Change Law, *Global Climate Litigation Report: 2020 Status Review*, U.N. Doc. DEL/2333/NA 6 (2020); see also Hailey A. Walley, *Two Arguments for Extending Legal Personhood to Nature 1* (May 2019) (Honors thesis, University of Mississippi).

49. Gellers, *supra* note 12, at 1.

50. Paola Villavicencio Calzadilla & Louis J. Kotzé, *Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia* 7 *TRANSNAT'L ENV'T L.* 397, 424 (2018) [hereinafter Calzadilla & Kotzé, *Living in Harmony*].

Environmental protection legislation has traditionally focused on bringing violators into compliance with the law rather than restoring contaminated ecosystems.⁵¹ In 1972 Stone remarked upon the inadequacy of the remedies available in traditional environmental protection litigation:

[E]ven if a plaintiff riparian wins a water pollution suit for damages, no money goes to the stream itself to repair its damages . . . even if the jurisdiction issues an injunction . . . there is nothing to stop the plaintiffs from selling out the stream, i.e. agreeing to dissolve or not enforce the injunction at some price.⁵²

Moreover, plaintiffs have historically struggled to obtain adequate remedies in environmental protection litigation.⁵³ For example, in the United States, many such actions are never tried on their merits, immediately failing on grounds of non-justiciability or lack of standing.⁵⁴ Kaitlin Sheber, environmental law attorney, states that granting rights to nature would better protect the environment because this would allow more environmental protection lawsuits to be brought, fewer cases would “fall through the cracks” due to lack of standing, and, if an action was successful, any damages awarded would redress the injury to the environment, rather than enrich a human or corporate plaintiff.⁵⁵ At the very least, granting rights to nature assists in obtaining a favorable decision from a court.⁵⁶

Dutch ecologists recently considered the potential efficacy of granting personhood to rivers.⁵⁷ They concluded that the transfer of legal personhood to a river would not necessarily improve its health⁵⁸ and found that environmental personhood has the potential to address the significance of healthy rivers now and for future generations, “but must be accompanied by enforceable rules, laid down in legislation, on priority setting and the role of the

51. Nicholas Bilof, *The Right to Flourish, Regenerate, and Evolve: Towards Juridical Personhood for an Ecosystem* 10 *GOLDEN GATE U. ENV'T L.J.* 111, 120 (2018).

52. Stone, *supra* note 1, at 462.

53. Bilof, *supra* note 51, at 120.

54. *Id.*

55. Sheber, *supra* note 39, at 165-66.

56. *Id.*

57. See Susanne Wuijts et al., *An Ecological Perspective on a River's Rights: A Recipe for More Effective Water Quality Governance?*, 44 *WATER INT'L* 647 (2019).

58. *Id.* at 662-63.

custodian across multi-jurisdictional hydrological scales and institutional levels."⁵⁹

Blake opines that the efficacy of nature's rights depends on the scale of injury that is required to invoke these rights. For example, if courts only recognize substantial damage as an injury to nature, these rights may not be very effective. Additionally, she considers that environmental personhood will only result in improved environmental outcomes if a guardian body is appointed to rigorously oversee the health of the ecosystem and empowered to bring proceedings to protect that ecosystem.⁶⁰ Conversely, Darpö considers that environmental personhood is likely to face the same challenges encountered by traditional environmental protection frameworks, including the deferral to economic growth, weak enforcement, and a lack of funding.⁶¹

These observations are particularly apt with respect to countries with high rates of poverty where the extraction of natural resources is the easiest and most lucrative way to ensure economic development.⁶² For example, environmental exploitation persists in Ecuador,⁶³ despite a wave of successful litigation based on the country's constitutional rights of nature. Esperanza Martínez, the founder of the environmental organization *Acción Ecológica*, recently stated, "[A]lthough [Ecuador] has improved regarding the rights of nature, and environmental discussions have permeated government entities, the intention to accelerate extraction is entirely present."⁶⁴ As of 2014, approximately thirty-nine percent of Ecuador's greenhouse gas emissions were derived from deforestation and other land use

59. *Id.* at 664.

60. Emilie Blake, *Are Water Body Personhood Rights the Future of Water Management in the United States*, 47 TEX. ENV'T L.J. 197, 208 (2017).

61. Jan Darpö, *Can Nature Get it Right? A Study on Rights of Nature in the European Context*, EUR. PARLIAMENT POL'Y DEP'T FOR C'ITIZENS' RTS. & CONST. AFF. DIRECTORATE-GENERAL FOR INTERNAL POLICIES 60 (2021), [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/689328/IPOL_STU\(2021\)689328_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/689328/IPOL_STU(2021)689328_EN.pdf) [<https://perma.cc/WLN4-NY2N>] (last visited Oct. 7, 2021).

62. Calzadilla & Kotzé, *Living in Harmony*, *supra* note 50, at 400.

63. Rickard Lalander, *Rights of Nature and the Indigenous Peoples in Bolivia and Ecuador* 3 IBEROAM. J. DEV. STUD. 148, 150-51 (2014).

64. Antonio José Paz Cardona, *For Ecuador, a Litany of Environmental Challenges Awaits in 2020*, MONGABAY (Romina Castagnino & Sarah Engel trans., Feb. 5, 2020), <https://news.mongabay.com/2020/02/for-ecuador-a-litany-of-environmental-challenges-awaits-in-2020/> [<https://perma.cc/H9HG-AAKL>].

practices, largely for the purpose of oil extraction.⁶⁵ In 2020, Ecuador had the highest annual deforestation rate of any country in the western hemisphere for its size.⁶⁶

Similarly, Bolivia has legislated the rights of nature but continues to expand its extractive industry.⁶⁷ For example, *Supreme Decree 2366*, enacted in May 2015, legalized exploratory drilling in more than sixty of Bolivia's protected areas and twenty-two of its national parks.⁶⁸ In 2019 Bolivia lost 50,000m² of forest in an unusually destructive fire season and experts say that the unique scale of destruction resulted from agricultural expansion driven by the government's pro-development agenda.⁶⁹ These environmental outcomes have prompted some scholars to query whether Bolivia's use of environmental personhood was a "window-dressing exercise" designed to promote Bolivia's ethno-ecologist image on the world stage rather than to safeguard the environment.⁷⁰

Finally, the government of Uganda, like those of Ecuador and Bolivia, has a record of prioritizing national economic growth over ecological integrity, notwithstanding its recent statutory implementation of rights of nature.⁷¹ Under Uganda's statutory personhood scheme, the Minister responsible for the environment is empowered to, by regulation, prescribe the conservation areas to which rights of nature apply.⁷² The conferral of this broad ministerial discretion is concerning in light of the government's

65. Caleb Stevens et al., *Ecuador Shows Why Communities and the Climate Need Strong Forest Rights*, WORLD RESOURCES INSTITUTE (Sep. 19, 2014), <https://www.wri.org/insights/ecuador-shows-why-communities-and-climate-need-strong-forest-rights> [<https://perma.cc/Z27G-J533>].

66. Cardona, *supra* note 64; *see also* Calzadilla & Kotzé, *Somewhere Between Rhetoric and Reality*, *supra* note 46, at 418.

67. Calzadilla & Kotzé, *Living in Harmony*, *supra* note 50, at 419.

68. Calzadilla & Kotzé, *Living in Harmony*, *supra* note 50, at 420.

69. Yvette Sierra Praeli, *Conservationists Urge Reforms in Bolivia After Environmental, Political Crises*, MONGABAY (Mar. 27, 2020), <https://news.mongabay.com/2020/03/conservationists-urge-reforms-in-bolivia-after-environmental-political-crises/> [<https://perma.cc/AR2L-EFR9>]; *see also* Francesco Cantini et al., *Evidence-Based Integrated Analysis of Environmental Hazards in Southern Bolivia*, 16 INT. J. ENV'T RSCH. 2107 (2019).

70. Calzadilla & Kotzé, *Living in Harmony*, *supra* note 50, at 415.

71. Matthew W. Hopewell, *The Rights of Nature in Uganda: Exploring the Emergence, Power and Transformative Quality of a 'New Wave' of Environmentalism* 6 (July 9, 2019) (MSc Dissertation, University of London).

72. National Environment Act 2019, § 4(4) (Act No. 5/2019) (Uganda).

extractive aspirations. In the immediate aftermath of Uganda's implementation of the rights of nature, oil fields continued to be developed in the Albertine Rift on the ancestral lands of the Bagungu people.⁷³ In April 2021, governmental officials signed final agreements to allow private entities to extract approximately 1.7 billion barrels of oil in that region, including in land within a national park and directly adjacent to a United Nations Educational, Scientific and Cultural Organization wetland.⁷⁴ Of the interrelationship between Uganda's new rights of nature and its developmental aspirations, Naomi Karekaho, spokesperson for Uganda's National Environment Management Authority, recently stated, "[N]ature definitely has its own rights. But so do people and so does development."⁷⁵

Conversely, granting rights to nature may be a way to better protect the environment where governments are unable or unwilling to protect the state's natural resources. As one critic notes:

History has shown that governments and the law have failed to safeguard the environment upon which civilization depends. In a system that has so much hope, trust, and reliance on the mechanical wrenching of the adversarial push-and-pull to extract justice, perhaps it is only logical that Nature be given the power to advocate for itself—especially when its foremost historical enemies, governments and corporations, yield so much legal force.⁷⁶

Justice William O. Douglas of the United States Supreme Court famously referenced Stone's argument for environmental personhood in his powerful 1972 dissent in *Sierra Club v. Morton*.⁷⁷ In *Morton*, a non-profit environmental conservation organization attempted to prevent the development of a large resort complex in the Sierra Nevada Mountains.⁷⁸ The Sierra Club argued that its

73. Jack Losh, *Uganda Joins the Rights-of-Nature Movement but Won't Stop Oil Drilling*, NAT'L GEOGRAPHIC (June 3, 2021), <https://www.nationalgeographic.com/environment/article/uganda-joins-the-rights-of-nature-movement-but-wont-stop-oil-drilling> [https://perma.cc/3UX5-36AK].

74. *Id.*

75. *Id.*

76. Bilof, *supra* note 51, at 133.

77. *Sierra Club v. Morton*, 405 U.S. 727, 729, 742-43 (1972); *see also* Bilof, *supra* note 51, at 129-30.

78. Bilof, *supra* note 51, at 120-22.

“longstanding concern with and expertise in [environmental] matters were sufficient to give it standing as a ‘representative of the public.’”⁷⁹ Ultimately that argument was unsuccessful.⁸⁰ However, Justice Douglas stated in dissent that “those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.”⁸¹ He opined that granting rights to nature could result in improved environmental outcomes in circumstances where federal regulatory agencies were “notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations.”⁸²

Similarly, some scholars have argued that the development of the doctrine of environmental personhood is essential in India to combat the government’s repressive approach to environmental activists.⁸³

As the above examples demonstrate, the extent to which environmental personhood will result in enhanced environmental protection is likely to depend upon the strength of the conferring instrument and the political will to protect the environment underlying it.⁸⁴

The rationale underlying the conferral of rights on nature also includes that it may further First Nations sovereignty. The following Section considers the merits of this argument.

3. Recognition of First Nations Modes of Custodianship

Some scholars have posited that through providing rights to nature and codifying First Nations conceptions into law within environmental personhood frameworks, First Nations

79. *Id.* at 120-22.

80. *Sierra Club*, 405 U.S. at 727, 735, 741.

81. Megan Schmiesing, *Rights, Water, and Guardians: How Rights of Nature Movements are Reshaping our Current Environmental Ethics and What These Policies Need to be Successful* 8 (2020) (Thesis, Claremont Graduate University).

82. *Sierra Club*, 405 U.S. at 727, 729, 745.

83. Palash Srivastav, *Legal Personality of Ganga and Ecocentrism* 4 *CAMB. L. REV.* 151, 151-68 (2019); see also Joanna Slater & Niha Masih, *In India, a Climate Activist’s Arrest Shows Shrinking Space for Dissent*, *WASH. POST* (Feb. 18, 2021), https://www.washingtonpost.com/world/asia_pacific/india-modi-dissent/2021/02/17/b6ab6ec8-7059-11eb-8651-6d3091eac63f_story.html [<https://perma.cc/SN26-BBA7>].

84. Good, *supra* note 46, at 40.

communities may be granted more agency within their custodial lands.⁸⁵

Two statutes enacted in New Zealand illustrate this rationale. In 2014, the Te Urewera protected area was granted legal personhood.⁸⁶ The *Te Urewera Act 2014* (“*Te Urewera Act*”) recognized Te Urewera as “a place of spiritual value,” that possesses “its own mana and mauri,” “an identity in and of itself,”⁸⁷ and a deep connection to the Tūhoe people.⁸⁸ The Act created the Te Urewera Board, which is made up of four members appointed by the trustees of Tūhoe Te Uru Taumatua, and four appointed by the Crown.⁸⁹

The *Te Urewera Act* vests the fee simple estate of Te Urewera establishment land in Te Urewera itself, as opposed to its representative entity or the Tūhoe people.⁹⁰ The drafters of this provision have stated that it was intended to “sidestep” the vexed issue of ownership and reassure non-First Nations New Zealanders that a proprietary interest in Te Urewera (previously a national park) was not to be vested in any one group.⁹¹

Tănăsescu highlights the paucity of Māori terms in the operational provisions of that statute in comparison to the prevalence of Western bureaucratic and managerial frameworks.⁹² Conversely, Gordon defends the radical nature of the *Te Urewera Act*, labelling it an “unequivocal rejection of a human-centered rights regime for protecting nature as property.”⁹³

The *Te Urewera Act* has enhanced the Tūhoe peoples’ ability to manage Te Urewera in accordance with their traditional practices. When Te Urewera was a national park managed by the

85. Sheber, *supra* note 39, at 166.

86. *Te Urewera Act, 2014* (Act No. 51/2014) (N.Z.).

87. *Id.* § 3.

88. *Id.* § 4.

89. *Id.* § 21(1). For a detailed consideration of the background of that Act see Craig M. Kauffman, *Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand*, <http://files.harmonywithnatureun.org/uploads/upload923.pdf> [https://perma.cc/PN6Q-JDKT] (last visited Oct. 7, 2021).

90. *Te Urewera Act, 2014*, § 12.

91. Kauffman, *supra* note 89, at 10.

92. Mihnea Tănăsescu, *Rights of Nature, Legal Personality and Indigenous Philosophies*, 9 *TRANSNAT’L ENV’T L.* 429, 445 (2020).

93. Gwendolyn J. Gordon, *Environmental Personhood*, 43 *COLUM. J. ENV’T L.* 49, 52 (2018).

Department of Conservation, the Department controlled the burgeoning possum population by the use of a toxic spray.⁹⁴ Following the enactment of the *Te Urewera Act*, Tūhoe custodians commenced possum trapping and hunting as a means to control possum populations while lessening the risk of adverse environmental impacts as a result of toxic bait use.⁹⁵ In turn, these activities have provided a sustainable livelihood for Tūhoe families who consume possum meat and sell possum fur.⁹⁶ In their interviews with Craig Kauffman, environmental politics scholar, regarding these practices, Tūhoe hunters expressed a sense of duty to help maintain the possum population at a level that would not overwhelm the ecosystem.⁹⁷ Kauffman concluded, “[T]he Tūhoe play a natural role in the forest’s food web so that the forest ecosystem can sustain itself.”⁹⁸

In 2017, the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) (“*Te Awa Tupua Act*”) became the second statute in New Zealand to declare an ecosystem a legal person.⁹⁹ The *Te Awa Tupua Act* recognized the status of Te Awa Tupua, that is, “an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.”¹⁰⁰ Additionally, that Act provided that Tupua te Kawa comprises the intrinsic values that represent the essence of Te Awa Tupua, including “Ko te Awa te mātāpuna o te ora: the River is the source of spiritual and physical sustenance,” and “Ko au te Awa, ko te Awa ko au: I am the River and the River is me.”¹⁰¹ The function of the River’s representative entity, Te Pou Tupua, is to uphold the status of both Te Awa Tupua and Tupua te Kawa.¹⁰² That entity is made up of one representative nominated by the Whanganui iwi, and one by the Crown.¹⁰³ Support is offered

94. Kauffman, *supra* note 89, at 21.

95. *Id.*

96. *Id.* at 22.

97. *Id.*

98. *Id.*

99. Toni Collins & Shea Esterling, *Fluid Personality: Indigenous Rights and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 in Aotearoa New Zealand*, 20 MELB. J. INT’L L. 1 (2019).

100. *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*, § 12 (N.Z.).

101. *Id.* § 13.

102. *Id.* § 19(1)(b).

103. *Id.* § 20.

to that entity by Te Karewao, an advisory group.¹⁰⁴ A strategy group, Te Kōpuka nā Te Awa Tupua, is also established under that Act.¹⁰⁵ That group consists of stakeholders such as Whanganui iwi, local and central government personnel, and representatives from the tourism, conservation, recreation, and wild game industries.¹⁰⁶ The Act also creates a contestable fund.¹⁰⁷

Under the *Te Awa Tupua Act*, the vesting of the Crown-owned parts of the bed of the Whanganui River in Te Awa Tupua does not transfer a proprietary interest in water to its representative entity or to the Whanganui iwi.¹⁰⁸ Moreover, Te Pou Tupua's consent is not required to use water from the River.¹⁰⁹ On that basis, critics claim that the statute does not sufficiently enhance the Whanganui iwi's ability to manage the River.¹¹⁰

Critically, while both statutes considered above restore a level of Māori stewardship over the ecosystems they affect, they were also enacted as a result of the Crown's refusal to grant the Tūhoe and the Whanganui iwi ownership of either ecosystem, and neither statute confers substantive proprietary rights on the traditional custodians of those resources.

It has been proposed that New Zealand's rights of nature model could be adapted to an Australian context.¹¹¹ However, Dr. Virginia Marshall, Inaugural Indigenous Postdoctoral Fellow with the Australian National University's School of Regulation and Global Governance and the Fenner School of Environment and Society, opines that granting rights to nature is antithetical to Aboriginal and Torres Strait Islander peoples' cultural obligations

104. *Id.* §§ 14, 27.

105. *Id.* pt. 2 (4).

106. *Id.* § 32(1).

107. Erin L. O'Donnell & Julia Talbot-Jones, *Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India*, 23 *ECOLOGY & SOC.* 7 (2018); see also Sequoia L. Butler, *'I Am the River, the River Is Me': How Environmental Personhood Can Protect Tribal Food Systems*, 38 *WIS. INT'L L.J.* 79, 90 (2020).

108. Abigail Hutchison, *The Whanganui River as a Legal Person*, 39 *ALT. L.J.* (GAUNT) 179, 181-82 (2014); see also Katie O'Bryan, *Giving a Voice to the River and the Role of Indigenous People: The Whanganui River Settlement and River Management in Victoria*, 20 *AUSTL. INDIGENOUS L. REV.* 48, 57 (2017).

109. O'Bryan, *supra* note 108, at 57.

110. *Id.* at 68-69; Collins & Esterling, *supra* note 99, at 4-5.

111. O'Bryan, *supra* note 108, at 50.

to care for custodial lands¹¹² and considers that environmental personhood is merely a “new tool of colonization which would decouple Indigenous ontological relationships and laws and the inherent obligations to manage and care for the environment.”¹¹³ Additionally, the rights of nature movement may compromise the myriad exclusive and non-exclusive property rights to land and water that have been vested in First Nations communities under various Australian federal, state, and territory laws.¹¹⁴ Dr Marshall therefore concludes:

The answer to inadequate or poorly performing government policies and law is not to retreat to legal personhood; not to separate the rivers, the creeks and the mountains, the national heritage areas or the national parks from Indigenous peoples. The answer is to meaningfully consult and engage with Indigenous communities and give those communities a significant and central role in the management of Australia’s land, waters and resources.¹¹⁵

There is, moreover, abundant evidence that conferring rights on nature will not necessarily further First Nations interests. For example, despite the inclusion of First Nations concepts in Bolivia’s statutory personhood framework, the exploitation of First Nations custodial lands remains rife in Bolivia. In August 2017, Evo Morales’ government enacted the *Law on Protection, Integral and Sustainable Development of the Isiboro Secure National Park and Indigenous Territory* (“Law on Protection”) which repealed an earlier law disallowing the construction of transport infrastructure on the traditional lands of the Tsimané, Yuracaré and Mojeño-Trinitario peoples.¹¹⁶ Those peoples had no right to reject such works notwithstanding their right to prior informed consent under Article 16.1 of the *Framework Law 300 of Mother Earth and Integral Development for Living Well of 2012* (“Framework Law”).¹¹⁷

In 2019 the IRNT found that the Law on Protection was invalid because there had been inadequate consultation with First Nations

112. Virginia Marshall, *Removing the Veil from the ‘Rights of Nature’: The Dichotomy between First Nations Customary Rights and Environmental Legal Personhood*, *AUSTL. FEMINIST L.J.* 1, 2 (2020).

113. *Id.* at 2.

114. *Id.* at 5.

115. *Id.* at 16.

116. Calzadilla & Kotzé, *Living in Harmony*, *supra* note 50, at 423.

117. *Id.* at 416-17.

peoples prior to its enactment. In making this finding the IRNT had regard to Bolivia's statutory personhood framework, protections for First Nations peoples in the Bolivian Constitution and Supreme Court jurisprudence.¹¹⁸ The IRNT ordered that the Bolivian Government immediately halt the construction of the relevant road infrastructure. However, as at the date of writing, this is yet to occur and the Bolivian Minister of State, Carlos Romero Bonifaz, has publicly rejected the authority of the IRNT.¹¹⁹

While, in some cases, environmental personhood may constitute a useful mechanism to advance First Nations sovereignty, there is a danger in over-emphasizing the interconnectedness between the rights of nature and First Nations interests. Moreover, consultation with First Nations communities is key prior to the implementation of rights of nature frameworks.¹²⁰

Having considered the rationale underlying environmental personhood, an analysis of the types of rights that have been conferred on nature and who is able to protect those rights is necessary.

B. *Types of Rights and Approaches to Standing*

The types of rights that have been conferred upon nature vary widely.¹²¹ Express rights have been conferred on nature by constitution and statute in several jurisdictions, including Ecuador, Bolivia, Uganda, and New Zealand. In other jurisdictions, including the United States, local government orders and First Nations laws have conferred rights on nature. Conversely, courts have found implied rights of nature in Colombia, India, and Bangladesh. These rights have generally been inferred from constitutional provisions

118. See generally International Tribunal for the Rights of Nature, *Case of the Isiboro Sécure National Park and Indigenous Territory: Final Judgement* (2019) <https://therightsofnature.org/wp-content/uploads/2019/05/TIPNIS-Judgement-English-.pdf> (last visited Oct. 7, 2021).

119. *Rights of Rivers*, *supra* note 13, at 15.

120. Tănăsescu, *supra* note 92, at 453; see, e.g., Hopewell, *supra* note 71, at 29.

121. For a helpful comparison regarding the scope and strength of global personhood regimes, see the table provided in Craig Kauffman & Pamela L. Martin, *Comparing Rights of Nature Laws in the U.S., Ecuador, and New Zealand: Evolving Strategies in the Battle Between Environmental Protection and "Development"*, in INT'L STUD. ASS'N ANN. CONF. 20 (Feb. 23, 2017) [hereinafter Kauffman & Martin, *Evolving Strategies*]; see also *Rights of Rivers*, *supra* note 13, at 6-7.

requiring environmental protection and international rights of nature jurisprudence. A detailed consideration of curial decisions finding rights of nature and the burgeoning international jurisprudence of environmental personhood is provided in Section D of this article.

A survey of international rights of nature frameworks reveals that the types of rights of nature broadly fall into the following categories:¹²² a) positive enumerated rights (including to “exist,” “thrive,” and “be restored”) granted to nature as a whole (“all of nature rights”) and b) rights by analogy to a legal person granted to particular ecosystems (“narrow personhood rights”).¹²³ In some cases, these categories overlap.

The standing mechanisms accompanying these frameworks differ. Generally, in respect of all of nature rights a liberalized standing model is adopted to enable all persons or all citizens of the relevant country to enforce nature’s rights. Narrow personhood rights tend to limit standing to a representative entity tasked with speaking as the voice of the relevant ecosystem.

Conversely, in some jurisdictions, liberalized standing rules are utilized to protect nature’s interests in lieu of granting rights to nature. For example, in 2018 the Royal Court of Justice of Bhutan constituted the Green Bench and developed a Bench Book allowing for environmental protection actions to be brought by any person as a “trustee” of nature.¹²⁴ Similarly, the *Philippines Supreme Court Rules of Procedure 2010* provides that any “citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws.”¹²⁵

122. See Allison Katherine Athens, *An Indivisible and Living Whole: Do We Value Nature Enough to Grant It Personhood*, 45 *ECOLOGY L.Q.* 187, 206 (2018); see also Craig Kauffman, *Guardianship Arrangements in Rights of Nature Legal Provisions*, in *EARTH LAW: EMERGING ECOCENTRIC LAW—A GUIDE FOR PRACTITIONER* (Anthony Zelle et al. eds., Wolters Kluwer 2020) <http://files.harmonywithnatureun.org/uploads/upload922.pdf> [<https://perma.cc/EH3Z-W2YS>] (last visited Oct. 7, 2021).

123. Gordon, *supra* note 93, at 52; Jha & Ghosh, *supra* note 9.

124. *Rights of Rivers*, *supra* note 13, at 47.

125. *Id.*

1. All of Nature Rights

This Section will examine all of nature rights and corresponding standing rules that govern Ecuador, Bolivia, and Uganda.

a. Ecuador

In 2008, the Ecuadorian Constitution enshrined broad rights for Mother Earth, or *Pachamama*.¹²⁶ Namely, *Pachamama* has the right to exist, maintain, and regenerate vital cycles, structures, functions, and evolutionary processes.¹²⁷ *Pachamama* also has the right to be restored when destroyed.¹²⁸

Pachamama is recognized as the bearer of rights as “nature,” distinct from “persons, people, communities and nationalities” and “natural and juridical persons.”¹²⁹ The Ecuadorian Constitution does not introduce a hierarchy of rights, and therefore, the rights of nature are not superior to any other category of right conferred by that instrument.¹³⁰ No regulation can restrict the content of any constitutionally entrenched right without justification.¹³¹ However, concerning, no constitutional guidance is offered as to what constitutes “justification.”¹³²

Broad standing rights are conferred by the Constitution. All persons, communities, peoples, and nations are permitted to call upon public authorities to enforce the rights of nature, subject to the other provisions of the Constitution.¹³³

Article 11(3) of the Constitution states that “rights shall be fully actionable. Absence of a legal regulatory framework cannot be alleged to justify their infringement or ignorance thereof, to dismiss proceedings filed as a result of these actions, or to deny

126. CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct 20, 2008, arts. 71-74.

127. *Id.* art 71.

128. *Id.* art 72.

129. Gordon, *supra* note 93, at 52, 54 (citing CONSTITUTION OF THE REPUBLIC OF ECUADOR, Oct. 20, 2008, arts. 10, 71, 72, and 74).

130. Calzadilla & Kotzé, *Somewhere Between Rhetoric and Reality*, *supra* note 46, at 419, 422.

131. CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, arts 11(4), 11(8), 71.

132. Calzadilla & Kotzé, *Somewhere Between Rhetoric and Reality*, *supra* note 46, at 419.

133. CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, art. 71; Calzadilla & Kotzé, *Somewhere Between Rhetoric and Reality*, *supra* note 46, at 424.

their recognition.”¹³⁴ That is, those provisions are directly justiciable.¹³⁵

Kauffman and Pamela L. Martin, politics and international relations scholar, have identified the following categories of litigation and administrative action in Ecuador which commonly invoke the constitutional rights of nature: (a) litigation seeking the protection of the rights of nature including by the restoration of damaged ecosystems or preventative action to mitigate future degradation in either the civil or constitutional courts of Ecuador; (b) litigation seeking to punish offenders for environmental crimes contained in the *Ecuadorian Penal Code*; and (c) administrative action by government agencies to uphold the rights of nature, including by the imposition of fines, revocation of licenses, eviction of companies from sites of environmental significance, and the restoration of damaged ecosystems.¹³⁶

By 2016, Ecuadorian courts had considered thirteen claims brought under the constitutional rights of nature provisions.¹³⁷ Ten of those claims prevailed in favor of *Pachamama*, including one concerning the pollution of the Vilcabamba River, which is considered in detail at Section D of this article.¹³⁸ These claims related to illegal mining, logging, fishing, and the disposal of waste.¹³⁹ Of those cases, four were initiated by a government entity; four were criminal matters; and the remaining were constitutional actions commenced by individual citizens and civic groups. As of 2019, plaintiffs had initiated twenty-four claims under Ecuador’s constitutional rights of nature.¹⁴⁰

134. CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, art. 11(3). See also Calzadilla & Kotzé, *Somewhere Between Rhetoric and Reality*, *supra* note 46, at 418.

135. Calzadilla & Kotzé, *Somewhere Between Rhetoric and Reality*, *supra* note 46, at 419.

136. Craig Kauffman & Pamela Martin, *Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail*, 92 *WORLD DEV.* 130, 133 (2017) [hereinafter Kauffman & Martin, *Can Rights of Nature*].

137. For a summary of these cases, see *id.* at app.

138. Eric Alston, *Ecuador’s 2008 Constitution: The Political Economy of Securing an Aspirational Social Contract*, 3 *CONST. STUD.* 69, 88 n.27 (2018).

139. *Id.* at 88 n.27.

140. Craig M. Kauffman, *Why Rights of Nature Laws are Implemented in Some Cases and Not Others: The Controlled Comparison of Bolivia and Ecuador*, *INT’L STUD. ASS’N ANN. CONF.* 8 (Mar. 29, 2019) <http://files.harmonywithnatureun.org/uploads/upload861.pdf> [https://perma.cc/PF62-8HBF].

b. Bolivia

While Bolivia's 2009 Constitution provides a human right to a healthy, protected, and balanced environment,¹⁴¹ it does not constitutionally entrench the rights of nature like its Ecuadorian counterpart.¹⁴² The rights of nature in Bolivian law are set out in the *Law 071 of the Rights of Mother Earth of 2010* ("Law of the Rights of Mother Earth").¹⁴³ The Framework Law operationalizes these rights in the context of development for living well or *vivir bien*.¹⁴⁴

The Law of the Rights of Mother Earth describes the legal status of Mother Earth as follows:

For the purpose of protecting and enforcing its rights, Mother Earth takes on the character of collective public interest. Mother Earth and all its components, including human communities, are entitled to all the inherent rights recognized in this Law. The exercise of the rights of Mother Earth will take into account the specificities and particularities of its various components. The rights under this Act shall not limit the existence of other rights of Mother Earth.¹⁴⁵

The rights of Mother Earth under that statute include the rights to life, diversity of life, water, clean air, equilibrium, restoration, and pollution-free living.¹⁴⁶

Like the Ecuadorian regime, Bolivia's framework does not confer personhood on nature *per se*. Rather, it strips human persons of their dominance over nature by conferring on nature its own competing set of rights.¹⁴⁷

Article 6 of the statute grants broad standing rights to protect Mother Earth to the citizens of Bolivia: "All Bolivians, to join the community of beings comprising Mother Earth, exercise rights under this Act, in a way that is consistent with their individual and collective rights."¹⁴⁸

141. CONSTITUCIÓN POLÍTICA DEL ESTADO [CONSTITUTION] Feb. 7, 2009, art. 33 (Bol.).

142. Calzadilla & Kotzé, *Living in Harmony*, *supra* note 50, at 399.

143. *See generally* Ley de Derechos de la Madre Tierra [Law of the Rights of Mother Earth], Law 071 (2010) (Bol.).

144. Calzadilla & Kotzé, *Living in Harmony*, *supra* note 50, at 399.

145. Law of the Rights of Mother Earth, Law 071, art. 5 (2010) (Bol.).

146. *Id.* art. 7.

147. Gordon, *supra* note 93, at 54-55.

148. Law of the Rights of Mother Earth, Law 071, Art. 6 (2010) (Bol.).

The Law provides for the establishment of the Office of Mother Earth to ensure the protection and fulfillment of Mother Earth's rights.¹⁴⁹ However, as of 2019 the Office had not been established.¹⁵⁰

Importantly, the ecocentric provisions considered above are arguably diluted by the obligation of the Bolivian state to "develop balanced forms of production and patterns of consumption to satisfy the needs of the Bolivian people to live well."¹⁵¹

The authors of this article are unaware of any actions that have been brought pursuant to Bolivia's statutory rights of nature.

c. Uganda

In March 2019 Uganda enacted statutory rights of nature similar to those introduced in Ecuador and Bolivia.¹⁵² The *National Environment Act 2019* confers rights on nature "to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution."¹⁵³

The Act provides liberalized standing procedures granting all persons "a right to bring an action before a competent court for any infringement of rights of nature under this Act".¹⁵⁴

Pursuant to the Act, the Ugandan government established a Policy Committee on Environment for strategic policy guidance on the environment. The Committee is comprised entirely of government ministers.¹⁵⁵

2. Narrow Personhood Rights

Other jurisdictions have favored a narrow personhood approach, conferring rights on nature by analogy to a legal person or legal entity and limiting standing to bodies appointed to represent the interests of those ecosystems.

149. Calzadilla & Kotzé, *Living in Harmony*, *supra* note 50, at 409-10, 413; White, *supra* note 26, at 145.

150. *Rights of Rivers*, *supra* note 13, at 22.

151. Law of the Rights of Mother Earth, Law 071, Art. 8(2) (2010) (Bol.).

152. National Environment Act, 2019 (Act No. 5/2019) (Uganda).

153. *Id.* § 4(1).

154. *Id.* § 4(2).

155. *Id.* § 6(2).

a. New Zealand

The *Te Urewera Act* declares Te Urewera a legal entity with all the rights, powers, duties, and liabilities of a legal person. However, the exercise of these functions is limited to its representative entity, the Te Urewera Board (the structure of which is described above in Section A).¹⁵⁶ Similarly, the *Te Awa Tupua Act* declares Te Awa Tupua to be a legal person who has “all the rights, powers, duties, and liabilities of a legal person.”¹⁵⁷ The representative entity, Te Pou Tupua, is tasked with exercising those functions.¹⁵⁸

Those statutes are rarely invoked in New Zealand, likely because their implementation had bipartisan support, was relatively uncontroversial, and the representative entities established to protect the interests of those ecosystems are yet to encounter substantial difficulties.¹⁵⁹ However, a test of the efficacy of the *Te Awa Tupua Act* may arise if there is a legal conflict regarding the diversion of the waters of the River by Genesis Power Company. Genesis’s hydropower system currently diverts the waters of the Whanganui River and five of its upper tributaries. The company’s consents will expire in 2039.¹⁶⁰

b. Australia

The Australian State of Victoria adapted parts of New Zealand’s environmental personhood framework in 2017 when it enacted the *Yarra River Protection (Wilip-gin Birrarung murrong) Act 2017*.¹⁶¹ That Act recognizes the status of the Yarra River as a living entity¹⁶² but does not confer legal personhood or rights on the River itself. The statute appointed a body, the Birrarung Council, as the independent voice of that river.¹⁶³ The role of the Birrarung Council to advocate for the Yarra River is similar to the guardianship model adopted in the New Zealand statutes considered above.¹⁶⁴ The Act provides that at least two of the

156. *Te Urewera Act 2014*, § 11 (Act No. 51/2014) (N.Z.).

157. *Te Awa Tupua Act 2017*, § 14 (N.Z.).

158. *Id.* § 14(2).

159. *Rights of Rivers*, *supra* note 13, at 18.

160. Zartner, *supra* note 37, at 22-23.

161. *Yarra River Protection Act 2017*, (Austl.).

162. *Id.* pt. 1 § 1(a).

163. *Id.* pt. 5 § 46-48.

164. *Rights of Rivers*, *supra* note 13, at 19.

twelve members of the Birrarung Council must be nominees of Wurundjeri Tribe Land and the Compensation Cultural Heritage Council Inc.¹⁶⁵

c. Curial Decisions

As Section D of this article demonstrates, several curial decisions have also adopted a narrow personhood approach, directly citing New Zealand's statutes considered above.

3. Comparing the Types of Rights

Any analysis of the comparative efficacy of the types of rights considered above must be tempered by an acknowledgment that the practical impacts of those frameworks are yet to be seen.¹⁶⁶ For example, it is too soon to tell whether the *Te Awa Tupua Act* will positively advance the environmental outcomes of the Whanganui River.¹⁶⁷ In late 2019, Adam Daniel, a biologist employed to monitor the health of the river, emphasized the long-term pollution challenges facing the river and raised concerns about the river's turbidity as a result of intensive agriculture along its banks.¹⁶⁸

Additionally, there are limits to the helpfulness of comparing the efficacy of legislative and policy frameworks between states.¹⁶⁹ For example, despite the similarities between the Ecuadorian and Bolivian rights of nature regimes, the implementation of the rights of nature has proven to be dramatically different in each jurisdiction.¹⁷⁰ Environmental personhood jurisprudence continues to strengthen in Ecuador as a result of the litigation discussed above and, in more detail, below. Additionally, the Ecuadorian Ministry of the Environment has invoked rights of nature to justify regulatory actions and judges have recognized the

165. Yarra River Protection Act, 2017, § 49(1)(a) (Austl.).

166. *Rights of Rivers*, *supra* note 13, at 18.

167. Jeremy Lurgio, *Saving the Whanganui: Can Personhood Rescue a River?*, *GUARDIAN* (Nov. 30, 2019), <https://www.theguardian.com/world/2019/nov/30/saving-the-whanganui-can-personhood-rescue-a-river> [<https://perma.cc/4HDK-XFW4>]; Catriona May, *Should Rivers Have Legal Rights?*, *UNIV. MELBOURNE* (July 30, 2020), <https://law.unimelb.edu.au/news/MLS/should-rivers-have-legal-rights> [<https://perma.cc/C6SU-S5Z6>]; *Rights of Rivers*, *supra* note 13, at 18.

168. Lurgio, *supra* note 167.

169. O'Bryan, *supra* note 108, at 50.

170. Kauffman, *supra* note 140, at 2.

rights of nature in their rulings even where plaintiffs have not invoked those provisions. Finally, Ecuador's National Ombudsman regularly investigates rights of nature violations.¹⁷¹ These factors suggest that the normative weight of rights of nature continues to steadily increase in Ecuador. By comparison, Kauffman opines, there is little evidence that the government is implementing Bolivia's rights of nature regime.¹⁷²

Notwithstanding these difficulties, a cautious evaluation of the efficacy of the various types of rights of nature can be attempted.

With respect to the respective merits and limitations of all of nature rights and narrow personhood rights, Kauffman states that:

It is debatable which model provides stronger protections for the rights of nature. Theoretically, when authority to represent nature is distributed broadly, the barriers to defending nature's rights are lower. However, empowering people to protect nature by invoking rights of nature is not the same thing as requiring them to do so. When rights are not accompanied by the assignment of responsibilities, rights of nature legal provisions may be weakened. New Zealand's rights of nature laws, for example, emphasize the concept of responsibility much more than rights. These laws create statutory guardians charged with promoting and protecting the interests, well-being, and rights of the river Te Awa Tupua and the forest Te Urewera. While this legal design limits who can represent nature, advocates argue that this guardianship model is stronger because it appoints representatives who are legally mandated to advocate for nature's interests and protect its rights, not only in courts but also in policy and social forums.¹⁷³

All of nature rights can be criticized on several bases.¹⁷⁴ First, their breadth makes their implementation uncertain. Writing in 2013, Good considered that these rights were so broad that it was unclear whether they could ever provide a basis for a legal cause

171. *Id.*

172. See Kauffman, *supra* note 140, at 2; see also Yifan He et al., *Guardians of the Forests: How Should an Indigenous Community in Eastern Bolivia Defend Their Land and Forests Under Increasing Political and Economic Pressures?* 3 CASE STUDIES IN THE ENV'T 1, 10-11 (2019).

173. Kauffman, *supra* note 122, at 17.

174. Darpö, *supra* note 61, at 22.

of action or were rather intended as statements of policy.¹⁷⁵ Others have labelled all of nature rights “impractical” and opined that they are “likely to confuse courts and litigants alike.”¹⁷⁶ Second, the expansive breadth of the standing mechanisms that generally accompany these rights run the risk of “flooding the courts with non-meritorious claims.”¹⁷⁷ Third, the conferral of rights on nature as a whole could result in absurd outcomes, such as water being held liable for damage caused by flooding.¹⁷⁸ For that reason, Lillo opines that the preferable approach is to identify a specific ecosystem upon which rights are conferred.¹⁷⁹ Fourth, Gordon considers that under all of nature rights frameworks it is difficult to partition conflicting interests in a principled way. She considers that the Bolivian government’s prioritization of extractive industry (considered in Section A of this article) exemplifies this.¹⁸⁰ Fifth, all of nature rights are less amenable to the construction of representative or guardian entities because they necessarily encompass a variety of dynamic ecosystems.¹⁸¹ This means that no one is obligated to speak on behalf of the environment and legal action is voluntary.¹⁸²

Several scholars note the efficacy of New Zealand’s approach to environmental personhood. Dana Zartner, international law scholar, recently wrote that, “while still new and relatively untested, Te Awa Tupua, is probably the most successful rights of nature law in existence.”¹⁸³ Other commentators have observed that, by reason of its precision, New Zealand’s mode of statutory recognition may avoid a main criticism typically directed at environmental personhood regimes, namely, ambiguity in application (as considered above).¹⁸⁴ The benefits of the inclusion of a number of stakeholders in the organizational structure of New

175. Good, *supra* note 46, at 35.

176. Mary Elizabeth Whittenmore, *The Problem of Enforcing Nature’s Rights Under Ecuador’s Constitution: Why the 2008 Environmental Amendments Have No Bite* 20 PAC. RIM L. & POL’Y J. 659, 667, 669 (2011).

177. Babcock, *supra* note 45, at 4.

178. Lillo, *supra* note 6, at 187.

179. *Id.* at 186.

180. Gordon, *supra* note 93, at 83-84.

181. Kauffman, *supra* note 122, at 1.

182. *Id.* at 2.

183. Zartner, *supra* note 37, at 3.

184. Good, *supra* note 46, at 40.

Zealand's statutory rights of nature has also been emphasized.¹⁸⁵ Finally, Gordon notes that the strength of the New Zealand statutes is derived from the dual "legal and cultural heft" the statutes embody.¹⁸⁶

The *Te Urewera Act* and the *Te Awa Tupua Act* contain several elements that can be characterized as best practice.¹⁸⁷ Namely, those statutes prioritize First Nations interests by the creation of representative entities with Māori membership.¹⁸⁸ Therefore, critically, those entities include independent non-government representatives.¹⁸⁹ In addition, the statutes provide a detailed organizational structure for the management of the representative entities.¹⁹⁰ The representative entities are embedded within the governance of the ecosystems, meaning that the rights of the relevant ecosystem can be protected through policy-making processes rather than merely by litigation.¹⁹¹ Finally, the statutes operationalize funding arrangements for the management of the ecosystems.¹⁹²

C. Creating Rights of Nature

Rights have been conferred on nature by way of constitutional enactment, statutory enactment, local government ordinance, Tribal Code, and curial decisions. This Section will focus on the former four methods of rights creation and their respective advantages and limitations. Court-conferred personhood will be considered in Section D of this article through several case studies.

1. Constitutional Recognition

The constitutional enactment of the rights of nature has greater legal and normative force when compared to other modes of recognition. This is due to the status of constitutions as supreme laws, generally prevailing over statute to the extent of any inconsistency and requiring special measures for their

185. Jha & Ghosh, *supra* note 9, at 500.

186. Gordon, *supra* note 93, at 86-87.

187. See O'Donnell & Talbot-Jones, *supra* note 107, at 7.

188. *Te Awa Tupua Act 2017*, § 20 (N.Z.); *Te Urewera Act 2014*, § 21 (N.Z.).

189. *Id.*

190. *Te Awa Tupua Act 2017*, pt. 2 (N.Z.); *Te Urewera Act 2014*, pt. 2 (N.Z.).

191. Kauffman, *supra* note 122, at 1.

192. Butler, *supra* note 107, at 88-89; *Te Urewera Act 2014*, §§ 38-40, 53 (N.Z.).

amendment, such as legislative supermajority or referendum.¹⁹³ Furthermore, enshrining environmental rights constitutionally can augment the social and legal legitimacy of these rights.¹⁹⁴

As stated in Section B above, however, the efficacy of constitutional rights of nature will be diluted if the relevant provisions are poorly drafted, ambiguous, unaccompanied by sufficiently broad standing regimes, or if constitutionally entrenched pro-development prerogatives compete with those rights.¹⁹⁵ Additionally, although a strong protective measure, the constitutional recognition of the rights of nature is difficult to secure.¹⁹⁶ For example, any attempt to amend Australia's Constitution to include the rights of nature would face numerous obstacles, including the Australian public's reticence to constitutional amendment, the lack of clarity around whether there is a constitutional power to implement such a measure, and Australia's continued dependence on the natural resources sector.¹⁹⁷

The difficulty of constitutionally entrenching the rights of nature is exemplified by the fact that only one state—Ecuador—has adopted this course. Former Ecuadorian President Rafael Correa, a democratic socialist, was elected to office in 2006 on a progressive platform.¹⁹⁸ Correa incorporated the promise of constitutional reform into his mandate and called for a referendum to draft a new constitution through a participatory process.¹⁹⁹ The main proponents of the incorporation of personhood provisions into that instrument were a group of environmentalist lawyers and activists. It is unlikely that their efforts would have succeeded if not for the groundwork laid by environmental social movements of

193. See *Constitutional Beginnings: Making and Amending Constitutions*, MELBOURNE F. ON CONST.-BLDG., Oct. 2018, at 1, 4, https://law.unimelb.edu.au/_data/assets/pdf_file/0005/2903693/MF-Constitutional-INSIGHT-01-Constitutional-beginnings.pdf [<https://perma.cc/5G7X-XTZU>].

194. Rachel Pepper & Harry Hobbs, *The Environment is All Rights: Human Rights, Constitutional Rights and Environmental Rights*, 44 MEL. U. L. REV. 634, 661 (2021).

195. *Id.* at 662-63.

196. See generally Athens, *supra* note 122, at 204-05.

197. Good, *supra* note 46, at 39-40.

198. Knauß, *supra* note 46, at 707-08.

199. Maria Akchurin, *Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador* 40 L. & SOC. INQUIRY 937, 942 (2018).

prior decades²⁰⁰ and the fact that by the late twentieth century, Ecuadorian First Nations groups were powerful political actors organized into a national movement led by the Confederation of Indigenous Nationalities of Ecuador.²⁰¹

It would appear that Ecuador's constitutionally entrenched rights of nature resulted from a unique political moment in Ecuador's history.

2. Statutory Rights of Nature

Statutory personhood regimes also carry significant legal force, and, where implemented on a national level in federal systems, usually prevail over incompatible state legislation.²⁰² As Zartner considers with respect to the *Te Awa Tupua Act*, "Now codified as national legislation, Te Awa Tupua is on equal legal footing with other laws such as the Resources Management Act. It 'sits alongside other statutes,' but it doesn't invalidate existing laws. Correspondingly, other laws cannot invalidate consideration of Te Awa Tupua and the interests of the Whanganui."²⁰³

Moreover, the *Te Awa Tupua Act* provides that any person exercising functions under twenty-five enumerated statutes "must recognise and provide for" the status of Te Awa Tupua as a legal person and Tupua te Kawa. Tupua te Kawa are the intrinsic values that represent the essence of Te Awa Tupua contained in section 13 of the *Te Awa Tupua Act*.²⁰⁴ That is, the values of Tupua te Kawa must be reflected in the outcome of any decision made by an officer pursuant to those twenty-five statutes.²⁰⁵

However, much like Ecuador's constitutional rights of nature, statutory rights of nature have been implemented because of unique political moments and the enhanced visibility of First Nations voices. For example, the enactment of the *Te Awa Tupua Act* resulted from the culmination of over a century of First Nations

200. *Id.* at 939; see also Walley *supra* note 48, at 5-6.

201. Akchurin, *supra* note 199, at 948. See also Emma Bainbridge, *Indigenous Mobilization in Ecuador: The Emergence of CONAIE*, BROWN UNIV., <https://library.brown.edu/create/modernlatinamerica/chapters/chapter-6-the-andes/moments-in-andean-history/indigenous-mobilization-in-ecuador/> [<https://perma.cc/RCY7-6WJW>] (last visited Oct. 7, 2021); Lalander, *supra* note 63, at 156.

202. Kauffman & Martin, *Evolving Strategies*, *supra* note 121, at 29-30.

203. Zartner, *supra* note 37, at 11-12.

204. O'Bryan, *supra* note 108, at 55.

205. *Id.* at 60.

activism.²⁰⁶ The Whanganui iwi had asserted their claim to the Whanganui River since 1873. In 1990, a claim relating to the Whanganui River was filed in the Waitangi Tribunal on behalf of the Whanganui iwi.²⁰⁷ Negotiations between the Whanganui iwi and the government of New Zealand occurred from 2002 to 2004, re-commencing in 2009. In March 2017, the settlement between both parties was codified in the *Te Awa Tupua Act*.²⁰⁸

Similarly, Bolivia's statutory recognition of the rights of nature coincided with a rise in the political power of First Nations peoples, following the election of the country's first Indigenous president, Evo Morales, in 2005.²⁰⁹

3. Local Government and First Nations Recognition of Rights of Nature

In the United States, local government ordinances and First Nations laws confer personhood on natural resources.²¹⁰

The Tamaqua Borough Sewage Sludge Ordinance, passed in 2006,²¹¹ recognized the Tamaqua Borough ecosystem in Pennsylvania as a legal person capable of enforcing civil rights.²¹² Similar rights of nature ordinances have been passed in Santa Monica, California, Shapleigh, Maine, and Exeter, New Hampshire.²¹³ As of 2016, more than 150 local communities in more than twenty-four towns and cities had passed rights of nature ordinances in the United States.²¹⁴

However, these ordinances have proven vulnerable to invalidation.²¹⁵ For example, on February 26, 2019, Toledo, Ohio, passed the Lake Erie Bill of Rights ("LEBOR").²¹⁶ LEBOR conferred on the Lake rights to "exist, flourish, and naturally evolve" and held

206. Butler, *supra* note 107, at 87-88.

207. Collins & Esterling, *supra* note 99, at 3.

208. *Id.* at 200.

209. Gordon, *supra* note 93, at 49, 53; White, *supra* note 26, at 144.

210. White, *supra* note 26, at 155-58; *Rights of Rivers*, *supra* note 13, at 39.

211. Tamaqua Borough Ordinance, *supra* note 22.

212. *Id.*

213. Jha & Ghosh, *supra* note 9, at 486. See also Devon Alexandra Berman, *Lake Erie Bill of Rights Gets the Ax: Is Legal Personhood for Nature Dead in the Water?*, 20 *SUSTAIN. DEV. L. & POL'Y* 15 (2019).

214. Susana Borràs, *New Transitions from Human Rights to the Environment to the Rights of Nature*, 5 *TRANSNAT'L ENV'T L.* 113, 137 (2016); Jha & Ghosh, *supra* note 9, at 487.

215. Jha & Ghosh, *supra* note 9, at 486.

216. Schmiesing, *supra* note 81, at 27.

liable any entity that violated Lake Erie's rights.²¹⁷ LEBOR was enacted following several years of educational campaigns coordinated by a grassroots community movement in partnership with the Community Environmental Legal Defense Fund, an organization that has been involved in the nature's rights movement in the Americas since the 1990s.²¹⁸ However, the ordinance was declared invalid in its entirety in early 2020 because it was unconstitutionally vague and exceeded the power of the municipal government in Ohio.²¹⁹

Several First Nations communities in the United States have also implemented rights of nature. For example, in 2019 the White Earth Band of Ojibwe in Minnesota formally recognized the intrinsic rights of wild rice.²²⁰

Similarly, the *Navajo Nation Code 2003* Title I § 295 provides that, "All creation, from Mother Earth and Father Sky to the animals, those who live in water, those who fly and plant life have their own laws and have rights and freedoms to exist."²²¹

Because First Nations law enjoys greater sovereignty than local government ordinances in the United States, such provisions are likely to have greater longevity than local government ordinances such as LEBOR.²²²

Grassroots efforts to implement rights of nature are likely to continue to expand as communities adopt innovative ways to combat environmental degradation. Recently, the Blue Mountains City Council became the first Australian local government to recognize environmental personhood when it supported a mayoral minute on March 31, 2021 during a council meeting, seeking the integration of the concept of the rights of nature into

217. *Id.*

218. *Id.*

219. *Drewes Farm P'ship v. City of Toledo*, 441 F. Supp. 3d (N.D. Ohio 2020).

220. Zartner, *supra* note 37, at 25-26.

221. *Rights of Rivers*, *supra* note 13, at 39.

222. *Id.* at 41.

its future operations and planning.²²³ Significantly, Blue Mountains City Council encompasses a World Heritage National Park.²²⁴

4. Evaluating the Methods of Conferring Rights on Nature

In summary, of the methods discussed above, local government ordinances offer the weakest form of rights of nature protection and have proven vulnerable to invalidation. As the following Part of this article demonstrates, lower court decisions are similarly vulnerable to appeal.

Therefore, constitutional and statutory recognition of rights of nature are preferable in terms of strength and longevity. As the Ecuadorian and New Zealand contexts demonstrate, however, those frameworks have arisen as a result of unique political situations and decades of First Nations activism and, therefore, are not necessarily amenable to universal transplantation,²²⁵ particularly to non-settler states.

D. A New Arena: Domestic Courts and Rights of Nature Litigation

Judiciaries in domestic legal systems have played a unique and substantial role in giving effect to express rights of nature and finding implied rights of nature. Rights of nature cases are relatively few and therefore novel. An examination of judicial approaches in novel cases can highlight the importance of judicial independence, the nature of the judicial role, and the significance of judicial reasoning to the development of the law in respect of the rights of nature. This Section examines judicial developments in Ecuador, Colombia, India, and Bangladesh.

Broadly speaking, courts in civil and common law systems fulfill the essential function of dispute resolution. In the common law world, a fundamental aspect of constitutional arrangements is

223. B.C. Lewis, *Rights of nature new rule at Blue Mountains Council*, BLUE MOUNTAINS GAZETTE (Apr. 29, 2021, 3:30 PM) <https://www.bluemountainsgazette.com.au/story/7228788/rights-of-nature-new-first-at-council/> [<https://perma.cc/2KU7-R27U>]; Blue Mountains City Council, 'Council resolves to integrate Rights of Nature into operations and planning', BLUE MOUNTAINS CITY COUNCIL (Apr. 15, 2021), <https://www.bmcc.nsw.gov.au/media-centre/council-resolves-to-integrate-rights-of-nature-into-operations-and-planning> [<https://perma.cc/RC58-JRH3>].

224. Blue Mountains City Council, *supra* note 223.

225. Schmiesing, *supra* note 81, at 59.

that members of an independent judiciary resolve legal issues brought before a court according to the rule of law.²²⁶

There is no doubt that *stare decisis* is deeply “woven into the essential fabric of each common law country’s constitutional ethos.”²²⁷ However, in some instances, novel developments require overturning precedent, sometimes precedent that is long-standing.

The proper resolution of the issues in dispute may also inevitably lead to judges developing the law. As the High Court of Australia has written:

To suppose that this [the common law] was a body of rules waiting always to be declared and applied may be for some people satisfying as an abstract theory. But it is simply not true in fact. It overlooks the creative element in the work of courts . . . In a system based, as ours is, on case law and precedent there is both an inductive and a deductive element in judicial reasoning, especially in a court of final appeal for a particular realm or territory.²²⁸

A majority of the High Court has opined that this “creative element” of inductive and deductive reasoning may include: “(i) applying accepted principles to new cases; (ii) reasoning from the more fundamental of settled legal principles to new conclusions; (iii) deciding that a category is not closed against unforeseen instances which in reason might be subsumed thereunder”; and (iv) deciding that, where the foundation for a rule of common law depends upon another rule, which, by reason of shifts in the law, is no longer maintained, the first rule no longer exists.²²⁹ Sir Owen Dixon, former Chief Justice of Australia, contrasted the first three categories of orthodox modes of legal reasoning with “an entirely different thing,” being a discontented judge abandoning longstanding legal principle in the name of social necessity or

226. Commonwealth Parliamentary Association, *Commonwealth (Latimer House) Principles on the Three Branches of Government*, 33 (Feb. 2009), <https://www.cpahq.org/media/dhfajkpg/commonwealth-latimer-principles-web-version.pdf> [<https://perma.cc/3FUM-TQJT>] [hereinafter *Latimer House Principles*].

227. B.V. Harris, *Final Appellate Courts Overruling Their Own “Wrong” Precedents: The Ongoing Search for Principle*, 118 L. Q. REV. 408, 412 (2002); see Anthony Mason, *The Use and Abuse of Precedent*, 4 AUSTL. BAR REV. 93 (1998).

228. *Skelton v. Collins* (1966) 115 CLR 94, 134, (Austl.) (Windeyer J.).

229. *PGA v. The Queen* (2012) 245 CLR 355 ¶¶29-30 (Austl.); see Owen Dixon, *Concerning Judicial Method*, 29 AUSTL. L.J. 468, 472 (1956) (from which the High Court was drawing).

social convenience.²³⁰ The High Court added the fourth category in rejecting an argument that in 1963, despite a range of legal changes related to the status of women and marriage in South Australia in the nineteenth and twentieth centuries, a wife could not retract her consent to sexual intercourse with her husband while lawfully married.²³¹ These principles of reasoning underscore the notion that creativity is intrinsic to the method of the common law.

Both Colombia and Ecuador are civil law jurisdictions.²³² This means that the primary function of the courts in those jurisdictions is to apply the law set out in the relevant civil codes and statutes, and, where matters are unregulated, fill in the gaps according to general principles found in those instruments.²³³ This description of the judicial function may sound familiar to common law lawyers, given the proliferation of statutes in these jurisdictions in recent decades.²³⁴ In civil law countries with a strong separation of powers, the task of creating law is in theory more strictly left to the people's representatives than in common law countries.²³⁵ Moreover, the doctrine of *stare decisis* is absent from civil law jurisdictions, meaning that cases lack binding precedential force. However, this difference between common and civil law systems may be overstated given the influence senior courts exert on lower courts in civil law jurisdictions.²³⁶ For example, both Ecuador and Colombia have constitutional Bills of Rights that entrench rights that constitutional courts are empowered to interpret and

230. Dixon, *supra* note 229.

231. *PGA v. The Queen* (2012) 245 CLR 355 (Austl.).

232. Juan Andres Fuentes, *UPDATE: The Basic Structure of the Ecuadorian Legal System and Legal Research*, N.Y.U. (March/April 2021), https://www.nyulawglobal.org/globalex/Ecuador1.html#Section_3_3 [https://perma.cc/6AG4-FUTX]; Antonio Ramirez, *An Introduction to Colombian Governmental Institutions and Primary Legal Sources*, N.Y.U. (May 2007), <https://www.nyulawglobal.org/globalex/Colombia.htm> [https://perma.cc/UGY6-48ZE] (last visited Oct. 7, 2021).

233. Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VICT. UNIV. OF WELLINGTON L. REV. 817, 819 (2001).

234. *See, e.g.*, Cincent Chiao, *Hyperlexis and the Rule of Law*, 27 LEGAL THEORY 126 (2021); Lord Steyn, *Dynamic Interpretation Amidst an Orgy of Statutes*, 3 EUR. HUM. RTS. L. REV. 245 (2004); Mark Leeming, *Equity: Ageless in the 'Age of Statutes'*, 9 J. EQUITY 108 (2015); Guido Calabresi, *A Common Law for the Age of Statutes* (1982).

235. *See* Felipe Sáez Garcia, *The Nature of Judicial Reform in Latin America and Some Strategic Considerations* 13(5) AM. U. INT'L L. REV. 1267 (1998).

236. Pejovic, *supra* note 233.

enforce.²³⁷ Therefore, in the constitutional jurisdiction the role of apical courts of both countries may more closely resemble that of their common law counterparts.²³⁸

In all jurisdictions that will be touched upon below, the nature of the judicial role and process makes courts a particularly attractive forum for the implementation of the rights of nature. Examining the broad guidance issued for judiciaries in Commonwealth countries through the “Latimer House Principles” illustrates these features of the judicial role and process. Judiciaries should be made up of members of an independent legal profession which presses for the entrenched independence of courts, speaks out against administrative action and inaction, has regard for its social responsibility, and avoids being an instrument of party politics.²³⁹ Commonwealth judiciaries are to be independent, impartial, honest, and competent.²⁴⁰ Inherent in this judicial duty is the absence of perceived bias and neutrality in decision-making by judges. Judges must act, and be seen to act, without fear or favor. Courts must not act unreasonably, arbitrarily, or capriciously, but based on evidence. Commonwealth judiciaries are expected to fulfill their critical role in the promotion of the rule of law, especially by exerting their independence.²⁴¹ Judicial appointments, tenure, remuneration, and resourcing must be tailored to this end.²⁴² Commonwealth judges are exhorted to adopt a generous and purposive approach to Bills of Rights.²⁴³ All people should ideally have access to the courts to enforce their fundamental rights,²⁴⁴ and justice should generally be open and transparent.²⁴⁵ These factors are particularly important in novel environmental litigation against governments, where constitutional rights are involved, open proceedings can facilitate

237. Fuentes, *supra* note 232; Ramirez, *supra* note 232.

238. Angie Vega, *A Brief Explanation of Colombia's Legal System*, ANIMAL LEGAL & HIST. CTR. MICHIGAN STATE UNIV. (2018), <https://www.animallaw.info/article/brief-explanation-colombia%E2%80%99s-legal-system> [<https://perma.cc/S4NZ-NXSZ>] (last visited Oct. 7, 2021).

239. *Latimer House Principles*, *supra* note 226.

240. *Id.* at 11.

241. *Id.* at 10.

242. *Id.* at 17-18.

243. *Id.* at 17.

244. *Id.* at 11.

245. *Id.*

accountability and transparency, and the plaintiffs may be marginalized or indirectly interested parties.

In both Ecuador and Colombia, the principle of judicial independence is a crucial component of the constitutional order, which is based on the adoption of a “rigorous Montesquieuan principle of separation of powers.”²⁴⁶ While there may be arguments about the extent to which judicial independence in those jurisdictions has been observed in practice, these principles persist.²⁴⁷ The judicial process is also informed by the principles of rationality, due process, due diligence, efficiency, and justice,²⁴⁸ although once again the degree to which these principles are followed is unclear.²⁴⁹

1. Rights of Nature Litigation

Landmark cases in common and civil law jurisdictions, including Ecuador, Colombia, India, and Bangladesh, have recognized and enforced the rights of nature. The rights of river ecosystems have been central to these cases, reflecting the environmental, cultural, social, and economic importance of these systems and the urgency of their protection. As examined below, the cases in which the courts upheld the rights of nature applied domestic constitutional provisions which provide express protection for such rights (see Section C of this article), or implied rights by recourse to the canons of interpretation. While there is a growing trend of courts finding implied rights of nature, this recognition faces a unique set of obstacles, including that lower court decisions are vulnerable to appeal, court-conferred rights of nature may erode the perceived legitimacy of the judiciary, and due to the difficulties with enforcement of remedial orders. The

246. CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, arts. 11(3), 167-70, 172-88; THE POLITICAL CONSTITUTION OF COLOMBIA OF 1991, arts. 29, 228-33, 241-45; Sáez García, *supra* note 235, at 1287.

247. Sáez García, *supra* note 235, at 1288, 1297.

248. CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, arts. 11(3), 167-70, 172-88; THE POLITICAL CONSTITUTION OF COLOMBIA OF 1991, at arts. 29, 228-33, 241-45; Fuentes, *supra* note 232; Ramirez, *supra* note 232; Sáez García, *supra* note 235, at 1296; Burgenthal et al., *Ecuador: Legal and Judicial Sector Assessment*, LEGAL VICE PRESIDENCY WORLD BANK 23 (Dec. 2000), <https://documents1.worldbank.org/curated/zh/103461468751811623/pdf/269170Ecuador0Legal0Assessment0SCODE09.pdf> [<https://perma.cc/UAL3-N7L9>].

249. Sáez García, *supra* note 235, at 1301-07.

cases considered in the following Section illustrate these challenges.

a. Protecting the Vilcabamba River – Ecuador

In 2010, two private citizens—Richard Wheeler and Eleanor Huddle—brought the first case under the rights of nature provisions enshrined in the Ecuadorian Constitution.²⁵⁰ The plaintiffs brought an action on behalf of the Vilcabamba River following the dumping of debris from road construction by the Loja Provincial Government (“LPG”), which caused flooding and damage to the river and the plaintiffs’ property. The plaintiffs sought orders for restoration of the river and nearby affected ecosystems. The respondent LPG, the Ministry of Environment, and the Ombudsman’s Office were ultimately the subject of the Court’s orders.²⁵¹ The plaintiffs argued that the river’s constitutional rights of nature had been violated by the LPG. The first instance judge denied the river’s legal standing.²⁵² On appeal, the Loja Provincial Court of Justice held that the case could be brought under the Ecuadorian Constitution’s broad rights of nature provisions, thereby conferring standing on the plaintiffs to appear for the river.²⁵³ The Provincial Court found in favor of the plaintiffs and ordered the LPG to undertake restoration of the river in accordance with measures to be specified by the Ministry of Environment.²⁵⁴ The Provincial Court held that precautionary measures must be implemented to prevent damage to the river. The Provincial Court found, applying the “reverse” burden of proof

250. *Richard Frederick Wheeler y Eleanor Geer Huddle c/ Gobierno Provincial de Loja*, juicio 11121-2011-0010 (Mar. 30, 2011) (Ecuador). No English translation of the judgment is available. Kauffman & Martin, *supra* note 139; Sofía Suárez, *Defending Nature: Challenges and Obstacles in Defending the Rights of Nature Case Study of the Vilcabamba River*, ECUADORIAN ENV’T L. CTR., 3-4, 7 (2013).

251. Suárez, *supra* note 250, at 4.

252. Craig Kauffman & Pamela L. Martin, *Testing Ecuador’s Rights of Nature: Why Some Lawsuits Succeed and Others Fail*, INT’L STUD. ASS’N ANN. CONF. at 6 (Mar. 18, 2016).

253. The highest court in Ecuador is the National Court of Justice, then the Provincial Courts of Justice which have jurisdiction in each of the provinces. See CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, Title III, Ch. 3; Title IV, Chap. 4. Lower courts and tribunals sit below the Provincial Courts. *Id.* The Constitutional Court sits separately and hears constitutional matters. *Id.* at Title IX, Ch. 2. Constitutional questions can also be raised in lower and provincial courts. *Id.* For the nature of Ecuador’s constitutional rights provisions, see *supra* Section B.

254. Suárez, *supra* note 250, at 7-8.

in Article 397 in the Ecuadorian Constitution, that the plaintiffs did not have to prove damage.²⁵⁵

The remedies granted were broad in scope. Road construction was not prohibited, but the project was required to be carried out in a way that respected the rights of nature and complied with environmental rules and regulations.²⁵⁶ The judgment required the LPG to issue an apology in a major newspaper. The Ministry of Environment was ordered to conduct inspections to identify the status of the river and the roadworks which had resulted in the initial pollution. The LPG was required to prepare a plan for remediation and rehabilitation.

Implementation of these wide-ranging remedies has, however, proven problematic. A further inspection in 2012 identified that remediation work was still in a preliminary stage. An action brought by the plaintiffs in the Constitutional Court in 2012 seeking enforcement of the Provincial Court's orders was dismissed.²⁵⁷ According to the plaintiffs, the progress of remediation has been unsatisfactory.²⁵⁸ Ultimately, the plaintiffs were forced to incur the remediation costs themselves.²⁵⁹

b. Protecting the Atrato River and the Amazon – Colombia

In 2016 the Constitutional Court of Colombia declared the Atrato River a legal person with rights to protection, conservation, maintenance, and restoration,²⁶⁰ inferring personhood from the Colombian constitutional guarantees of biodiversity, cultural, and humanitarian protection.²⁶¹ The *Atrato River* case followed decades of environmental degradation, which resulted both from

255. CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, art. 397 (in relation to environmental damage “the burden of proof regarding the absence of potential or real damage shall lie with the operators of the activity or the defendant”).

256. Suárez, *supra* note 250, at 7-8.

257. *Id.* at 9-10; Constitutional Court of Ecuador, Case no. 0032-12-IS, 2018 (Ecu.).

258. *Id.* at 10.

259. Lidia Cano Pecharroman, *Rights of Nature: Rivers That Can Stand in Court*, 7 RESOURCES 13, 9 (2018).

260. Ctr. for Soc. Just. Stud. et al. v. Presidency of the Republic (Constitutional Court of Colombia, T-622/16, 10 November 2016) (Colom.) at 110.

261. THE POLITICAL CONSTITUTION OF COLOMBIA OF 1991, arts. 78-82. For discussion, see Craig Kauffman & Pamela Martin, *How Courts are Developing River Rights Jurisprudence: Comparing Guardianship in New Zealand, Colombia and India*, 20 VT. J. ENV'T L. 260, 273-80 (2019) [Hereinafter Kauffman & Martin, *How Courts are Developing River Rights Jurisprudence*].

large-scale mining causing toxic chemicals to enter the river and illegal logging which changed the flow of the river and caused sedimentation.²⁶² At first instance, the Administrative Tribunal of Cudinamarca decided against protective action on the grounds that the various government ministries named as respondents to the motion were not duty bound to protect the river.²⁶³ That decision was then appealed to the Constitutional Court.²⁶⁴

The Constitutional Court found in favor of the plaintiffs, recognizing that the river had constitutional rights, infringements of which could be heard by the Court. The panel of three judges led by the Chief Judge relied on Article 215 of the Constitution which allows the government to declare a state of emergency when there is a grave threat to the ecological order of the country,²⁶⁵ *inter alia*, also noting constitutional recognition of Indigenous and Afro-Colombian ethnic groups as a factor influencing the decision.²⁶⁶ Several aspects of reasoning in the case are noteworthy. The judgment noted the spiritual importance of the river and expounded on the ‘Ecological Constitution,’ or the set of normative content composed of principles, fundamental rights, and obligations that protect the environment and natural resources.²⁶⁷ The final decision was partly based on “biocultural” rights which emphasize that the rights of people and nature are inextricably linked.²⁶⁸ The Court defined biocultural rights as:

[T]he rights that ethnic communities have to administer and exercise autonomous guardianship over their territories - according to their own laws and customs - and the natural resources that make up their habitat, where their culture, their

262. Ctr. for Soc. Just. Stud. et al. v. Presidency of the Republic (Constitutional Court of Colombia, T-622/16, 10 November 2016) (Colom.) at 8, 10.

263. *Id.* at 14.

264. There are four “High Courts” in Columbia—the Constitutional Court (constitutional jurisdiction), the Supreme Court (ordinary jurisdiction), the Council of State (administrative jurisdiction), and the Superior Council of Judicature (disciplinary jurisdiction). Below the High Courts, Superior Tribunals sit in each judicial district. Each judicial district includes municipal and circuit courts. See THE POLITICAL CONSTITUTION OF COLOMBIA OF 1991, Art. 116, Title VIII; REPUBLIC OF COLUMBIA, ORGANIZATIONAL STRUCTURE, SUPREME COURT OF JUSTICE, <https://cortesuprema.gov.co/corte/wp-content/uploads/2015/08/ORGANIGRAMACONFONDOPEQUENO.jpg>.

265. Ctr. for Soc. Just. Stud. et al. v. Presidency of the Republic (Constitutional Court of Colombia, T-622/16, 10 November 2016) (Colom.) at 109.

266. *Id.* at 54-55, 57, 102.

267. *Id.* at 32.

268. *Id.* at 35, 40, 102.

traditions and their way of life are developed based on the special relationship they have with the environment and biodiversity.²⁶⁹

The decision also cited the need for sustainable development,²⁷⁰ international legal precedents concerning biocultural rights, the principle of the prevention of environmental harm, and the precautionary principle.

The Constitutional Court ordered the creation of the Commission of the Guardian of Atrato River, which included two designated guardians from the Humboldt Institute and World Wildlife Fund Colombia, two non-government organizations, assisted by a panel of experts. Rights of nature were embedded within a management governance body to be collectively implemented by the guardian body together with government bodies, other institutions, and community stakeholders.²⁷¹ The government was ordered to eradicate illegal mining in and around the river and to create plans to restore subsistence farming along the river, allowing for cleaner food sources. Epidemiological and toxicology studies were also ordered.²⁷²

The Supreme Court of Justice of Colombia has also recognized the Colombian portion of the Amazon river as the “subject of rights” citing the *Atrato River* case.²⁷³ The plaintiff non-government organization representing a group of children and young adults sought the protection of various rights such as the right to life and health threatened by climate change by seeking orders to control deforestation of the Colombian Amazon.²⁷⁴ The Presidency of the Republic, the Ministry for the Environment, and affected communities were ordered to prepare a short-, medium-, and long-term action plan within four months to counteract the rate of deforestation in the Colombian Amazon.²⁷⁵

269. *Id.* at 35.

270. *Id.* at 30-31, 35, 37, 51-52, 64, 66, 74, 97, 106.

271. *Id.* at 100-01, 110.

272. *Id.*

273. *Future Generations v Ministry of Environment* (2018) STC4360-2018 at 14. Anastasia Moloney, *Colombia's top court orders government to protect Amazon forest in landmark case*, REUTERS (Apr. 7, 2018), <https://www.reuters.com/article/us-colombia-deforestation-amazon/colombias-top-court-orders-government-to-protect-amazon-forest-in-landmark-case-idUSKCN1HD21Y> [<https://perma.cc/S2V7-DCGT>].

274. CYRUS. R. VANCE CENTRE FOR INTERNATIONAL JUSTICE, *supra* note 13, at 24.

275. *Id.* at 25.

It should be noted, however, that the enforcement of orders in both cases concerning the Atrato River and Amazon Basin has been difficult, taking many months or years.²⁷⁶

c. Protecting the Ganga and Yamuna rivers – India

India is a jurisdiction in which the courts at various levels, led by the Supreme Court,²⁷⁷ have very actively recognized rights of nature in the absence of an explicit constitutional or legislative instrument enshrining such rights. This has been achieved through provisions in the *Constitution of India* that recognize a right to life,²⁷⁸ impose duties of environmental protection,²⁷⁹ and enable public interest litigation in the Supreme Court.²⁸⁰ Indian courts have heard many cases based on the constitutional right to life and it is beyond the scope of this article to examine them all.²⁸¹

In *Mohd Salim v State of Uttarakhand (Salim)*, the High Court of Uttarakhand conferred legal personhood status on the Ganga and Yamuna rivers.²⁸² The case was brought following decades of government inaction to restore the heavily polluted sacred Ganga and Yamuna Rivers.²⁸³ Mohammed Salim, a local resident, filed a public interest lawsuit in 2014 to stop illegal mining and construction and address pollution in the rivers. The final ruling issued in 2017 ordered the Ganga and Yamuna rivers to be treated as living human entities with all the ensuing rights of legal

276. *Id.*; Phillip Wesche, *Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision*, 33 J. ENV'T L. 531 (2021).

277. The Supreme Court is the apical court in India and hears appeals from the High Courts of the states and union territories. States and union territories are divided into districts. Each district has a District Court and may have Sub-District Courts. *See* BHARATIYA SAMVIDHANA [CONSTITUTION], Art. 124(1), 214 (India); MARY KOZLOVSKI, A BRIEF INTRODUCTION TO THE INDIAN JUDICIAL SYSTEM AND COURT HIERARCHY (Melbourne University Asian Law Centre 2019).

278. BHARATIYA SAMVIDHANA [CONSTITUTION], Art. 21 (India).

279. *Id.* arts. 48A, 51A(g).

280. *Id.* art. 32.

281. For example, in *Centre for Environmental Law, WWF-I v. Union of India* (2013) 8 SCC 234, the Supreme Court of India extended the application of the right to life guaranteed by Article 21 of the Constitution to a group of endangered Asiatic Lions. In *Animal Welfare Board of India v. A. Nagaraja* (2014) 7 SCC 547, 27, 28, the same Court held that the right to life extended to non-human animals and found that statutory duties on those in charge of animals to ensure their well-being conferred corresponding rights on the animals.

282. *Mohd. Salim v. State of Uttarakhand* LNIND 2016 UTTAR 990 (India).

283. *Id.* at 1-4.

personhood.²⁸⁴ The plaintiff, who sought removal of illegal construction, did not seek this declaration of environmental personhood.²⁸⁵ The judges took this step, noting that the dire environmental situation of the Ganga and Yamuna rivers required drastic measures.²⁸⁶ The decision was also justified by reliance on domestic decisions in which juristic personhood had been granted to Hindu idols representing deities which are able to sue to protect their interests and spiritual role in society.²⁸⁷ The Court stated that the Ganga and Yamuna rivers were similarly sacred.²⁸⁸ The Court also cited the government's failure to uphold Articles 48A and 51A(g) of the Constitution of India, which require the state and society in general to protect and improve the environment, as bases for the decision to grant personhood.²⁸⁹

The Court specified that certain government bodies and officers were responsible to act for the protection of the rivers, invoking the legal doctrine of *in loco parentis* ("in the place of a parent").²⁹⁰ This is notably different from the New Zealand arrangements, where the ecosystems are considered legally mature persons and their representative bodies are made up partly of Indigenous peoples. The Court's decision responded to the failure of the government to act on previous orders requiring the establishment of a Ganga Management Board and prohibiting mining in the Ganga river bed and flood plain.²⁹¹

Lalit Miglani v. State of Uttarakhand (Miglani) subsequently extended the personhood status of the rivers to the surrounding ecosystem, including glaciers, streams, and mountains.²⁹² The Court's decision referred to the *Te Awa Tupua Act*.

In May 2019, the High Court of Punjab and Haryana adopted similar arrangements, extending legal personality to the "entire animal kingdom" within the state.²⁹³

284. *Id.* at 18-20.

285. *Id.* at 1.

286. *Id.* at 10.

287. *Id.* at 11-15.

288. *Id.* at 16-17.

289. *Id.* at 18.

290. *Id.* at 19.

291. *Id.* at 1.

292. *Lalit Miglani v. State of Uttarakhand* LNIND 2016 UTTAR 885 (India).

293. *Karnail Singh v. State of Haryana*, 2019 SCC Online P&H 704 (India).

On March 3, 2020 that Court declared the artificial Sukhna lake to be a legal person with the indicia of a living person and declared that all citizens of the city of Chandigarh stood *in loco parentis* for that entity.²⁹⁴

Interestingly, the decisions of Indian courts have a broader operation than the statutory approach to rights of nature in New Zealand in a number of respects: they apply to a huge array of natural objects and creatures; they impose strict liability on those who are the subject of litigation;²⁹⁵ and in some cases they hold that the protected environs are deemed living persons, not just artificial legal ones, potentially giving them access to rights, duties, and liabilities inaccessible to other non-human legal persons.²⁹⁶

The State of Uttarakhand appealed the 2017 High Court of Uttarakhand's decisions to the Supreme Court of India, seeking to set aside the orders naming them as the guardians of the relevant ecosystems. The High Court of Uttarakhand's decisions have been stayed.²⁹⁷ In the appeal of *Salim* the State of Uttarakhand contended that despite the importance of the rivers, this alone was not enough to justify a declaration that they are living entities.²⁹⁸ The State raised constitutional difficulties associated with the management of interstate rivers under the institutional arrangements mandated by the Court.²⁹⁹ The State further raised the possibility of state liability in lawsuits against the river's guardians following flooding of the rivers that caused property damage.³⁰⁰

294. *Court on its own motion v. Chandigarh Admin.*, No. 18253 (High Court of Punjab-Haryana, Mar. 2, 2020); Saurabh Malik, *HC: Sukhna Lake of Chandigarh is Legal Entity, Raze Buildings in Catchment Area*, TRIBUNE INDIA (Mar. 3, 2020), <https://www.tribuneindia.com/news/hc-sukhna-lake-of-chandigarh-is-legal-entity-raze-buildings-in-catchment-area-50017> [<https://perma.cc/EV2F-QJDA>].

295. Erin L. O'Donnell, *At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India*, 30 J. ENV'T L. 135, 140 (2018).

296. *Id.* at 138.

297. *See Uttarakhand v. Mohd. Salim.*, Special Leave to Appeal No. 016879 (Jul. 7, 2017) (stayed the ruling in *Salim*); *see also Union of India v. Lalit Miglani*, Special Leave Petition (Civil) Diary No. 34250 (Nov. 27, 2017) (stayed the ruling in *Miglani*).

298. Amit Anand Choudhary, *SC Stays Uttarakhand HC Order Declaring Ganga, Yamuna as Living Entities*, TIMES INDIA (July 7, 2017) <https://timesofindia.indiatimes.com/india/sc-stays-uttarakhand-hc-order-declaring-ganga-yamuna-as-living-entities/articleshow/59494002.cms> [<https://perma.cc/7MCC-VHF9>].

299. *Id.*

300. *Id.*

d. Protecting the Turag River – Bangladesh

A non-government organization commenced action seeking a directive from the Supreme Court of Bangladesh High Court Division to evict substantial illegal encroachments on the Turag River and halt further construction and in-filling.³⁰¹ The action was enabled under Article 102 of the Constitution of Bangladesh, which allows citizens to enforce their fundamental human rights, including the right to life.³⁰² The case followed years of litigation, including a similar petition in 2009 and an inquiry report by the Chief Judicial magistrate.³⁰³ The High Court's lengthy judgment examined the application of the public trust doctrine, cited relevant water protection statutes,³⁰⁴ cited Principle 15 of the Rio Declaration as supporting a precautionary approach,³⁰⁵ declared the river a legal person and a living entity,³⁰⁶ and relied upon cases such as the *Atrato River* case in Colombia³⁰⁷ and *Salim* in India.³⁰⁸ The judgment also referred to the *Te Awa Tupua Act*.³⁰⁹

The decision declared that the Turag River and all rivers flowing through Bangladesh were legal persons. The Court declared the National River Conservation Commission the person *in loco parentis* to all the rivers of Bangladesh and found that this body was obligated to ensure their protection, conservation, and freedom from pollution.³¹⁰ The High Court Division declared that illegal structures, encroachment, and pollution in the Turag River should be removed at the expense of the encroachers *inter alia*.³¹¹ The decision was upheld in key respects by the Appellate

301. *Human Rts. and Peace for Bangl. v. Gov't of Bangl.*, No. 13989 [hereinafter *Turag River*]. The authors have relied on an English translation of Writ Petition No 13989/2016 by Rebecca Peters from the University of Oxford and Mohammad Sarwar from the University of Dhaka produced in 2019. Page references refer to the pages of the English translation.

302. THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH, arts. 31, 32.

303. *Turag River*, *supra* note 301, at 5-14.

304. *Id.* at 93-219.

305. *Id.* at 437.

306. *Id.* at 446.

307. *Id.* at 440-41.

308. *Id.* at 441-43.

309. *Turag River*, *supra* note 301, at 443-45.

310. *Id.* at 446-49.

311. *Id.* at 446-50.

Division.³¹² As a result of the finding, authorities have evicted people living along the banks of Bangladesh's rivers.³¹³

Several observations can be made about rights of nature litigation based upon the above cases. These are provided below.

2. The Role of Appellate Courts and Court Hierarchies

Courts generally exist in a hierarchy and the apical court in a regional or national system is the ultimate decider of an issue, whether exercising original or appellate jurisdiction. Where landmark decisions are made at the highest court level the impact on a legal system and society more broadly is likely to be substantial.

The *Vilcabamba River* case in Ecuador and the *Atrato River* case in Colombia highlight the need for litigants to pursue matters on appeal when unsuccessful at the lower court level. On appeal to higher courts in both cases the plaintiffs were successful.³¹⁴ The Indian Supreme Court, a national apical court, has led the development of jurisprudence on the right to life in relation to environmental issues.³¹⁵ The same observation can be made about the Pakistan Supreme Court.³¹⁶

312. The Appellate Division of the Supreme Court is the apical court in Bangladesh. The Supreme Court has jurisdiction to conduct constitutional interpretation and hear appeals on various matters from inferior courts. There are a range of subordinate courts and tribunals, including a specialist Environmental Court. *See* Nishat Jute Mills Ltd. v Hum. Rts. and Peace for Bangladesh No. 3039 Supreme Court of Bangladesh 2019 (Feb. 17, 2020) (Bangl.); *see also* Md. Ershadul Karim, *UPDATE: The Legal System of the People's Republic of Bangladesh*, N.Y.U. (July/Aug., 2018), <https://www.nyulawglobal.org/globalex/Bangladesh1.html> [<https://perma.cc/FS3R-3JJ3>] [last visited Oct. 7, 2021].

313. Rina Chandran, *Fears of Evictions as Bangladesh Gives Rivers Legal Rights*, REUTERS (July 4, 2019), <https://www.reuters.com/article/us-bangladesh-landrights-rivers-idUSKCN1TZ1ZR> [<https://perma.cc/W79M-FZZV>].

314. *See* Kauffman & Martin, *Can Rights of Nature*, *supra* note 136, at 136; *see also* *Rights of Rivers*, *supra* note 13, at 22-23.

315. *See supra* note 281 and accompanying text.

316. *See* Shelha Zia v. WAPDA, (1994) 693 PLD (SC) No.15-K (Pak.); Asghar Leghari v. Fed'n Pak., (2018) PLD (Lahore) 364 (Pak.); Dr. Parvez Hassan, *Environmental Jurisprudence from Pakistan: Some Lessons for the SAARC Region*, S. ASIA CONF. ON ENV'T JUST. (Mar. 24-25, 2012), https://www.iucn.org/sites/dev/files/import/downloads/pk_1_environmental_jurisprudence_from_pakistan__some_lessons_for_the_saarc_region_d.pdf [<https://perma.cc/73AX-9L2L>].

Conversely, decisions of lower courts are subject to being overturned on appeal. For example, the Indian decisions of *Salim*³¹⁷ and *Miglani*³¹⁸ were stayed by the Uttarakhand Supreme Court soon after they were handed down for reasons discussed above.³¹⁹

The existence of a dispersed, independent federal court structure in India may have contributed to the development of nature's rights in that country. When resolving controversies and in circumstances of increasing local environmental degradation, India's federal structure allows intermediate judges to act where they find federal legislation to be ineffective. However, the court structure may also constitute a potential source of the frustration of the rights of nature movement, as exemplified by the Supreme Court's stay of *Salim* and *Miglani*. The development of environmental personhood is always peculiar to the jurisdiction concerned. For example, developments in Uttarakhand should be understood in the context of the serious environmental degradation of the rivers and glaciers concerned, their religious and symbolic importance for Hindus,³²⁰ Uttarakhand's exceptional biodiversity and forest cover,³²¹ its position in the shadow of the Himalayas (from which India's great rivers flow),³²² the massive bushfire damage suffered in this region in 2016,³²³ and the legacy

317. *Salim v. State of Uttarakhand* LNIND 2016 UTTAR 990 (India).

318. *Lalit Miglani v. State of Uttarakhand* 2016 UTTAR 885 (India).

319. See *Uttarakhand v. Mohd. Salim.*, Special Leave to Appeal No. 016879 (Jul. 7, 2017) (stayed the ruling in *Salim*); see also *Union of India v. Lalit Miglani*, Special Leave Petition (Civil) Diary No. 34250 (Nov. 27, 2017) (stayed the ruling in *Miglani*).

320. See, e.g., Ashraf Jamal, *Exploring the Land of Gods*, Uttarakhand, CONNECTED TO INDIA (Feb. 2 2019), <https://www.connectedtoindia.com/exploring-the-land-of-gods-uttarakhand-66.html> [<https://perma.cc/9RUH-5QZ3>]; see also *Salim v. State of Uttarakhand* LNIND 2016 UTTAR 990 (India) at 11, 17.

321. See, e.g., Mayank Aggerwal, *Uttarakhand's Draft Ecotourism Policy Could Threaten Biodiversity*, MONGABAY (Aug. 21, 2020) <https://india.mongabay.com/2020/08/uttarakhands-draft-ecotourism-policy-could-threaten-biodiversity/> [<https://perma.cc/ZC2W-SN77>]. See also *Lalit Miglani v. State of Uttarakhand* 2016 UTTAR 885 (India) (containing a lengthy analysis of the type and value of the Himalayan ecosystem).

322. D. Aithani et al., *Water Quality of Himalayan Rivers in Uttarakhand*, in *WATER, CRYOSPHERE, AND CLIMATE CHANGE IN THE HIMALAYAS* (Ajay Kumar Taloor et al. eds., Springer Cham 2021).

323. Seema Sharma, *Forest Fire: What Uttarakhand's Needs to Change*, *ECON. TIMES* (May 8, 2016), <https://economictimes.indiatimes.com/news/politics-and-nation/forest-fire-what-uttarakhands-needs-to-change/articleshow/52172780.cms> [<https://perma.cc/57WB-X37L>]; see also *Lalit Miglani v. State of Uttarakhand* 2016 UTTAR 885 (India) (containing a section examining forest fires in the judgment).

of local environmental movements including the Chipko conservation movement.³²⁴ The Chipko movement was a forest conservation movement that emerged in the 1970s in Uttarakhand which successfully employed Gandhian methods of non-violent protest.³²⁵

3. Developing a Global Jurisprudence

A striking aspect of the cases described above is how judges from diverse countries across civil and common law legal systems have drawn on similar international and domestic instruments, cases, and legislation to undertake a comparative analysis of other jurisdictions, effectively using them as precedent. This is particularly important when a judge is being asked to consider an issue for the first time and no precedent from within the domestic legal system is likely to exist.

The willingness of the Colombian Constitutional Court in the *Atrato River* case, the High Court of Uttarakhand in *Salim and Miglani*, and the Supreme Court of Bangladesh in *Turag River* to consider comparative cases and legislation such as the *Te Awa Tupua Act* in New Zealand is critical to the judicial reasoning process. While no New Zealand court has considered the personhood legislation in that country to date, these statutory rights have proved influential in the reasoning of judges in other jurisdictions.

Well-established principles from international and domestic environmental law, especially the precautionary principle—which recommends making decisions that avoid harm where there is a lack of scientific certainty about the potential extent of harm—are cited in several of the cases considered above.³²⁶ The

324. R GUHA, *THE UNQUIET WOODS: ECOLOGICAL CHANGE AND PEASANT RESISTANCE IN THE HIMALAYA*, (U.C. Press ed. 2000); *see also* Lalit Miglani v. State of Uttarakhand 2016 UTTAR 885 (India) (noting that the judgment refers approvingly to the goals and activities of the Chipko movement).

325. Ramachandra Guha, *A Common Thread*, TELEGRAPH ONLINE (June 5, 2021), <https://www.telegraphindia.com/opinion/gandhians-north-and-south/cid/1817775> [<https://perma.cc/4PH5-KQBE>]; The Editorial Board, *Life Lessons: Sunderlal Bahuguna*, TELEGRAPH ONLINE (May 26, 2021), <https://www.telegraphindia.com/opinion/life-lessons-sunderlal-bahuguna/cid/1816777> [<https://perma.cc/8STJ-3S8D>].

326. *See, e.g.*, Suárez, *supra* note 250, at 8; Lalit Miglani v. State of Uttarakhand 2016 UTTAR 885 (India); Ctr. for Soc. Just. Stud. et al. v. Presidency of the Republic

precautionary principle is embodied in Principle 15 of the Rio Declaration 1992. Courts have also deployed the emerging principle of *in dubio pro natura* (that is, when in doubt, decide in favor of nature).³²⁷ The latter principle is entrenched in the IUCN World Declaration on the Environmental Rule of Law (2016).³²⁸

The cases referred to above have dealt with allegations of overexploitation by development and encroachment. In this context, sustainable development principles have been a guiding focus.³²⁹ Sustainable development is a now well-established concept. It can be defined as development that meets the needs of the present without compromising the ability of future generations to do so. In the *Atrato River* case, sustainable development played a key role given the constitutional enshrinement of that principle in Colombia.³³⁰ Interestingly, both Colombian and Indian courts have recognized the tension inherent within the principles of sustainable development. For example, the decision of *Miglani* cited the works of Vikram Soni and Sanjay Parikh, who have concluded that sustainable development is unworkable and a “dangerous cliché.”³³¹ The Constitutional Court of Colombia noted that the principle involves the “difficult” reconciliation of economic growth, social welfare, and the protection of the environment.³³² However, that Court also noted that global solidarity on environmental issues is based on the concept of sustainable development.³³³ The High Court of Punjab and Haryana cited an earlier Indian decision which stated that “the traditional concept that development and ecology are opposed to each other, is no longer acceptable. Sustainable Development is the answer.”³³⁴

(Constitutional Court of Colombia, T-622/16, 10 November 2016) (Colom.); *Turag River*, *supra* note 301, at 434, 436, 447.

327. *See, e.g.*, Ctr. for Soc. Just. Stud. et al. v. Presidency of the Republic (Constitutional Court of Colombia, T-622/16, 10 November 2016) (Colom.), at 78.

328. World Declaration on the Environmental Rule of Law, Principle 5 (IUCN, 2016).

329. *See, e.g.*, Ctr. for Soc. Just. Stud. et al. v. Presidency of the Republic, at 30-32, 35-37, 51-53, 64, 65-66, 75-76, 97-98, 105-06; *Lalit Miglani v. State of Uttarakhand* 2016 UTTAR 885 (India).

330. Ctr. for Soc. Just. Stud. et al. v. Presidency of the Republic, at 51-52, 61-63; CONSTITUTION OF COLOMBIA, art. 80.

331. *Lalit Miglani v. State of Uttarakhand* 2016 UTTAR 885 (India).

332. Ctr. for Soc. Just. Stud. et al. v. Presidency of the Republic, at 32.

333. *Id.* at 33.

334. *Court on its own motion v. Chandigarh Admin.*, No. 18253 (High Court of Punjab-Haryana, Mar. 2, 2020) (citing *Vellore Citizens' Welfare Forum v. Union of India*, (1996) 5 SCC 647 (India)).

This expansion of jurisprudence can be seen in other environmental law cases. In *DG Khan Cement Ltd v Government of Punjab*, the petitioner, an operator of a cement company, argued that regional government controls preventing the expansion of such activities in a defined area were unlawful.³³⁵ The two-judge bench found that there were serious environmental threats to underground water aquifers in the area.³³⁶ The judgment applied the precautionary principle to find that the development should be prohibited until a detailed hydrogeological study had been prepared.³³⁷ The Court recognized the importance of protecting the environment in its own right by conferring legal personhood on it, rather than through recognition premised on human rights. The Court did so with reference to the Ecuadorian Constitution and New Zealand statutes, decisions handed down in Colombia, India, and Bangladesh, and local governing ordinances in the United States, which have all granted legal personhood to nature.³³⁸

The Court also invoked the principle of water justice, whereby the state should exercise stewardship over all water resources.³³⁹ It also noted that notwithstanding scientific uncertainty and complexity regarding the extent of the risk of serious or irreversible harm to water, human health, or the environment, judges should uphold or order the taking of the necessary protective measures having regard to the best scientific evidence available.

While not strictly precedential, novel developments in one jurisdiction are influencing other jurisdictions and being used as an aid in curial decision-making. The successful implementation of the rights of nature in one legal system may therefore influence developments elsewhere, providing a basis for a global jurisprudence to develop further in this area.

The diverse jurisprudence from around the world on the rights of nature reflects a global movement, however each ruling “emanates from local communities’ struggles” and “interpret[s]

335. *DG Khan Cement Ltd. v. Gov't of Punjab*, C.P. 1290-L 2 (2021) (Pak.).

336. *Id.* at 16.

337. *Id.* at 16-17.

338. *Id.* at 12.

339. *Id.* at 13; see *An Urgent Call for Decisive Action on Water*, 2020 8th World Water Forum, Mar. 20, 2018, <http://8.worldwaterforum.org/en/news/ministerial-declaration-seeking-decisive-action-water> [<https://perma.cc/6AXS-P6F3>].

emerging global norms within the context of domestic law and culture.”³⁴⁰

4. Rising to the Substantive and Procedural Challenges

Several substantive and procedural issues may arise for judges when adjudicating matters where the environment has been granted rights. Threshold issues for litigation where novel issues arise include jurisdiction, justiciability, and standing to sue. Procedural issues during a trial include evidential requirements, fact finding, and the application of the onus of proof.

a. Jurisdiction and Justiciability

A fundamental question is whether a court has jurisdiction to hear a particular matter. A related but separate question is justiciability. Jurisdiction concerns whether the court in question is empowered by law to hear the matter, whereas justiciability concerns whether the question is “susceptible to being the subject of legal norms or of adjudication by a court of law.”³⁴¹

Jurisdiction in this strict sense was not an issue in the cases considered in Section D.1 above. Interestingly, in *Miglani*, the Court noted that in matters of grave importance, it was not bound by procedural technicalities, and cited a 1989 decision of the Supreme Court of India holding that jurisdiction should not be declined on the basis that an Act already deals with the subject matter.³⁴²

Justiciability was also not an issue in the cases considered above. This is not to say, however, that the issue may not arise in environmental personhood or rights of nature litigation. This is particularly the case where plaintiffs invoke rights of nature arguments in jurisdictions where those rights are not entrenched and where there is an absence of explicit constitutional environmental protections. For example, in *Colorado River Ecosystem v. Colorado*, the plaintiffs attempted to have the Court confer environmental personhood on the Colorado River and to

340. Kauffman & Martin, *How Courts are Developing River Rights Jurisprudence*, supra note 261, at 265.

341. Ariel L. Bendor, *Are There Any Limits to Justiciability? The Jurisprudential and Constitutional Controversy In Light Of The Israeli and American Experience*, 7 *IND. INT'L & COMP. L. REV.* 311, 312 (1997).

342. *Lalit Miglani v. State of Uttarakhand* 2016 UTTAR 885 (India).

obtain redress for violations of the River's constitutional rights.³⁴³ The plaintiffs ultimately abandoned their case, submitting in their own motion to dismiss that "the expansion of rights is a difficult and legally complex matter. When engaged in an effort of first impression, the undersigned has a heightened ethical duty to continuously ensure that conditions are appropriate for our judicial institution to best consider the merits of a new canon".³⁴⁴

Although the full reasons behind the plaintiffs' abandonment of their case are unknown, one could infer that the plaintiffs may have considered their pleadings insufficient to achieve a successful outcome based on their comments reproduced above and reports that the State Attorney-General threatened to apply sanctions to the plaintiffs' lawyers for commencing frivolous proceedings.³⁴⁵ The Defendants' motion to dismiss argued that the complaint "presents a nonjusticiable issue of public policy. Whether the ecosystem should have the same rights as people, and who should be allowed to assert those rights in federal courts, are matters reserved to Congress by the Constitution."³⁴⁶

Jurisdiction and justiciability affect the accessibility of the courts to civil society. Notably, in the cases described above, higher courts have embraced jurisdiction and justiciability to determine the matter in issue.

b. Standing to Sue

A requirement for the initiating party in litigation to show that they have an interest in the matter which is capable of establishing

343. Unopposed Motion to Dismiss Amended Complaint with Prejudice, Colorado River Ecosystem v. Colo., No. 1:17-cv-02316-NYW (D. Colo. Dec. 3, 2017) http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171204_docket-117-cv-02316_order.pdf [<https://perma.cc/2CRX-E2DC>]; Matthew Miller, *Environmental Personhood and Standing for Nature: Examining the Colorado River case*, 17 U.N.H. L. REV. 355 (2019).

344. Unopposed Motion to Dismiss Amended Complaint with Prejudice, Colorado River Ecosystem v. Colo., No. 1:17-cv-02316-NYW (D. Colo. Dec. 3, 2017).

345. Chris Walker, *Attorney to Withdraw Colorado River Lawsuit Under Threat of Sanctions*, WESTWORD (Dec. 4, 2017), <https://www.westword.com/news/colorado-river-lawsuit-to-be-withdrawn-due-to-potential-sanctions-9746311> [<https://perma.cc/HY9V-X6LS>].

346. See Miller, *supra* note 343, at 372; Defendant's Motion to Dismiss Amended Complaint, Colorado River Ecosystem v. Colo., No. 1:17-cv-02316-NYW at 2 (D. Colo. Dec. 1, 2017).

standing to sue in a court is a feature of many legal systems. Whether a plaintiff has standing to sue determines what interest can be represented in court. As identified in Section B above, standing can accommodate or hinder rights of nature cases.

A question that can arise in cases that have nature entities as parties in the litigation is whether it or an individual or group acting on its behalf has standing. For example, does the enabling law, such as a constitutional provision, provide for representation of rights of nature expressly in legal proceedings or must the ability to do so be granted by a court exercising its discretion? Can any organization interested in protecting an ecosystem petition a court to do so, or must the petitioner be in a particular relationship with, or have some proximity to, the ecosystem?

Generally, the issue of standing has not proven to be an impediment in the cases discussed in Section D.1. The constitutions of India and Bangladesh contain provisions which enable public interest cases to be brought, meaning that standing is not in issue.³⁴⁷

In the *Atrato River* case, the court recognized that nature could be represented by individual plaintiffs.³⁴⁸ Article 241 of the *Constitution of Colombia* confers standing on any citizen to enforce constitutionally entrenched rights.³⁴⁹

Given that Ecuador lacks a developed constitutional or statutory regime with respect to standing, the operation of any standing requirements in actions to enforce constitutional rights of nature was unclear after the enactment of the Ecuadorian Constitution.³⁵⁰ However, in the *Vilcabamba River* case, the relevant constitutional provisions were interpreted to confer standing on anyone to enforce the rights granted to nature under the Constitution.³⁵¹ In at least one other rights of nature case in Ecuador, standing was a live issue. In the 2014 *Tangabana* case, the Judicial Court of Colta ruled against the claimants, partly on the grounds that they could not prove that they themselves were

347. See CONSTITUTION OF INDIA, Art. 32; CONSTITUTION OF BANGLADESH, art. 102.

348. *Ctr. for Soc. Just. Stud. et al. v. Presidency of the Republic* at 110-13.

349. See Angel R. Oquendo, *The Solitude of Latin America: The Struggle for Rights South of the Border*, 43 *TEX. INT'L L.J.* 185, 218 (2008).

350. Whittenmore, *supra* note 176, at 666.

351. Akchurin, *supra* note 199, at 942.

harmed.³⁵² Kauffman and Martin argue that this case demonstrated a lack of understanding by the primary judge of the open standing to enforce rights of nature created by Article 71 of the Constitution.³⁵³ The decision was appealed to the Provincial Court of Chimborazo but the appellate judge would not consider new evidence and the appeal was dismissed.³⁵⁴ An appeal was filed in the Constitutional Court in September 2015, but the Court declined to hear the case, meaning the lower court decision stands.³⁵⁵

Conferral of personhood can reduce the difficulty of meeting standing requirements in environmental litigation. The result of the decisions considered above in Section D.1 is that in future litigation involving those relevant ecosystems, guardian entities previously instituted by courts will have no issue with proving standing in relation to enforcing rights of the natural entities.

c. Getting the Right Parties and Issues Before the Court

The courts in some of the cases considered above have been prepared to have a wide range of parties represented before them. In several cases, different departments and levels of governments participated and were the subject of wide-ranging orders, including in the *Atrato River* decision, the *Salim* and *Miglani* decisions, and the *Turag River* decision.

Amicus briefs filed by individuals or organizations not party to the proceedings who have an interest in the proceedings play an important role in novel litigation. These briefs inform courts of relevant facts and issues and provide a mechanism by which civil society can present arguments to the court. Amicus briefs played a role in several of the rights of nature cases considered above.³⁵⁶ Notably, in the *Atrato River* case, the amicus parties were referenced in the remedial orders made.³⁵⁷

352. Kauffman & Martin, *Can Rights of Nature*, *supra* note 136, at 135.

353. *Id.* at 135-36.

354. *Id.*

355. Craig Kauffman & Pamela Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future*, MIT PRESS, 94 (2021).

356. *See, e.g.*, Ctr. for Soc. Just. Stud. et al. v. Presidency of the Republic; *Court on its own motion v. Chandigarh Admin.*, No. 18253 (High Court of Punjab-Haryana, Mar. 2, 2020); *Karnail Singh v. State of Haryana*, 2019 SCC Online P&H 704 (India).

357. Ctr. for Soc. Just. Stud. et al. v. Presidency of the Republic, at 110.

d. The Onus and Standard of Proof

The issue of who bears the onus of proof in a particular case is of fundamental importance to a court. Broadly, a plaintiff seeking relief must prove their civil case. In Ecuador, the Constitution reverses that onus of proof, placing the onus on the party seeking to undertake development to demonstrate that no harm will be caused by that development.³⁵⁸

In civil cases in the common law world, including India and Bangladesh, the standard of proof is the balance of probabilities.³⁵⁹ In some civil law jurisdictions, including Ecuador and Colombia, the standard of proof is not fixed by general rules but varies depending on jurisdiction and area of law.³⁶⁰

e. The Factual Matrix

The factual matrix of a case is generally significant for determining preliminary procedural issues and ultimately whether relief will be granted. Where there is actual environmental harm, discharging the burden of proving harm or the potential for harm is likely to be straightforward. Where the risk of future harm is uncertain or difficult to measure, the application of the precautionary principle has proven of assistance to plaintiffs. In many of the cases examined above, the precautionary principle was employed as a guiding principle in determining whether relief should be granted and the scope of that relief.³⁶¹

In successful cases, expert evidence concerning the state of environmental degradation in issue will be adduced. In common law countries, where experts are relied upon by the parties in

358. CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, art. 397.

359. ANUPAMA HEBBAR ET AL., LITIGATION AND ENFORCEMENT IN INDIA: OVERVIEW, Country Q & A, Thomson Reuters Practical Law Westlaw UK (database updated Apr. 2021); *Judicial Proceedings in Bangladesh*, LAWYERS & JURISTS FOUND, <https://www.lawyersnjurists.com/article/judicial-proceedings-bangladesh/> [https://perma.cc/948V-PBLL] (last visited Oct. 7, 2021).

360. E.g. there is no general standard of proof in Ecuador or Colombia. See JORGE SICOURET LYNCH & MARCOS MIRANDA BURGOS, CORONEL & PEREZ, ABOGADOS, LITIGATION AND ENFORCEMENT IN ECUADOR: OVERVIEW, Country Q & A, Thomson Reuters Practical Law Westlaw UK (database updated November 2015); DAVID ARAQUE ET AL., LITIGATION AND ENFORCEMENT IN COLOMBIA: OVERVIEW, Country Q & A, Thomson Reuters Practical Law Westlaw UK (database updated May 2021).

361. See *supra* Section D.3.

adversarial litigation, the calling of expert evidence by both parties may result in contested expert evidence which a court must evaluate. The United Nations Environment Programme has extensively discussed the need for judges with expertise in environmental issues to enable informed decision-making.³⁶² In civil law countries where experts are generally appointed by a court, judicial expertise is also very important when analyzing evidence, and especially in a context where the judge can actively initiate the introduction or disclosure of relevant evidence.³⁶³

In the authors' opinion, the evidence in cases considered above in Section D.1 identifying the existing environmental damage to the river system in question has generally been overwhelming and supportive of judicial intervention. Consequently, establishing the factual matrix has not proved a hurdle in those cases.

5. Remedies and Limits of the Judicial Role

After finding a cause of action, the court must turn to the threshold question of whether it can grant an effective relief or remedy.

In the authors' opinion, all the river protection cases gave rise to wide-ranging remedies that judges were prepared to impose on numerous government entities and, occasionally, civil society groups such as non-government organizations, with consequential substantial social and economic effects.

The decisions of *Salim* and *Miglani* have been criticized for undermining Indian environmental protection legislation that confers broad standing rights since it is unlikely that government bureaucrats, particularly without the allocation of additional funding for the cause, are best placed to advocate for the rights of India's rivers.³⁶⁴ The State of Uttarakhand, officials of which were appointed as the guardians of the Ganga and Yamuna rivers,

362. U.N. Env't Programme, *Environmental Rule of Law: First Global Report*, 114 (Jan. 24, 2019) (citing George Pring & Catherine Pring, *Environmental Courts and Tribunals: A Guide for Policy Makers*, UNEP (2016), <https://www.ajne.org/sites/default/files/resource/publications/7182/unep-ects-guide.pdf> [<https://perma.cc/G44R-AUUJ>]).

363. Pejovic, *supra* note 233, at 331, 335.

364. Jha & Ghosh, *supra* note 9, at 501, 504.

appealed the decision because of its unworkable implications.³⁶⁵ The content and scope of the duties to “uphold the status” and “promote the health and wellbeing” of those ecosystems imposed upon their representatives were unclear, raising difficult questions, including with respect to retroactive liability, oversight and review, and the degree of discretion conferred on the government officials appointed as guardians of those entities.³⁶⁶ Additionally, to the extent that the principle of *in locus parentis* implies responsibility for the actions of the minor, the decisions raise a question as to whether the appointed guardians may be exposed to liability for natural disasters such as flooding. This was a ground of appeal in *Salim*.³⁶⁷ Issues of workability are arguably exacerbated by the imposition of a strict liability standard; the Court in *Miglani* declared that:

[A]ny person causing any injury and harm, intentionally or unintentionally to the Himalayas, Glaciers, rivers, streams, rivulets, lakes, air, meadows, dales, jungles and forests is liable to be proceeded against under the common law, penal laws, environmental laws and other statutory enactments governing the field.³⁶⁸

Another issue, and a further ground of appeal in the *Salim* case, was the jurisdictional extent of responsibility, given that the relevant ecosystems extend beyond the borders of Uttarakhand.³⁶⁹ Jha and Ghosh doubt the efficacy of *Salim* and *Miglani* and argue that the health of India’s rivers would be best achieved by prioritizing the remediation of pollutant hotspots, frequent water quality testing, a focus on institutional accountability, and interstate cooperation to ensure the consistency of approach in different states.³⁷⁰

Court-ordered personhood may also result in unforeseen social consequences. As a result of the *Turag River* case, authorities

365. See discussion *supra* Section D.1.

366. O’Donnell, *supra* note 295, at 142; Madeleine Lovelle, *Entering Unchartered Waters: Awarding Legal Rights to Rivers*, FUTURE DIRECTIONS INT’L (Sep. 2018), <http://www.futuredirections.org.au/publication/entering-unchartered-waters-awarding-legal-rights-to-rivers/> [https://perma.cc/8VJQ-6BCY].

367. O’Donnell, *supra* note 295, at 142; see also discussion *supra* Section D.1.

368. O’Donnell, *supra* note 295, at 140; Lalit Miglani v. State of Uttarakhand 2016 UTTAR 885 (India).

369. O’Donnell, *supra* note 295, at 142.

370. Jha & Ghosh, *supra* note 9, at 511-12.

have evicted people living along the banks of Bangladesh's rivers.³⁷¹ This has resulted in extensive homelessness of those living in densely populated slums along the banks of those rivers.³⁷² The consequences of this decision are an apt illustration of Hope Babcock's concern that judicially conferred personhood carries a danger that political matters will be transferred to the judicial branch.³⁷³ If courts do decide rights of nature cases with inevitable public policy implications, and craft extensive remedies affecting multiple entities, they are unavoidably entering into politically contentious terrain.

The court orders in the *Vilcabamba River* case, which focused extensively on remediation in the context of one development, a substantial road, included orders that the relevant Ministry was required to undertake inspections, prepare a report identifying remedies, and monitor implementation of remedial works. The Court ordered an apology in a major newspaper. However, as discussed above, enforcement and implementation of those orders proved problematic and the plaintiffs were ultimately forced to fund remediation themselves.³⁷⁴ As examined above, similar issues with implementation have occurred in relation to the comprehensive orders in the *Atrato River* case, with compliance delayed by several months.³⁷⁵

Plainly, difficulties arise in enforcing orders where courts unilaterally develop institutions and expensive measures considered necessary to sustain the health of ecosystems. Courts that craft remedies which aim to manage ecosystems, establish complex governance structures, and balance government and civil society participation may push against the legal limits of the judicial role.

6. Judicial Overreach

Some scholars identify the legitimacy of a judiciary as a major issue. Courts are described as unelected, relatively insulated from accountability compared to elected representatives, potentially

371. Chandran, *supra* note 313.

372. *Id.*

373. Babcock, *supra* note 45, at 4.

374. Pecharroman, *supra* note 258.

375. Paola Villavicencio Calzadilla, *A Paradigm Shift in Courts' View on Nature: The Atrato River and Amazon Basin Cases in Colombia* 15 L. & DEV. J., 58 (2019).

counter-majoritarian, and as being able to decide politically contentious issues despite being composed of a small number of people relative to legislatures.³⁷⁶ In scholarly examination of judicial legitimacy, it has often been equated with ‘diffuse’ support, meaning that the judiciary is the subject of a ‘reservoir’ of goodwill irrespective of the outcome of a specific case.³⁷⁷ Issues of judicial legitimacy may become especially pronounced where courts fashion wide-ranging remedies and innovative doctrines.

The Indian judiciary, particularly the Supreme Court, has long held a reputation for judicial creativity with respect to environmental issues.³⁷⁸ The Supreme Court has been provided with opportunities to develop environmental law as a result of extensive public interest litigation, which has been employed strategically to circumvent the inaction of the legislature and executive.³⁷⁹ The Supreme Court has, for example, declared that the ancient doctrine of public trust, dating back at least to the Institutes of Justinian, is part of the law of India.³⁸⁰ In *Vellore Citizen's Welfare Forum*, the Supreme Court imposed obligations on a range of actors in Indian society to prevent and confront the causes of environmental degradation, and placed the onus on actors to demonstrate that their actions are environmentally benign.³⁸¹ Perhaps the willingness to innovate stems from the importance attributed to environmental protection by the Constitution of India, which imposes a fundamental duty on every citizen of India to “protect and improve the natural environments including forests, lakes, rivers and wild life, and to have

376. Shiri Krebs et al., *What Determines the Institutional Legitimacy of the High Court of Australia?*, 43 MELB. UNIV. L. REV. 605, 605 (2020); Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. OF POL. SCI. 184, 184 (2013); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. OF POL. SCI. 635 (1992); see generally DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* (New York, John Wiley 1965).

377. *Id.*

378. See, e.g., Shalini Iyengar et al., *Selectively Assertive: Interventions of India's Supreme Court to Enforce Environmental Laws*, SUSTAINABILITY, Dec. 2019, at 1, 2; VG Shinde, *Expanding Horizons Of Environmental Jurisprudence: A Judicial Creativity In India*, 3 INT'L J. OF ADVANCED RESEARCH & DEV 1, 2 (2018); Geetanjoy Sahu, *Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence*, 4 L. ENV'T & DEV. J. 1, 3-4 (2008).

379. Sahu, *supra* note 378, at 3.

380. M. C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India); see also Bruce W. Frier, *The Roman Origins of the Public Trust Doctrine*, 32 J. ROMAN ARCHAEOLOGY 641 (2019).

381. *Vellore Citizens' Welfare Forum v. Union of India*, (1996) 5 SCC 647 (India); Sahu, *supra* note 378, at 10-11.

compassion for living creatures.”³⁸² *Miglani* and *Salim*, which have continued this practice of creativity in the Indian judiciary, have both been embraced by scholars and critiqued for what has been labelled as judicial overreach,³⁸³ or a “drift into policy making.”³⁸⁴

The development of environmental personhood is novel. In any given case, a balance must be struck between “neither wholly mechanical nor excessively creative” judging in which “creative bursts” can legitimately occur.³⁸⁵ That a court extends the benefit of constitutional rights to new subjects or expands the operation of an existing doctrine does not render its decision outside orthodox modes of legal reasoning.

II. PERSONHOOD: SYMBOLIC GESTURE OR A POWERFUL TOOL FOR CHANGE?

Due to the nascent nature of environmental personhood regimes and the paucity of evidence elucidating their efficacy, it is difficult to answer the question of whether environmental personhood can protect the environment.³⁸⁶

Environmental personhood may overcome the difficulties that have historically burdened environmental protection litigation, particularly with respect to justiciability and standing. The wave of successful litigation in Ecuador relying on that state’s constitutional rights of nature exemplifies how these rights may substantially widen the scope of strategic climate change and environmental protection litigation available in jurisdictions where they are enacted.

Additionally, as the normative influence of those rights increase, they are likely to result in improved environmental outcomes in relevant ecosystems and contribute to a reimagining of the relationship between humans and the natural world. As Gordon writes: “[T]he legal structure underlying the personhood changes give them actual heft, and can change the way people think

382. CONSTITUTION OF INDIA. art. 51A(g).

383. Jha & Ghosh, *supra* note 9, at 504.

384. Athens, *supra* note 122, at 217.

385. Michael Kirby, *Precedent Law, Practice and Trends in Australia*, 28 AUSTL. BAR REV. 243, 249, 253 (2007); *see also* MICHAEL KIRBY, *JUDICIAL ACTIVISM: AUTHORITY, PRINCIPLE AND POLICY IN THE JUDICIAL METHOD* (Sweet & Maxwell 2004).

386. Zartner, *supra* note 37, at 1; Takacs, *supra* note 20, at 601-02.

about the rights of the environment in ways that really change the law in ways that affect the real world.”³⁸⁷

Environmental personhood, however, is not a panacea for environmental degradation.³⁸⁸ Good drafting, political will, enforcement, and funding is necessary to ensure the efficacy of environmental personhood frameworks. In jurisdictions where rights of nature have been implemented, but these indicia are inadequate or absent, conservation and (in the context of settler-states) the interests of First Nations peoples, continue to be subservient to economic development. Governments in those jurisdictions may benefit from the outward appearance of ecocentrism, all the while acting with a pro-development agenda.³⁸⁹ Conversely, there are early indications that where environmental personhood is implemented as the result of extensive consultation with First Nations peoples, these frameworks can enhance the agency of First Nations peoples with respect to their custodial lands, as in the case of New Zealand’s Te Urewera protected area.

The method by which rights are conferred on nature also has a direct bearing on their efficacy. Rights conferred by way of constitution or statute have the greatest legal and symbolic force but are difficult to enact. Conversely, local government orders and court decisions finding rights of nature are vulnerable to appeal. Judicially implied rights of nature have proven problematic where respondents have failed to comply with court orders or complied with those orders late.³⁹⁰ Additionally, courts have been accused of judicial activism and impermissibly engaging in policy creation³⁹¹ where decisions conferring personhood have far-reaching social and economic impacts.

The current status of environmental personhood in various jurisdictions is unlikely to represent the apotheosis of the rights of nature movement. In its 2019 *Harmony with Nature Report*, the United Nations Secretary-General observed that: “Earth jurisprudence can be seen as the fastest growing legal movement of the twenty-first century. The most significant consequence of

387. Gordon, *supra* note 93, at 87.

388. Good, *supra* note 46, at 42.

389. Calzadilla & Kotzé, *Living in Harmony*, *supra* note 50, at 415.

390. Calzadilla, *supra* note 375, at 58; Wesche, *supra* note 276.

391. Athens, *supra* note 122, at 217.

acknowledging human interconnectedness and inextricability from the rest of the world has been casting the non-human world as a legal subject.”³⁹²

If this movement finds more widespread favor, environmental personhood may result in a paradigm shift akin to the advent of corporate personhood. Lord Sumption described that concept “as a fiction, and in a sense it is. But the fiction is the whole foundation of English company and insolvency law.”³⁹³ Whether environmental personhood will have a similarly broad-reaching impact is unclear. It remains to be seen whether “time and conditions are finally such that we can use these ideas to protect nature with the zeal with which we have protected corporate power.”³⁹⁴

However, time is of the essence. A 2019 Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services warned that “transformative change” is needed to save humanity and nature from the effects of rapid biodiversity and ecosystem decline.³⁹⁵ In this context, it appears increasingly urgent that the law adapt, radically if required, in order to reverse, or at the very least decrease, the current course of accelerating environmental destruction. While not without limitations, environmental personhood is one such method by which the law can answer that call.

392. U.N. Secretary-General, *Harmony with Nature*, 129, U.N. Doc. A/74/236 (July 26, 2019).

393. *Prest v. Petrodel Resources Ltd.*, [2013] UKSC 34, [2013] 2 AC 415, [8] (appeal taken from Eng.).

394. Gordon, *supra* note 93, at 70.

395. E.S. Brondizio et al., *Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*, IPBES (May 2019), <https://ipbes.net/global-assessment> [<https://perma.cc/X7YL-3BB2>]; *Rights of Rivers*, *supra* note 13, at 6; Harriet Harden-Davies, Fran Humphries et al., *Rights of Nature: Perspectives for Global Ocean Stewardship*, 122 MARINE POL’Y 1, 1-9 (2020).

