



# CAN NATURE HAVE RIGHTS?

Legal and  
Political Insights

Edited by

Anna Leah Tabios Hillebrecht  
María Valeria Berros



Transformations in  
Environment and Society

2017 / 6

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Anna Leah Tabios Hillebrecht and María Valeria Berros

## Introduction

Rights of Nature is a new emerging concept, one that is being integrated and developed in several legal systems around the world, and spurring a new field of political discourse. Though Rights of Nature has its foundations in law and politics, its implications for humans, nonhumans, environments, and societies, are being felt and keenly followed by those both within and beyond the legal and political arenas. The challenges and long-term consequences of providing Nature with legal rights are therefore of interest to many disciplines during these unstable times. But engaging nonlegal scholars, students, and lay people in a discussion on law can be problematic. First, the language of the law can be challenging—indeed, the legal maxim *dura lex sed lex* (“The law is hard, but it is the law”) could prove limiting, overbearing, and unbending, especially when one factors in the issue of justice. Second, legal literature can be relatively dull when juxtaposed with literary narratives and historical accounts. Could an interdisciplinary approach make it possible to transcend these difficulties? After all, legal cases are also historical accounts and narratives, sometimes even literary, depending on who holds the pen. Judicial cases can be riveting and dramatic, action packed, and philosophical. They are stories in their own right. Therein, every detail, every word, or even time itself is of the essence. In these stories, the precise use or avoidance of terminology can spell out the difference between (legal) wrong and right and, in some cases, even life and death. Laws and legal theory can be malleable and constructive, deviating from bodies of norms, inventively applied to curtail or advance all kinds of agendas. We might also be wary of the fact that policy decisions can undermine or trump other legal proceedings or actions, sometimes with unwittingly or deliberately flawed outcomes.

Legal education, due to its focus on “positive law,” tends to gravitate towards the regulations of juridical systems that rely on orderly and systematic interpretations of the law. Conscious of scopes and limitations, legal education is mindful not to overstep the law’s bounds. Such strict adherence tends to propagate disconnection between law and lived realities in a complex world. This was something that we took care to avoid, preferring instead to integrate different perspectives on Rights of Nature from and across various disciplines, such as history, sociology, and anthropology, to name a few. Within the two sections of this volume, *Towards a Non-Anthropocentric Understanding of Nature* and

and *Rights of Nature in Present-Day Cultures*, using examples of both legal theory and case studies, we hoped to highlight some of the relevant, inspiring, and sometimes inconspicuous issues regarding the formulation and application of the Rights of Nature concept.

We believe transdisciplinary exercises such as this are necessary to understand and regard Nature as a multidimensional, omnipresent entity. In the indigenous worldviews of Ecuador and Bolivia, *Pachamama*, or Mother Earth, is a being that embraces the living world. *Pachamama*, as a common ground, is ideal to impress upon all disciplines the essentiality of Nature. Alongside the possibilities opened up by recognizing Nature as a legal entity, we also feel that existing environmental law, with Nature as its centerpiece, has the potential to bind participating disciplines together.

Drawing on examples of applied Rights of Nature as well as existing environmental laws from Ecuador and beyond, this issue seeks to mend the disconnection between legal abstractions and realities. Bearing in mind that the law is never neutral but is rather a translation of the demands of the (present) time, we asked the authors to draw from their respective fields those perspectives and intricacies that they felt were significant to the discourse on Rights of Nature. The points that they consider are what, we feel, the law should then address, if it aims to be relevant and adequate. We believe that this collection goes a long way towards achieving the goal of obscuring the disparities between legal concepts and actual conditions, and highlights the importance of Rights of Nature in the transformation of human-environment relations.

# **Towards a Non-Anthropocentric Understanding of Nature**



Jens Kersten

## Who Needs Rights of Nature?

From a legal perspective, there is more than one answer to this question: we, living humans, as well as future generations or Nature itself, might need Rights of Nature. The law offers very different concepts with which to frame nature and we can see an evolution of these legal concepts: from treating nature as an object which has to be protected, to regarding Nature as a subject or legal person that can exercise its own rights.

To get an idea of this development in the normative perception of nature, we have to turn to the concept of the legal person. Law is the body of norms that regulates the relationships between persons or between persons and things. In the traditional legal understanding, nature is a thing or—even more technically—all parts of nature except humans are things. Things (e.g., animals, plants, or stones), have no rights. They are goods, which can be owned and used, destroyed or protected. In this traditional framework, subjective rights were reserved for humans, organizations, or economic actors, for example firms or trusts. These legal persons were and are able to exercise their rights, and to enforce them in negotiations or in court trials.

Law is, however, not just a body of norms. It is highly constructive as well. This means that legal systems are free to choose between different legal concepts in order to solve social, economic, and ecological problems. The legal system of a country can still use, for example, the traditional approach and might understand nature as an object or good, the value of which can/must be quantified. On the other hand, it can apply the concept of legal personhood to Nature and thus give Nature subjective rights in order to solve ecological conflicts. To implement this innovative approach, a legal system will appoint legal agents (e.g., NGOs) which will act for Nature in representative actions.

The recognition of nonhuman actors as legal persons with subjective rights is nothing peculiar. We do it all the time in the economic sphere. Over centuries, we have gotten accustomed to the idea that firms or trusts are legal persons with rights and obligations. Nobody questions this. Today, we are getting used to the idea of Nature or parts of Nature as legal persons. Of course, the application of the concept of the legal person to Nature is the subject of controversial discussions and polemical challenges. If you favor

an Aristotelian or Kantian understanding of the person, you will be very reluctant to accept, for example, an animal, a plant, or a stone as a (legal) subject. In this case, you will similarly have problems with the subjective status of firms or trusts in legal systems, too. Such heavily loaded deliberations are rarely a problem, however, in the world of law: with respect to the concept of the (legal) person, lawyers travel with very light luggage. They do not carry the burden of Aristotelian or Kantian philosophy. Quite the contrary: they use the concept of the legal person simply when it is appropriate, practical, or fair in solving conflicts. But even though lawyers might not carry the burden of philosophical concepts, they do carry the burden of critique.

The question of who or what we recognize as a legal person with specific rights is very much a question of traditions and, of course, of social and economic interests. You will realize this straight away if you ask yourself why we traditionally accept an accumulation of money—for example, in the form of a firm or a trust—as a legal person, but not animals or plants. So the concept of the legal person is very much interest-driven. To give and to withhold the status of a legal person to somebody or something is a question of power. If animals and plants were legal persons, it would be much more difficult to kill or to destroy them: they would have subjective rights then, which could be enforced in court. Against this background, we can understand that the real arguments against the Rights of Nature do not come from philosophy, but from those actors of social welfare and those with invested economic interests, who want to own, use, pollute, or destroy Nature without noteworthy obstacles.

In “premodern” societies, we can see that “things” had legal rights and obligations. In the European Middle Ages, for example, there were court cases and lawsuits against things, like animals and trees, which thus had the status of a legal person. Although “modern societies” have problems with this animistic provocation, today we discuss the possibility of legal personhood for robots, autonomous machines, and computerized agents—for example, in the context of economic trade or ambient assisted living. We can see, as indicated above, a legal evolution in recognizing Nature or at least parts of Nature as legal persons. Although these differing ways and extents to which people have sought to recognize and represent Nature’s legal personhood are governed by their own motivations and interests, they are guided by five possibilities for framing Nature within our legal system.



*First, the legal status of nature as a normative reflex of human rights.*

In this traditional concept, nature has no legal status of its own, but is protected indirectly by the subjective rights of humans. Lawyers call this kind of indirect protection a “legal reflex”: human subjects have rights to life, to physical integrity, and to property. If nature is polluted or destroyed in a way that would affect one of these rights, the affected human subjects have the right to be protected—and nature is protected indirectly by this legal mechanism, too.

*Second, the legal status of nature as common heritage of humanity.*

The common heritage of humanity is a concept from international law that can guard the environment by setting up international institutions for the protection of nature and the governance of knowledge. This concept was developed with respect to the ocean floor and the Antarctic. The heritage concept is, however, a very limited one: it is constrained to charismatic parts of nature and it does not protect nature or its resources from being exploited. Alongside the heritage concept, international law came up with the idea of the common concern of humanity. We can find it in the United Nation’s Convention on Biodiversity from 1992. This convention announces in its preamble that the conservation of biodiversity is a common concern of humanity. This idea of the common concern of humanity is even weaker than the heritage concept: the sovereign states were afraid that Nature having a strong legal status could prevent them from exploiting “their” natural resources.

*Third, the legal status of nature as a constitutional objective to protect the environment.*

In this concept, the state has the constitutional obligation to protect nature. An example of this is Article 20a of the German Constitution (The Basic Law). It reads: “Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.” Article 20a of the German Basic Law is a very restrictive norm: it does not convey any subjective rights, neither to citizens nor to nature. This is the main reason why Article

20a of the Basic Law has no real relevance in day-to-day legal business. If you read the text of Article 20a carefully, you can see at once that its legislator was even afraid of nature and its potential power if provided with such legal status. It does not say straight away that the environment and animals have to be protected. The legislator added an “Angstklausel”—a disclaimer—which shows his political, social, and economic fear that the protection of nature could go too far. That is why he stresses that the protection of nature has to be validated/defensible by “legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.”

*Fourth, the legal status of nature as a human right to a favorable environment.*

This legal concept gives human beings a subjective right to a favorable environment. An example for this is Article 42 of the Constitution of the Russian Federation (1993). It reads: “Everyone shall have the right to a favorable environment, reliable information on the state of the environment, and compensation for damage caused to his/her health and property by violations of environmental laws.” We can see here a combination of three human rights to protect nature directly and indirectly: the right to a favorable environment, the right to information on the environment, and the right to recover damages. Although this framework is very anthropocentric, it already goes far beyond the traditional approaches, which were and are used to frame nature in legal systems. According to Article 42 of the Constitution of the Russian Federation, every citizen has rights to foster the environment. This innovative legal concept faces, of course, a very tough on-road test with respect to the severe ecological problems of the Russian Federation.

*Fifth, the legal status of Nature as a legal subject and person.*

This latest approach is the most inspiring framework law can offer Nature and society: Nature is a legal person itself and has subjective rights. An example of this approach can be found in Article 71 to Article 74 of the Constitution of Ecuador (2008). The essential regulation of Article 71 reads:

Nature, or Pachamama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes. All persons, communities, peoples, and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate. The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.

Article 71 of the Constitution of Ecuador thus recognizes Nature as a legal person, with subjective rights that can be enforced by legal agents. Even so, the innovative character of this concept of Pachamama (or Mother Earth) cannot be disputed. Legal realism is important, too: giving subjective rights to Nature or parts of Nature does not mean that these rights will always prevail or win in every single case. The rights of Nature have to be balanced with social and economic interests. Therefore, the advantages of this concept are that it leads to hard but fair legal conflicts between society and economy, with Nature as a nonpassive actor.

Who, then, needs Rights of Nature? We have seen that both humans and nonhumans, as well as Nature itself, could benefit (directly or indirectly), depending on the way in which nature is constructed in the legal context. If it comes to the recognition of the rights of Nature, we lawyers are not just part of the problem, but part of the solution, too. We can offer different frameworks for the legal status of nature. “Lawyers have,” says Bruno Latour, “always been polite enough to admit their relativism and constructivism without making a big affair out of that.” Despite the challenges accompanying the evolution of legal frameworks for Rights of Nature, it is most important that we do not fall back on nature’s indirect legal status under the human right to a favorable environment. Rather, we should imagine the possibilities of Nature as a legal person with its own rights as the most innovative and inspiring concept to save our planet, and ourselves.



Anna Leah Tabios Hillebrecht

## Disrobing Rights: The Privilege of Being Human in the Rights of Nature Discourse

Dolphins, chimpanzees, jaguars, trees—often they are overlooked in traditional legal discourse. More specifically considered, in traditional environmental legal discourse, the focus centers on humankind's access to resources and to a healthy natural environment. Even the reference to living beings apart from the human species as “stakeholders” is fraught with further questions and is perhaps delivered with hesitation. Although it is clear that flora and fauna are physically part of the natural environment, the question that may be raised at this point is: Do these parts of nature—or Nature itself, at that—in fact have *legal rights*?

Rights are those sets of inalienable fundamental norms that entail protection within the recognizing jurisdiction, and right holders are entitled to seek redress in case of violations. While the Universal Declaration of Human Rights (UDHR) provides for rights and freedoms in “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family,” it clearly limits “right holders” to human beings and does not mention the natural environment. This exclusion is understandable: it was precisely “barbarous acts” *against humanity* that the UDHR aimed to protect its right holders from. Barbarous acts *against the natural environment* were not within its scope. The UDHR notwithstanding, environmental rights emerged in the front line of world politics decades thereafter.<sup>1</sup> Anthropocentric as it may be, the human right to a healthy environment provided a check on the extent to which human beings could impact their natural surroundings. Still, the framework treated the natural environment as an object, rather than as a right holder herself.

## Getting to Know the Rights of Nature

The Andean worldview of Rights of Nature, now recognized as legal rights in the Constitution of Ecuador and in the Framework Law of Mother Earth and Integral Development for Living Well of Bolivia, unequivocally acknowledges Nature as a legal entity. Breaking

<sup>1</sup> See “The Stockholm Declaration,” *Declaration of the United Nations Conference on the Human Environment* (Stockholm, June 1972), available at <http://www.un-documents.net/unchedec.htm>.

its traditional legal assignment as an object of rights, Nature is a right holder. Nature has standing to sue—Nature must be protected, not as a means to ensure human rights and the protection of the human race, but as a separate entity who holds rights in her own name: *Pachamama* or Mother Nature.

According to Article 71 of the Ecuadorian Constitution, flora and fauna generally have “the right to exist, persist, maintain, and regenerate their vital cycles, structure, functions and their processes in evolution.” Any act that infringes this right enables Nature, via representatives, to sue in her name and on behalf of her interests. While very straightforward, this underlines a vital element: representation. Nature still needs, even out of practicality, a “person, people, community, or nationality,” according to the Ecuadorian Constitution, to demand the recognition of her rights before tribunals and offices.

### Constructing Rights

The recognition of the rights of nature presents a significant leap forward in rights-based approaches to environmental protection. The “Rights of Nature” approach dares to stand against heavily anthropocentric notions of environmental rights and carves out a *sui generis* group of rights. Rights of Nature command the recognition and, subsequently, the enforcement of the rights and wellbeing of entities other than present-day humans.

But while doing so, these categories of rights also highlight the role and influence of humans. In these contexts, human beings lodge their influence in the rights-determination and enforcement process. Two elements stand in the way or, at the very least, blur these processes to the extent that determining the rights of Nature to be non-anthropocentric rights may prove to be a misconception. Here, I identify two interwoven elements which affect the postulation that environmental protection by way of *human* rights, or even basically *via* positive actions of human beings, works. The first element refers to the layers of power involved in Human-Nature relations. The second element, I term “survival compulsion” and it is rooted in self-preservation.

### *The fallacies of power*

Last month, an Olympic Jaguar, Juma, was killed after a torch ceremony in Brazil. After tigers and lions, jaguars are the third-largest species in the feline family. Their numbers are also declining and the International Union for Conservation of Nature has categorized them as “Near Threatened.” That the jaguar, or wild animals at that, could be “used” to serve human beings’ purposes at the Olympics, is a clear demonstration of power that is, in this case, tilted in favor of human beings.

The act of chaining Juma exhibits the first layer of power relations between humans and Nature. Humans have the capacity to tame Nature. The killing of Juma further accentuated this power.

However, the authority that enshrines such “usage” of wildlife, and that sets forth its political face and its regulation, represents another shroud of this power, this time not simply apparent but more benevolent in a sense. Erik Swyngedouw describes the Nature subscribed to this process as a “treacherously deceitful Nature” and as one that is “packaged, numbered, calculated, coded, modeled, and represented by those who claim to process, know, understand, and speak for the ‘real Nature.’”<sup>2</sup> This then represents the second layer of Human-Nature power relations. With these sets of rules and regulations, human beings further *design* and delineate the nuances between the exploitation and management of Nature. Outright, such a benevolent display of power—via legislation and a framework for rights—may contribute to the protection of Nature (be it theoretically or in actuality). Still, it is wielded not by Nature but by human beings—the same party that can also hold Nature on a leash according to how the wielders themselves behold Nature, pursuant to the first layer of power.

Protection of Nature via human beings and societal structure thus also attempts to improve the dialogue between the two. While the first layer of power shows that humans can tame and destroy Nature, the second layer demonstrates how humans, as Nature’s stewards, can wield their power over Nature *and* fellow humans *for Nature’s sake*.

2 Swyngedouw, Erik. “Impossible ‘Sustainability’ and the Postpolitical Condition.” In *The Sustainable Development Paradox*, edited by Rob Krueger and David Gibbs, 21. New York: Guilford Press, 2007.

The third layer of power requires a reconsideration of Juma's case, although an attempt to do so from a legal perspective would reveal a stretch of the unknown. What would have happened if the shooting had *not* been done? The paradigm of uncertainty and the lack of knowledge at hand trigger fear in humans of powers potentially greater than their own, that could pose a challenge or threat—whether such greater sources of power are imagined or otherwise. Juma represented an unmistakable greater source of power to that of humans. And such powers threaten to expose human beings as weaker parts of the same Nature they seek to control.

Even in dormancy and amid the safeguards, benevolent or otherwise, that human beings have erected and established to guard society from the unpredictability of “Nature's power,” the recognition of this “greater” source of power triggers the second element: the survival compulsion.

### *The “survival compulsion”*

In late May of this year, I read critical, mostly passionate, opinions on the Cincinnati Zoo incident, which resulted in the death of a 17-year-old western lowland gorilla named Harambe. A three-year-old boy went over or through a barrier and shrubbery, and thereafter fell into Harambe's enclosure. Although a long discussion could be had on whether or not the shooting was necessary, I would rather underline one fact: the choice between two lives, one human and one classified as “nature.” With the risk of perhaps appearing to be trivializing human life, I submit the Harambe case to careful scrutiny, very much in the spirit of a non-anthropocentric rights-based discussion.

From the crude example of gorilla vs. child, we must first determine who was making the choice in rights protection. Submitting the determination of interests, such as life, to a third party is a common procedure in rights-based approaches. In adjudication, for example, the third party determines which interests to uphold in a binding decision. In the scene involving Harambe and the child, the choice of survival and of death was made by a third party: a zoo official, one tasked with overseeing animals within the protective fences of a controlled environment, an onlooker who had to protect life. But whose life? Whose right to life?



The choice was made in Harambe's case and ended Harambe's life. In the human's case, the choice prolonged his. The choice that the zookeepers had to make was between a fellow living human being and a living gorilla. The third party making the choice was not in danger; but his choice to pull the trigger on Harambe protected one of his own species and, in a way, damned another species he could identify less with.

### *Choosing (legal) battles*

The rights of Nature defy the anthropocentric character of rights discourse. The suitability of representation itself is open to question.<sup>3</sup> Rights of Nature offers access to legal relief to what we have identified to be the traditionally overlooked stakeholders—that is, flora and fauna. The authority of representatives to act in Nature's interests, however, is limited by the knowledge and motivation of these representatives. Akin to guardianship procedures and corporate personality cases in specific jurisdictions, these representatives stand in representation of Nature, submitting their pleas and judicial requests before the public office on the premise that these will be in the best interests of the right holders.<sup>4</sup> The court and tribunals, in turn, deliver judgments based on the presents of the case, and pronounce the actions that may, most probably, determine the fate (or part of it) of Nature.

### *The privilege to act*

While developments in the law in selected jurisdictions have recognized Nature's legal personality or personhood, the privilege of enforcing them still lies with human society. Hence, even though environmental rights—namely, the human right to a healthy environment and the rights of Nature—are to be treated on equal footing, albeit in a different category, it cannot be denied that humans themselves have the practical primacy in enforcing these rights.

3 Marcus Taylor writes that representing nature "is an intrinsically political process." See Taylor, Marcus. *The Political Ecology of Climate Change Adaptation: Livelihoods, Agrarian Change and the Conflicts of Development*. London: Routledge, 2015.

4 This is not an exotic practice, however. Guardianships of both natural and juridical persons (e.g., corporations and organizations) require the representatives to act in the best interests of the represented.

Seen from this angle, the adage “first among equals,” if we can put it so crudely, applies. Humans hold the privilege to choose when, how, and whether or not to legally act on these rights.

### **Overcoming Disparities of Interests: One Step at a Time**

Yet, there is the question of suitability for the categorization and distinction between the rights of Nature and human rights. Are human beings not part of Nature itself,<sup>5</sup> so much so, that the scope of Rights of Nature necessarily encapsulates the human species as well?

It may be argued that humanity is an all-encompassing interest—that humans are necessarily linked to Nature and, as such, the protection of one redounds to that of the other. The human right to a healthy environment, for example, would have the correlative duty to protect the environment for the entire human community. Thus, in protecting their own interests, human beings are also enforcing their correlative duties to Nature in general, without the necessity of treating Nature as a separate right holder.

By embracing Nature within the anthropocentric rights discourse and highlighting its key role as right holder and right protector, we therefore render moot and unnecessary the concept of representation. But while it may hold water in the traditional sense of legal discourse, the question of whether such inclusion is enough or even appropriate to trump the “survival compulsion” of humankind, without detracting from the aims and values of Rights of Nature, is, however, doubtful. A separate set of rights—that of Nature’s—cannot be foregone; the difficulty only lies in ensuring that the representatives protecting these rights *do* further the right holder’s aims and values and not the representatives’ own.

5 See Raymond Williams’s three-dimensional definition of nature. Williams, Raymond. *Keywords: A Vocabulary of Culture and Society*. New York: Oxford University Press, 1983, 219–24. In his second and third definitions of nature, Williams explains nature to be the “inherent force which directs either the world or human beings or both” and the “material world itself, taken as including or not including human beings,” respectively.

Atus Mariqueo-Russell

## Rights of Nature and the Precautionary Principle

There is an emerging body of environmental law that seeks to give formal rights to Nature's ecosystems. These laws are intended to surpass standard environmental regulations that have provided weak opposition to the mass degradation of ecosystems. The most radical advancements in the Rights of Nature movement have been the inclusion of Rights of Nature in Ecuador's 2008 constitution, followed thereafter by Bolivia's passing of The Law of Mother Earth in 2010. These laws provide a powerful opportunity to reshape our uncritical models of economic "development," address our unmet moral obligations to future generations, and challenge our understanding of what it means to live a flourishing life. However, there are challenges that must be faced in getting Rights of Nature laws into the public consciousness and political decision-making chambers. This is especially true in Europe, where Rights of Nature laws are nonexistent and groups advocating them have only recently begun to emerge. Moreover, it must be ensured that these laws are advanced in a way that is conceptually coherent and rigorous enough to deliver shared prosperity across generations. Central to fulfilling this goal is the identification of connections between Rights of Nature and other conceptually similar environmental laws. With that in mind, this article argues that progress in environmental protection can be made by highlighting the mutually supportive relationship between Rights of Nature laws and the long established, though increasingly threatened, Precautionary Principle.

There is no single definition of the Precautionary Principle, and its multiple competing formulations are highly contested. However, a way of articulating the concerns of some of the more robust definitions can be put like this: when we encounter uncertain yet plausible threats of severe harm to the environment or public health, *scientific uncertainty should not be used as a reason for failure* to take protective or preventative action. Rather, *uncertainty about the potential of harm should be a reason for implementing regulation*. In other words, the Precautionary Principle looks to transfer the burden of proof; instead of one party having to prove that an action of another is potentially harmful, the burden is on those who wish to pursue the allegedly harmful action to demonstrate sufficient evidence of safety. The Precautionary Principle is often appealed to in cases where there are reasons to believe that the quantification of risk is impossible to

make with any degree of accuracy. Indeed, a large part of its appeal is in its recognition that uncertainty cannot always be usefully numericized and represented as a probability.

While the Precautionary Principle has existed in the academic literature since the 1980s, it has seen a recent bloom in success. Most notably, the European Union (EU) included it in Article 191 of the 2007 Lisbon Treaty. More recently, in late 2015, the Supreme Court of the Philippines upheld a national ban on the cultivation of genetically-modified eggplant by appealing to the Precautionary Principle.<sup>1</sup> However, these recent successes have not been without resistance. One of the main concerns highlighted by Greenpeace in their 2015 leak of documents pertaining to the negotiations over the proposed US-EU free-trade agreement (TTIP), was that the Precautionary Principle could be dropped from EU law and replaced by a “risk based” approach that manages hazards instead of proactively preventing them.<sup>2</sup> Presumably, this approach would be modelled upon the various US executive orders issued by successive presidents of both the Democratic and Republican parties. These explicitly require a cost-benefit analysis of proposed regulations and do not permit the application of the Precautionary Principle in cases of uncertain threats. Indeed, the United States has a long history of hostility towards the Precautionary Principle, having successfully won a case arbitrated by the World Trade Organization (WTO) against the EU for its ban on the sale of beef reared with growth hormones, which was based on the Precautionary Principle. The EU refused to comply with the WTO ruling and thereby incurred trade sanctions worth \$116.4 million on unrelated EU goods.<sup>3</sup>

One of the most influential critiques of the Precautionary Principle is articulated by Cass Sunstein. He argues that weak formulations of the principle are trivially true, while strong formulations are incoherent.<sup>4</sup> Sunstein points out that if all that the Precautionary Principle requires is that we consider the risks posed by uncertainty in our deliberations, then standard cost-benefit analysis approaches to valuing environmental harms can factor these risks into their calculations. However, if we opt for a stronger interpretation of the Precautionary Principle that requires uncertain threats of harm to be an overriding

1 See the press release from Greenpeace International. “Philippines’ Supreme Court bans development of genetically engineered products,” 11 December 2015. <http://www.greenpeace.org/international/en/press/releases/2015/Philippines-Supreme-Court-bans-development-of-genetically-engineered-products/>

2 See the BBC’s coverage of the leaks. “TTIP trade talks: Greenpeace leak, shows risks of EU-US deal,” 2 May 2016. <http://www.bbc.co.uk/news/world-europe-36185746>.

3 For more information, see Woodin and Lucas, *Green Alternatives to Globalisation*, 42–43.

4 See Sunstein, *Laws of Fear: Beyond the Precautionary Principle*.

consideration in our decisions, then the principle is incoherent because “risks exist on all sides.” His claim is that the act of regulating something can also lead to uncertain threats of harm in much the same way that refusing to regulate does. For example, it is possible to imagine the existence of a whole range of absurd threats which, while incredibly unlikely, are still conceptually possible. Therefore, according to Sunstein, the Precautionary Principle provides no way of deciding between public policy options.

This problem warrants careful consideration. However, it can be solved if a minimum plausibility threshold is set as a prerequisite for the Precautionary Principle to take effect.<sup>5</sup> Applying this threshold can filter out the infinitesimally unlikely threats of harm that can be ascribed to almost any action or inaction. Moreover, this must be coupled with a minimum harm threshold so that only those threats that present a genuinely harmful outcome will allow the principle to come into effect, thereby filtering out plausible threats of minute harm that can also be widely identified.<sup>6</sup> Such thresholds allow the Precautionary Principle to function as a decision-making rule, and stop precaution from being appealed to on both sides of the argument. In those rare cases where plausible threats of severe harm do exist on both sides of the argument, then we will need an alternative decision-making rule to arbitrate. Nevertheless, a methodology that delineates threats based on their plausibility and scale of harm is promising. Clearly there is much work to be done in deciding how to construct such a framework. It may well be, as Rupert Read argues, that “[t]he distinction between absurd threats and credible threats is too *fundamental* for there to be any algorithmic criterion.”<sup>7</sup> If this is the case, then democratic debate and practical intelligence are likely to play a large role in identifying uncertain yet plausible threats of severe harm.

The implementation of the Precautionary Principle may sound like common sense, yet it is remarkable how often uncertainty has historically been used to prevent, or more often delay, environmental regulations. The book *Merchants of Doubt* (2010) by Naomi Oreskes and Erik Conway is a useful resource in chronicling just how effectively doubt has been weaponized by corporate lobbyists to delay urgent action on environmental and public health hazards. While what Oreskes and Conway primarily show is how doubt is often manufactured and used to cloud what are, scientifically, relatively clear

5 This suggestion comes from Stephen Gardiner’s paper, “A Core Precautionary Principle,” 52.

6 Carolyn Raffensberger and Joel Tickner call the approach of requiring uncertainty and harm thresholds “dual trigger” mechanisms. See their chapter “Introduction: To Foresee and Forestall,” 1-11.

7 Quoted from his paper, “How to Think about the Climate Crisis via Precautionary Reasoning,” 142.

threats. The more fundamental lesson from their work is that we need public decision-making that does not react to doubt with inertia. After all, there have been precautionary cases against a litany of environmental and public health hazards well before scientific consensus of harm has emerged.<sup>8</sup> Formalizing the Precautionary Principle in national and international law is one way of ensuring rapid responses to uncertainty of harm when it is discovered, while also requiring more rigorous testing of new technologies and practices before their use is sanctioned.

From this, we can infer that the Precautionary Principle can be useful to discussions about Rights of Nature. If legal rights for ecosystems are to be sufficiently protective, there needs to be an accompanying criterion that sets out the circumstances in which actions violate an ecosystem's rights. The Precautionary Principle can provide this criterion, and can effectively arbitrate in instances of uncertainty when the potential harm to ecosystems is unpredictable. This is especially important given that the complexity of ecosystem health can make it difficult to detect and prove harm over shorter periods of time. Moreover, the Precautionary Principle can also provide a corrective against the power imbalances that so often characterize attempts to enforce environmental protection laws, where environmentalists often cannot match the legal spending power of multinational corporations and governments that are financially invested in ecosystem destruction. Without setting a high evidential barrier for proof that actions are harmless, we risk Rights of Nature laws being ineffective in the face of competing interests.

Interestingly, Ecuador's 2008 constitution clearly sets out both the rights that ecosystems possess: "The right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes," and also the State's requirement that, in environmental cases, "the burden of proof regarding the absence of potential or real danger shall lie with the operator of the activity or the defendant."<sup>9</sup> In this way, there is precedent for utilizing precaution as the basis for the harm criterion in Rights of Nature laws. Explicit articulation of the Precautionary Principle could benefit effective construction and implementation of these laws internationally.

8 See Harremoës et al, *The Precautionary Principle in the 20<sup>th</sup> Century*, for a list of public health and environmental harms that more precautionary regulation may have prevented.

9 Articles 71 and 397 respectively. See George Town University's translation of Ecuador's constitution. <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

Moreover, one can reach the position of supporting Rights of Nature laws by thinking about the environmental crises through the lens of the Precautionary Principle. Current widely-used systems of valuing Nature, such as “natural capital” valuations, are premised on the idea that through careful analysis we can optimize human wellbeing by balancing the benefits of ecosystem destruction against its harms on a case-by-case basis. The Precautionary Principle offers an alternative to such balancing methods by arguing that, while the harms of individual ecosystem destruction are not comprehensively measurable, given that we know their aggregation to be catastrophic, we ought to resist potentially fatal, “managed” ecosystem destruction to begin with by adopting Rights of Nature laws. Public policy based on the Precautionary Principle may therefore entail the adoption of Rights of Nature laws. In this way, the Precautionary Principle serves as a justification for Rights of Nature laws and is central to the harm criterion needed for those laws to provide meaningful protection.

Given that the Precautionary Principle has a strong enough precedent in international law to be under threat from global free-trade deals, there is a good case to think that it should form a part of ecologically protective legal frameworks. However, it could still be objected that despite its practical utility, it does not occupy anywhere near as radical a position as Rights of Nature laws do in reforming our relationship with the environment. The Precautionary Principle can be seen as anthropocentric in its essence, and unchallenging of the owner-object paradigm. Instead, it simply recognizes limits to the extent to which we can exploit Nature without undermining our own living conditions. While this might be true, this criticism misses the extent to which anthropocentrism has become conflated with a whole host of other ideals, such as *technophilia*, *growthism*, and *scientism*.<sup>10</sup> To conflate anthropocentrism with these other concepts is to misconstrue its essence. There are good reasons for believing that anthropocentric interests are not necessarily as far away from the ecocentric worldview as we might think. The work of Richard Wilkinson and Kate Pickett has been crucial in showing how increased material wealth does not equate to an increased quality of life, thus challenging the need for economic growth and increased consumption as an anthropocentric demand.<sup>11</sup> Similarly, the work of postgrowth economists such as Tim Jackson are showing the likely impossibility of continuing economic growth without seriously undermining our own living conditions and leading to radically decreasing quality of life in the (not so distant) future.<sup>12</sup>

10 For a discussion of how anthropocentrism and progress have become conflated with these ideas, see Read, “Wittgenstein and the Illusion of ‘Progress,’” 265–84.

11 See their book, *The Spirit Level*.

12 See his book, *Prosperity Without Growth*.

Without the need for (and possibility of) an economic model based upon ever-increasing consumption, the contrast between ecocentrism and anthropocentrism is not so stark. Through their work, these authors show that the perceived conflict can be reduced if we are willing work on reforming anthropocentrism and envision alternative definitions of human flourishing. Rights of Nature laws explicitly based upon the Precautionary Principle can provide a significant step towards this goal.



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## **Rights of Nature in Present-Day Cultures**



Rita Brara

## Courting Nature: Advances in Indian Jurisprudence

Recent advances in Indian jurisprudence speak to the conversation concerning Rights of Nature. Juridical thinking in India is attempting to navigate an ecocentric course, even if intermittently, by experimenting with a language for Rights of Nature that draws on India's Constitution, the drift of international currents and treaties, the judgments of its apex and provincial courts, as well as the rulings of a green tribunal.

Reflection on the religious and ethical traditions of the Indian peoples is a fertile source of inspiration for juridical thought. The notion of *dharma*, translated as “conduct” according to inherent qualities or character, is understood to characterize all of Nature. Hindus believe that “it is the dharma of the bee to make honey, of the cow to give milk, of the sun to radiate sunshine, of the river to flow.”<sup>1</sup> Nonviolence or *ahimsa*, too, continues to be an influential strain of thought in Indian religious traditions and affects the judicature as well.

A well-known jurist and former Supreme Court judge, V. R. Krishna Iyer, observed:

Justice to animal citizens is as basic to humanism as social justice is to an exploited people. The philosophical perspective of animal welfare is . . . part and parcel of our cultural heritage. Every time cruelty is practiced on man or beast or bird or insect, we do violence to Buddha and Mahavira [founding prophet of the Jain religion].<sup>2</sup>

Some of these ideas resonate with the Rights of Nature movement. As the country's Supreme Court deliberates the rights of citizens and the country's fauna to a “healthy” environment from a contemporary perspective, the juridical view is evolving. What is evident is that judgments on the extent to which the sacredness of long-standing traditions is to be upheld have varied, on occasion, between the provincial and higher courts, and run counter to the view of legislatures as well.

1 Van Buitenen, “Dharma and Moksa,” 33–40.

2 Iyer, *Towards a Natural World: The Rights of Nature, Animal Citizens and Other Essays*.

In legal terms, the Indian Constitution safeguards the right to life for its citizens. The right to a healthy natural environment, including clean air and water, for instance, flows from here. But this right comes accompanied by a duty. The citizen, too, is expected to protect the environment and show compassion towards all living creatures by an addition to the constitution that was inserted in 1976 (Article 51 A {g}). By simultaneously emphasizing the citizen's duty towards caring for other forms of life and their spaces, it opens a window for Rights of Nature beyond the rights to or upon nature for pleasure or gain.

So what are the judicial pronouncements that speak to Rights of Nature? I turn to animal rights, first, as a subject that constitutes one of its planks.

The use of animals for entertainment, such as in circuses, street shows, bullfights, and bull races, has been forbidden. In a recent appeal to ban bullfights that were a gruesome but long-standing part of local culture in the province of Tamil Nadu, the judicial decision in 2014 was guided by the concern for animal rights. It argued that this tenet is in keeping with what was recounted in ancient Indian texts, the Isha Upanishads, composed in 600 BCE or even earlier, which run counter to the spirit of speciesism. The writings uphold that: "[n]o creature is superior to any other. Human beings should not be above nature. Let no one species encroach over the rights and privileges of other species."<sup>3</sup>

The two-member Bench enquiring into cruelty against bulls in Tamil Nadu pronounced that the right to life in the Indian Constitution included the right to security and life for animals. The judgment noted that while the rights of animals had been raised to the level of constitutional rights in some European countries, such as Switzerland and Germany, it was to be regretted that neither the United Nations nor any international agreement had yet buttressed the cause of animal rights. The decision underscored that the World Society for the Protection of Animals was conducting a campaign for animal rights and hoped that it would lead to a universal declaration recognizing their intrinsic value.

Strikingly, the rights of animals are at the forefront of varied judicial pronouncements in India that range from how to vaccinate "stray" urban dogs and return them to the

3 Animal Welfare Board of India v. A. Nagaraja and Others (2014) 7 SCC 547.

streets, all the way to recommending the reintroduction and recovery of endangered species such as the wild buffalo and the Asiatic lion. Here, it is emphasized that the focus should not be on the conservation of a few charismatic species just because they happen to be the pride of a state or celebrated as an aspect of national culture, but because of their inherent value from the vantage point of an ecocentric orientation. Citing the UN's 1982 World Charter for Nature, such judgments highlight that "every form of life is unique, warranting respect, regardless of its worth to man."<sup>4</sup>

What about evidence pertaining to the rights of plant life in Indian courts? The laws of the country consider the use value of trees and other flora for humans and in this vein, there is considerable discussion about the rights of forest dwellers to subsist upon and profit from the non-timber products of forests alongside the timber rights of the state. Restrictions on tree felling are largely advocated on grounds of conservation in the wake of deforestation and an environmental crisis. The felling of whole trees without permission is forbidden right across the country and exceptions, by and large, accord with what is termed the doctrine of necessity. The Wildlife Protection Act, too, aims to protect the biodiversity of plant and animal life.

Juridical pronouncements also recommend that the state should compare national lists classifying endangered and threatened species with those issued by the International Union for the Conservation of Nature (IUCN) every three years. The right of farmers to grow certain plant varieties and the rights of the state to the genetic material that falls within its territory is obvious in legal deliberations. Again, there is continuous concern about the patenting of indigenous plant species marketed as strains that are biogenetically recreated and therefore deemed intellectual property by foreign firms, which would impose restrictions upon residents of India. However, jurisprudence in India has so far not considered the rights of plant life to be on par with other components of Nature such as animals or rivers, for instance.

If I were to compare animal and plant rights in an overview, what comes to the fore is that human beings, including judges, are affected by animals more than plants. Examining the juridical discourse in India, animal-centrism and animal rights reveal a level of attention and emotion that is not conferred upon the country's flora. By contrast to

4 UN General Assembly, Resolution 37/7, World Charter for Nature (28 October 1982), <http://www.un.org/documents/ga/res/37/a37r007.htm>.

the judicature, however, people across the length and breadth of the country imbue flora with sacredness that is apparent in practices pertaining to marked trees, smaller plant species, and sacred groves. Over and above the fact that flora have use value for human beings as food and building material, and even in terms of biodiversity, religious practices vis-à-vis marked plants and trees are oriented by the belief that they are manifestations or homes of certain deities in both folk and classical traditions.

But strikingly, neither the religious character of certain trees / plants, nor the plea for legal rights for trees that is so much in the forefront of the Latin American Rights of Nature movement now, features in the judicial discussion of landmark cases pertaining to flora in India. The idea of securing legal rights for trees in India and significantly extending them to other natural objects such as rivers, mountains, and landscapes—as proposed in 1972 by Christopher Stone, Professor of Law at the University of Southern California, and cited in a US court in the same year—have been absent till very recently in the juridical discussion of the subject here. Yet, courts in India have had to reckon with both the secular and sacred rights of swathes of Nature such as landscapes, mountains, and rivers. I will briefly outline three pathbreaking judicial interventions below.

In the province of Punjab, in the wake of the construction of a tourist resort on an ecologically fragile stretch of a river bank and that area's subsequent flooding, the diversion of the river's flow was disallowed by a judicial decision in 1997 by invoking the doctrine of public trust. The resort owners had deployed earthmovers and bulldozers to alter the course of the river and resettle the resort and the sandscape. But the court took cognizance of this incident (following a newspaper report on the subject) and observed that: "[t]he notion that the public has a right to want certain lands and natural areas to retain their natural characteristics is finding its way into the law of the land." The judgment drew on the doctrine of public trust articulated in the Mono Lake case in California, arguing that "the state must protect the people's common heritage of streams, lakes, marshlands, and wetlands."<sup>5</sup>

How does the legal story unfold in relation to mountains as a component of nature? A social movement against the bauxite mining of the Niyamgiri mountain in the province of Odisha had taken its case to the Supreme Court. The ruling of the Supreme Court in

5 M. C. Mehta v. Kamal Nath and Others (1997) 1 SCC 388.



2013 upheld the residents' rights to decide the issue. It advocated a local referendum on the matter and longtime residents of the area voted against mining the Niyamgiri mountain. They believed that the mountain was the abode of their deity and law giver, Niyamgiri, and that it was "sacred to them." Here the desire to preserve the mountain was buttressed by the shared religious beliefs of residents who constituted a majority in that tribal area. However, the right of the residents to exercise their choice on the issue of mining the sacred mountain was recognized and facilitated by the courts.

It was in 2015 that the National Green Tribunal turned its full attention to the pollution of rivers, looking into the ecology of entire river basins. The Tribunal declared that rivers should be rid of industrial effluents and deleterious sand mining. It also mandated that the ritual or sanctified materials that are immersed in rivers should be biodegradable and disposed of in an approved manner. At the same time, the social campaign for a cleaner Ganges had begun to argue for legal rights for this river. The campaigners are collaborating with the Global Alliance for the Rights of Nature, which is seeking to buttress the case for legal rights for Nature worldwide by carrying its battles to the courts. Against the backdrop of such thinking, and in line with the recent according of rights to a river in New Zealand, a recent judgment in March 2017 by the High Court in the province of Uttarakhand, northern India, declared that since the Ganges and the Yamuna are sacred to a large number of Indians, these rivers should be accorded the status of living entities and granted the rights of a juristic or legal person.

However, the judgment of the provincial court at Uttarakhand was overruled by the Supreme Court of India in July 2017 on the grounds that it interfered with the rights of other provinces and raised issues concerning who would be regarded as responsible for compensation in the event of natural calamities such as floods, if rivers were to be treated as juristic persons. Further, environmental activists in India argued that the rights of non-sacred rivers should also be accorded similar treatment from a secular state, such that sacredness could not be the ground for preferential environmental treatment. While granting rivers rights akin to persons was seen as a radical move, whether the state—which in many ways was complicit in the pollution, mining, and construction of dams along the rivers—could rise to be the guardian of rivers was also posed as a moot issue in discussions emanating from the Indian context.

Finally, how might one evaluate or interrogate the turn towards the Rights of Nature as a vision or beckoning? The juridical approach, cast in terms of rights, is a powerful conceptual construction that is blazing a trail. Perhaps the extraordinary and radical labor of thinking like a mountain, as Aldo Leopold put it, or like an animal, plant, or bacterium, that is now being attempted, will help us to rethink the nonhuman. Yet, any determination of Rights of Nature remains an anthropocentric and idealistic construction. Those points at which the juridical construction of Nature's rights is not benign will always call for scrutiny, keeping in mind the varied and often incompatible stakes of a stratified humanity, other species, and swathes of (seemingly) nonliving Nature. At a prosaic everyday level, moreover, court verdicts in India are challenged on the ground by administrative rulings, political and provincial interests, as well as continuing faith-based practices which recast the intent of the juridicature.

Put in a nutshell, Rights of Nature is being articulated and cogitated by Indian courts. Their efforts increasingly incorporate an ecocentric orientation, but not without contention. Judicial decisions draw on or seek to reorient international practices, selectively question or go along with the country's sacred traditions, and exhort the state to act as the guardian of Nature and the public trust. Without an explicit alignment with the Latin American Rights of Nature movement, environmental jurisprudence in India is indeed courting related concerns.

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María Valeria Berros

## Defending Rivers: Vilcabamba in the South of Ecuador

Is it possible to give “a legal voice” to a river? For several decades, different disciplines have been debating this possibility within a larger context: Could Nature have rights?

It was relatively easy to find a positive answer to this question in a number of environmental and animal ethics contributions, as well as from some legal scholarly perspectives.<sup>1</sup> But the idea of recognizing Nature as an entity holding legal rights or personality was not formally introduced to any legal system until the twenty-first century. In 2008, Ecuadorians amended their constitution and, in the Seventh Chapter, *Pachamama* (Mother Earth) was recognized as a legal entity. In a similar sense, the 2009 Constitution of Bolivia (as well as two national regulations in 2010 and in 2012) was amended to recognize the rights of Mother Earth.<sup>2</sup> In both cases, the idea of *buen vivir* or “good living”—living in harmony with Nature as its own entity (a simplified definition), epitomized by both the *quichua* expression *sumak kawsay*, and the *aymara* term *suma qamaña*<sup>3</sup>—was presented as a larger and alternative proposal to global capitalism. The environmental aspect of this proposal is connected with the understanding that Nature is itself a *subject*, concurrent with the heterogeneous indigenous worldviews present in the Andean region.

Translated into legal language: *Pachamama*, Mother Earth, has rights. Taken from the perspective of Jens Kersten’s contribution in the first part of this volume, these juridical experiences—which have since inspired several propositions in other countries, regions, and in the international legal arena—represent one of five possibilities of representing Nature within our contemporary juridical systems.

- 1 In the legal field, for example, the contributions from Christopher Stone (United States) and from Marie-Angele Hermitte (France) are central. It is important to observe that, as early as the beginning of the twentieth century, jurists such as Rene Demogue (France) were also trying to argue that the idea of legal personhood is a technical concept not specifically related to humans beings, allowing one to consider the recognition of the rights of animals or enterprises, for example.
- 2 Universal Declaration of the Rights of Mother Earth, 2010, Bolivia; Framework Act on Mother Earth and Holistic Development to Live Well, 2012, Bolivia.
- 3 *Quichua* is the language of various indigenous populations in the Andean region of South America (Argentina, Bolivia, Chile, Colombia, Ecuador, and Peru). In Ecuador’s most recent constitutional reform, different expressions in *Quichua* can be observed as a manifestation of the recognition that Andean culture has played an active role in this reform. *Aymara* is the language of the Aymaras or Aimarás, an indigenous group that represents an important part of Bolivia’s population and that inhabits some regions in the north of Argentina and Chile, and in the south of Peru.

### The River Has Rights to Its Natural Course

Nearly a decade after these initial transformations in Ecuador and Bolivia, scholars are starting to analyze case studies that show how the reforms can be implemented. From such case studies, newly available legal tools have been identified and described that can guide the process of recognizing and applying Rights of Nature. My focus is on the the judicial application of these newly available legal tools. In 2011, we observed the first case in which the Rights of Nature concept was applied: the right of a river to its natural course. In fact, the legal personhood attributed to *Pachamama* in Ecuadorian regulations gave rise to this particular event: it became possible to consider that a river has a “legal voice.”

In the Ecuadorian Loja Province, the natural course of a river situated in the southern region was stopped short and redirected by the expansion of a road providing access to the city of Vilcabamba. This special place is known throughout the world because it possesses a privileged climate, extraordinary biological diversity, and is also considered a sacred place: *Vilca* means sacred and *Bamba* means valley. The valley is situated 52 kilometers from Loja, the capital of Loja Province, at an altitude of 1,500 meters and is known as the “Valley of Longevity” because of its inhabitants’ long life spans. These special characteristics have encouraged people from other countries and other regions of Ecuador to retire there, resulting in important changes in the city’s way of life. Changing practices and use of the local landscape have already resulted in pollution and the divergence of cultural values between longer standing residents and newcomers. These rapid developments in Vilcabamba have made the issue of access routes to the valley increasingly relevant.

Within this context, the local state initiated a project to expand the Vilcabamba–Quinara road—surprisingly, without an environmental impact assessment. Since then, the natural course of the river has been diverted, excavation of materials begun, and stones have been deposited in the riverbed. It is possible to argue that the river is a natural resource that should be protected, or that its condition also affects our human right to a healthy environment. But, in this particular case, it became possible to affirm that the *river itself has the right* to its own natural course, according to the new Ecuadorian Constitution. This last point was central to the case put forward by the two inhabitants who decided to submit a judicial action to stop the road-building project. As a result, this—the first

case in the world to open jurisprudence on nature as a legal entity—was all about Rights of Nature. One of the main arguments in the judgment from the Penal Tribunal of Loja's Provincial Court, dated 30 March 2011, is the recognition of the constitutional Rights of Nature:

Our Constitution of the Republic, without precedent in the history of humanity, recognizes nature as a subject of rights. Article 71 affirms that: Nature, or *Pachamama*, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes.<sup>4</sup>

These types of references within judicial arguments—along with others presented to the constitutional assembly in which Rights of Nature was debated and, finally, recognized—present innovative ways of applying the new constitutional guidelines about the rights of *Pachamama*. Moreover, the Vilcabamba River judgment illustrated the different perspectives that underline and inspire the environmental law, showing that it is possible for new applications of the law to complement traditional, established legal tools. The judgment referred specifically to the local state's failure to carry out an environmental impact assessment, which was one of the reasons the project was stopped. The state has since been forced to repair the damage generated by the initial stages of the road construction.

### **Interpreting Rights of Nature: Territories, Activities, and Knowledge Production**

Since this judgement was passed, the Constitutional Court of Ecuador has made several other decisions that allow for a more comprehensive definition of Rights of Nature and what such recognition entails, particularly within a broader context. It has become apparent that other relevant issues still need to be addressed, such as how different communities and territories are distinguished and defined in the new constitution, as well as in existing environmental law. How should traditional settlements and cultures, protected places, be accounted for in comparison to more industrial human activities and places, when all are considered part of *Pachamama*? Identifying valuable spaces of

4 Criminal Division of the Provincial Court of Loja, Judgement no. 11121-2011-0010, 31 March 2011.

knowledge production (particularly those places in which scientific knowledge may not be prioritized) such as indigenous settlements, may prove an important focus. Assuming a basis for recognizing Rights of Nature can be established, a remaining challenge will revolve around how the juridical applications of the concept can be facilitated and implemented.

The definition of “territories” is a common conflict in—and an interesting aspect of—all cases of Rights of Nature recognition. If we examine environmental law, we can normally distinguish regulations for protected (“natural”) areas from those for urban and productive ones. But if *Pachamama* includes both humans and nonhuman beings, as the regulations in Ecuador and Bolivia suggest, is it possible that such distinctions between territories, as defined by existing environmental laws, can be upheld, and if so, how? A recent example from the Galápagos Islands demonstrates how the question of boundaries tentatively started to appear, albeit marginally, in judicial arguments. In this case study, an Ecuadorian resident who considered a law to be unconstitutional presented a judicial action to the courts.

This law, the Special Regime for Galápagos Islands, limits potential commercial, migratory, and tourism developments within the whole province of the Galápagos Islands and prevents non-residents from undertaking work in these areas. As one of the most popular tourist destinations in the Ecuadorian republic, the resident in question (and other Ecuadorians) considered this ruling to be a contradiction to his right to work and to migrate. The case is fundamentally complex because the territory defined under the Special Regime includes areas already used for commercial development, which continue to be developed to some extent by Galápagos residents. By designating a territory that includes both urban and protected spaces, with special laws for its environment as well as its inhabitants, the boundaries of “who can do what where” become blurred. According to the Ecuadorian resident, the Special Regime imposes restrictions upon certain people who, although governed by the same constitution, happen to live in or outside of a particular territory. It was up to the Constitutional Court to decide whether the regime was indeed unconstitutional and, in accordance with this, Rights of Nature appeared as a main argument in the 2012 decision. It was concluded that as long as there is a balance between Rights of Nature and human rights to work, migrate, and pursue livelihoods, then we can justify the formulation of special regimes like this one. In the official case report, there are many paragraphs explaining why this type of rec-

ognition is in fact crucial in deciding the constitutionality of special regimes that protect nature. Overriding the traditional definitions of boundaries with such regimes is a necessary way of advancing conservation actions. Indeed, among these paragraphs and in the final judgement, there is a particular reference: “Galápagos is not divided in[to] urban places and protected areas, the whole province is protected, not by parts.” “Galápagos is indivisible,” and so is *Pachamama*, according to Ecuador’s regulations.

This issue of territories highlights another critical concept regarding the interpretation of rights recognition: How do we prioritize human activities in the context of the rights of *Pachamama*, which itself includes humans? Especially when some of these activities are perceived to be in conflict with conservation practices or existing laws? This topic is highly relevant in most Latin American territories, in which the processing and management of natural resources constitutes a major part of their economies. (And, as debates about extractivism and other industrial activities assume a more prominent position in public discussions in these regions, related issues about who decides the costs of nature conservation and which groups of people should bear these costs, necessarily arise.) In those Latin American countries where enormous areas of land are used for agriculture (a practice that is unfortunately expanding with the use of genetically modified seeds), there are instances where the rules for protected areas restrict how indigenous people can use their land. It seems that one is entitled to live in an unrestricted way in unprotected, agricultural areas, yet there are limits on ancestral practices and ways of using nature—usually harmoniously—in protected areas. Considering that we (all humans), are a part of *Pachamama*, which debates do we still need to mobilize to recognize Rights of Nature effectively, and what are the juridical and institutional implications?

These two questions became startlingly prominent in two further cases brought to the Constitutional Court in Ecuador. The first case illustrated that the successful recognition of Rights of Nature depends on distinguishing spaces of knowledge production. The world of scientific research is largely considered to be the main stage for knowledge production, but it is not the only one, as the Bolivian and Ecuadorian constitutions, national plans, and regulations suggest. Given that living in harmony with nature (covered by the term “good living”) is one of the central features of the new constitution, it stands to reason that valuing and protecting the knowledge and cultural practices of indigenous peoples is of extreme importance, particularly where the

interests of different groups of humans come into conflict. In this first case, 70 families who worked collecting crabs in a mangrove swamp were displaced by the commercial prawn industry.<sup>5</sup> An initial judicial verdict found that the industry was exercising their property rights and that the families living there could only continue working in 20 percent of the territory. The rest of the land would be designated for the prawn industry. The Constitutional Court later determined that it was necessary to review this decision, which had ignored several pertinent and necessary legal elements: namely, an anthropological report about how ancestral practices contributed to the preservation of the mangrove swamp, and the establishment of the relation between Rights of Nature recognition and ancestral rights and knowledge. The renewed consideration given to this case demonstrates how the recognition of Rights of Nature is slowly being integrated and applied in the existing legal framework, and how different groups of people, cultures, and knowledges, in different contexts, can be taken into consideration within *Pachamama*.

The second case indicates some of the legal implications of recognizing Rights of Nature, especially when they are poised against existing constitutional rights, such as those relating to work and commercial development. In this case, the courts initially found that a private industry exploiting prawns in a protected area was not committing an offence—a decision based on the constitutional rights to work and to develop industries. It was called up for revision because it was considered unconstitutional, owing to a failure to consider an argument for Rights of Nature. The Constitutional Court overturned the original decision. One important argument it raised in this judgement concerned Rights of Nature as a juridical innovation: it posited that we need to build a new conception about our activities that is in harmony with nature, and to strengthen those environmental laws that rely heavily on the standards of nature protection.<sup>6</sup> By incorporating Rights of Nature arguments into the existing law, we allow for a better understanding of how activities can be carried out in harmony with Nature, and we give greater scope (and therefore force) to existing legal arguments.

5 Constitutional Court of Ecuador, Judgement no. 065-15-SEP-CC, 11 March 2011.

6 Constitutional Court of Ecuador, Judgement no. 166-15-SEP-CC, 20 May 2015.



## Conclusion

Now that the protection of a river's rights, as the opening jurisprudence, is in dialogue with other decisions regarding Nature as a legal entity, we can start the process of evaluating and reconstructing the judicial interpretation and meaning of Rights of Nature recognition. We often hear that the legal field is like "another world," with its own language and sometimes seemingly abstract rules. And, in a sense, it is. But a different perspective is to consider that regulations are a translation of social demands and conflicts.

In the judicial actions and tribunal decisions described above, some aspects of positive law (human-made laws that deal with establishing specific rights for individuals or groups) have been taken into account, while others have been overshadowed. The concept and scope of Rights of Nature laws and discourse are being built by articulating Rights of Nature through the judicial decisions that uphold them and by issuing the arguments for Rights of Nature in the legal arena. Protecting and representing Nature in this way is not just about allowing Nature legal personhood, but putting Rights of Nature into action in the real world. Just like "sustainable development," "green economy," and other such phrases, the idea of Rights of Nature could easily become just another catchphrase wielded by politicians, activist, NGO's, and the like to justify all sorts of decisions. For that reason, it is important to pay attention to the slow construction of this legal framework, and remember that recognizing Rights of Nature always reflects and correlates with what is happening in the legal field and beyond it, in social, cultural, and environmental processes and transformations.

**Further Reading:**

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Sophia Kalantzakos

## River Rights and the Rights of Rivers: The Case of Acheloos

The notion that nature possesses rights is a welcome addition to our attempts to understand life in the Anthropocene, especially since it provides an intelligible—albeit controversial—alternative analytical framework for states and governments that hitherto have embraced strictly utilitarian views of nature. For Europe, a Rights of Nature discourse has begun to enter the political realm, with some parties even adopting it as part of their platform. In this paper, I examine a specific legal dispute over the proposed diversion of Greece's second largest river, the Acheloos. This case offers a particularly egregious example of the failure of existing laws and policies to provide sufficient protection to a natural entity, even though European environmental laws have become among the most stringent in the world.

The flawed outcome of this case—in which the environment was subjected to destructive activities despite protective environmental laws—has been ascribed to such technical problems as: execution, lack of follow-up, a backlog in court cases, or, more importantly, the power of special interests and government entities to push forward developmental and economic agendas, undermining the implementation of protections.<sup>1</sup> For those questioning the usefulness of a Rights of Nature discourse, I will dispute such a view and discuss how Rights of Nature arguments might have informed policy choices themselves and, as a consequence, moved them in a better direction. Underlying these “technical” policy problems were, I suggest, a series of utilitarian judicial attitudes that manifestly allowed and perhaps even facilitated gaps in legal protections, despite the letter of the law. Accordingly, a Rights of Nature perspective might not only have impeded such an outcome; it might have prevented from the outset such technical problems from arising and from undermining the very protections the laws were meant to uphold.

It might be helpful, however, to begin by outlining the facts of the case. The Acheloos River is the second largest river in Greece, flowing 220 kilometers westward to the Ionian Sea from the Pindos Mountains. It constitutes an important ecosystem, a cultural

<sup>1</sup> For a general statement on this kind of argument see: Elder, P. S. “Legal Rights for Nature: The Wrong Answer to the Right(s) Question.” *Osgoode Hall Law Journal*, 1984, 285. Pages 281–348 stem from a symposium on Rights of Nature.

treasure, but also a valuable source of water for the irrigation of the valley of Thessaly. Already in the 1920s, a plan was being formed to divert water to irrigate over 300,000 hectares of Thessaly's cotton crops, to build dams, and to provide additional drinking water. It was believed that the water of the ancient river-god, Acheloos, could awaken the "sleeping giant" of Thessaly's plains, which was seen as still carrying unexploited agricultural potential. A plan for this diversion was submitted to DEH, the Public Power Corporation, in 1958.<sup>2</sup>

In 1964, Prime Minister George Papandreou was the first politician to announce the plan to divert the river in the name of economic prosperity. The full scheme called for the construction of a major diversion channel, two tunnels, a water intake system, sluice gates, and surge shafts. Moreover, the project would also incorporate a hydroelectric project, with a series of large dams to be built by DEH. In addition to the main infrastructure, service tunnels and access roads were also considered necessary, significantly impacting the pristine forest ecosystems of the area. Over the years, and certainly by the end of the twentieth century, the political desire to divert the river continued unabated. More than a decade ago, constructions costs were already estimated at €720 million, with a total expenditure of between €3 billion and €4.5 billion. Environmental groups, however, succeeded in tying up the project in a series of court cases between 1991 and 2014, when the already fully fledged diversion scheme was finally defeated.

It was in 1992 that the case began in earnest. The first major building interventions—the construction of an 18-kilometer-long tunnel to direct water toward Thessaly, with a series of dams and water reservoirs along the way—were approved by the Ministers of Economy, Agriculture, Environment, Urban Planning, Public Works and Industry, and Energy and Technology. These decisions were reversed in 1994 by the Council of State Court after the filing of objections by the Hellenic Ornithological Society, WWF Greece, and the Greek Society for Environment and Cultural Heritage, claiming that the decision was not based on a thorough study of the environmental repercussions of the proposed project.

The project was subsequently resurrected by the same ministries in 1995 and, again, the same plaintiffs appealed to the court. This led to the decision by the court plenary (in

2 Papagiannakis, Spyridon. "Kritikí Axiológi tou shedíou tis ektropís tou potamoú Achelóou sti Thessalíki Pediáda," (Critical consideration of the Acheloos River diversion project in the Thessaly Plain). *Ethniko Metsovio Politehnio* (2010).

2000) that although the study of the environmental impacts of the project was adequate, the project had not examined alternative scenarios for the construction, magnitude, and composition of the project. Such alternative plans could prevent the destruction of cultural monuments in the region, such as churches, old stone bridges, and the Monastery of Saint George Mirofilou. The Court, therefore, ruled against the undertaking on the grounds that it violated international legislation on the preservation of cultural heritage. It also found that the project violated Greek and EU legislation on water management. The Court concluded that the environmental impact assessment did not sufficiently examine the planning for the location of the construction of the dams, etc. Following this court decision, ΥΠΕΧΩΔΕ (Ministry of Environment and Public Works) decided to order a supplementary study in 2002 in order to facilitate the preservation of the aforementioned monastery. In addition, the ministry called for an updated general overview of the project with the continued aim of diverting 600 million cubic meters of water to ensure that the project itself was economically sustainable. These supplementary studies did not dissuade the court from again ruling against the ministerial decisions; this time in 2005 on the grounds of national law 1739/1987 for the “Management of Water Resources” and EU Water Framework Directive 2000/60/EC, because the project opposed EU policies on water management. Meanwhile, during this same period of review and resubmission of the plans, EU laws had also become stricter and were brought to bear on each new outcome.

These continued negative rulings did not, however, deter the government from trying to relaunch the plan yet again in 2006 as “a project of ‘national interest,’” thus attempting to sidestep the prior ruling. In October 2009, the Supreme Administrative Court of Greece sent a request to the Court of Justice of the European Union (ECJ) in Luxembourg concerning the project’s legality. Discussions of the case in the ECJ, involving 14 questions, began in May 2011. The ruling in 2012 found that while the project did not violate European laws in principle, it raised concerns about the potential environmental impact of the use of the water for irrigation, and stated that authorities should prohibit any “interventions” that could harm the environment, particularly in areas included within the Natura 2000 European protected-zone network. In 2006, the court had also already decided that the bid won by the Mihaniki construction company to complete the contested Sykia dam was null and void.

After the ECJ’s 2012 decision, the Greek court ruled that the diversion project would greatly affect the protected areas and would require further impact studies. However,

these measures would still not be sufficient to validate the project because there was very little research and updated data on the ecosystems of the region, which left the court in reasonable doubt about the adverse impacts on the protected areas. In addition, there was insufficient evidence that the project—which was viewed as damaging—constituted the only alternative available. Its being vital to securing an uninterrupted water supply was not deemed an adequate reason to counterbalance the overall negative impacts because, in fact, the water supply was a secondary priority for the entire scheme. The primary objectives were the production of hydroelectricity and the irrigation of farmland. This put the project in clear violation of articles from Directive 92/43/EC of the 2012 European Court decision.

In 2014, the Supreme Court Council of State, consisting of 27 judges, issued a final non-appealable court decision against the proposed project, arguing that it violated sustainability principles and adversely impacted the environment. The Court maintained that the project violated: (a) the Convention for the Protection of the Architectural Heritage of Europe (ETS No. 121), because it would destroy important cultural artifacts; (b) the Greek Constitution (Article 24, paragraph 1) stating that “the protection of the natural and cultural environment constitutes a duty of the State”; (c) the European Environmental Impact Assessment Directive 85/337/EEC, mandating a Europe-wide procedure ensuring that environmental consequences of projects are identified and assessed before authorization is given; (d) Directive 92/43/EC for ecosystems and animal and plant species.<sup>3</sup>

This decision was in accord with common European judicial attitudes aiming to protect the environment by using economic arguments to “justify” conservation. This reflects how environmental protection was first brought into European law through the back door of economic cooperation between member states. It should be noted that the European Union has been overhauling its environmental laws, yet they do not provide, I believe, a robust enough paradigm shift. This particular decision offers a case in point. The project had undergone transformations in response to previous court verdicts. Originally presented as an irrigation project, it was rejected and then resubmitted as an energy and irrigation project and only secondarily as a water supply project. The initial plan called for a diversion scheme that would provide 1.1 million cubic meters of water,

3 The Habitats Directive ensures the conservation of a wide range of rare, threatened, or endemic animal and plant species. Some two hundred rare and characteristic habitat types are also targeted for conservation in their own right. The Council Directive 92/43/EEC was adopted in 1992 and forms the cornerstone of Europe’s nature conservation policy.

then 600 million cubic meters and, by the end, was considering 250 million cubic meters per annum. Since the 2000 verdict, which had shown that the project was not in direct violation of sustainability practices, the directive for Natura 2000 had come into effect as well as the new Common Agricultural Policy. These rulings did not exist at the time of the 2000 verdict and subsequently needed to be considered. Because of this and other reasons I described earlier, the court rendered a decision that meant the cancellation of the project in its entirety because now, first and foremost, it went against principles of sustainability.

Unfortunately, this apparent legal victory and triumph for wider EU policies has been somewhat pyrrhic because the government was given time to continue building while the court reviewed the case. Indeed, a majority of the works—whether completed or semi-completed—now remain abandoned. Moreover, the government demonstratively continues to seek new ways of restating its claims under new guises in order to recoup some of the costs incurred—which have been reported to be close to €600 million. Unfortunately, this infrastructure has already damaged the ecosystem significantly; if the courts had succeeded in throwing out the case in 2000, much of the construction could have been prevented in the interim. Lurking behind the many faces of this dispute has been the mantra of growth and the suspicion that if nature per se is granted legal rights it would mean the adoption of extreme, or “deep,” ecological positions that reject development *simpliciter*. Moreover, it is argued that there is no need for a Rights of Nature perspective in Europe, given its conscious choice to transition to a low carbon economy and to decouple growth from resource use in order to ensure a sustainable global society.

However, the Acheloos case, I think, offers some possible hints about why the present legal status quo is insufficient. Given that the current legal system regulates human behavior predominantly through the distinction of “rights” holders—broadly recognizing these as human beings and entities created by human beings (corporations and countries)—nature is viewed as being in the category of “property,” and as a consequence, environmental issues are treated in administrative courts primarily as issues of planning. As the case of the Acheloos diversion scheme shows, often the best that can be achieved when facing decisions about property and its development is the reversal of a planning decision—only to then face a stream of newly revised applications. The result is that projects often go ahead under a different rubric or are

left abandoned, ultimately with damaging consequences. A general lassitude often informs policy administration and implementation because the objects of policy decisions are not viewed as having any value beyond the purely instrumental. I do not want to enter here into the entrenched battle lines that have been drawn between Kantians and deep ecologists about the coherence of conceptions of the nature of rights and the moral requirements for ascriptions of rights, etc. Yet, as perceptions of value change and sometimes enlarge, as in the cases where other so-called categories of “property” were seen to be morally problematic, it is clear that the effectiveness, precision, and care of policy implementation follows suit. Similarly, the inadequacy of current laws to account for and sufficiently face a wider range of long-term issues resulting from interference with ecosystems in an interconnected world, suggest the examination and adoption of new legal paradigms.

In the past, rights discourses have underscored legal inadequacies not only in the laws but also in the implementation of policies regarding slaves, women, children, and animals. The latter, for instance, in some countries today and certainly through Article 13 of the Treaty of the European Union, are recognized as sentient beings that have claims to being treated in ways beyond that of being mere property. But there has also been a sea change in the quality of the implementation of more fine-grained policies affecting animals, precisely because of changing views about their worth and our moral obligations towards them. By the same token, conceptions of Rights of Nature encourage the recognition of the value of ecosystems that need protection beyond and above state and private property interests. The debates about if and how such value can be grounded in conceptions of rights, and how such rights are to be weighed in comparison with other rights, etc., are likely to remain gridlocked at the level of abstract argument. My point, however, is that policy implementation is linked with the recognition of value, and as long as ecosystems are viewed, in general, as purely planning and development opportunities, the kinds of problems that afflicted the Acheloos case will continue, however stringent the legal basis for protecting them *qua* property.

How would the Acheloos case have gone had a recognition of the river’s value and its rights been part of the legal framework? The court, I believe, would have more quickly and more effectively stopped the push for a project of such pharaonic dimensions. In the end, the ever-shifting development arguments used by the state resulted in continued abuses, inefficiencies, and the wasting of water resources already available



in other parts of the country. Nor would it have been possible for the government to exploit the delays and court backlogs to continue building and developing “property” under the pretext that such changes could be altered or rectified in the future.

Ultimately, of course, the court has to make decisions about the relative strengths of conflicting claims based on the interests and duties of different rights holders. But, the kind of after-the-fact, bittersweet pyrrhic victory that resulted in this case might have been avoided had there been at least some recognition from the outset of the intrinsic value of this ecosystem. So too, such recognition might have forestalled the kinds of legal and governmental abuses and manipulation of policies and their implementation that have left the Acheloos unnecessarily damaged, with no plan in evidence to ever make things right.



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Jens Kersten studied law at the universities of Heidelberg, Leeds, and Bonn. He did his doctorate and habilitation at Humboldt University Berlin and was professor of planning and environmental law at the Technical University of Dortmund and of public and economic law at the University of Bayreuth. Since 2008, he has held a chair of public law and governance at LMU Munich. His research focuses on planning and environmental law, bioethics, and legal challenges of demographic change. His recent publications include *Schwarmdemokratie. Der digitale Wandel des liberalen Verfassungsstaats* (Mohr Siebeck, 2017) and *Arbeit 4.0. Arbeitsbeziehungen und Arbeitsrecht in der digitalen Welt* (C. H. Beck, 2017, together with Richard Giesen).

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In 2008, Ecuador became the first country to acknowledge Nature as a rights holder within its constitution. In a world where Nature is primarily treated as a resource, the Rights of Nature concept and its emerging application prompts important questions: What are the theoretical, logistical, and cultural challenges of granting Nature rights? Who can represent and defend Nature and why? Is the concept a necessary progression towards an environmental future? By presenting legal theory, politics, and case studies, the authors of this volume open up an accessible and multidisciplinary dialogue to explore the fundamental question: Can Nature have rights?

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