When Rivers Have Rights:
Case Comparisons of New Zealand, Colombia, and India

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The world is undergoing a normative shift in thinking about how we legally define our natural world. Since 2006, governments around the world have adopted legal provisions (laws and court rulings) recognizing Nature as a subject with inalienable rights. Rights of Nature (RoN) legal provisions now exist in Bolivia, Colombia, Ecuador, India, Mexico, New Zealand, and the US (Kauffman and Sheehan, forthcoming). Initiatives also exist to recognize RoN internationally, including the UN Harmony with Nature Initiative,[1] the proposed UN Declaration of the Rights of Mother Earth, and the proposed International Environment Court.

Many of these initiatives are driven by a desire to protect rivers, seen as the planet's lifeblood. In Ecuador, the Vilcabamba River became the world's first ecosystem to have its rights defended and recognized by a court (Kauffman and Martin 2017a). New Zealand's Whanganui River (Te Awa Tupua) also has legal rights (New Zealand Government 2017). More recently, court rulings recognized the rights of the Atrato River in Colombia in 2016 and of the Ganga and Yamuna Rivers in India in 2017 (Republic of Colombia Constitutional Court 2016; Uttarakhand High Court 2017). Internationally, a transnational network of lawyers and activists, coordinated by the Earth Law Center, are drafting a Universal Declaration of the Rights of Rivers (Earth Law Center 2017).

While much attention has been focused on the laws recognizing the rights of rivers in Ecuador and New Zealand, this paper examines the more recent court rulings recognizing the rights of rivers in Colombia and India. Colombia's and India's RoN legal provisions are unique compared to those in Ecuador, Bolivia, New Zealand, Mexico and the U.S. In contrast to these other countries, Colombia and India do not recognize RoN laws in their constitutions, national laws, or subnational laws. Rather, judges in Colombia and India unilaterally issued rulings granting the Atrato, Ganga, and Yamuna rivers legal personhood status, moving these rivers from "right-less to rights-bearing" entities (Margil 2017, 27).

The Colombian and Indian cases detailed below illustrate how RoN norms circulating globally are being institutionalized through court rulings even in countries that lack laws explicitly recognizing RoN. Our case comparisons show how judges are strategically interpreting existing constitutional provisions and other laws that do not explicitly recognize rights of nature in order to justify court orders that establish natural ecosystems like rivers as legal persons with rights. The judges justify their extraordinary actions in part by noting the need to address serious threats to important river ecosystems, and the communities that depend on them, in the face of government inaction.

[1] http://harmonywithnatureun.org (Accessed March 19, 2018).

The cases also show how RoN is being combined with new governance structures designed to implement new, more eco-centric approaches to solving the difficult challenges of sustainable development in the face of extractive industries. At the center of these new governance structures are Guardianship bodies charged with representing rivers and promoting their rights and wellbeing.

The institutionalization of RoN in Colombia and India is largely based on New Zealand's pioneering model (described below). In addition to establishing the Whanganui River as a legal person, New Zealand's Te Awa Tupua Act established guardians charged with representing the river's interests. This guardian body was then embedded within a larger integrated watershed management body charged with managing the river's resources in a sustainable way consistent with the river's status as an integrated, living spiritual being.

While both Colombia's and India's court rulings mimic New Zealand's pioneering model, Colombia follows the New Zealand model more closely than India. Colombia's court ruling not only created a guardian body comprised of state and civil society representatives, but it also restructured government entities and created a new oversight commission to protect and preserve the Atrato River. By contrast, India's ruling did not incorporate civil society representatives into the guardian body and did not restructure government agencies to manage the river basins in a more integrated way. India's differences reveal potential obstacles and dilemmas facing efforts to implement RoN that must be resolved. We address these obstacles and offer some initial lessons learned in the paper's final section.

In justifying their recognition of rivers as rights-bearing legal persons, the Colombian and Indian judges used normative arguments circulating globally through transnational networks of environmental lawyers, activists, and social movements. To strengthen RoN norms internationally, transnational networks have created new global organizations like the Global Alliance for the Rights of Nature; hosted International RoN Tribunals in Australia, Ecuador, Peru, and Germany; advocated adoption of the Universal Declaration of Rights of Mother Earth in the United Nations; convened global symposia on RoN in Australia, New Zealand, Ecuador, and the United States; developed curricula for teaching RoN in law schools; and established the United Nations Harmony with Nature Initiative.

In addition to these global efforts, the proliferation of domestic RoN legal provisions worldwide has created a diffusion effect, much like the "justice cascade" of prosecutions at domestic levels for violations against the International Declaration of Human Rights (Sikkink 2011). RoN court documents in Pennsylvania, for example, cite the Ecuadorian constitution (US District Court, The Western District of Pennsylvania 2014), while the Indian and Colombian court rulings detailed below cite New Zealand's RoN law as precedent.

While the Colombian and Indian rulings are part of a global movement to institutionalize RoN norms as a means for achieving truly sustainable development, they emanated from local communities' struggles to protect their ethnic and cultural identities, the places they hold sacred, and the water on which they depend for life. The rulings do not merely

parrot global discourse regarding RoN, but interpret emerging global norms within the context of domestic law and culture, creating unique institutional expressions. In sum, the Colombian and Indian cases demonstrate how normative underpinnings at the local and global levels converge to develop new legal tools and governance structures based on the normative assumption that the law should not dominate nature, but rather be embedded within in it (Biggs 2017).

Our paper's first section sets the stage by describing the RoN norms circulating globally, particularly as they relate to the rights of rivers. The following section briefly describes New Zealand's law granting rights to the Whanganui River and highlights how this law departed significantly from previous RoN laws, providing a new model. We then detail the Colombian and Indian court rulings, showing how they draw on normative arguments circulating globally and largely replicate the New Zealand model, but adapt it to fit domestic conditions. The final section notes key similarities and differences between the New Zealand, Colombian, and Indian RoN legal provisions and offers some preliminary lessons to consider.

The Cosmos of River Rights

Indigenous peoples from around the globe have long advocated norms and governance structures that unite humans and nature. Ponca Nation of Oklahoma leader, Casey Camp Horinek, explained her indigenous view of the relationship between nature and people in her opening address at the International Rights of Nature Tribunal held in Quito, Ecuador, in January 2014. She said:

> *If you drank the water this morning or liquids, if you ate of the hooded nations or the four legged; if you breathe; if your body became warm from the fires of the earth, then you must recognize and understand that there is no separation between humans and Earth and all that are relatives of Earth and the cosmos, because you live in relation with her as a result of being one with her and there is no separation* (Camp Horinek 2017, 12).

Camp Horinek and others in indigenous communities around the world are working within the Global Alliance for the Rights of Nature (GARN), a transnational RoN network, to codify their understanding of the inter-dependencies between humans and other elements of nature into new Western legal provisions. Because of the emphasis on rights in Western legal culture, this indigenous worldview is often expressed in terms of RoN. The efforts of indigenous communities to gain recognition for their understanding of humans' relationship to nature is currently expressed in RoN laws in Ecuador, Bolivia, New Zealand, Colombia, and elsewhere.

Many of the efforts to codify RoN are focused on protecting rivers. This is not surprising given that water is not only biologically necessary, but often considered sacred. Tom Goldtooth of the Indigenous Environmental Network explains that "water has spirit and water has life – water is life – water has rights that are recognized by Indigenous peoples" (Goldtooth 2017, 15). For Horinek, Goldtooth, and Patricia Gualinga of the Sarayaku

community of Ecuador, there is a "kinship" with water, the earth, and creatures that forms a bond and that structures their societies' governance arrangements (Goldtooth 2017, 15; Gualinga 2014). Many indigenous communities have governance structures that recognize the natural and human elements of the planet with equal rights. The court rulings recognizing RoN in Colombia and India, detailed below, similarly call for a restructuring of governance systems to better address the interdependencies between human and non-human members of biotic communities.

The normative framework undergirding existing RoN legal provisions (including those in Colombia and India) challenges dominant Western norms regarding humans' relationship to nature. Goldtooth differentiates Western society as one that sees humans as separate from nature, objectifies the natural world, and emphasizes its domination for human use. By contrast, Goldtooth argues the indigenous worldview sees humans as part of nature, an integrated whole in which the component parts have a "harmonious, awake, loving, and intelligent relationship with all other aspects of creation" (Goldtooth 2017, 16). This harmony between humans and nature is the basis of sumak kawsay, or well-being, an indigenous Quichua principle recognized in the Ecuadorian Constitution. It is also reflected in the Iroquois (or Haudenosaunee) normative framework for living called the Good Mind. Other Lakota and Dakota nations refer to this harmonious relationship as Mitakuye Owasin, "All My Relations" (Goldtooth 2017, 16; Manno and Martin 2015). Similar concepts exist in other communities around the world (Lalander 2014, 153-155).

Similar normative frameworks are now being adopted by non-indigenous communities, often to protect the water resources on which they depend. Norms associated with RoN are even transforming conversations and movements in the United States. For example, citizens in the Pennsylvania townships of Grant and Highland wrote home rule charters that recognized the rights of nature as a tool for protecting their local water ecosystems from wastewater injection wells creating by fracking companies. As rural and farming communities that rely on well water, they too are deeply connected to their natural environments. As one Grant Township Board of Supervisors noted, "We understand that an injection well for frack waste is a very bad idea, not only for the people who live here, but for the natural environment" (Grant Township 2018). These Pennsylvania townships are not unique. There are approximately 90 movements in the United States dedicated to promoting community rights to a clean environment and to recognize RoN.[2]

While these US movements are not driven by an indigenous worldview, they adopt similar understandings of humans as part of a larger biotic community characterized by interdependencies and reciprocal relationships. Cliff Stump of the Pennsylvania Environmental Rights Network justifies his efforts to recognize RoN this way:

> *Well, who created nature? Who created us? And our constitution mentions that fact. We are endowed by our creator, and we're endowed by our*

[2] Data on U.S. community rights and RoN movements was compiled by the authors from newspaper articles, press releases, and information from the Community Environmental Legal Defense Fund, www.celdf.org.

> *creator, everything that you made is endowed by our creator, and why shouldn't we all have the right to live?"*[3]

Marsha Buhl of Highland Township similarly explains why she and others in the community are including RoN in their township home rule charter:

> *…the ecosystem, the animals, the plants, they have, they should have, rights to clean water, clean air, and that's what we're fighting for, our clean water and our clean air. The Pennsylvania constitution says we have the right to clean water and clean air and that's all we're asking for… is rights to clean water and clean air, and the ecosystem should have that right too.*[4]

The normative framework undergirding RoN laws is gaining salience in communities around the world, and in international discourse, in large part because of the work of the Global Alliance for the Rights of Nature (GARN) and other transnational networks. Indigenous movements, environmental NGOs, environmental lawyers, academics and other RoN advocates share legal tools and strategies through GARN and other networks like the UN Harmony with Nature Knowledge Network.[5] Increasingly, conferences are being held to provide forums for RoN advocates from different countries to share ideas and strategize about local and global actions.

This transnational organizing is giving rise to global expressions of RoN norms and efforts to codify the rights of rivers in international documents. Following the Universal Declaration for the Rights of Mother Earth, adopted by civil society organizations in 2010,[6] the Earth Law Center coordinated the drafting of a Universal Declaration of River Rights to provide greater protection for the world's rivers. The declaration recognizes the "vital role of rivers in Earth's hydrologic cycle… and that "national and international laws pertaining to waterways are vastly inadequate to protect the integral health of rivers… to ensure current and future generations with adequate supplies of clean water to meet their basic needs" (Earth Law Center 2017, 1). Consequently, the declaration calls for the recognition of rivers' rights: 1) to flow; 2) to perform essential functions within their ecosystems; 3) to be free from pollution; 4) to feed and be fed by sustainable aquifers; 5) to native biodiversity; and 6) to restoration" (Earth Law Center 2017, 3).

The above anecdotes illustrate how RoN norms are circulating globally and being used to justify new legal provisions and governance structures to protect river ecosystems. Below, we analyze how judges in Colombia and India drew on these norms and strategically interpreted existing laws in their own countries to justify rulings that ordered the recognition of river rights and the creation of new governance structures to protect the

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[3] Interview with author via telephone, July 7, 2017.
[4] Interview with author via telephone, July 13, 2017.
[5] http://www.harmonywithnatureun.org/knowledgenetwork/. Leading RoN organizations include CELDF, Movement Rights, Earth Law Center, Indigenous Environmental Network, Pachamama Alliance, Women's Earth & Climate Action Network, and many others.
[6] http://therightsofnature.org/wp-content/uploads/FINAL-UNIVERSAL-DECLARATION-OF-THE-RIGHTS-OF-MOTHER-EARTH-APRIL-22-2010.pdf.

rights and wellbeing of rivers. They based these governance structures on a model pioneered by New Zealand. To provide a basis for analyzing the Colombian and Indian cases (and to highlight the diffusion of RoN norms and legal provisions), we first summarize New Zealand's law recognizing the rights of the Whanganui River.

New Zealand's Pioneering Guardianship Model

New Zealand's law granting rights to the Whanganui River (the 2017 Te Awa Tupua Act) emerged from treaty settlement negotiations resolving historical Treaty of Waitangi claims of the Whanganui Iwi (tribe) in relation to the Whanganui River. The settlement agreement, Tūtohu Whakatupua, was signed August 30, 2012. In addition to addressing issues of cultural and financial redress, the settlement adopts the Māori view of the river, recognizing "the Whanganui River as a living being, Te Awa Tupua; an indivisible whole incorporating its tributaries and all its physical and metaphysical elements from the mountains to the sea" (Whanganui Iwi and The Crown 2012, para 1.2). In describing the river, the agreement details the Whanganui Iwi's links to the river:

> *Whanganui Iwi have common links in two principal ancestors, Paerangi and Ruatipua. Ruatipua draws lifeforce from the headwaters of the Whanganui River on Mount Tongariro and its tributaries which stretch down to the sea. The connection of the tributaries to form the Whanganui River is mirrored by the interconnection through whakapapa [geneology] of the descendants of Ruatipua and Paerangi* (para 1.1).

To implement this Māori perspective of the river's status, the settlement recognizes the river as a legal person, Te Awa Tupua, with "all the rights, powers, duties, and liabilities of a legal person" (New Zealand Government 2017, Clause 14). This is intended to reflect the Whanganui Iwi's view that the River is a living entity with intrinsic value that is incapable of being "owned" in an absolute sense and to enable the River to have legal standing in its own right (Iorns Magallanes 2014). The terms of the treaty settlement were given the force of national law through the 2017 Te Awa Tupua Act.

New Zealand's Whanganui treaty settlement was pioneering in part because it differed greatly from previous RoN laws established in Ecuador, Bolivia, and the U.S. RoN laws in these latter countries recognized numerous rights held by all natural ecosystems, including the rights to exist, to maintain their integrity, to regenerate their life cycles and functions, and to be restored when damaged (e.g., Republic of Ecuador 2008). By contrast, the Whanganui treaty settlement and Te Awa Tupua Act do not delineate specific RoN, but merely recognize the Whanganui River as a legal person. They grant the river procedural access to New Zealand's political, legal, and economic systems.

This different approach stems from the fact that the treaty settlement institutionalized Māori understandings of their connection to the river. In interviews, Māori negotiators explained that "rights" is a foreign concept stemming from the European legal system. Rather, the Māori emphasize their responsibility of guardianship (*rangatiratanga*) for the

natural entity (e.g., river) to which their iwi is tied geneologically.[7] Their focus is their responsibility to care for their ancestor in order to maintain their ties to it. For Whanganui negotiators, the idea of granting their river a legal personality was an imperfect approximation (but likely the best that could be done within a European legal framework) of treating the river as a whole, living, spiritual being.

The granting of legal personhood status raised the question of who would speak for the river. Given the Māori emphasis on the responsibility of guardianship (*rangatiratanga*), the treaty settlement established a guardian body (Te Pou Tupua) authorized to speak on behalf of Te Awa Tupua and charged with protecting its interests. The guardian body is comprised of one Whanganui iwi representative and one Crown representative. Importantly, guardians must secure Te Awa Tupua's spiritual and cultural rights, not simply its physical and ecological rights.

The guardian body marked another difference with previous RoN laws. In Ecuador, Bolivia, and the U.S., RoN laws empower anyone to bring suit to defend the RoN, but do not require anyone to actually do so (Kauffman and Martin 2017b). By contrast, New Zealand's RoN law created statutory guardians charged with promoting and protecting the river's interests and wellbeing. While this legal design limits who can represent Nature, advocates argue that the guardianship model is stronger because it appoints responsible representatives legally mandated to protect Nature (Iorns Magallanes 2017, 1)

A third unique feature of New Zealand's guardianship-based approach is that it embedded the Whanganui guardianship body within a collaborative, integrated watershed management body (called Te Kōpuka nā Te Awa Tupua). This group is comprised of various stakeholders with interests in the river, including multiple iwi, central and local governments, commercial actors, recreations users, and environmental groups. It is charged with developing an integrated watershed management strategy to ensure the environmental, social, cultural and economic health and wellbeing of the Whanganui River (Te Awa Tupua). The group is also responsible for monitoring the management plan's implementation and providing a forum for discussing issues related to the health and wellbeing of Te Awa Tupua.

New Zealand's recognition of river rights quickly gained international attention, in part due to the promotional efforts of the transnational RoN networks described above. In the following sections, we show how judges in Colombia and India replicated key elements of New Zealand's guardianship model through court decisions meant to address serious threats to important river ecosystems in the face of government inaction. While the judges drew on New Zealand's precedent, they also justified their decisions by strategically interpreting domestic laws not explicitly recognizing RoN. Moreover, they

[7] Gerrard Albert, Lead Whanganui Iwi negotiator, interview by author, Whanganui, New Zealand, August 16, 2016. Tamati Kruger, Lead Tuhoe negotiator, interview by author, Wellington, New Zealand, August 17, 2016. Kirsti Luke, Lead Tuhoe negotiator, interview by author, Wellington, New Zealand, August 17, 2016.

adapted the model to distinct socio-political environments, with varying outcomes that we analyze in the paper's concluding section.

Recognizing Rights for El Rio Atrato, Colombia

In November 2016, Colombia's constitutional court declared the Atrato river basin to be a legal person possessing the rights to "protection, conservation, maintenance, and restoration." Judge Jorge Ivan Palacio termed the rights bestowed to Rio Atrato and the peoples living in the basin as biocultural. He based his terminology and legal argument on guarantees in the Colombian Constitution for biodiversity, cultural, and humanitarian protections.[8] The biocultural argument is unique in that it bridges the special designation and rights of Colombian indigenous and Afro-Colombian citizens with the ecological diversity of the Choco region and the Rio Atrato. While the Colombian Constitution does not include RoN specifically, Judge Palacio argued that the rights of the peoples of the Choco region are intertwined with the rights of the river, thus necessitating both biological and cultural rights (Republic of Colombia Constitutional Court 2016, 35).

El Choco Region: A Biocultural Examination

Choco constitutes four percent of Colombia's territory and is one of the most biodiverse regions on the planet. Ninety percent of its territory is a special conservation zone, home to Los Katios, Ensenada de Utria and Tatama National Parks. The Rio Atrato is located in a large valley and represents 60 percent of the Choco region's area. With 15 other rivers and 300 ravines flowing in to it, Rio Atrato is identified as one of the strongest rivers in the world. It is also the 3rd most navigable river in the country.

Choco has 30 municipalities in 5 regions and is home to about 500,000 residents, 87% of whom are afrodescendents, 10% indigenous, and 3% mestiza.[9] The population is organized into collective institutions. There are 600 Afro-Colombian organizations in 70 communities and 120 indigenous organizations from the Embera-Dobida, Embera-Katio, Embera-Chami, and Wounan y Tule ethnic groups. The primarily Afro-Colombian and indigenous cultures that live along the Rio Atrato are agricultural, growing corn, rice, cacao, coconuts, sugar cane, plantains, and other products. Fishing and artisanal mining are also traditional activities. Most communities are organized in peasant (*campesino*) collectives and are subsistence communities, living off the river and the land.

Since the rise of armed conflict in the 1970s, community members have been displaced and face greater levels of violence. These threats are exacerbated by rich deposits of gold, platinum, and minerals in the river, which have been extracted since colonial times. Despite such natural resource wealth, 48.7% of the region's citizens live in extreme poverty. Additionally, 82.8% do not meet the basic minimum needs for living, according to Colombian census data (Republic of Colombia Constitutional Court 2017, 4).

[8] The constitutional articles referred to are: 1, 2, 5, 8, 11, 12, 13, 16, 22, 44, 48, 49, 63, 65, 67, 70, 72, 79, 80, 188, 189, 288, 298, 311 339, 356, 357, 365, 366, Constitution Republic of Colombia 1991.
[9] The five regions include Atrato, San Juan, Pacifico Norte, Baudo, and Darien.

Biocultural Crises

Mining has been present in the Choco region since the 1550s, when Francisco Pizarro's representatives launched expeditions (Republic of Colombia Constitutional Court 2017, 89). Today, large scale mining and illegal logging have severely impacted traditional ways of life for Afro-Colombians and indigenous peoples. Illegal logging has changed the flow of the river, as well as increased the level of toxic chemicals from mining entering the river system. Logging has also caused sedimentation in the river, which threatens many species.

Chemicals used in illicit mining (mercury, cyanide, among others) have severely impacted the most vulnerable people in these societies, including children. A 2014 *Defensoria del Pueblo* (Citizens Advocacy Agency) report documented 34 Embera-Katio child deaths, and an increase in illnesses such as dengue, malaria, and dysentery. Such public health crises coincide with the increase in large-scale illegal mining. A 2016 study by Rojas and Montes (2008) shows that miners in the Choco region are exposed to mercury levels 50 times higher than acceptable levels set by the World Health Organization (Republic of Colombia Constitutional Court 2017, 96). According to Mercury Watch, Colombia emits 180 tons of mercury due to gold extraction each year (Mosquero 2005). Because mercury is the most toxic non-radioactive substance in nature, particularly when used in gold mining in water systems like the Rio Atrato, the health impacts on the communities in Choco are significant (Olivero 2016). By the 2000s, the river's level of contamination had negatively impacted food, water, and health, as well as local communities' culture and spiritual places.

In 2011, local communities asked the National Mining Agency to stop illegal activity, producing Decree 4134 to suspend mining concessions. In 2013-2014, the National Mining Agency worked in Choco to create sustainable mining practices with the community. The Agency argues that these policies were successful. Nevertheless, in 2014 the Defensoria del Pueblo declared a state of human and environmental emergency in Choco. The Defensoria noted with alarm that the Presidency of the Republic, the Ministries of Health, Environment, Mining, Agriculture, Housing, Education, Defense, and the National Institute of Health, as well as the local government agencies of Choco and Antioquia had not provided actions to confront and solve the serious situation that threatened the Rio Atrato, its tributaries, and the existence of the forest and the people.

In light of these grave circumstances, an inter-governmental panel called the Mesa Minera Interinstitucional (Interinstitutional Mining Working Group) was formed in 2014. However, Choco residents complained that the inter-governmental panel did not meet and was not effective. Frustrated with the government's failure to take action, in January 2015, community organizations filed a motion for protection in the Administrative Court of Cundinamarca. The plaintiffs included the Center for the Study of Social Justice "Tierra Digna," representing the Community Council for Peasants of Alto Atrato (Cocomopoca); the Community Council of the Integral Peasant Association of Atrato (Cocomacia); the Association of Community Councils of Bajo Atrato (Asocoba); and the Inter-Ethnic Forum of Choco Solidarity (FISCH).

On January 27, 2015, the Administrative Tribunal of Cundinamarca decided against protective action for the community. It argued that the government ministries named in the suit were not competent to provide protection as this did not fall within their prescribed duties under the national law (Republic of Colombia Constitutional Court 2017, 9). The Tribunal ordered the interinstitutional working group formed in 2013-14 to meet and create sustainable mining practices and policies.

The Constitutional Decision: Rights for el Rio Atrato

Frustrated with the lack of progress, in November 2016, the plaintiffs brought their case to the Sixth Circuit Constitutional Court for review (Republic of Colombia Constitutional Court 2017, 8-9). The court found in favor of the Choco residents. Citing heavily the precedent established by New Zealand's RoN laws (Republic of Colombia Constitutional Court 2017, 140), the court issued the following rulings:

1. The court recognized the Rio Atrato as a subject with rights to protection, conservation, maintenance, and restoration by the State and ethnic communities.
2. In order to protect and restore the Rio Atrato, a Commission of the Guardians of Rio Atrato must form within three months and include two designated guardians as well as an evaluation team from the Humboldt Institute and WWF Colombia, both of which had worked in the Rio Bita de Vichada region.
3. A panel of experts should convene to assist the Guardians. Their role is that of auditors to verify that the work to restore the Rio Atrato is completed, to accompany the Guardians, and supervise such work.
4. The Ministries of Environment, Housing, and Defense, the governments of Choco and Antioquia, the Humboldt Institute, the Universities of Antioquia and Cartagena, the Institute for Environmental Research of the Pacific, WWF Colombia, and other organizations with ethnic community associations must collectively implement a plan to clean the Rio Atrato and its tributaries. The plan must: 1) reestablish the river channels, 2) eliminate mining activities, and 3) reforest affected areas.
5. The Ministry of Defense, National Police, Commission against Illegal Mining, the National Military, the Treasury, and the municipalities of Choco and Antioquia must eradicate illegal mining in the Rio Atrato.
6. Within six months, the Ministries of Agriculture, Interior, and Housing; the Departments of National Planning, Social Prosperity, and Interior; as well as municipal governments must create integrated action plans to recuperate traditional forms of subsistence farming and cleaner food sources.
7. The Ministry of Environment, Ministry of Health, the Humboldt Institute, the University of Antioquia, University of Cartagena, the Institute of Environmental Research of the Pacific, and WWF Colombia must initiate epidemiology and toxicology studies within three months to establish a base line of environmental indicators for the region. A panel of experts will be appointed to do this work.

In justifying the decision, Judge Palacio invoked Article 215 of Colombia's Constitution declaring a "state of emergency" when there is a grave or imminent threat to the economic, social, or ecological order of the country. Judge Palacio also noted that the Constitution recognizes special protection for indigenous and Afro-Colombian ethnic groups, which are culturally distinct from the "dominant culture" (Republic of Colombia Constitutional Court 2017,17). The ruling gave the region's ethnic and indigenous organizations (e.g., Cocomopoca, Cocomacia, FISCH, Asocoba, etc) the authority to represent the collective will of the peoples of the Choco region.

Judge Palacio further justified the ruling by outlining the Constitution's "social state of rights" that encompass human dignity, social justice, well-being, protections for vulnerable peoples, cultural and ethnic diversity, and protection of the environment and natural resources (T-622 2017, 21; sentences: T-426 1992; T-505 1992; SU-747 1998; C-1064 2001 are the foundations of this as well). Judge Palacio argued that the principles mentioned above on which the Constitution was founded form an Ecological Constitution that justifies the protection not only of a pluralist society with diverse cultures, but also of the environment in which those peoples live (Republic of Colombia Constitutional Court 2017, 26, 28). Additionally, Judge Palacio noted the spiritual importance of natural resources and the environment for many cultures. He argued that cultural, economic, social, and environmental rights combined to form biocultural rights.

It was on these biocultural rights that Judge Palacio based his decision to give Rio Atrato legal personhood status. The concept of biocultural rights emphasizes that the rights of peoples and nature are inextricably linked (Republic of Colombia Constitutional Court 2017, 35-6). Consequently, Judge Palacio argued that such rights should prevent (or proactively control) environmental destruction and should support conservation, restoration, and sustainable development (Republic of Colombia Constitutional Court 2017, 36).

Judge Palacio's decision also recognized that sustainable development solutions require integrated responses, and that the State is not structurally organized in an integrated manner to adequately meet the needs presented by the case. Consequently, the ruling orders a restructuring of the state and the creation of a framework for not only guardianship, but also integrated care of the peoples and the ecosystem from the national to the local levels (see orders 2-7 above).

The Colombian Constitution and national laws cited by Judge Palacios reflect Colombia's ratification of international treaties, including the Stockholm Convention (1972), ILO Convention 169 (1989) for prior informed consent to communities regarding activities in their territories, the Convention on Biological Diversity (1994), the UN Declaration for Rights of Indigenous Peoples (2007), the American Declaration on Rights of Indigenous Peoples (2016), and the UNESCO Convention on Cultural Patrimony (2003). Judge Palacio noted that these international laws, ratified by Colombia, and the court rulings in New Zealand contributed to conception of biocultural rights in his decision (Republic of Colombia Constitutional Court 2017, 48-50;140). Moreover, his orders to restructure governance, including a guardianship body for the Rio Atrato, are

meant to fulfill the UN's 2030 Sustainable Development Agenda, which calls for a unified approach to social, economic, and environmental solutions and planning in states.

Current Status

In July 2017, Colombia's President appointed the Ministry of Environment as the government's designee to the Guardian Council for Rio Atrato. The Guardian Council also contains 14 community members from the Choco region, 7 permanent members and 7 replacements. They were chosen based on their leadership in the organizations involved in the court ruling in the Choco region (Silva Numa 2017). Five committees representing appropriate government institutions were created to coordinate and implement policies relating to the river, including de-contamination (Ministry of Environment); eradication of illicit mining (Ministry of Defense); food security (Ministry of Housing); and toxicology and epidemiology studies (Ministry of Health).[10] Colonel Juan Francisco Pelaez of Colombia's Anti-Illicit Mining Unit says that the constitutional decision to give rights to Rio Atrato has improved his coordination with the military and the treasury. He also notes that the structural changes provide institutional solutions to these complex problems.[11]

In a December 2017 speech, Judge Palacio explained his decision to give el Rio Atrato rights this way: "When protection came to my charge, I knew what the path was. Nature has a right not to be contaminated, not to be destroyed, to be used rationally."[12] Much like the cosmovision of indigenous peoples, Judge Palacio's decision recognizes that humans are part of nature. According to Palacio, the interdependency between humans and other elements means that the dominant anthropocentric approach to development must be replaced with an emphasis on "ecocentrism in which the human is just one more species within nature, like fauna, flora, and other species."[13]

The court ruling recognizing rights of Colombia's Rio Atrato shows how normative underpinnings for RoN are diffusing globally and may be institutionalized even when laws explicitly recognizing such rights are absent. The case also shows how RoN is being combined with new governance structures designed to develop new solutions for the difficult and complex challenges of sustainable development in the face of extractive industries.

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[10] "Estos son los Lideres Sociales que Protegen el Rio Atrato," *La Semana.* December 15, 2017, Accessed 19 March 2018, http://www.semana.com/contenidos-editoriales/atrato-el-rio-tiene-la-palabra/articulo/defensores-del-atrato/551254.

[11] "El Coronel que Protégé al Rio Atrato," *La Semana.* December 15, 2017, Accessed 19 March 2018, http://www.semana.com/contenidos-editoriales/atrato-el-rio-tiene-la-palabra/articulo/coronel-juan-francisco-pelaez-protege-al-rio-atrato/551281.

[12] "Estos son los Lideres Sociales que Protegen el Rio Atrato," *La Semana.* December 15, 2017, Accessed 19 March 2018, http://www.semana.com/contenidos-editoriales/atrato-el-rio-tiene-la-palabra/articulo/defensores-del-atrato/551254.

[13] "Jorge Ivan Palacio: El Centinela del Rio Atrato," *El Espectador,* December 3, 2017, Accessed 19 March 2018, https://www.elespectador.com/noticias/judicial/jorge-ivan-palacio-el-centinela-del-rio-atrato-articulo-726304.

Recognizing Rights for the Ganga and Yamuna Rivers, India

On March 20, 2017, the Uttarakhand High Court (UHC), in the Indian State of Uttarakhand, issued a ruling declaring that "the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna" (Uttarakhand High Court 2017, 11). Based on these rights, the court ordered government agencies to take specific actions to "promote the health and wellbeing of these rivers" (Uttarakhand High Court 2017, 12).

Environmental Public Interest Litigation

The UHC's ruling provides another example of courts recognizing the rights of nature in the absence of laws recognizing such rights. The Indian state court's ability to issue such orders stems from India's constitutional provision allowing Public Interest Litigation. Public interest litigation was introduced in 1986, justified under Article 32 of India's constitution, as a way to give marginalized groups in society access to justice when the state failed to take action to address problems of public interest. Public interest litigation allows any individual or NGO to seek legal remedy from the courts when they can demonstrate the public interest is at stake and the state has failed to take action. Importantly, citizens do not have to be victims of a violation to bring public interest lawsuits. A court may also introduce public interest litigation unilaterally. Public interest litigation has been used extensively to address environmental harms in India. While Indian courts' use of environmental public interest litigation has been inconsistent, studies show that the practice is widely accepted and, in some cases, has reduced pollution levels (Faure and Raja 2010, Sahu 2008).

Public Interest Litigation to Restore the Ganga

The UHC ruling comes after decades of failed government programs designed to clean up the Ganga river. The Ganga is one of the most sacred rivers for Hindus, believed by many to contain divine properties. It is also strategically important, as many cities are built on its banks and millions of people depend on it for their survival. The Ganga and the Yamuna (the Ganga's longest tributary) are also highly polluted. The government's first attempt to clean up the Ganga was the 1985 National Ganga Action Plan. The second was the National Ganga Basin Authority's 2009 Mission Clean Ganga. Both were unqualified failures (Das 2017). The latest attempt to restore the Ganga is "Namami Gange" ("Obeisance to Ganga" in Sanskrit), an initiative launched in 2014 by the Hindu nationalist BJP government.[14]

The process leading to the UHC's historic ruling began when Mohammed Salim, a man living in the village of Kuhlal (in Uttarakhand), complained to Uttarakhand state authorities about encroachments on the banks of a canal emerging out of the Ganga in the state capital. The encroachments resulted from illegal construction undertaken by private

[14] http://nmcg.nic.in.

actors engaged in mining and stone crushing on land operated by the Uttarkhand Irrigation Department. State authorities sent letters ordering the illegal encroachments to be removed and further construction stopped. The private actors refused and sought an injunction against the order. They argued they had purchased the land from the state of Uttar Pradesh, which they argued owned the land at the time of sale (Uttarakhand was carved out of Uttar Pradesh as a separate state in 2000). Thus, the case was complicated from the beginning by inter-state disputes over land and the diversion of water from the Ganga (the river serves power stations in both states).

Frustrated by the lack of action, in 2014 Salim filed a public interest lawsuit with the UHC to stop the construction and mining, have the encroachments removed, and address the high levels of pollution in the Ganga and its tributaries. The suit also called on India's central government to settle the disputes over the distribution of land and water between the two states in order to stop the encroachment on government lands. The process dragged on for several years and, despite numerous court orders directing Uttarakhand state authorities to remove the encroachments, no action was taken by the state.

Legal Rights for the Ganga and Yamuna Rivers

On March 20, 2017, the UHC issued its ruling in which it ordered the Ganga and Yamuna rivers to be treated "as living human entities" with all the rights and responsibilities of a legal person. This ruling is interesting since the original lawsuit never asked to declare the rivers legal persons; the judges took this step unilaterally. In justifying this extraordinary step, the court noted:

> *The extraordinary situation has arisen since Rivers Ganga and Yamuna are loosing their very existence. This situation requires extraordinary measures to be taken to preserve and conserve Rivers Ganga and Yamuna (UHC 2017, 4)*

The court cited as precedent the New Zealand government's awarding of legal personhood status to the Whanganui River.[15] It also noted that the Indian Supreme Court had "held that the concept 'Juristic Person' arose out of necessities in human development—Recognition of an entity as juristic person is for subserving the needs and faith of society" (UHC 2017, 7). Additionally, the UHC cited previous Indian court rulings establishing that Hindu idols representing deities can have legal personhood status and sue to protect their interests due to their spiritual role in "subserving the needs and faith of the society." The UHC argued that, similarly,

> *the Rivers Ganges and Yamuna are worshipped by Hindus. These rivers are very sacred and revered. The Hindus have a deep and spiritual connection with Rivers Ganges & Yamuna. According to Hindu beliefs, a dip in River Ganga can wash away all the sins…Thus, to protect the*

[15] "Uttarakhand High Court accords status of 'living entities' to Ganga, Yamuna," *Times of India*, 20 March 2017, Accessed 21 March 2018, https://timesofindia.indiatimes.com/india/uttarakhand-high-court-accord…of-living-entities-to-ganga-yamuna/articleshowprint/57738570.cms?null.

> *recognition and the faith of society, Rivers Ganga and Yamuna are required to be declared as the legal persons/living persons (UHC 2017, 4, 11).*

The court also argued that "there is utmost expediency to give legal status as a living person/legal entity to Rivers Ganga and Yamuna" because of the government's failure to adequately address Articles 48-A and 51A(g) of the Indian constitution. These articles require the State to "endeavor to protect and improve the environment" and oblige Indian citizens "to protect and improve the natural environment including forests, lakes, rivers and wild life."

The UHC invoked the legal doctrine "in loco parentis" (Latin for "in the place of a parent") to make a set of government bodies and officers responsible to act on behalf of the rivers for their protection and conservation. This is the same legal principle used to appoint guardians for children or incapacitated people who cannot defend themselves. The Court-appointed guardians include the Chief Secretary of Uttarakhand, the Advocate General of Uttarakhand, and the Director of Namami Gange (the central government initiative to clean up the river). Acting on behalf of the Ganga and the Yamuna rivers, these state bureaucrats are "bound to uphold the status" of the rivers and also to protect, conserve, and preserve them by promoting their health and wellbeing. The Advocate General of Uttarakhand is charged with representing the rivers at all legal proceedings.

Finally, the UHC ruling ordered several steps be immediately taken to begin restoring the river. First, the court ordered Uttarakhand state authorities to evict the private actors engaged in the mining and stone crushing that prompted the suit. Second, it directed India's central government to make a final decision regarding the division of assets and properties between the states of Uttarakhand and Uttar Pradesh within three months. Third, the central government was also directed to create a Ganga Management Board to develop a coordinated approach to managing the river basin. Finally, the court banned mining in the Ganga's river bed and highest flood plain (Uttarakhand High Court 2017, 1-2).

Legal Challenge to the UHC Ruling

In May 2017, the State of Uttarakhand, along with India's central government and others, filed a petition with India's Supreme Court to overturn the UHC ruling. In other words, the entities appointed by UHC to be the guardians of the Ganga and Yamuna rivers sought to have the Supreme Court overturn the ruling naming them as the rivers' legal guardians. The objection to the UHC ruling given in the petition provides insight into the source of concern among Uttarakhand authorities.

The primary complaint appears to be that Uttrakhand authorities do not wish to be held accountable for the Ganga and Yamuna rivers. In a press conference regarding the Supreme Court petition, Uttarakhand minister and state government spokesperson Madan Kaushik stated, "Let me be very clear that we are not against according of living entity status to the two holy rivers Ganga and Yamuna," but "how can the chief secretary here

be held accountable if the river is polluted in West Bengal, Bihar, Jharkhand or UP?"[16] More important, from the perspective of rights of nature jurisprudence, the petition complains that if the rivers flood and someone dies (as often happens), victims' families could potentially sue for damages against the Chief Secretary. Consequently, the petition asks the Supreme Court to determine whether the state government (as the rivers' "legal parents") would be liable to bear the financial burden of harms caused by the river (State of Uttarkhand v. Mohd Salim 2017, 10-11).

The petition cites several other objections related to jurisdictional issues resulting from the fact that the UHC ruling addresses river basins spanning multiple states. Uttarkhand state authorities argue that the UHC does not have the authority to tell other states what they must do. Does Uttarakhand's Chief Secretary, as the river's legal parent, have the authority to give orders to other states or to the federal government? Can court cases related to the river only be filed in the name of the Chief Secretary (thus denying this legal authority to other states and the central government)? Since the river basin is one legal person spanning state boundaries, is it possible to file separate litigation in different states? Previously, the National Green Tribunal had jurisdiction to determine cases of encroachment; will the Chief Secretary now have to submit cases before courts of law? These are the kinds of jurisdictional questions that the Supreme Court will have to determine if it chooses to uphold the UHC ruling.

India's Supreme Court agreed to hear the petition and temporarily stayed the UHC ruling until the Supreme Court issues its decision.

Conclusion

The lawsuits producing court rulings recognizing rights for the Atrato, Ganga, and Yamuna rivers were not spearheaded by RoN activists. They sought to protect the rivers, but did not ask for RoN to be recognized. The judges deciding these cases unilaterally invoked RoN, drawing on RoN principles and models circulating globally through transnational networks of environmental lawyers and activists. Specifically, the Colombian and Indian judges cited New Zealand's RoN laws as precedent, and their rulings replicated key elements of New Zealand's guardianship model.

The judges justified their extraordinary rulings by citing the need to address serious problems of environmental degradation that had long been known and acknowledged by governments, but were effectively ignored. After repeatedly ordering governments to clean up the rivers, courts took the extra step of recognizing rivers' rights only after governments repeatedly failed to take action.

[16] "Supreme Court stays Uttarakhand high court's order declaring Ganga and Yamuna 'living entities'," Times of India, 7 July 2017, Accessed 20 March 2018, https://timesofindia.indiatimes.com/india/supreme-court-stays-uttarakhand-high-courts-order-declaring-ganga-and-yamuna-living-entities/articleshow/59489783.cms.

Despite citing international precedent, the judges rooted their decisions in domestic law. In both Colombia and India, judges strategically interpreted constitutional provisions and other domestic laws to justify the granting of legal personhood status to rivers. In Colombia, Judge Palacio drew on biodiversity, cultural, and humanitarian guarantees in the Colombian Constitution to argue that the rights of the peoples of the Choco region are intertwined with the rights of the Atrato river, thus necessitating both biological and cultural rights. In India, UHC judges based their ruling on the spiritual significance of the Ganga and Yamuna rivers to Hindus and cited as precedent previous court rulings establishing legal personhood status for Hindu deities and idols. The UHC also cited constitutional provisions requiring the State to protect and improve the environment.

While drawing on New Zealand's model, the Colombian and Indian rulings structure guardianship differently. Civil society and community groups play an influential role in Rio Atrato's guardianship body, occupying seven of the eight positions. As in New Zealand, the state is represented in the guardianship body, but is balanced with civil society participation. Moreover, organizations select the individuals to represent them. By contrast, the Ganga's guardianship body is heavily weighted toward state representatives who were mandated to serve as "legal parents" by the court. This situation is problematic given the Indian government's sorry record of protecting the river.

Attempts by the Ganga's legal guardians to overturn the UHC ruling reveal several dilemmas not previously contemplated by most RoN advocates.[17] What happens if guardians do not discharge their duties? Should there be a system of penalizing negligent guardians? Until recently, it generally has been assumed that appointed guardians would be willing to protect Nature's interests. The Indian case shows this may not always be the case. Provisions for dealing with this may need to be built into future RoN laws.

The Indian case reveals a second unresolved dilemma inherent in the New Zealand model. This is that legal personhood status confers not only rights, but also responsibilities and liabilities. The idea that rivers could be held liable for damage is something that has largely been ignored by RoN activists, but is a topic that is at the center of the dispute in India. In part, this is because of the legal doctrine used to appoint guardians of the rivers. The "in loco parentis" legal doctrine is regularly used to appoint "legal parents" to people who are incapable of caring for themselves. This legal doctrine makes the guardians responsible for such people. It also forces them to assume any liabilities incurred by their charges. When applied to rivers, this suggests that rivers, and their guardians, may be liable for damages incurred to people and their property. While this is clearly not something RoN advocates have wanted to focus on, it is something that will have to be addressed if the guardianship model for legalizing RoN is to be implemented and copied.

Finally, the case comparisons highlight the importance of combining guardianship with collaborative integrated management systems when legal personhood status is granted to ecosystems. The legal provisions recognizing the Whanganui and Ganga rivers as legal persons do not explicitly delineate a set of rights. Rather, they provide legal standing for

[17] A notable exception is Kothari and Bajpai (2017).

the rivers to defend their interests. While the rivers can respond to violations by going to court, it is more efficient to create governance arrangements that allow the rivers to proactively address and regulate activities that affect their wellbeing. For this reason, a crucial aspect of the New Zealand and Colombian systems is the involvement of multiple sets of people from different backgrounds on formal bodies created to address issues relating to the rivers' wellbeing. This greatly strengthens the ability of the guardians to understand complex issues, to withstand pressure to compromise the river's interests, or reach resolution in the case of disputes (Kothari and Bajpai 2017). This kind of collaborative, integrated watershed management body was not part of the UHC order, but it could potentially be added as the operational aspects of the order are worked out via the Supreme Court's review.

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