CHAPTER 4a

GUARDIANSHIP ARRANGEMENTS IN RIGHTS OF NATURE LEGAL PROVISIONS

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4.1 Introduction

Over the last decade, dozens of laws have been adopted around the world recognizing ecosystems (e.g., forests, watersheds, river systems, etc.) as legal subjects (as opposed to an object or resource) or as legal entities with rights; akin to the status of corporations and other legally-recognized organizations. Known generally as "rights-of-nature laws," these legal provisions confer standing, procedural, and substantive rights to ecosystems that cannot speak for themselves in human forums. This raises the practical question of who can speak for these ecosystems and represent their interests in legal, policy, and social forums. Existing rights-of-nature legal provisions vary in how they structure arrangements for humans to represent these ecosystems in human forums, which this chapter refers to as guardianship arrangements. Specifically, such guardianship arrangements vary in who can legally represent ecosystems to protect their rights, whether anyone is obligated to do so, and whether guardians are embedded in governance institutions so that ecosystems' rights are not only protected reactively through the courts, but also protected proactively through policy-making processes.[2]

Different guardianship arrangements stem in part from differences in how rights-bearing nature is defined. When rights are recognized for specific ecosystems, such as a river or a forest, it is easier to specify particular guardians and embed them in ecosystem management institutions. When rights-bearing nature is defined more broadly, such as when rights are recognized for "all of nature" (conceptualized as "nested ecosystems"), choosing appropriate guardians becomes more complicated as a nested ecosystem encompasses a variety of dynamic characteristics all of which are interrelated in complex, multiscale connections. This chapter examines these issues through a comparative analysis of guardianship arrangements established by a selection of existing rights of nature legal provisions.

Two distinct models have emerged for how to structure rights-of-nature legal provisions, including guardianship arrangements (*see* Table 1). The first model is illustrated by rights of nature laws in Ecuador and the United States (*see* original text excerpts, *supra*). In Model 1, rights-bearing nature is defined extremely broadly; all of nature within the legal jurisdiction is recognized as having rights. These laws identify the specific rights held by nature, such as the rights to exist, to maintain the functioning of ecosystem cycles, and to be restored when damaged. Under these laws, any person may stand to speak for nature; however, Ecuador has created the role of Ombudsman specifically to investigate and report on allegations of rights of

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[2] These and other differences are detailed in Craig M. Kauffman & Pamela L. Martin, Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand, 18 GLOBAL ENVIRONMENTAL POLITICS 43 (2018).

nature violations brought by people and communities. Representation, therefore, is voluntary; no person is legally obligated to speak for nature. Consequently, the model tends to address rights of nature reactively, with people seeking to defend nature's rights in court when violations are imminent or after they have occurred.

The second model is illustrated by rights-of-nature legal provisions in New Zealand, Colombia, and India, among other places. In Model 2, particular ecosystems are recognized as legal persons, establishing them as rights-bearing subjects. In most cases, legal provisions do not delineate specific rights other than those held by all legal persons. To protect those rights, not only are specific guardians appointed to speak on behalf of the ecosystem, but they are obliged to do so in both legal and policy arenas. Moreover, guardians are often embedded in newly created governance institutions charged with managing the ecosystem in a way that ensures the health and wellbeing of the ecosystem. These arrangements are intended to give the ecosystem a voice in decision-making processes regarding the management of the ecosystem, allowing rights of nature to be considered and protected proactively.

The remainder of this chapter illustrates the different approaches to institutionalizing rights of nature generally, and guardianship specifically, by providing key excerpts of representative rights-of-nature legal provisions from different countries. Section 1 addresses guardianship agreements in Model 1 by examining key passages from rights of nature laws in Ecuador and the United States. The section notes differences stemming from the fact that rights of nature is recognized in Ecuador's Constitution, while rights of nature is mainly recognized in the United States through local ordinances. Section II examines guardianship in Model 2 by looking at passages from legal provisions in New Zealand, Colombia, and India.

Table 1: Two Models for Structuring Guardianship Arrangements

	Model 1	**Model 2**
Illustrative Country	a) Ecuador b) United States	a) New Zealand b) Colombia c) India
Scope of Protection	All nature (conceptualized as nested ecosystems within the legal jurisdiction) has rights	Rights of particular ecosystems are recognized
Legal Rights	Nature's rights are explicitly delineated	An ecosystem is granted legal personhood status
Legal Representation	Anyone can speak for nature, but no one is obliged to	Specific guardians are obliged to represent ecosystem
Redress	Rights of nature are protected when violations are reported	Guardians are embedded in integrated ecosystem management institutions

SECTION I: Guardianship Agreements Model 1

4.2 Guardianship Model 1a: Ecuador

Perhaps the most prominent example of the first model is Ecuador's 2008 Constitution. It provides a relatively vague and expansive definition of rights-bearing nature. Article 71 of the

Constitution defines nature as the Andean Indigenous deity "Pachamama [typically translated in English as Mother Earth], where life is reproduced and occurs." No other definition of rights-bearing nature is offered, implying that rights are inherent to all of the Earth's ecosystems.

Ecuador's Constitution presents rights of nature as one component of a set of inter-related rights, along with individual rights and community rights, which together constitute tools for building "a new form of public coexistence, in diversity and in harmony with nature," rooted in the Andean Indigenous concept of *sumak kawsay*.[3] This is not merely a concept of living well (it is often translated into Spanish as *buen vivir*), but a way of life that celebrates and reveres Pachamama (translated as Mother Earth in English). It acknowledges humans' inseparable relationship with Nature and the vital role that Nature plays in human existence. For this reason, the specific rights of nature identified in the Constitution reflect a holistic approach to conceptualizing nature's intrinsic value and an emphasis on maintaining balance within natural systems. Title II, Chapter 7 recognizes that nature has rights to exist, to maintain the integrity of its ecosystems, and to regenerate "its life cycles, structure, functions and evolutionary processes." Nature also has the right to be restored if injured, independently of human claims for compensation.

Guardianship in Ecuador's 2008 Constitution

The principle of guardianship is established in Article 71 of Ecuador's Constitution, which states: "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."

While the Constitution allows anyone to speak on behalf of nature, it does not require them to do so. It does, however, establish two specific obligations of the State. In regards to nature's right to be restored when damaged, Article 72 states, "In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences."

Secondly, Article 73 requires the State to act according to the precautionary principle, stating, "The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles." This article is important for establishing certain State responsibilities to act as guardian.

2015 General Organic Code of Processes

[3] It is beyond the scope of this chapter to fully explain the depth of *sumak kawsay*. For a fuller exposition of the concept, see Antonio Luis Hidalgo-Capitán, Alejandro Guillén García, and Nancy Deleg Guazha, Sumak Kawsay Yuyay: Antología del Pensamiento Indigenista Ecuatoriano sobre Sumak Kawsay (Huelva y Cuenca: FIUCUHU, 2014).

In 2015, a secondary law was passed, which empowered the national Ombudsman's office (in Spanish, the Defensoría del Pueblo) to represent nature's interests.[4] The national Ombudsman was given the authority to act on its own initiative, thereby expanding its standing. Nature itself cannot be sued in court or reprimanded. The Ombudsman's office is responsible to handle all allegations brought by people and communities alleging a violation of the Rights of Nature. Claims for remedial and restorative measures and the subsequent implementation are submitted for the approval of the national environmental authority [Ministry of Environment]. If claims for environmental, personal, or property damage are brought separately under the application of other laws, there will not be a "double recovery" under the rights-of-nature claims permitted unless the State or other public authority takes responsibility for remediation.[5]

Ecuadorian Guardianship in Action:

Ecuador's guardianship arrangement has meant that many different types of actors have attempted to speak for nature. Lawsuits seeking remedy for violations against the rights of nature have been filed by individual lawyers and citizens, community groups, social activists, and government bureaucracies like the Ministry of Environment. Judges have *sua sponte* recognized rights of nature in their rulings on cases where rights of nature violations were not claimed either by claimants or defendants. While the Defensoría del Pueblo has written reports documenting rights of nature violations, it has no power to enforce its recommendations or findings without bringing a formal lawsuit.

In one sense, Ecuador's guardianship model can be considered strong in that it empowers anyone to speak for nature. But in another sense, it is weak since no one is obligated to represent nature or fight for its rights. The system relies on volunteerism. It also sets up a reactive system in which people are expected to appeal to public authorities, typically through the legal system, to stop an ongoing or impending violation of the rights of nature. Those acting for nature require funding and other resources, which are not provided for in the Constitution. Consequently, the system sets up a collective-action problem in which the benefits of protecting nature's rights are broadly diffused, but some individual or group of individuals must incur the costs of doing so.

4.3 Guardianship Model 1b: U.S. Municipalities

At least seventy municipalities around the United States, from Pittsburgh, Pennsylvania to Santa Monica, California, have passed local laws creating enforceable rights for ecosystems. Most of these follow the same model as that seen in Ecuador, recognizing specific rights held by all ecosystems within the political jurisdiction and granting all citizens the authority to speak for nature. For example:

> HOME RULE CHARTER OF THE CITY OF PITTSBURGH, PENNSYLVANIA
> **§618.03 Statements Of Law—Rights Of Pittsburgh Residents And The Natural Environment.** (b) Rights of Natural Communities. Natural communities and ecosystems, including, but not limited to, wetlands, streams, rivers, aquifers, and other water systems, possess inalienable and fundamental rights to exist and flourish within the City of

[4] Republic of Ecuador, 2015 General Organic Code of Processes, Arts. 38-39.
[5] Republic of Ecuador, 2015 General Organic Code of Processes, Art. 40.

Pittsburgh. Residents of the City shall possess legal standing to enforce those rights on behalf of those natural communities and ecosystems.

Interestingly, the City of Santa Monica's approach addresses environmental protections in terms of sustainability and city planning:

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SANTA MONICA ESTABLISHING SUSTAINABILITY RIGHTS

WHEREAS, in the last fifty years, national and state governments have attempted to address the crisis by adopting specific environmental protection laws, such as the Clean Water Act, Clean Air Act, National Environmental Policy Act and California Environmental Quality Act, that limit pollution and resource consumption; but those laws also have proven inadequate to provide long-term protection of our rights to clean air, water, and soil, and sustainable food systems, and the rights of natural ecosystems;

However, it should be noted that these laws cannot bar development but can only address zoning-type issues by presenting a cost-benefit analysis. This has played out in two Pennsylvania ordinances that have been rejected by the courts after challenges to their constitutionality. The Home Rule Charter of the Township of Grant County in Pennsylvania is representative of most U.S. rights-of-nature laws in that it gives all residents the right to enforce the protective provisions of the Charter "in the name of the ecosystem or natural community as the real party in interest", and damages are intended to be restorative.

The Home Rule Charter in Grant County, Pennsylvania, was adopted after an earlier Ordinance was found to be invalid and preempted by various other state laws and township codes. It is unlikely that assertions of right under the Charter will be any more successful as the Federal Judge in the original Ordinance case noted in her Order for attorney's Fees: "Even after the Ordinance was adjudged pre-empted by state law, Grant Township sought to make an end run around that judicial determination by amending its form of government and adopting the pre-empted and constitutionally deficient provisions in the form of a Home Rule Charter."[6]

Substantively, the Ordinance attempted to establish "their sovereign right of local community self-government"[7] to secure their "right to the scenic, historic, and aesthetic values of the Township, including unspoiled vistas and a rural quality of life."[8] Article III enumerates the various prohibited activities which would interfere with the residents' environmental rights.

ARTICLE III – PROHIBITIONS AND ENFORCEMENT

Section 301. Depositing of Waste from Oil and Gas Extraction. It shall be unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.

[6] *Pa. Gen. Energy Co, LLC v. Grant Twp.,* C.A. No. 1:14-cv-209. (W.D. Pa. 2019)
[7] Home Rule Charter of the Township of Grant, Indiana County, Pennsylvania, Art. 1; Sec. 103
[8] *Id*. Sec. 105

Section 302. State and Federal Authority. No permit, license, privilege, charter, or other authorization issued to a corporation, by any State or federal entity, that would violate the prohibitions of this Charter or any rights secured by this Charter, shall be deemed valid within Grant Township.

Section 303. Summary Offenses. Any corporation or government that violates any provision of this Charter shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and each violation of a section of this Charter, shall count as a separate violation.

Section 304. Standing for Township and Residents. Grant Township, or any resident of Grant Township, may enforce the rights and prohibitions of the Charter through an action brought in any court possessing jurisdiction over activities occurring within Grant Township. In such an action, Grant Township or the resident shall be entitled to recover all costs of litigation, including, without limitation, expert and attorney's fees.

Section 305. Enforcement of Natural Community and Ecosystem Rights. Ecosystems and natural communities within Grant Township may enforce their rights, and this Charter's prohibitions, through an action brought by Grant Township or residents of Grant Township in the name of the ecosystem or natural community as the real party in interest. Actions may be brought in any court possessing jurisdiction over activities occurring within Grant Township. Damages shall be measured by the cost of restoring the ecosystem or natural community to its state before the injury, and shall be paid to Grant Township to be used exclusively for the full and complete restoration of the ecosystem or natural community.

The District Court in *Pennsylvania General Energy Company, LLC v. Grant Township*,[9] found that the Home Rule Charter was preempted by several provisions of the Second Class Township Code, rules under the Oil and Gas Act, and the Limited Liability Company Law, and the Pennsylvania Constitution and therefore was declared invalid. Ultimately, the United States District Court granted damages to the Pennsylvania General Energy Company (PGE) in the sum of $102,979.18, although PGE submitted detailed billing records for over $600,000, it "expressed a willingness to accept" the lesser sum in order avoid bankrupting Grant Township.[10]

This presumption of preemption may well prove to be a stumbling block for American municipalities attempting to assert their historic "home rule" rights to control and protect the natural resources and ecosystems. Tribal sovereignty may provide a means to protect, if not the natural resource itself, a product of it. In its Report to the Minnesota Governor, members of the Task Force on Wild Rice, "agreed on the importance of protecting wild rice and clean water, ensuring the viability of all Minnesota communities, respecting Tribal sovereignty, the need to address biological, chemical, and hydrological threats to wild rice and sharing the burdens and benefits of any solutions the state develops."[11]

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[9] *Pa. Gen. Energy Co, LLC v. Grant Twp,* C.A. No. 14-209ERIE (W.D. Pa.2015)
[10] *Pa. Gen. Energy Co, LLC v. Grant Twp.,* C.A. No. 1:14-cv-209. (W.D. Pa. 2019)
[11] Environmental Quality Board, Minnesota Task Force Report on Wild Rice (Jan. 3, 2019)

SECTION II: Guardianship Agreements Model 2

4.4 Guardianship Model 2a: New Zealand's Te Awa Tupua Act

New Zealand pioneered a very different approach to institutionalizing rights of nature, compared to Ecuador and the United States, as described in the introduction. This second model is illustrated by New Zealand's 2017 Te Awa Tupua Act[12], which recognizes the Whanganui River as a living, spiritual being with legal personhood status. The Whanganui River is known by the indigenous Maori as Te Awa Tupua and is understood to be an integrated whole from the mountains to the sea. As a tourist attraction and filmmaking site (The Lord of the Rings' Mount Doom is New Zealand's Mount Ngauruhoe, the origin of the Whanganui River), it has suffered degradation through dynamiting to create easier tourist boats and diversion for a hydroelectric power scheme. The Act does not specify specific rights held by Te Awa Tupua, but simply states that the river possesses "all the rights, powers, duties, and liabilities of a legal person."

The Te Awa Tupua Act emerged from treaty settlement negotiations resolving claims by the Whanganui Iwi (tribe) in relation to the Whanganui River under the Treaty of Waitangi. The settlement agreement, Tūtohu Whakatupua, was signed on August 30, 2012. The terms of the treaty settlement were given the force of national law through the 2017 Te Awa Tupua Act. After defining Te Awa Tupua (hereinafter "the River"), both in terms of its physical geography and the intrinsic values that represent its essence, the Act specifies the procedures for appointing guardians (called Te Pou Tupua, hereinafter "the Guardians") as well as their obligations to the River.

In order to effectuate the Act, an Office of human guardians was established with all the powers necessary to protect and preserve the River. There is an extensive set of conditions for nominations to this Office which is comprised of two people, one selected by the Crown government and one selected by Maori iwi with ties to the River. Not only are these Guardians charged with protecting the intrinsic value of the River, but they are able to assert landowner rights for those lands vested in the River. Fund administration and treaty / contract powers are also granted to the Office of the Guardian.

The Guardian is also responsible to engage with, and report to, the iwi and hapū [Maori clan] on matters relating to the River "as a means of recognizing the inalienable connection of those iwi and hapū with Te Awa Tupua". Promotion and the protection of the status of the River with the public, agencies, or other bodies may be appropriate by developing or reviewing relevant guidelines or policies. The River also has the right to participate in any statutory process affecting it.

The Te Awa Tupua Act also provides for support to be given to the Guardians by an advisory group, called Te Karewao (hereinafter "the Advisors") and a 17-member strategy group, called Te Kōpuka (hereinafter the "Strategists") who must also act in the interests of the River. The Strategist group is composed of "representatives of persons and organizations with interests in

[12] The full text of the 2017 Te Awa Tupua Act can be found in the Appendix.

the Whanganui River, including iwi, relevant local authorities, departments of State, commercial and recreational users, and environmental groups." The primary function of Strategists is to develop and approve a collaboratively developed integrated watershed management plan (Te Heke Ngahuru).

These Guardians, Advisors, and Strategists act as an integrated support system that is embedded in a collaborative governance body tasked with managing the protected ecosystem, and that "management" is characterized as protecting the River's "health and well-being" as a natural being. In New Zealand's model, decision-making takes the ecosystem's rights and interests into consideration and requires collaborative planning among the stakeholders.

4.5 Guardianship Model 2b: Colombia's Atrato River

The Atrato River lies in Colombia's Chocó region. One of the most biodiverse regions on the planet, the Chocó region, and particularly the Atrato River, have been severely degraded from the mining of heavy metals and other industrial activities. 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." While Colombia's Constitution does not explicitly recognize rights of nature, Judge Jorge Ivan Palacio ruled that rights of nature are part of a set of "biocultural rights" that may be inferred from guarantees in the Colombian constitution for biodiversity, cultural, and humanitarian protections. This Rights-of-nature interpretation was asserted in the opinion rendered in a protection action filed by the Center of Studies for Social Justice "Tierra Digna," on behalf of the Greater Community Council of the Popular Farmer Organization of the Alto Atrato (Cocomopoca), the Greater Community Council of the Integral Farmer Association del Atrato (Cocomacia), the Association of Community Councils of Bajo Atrato (Asocoba), the Inter-Ethnic Forum of Solidarity Chocó (FISCH) and others, against the Presidency of the Republic and others.[13]

Further underscoring the concept of "biocultural rights", Judge Palacio noted that the Constitution recognizes special protection for indigenous and Afro-Colombian ethnic groups, which are distinct from the "dominant culture."[14] Biocultural rights

> refer[s] to the rights that ethnic communities have to administer and exercise autonomous guardianship over their territories -- according to their own laws and customs -- and the natural resources that make up their habitat, where their culture, their traditions and their way of life are developed based on the special relationship they have with the environment and biodiversity.[15]

The ruling gave the Chocó region's ethnic and indigenous organizations the authority to represent the collective will of the peoples of the Choco region.

Judge Palacio then outlined the Constitution's "social state of rights" that encompass human dignity, social justice, well-being, protections for vulnerable peoples, cultural and ethnic

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[13] *Tierra Digna v. Presidency of Colombia,* Judgment T-622/16 (The Atrato River Case), Constitutional Court of Colombia (2016), translated by and available at Dignity Rights Project.
[14] *Id.*, at 17.
[15] *Id*. at 43.

diversity, and protection of the environment and natural resources.[16] He argued that these Constitutional principles 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.[17] Alluding to rights-of-rivers movements circulating globally, Judge Palacio noted the spiritual importance of natural resources and the environment for many cultures. He argued that the cultural, economic, social, and environmental rights recognized in the Constitution combined to form a set of biocultural rights.

Judge Palacio based his decision to give the Atrato River legal personhood status on this concept of biocultural rights. This concept emphasizes that the rights of peoples and nature are inextricably linked.[18] Consequently, Judge Palacio argued that such rights should prevent (or proactively control) environmental destruction and should support conservation, restoration, and sustainable development.[19]

Citing the precedent established by New Zealand's rights of nature laws, the Court issued orders to implement provisions that, not coincidentally, mirror almost exactly the key provisions in New Zealand's Te Awa Tupua Act (i.e., the key components of Model 2 described in the Introduction and Table 1). Below are key excerpts from the court ruling that pertain to the mandated guardianship arrangement. Throughout the text, the court repeated the theme of interconnectivity and necessity of preserving biodiversity, "beyond the human scenario" and therefore that "justice for nature" must be protected in terms of its status as a protected being with rights.[20]

Until these guardians were in place, the national and local governments charged with protecting the environment had not approached their actions holistically, and the River's degradation had revealed these gaps in protection. Therefore, the court directed more attention to the "profound relationship between biological and cultural diversity."[21] Public policy that is focused on the preservation of the entire ecosystem and cultivation of biodiversity could create a stable and healthy environment. The River's entire ecosystem is "a living entity composed of other multiple forms of life and cultural representations."[22] The State and society must "enter into relationships with them [the components of the ecosystem] in fair and equitable terms, leaving aside any concept that is limited to the simply utilitarian, economic, or efficient [310]."[23]

> **9.32.** To that extent, considering the scope of protection of international treaties signed by Colombia in the field of environmental protection, the Ecological Constitution and biocultural rights [314] (sections 5.11 to 5.18), which preach the joint and interdependent protection be human with nature and its resources, is that the Court will declare that the

[16] *Id*., at 21. Other court sentences cited as providing a foundation for this ruling include T-426 1992; T-505 1992; SU-747 1998; C-1064 2001.
[17] *Id.,* at 26, 28.
[18] *Id.,* at 35-36.
[19] *Id*., at 36.
[20] *Id*. at 99.
[21] *Id.* at 100.
[22] *Id.* at 98.
[23] *Id.*

> Atrato River is subject to rights that imply its protection, conservation, maintenance and, in the specific case, restoration. **For the effective fulfillment of this declaration, the Court will arrange for the Colombian State to exercise legal guardianship and representation of the rights of the river in conjunction with the ethnic communities that inhabit the Atrato River Basin in Chocó; in this way, the Atrato River and its basin - henceforth - will be represented by a member of the plaintiff communities and a delegate of the Colombian State**. [315] Additionally, and with the purpose of ensuring the protection, recovery and due conservation of the river, both parties must design and set up a commission of Atrato River guardians whose integration and members will be developed in the section of orders to proffer in this ruling. [emphasis added].

Recognizing that the ecosystem is not siloed from human existence, the court emphasized the special relationships between the natural environment and the indigenous, tribal and Afro-Colombian peoples that are co-dependent. Therefore, these peoples do not assert dominion over the environment. This unifying character should be respected when addressing the preservation of not only of its physical existence but also the culture associated with the ecosystem.

After such lengthy discussion of the individual, living character of the River's ecosystem, the court could only find that the mining companies and the state entity defendants had "violated the fundamental rights to the territory and culture of the ethnic communities [which encompasses] the rights to life, health, water, food security, a healthy environment"[24] To enable a holistic, long-term vision for sustainability, the court opined that it is "imperative to strengthen a constitutional pedagogy that favors the values of biological diversity and cultural heterogeneity, with the aim of mobilizing towards a new human rationality based on the protection and respect of nature as an expression of evolution and civilization. [327]"[25] To this end, the court ordered:

> **10.2.**
> **1.-** The Atrato River, its basin and tributaries will be recognized as an **entity subject to rights of protection, conservation, maintenance and restoration** by the State and ethnic communities, as indicated in the motivating part of this provision in the Sections 9.27 to 9.32. [emphasis added]
>
> Consequently, **the Court will order the national government to exercise legal guardianship and representation of the rights of the river** (through the institution designated by the President of the Republic, which could be the Ministry of the Environment) together with the ethnic communities that inhabit the basin of the Atrato River in Chocó; **in this way, the Atrato River and its basin - henceforth - will be represented by a member of the (plaintiffs) and a delegate of the Colombian Government, who will be the guardians of the river.** For this purpose, the Government, headed by the President of the Republic, must make the appointment of its representative within the month following the notification of this ruling. In that same period of time, the active communities must choose their representative.

[24] *Id*. at 103-104.
[25] *Id*. at 106.

> Additionally, and with the purpose of ensuring the protection, recovery and due conservation of the river, the legal representatives of the same shall design and conform, within three (3) months following the notification of this order, a **commission of guardians of the Atrato River**, integrated by the two appointed guardians and an advisory team integrated by invitation of the Humboldt Institute and WWF Colombia, who have developed the Bita River protection project in Vichada [337] **who therefore, have the necessary experience to guide the actions to take**. This advisory team can be formed and receive support from all public and private entities, universities (regional and national), research centers on natural resources and environmental organizations (national and international), community and civil society wishing to join the protection project of the Atrato River and its basin. [emphasis added]
>
> Notwithstanding the foregoing, the **panel of experts** that will be responsible for verifying compliance with the orders of this Judgement (number 8) may also supervise, accompany and advise the work of the Atrato river guardians.

The remainder of the orders relate to the functioning of the oversight (including monitoring of precise indicators) and restoration of the River's ecosystem. The plans contemplated participation of the ethnic communities to honor their relationship, knowledge of, and reliance on the environment for their way of life. Recognizing the time-sensitiveness of restoration, the court ordered:

> the Office of the Attorney General to convene within three (3) months after the notification of this ruling a **panel of experts** [342] to advise on the follow-up and execution process -according to its experience in the specific topics-, always with the participation of the plaintiff communities, in order to establish timelines, goals and indicators of compliance necessary for the effective implementation of the orders here stated.[26]

In July 2017, Colombia's President appointed the Ministry of Environment as the government's designee to the Guardian Council for the Atrato River, and the Council was formed in May 2018. The Guardian Council also contains 14 community members from the Chocó region, including seven permanent members and seven replacements. These guardians were chosen based on their leadership in the organizations involved in the court ruling in the Chocó region. Five committees representing appropriate government institutions were created to coordinate and implement policies relating to the river, including decontamination under the Ministry of Environment; eradication of illicit mining under the Ministry of Defense; food security under the Ministry of Housing; and toxicology and epidemiology studies under the Ministry of Health. Colonel Juan Francisco Pelaez of Colombia's Anti-Illicit Mining Unit said that the constitutional decision to give rights to the Atrato River has improved his coordination with the military and the treasury. He also noted that the structural changes provide institutional solutions to these complex problems.[27] Interviews with the communities and Guardians has

[26] *Id.* at 112.

[27] *El Coronel que Protégé al Rio Atrato*, LA SEMANA, December 15, 2017.

indicated that the court's decision was well-received although delays in implementation and the lack of funding resources has slowed action.[28]

4.5 Guardianship Model 2c: India's Ganga and Yamuna Rivers

On March 20, 2017, the Uttarakhand High Court 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 [the] river[s] Ganga and Yamuna."[29] Based on these rights, the Court ordered government agencies to take specific actions to "promote the health and wellbeing of these rivers."

The 2017 Uttarakhand High Court ruling came 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. The latest attempt to restore the Ganga is Namami Gange ("Obeisance to Ganga" in Sanskrit), an initiative launched in 2014 by the Hindu nationalist government led by the Bharatiya Janata Party.

The Uttarakhand High Court ruling is interesting in many ways. From a procedural perspective, the original lawsuit never asked to declare the rivers legal persons; the judges took this step unilaterally. The process leading to the Court'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. Frustrated by the lack of action, in 2014 Salim filed a public interest lawsuit with the Uttarakhand High Court to stop the construction and mining, to have the encroachments removed, and to address the high levels of pollution in the Ganga and its tributaries.[30] 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, leading the Court to recognize the rivers as legal persons with rights. In justifying this extraordinary step, the Court noted: "The extraordinary situation has arisen since [the] Rivers Ganga and Yamuna are losing their very existence. This situation requires extraordinary measures to be taken to preserve and conserve [the] Rivers Ganga and Yamuna."

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[28] Roncucci, Regine, *Rights of Nature and the pursuit of environmental justice in the Atrato case* (Wageningen University & Research, July 2019) at 72.

[29] Salim v. State of Uttarakhand, Writ Petition (PIL) No.126 of 2014, (High Court of Uttarakhand at Nainital March 20) (India), 11.

[30] State of Uttarakhand & Ors v. Mohd Salim & Ors., Special leave petition submitted to the Supreme Court of India Civil Appellate Jurisdiction against the judgement and final order dated March 20, 2017 in Writ Petition No. 126 of 2014, passed by the Honorable High Court of Uttarakhand at Naintal, 2017.

The Court cited as precedent the New Zealand government's awarding of legal personhood status to the Whanganui River. Consequently, the institutionalization of rights of nature is similar to that in New Zealand (generally following Model 2). However, there are some important differences in regard to guardianship stemming from the legal doctrine invoked to justify appointing guardians.

After establishing the rivers as legal persons whose wellbeing is threatened due to neglect, the Court invoked the legal doctrine of *in loco parentis* (Latin for "in the place of a parent") to make a set of government bodies and officers responsible for acting on behalf of the rivers for their protection and conservation. Courts commonly use this legal principle to appoint guardians for children or incapacitated people who cannot defend themselves. Adopting the same logic, the Court appointed Uttarakhand's Chief Secretary, the Advocate General of Uttarakhand, and the Director of Namami Gange, the central government initiative to clean up the river, as guardians. Excerpts of the ruling regarding guardianship are provided below.

Salim v. State of Uttarakhand
Writ Petition (PIL) No.126 of 2014
High Court of Uttarakhand at Nainital (India)
March 20, 2017

[…]

18. The constitution of Ganga Management Board is necessary for the purpose of irrigation, rural and urban water supply, hydro power generation, navigation, industries. There is utmost expediency to give legal status as a living person/legal entity to Rivers Ganga and Yamuna r/w Articles 48-A and 51A(g) of the Constitution of India.

19. Accordingly, while exercising the parens patriae jurisdiction, 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 the rivers Ganga and Yamuna. The Director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand are hereby declared *persons in loco parentis* as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries. These Officers are bound to uphold the status of Rivers Ganges and Yamuna and also to promote the health and well being of these rivers.

20. The Advocate General shall represent at all legal proceedings to protect the interest of Rivers Ganges and Yamuna.

21. The presence of the Secretary, Ministry of Water Resources, River Development & Ganga Rejuvination is dispensed with.

[…]

It is worth noting that, despite invoking the New Zealand example, the Uttarakhand High Court ruling lacks several important features of the New Zealand model. First, rather than having local stakeholder groups in the watersheds nominate guardians to protect the rivers, the court appointed state officials to serve as guardians, following the usual procedure *when in loco parentis* is invoked. Also, the ruling did not embed the guardianship body within a multi-stakeholder, collaborative, integrated watershed management body. These differences have undermined efforts to protect the rights of rivers in India compared to New Zealand and Colombia.

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 Uttarakhand High Court ruling. In other words, the entities appointed by the court 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 ruling given in the petition provides insight into the source of concern among Uttarakhand authorities, with important considerations for structuring guardianship arrangements. These objections are presented in the excerpts below.

State of Uttarakhand & Ors v. Mohd Salim & Ors.
Special Leave Petition
Supreme Court of India
2017

> It is respectfully submitted that the Hon'ble High Court has erred in passing the impugned order in a writ petition which was disposed of on 05.12.2016. That the High Court, while hearing the matter for compliance of its earlier order dated 05.12.2016 with respect to the constitution of the Ganga Management Board and removal of illegal encroachment done by the respondent no. 2 and 3, has passed the impugned order and, declaring the Rivers Ganga and Yumna as living entities, further went on to appoint Director NAMAMI Gange, the Chief Secretary of the State Of Uttarakhand and Advocate General of the State of Uttarakhand *persons in loco parentis* as the human face to protect, conserve and preserve the Rivers Ganga and Yamuna and their tributaries. These officers are bound to uphold the status of Rivers Ganges and Yamuna and also to promote the health and well being of these rivers. Further, the High Court has directed that the Advocate General shall represent at all legal proceedings to protect the interest of the Rivers Ganga and Yamuna.
>
> That it is respectfully submitted that in view of the para 19 of the impugned order passed by the Hon'ble High Court, the River Ganga, Yamuna and their assistant tributaries which are flowing naturally are all declared as legal persons/ and living entities. Hence, in that view all rights, duties and responsibilities of a legal person are now made available to the Ganga and Yamuna so that proper preservation and efficacious protection be made available to these rivers. Hence, if the provisions of the para 19 of the impugned order dated 20.03.2017 is to be implemented in its true spirits in the state of Uttarakhand, then the following will be the resultant effect/legal repercussions;

1. Ganga and Yamuna are inter-state rivers and these rivers flow in different states. As per the provisions under item no. 56 of the union list of the 7th Schedule (Article 246) of the Constitution, it is the sole constituent right of the Union Government to frame out the rule for efficacious management of all the inter-state rivers. Hence, having resultant effect to others states as to whether the state of Uttarakhand High Court can declare the river Ganga and Yamuna as a legal person/living entity or not?

    (i) It is in respect of these two inter-state rivers, the Director, Namami Gange, Government of India, Chief Secretary State of Uttarakhand and the Advocate General of the State are all declared as *persons in loco parentis*. Hence, in view of the aforesaid light, if there arises any dispute in respect to any kind of different illegalities being committed in other states, then as to whether the Chief Secretary may pass any instruction against any other States or Union of India or not?

    (ii) It is because; Ganga and Yamuna rivers are now declared as legal persons/living entities. Hence, in case of the coming of a flood vis-a-vis someone dying in these rivers due to such flood, then as to whether the effective party can file suit for damages against the Chief Secretary of the State and as to whether the State Government is liable to bear such financial burden?

    (iii) The two rivers and all tributaries mixing in these rivers belong to one State is now declared as a legal unit. Hence, for seeking declaration of all other different rivers and their tributaries lying on all other different states as legal persons/living entities, whether it is possible to file separate court case/litigation?

    (iv) Whether in view of the previous direction of the National Green Tribunal, it is for removal of the illegal encroachment/construction within 200 meters from the bank of the aforesaid two rivers, it is the duty of the Chief Secretary to submit the case before the court of law?

    (v) Whether in case of floods and resultant effect of human casualties vis-a-vis in case of encroachment of the river bank area; court cases can only be filed in the name of Chief Secretary, State of Uttarakhand?

    That it is respectfully submitted that the State Government feeling aggrieved by the order dated 05.12.2016 passed by the High Court has preferred Special Leave Petition No. CC 8202-8203/2017, which was listed on 05.05.2017 when this Hon'ble Court has been pleased to issue notice and stayed the order dated 05.12.2016. Hence the present Special Leave Petition."

* * *

In July 2017, India's Supreme Court agreed to hear the petition and temporarily stayed the Uttarakhand High Court ruling until the Supreme Court issues its decision. No decision had been issued at the time of writing February 2020).

Guardianship in India's Court Ruling on Rights of the Animal Kingdom

The following matter is being presented as a contrast to the above rights-of-nature given to a resource rather than, as here, to a class of sentient beings. The same underlying guardianship theory was applied. Readers are encouraged to examine the differences both between the covered entities and the guardianship enforcement provisions in the two cases.

On April 7, 2018, the Uttarakhand High Court issued another ruling recognizing the rights of nature in regard to a separate writ petition, this one protesting the abuse of horses used to transport cargo from Nepal to India. In this ruling the Court recognized rights for the entire animal kingdom. Like its ruling for the Ganga and Yamuna rivers, the Court recognized all members of the animal kingdom as legal entities with all the rights, duties, and liabilities of a legal person. However, this judgement mandated a different guardianship arrangement than that proposed in its disputed ruling for the Ganga and Yamuna Rivers. The excerpt on guardianship follows.

Narayan Dutt Bhatt v. Union of India & Others
Uttarakhand High Court
Writ Petition No. 43 of 2014.

[…]

99. Accordingly, the writ petition is disposed of by issuing the following mandatory directions:-

> A. The entire animal kingdom, including avian and aquatic, are declared as legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person. All the citizens throughout the State of Uttarakhand are hereby declared persons in loco parentis as the human face for the welfare/protection of animals . . .

* * *

It is worth noting that the Uttarakhand High Court again invoked the doctrine of *in loco parentis* to order Court-appointed guardians for the entire animal kingdom, rather than having guardians be voluntarily nominated by different stakeholder groups. However, rather than appointing state officials, the court appointed all citizens as guardians, somewhat similar to the model used in Ecuador. This choice makes sense given the previous experience with state officials rejecting their status as guardians, and the collective-action problem inherent in naming all citizens as guardians (described above in regard to Ecuador's guardianship arrangement). It may be that the Court saw this collective-action problem as an advantage in this case, since it would reduce the likelihood that the appointed guardians would appeal the ruling. Since

everyone is a guardian, the obligation to speak for nature is broadly diffused, reducing individual accountability and thus the incentive of individual citizens to appeal the ruling.

4.6 Conclusion

The above case studies show how guardianship arrangements in existing rights of nature legal provisions can be categorized into two models. In the first, anyone can speak for nature, but no one is specifically obligated to do so. In the second, specific guardians are appointed and obligated to represent and advocate for nature's rights, often within legal and policy arenas. The first guardianship model tends to be used when rights-bearing nature is defined broadly (e.g., all of nature or the entire animal kingdom). The second model is typically used when rights are recognized for particular ecosystems.

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

Discussion Questions

1. "Who speaks for the trees" is the famous question on environmental representation posed first in *The Lorax*. The legal community has long grappled with answering question to determine who best represents nature in the courts and otherwise. Which of the guardianship models above do you think provides the best representation for nature? How would you improve upon either model? What are their biggest shortcomings? Do you think that a governmental body can represent nature as a neutral party? What about an environmental organization—or do they have inherent bias?

2. Do you think there should be objective qualifications to serve as a legal guardian of nature? Such qualifications could be professional (e.g., level of education and years of experience), based upon an affiliation with a particular community or people (e.g., indigenous peoples that live within the boundaries of a particular ecosystem), or of any other sort. Or do you think it is better than anybody can serve as a legal guardian? Or for legal guardians to be appointed on a case-by-case basis with rough guidelines?

3. In the Atrato River case, the Court acknowledged the rights of the Atrato River based on biocultural rights, which recognize the importance of community stewardship over nature in accordance with customary laws. In turn, the Court reasoned that biocultural rights arise from recognized cultural, economic, social, and environmental rights. Did you agree

with the Court's reasoning? Could similar biocultural rights and, thus, the rights of nature be recognized in the United States, such as through tribal law and custom? (It may be helpful to refer back to the Minnesota Ojibwe Tribal rights to the land and water for wild rice cultivation discussed in 4.3.[31])

4. Should legal guardians be appointed to represent particular ecosystems? How does this change if all ecosystems are recognized as having rights? What are the pros and cons of a system of guardianship based upon political boundaries, such as a city, county, or state?
5. As a purely theoretical exercise: Do you think legal guardians of nature should also have legal duties to their charges and should be brought into court when such legal duties are violated – in a similar fashion as parents as guardians of their children can face charges of neglect? What duties would natural entities, such as rivers, even have? Could they be similar to those duties that humans have towards each other as in torts for example? Under this rights-of-nature approach, could you sue a river for a flood that destroyed your house? Why or why not?

[31] See, Enbridge Line 3 Water Quality Permitting Resolution 4-1-2019, (White Earth Reservation Business Committee). "the reservation of sovereign rights is an important part of our ongoing struggle to preserve a culture that is best understood in terms of our relationship with the natural environment and that there is no economic framework that can properly define the value of manoomin [wild rice] to the Ojibwe people because manoomin is central to Ojibwe cultural identity, spiritual traditions, and physical well-being and serves as an important indicator species to the ecology of Minnesota's lakes and rivers and provides critical food and habitat to both endemic and migratory species"