The Politics of Rights of Nature

Strategies for Building a More Sustainable Future

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THE EVOLUTION OF THE LEGAL PERSONHOOD MODEL THROUGH THE COURTS

Between 2016 and 2020, a number of courts issued rulings recognizing the rights of rivers and lakes in Bangladesh (all rivers); Colombia (the Atrato, Cauca, Cocora, Coello, Combeima, La Plata, Magdalena, and Quindio Rivers, and Tota Lake); and India (the Ganga, or Ganges, and Yamuna Rivers and Sukhna Lake). What makes these rights of Nature (RoN) legal provisions different from the others mentioned so far in this book is that Bangladesh, Colombia, and India do not recognize rights for these ecosystems in their constitutions, national laws, or subnational laws.[1] Rather, judges in these three countries issued rulings recognizing the rivers and lakes as legal persons, moving them from "right-less to rights-bearing" entities (Margil 2017, 27).

This chapter examines court rulings recognizing the rights of the Atrato River in Colombia and the Ganga and Yamuna Rivers in India, and specifically the unique institutional structures mandated to protect those rights.[2] These cases provide a valuable lens for analyzing the politics of implementing Earth jurisprudence for three reasons. First, these cases show the diffusion of the legal personhood model pioneered in New Zealand, and also show how the model evolved as it was adapted to fit varying unique conditions. Second, the cases show how RoN jurisprudence is evolving as a result of this experimentation, with an emphasis on the role of judicial interpretation. In this way the chapter builds on

our analysis of how judges are shaping RoN normative development in Ecuador (see chapter 4).

Third, the chapter shows the interaction between the domestic and international levels in RoN norm construction. The Colombian and Indian cases illustrate how the RoN norm now circulating globally as a result of the networks described in chapter 2 are being institutionalized through court rulings even in countries that lack laws explicitly recognizing RoN. Moreover, our case comparisons illustrate the domestic effects of the transnational diffusion of RoN laws. Specifically, they show how judges strategically interpret existing constitutional provisions and other laws that do not explicitly recognize RoN in order to justify court orders that establish natural ecosystems like rivers as legal persons with rights. By linking RoN to established legal principles, judges cause RoN jurisprudence to evolve in ways that can be unexpected and at times unwelcome by some RoN advocates, fueling normative contestation surrounding it at the international level. Consequently, this chapter highlights the key role of judges in strengthening RoN jurisprudence, the expanding set of legal doctrines being used to support RoN worldwide, and the impact on norm contestation internationally.

The Colombian and Indian judges justified 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, citing other countries' RoN laws as precedent (Corte Constitucional de Colombia 2016; *Times of India* 2017). In addition to analyzing the evolution of RoN jurisprudence, we show how RoN legal provisions are being combined with new governance structures designed to implement more ecocentric 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 well-being. In this way they follow the legal personhood model discussed in chapters 1 and 6.

The institutionalization of RoN in Colombia and India is largely based on New Zealand's pioneering model. In addition to establishing the Whanganui River as a legal person, New Zealand's 2017 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 model, Colombia follows it more closely than does India, in part due to the distinct legal doctrines invoked. Colombia's court ruling not only created a guardian body comprised of state and civil society representatives but also restructured government entities and created a new oversight commission to protect and preserve the Atrato River. By contrast, India's court 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. As we detail herein, these differences undermined implementation efforts and suggest challenges that have not been adequately addressed by RoN scholars. Our case comparisons highlight how judges' strategic use of existing legal doctrines to justify RoN can produce unintended complications during implementation. We address this phenomenon and offer some initial lessons learned in the final section of this chapter and in the book's Conclusion.

While the Colombian and Indian court rulings reflect a global movement to institutionalize RoN as a means for achieving ecologically 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 the emerging global norm 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 inherent in Earth jurisprudence that the law should not dominate Nature but rather be embedded within it.

This chapter shows the perverse outcomes that can occur when the concept of legal personhood for Nature is applied in a context divorced from Earth jurisprudence. In doing so it highlights the importance of distinguishing between RoN legal provisions and Earth jurisprudence (what some call a RoN approach), and the need to remember that RoN

legal provisions are not themselves the ultimate goal but merely a tool for achieving governance systems rooted in Earth jurisprudence.

The remainder of this chapter first summarizes the key features of New Zealand's law recognizing the rights of the Whanganui River, which provided a model for the Colombian and Indian court rulings on river rights. We then detail these 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 by strategically interpreting existing domestic law. 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.

NEW ZEALAND'S PIONEERING GUARDIANSHIP MODEL

New Zealand's Te Awa Tupua Act codifies the intrinsic values of the river ecosystem according to the Māori worldview, recognizing it as a legal person with rights, appointing guardians, and embedding the river (via its guardians) within a new governance institution tasked with managing the river in an integrated way that is consistent with Earth jurisprudence principles (New Zealand Parliamentary Counsel Office 2017). As part of this governance arrangement, the act creates an advisory group, Te Karewao, to provide technical and administrative support to the guardians. This system allows the river's interests and rights to be addressed proactively by incorporating them into watershed management decision-making processes. The law's legal personhood provision is important primarily for allowing the river to participate directly in these decision-making processes (via its guardians). This contrasts with the more reactive approach of the Nature's rights model, which enumerates unique RoN but requires defenders of Nature to voluntarily challenge violations through the courts.

New Zealand's recognition of river rights quickly gained international attention, in part due to the promotional efforts of the transnational RoN networks discussed in chapter 2.[3] In the following sections we show how judges in Colombia and India cited the Te Awa Tupua Act to justify recognizing RoN; they 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. Consequently, they had to adapt the model to distinct legal and sociopolitical environments, with varying outcomes that we analyze in the chapter summary.

RECOGNIZING RIGHTS FOR COLOMBIA'S ATRATO RIVER

In November 2016, Colombia's Constitutional Court declared the Atrato basin to be a legal person possessing the rights to "protection, conservation, maintenance, and restoration." While the Colombian Constitution does not explicitly recognize RoN, Judge Jorge Ivan Palacio ruled that it is part of a set of "biocultural rights" that may be inferred from guarantees in the constitution for biodiversity, cultural, and humanitarian protections (Corte Constitucional de Colombia 2016).[4] The biocultural argument is unique in that it connects the special designation and rights of Colombian Indigenous and Afro-Colombian citizens, protections for the ecological diversity of the Chocó region, and the rights of the Atrato River, which flows through the region. Judge Palacio argued that the rights of people living in the Chocó region are intertwined with the rights of the Atrato River, thus necessitating both biological and cultural rights.

THE BACKGROUND OF THE ATRATO RIVER CASE

Chocó constitutes 4 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 Ensenada de Utria, Los Katíos, and Tatamá National Parks. The Atrato River is located in a large valley and represents 60 percent of the Chocó region's area. Chocó is home to about 500,000 residents, of which 87 percent are of African descent, 10 percent are Indigenous, and 3 percent are mestizo. The population is organized into collective institutions, including six hundred Afro-Colombian organizations in seventy communities and 120 Indigenous organizations (Corte Constitucional de Colombia 2016). The communities that live along the Atrato River are agricultural, growing corn, rice, cacao,

coconuts, sugarcane, plantains, and other products. Fishing and artisanal mining are also traditional activities. Most communities are organized in campesino collectives and are subsistence communities, living off the river and the land.

Since the rise of armed conflict in the 1970s, community members face greater levels of violence, and many have been displaced. These threats are exacerbated by rich deposits of gold, platinum, and minerals in the river that are sought after by armed combatants. Despite such natural resource wealth, 49 percent of the region's citizens live in extreme poverty, and 83 percent do not meet the basic minimum needs for living (Corte Constitucional de Colombia).

While mining has been present in the Chocó region for centuries, current large-scale mining and illegal logging practices have severely impacted traditional ways of life for Afro-Colombians and Indigenous peoples. Illegal logging has changed the flow of the river, and mining has increased the level of toxic chemicals entering the river system. Logging has also caused sedimentation in the river, which threatens many species.

Chemicals used in illicit mining (among others, mercury and cyanide) have severely impacted the most vulnerable people in these societies, including children. A 2014 report documented thirty-four Indigenous child deaths and an increase in illnesses such as dengue, malaria, and dysentery (Defensoría del Pueblo Colombia 2014). Such public health crises coincide with an increase in large-scale illegal mining. A 2016 study shows that miners in the Chocó region are exposed to mercury levels far in excess of acceptable levels set by the World Health Organization (Corte Constitucional de Colombia 2016; Rojas and Montes 2016). According to Mercury Watch, Colombia emits 180 tons of mercury due to gold extraction each year (Godoy 2014). Because mercury is the most toxic nonradioactive substance in Nature, the health impacts on Chocó's communities are significant (Olivero 2016). By the beginning of the twenty-first century, 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 with the community in Chocó to create sustainable mining practices. Nevertheless, in 2014

the Defensoría del Pueblo declared a state of human and environmental emergency in Chocó. The agency noted with alarm that neither national nor local government agencies had taken action to confront the serious situation threatening the Atrato River, its tributaries, the forest, and the people dependent on them.

In light of these grave circumstances, an intergovernmental panel, the Interinstitutional Mining Working Group, was formed in 2014. But Chocó residents complained that the intergovernmental panel did not meet and was not effective. Frustrated with the government's failure to take action, community organizations filed a motion for protection in the Administrative Tribunal of Cundinamarca in January 2015. The plaintiffs included the Center for the Study of Social Justice "Tierra Digna," representing the Association of Community Councils of Bajo Atrato; the Community Council of the Integral Campesino Association of Atrato; the Community Council of Campesinos of Alto Atrato; and the Inter-Ethnic Forum of Chocó Solidarity.

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. The tribunal ordered the interinstitutional working group formed in 2013–2014 to meet and create sustainable mining practices and policies. Frustrated with the lack of progress, the plaintiffs brought their case to the Sixth Circuit Constitutional Court for review in November 2016 (Corte Constitucional de Colombia 2016).

JUDGES JUSTIFYING RIGHTS FOR THE ATRATO RIVER

Colombia's Constitutional Court ruled in favor of the Chocó residents. Citing the precedent established by New Zealand's RoN 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. These orders include the following provisions:

1. The court recognized the Atrato River as a legal person with rights to protection, conservation, maintenance, and restoration by the state and ethnic communities.

2. The court ordered the creation, within three months, of a guardian body—the Commission of the Guardians of Atrato River. The commission should include two designated guardians as well as an evaluation team from the Humboldt Institute and World Wide Fund for Nature–Colombia (WWF Colombia).
3. The court ordered that a panel of experts convene to assist the guardians. Their role is that of auditors to verify that the work to restore the Atrato River is completed, to accompany the guardians, and to supervise such work. This is similar to the role of Te Karewao in New Zealand's Te Awa Tupua Act.
4. The court embedded the above RoN legal provisions within an integrated watershed management governance body. It ordered the Ministries of Defense, Environment, and Housing; the departmental governments of Antioquia and Chocó, the Humboldt Institute, the Pacific Environmental Research Institute, the Universities of Antioquia and Cartagena, WWF Colombia, and other organizations linked to local ethnic communities to collectively implement an integrated watershed management plan to clean the Atrato River and its tributaries. The plan must: (1) reestablish the river channels, (2) eliminate mining activities, and (3) reforest affected areas. (Corte Constitucional de Colombia 2016)

In addition, the court ordered the Ministry of Defense, the National Police—Unit against Illegal Mining, the National Army of Colombia, the General Prosecutor's Office of the Nation, the governors of Chocó and Antioquia and the related municipalities to eradicate illegal mining in the Atrato River. It also ordered the Ministries of Agriculture, Housing, and Interior; the Departments of National Planning and Social Prosperity; and the governors and municipalities of Chocó and Antioquia to create integrated action plans to restore traditional forms of subsistence farming and cleaner food sources. Finally, the court ordered the Ministry of Environment, the Ministry of Health, and the National Institute of Health—with the support of the Universities of Antioquia and Cartagena, the Pacific Environmental Research Institute, and WWF Colombia—to initiate epidemiology and toxicology studies to establish a baseline of environmental indicators for the region (Corte Constitucional de Colombia 2016).

How did the Constitutional Court justify this ruling, given that Colombia's constitution does not specifically recognize RoN? First, Judge Palacio invoked article 215 of the constitution, which allows the government to declare a "state of emergency" when there is "a grave or imminent" threat to "the economic, social, or ecological order of the country" (Corte Constitucional de Colombia 2016; Republic of Colombia 1991).

Judge Palacio also noted that the constitution recognizes special protection for Afro-Colombian and Indigenous ethnic groups, which are culturally distinct from the "dominant culture" (Corte Constitucional de Colombia 2016). The ruling gave the Chocó region's ethnic and Indigenous organizations the authority to represent the collective will of the peoples of the Chocó region.

The judge then outlined 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. 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. Alluding to RoN and Earth jurisprudence norms 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" (Corte Constitucional de Colombia 2016).

Judge Palacio based his decision to give the Atrato River legal personhood status on this concept of biocultural rights, which emphasizes that the rights of peoples and Nature are inextricably linked. Consequently, he argued that such rights should prevent (or proactively control) environmental destruction and should support conservation, restoration, and sustainable development (Corte Constitucional de Colombia 2016).

The judge'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 an institutional framework not only for guardianship, but also for the integrated care of the peoples and ecosystems of

which they are a part (Corte Constitucional de Colombia 2016; see orders 3–4 above).

In addition to the constitutional provisions, Judge Palacio justified the ruling by citing Colombia's ratification of international treaties, including the Stockholm Convention (1972), the International Labor Organization's Convention 169 (1989) for prior informed consent to communities regarding activities in their territories, the United Nations (UN) Convention on Biological Diversity (1994), the UN Declaration on the Rights of Indigenous Peoples (2007), the American Declaration on the Rights of Indigenous Peoples (2016), and the UN Educational, Scientific and Cultural Organization's Convention for the Safeguarding of the Intangible Cultural Heritage (2003). Judge Palacio noted that these international laws and New Zealand's RoN laws contributed to the conception of biocultural rights in his decision. Moreover, he emphasized that his orders to restructure governance, including a guardianship body for the Atrato River, are meant to fulfill the UN's 2030 Agenda for Sustainable Development, which calls for a unified approach to social, economic, and environmental solutions and planning in states and includes universal access to water and health as one of its seventeen global objectives (Corte Constitucional de Colombia 2016).

CHALLENGES TO IMPLEMENTATION

The original plan for the guardianship body was to follow the example of New Zealand's Te Awa Tupua act, with one government representative and one community representative. In July 2017, Colombian president Juan Manuel Santos appointed the Ministry of Environment as the government's designee to the Guardian Council for the Atrato River. Civil society rejected the idea of just one community representative, saying they needed a whole community council to ensure the involvement of various community actors and enhance their capacity to take action (Mosquera 2020). This request was approved and fourteen community members from the Chocó region were selected to serve on the Guardian Council, chosen based on their leadership in the organizations involved in the court ruling (Silva Numa 2017). The council itself was formed in May 2018 (Becerra 2018). Five committees representing appropriate government institutions

were created to coordinate and implement policies relating to the river, including decontamination (Ministry of Environment); eradication of illicit mining (Ministry of Defense); food security (Ministry of Housing); and toxicology and epidemiology studies (Ministry of Health; see *Semana* 2017b). Civil society members of the Guardian Council created three working groups to coordinate with various community stakeholders: the Roundtable of Indigenous Communities, the Environmental committee of Carmen del Atrato, and the Community Councils of Rio Quito (Mosquera 2020).

In the first 18 months of its existence, the Guardian Council focused on five types of actions: holding workshops and events to educate the public about the court ruling and the Guardian Council's work, engaging in advocacy to mobilize support, creating working groups to coordinate with the institutions responsible for implementing the court's orders, writing publications and creating culturally appropriate oral presentations, and developing action plans (Mosquera 2020). From the government's perspective, Colonel Juan Francisco Peláez of Colombia's Anti–Illegal Mining Unit says that the constitutional decision to give rights to the Atrato River has improved his coordination with the military and the treasury. He also notes that the structural changes provide institutional solutions to these complex problems (*Semana* 2017a).

Yet, implementation efforts face many challenges and change will not come over night. This area of the country is riddled with increasing tensions caused by members of the Armed Revolutionary Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, or FARC) and the National Liberation Army (Ejército de Liberación Nacional, or ELN) who seek more land from the community for illicit drug cultivation and illicit gold mining. Members of the Afro-Colombian and Indigenous communities that live in collectively protected territories fear reprisal for their support of the protection of the Atrato River. All fourteen guardians have asked for protection from the National Protection Unit, the state security organization charged with protecting human rights, but only three have received protected status (Ávila 2018). The guardians say that ELN, FARC, and other illicit actors blame them for stronger oversight in the region. In the first three months of 2018, forty-six social and environmental activists and leaders were murdered for protecting their communities and

Nature in Colombia; several were from the Atrato River region (*El Espectador* 2018). As noted in chapter 1, water protectors worldwide are regularly targeted, with 164 environmental activists killed in 2018 (Global Witness 2019).

Constitutional Court judges Jorge Ivan Palacio and Armando Tolosa Villabona recognize the conflict in these zones and the need to codify their protection (Palacio and Tolosa Villabona 2018). In a December 2017 interview, Judge Palacio explained his decision to give the Atrato River rights: "When the tutela [legal petition for protection] came to my office, I knew what path I should follow. Nature has a right not to be contaminated, not to be destroyed, to be used rationally" (quoted in *El Espectador* 2017). Palacio's decision recognizes that humans are part of Nature, a fundamental principle of Earth jurisprudence. According to the judge, the interdependency between humans and other elements of Nature 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" (quoted in *El Espectador* 2017).

The court ruling recognizing the rights of Colombia's Atrato River shows how normative underpinnings for RoN are diffusing globally and may be institutionalized even when laws explicitly recognizing such rights are absent. To do so, judges strategically interpret existing domestic laws in light of global RoN and Earth jurisprudence norms. This expands the range of legal doctrines being invoked worldwide to justify recognition of RoN. In Colombia's case, judges began developing jurisprudence that connects RoN and human rights through the concept of biocultural rights but framed RoN as necessary for meeting human environmental and cultural rights. This mirrors the evolution of RoN jurisprudence developing in Ecuadorian courts (see Chapter 4), and we will return to this topic in the book's Conclusion.

Moreover, this Colombian case shows how—despite the inevitable challenges of implementation—RoN legal provisions like legal personality and guardianship are given greater force through their incorporation into new governance structures designed to develop new solutions for the difficult and complex challenges of sustainable development in the face of extractive industries, illicit drug cultivation, and the aftermath of over fifty years of conflict in the region.

RECOGNIZING RIGHTS FOR INDIA'S GANGA AND YAMUNA RIVERS

On March 20, 2017, the High Court of Uttarakhand (HCU), in the Indian state of Uttarakhand issued a ruling declaring that "the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing . . . 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." Based on these rights, the court ordered government agencies to take specific actions to "promote the health and well-being of these rivers" (High Court of Uttarakhand at Nainital 2017a).

PUBLIC INTEREST LITIGATION TO RESTORE THE GANGA

The HCU's ruling provides another example of courts recognizing RoN in the absence of laws explicitly recognizing such rights. The state court's ability to issue such orders stems from a provision in the Constitution of India allowing public interest litigation. Public interest litigation was introduced in 1986, justified under article 32 of the constitution, as a way to give marginalized groups in society access to justice when the state fails to address problems of public interest (Bhuwania 2018). It allows any individual or nongovernmental organization to seek legal remedy from the courts when they can demonstrate that the public interest is at stake and the state has failed to take action. Notably, citizens do not have to be victims of a violation to bring public interest lawsuits. Moreover, a court may 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).

The 2017 HCU ruling came after decades of failed government programs designed to clean up the Ganga River, which 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 in 1985 with the Ganga Action Plan. The second was the National Ganga River Basin Authority's Clean Ganga Mission in 2009. 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 Bharatiya Janata Party government.

The process leading to the HCU's historic ruling began when Mohammed Salim, a man living in the village of Kuhlal, in Uttarakhand, complained to the 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 actors engaged in mining and stone crushing on land operated by the Uttarakhand 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 that 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 interstate 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 HCU 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 (High Court of Uttarakhand at Nainital 2017a). The lawsuit 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.

JUDGES JUSTIFYING RIGHTS FOR THE GANGA AND YAMUNA RIVERS

On March 20, 2017, the HCU issued its ruling, in which it ordered the Ganga and Yamuna Rivers to be treated as living entities with all the

rights and responsibilities of legal persons. Like the Atrato River case, 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 [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" (High Court of Uttarakhand at Nainital 2017a).

The court cited as precedent the New Zealand government's recognition of the Whanganui River as a legal person (*Times of India* 2017). Nevertheless, the HCU had to justify the ruling by interpreting domestic legal provisions. The judges noted that the Indian Supreme Court had "held that the concept 'Juristic Person' [i.e., legal personhood] arose out of necessities in human development—Recognition of an entity as [a] juristic person is for subserving the needs and faith of society." Additionally, the HCU cited previous Indian court rulings establishing that Hindu idols representing deities can have legal personhood status and can sue to protect their interests due to their spiritual role in subserving the needs and faith of the society. The court 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 recognition and the faith of society, Rivers Ganga and Yamuna are required to be declared as the legal persons/living persons" (High Court of Uttarakhand at Nainital 2017a).

The HCU 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 48A and 51A(g) of the Indian constitution (High Court of Uttarakhand at Nainital 2017a), which 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," respectively (Republic of India 1949).

After establishing the rivers as legal persons whose well-being is threatened due to neglect, the HCU 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 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 HCU appointed Uttarakhand's chief secretary, the advocate general of Uttarakhand, and the director of Namami Gange as guardians. Acting on behalf of the Ganga and Yamuna Rivers, these state bureaucrats are "bound to uphold the status" of the rivers, to "protect, conserve and preserve" them, and to promote their health and well-being. The advocate general of Uttarakhand is charged with representing the rivers at all legal proceedings (High Court of Uttarakhand at Nainital 2017a).

Finally, the HCU ruling ordered several steps to 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 riverbed and highest flood plain (High Court of Uttarakhand at Nainital 2017a).

The HCU ruling is similar in several respects to New Zealand's Te Awa Tupua Act. It recognizes the Ganga and Yamuna Rivers as living spiritual beings with legal personhood status, and provides for a guardian body to speak on behalf of the rivers. These provisions tend to receive the most attention by RoN scholars, as they provide the basic framework for RoN. But the HCU ruling lacks several features of the New Zealand model that are crucial to putting RoN into action. 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 the in loco parentis doctrine is invoked. More important, the ruling did not embed the guardianship body within a multi-stakeholder, collaborative, integrated watershed management body. Nor did it establish a set of Earth jurisprudence principles, based on the character of the rivers as integrated, living, spiritual beings, to guide decision making regarding river management. These differences have undermined efforts to protect the rights of rivers in India, compared to efforts in Colombia and New Zealand.

A LEGAL CHALLENGE TO THE HIGH COURT 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 HCU ruling (High Court of Uttarakhand at Nainital 2017b). In other words, the entities appointed by the HCU 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 HCU ruling given in the petition provides insight into the source of concern among the appointed guardians.

The primary complaint appears to be that Uttarakhand 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 living entity status to the two holy rivers Ganga and Yamuna." But, he added, "How can the chief secretary here be held accountable if the river is polluted in West Bengal, Bihar, Jharkhand or UP [Uttar Pradesh]?" (quoted in Singh and Jaiswal 2017).

In part, the complaint notes the problem of a legal provision recognizing the rights of an ecosystem that crosses subnational boundaries. But more important from the perspective of RoN 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 (High Court of Uttarakhand at Nainital 2017b).

This concern stems from the use of the in loco parentis doctrine. In conventional applications, such as with children, court-appointed "parents" do not simply speak for those in their charge; they are also responsible for what their wards do. Making guardians of natural ecosystems liable for damage done to humans in the course of regular ecosystem functioning is, of course, problematic. It contradicts the logic behind Earth jurisprudence by reproducing the problematic view of humans as controlling Nature and possessing greater authority than natural ecosystems, rather than viewing humans as one cog within the ecosystem. And it reverses the natural order of things by embedding Nature within human economic and governance systems rather than the other way around.

This dilemma has fueled normative debate internationally among RoN scholars and practitioners about how to conceptualize RoN and the desirability of using legal personhood status to protect ecosystems, a subject we will return to in the book's Conclusion. Nevertheless, this legal question of guardian liability must now be addressed due to the use of the in loco parentis doctrine to justify RoN legal provisions. In this way the HCU case illustrates the unintended consequences for RoN jurisprudence that arises from judges' strategic interpretation of existing laws to justify recognizing RoN.

The petition also cites several other objections related to jurisdictional issues resulting from the fact that the HCU ruling addresses river basins spanning multiple states (High Court of Uttarakhand at Nainital 2017b). Uttarakhand state authorities argue that the HCU 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 India's Supreme Court must answer if it chooses to uphold the HCU ruling.

India's Supreme Court agreed to hear the petition and temporarily stayed the HCU ruling until the Supreme Court issues its decision (Rautray 2017). No decision had been issued at the time of this writing in January 2021.

CHAPTER SUMMARY

The lawsuits producing court rulings recognizing rights for the Atrato, Ganga, and Yamuna Rivers were not spearheaded by RoN activists. These lawsuits sought to protect the rivers, but not by recognizing RoN. 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 2017 Te Awa Tupua Act as precedent, and their rulings replicated key elements of New Zealand's guardianship model (the legal personhood model described in chapter 1).

The judges in each case 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 act.

Despite citing international precedent, the judges rooted their decisions in domestic laws, even though these did not explicitly recognize RoN. 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 Chocó region are intertwined with the rights of the Atrato River, thus necessitating both biological and cultural rights. In India, HCU 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 HCU also cited constitutional provisions requiring the state to protect and improve the environment. Citing extreme neglect by the state, the court invoked the in loco parentis doctrine to appoint court-mandated guardians, much like a court might do in cases of child abuse.

While both drew on New Zealand's model, the Colombian and Indian rulings structure guardianship differently. Civil society and community groups play an influential role in the Atrato River'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, participation in the guardianship body is voluntary, with stakeholder organizations selecting the individuals to represent them. By contrast, the Ganga's guardianship body is comprised only of state representatives who were mandated to serve as "legal parents" by the court. This situation is problematic given the Indian government's poor record of protecting the river.

Attempts by the Ganga's legal guardians to overturn the HCU ruling reveal several dilemmas not previously contemplated by most RoN advocates.[5] What happens if guardians do not discharge their duties? Should there be an oversight system that penalizes negligent guardians? Until recently, people generally 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 that follow the legal personhood model.

A 2018 ruling by the HCU shows how the court's judges learned from the Ganga case and are experimenting with different ways to structure guardianship arrangements. On April 7, 2018, the HCU issued another ruling recognizing the RoN in regard to a separate writ petition, this one protesting the abuse of horses used to transport cargo from Nepal to India (High Court of Uttarakhand at Nainital 2018). 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 persons with all the rights, duties, and liabilities of a legal person. Yet this judgment mandated a different guardianship arrangement than that proposed in its disputed ruling for the Ganga and Yamuna Rivers.

Notably, the HCU 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. Instead of appointing state officials, the court appointed all citizens as guardians, somewhat similar to the Nature's rights 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. 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. By allowing anyone to speak for Nature rather than appointing specific guardians, the ruling resembles Ecuador's model, and shows how experimentation and adaptation is leading to the blending of the Nature's rights and legal personhood models.

Yet none of the Indian cases resolve a dilemma inherent in the legal personhood model: that legal personhood status extends human rights and liabilities to natural ecosystems. The idea that rivers could be held liable for damage caused through their natural cycles is something that has largely been ignored by RoN activists but is a topic at the center of the legal dispute in India. This is largely due to the legal doctrine used to appoint guardians of the rivers. The in loco parentis doctrine is regularly used to appoint "legal parents" to people who are incapable of caring for themselves and makes the guardians responsible for such people. It also forces them to assume any liabilities incurred by their charges. When applied to rivers, this may suggest that rivers' guardians may be liable for damages incurred to people and their property by the river. 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. We will consider this issue further in the Conclusion.

Finally, the case comparisons highlight the importance of combining guardianship with collaborative integrated management systems, an issue that chapter 6 addressed in detail. The legal provisions recognizing the Ganga and Whanganui Rivers as legal persons do not explicitly delineate a set of rights. Rather, they provide legal standing for 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 well-being. For this reason, a crucial aspect of the Colombian and New Zealand systems is the involvement of multiple sets of people from different backgrounds on formal bodies created to address issues relating to the rivers' well-being in an integrated fashion. As Ashish Kothari and Shrishtee Bajpai note, 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" (2017, 105). This kind of collaborative, integrated watershed management body was not part of the HCU order. But it could potentially be added "as the operational aspects of the order are worked out" via the Supreme Court's review (Kothari and Bajpai 2017, 105).

In the end, guardianship models are only as good as the power and resources given to them, and "the capacity and freedom to use those

powers in the particular legal, social, and economic context in which they operate" (O'Donnell 2019, 215). It remains to be seen whether Indian authorities can revise the guardianship arrangement in a way that resolves the dilemmas described in this chapter, and whether Colombia's guardians for the Atrato River can overcome the deep tensions of their region. Both will be necessary to create new pathways toward more sustainable development.