

LEGAL TRANSPLANTS AS SEEN IN THE COMPARATIVE ANALYSIS OF JUDICIAL DECISIONS ON THE ENVIRONMENTAL PERSONHOOD OF RIVERS

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ABSTRACT

The article seeks to foremost answer the question: how have courts in differing jurisdictions, in different major legal systems, geographic regions, different economic conditions and linguistic traditions addressed the question of the legal personhood of rivers? Following the dissent in the United States Supreme Court judgment in 1972, the past decade has seen an expansion of the legal personhood of rivers: in Ecuador in 2011, followed by a legislation passed in New Zealand in 2012, and judgments in Colombia, India and Bangladesh in 2016, 2017 and 2019 respectively have witnessed the emergence of a new transnational environmental jurisprudence regarding environmental legal personality, particularly in the context of rivers. Using the test case of environmental legal personality, the article examines how the act of comparison, and the use of method in comparative law is beneficial, particularly in environmental legal jurisprudence. In this context, the article first discusses the rationale in comparative law and how legal transplants operate: the transportation of legal norms across jurisdictions. This is followed by a discussion on how the method of comparing judicial decisions, or the cases-approach adds value to comparison. With this background, the article provides an overview of judicial developments in the United States, New Zealand, Ecuador, Colombia, India and Bangladesh on the legal personhood of rivers, with the motivation to uphold the rights of nature and promote the conservation of those rivers. The analysis of the judgments helps us observe this legal transplant in environmental law and gain a better understanding of how legal systems interact with each other.

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I. INTRODUCTION

This article aims to explore the evolution and expansion of environmental rights in multiple jurisdictions through a comparative analysis of judicial decisions. The article first intends to lay out the theory within comparative law as a discipline, especially regarding its application in environmental law, and the use of comparative law methods to discuss the why and how of the exercise in comparison, and how the study of judicial decisions is valuable as an exercise in comparative law. This is followed by a brief explanation of the method used in this particular article in keeping with the literature on comparative law research design. I will then discuss judgments, from the United States, New Zealand, Ecuador, India, Colombia, and Bangladesh. Since these judgments followed each other within a period of a decade, there is basis for inquiry regarding the extent of legal transplanted that has taken place in the expansion of the limits of legal personhood to include rivers, especially when one decision cites another from a foreign jurisdiction on the issue within the *obiter dictum*.

II. WHY COMPARE? THEORETICAL UNDERPINNINGS

The theory of comparative law is expansive in the ways in which it addresses its questions and employs its methods. The use of comparative law is in itself a method of legal analysis. There is some debate whether comparative law should be characterised as a method of legal research or as a perspective instead, which as Dr. Simone Glanert, Director of the Kent Centre for European and Comparative Law, describes as allowing “*for a relativization of the posited law, not unlike economic analysis or feminist theory*”.¹

Comparative law is criticised by scholars for being repetitive and sterile, and engaging in a superficial exercise of satisfying curiosity, similar to gathering information on sports trivia or philately, with evidently negative impressions of the discipline.² Comparatist scholars have defended

¹ S. Glanert, *Method?* in *Methods of Comparative Law*, 61, 62 (P.G. Monateri, 2012); See P. Legrand, *Beyond Method: Comparative Law as Perspective*, 36 *American Journal of Comparative Law* 788, 789 (1988).

² C. Valcke, *Comparative Law as Comparative Jurisprudence - The Comparability of Legal Systems*, 52 *The American Journal of Comparative Law* 713, 714-715 (2004).

comparative law reiterating its strength in the multiple purposes it can serve, and that it is misplaced to distil one single purpose for its deployment.³

Prof. Mark Van Hoecke, Professor of Comparative Law at Queen Mary University of London, has explained this multiplicity of purposes served by comparative law research, stating the aim and research questions of a project make space for the location of comparative law or lack thereof, such as if the aim is to harmonize law between countries (for example in the European Union) then, comparison is implied, and the approach to harmonisation will be determined by that act of comparison.⁴ The decision to compare the environmental personhood of rivers in multiple jurisdictions arose precisely owing to the judicial decision by a court in India, the legal system which I am qualified in, thus confirming Van Hoecke's aforementioned characterisation of comparative legal research.

My interest in this comparison was further informed by the potential of the cases discussed later in the article as not only relating to comparative environmental law, but also comparative constitutional law. From the vantage point of India, the expansion of rights, particularly towards the protection of the environment has been based in transformative interpretation of India's Constitution. It is relevant to explore to which extent that is the case in other jurisdictions or if other statutory or right-based mechanisms outside of constitutional environmental law can surface in the judicial decision-making on the topic. This is because constitutions can also offer a window into understanding those particular legal cultures. When constitutions are considered as "*phenomena of culture*", they transcend the borders of the instrumental paradigm, and take on symbolic value. Comparison is able to move from legal positivism to an understanding of how that culture as "*the collective ensemble of artefacts, practices, and spaces enmeshed in the production and dissemination of meanings and knowledges*" informs the

³ Ibid.

⁴ M.V. Hoecke, *Methodology of Comparative Legal Research*, Law and Method (2015), available at <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001>, last seen on 30/11/2020.

constitution and constitutional decision-making.⁵ This is especially relevant to environmental jurisprudence; in India we have a decade-long body of judicial decisions involving transformative constitutional interpretation to expand the right to life to include environmental rights, in a specific historic and social context, particularly following the events of the Bhopal gas disaster in 1984.

1. Transplants

An important invention in comparative legal studies: the legal transplant, is of particular relevance to the question of legal personhood of rivers. The late Scottish legal historian Alan Watson, one of the foremost scholars on legal transplants, describes transplants as “*the moving of a rule or a system of law from one country to another, of from one people to another*”.⁶ The study of transplants and how they are received includes comparing and understanding legal cultures, given that transplants and receptions have shaped the world’s legal systems.⁷

Legal transplants can be made for a variety of reasons, including imitation for the purpose of prestige, or for the purpose of imposition. There are legal cultures that seek to impose their systems and can succeed if they have the power to do so, as observed in the diffusion of legal systems by violent and invasive colonial regimes. However, diffusion based on force alone can be reversed when the force is removed. Another reason for transplantation can be the intention to appropriate the work of others owing to factors such as prestige.⁸ The study of transplants in the last few decades has progressed considerably, from simplistic notions such as that it often involves transmission from “*an advanced (parent) civil or common law system to a less developed one*”, to the possibility of modernising or addressing voids in local legislation.⁹

⁵ G. Frankenberg, *Comparative constitutional law*, in *The Cambridge Companion to Comparative Law* 171, 172-173 (M. Bussani & U. Mattei, 1st ed., 2012).

⁶ A. Watson, *Legal transplants* 21 (1st ed., 1974).

⁷ M. Graziadei, *Comparative Law as the Study of Transplants and Receptions*, 442 in *The Oxford Handbook of Comparative Law* (M. Reimann & R. Zimmermann, 2nd ed., 2006).

⁸ R. Sacco, *Legal formants: A dynamic approach to comparative law*, 39(2) *American Journal of Comparative Law* 343, 398 (1991).

⁹ W. Twining, *Globalisation And Legal Scholarship*, 51-52 (2009).

There is agreement in a certain section of comparative law scholars that the very study of comparative law is the study of legal transplants, and how rules transport themselves through different legal systems. However, this view has its limitations since often it adds no value to merely understand how rules are transplanted from one system to another unless one is aware of the historical and political events that have shaped the conditions that enabled such transplantation.¹⁰ In a secondary analysis of sorts relating to transplants by Prof. J.C. Hage, Chair of Jurisprudence at the Maastricht University Law School, it is important to study how both legal and non-legal factors lead to development of law, and whether these developments are aligned across the jurisdictions studied.¹¹ It is my understanding that coordinated efforts by local and indigenous communities on the question of rights of nature, across the jurisdictions studied in this article, coincided and possibly correlated with the development of judicial and then legislative development on the issue, which follows from Hage's thesis.¹²

III. COMPARATIVE LAW METHODS AND A FOCUS ON JUDICIAL DECISIONS

While there is a vast body of literature on the various methods within comparative law, this section focuses primarily on the use of the cases-approach. The next section uses the cases-approach for the purpose of comparing environmental personhood in multiple jurisdictions. Comparative lawyers are not only interested in foreign legal systems, but also in domestic law, developing skills and methods which have relevance in litigation, the potential of comparative work to be cited in judicial decisions, and its value in solving problems in case law.¹³ Issues in case law from other systems can deepen the understanding of the domestic problems and ways of solving them.¹⁴

¹⁰ W.B. Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat?*, 143 *University of Pennsylvania Law Review* 1889, 1938 (1995).

¹¹ J. Hage, *Comparative Law as Method and the Method of Comparative Law*, in *The Method and Culture of Comparative Law. Essays in Honour of Mark Van Hoecke* 37, 45 (M. Adams & D. Heirbaut, 1st ed., 2015).

¹² *Ibid*, at 52.

¹³ G. Samuel, *An Introduction to Comparative Law Theory and Method*, 17 (1st ed., 2014).

¹⁴ *Ibid*, at 19.

In this particular instance of comparing judgments, I would argue that the cases approach serves the larger functionalist method, given that the judgments studied are from the higher courts, all fulfilling similar if not identical functions of judicial decision-making on environmental legal issues and the rights of nature. Even if doctrinally different, the study of these functionally equivalent institutions enables a comparatist to observe litigation problems in a particular legal system and examine how different legal systems solve the same problem.¹⁵ However, to compare case law and legislation effectively, a knowledge of historic, social, economic and political context of the cases is essential.¹⁶

Van Hoecke's characterisation of the 'cases-approach' in comparative analysis as being deficient is that it is not an adequate way of showing differences and commonalities between entire legal systems, given that they offer only a pathology of that system. This critique is important to this article given that the cases analysed are usually limited to the Supreme Court and higher court decisions, and it is questionable as to what extent it provides the correct picture of a legal system.¹⁷ However, there is still value in using the cases approach because while it may not offer a complete picture of the legal system, the study of judicial decisions allow us to examine how rules work in practice, and how legal practitioners within that legal system interact with those rules.¹⁸

The value of the cases-approach is also evidenced by its use in the courtrooms, as judges conduct their own exercise in comparison by analysing how the problems have been resolved by other jurisdictions, particularly when there is a discernible relationship between courts, such as in the case of the Court of Justice of the European Union ("**CJEU**") or European Court of Human Rights ("**ECHR**") and domestic courts of the European Union ("**EU**") States. Gless and Martin found that when studying the CJEU and ECHR, "*courts are rather inclined to 'borrowing' legal discourse from another country and thus may join the 'global community of courts'*". The

¹⁵ Ibid, at 67.

¹⁶ Supra 4, at 7.

¹⁷ M.V. Hoecke, *Deep Level Comparative Law* 446 in *Epistemology and Methodology of Comparative Law* (M.V. Hoecke, 1st ed., 2004).

¹⁸ Ibid, at 447.

European Courts also use this method of choosing and enhancing when comparing the laws of their respective Member States.¹⁹

Sabino Cassese, Professor and Judge of the Constitutional Court of Italy, writes that there is extensive evidence of constitutional court judges resorting to comparison, and that constitutional courts do consider foreign judgements while drafting their decisions, especially when the Constitution itself allows for judges to take into consideration foreign law, as emphasised in section 39 of the South African Constitution. Moreover, national legal orders adhering to supranational regimes, as seen in cases of international legal orders being drafted into legislation, such as the issue of refugee rights, which ultimately paves way for a new global constitutional order. Globalised constitutionalism “*renders constitutional borders permeable and acts as a bridge, encouraging local courts to look beyond national borders*”, and there is value in courts citing foreign courts, and developing the cases-approach of comparison in their judgments.²⁰

However, there is opposition to this approach by some judges using the argument of legitimacy, with critics asserting that borrowing foreign law may not be democratic, and insisting on “*legal particularism*,” an argument which has been put forth in the United States as well. Cassese points out the inherent nativist superiority in this thinking by stating that “*where those who oppose the use of foreign law by American courts do not, to my knowledge, also oppose the use of US law by foreign courts*”.²¹ Courts making reference to foreign laws and decisions is not so much a surrender of sovereignty as much as engaging in a discussion of what legal developments outside of the immediate context have preceded the case at hand.²² The judge uses the decisions for persuasive value just as much as a lawyer would in arguing before the judge.

The research design for this brief analysis of judicial decisions on the environmental personhood of rivers in the United States, New Zealand,

¹⁹ S. Gless & J. Martin, *The comparative method in European Courts: A comparison between the CJEU and ECtHR?*, 1(1) Bergen Journal of Criminal Law & Criminal Justice 36, 36-37 (2013).

²⁰ S. Cassese, *Legal Comparison by the Courts*, 9(1) Revista Jurídica Piélagus 21, 22 (2010).

²¹ *Ibid*, at 24-25.

²² *Ibid*.

Ecuador, India, Colombia and Bangladesh is based on the fundamental question: how have courts in differing jurisdictions (in different legal systems and geographic regions, different economic conditions and in two different linguistic traditions) addressed the question of the legal personhood of rivers.

Although comparative law uses multiple epistemological approaches, this article uses the functionalist method. Since courts provide similar decision-making functions in these countries, the article examines how these courts have granted or recognized the legal personhood of rivers, and through that, more generally of environmental persons.²³

In studying the requisite case laws, this article presumes that the judgments do not offer an accurate or comprehensive overview of the living law of that society.²⁴ For an extended research design of this topic, a greater study using methods in legal history, sociology and anthropology regarding the relationship between societies and individual persons with their ecosystems, and the recognition of rights including customary norms and indigenous practices is required. This article aims to provide merely an introduction to the possibilities of that comparison.

IV. COMPARING JUDGMENTS ON THE LEGAL PERSONHOOD OF RIVERS

The evolution of environmental law as a distinct discipline of legal research, and the study of how the environment is protected through judicial process is a relatively recent development from the 1960s onward. An on-going quandary in environmental law is how the environment can be best represented before the courts, and how nature can be protected for its own sake, beyond the anthropocentric use and consumption of it. Understanding environmental harm beyond the limited extent to which it harms humans, is crucial to the protection of the environment in law, incentivising the expansion of the rights of nature from an environmental

²³ E.L. O'Donnell & J. Talbot-Jones, *Creating legal rights for rivers: lessons from Australia, New Zealand, and India*, 23(1) *Ecology and Society* (2018), available at <https://doi.org/10.5751/ES-09854-230107>, last seen on 30/11/2020.

²⁴ *Supra* 4, at 17-18.

protection perspective. This is also because, in not accounting for environmental harm beyond the damage caused to humans or legal persons such as corporations, the law ignores and externalises the costs of that harm, making limited rights of nature an inefficient method of protecting nature.

The concept of personhood has greatly evolved over the years; Aristotle's conception was that while women or slaves were nominally human, and without souls, they did not possess legal personhood and the rights that accompanied being a full legal person in Athenian society. Roman law, derived from the Greek antecedents, distinguished between persons and property; however, with there being further distinction in the latter with the gradation of slaves, and creating a context where persons could shift from the status of person to property in case of conquered slaves, for instance.²⁵ As canon law evolved, the expansion of rights to women, and the emancipation of slaves illustrated the extents to which humans and persons were interchangeable. The rise of trade and the invention of the Corporation, and the State, and the Church, led to the widespread diffusion of the non-human legal person as an entity, with rights to sue, to enter into contracts and the State's rights to enforce the law.²⁶

However, this is only the trajectory of what we understand as the Western concept of a legal person. Indigenous philosophies have personified nature in a way that "*naturalize[s] the human person, bringing her into genealogical relations with particular lands*".²⁷ Several scholars have called for a shift from a binary system of legal personhood within nature which instead of granting personhood or lack thereof to natural entities, provides it for certain purposes or degrees in the interest of a particular legal goal. This has also been the case in company law and the law of trusts with respect to creating the corporate entities or trusts.²⁸

²⁵ D.J. Calverley, *Imagining a non-biological machine as a legal person*, 22(4) *AI & Society* 523, 525 (2008).

²⁶ *Ibid.*

²⁷ M. Tănașescu, *Rights of Nature, Legal Personality, and Indigenous Philosophies*, 9(3) *Transnational Environmental Law* 429, 453 (2020).

²⁸ L.C. Pecharroman, *Rights of Nature: Rivers That Can Stand in Court*, 7 *Resources* 1, 3 (2018).

Before proceeding to the judgments, I wish to provide some background from other jurisdictions as well. While several jurisdictions including Bolivia and Mexico have recognised the rights of nature in their legislation, along with separate body of jurisprudence on the rights of animals, this article limits itself to the recognition of the legal personality of rivers, as an illustration of how legal transplants can operate within domestic environmental law. New Zealand's recognition of the legal personality of the Whanganui River in 2012, while not contained in a court judgment, has been included in this set, as it emerged from an adjudicatory process, and has had tremendous effect in codifying the legal personality of the river through legislation. The following judgment by the United States Supreme Court in 1972, while did not ultimately decide in favour of granting environmental personhood to rivers, stands as an example of how norms be birthed through dissents within judgments as well.

1. United States

In *Sierra Club v. Morton*,²⁹ decided by the US Supreme Court in 1972, Justice William O. Douglas' dissenting opinion dealt with the issue of legal personhood of natural entities, for environmental conservation. The petitioner, Sierra Club was a membership-based corporation and sought a declaratory judgment and injunction to prevent the approval of extensive skiing development in the Sequoia National Forest. It was a public action, and the petitioner did not themselves face any harm/loss. The Court held that the petitioner lacked legal standing as they faced no irreparable injury. Justice William O. Douglas dissented from this view and stated that natural resources should have the ability to sue for their own protection, stating:

So, it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a

²⁹ *Sierra Club v. Morton*, 405 U.S. 727.

zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction...
(Emphasis added)

Justice Douglas’s dissent in *Sierra Club* in as early as 1972 recognised that individuals seeking environmental protection encounter difficulty, and the fact that regulatory agencies can be “*notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations*” such as the relationship between the Forest Service and the timber companies in this case.³⁰

It is clear, that the question of the legal personality of nature, ecosystems and in this case rivers, isn’t a radical new innovation, or an anomaly of jurisprudence.³¹ The dispersion of the normative idea of granting environmental legal personality has been long time in the making,³² but we observe that only in the past decade starting with Ecuador in 2011, followed by New Zealand in 2012, and then followed by Colombia in 2016, India in 2017, and Bangladesh in 2019, is the norm gaining traction in its dispersion, and the legal transplantation of the norm can then be observed. The following cases continue to illustrate this using the cases-approach in comparative legal studies, and particularly legal transplants in environmental law.

2. New Zealand

In New Zealand, the struggle to establish the rights of the Maori indigenous communities over the river Wanganui started in the 1870s to protect the land and water from exploitation and overfishing.³³ The Waitangi Tribunal was set up in 1975 to resolve the disputes of the Maori ingenious communities with respect to their rights to the river Whanganui, and after a through fact-finding process, published a report in 1999 which “*recognised Maori interests in the river, including their authority (mana and*

³⁰ C. McDonough, *Will the River Ever Get a Chance to Speak: Standing up for the Legal Rights of Nature*, 31(1) Villanova Environmental Law Journal 143, 158-159 (2020).

³¹ M. RiverOfLife et al., *Recognizing the Martumarra's First Law Right to Life as a Living Ancestral Being*, 9(3) Transnational Environmental Law 541, 552 (2020).

³² See D.R. Boyd, *Recognizing the Rights of Nature: Lofty Rhetoric or Legal Revolution*, 32 Natural Resources & Environment 13 (2018).

³³ L. Schimmöller, *Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador*, 9(3) Transnational Environmental Law 569, 575 (2020).

rangatratanga) over the whole of the River as represented by the Whanganui River Maori Trust Board”, and the “recognition of the Whanganui River as *Te Ava Tupua*, a living being and entity in its own right, and the unique status of the Whanganui River in relation to *Te Ava Tupua* and its governance”.³⁴ The relationship of the Maori to the river, as their ancestor, and that the river is part of them and they part of the river, and that the river is not property that can be owned but is a person in itself has now been granted legal basis within New Zealand’s laws, after the Tribunal’s decision, and the enactment of Treaty of Settlement.³⁵ The Treaty, called *Tfifitohu Whakaturua*, was settled in 2012, and completed in 2014, with a supplementary deed enacted in 2016. In 2017, New Zealand adopted *Te Ava Tupua* (Whanganui River Claims Settlement) Act³⁶ which recognised the Whanganui River as a legal entity indivisible from the local Māori communities, recognising the community’s customary rights to property and fishing relating to the river.³⁷ It is important to note that the ownership rights and customary title rights of local community had been contested for several decades, and the government did not wish to transfer ownership rights directly to the claimants, therefore the solution was to grant the river a legal personality in a manner that the titles could be transferred to the river and then governed through the aforementioned Settlement Treaty.³⁸

³⁴ E.C. Hsiao, *Whanganui River Agreement – Indigenous Rights and Rights of Nature*, 42(6) *Environmental Policy & Law* 371, 372-373 (2012); See T. Butcher-Cornet, *Recognising Indigenous Conceptions of Custodianship in Environmental Law*, 28 *Australian Law Librarian* 156, 157-158 (2020).

³⁵ A. Hutchison, *The Whanganui River as a Legal Person*, 39(3) *Alternative Law Journal* 179 (2014).

³⁶ A. Lillo, *Is Water Simply a Flow: Exploring an Alternative Mindset for Recognizing Water as a Legal Person*, 19 *Vermont Journal of Environmental Law* 164, 174 (2018).

³⁷ A. Argyrou & H. Hummels, *Legal personality and economic livelihood of the Whanganui River: a call for community entrepreneurship*, 44 *Water International* 752 (2019) available at <https://doi.org/10.1080/02508060.2019.1643525>, last seen on 11/01/2021; See T. Collins & S. Esterling, *Fluid Personality: Indigenous Rights and the Te Ava Tupua (Whanganui River Claims Settlement) Act 2017 in Aotearoa New Zealand*, 20(1) *Melbourne Journal of International Law* 197, 201 (2019).

³⁸ K. Sanders, *Beyond Human Ownership: Property, Power and Legal Personality for Nature in Aotearoa New Zealand*, 30(2) *Journal of Environmental Law* 207, 216 (2018).

3. Ecuador

*Richard Frederick Wheeler and Eleanor Geer Huddle v. Provincial Government of Loja*³⁹

The judgment was in response to an injunction petition before the Provincial Justice Court of Loja in favour of the Vilcabamba River, relating to a road-widening project along the river which was interfering with the hydrology and water flow of the river and posing as a flood hazard for the local population. The government of Loja deposited rocks and excavated material into the river Vilcabamba, resulting in flooding which affected local citizens. Two United States citizens residing near the Vilcabamba filed a protective action, in favour of nature and the Vilcabamba river.⁴⁰

The Court in its ruling issued the Constitutional Injunction 11121-2011-0010 recognizing that “*damages to nature are generational damages, defined as such for their magnitude that impact not only the present generation but also future ones*”. In its remedial model the Court included several components, including a public apology from the government for causing damage to the River, establishment of a reparations mechanism for the government of Loja to create a remediation and rehabilitation plan of areas affected by the road widening project while creating a delegation and Ombudsman to follow up on the implementation of the ruling, adopting immediate actions to ensure environmental permits to protect against water pollution in the Vilcabamba, and to implement warning systems to prevent future damage and clean up the existing damage to the river.⁴¹

Most importantly while deciding on the question of the rights of nature in the context of the river, the Court established that “*the right that nature has to be fully respected in its existence and maintenance of its vital cycles, structure, functions,*

³⁹ Richard Frederick Wheeler and Eleanor Geer Huddle v. Provincial Government of Loja, Trial 11121-2011-0010 (30/03/2011).

⁴⁰ J. Colon-Rios, *The Rights of Nature and the New Latin American Constitutionalism*, 13(1) New Zealand Journal of Public and International Law 107, 111 (2015).

⁴¹ E. Daly, *The Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights of Nature*, 21(1) Review of European, Comparative & International Environmental Law 63, 64 (2012).

and evolutionary processes".⁴² Further, the Court held that in order for the plaintiffs to successfully claim in favour of the rights of nature, the burden of proof was not on the plaintiffs to prove that harm had resulted from the Defendant's actions; instead, the Defendant had the burden to prove that their actions did not result in harm.⁴³

While the judgment did pioneer the trend of granting legal personality to rivers, it is important to note that it went beyond merely granting it that status, it also created a complex remedial model to address river pollution including insisting on public acknowledgement and apology for environmental harm, and clarified that in cases of claims involving the rights of nature, the burden of proof did not lie with the plaintiffs.

4. Colombia

In 2016, the Colombian Constitutional Court (*Corte Constitucional de Colombia*)⁴⁴ declared that the Atrato River basin possessed the rights to "*protection, conservation, maintenance, and restoration*".⁴⁵ The NGO, *Tierra Digna* had filed a claim on behalf of the councils of Afro-descendent communities, to protect their right to life and the environment, in relation the toxic dumping of mercury in the Atrato river. The judgment was the first decision to recognise the river as a legal entity, and recognised the river both as a living entity and an autonomous subject in itself, while also granting protection to communities residing around the river, in its basin.⁴⁶ The Court based its decision in the principle of social rule of law (*Estado Social de Derecho*) and their Ecological Constitution, which placed the protection of nature as the foremost public interest, above the fundamental rights of individuals. It is important to note that the Court also cited the judgment on the Vilcabamba delivered by the Provincial Justice Court of

⁴² N. Greene, *The First Successful Case of the Rights of Nature Implementation in Ecuador*, Global Alliance for the Rights of Nature, available at <https://therightsofnature.org/first-ron-case-ecuador/>, last seen on 30/11/2020.

⁴³ *Supra* 40.

⁴⁴ *Tierra Digna v. Presidencia da Republica*, Colombian Constitutional Court, ruling T-622 of 10/11/2016 Expediente T-5.016.242.

⁴⁵ *Ibid.*

⁴⁶ X.S. Camargo, *The Ecocentric Turn of Environmental Justice in Colombia*, 30(4) *King's Law Journal* 224, 225 (2019).

Loja in 2011.⁴⁷ Notably, the Court also cited the settlement treaty recognising the personhood of the Whanganui river (*Te Awa Tupua Act*) in New Zealand.⁴⁸

The Court confirmed the harmful effects of illegal mining in the Atrato river basin, and harms to current and future generations, and recognised that the river was a “*sujeto de derecho*” or subject of rights, because there was a necessity to establish a legal tool which offered equity and justice to nature, and the human relationship with nature.⁴⁹ The Court made an important observation that the existing mining legislation was anthropocentric, and it was necessary to depart from this anthropocentric view of rights (such as the right to extract mineral resources) and instead characterise the Atrato itself to be a legal entity bearing rights. The judgment included a direction which stated that the national government was to be the joint guardian of the river, together with the local ethnic communities, and representation would be organised through the Commission of the Guardians of the Atrato River (*Comision de Guardianes del Rio Atrato*).⁵⁰ There was particular emphasis in the judgment regarding the importance of public participation and the involvement of indigenous and Afro-descendent communities in the decision-making involving the Atrato.⁵¹

Subsequently in 2018, the Supreme Court of Colombia (*Corte Suprema de Justicia de Colombia*),⁵² recognised the legal rights of the Amazon River ecosystem declaring that “*for the sake of protecting this vital ecosystem for the future of the planet, it would ‘recognize the Colombian Amazon as an entity, subject of rights,*

⁴⁷ A. Pelizzon, *An Intergenerational Ecological Jurisprudence: The Supreme Court of Colombia and the Rights of the Amazon Rainforest*, 2(1) *Law, Technology and Humans* 33, 39 (2020).

⁴⁸ CELDF, *Press Release: Colombia Constitutional Court Finds Atrato River Possesses Rights* (04/05/2017) available at <https://celdf.org/2017/05/press-release-colombia-constitutional-court-finds-atrato-river-possesses-rights/>, last seen on 30/11/2020.

⁴⁹ P.V. Calzadilla, *A Paradigm Shift in Courts' View on Nature: The Atrato River and Amazon Basin Cases in Colombia*, 15 *Law, Environment and Development Journal* 1, 6 (2019), available at <https://bit.ly/3sLLf5o>, last seen on 11/01/2021.

⁵⁰ *Ibid*, at 7.

⁵¹ E. Macpherson, J.T. Ventura & F.C. Ospina, *Constitutional Law, Ecosystems, and Indigenous Peoples in Colombia: Biocultural Rights and Legal Subjects*, 9(3) *Transnational Environmental Law* 521, 522 (2020).

⁵² *Justicia y otros v. Presidencia da Republica y otros*, Colombian Supreme Court, ruling STC4360 of 4/05/2018.

*and beneficiary of the protection, conservation, maintenance and restoration' that national and local governments are obligated to provide under Colombia's Constitution".*⁵³

5. India

*Mohd. Salim v. State of Uttarakhand and Ors.*⁵⁴

The judgment by the Uttarakhand High Court (at the state level), in response to a public interest litigation challenging the mining of the riverbeds of the Ganga and Yamuna and the ensuing pollution, and other questions of water quality led to the Court recognising the two largest rivers in India to be legal persons. In this particular case, the Uttarakhand High Court was hearing this matter for the creation of the Ganga Management Board. The Court had ordered for the creation of the Board previously, but the State Governments of Uttar Pradesh and Uttarakhand were not cooperating with the Union Government for the same. The Court expressed their displeasure with respect to this and also observed that the rivers Ganga and Yamuna were losing their very existence. In light of this, the Court noted the need to take extraordinary measures for their preservation, conservation and protection. The final decision of Court included the declaration that:

[w]hile exercising the *parens patrie* 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 river 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.⁵⁵

⁵³ N. Bryner, *Colombian Supreme Court Recognizes Rights of the Amazon River Ecosystem*, IUCN (20/04/2018), available at <https://www.iucn.org/news/world-commission-environmental-law/201804/colombian-supreme-court-recognizes-rights-amazon-river-ecosystem>, last seen on 30/11/2020; See P. Parenteau, *Green Justice Revisited: Dick Brooks on the Laws of Nature and the Nature of Law*, 20 Vermont Journal of Environmental Law 183, 185-186 (2019).

⁵⁴ *Mohd. Salim v. State of Uttarakhand and Ors.*, 2017 SCC Utt 367 [*"Mohd. Salim"*].

⁵⁵ *Ibid*, at ¶ 19.

Before reaching this decision, the Uttarakhand High Court discussed jurisprudence regarding juristic persons, especially with respect to religious entities. The Court noted that the rivers Ganga and Yamuna are considered to be sacred and worshipped by Hindus. The Court then cited *Yogendra Nath Naskar v. Commission of Income Tax, Calcutta*⁵⁶ to establish that Hindu idols can be held to be juristic persons, capable of holding property and paying taxes through a person as a manager. The Court also discussed the case of *Ram Jankijee Deities v. State of Bihar*⁵⁷ wherein the Supreme Court elaborately discussed the kinds of images as per Hindu authorities and reached the conclusion that it is the ‘human concept of a particular divine existence’ which grants divinity to an idol.

The Court then relied on the decision and the discussion in the case of *Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Somnath Dass*.⁵⁸ In *Shiromani*, the Supreme Court held that the words ‘juristic person’ connote the recognition of an entity to be in law a person which otherwise it is not. The judgment traced the history of the scope of the term “*person*” from its exclusionary nature under Roman Law, the US Constitution (prior to the Reconstruction Amendments) etc. The Supreme Court noted that Constitutions, corporations etc. were all creations of the law, due to human necessities. The Court also discussed and cited authorities on jurisprudence with respect to natural and artificial persons. The Court finally concluded that evolution of juristic persons happened for “*socio-political-scientific development evolution*” and for “*sub-serving the needs and faith of the society*”. The Court also noted that the relationship between an idol and its shebait/manager is analogous to one between a minor and a guardian. The Uttarakhand High Court then, concluded that to protect the recognition and faith of society, it was imperative to grant legal personality to rivers Ganga and Yamuna. The Court highlighted that these rivers provide physical and spiritual sustenance. Accordingly, legal status was granted under Articles 48A and 51A(g) of the Constitution. It must be noted that the judgment was appealed to the Supreme Court which has currently

⁵⁶ *Yogendra Nath Naskar v. Commission of Income Tax, Calcutta*, (1969) 1 SCC 555.

⁵⁷ *Ram Jankijee Deities v. State of Bihar*, (1999) 5 SCC 50.

⁵⁸ *Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Somnath Dass*, (2000) 4 SCC 146.

stayed the judgment, and we await a final decision on the survival of this precedent.

The Indian Supreme Court and other High Courts have had a tradition of looking towards Hindu notions of religious duty, or individual duty towards God and society, influencing decision-making regarding environmental protection, which is further confirmed by the constitutional duties in India regarding the protection of the environment.⁵⁹ The judgment by the Uttarakhand High Court relies heavily on Hindu traditions to protect the river, including the personified role that the two rivers occupy in Hindu mythology and exercise of faith and worship, as the rationale for recognising their legal personhood.⁶⁰ The invocation of Hindu religious beliefs as the basis of granting legal personality has been criticised for undermining the legal impact of granting the rivers legal personality, and the very conspicuous omission of the beliefs of other faiths connected to the rivers, and their cultural importance beyond Hinduism is not articulated, making the judgment weak in its reasoning.⁶¹

While this article is limited to rivers, I wish to highlight another subsequent judgment of the Punjab and Haryana High Court in India. In the case of *Court on its own motion v. Chandigarh Administration*⁶² decided in 2020, the High Court granted legal personality to the Sukhna Lake in Chandigarh. It is noteworthy because this judgment has been co-authored by the same Justice who co-authored the judgment in *Mohd. Salim*, and it is evident how a single judge placed across different High Court in India (both Uttarakhand, and Punjab & Haryana) has been at the helm of granting legal personality to rivers, a lake, and the entire animal kingdom.⁶³ In the latter case, when the Uttarakhand High Court extended legal personality to the entire animal kingdom, it relied heavily on Hindu mythology in making its reasoning, referring to how Hinduism, Jainism and Buddhism deify

⁵⁹ W.F. Menski, *Hindu law: the search for appropriateness in Comparative Law in a Global Context: The Legal Systems of Asia and Africa* 196, 268-269 (2006).

⁶⁰ *Mohd. Salim*, at ¶ 19.

⁶¹ See C. Clark et al., *Can You Hear the Rivers Sing: Legal Personhood, Ontology, and the Nitty-Gritty of Governance*, 45(4) *Ecology Law Quarterly* 787, 816 (2019).

⁶² *Court on its own motion v. Chandigarh Administration*, CWP No. 18253 of 2009 & other connected petitions, Punjab and Haryana High Court (02/03/2020).

⁶³ *Narayan Dutt Bhat v. Union of India and Ors.*, 2018 SCC OnLine Utt 645.

animals, and how animals are associated with gods in Hindu mythology.⁶⁴ Through this particular judgment, in expanding legal personality to the Sukhna Lake, all citizens of Chandigarh were declared in *loco parentis* of the Lake, for its conservation and protection. By way of a common order, the Court decided seven related petitions, reiterating that protection of ecologically sensitive zones like the Sukhna Lake is the duty of the government under the public trust doctrine, and thereby bridged the doctrine of public trust and the concept of environmental legal personality by declaring citizens of Chandigarh as *in loco parentis*. The judgment primarily follows the same legal rationale, cases and authorities that were relied upon in *Mohd. Salim*.

6. Bangladesh

The High Court division of the Supreme Court of Bangladesh joined courts in Ecuador, Colombia, and India in granting legal personality to rivers, this time in the case of the River Turag. In response to the Writ Petition filed by the NGO *Human Rights and Peace for Bangladesh*,⁶⁵ regarding the pollution and encroachment in the river Turag and its riverbeds, the Court held that based on the doctrine of public trust being an integral part of Bangladesh's laws, the River Turag was "*declared as legal person/legal entity/living entity*" and that "*all rivers flowing inside and through Bangladesh will also get the same status of legal persons or legal entities or living entities*".⁶⁶ The Court declared the National River Conservation Commission (NRCC) as *person in loco parentis* of all the rivers in Bangladesh⁶⁷ and directed the government to amend the National River Conservation Commission Act, 2013 "*by inserting provisions of criminal offences for river encroachment and its pollution with stricter punishment and fines, and also procedure of institution of case, its investigation and trail*".⁶⁸ Along with giving directions to various government authorities

⁶⁴ M. Shinde & K.W. Junker, *Horse before the Cart: Discussing the Legal Fiction of Animal Personhood in India*, VII Bharati Law Review 1, 10 (2019).

⁶⁵ WP No. 13989/2016 filed on 7/11/2016, Judgment dated 30/01/2019, order dated 03/02/2019.

⁶⁶ Human Rights and Peace for Bangladesh, *Turag River Case*, ¶ 2 available at <http://www.hrp.org.bd/upload/judgement/Writ-Petition-No.-13989-of-2016-only-17-directions--River-Turag-Case.pdf>, last seen on 11/01/2021.

⁶⁷ *Ibid*, at ¶ 3.

⁶⁸ *Ibid*, at ¶ 8.

to encourage education regarding water resources and rivers, including the Director General, Bangladesh Television,⁶⁹ the Court also directed authorities to *“prepare a list of all local river encroachers and polluters and to put them up on notice boards at their all local offices and on billboards within six months with a view to informing the public about such river grabbers”*.⁷⁰ It also declared that the polluter pays principle and the precautionary principle was the law of the land.⁷¹ In a unique enforcement mechanism, the Court added an element of practical enforceability to the public trust doctrine, stating that:

As the environment, climate, water lands, sea, sea-beach, river, foreshore of river, canal-bill, hawor-bawor, nala, jhil, jhiri, and all open water bodies, mountains, forests, wild animals, and air is the Public Trust Property or Public Property, hence, Bangladesh Bank is directed to issue circular with necessary instructions to all the Scheduled Banks of Bangladesh declaring any institution, company, or person involved in encroachment of such lands or pollution thereof, ineligible for any loans there from. The Governor, Bangladesh Bank is also directed to submit an affidavit-of-compliance to this Court within six months as to the implementation of such directions.⁷²

In what might appear to be an overreach when deciding an environmental legal matter, as it strikes at the heart of representative democracy and adult franchise, the Court added another direction to the Election Commission: *“to disqualify all encroachers and polluters of such properties from contesting any type of elections of Union, Upozila, Municipality, Zila Parishad and Nation al Parliament Election and to submit an affidavit to this Court within six months containing a list of those people.”*⁷³

As we can observe, the Court in the Turag case, not only granted the Turag legal personality, but also all of the rivers in Bangladesh, and displayed significant ambition and innovation in providing a multitude of directions to attempt ensuring the protection of Bangladesh’s rivers. However, this seeming excess was soon decided upon the by the Appellate division.

⁶⁹ Ibid, at ¶¶ 10-12, ¶¶ 16-17.

⁷⁰ Ibid, at ¶ 13.

⁷¹ Ibid, at ¶ 4.

⁷² Ibid, at ¶ 14.

⁷³ Ibid, at ¶ 15.

The judgment was challenged by a jute manufacturing company in 2020,⁷⁴ before the Appellate Division of the Supreme Court of Bangladesh, with respect to an encroaching jetty in the river Turag that violated the encroachment, and the Company prayed that the High Court's order be set aside, claiming that the report regarding the boundaries of the river relied upon by the High Court were erroneous. The Appellate Division did not hold in favour of the appellants and ruled that the High Court's decision regarding the removal of encroaching structures and material from the river was lawful. However, in an important ruling, the Appellate division nullified several of the direction of the High Court, including holding that the Court cannot decide if any principle (precautionary or polluter-pays principle) was the law of the land, it was the domain of the Parliament; that Courts cannot direct that a law be amended, may only express its opinion and it was the within the domain of Parliament whether to accept the opinion; the Court cannot direct that a person is ineligible for bank loans based on allegation of river grabbing in the absence of such legislation; nor can the Court direct the Election Commission to declare the electoral ineligibility of any persons. The Appellate Division in its judgment overruling several directions of the High Court, stated that it *"would like to politely point out that the High Court Division, while passing an unnecessary lengthy judgment, has discussed many extraneous matters having no nexus in deciding the merit of the rule"*.⁷⁵

V. CONCLUSION

As discussed above, the past decade has witnessed a series of normative precedents which recognize nature as a legal subject and holder of rights. These judgments contribute not only greater sensitivity to environmental adjudication, but also a reorientation of how we can create eco-centric

⁷⁴ Nishat Jute Mills Limited v. Human Rights and Peace for Bangladesh (HRPB) and others, Civil Petition for Leave to Appeal No. 3039 of 2019, Judgment dated 17/02/2020, available at <http://www.hrpb.org.bd/upload/judgement/Civil-Petition-For-Leave-To-Appeal-No.-3039-of-2019---Legal-and-Living-Status-of-Rivers-of-Bnagladesh.pdf>, last seen on 11/01/2021.

⁷⁵ Ibid, at ¶ 13.

environmental law⁷⁶ as opposed to the anthropocentrism currently inherent in our laws, which govern the use and abuse of nature.

Comparative environmental law when analyzing developments in domestic environmental law, has the potential of also informing and influencing international law. International environmental legal principles such as sustainable development, the precautionary principle, or the polluter pays principle were adopted in the language of domestic legislation and also in the decision-making rationale of courts when deciding environmental issues. The rise of progressive domestic case law in the expansion of rights of nature could possibly lead to consensus between more jurisdictions on these principles, allowing for the potential to encapsulate these ideas within international law through consensus-building among nations. International jurists can also treat these systems as sources of inspiration and ideas of persuasive value.⁷⁷

This article focused on the concept of legal personality when granted to rivers as the hypothetical legal transplant in multiple jurisdictions, with courts successively deciding on the issue across the span of 9 years, starting with Ecuador in 2011, up to the Bangladesh Supreme Court's judgments in 2019 and 2020. The process of comparing or "*doing*" comparative environmental law often involves the study of legal transplants, how legal norms and rules disperse and travel across jurisdictions and understanding, how both legal and extra-legal factors contribute to the transplantation of law. In this article, we see how the Court in Ecuador, basing its reasoning on its ecological constitution and prioritising of nature protection, recognised the legal status of Vilcabamba river, which in turn was quoted and cited by the Court in Colombia in 2016. We also see how the Colombian Court drew inspiration from New Zealand's legislation recognising the Whanganui river as a legal entity, and explicitly cited the *Te Awa Tupua* (Whanganui River Claims Settlement) Act. Even though it is not made explicit, creation of government authorities that are in *loco parentis*

⁷⁶ S. Borrás, *New Transitions from Human Rights to the Environment to the Rights of Nature*, 5(1) *Transnational Environmental Law* 113, 114 (2016).

⁷⁷ J. Ellis, *General Principles and Comparative Law*, 22(4) *European Journal of International Law* 949, 971 (2011).

or guardians of the river has been a consistent theme throughout the judgments, with Colombia creating a hybrid representation system of the public and the government; India limiting the guardianship to the Director of NAMAMI Gange, the Chief Secretary, and the Advocate General of the State of Uttarakhand; and Bangladesh clarifying the government authorities involved in safekeeping of the rivers, while still maintaining that all citizens were guardians of the rivers in Bangladesh. Since the Colombian Court's decision with respect to the Atrato river has been followed by the formation of Commission of Guardians of the Atrato River in 2017, and subsequent court decisions have clarified the legal responsibility of the institutions in charge of ensuring compliance with the rulings with respect to the Atrato River. In a demonstration of how comparative environmental law involving legal transplants can lead to crucial findings, Sheber states,

unlike the ruling in India for the Ganges and Yamuna rivers, the ruling for the Atrato River actually stuck, in part because the court provided more direction, borrowing from New Zealand's model, as to how legal rights for the river would operate, especially given the instruction for formation of the Commission of Guardians.⁷⁸

We see that while the jurisdictions and decisions differ in their legal framework, there are threads of an emerging transnational jurisprudence regarding the rights of rivers as legal persons, and the rights of nature, providing similar functions of protecting and trusteeship over the natural resource and personality of the river.⁷⁹

The study of these judgments reveals how the experiences of multiple jurisdictions in recognising the legal personality of natural entities has helped to diversify the concept, as opposed to only transplanting the idea uniformly. This includes greater clarity on the nature of rights that environmental persons can be bestowed with, whether it is the right to be protected, whether it is the rights to recognition as an ancestor of the

⁷⁸ K. Sheber, *Legal Rights for Nature: How the Idea of Recognizing Nature as a Legal Entity Can Spread and Make a Difference Globally*, 26 *Hastings Environmental Law Journal* 147, 162-163 (2020).

⁷⁹ E. Macpherson & F.C. Ospina, *The pluralism of river rights in Aotearoa, New Zealand and Colombia*, 25 *Journal of Water Law* 283, 284-285 (2015).

indigenous communities and the ensuing cultural rights, or the right to sue and enter into contracts.⁸⁰

Most “core” branches of law, such as constitutional law, criminal law and commercial law have developed in order to define and refine the relationship of humans with other humans. Environmental law, on the other hand has always involved the interaction between humans and their natural environment.⁸¹ Our legal systems exist within the security of sovereignty. The environment, however much we lay claim to its title and to its use, is transboundary. This then begs the question: how do sovereign domestic legal systems interact with its transboundary environment? The act of comparison and studying the interaction between Courts when answering similar legal questions, (in this case, the granting of legal personality to rivers) allows us to understand how legal systems can learn from each other when solving transboundary problems like matters concerning the hydrological system. This learning can take place not because it is forced, as in the case of colonial or neo-colonial projects, but because judges want to, and see value in that act of comparison of others’ experiences with nature

⁸⁰ E. O’Donnell et al., *Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature*, 9 *Transnational Environmental Law* 403, 408-409 (2020).

⁸¹ J.B. Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27 *Ecology Law Quarterly* 1295, 1365-1366 (2001).