Chapter V: The Perils of Totality
A Short Foray into Modernist Thought

So far, I have analyzed two different kinds of cases of rights of nature. On the one hand, I discussed cases that have explicitly drawn from a theoretical tradition steeped in what I have called ecotheology. On the other hand, I have also presented two cases (Te Urewera and Te Awa Tupua) that have used the concept of legal personality in radically different ways. These are very important for future rights theory, as they have revealed previously hidden potential and inaugurated a different theoretical course, away from ecotheology. These two kinds of cases – ecotheological rights of existence and legal personality arrangements – are not, however, the only ones. In this chapter I want to look at several other instances, with the benefit of having the aforementioned cases in the background.

I will examine the legal personality of several different rivers and several different places, as well as the push to pass international rights for nature laws in one form or another. These cases combine elements of the ones explored so far, showing both the limits of typologies and the fluidity of nature's rights in practice. Atrato river in Colombia, the Amazon rainforest, two rivers in India, all rivers in Bangladesh, and a potential UN declaration of the Rights of Mother Earth are at different judicial levels, reached through different mechanisms, and in many other ways completely different from each other. These differences are important. But equally important is to recognize a certain intellectual inheritance that con-

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nects them.[1] Through mechanisms of policy diffusion (the formal and informal passing of policy ideas from one place to another), all of these cases inherit parts of ecotheology that combine in different ways with the kind of place-based thinking on display in Aotearoa New Zealand. They share many of the same intellectual assumptions seen in Ecuador and Bolivia, and therefore the same potential problems, even though they seem to be concerned with places.

The concepts of nature, rights, and guardianship are important junctions between rights of nature theory and practice. Another such conceptual connector is what I call 'totality'. We have seen it already at work in the ecotheological concept of Nature, as well as of 'humanity'. Totality, and the insistence on it, is a potent marker of modernist thinking, namely the kind of thought originating in Western Europe at the time of the Enlightenment that considers itself to be universal and therefore applicable everywhere and to everyone. It is the kind of thought that thinks in terms of "humanity" versus "nature", and that looks for essential qualities abstracted from any lived experience (also see Debaise 2017, Tănăsescu 2022). It is the thought that sees current ecological problems as the result of humanity going astray, instead of very specific forms of power gaining momentum because of the benefit to certain groups at the expense of others.

The reliance on totality is insidious precisely because modernity has all but saturated the landscape of thought and practice (Chakrabarty 2009b, 2018). Virtually no-one is opposed to "modern development", just as no-one can be opposed to rights. What I want to argue is that one of the reasons why rights are unopposable (or, to say it differently, hegemonic) is the same as why modern development appears unstoppable. Simply stated, moderns (mostly everyone today) have been trained to think in universal abstractions, and they do so even when supposedly opposing modern ills (like environmental destruction). The cases I will survey here exemplify the subversive power of totality. They also show why, in rights of nature theory and practice, we need much more than ecotheology in order

1 This inheritance is not limited to philosophical concepts, but also to conceptions of law.

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to overcome modernist ecological predicaments and to be able to propose alternatives that are truly different.

One of the motivating questions of this analysis is whether the law can use mechanisms that are intrinsic parts of colonial enclosure and environmental destruction in order to oppose such depredations. These mechanisms are legal personality, rights, and – to an equally great extent – universality and totality. I don't propose to answer this question once and for all; that pretense would be absurd. But keeping the question central to the expansion of rights is crucial for the intellectual and moral development of this growing trend.

Many Landscapes, Some Places[2]

Atrato

Atrato river, in the department of Chocó, Colombia, became a legal person in 2016.[3] This grant of legal personality to a particular place was neither a municipal ordinance, nor a constitutional one

2 The following sections discuss cases in Colombia and India for which I undertook no independent field work. For the other cases discussed in this book, I did independent field work in the languages of the relevant countries. The language barrier, especially in the Indian case, should not be underestimated. Though I do not claim to have the final word on any cases, I think that more errors of interpretation may arise in the following sections, where I rely primarily on secondary sources by authors that may also not have had the opportunity to do independent research in the relevant languages. I have done my best to consult Colombian and Indian authors first and foremost, but I think that it is still necessary to contextualize my own research of these cases. In the Colombian case, I have consulted official documents in the original language.

3 The decision was only made public in May 2017. See Macpherson and Clavijo Ospina (2020). "Person" here translates the term "sujeto", which can also be translated as "subject". For the purposes of the argument, I treat both as synonymous.

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(in the sense of being included in the constitution of the state), nor a national law, nor the result of claim settlement processes. Whereas until now I juxtaposed an ecotheological rights tradition to the place-based one, this case combines elements of both in surprising ways. In particular, it differs in how the idea of legal personality was reached.

Atrato river became a legal person out of judicial pronouncement. This means that the legal personality of Atrato was not reached as part of a more or less explicit political process. This does not mean that it doesn't have potentially enormous political consequences, but it is important to note that there is a whole class of cases under development (including the Ganga and Yamuna rivers, in India) that appear entirely out of judicial decisions (O'Donnell 2018). Judges, for reasons I will explore, have decided in these cases that the best way to protect the rivers (or places) under discussion was by proclaiming them to be legal persons.

The Colombian Constitutional Court recognized Atrato river as a subject of rights in 2016, while the Colombian Supreme Court did the same for the Colombian Amazon rainforest in 2018. Both of these cases demonstrate, as Calzadilla (2019, 3) argues, that "rights of nature/ecosystems can be recognized by both legislative and judicial channels". Though in the case of rights of nature theory strictly speaking this possibility was not explicitly formulated, it does nonetheless conform to the theoretical view of legal personality as something that is simply declared by a competent authority. Why that may be done, and to what end, remain questions to be explored. But *that* it can be done is beyond doubt.

In the Atrato case, the court proclaimed it a legal person in response to a *tutela* action brought by an NGO – *Tierra Digna* – on behalf of residents suffering the harm of illegal mining activities on the river. A tutela action is a constitutional mechanism that allows any person to "request any judge in the country to protect his/her fundamental constitutional rights when they are being violated by a state agent or an individual" (Calzadilla 2019, 4). Because of the high levels of pollution caused by mining activities on the river, the NGO used the tutela mechanism in order to compel the state to take

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protective action for safeguarding the wellbeing of local residents as well as that of the river.

Several things are important to note at the outset. First, this case begins as a violation of the rights *to* nature of the local residents (as well as a host of other human rights) and becomes – through the decision of the judge – a case of rights *for* nature. This is not the first time we encounter the tension between these two different kinds of rights. It again shows that the binary thinking in terms of anthropocentric versus ecocentric laws is not really fit for purpose: it cannot make sense of rights of nature laws themselves, which are supposedly ecocentric. As Macpherson and Clavijo Ospina (2020) argue, this kind of case raises doubts "about the usefulness of the ecocentric/anthropocentric divide".

Second, the mining activities that were the source of contention and harm were already illegal. In other words, the state already had mechanisms at its disposal to protect the wellbeing of local inhabitants, human and non-human alike. The Colombian Constitution itself, which made space for a tutela action, is also known as an *ecological constitution*. This point must be underlined because of the often-repeated advocacy claim that giving nature rights is necessary in order to ensure environmental protection. But no compelling reason is given for *why* these would fare better than already existing legislation, especially once we dispel the myth that ecocentrism can exist as such, let alone be effective in practice. In the end, the issue of state power is central and cannot be avoided. Chapter 6 will show how, in the cases of Ecuador and Bolivia extractive industries have *increased* since the passage of those country's radical-seeming rights of nature laws. This is a possibility that cannot be ignored in the Atrato case as well.

Similarly, the 2018 decision to grant the Amazon legal personality status came from another tutela action against government actors that failed to uphold resident's constitutional rights in the face of increasing deforestation. Just like in the Atrato case, this decision enacts a passage from the violation of rights to a healthy environment towards rights for the environment itself. Similarly, the deforestation under question was already illegal. Finally, the role of the state is ambiguous and central: In the Amazon case, the state

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was explicitly targeted as a cause of deforestation, while the idea of legal personality also depends on the state for its functioning. It may seem as if the mechanism of judicial decision sidesteps the importance of the state, but it does not: the newly created Atrato and Amazon legal entities will have to be incorporated within political processes mediated by and through the state; they cannot exist in the hands of judges alone nor, perhaps, should they.

In the Atrato case, the court gave the river specific rights, namely to "protection, conservation, maintenance and restoration" (operative part 4). These rights are very similar to the ones coming out of the ecotheological tradition analyzed in depth earlier, though here they are applied to a particular place. The right of restoration raises the same conundrums already explored, as by the admission of the court itself it is impossible to currently establish the 'original' course of the river (see Calzadilla 2019). The judicial decision in this case repeats the majority of ecotheological orthodoxy, from the gendered use of nature as feminine figure to the anthropocentric – ecocentric distinction and the idea that rights are recognized and depend on the existence of intrinsic values.

This case is both place-based in that legal personality applies to Atrato river, a particular being in a particular place, and is steeped in totality thinking. This combination is striking, and it remains to be seen just how it may play out in practice. But exposing conceptual commitments is already a good indicator of what may happen. The specific combination in this case is brought about by the international diffusion of the two kinds of rights of nature exemplified by Ecuador and Bolivia on the one hand and New Zealand on the other. But the lack of proper attention to their differences allows ecotheology and totality thinking to monopolize the way in which rights are conceived of and implemented, even when applied to specific territories.

For example, the court frames the legal personality of Atrato in terms of "the planet" and "humanity". It claims that "nature" must be recognized as an entity with intrinsic value, though it also speaks about the necessity to protect resources for future generations, in line with the sustainable development commitments already present in Colombia's ecological constitution. But under

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the premises of intrinsic value that the court itself upholds, why would future generations be allowed to use resources at all, on their own terms? This tension between intrinsic value and resource use is not a real tension, but one created by the theoretical artifact of framing the rights of nature as a passage from anthropocentrism to ecocentrism (as part of the expanding circle of moral concern). As I have argued in the case of Te Urewera and Te Awa Tupua, use as such is central to a-modern ways of living. In the neoliberal universe that ecotheological rights cannot but inhabit, there will always be an unresolvable tension between use and intrinsic values.

The majority of the literature starting to take stock of the Atrato and Amazon cases continues to frame these as a passage from anthropocentric to ecocentric law (with notable exceptions, such as Macpherson and Clavijo Ospina 2020). This is because of the so-far absent questioning of rights of nature orthodoxy. In fact, it is impossible for the rights of nature to be consistently ecocentric, and no case to date has managed this unmanageable feat. Besides the lack of consistency, there are two basic problems with thinking in terms of the opposition anthropo-eco: it repeats exactly the same opposition that is foundational for modernist ways of thinking and is therefore impotent to overcome these; and it depoliticizes rights by making it seem as if the problem of environmental degradation and destruction is nothing but a problem of having the wrong kind of consciousness (rooted in the 'anthropo-)'. This latter problem obscures the fundamental role of political infrastructures in *causing* environmental destruction, a thesis that has been amply demonstrated, beyond reasonable doubt, in the vast literature on political ecology. The underlying problem of environmental destruction is not the lack of ecocentric values, now widely shared, but rather the willful persistence of political arrangements that demand a consumptive relationship to the environing world for their own reproduction.

The irony of the anthropocentric – ecocentric framework is that it modernizes indigenous thinking, thus rendering it much less radical. Indigenous thinking is mostly of the relational type because it is not predicated on some foundational separation of humans from nature (Tănăsescu 2020, Macpherson 2021). The image of this sepa-

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ration in Biblical cultures is that of the fall, which is often repeated in rights of nature literature precisely because of the influence of ecotheology: man has fallen away from his Mother, and the fall is basically an error of thinking. Instead, indigenous philosophies have much more ambiguous genders for both the human and the natural side (they can contextually change; see last section for discussion in relation to Māori conceptions) and don't posit an original fall but an original differentiation into types of beings that, crucially, continue to have access to each other. The error of environmental destruction is therefore not primarily one of thinking, but one of *doing*, which is always a political error: a community member can only be destructive of the environment if the political infrastructure of her community allows it.

Indeed, the Chocó region through which Atrato flows is a densely layered landscape of historical uses that all have to do with various political infrastructures that make certain kinds of living, and doing, possible. The current population of the region is both overwhelmingly Indigenous and Afro-descendant, and overwhelmingly poor (the poorest in one of the most unequal countries in the world). This coincidence of poverty and ethnic background is no coincidence at all, but rather a trademark of settler states everywhere. The Afro-descendent community owes its very existence in this territory to the slave trade that captured the vast natural resources of this 'marginal' territory for transfer to the centers of power. In fact, artisanal mining has been a presence in the region (Atrato is rich in gold) since the 16th century (Macpherson and Clavijo Ospina 2020, Cagüeñas et al 2020). The 'traditional' panning for gold gave way to a mechanized and much more destructive form of mining in the 1990s. But it is important to see that at each step of interaction with the riverine environment, there is a political infrastructure that allows and makes possible certain activities, despite (and often because of) the law.

The anthropocentric - ecocentric framework is paradigmatically steeped into the modernist obsession with totality and grand narratives, a move that is anathema to highly localized ways of thinking and doing. The influence of totality thinking on the Colombian Constitutional Court is perhaps nowhere better seen than when the

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court identifies the human species itself as the main culprit for ecological devastation. It also thinks that its own action of declaring Atrato as a bearer of rights is part of a change in consciousness that is necessary for reorienting human behavior away from ecological sin and towards intrinsic value virtue.

These kinds of claims are not supposed to be verifiable or factual. Instead, to the extent that they have any meaning at all, it is because of the underlying theoretical construction that brings them forth. Humanity did not fall from Eden and lose its native benign ways. Instead, a well-documented history of colonial capitalism, which mutated into neoliberal consumerism actively promoted by nation states, has occasioned ecological crises (Tzouvala 2020). There is plenty of eco-consciousness to go around, but until the nation state is no longer predicated on neoliberal consumption, none of that will matter decisively. The 21st century miners devastating the poorest region of Colombia are part and parcel of a transnational network of resource extraction that the state makes possible and, on occasion, directly controls.

Besides receiving the status of legal person and a series of rights, Atrato was also granted guardians. This was an explicit reflection of the Whanganui case, though the nuance of Whanganui *iwi* being the human face of their river, and not its guardian, was lost. The way in which the Whanganui case has been appropriated by ecotheological rights influences the way in which policy diffuses from one place to another: the way laws from elsewhere are presented comes to influence new rights of nature cases (Kauffman and Martin 2017b). In this diffusion the work of the transnational network of rights of nature advocacy is undeniably strong. This is why it is crucial to restore the diversity of theoretical and practical orientations, so as to avoid a perpetuation of the same ecotheological tropes in myriad cases, together with their tensions and inconsistencies. These tensions are perhaps nowhere better exemplified than in the court's dealing with the idea of guardianship.

The guardians of Atrato are the national government itself, as well as "ethnic communities living in the Atrato River basin" (Calzadilla 2019, 7; *Tierra Digna*). The court further ordered the formation of a Commission of the Guardians to be subsequently

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established in order to represent the river. In the Aotearoa New Zealand cases, there was a very careful and innovative parsing through the political motivation for assigning representative powers to certain groups and not others. In the Atrato case, the stereotypical idea of "native" guardianship is particularly stark, as the court identifies local guardians by ethnic criteria, as if being local depended on one's genetic makeup or, conversely, being a miner does. At the same time, the central power of the state cannot be sidestepped, and therefore the very state that was sued because of its gross negligence in defending constitutional rights becomes a guardian! This state, as I argued earlier, already had plenty of laws at its disposal for stopping Amazonian land grabbing or mining with mercury. The court seems to think that it either lacked the appropriate 'consciousness' or else that rights by themselves can do the job the Colombian state has been actively resisting for centuries (because it is part and parcel of its very existence).

Despite the seemingly insufficient order of a bilateral guardianship model for Atrato, local communities seized on the opportunity created by the ruling to develop the model further, for and by themselves. Simply fulfilling the court's order of appointing one guardian from local communities would have been widely insufficient in getting across the multiplicity that is inherent in the river itself and in its human neighbors. As with Whanganui, the river is a being of multiple facets, flowing differently, with different waters in different places, with various speeds and over varied terrain. These kinds of specificities, completely alien to modernist thought, were nonetheless brought in by the local communities themselves when they decided to use the order of the court to create a multiple local guardian made up of 14 different people. These represent the seven local communities interacting with substantively different portions of the river. The communities appointed one male and one female guardian in order to ensure equitable representation. Both moves go beyond the decision of the court itself (Macpherson and Clavijo Ospina 2020, Cagüeñas et al 2020).

Cagüeñas et al (2020) document how communities have invented a forum of dialogue that will slowly parse through the meaning of representing the river. This is also in contrast to the

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Māori experience, which already had such representation and was seeking its formal recognition by the state. In the Atrato case, the court order is used for political innovation on the ground, but it is locals themselves that are most aware of the dangers of working together with a state apparatus that has always excluded them. In this case, the local communities do not have any privileged relationship with the Atrato that is recognized by the law, and therefore the new legal person can easily be captured by the state and put to work for an extractivist agenda. This law can be used, for example, to ban *all* artisanal mining, without making the necessary difference between local kinds and mechanized ones. Afterwards, and especially in light of the river's right to restoration, the state can make concessions to mining conglomerates that fill all the necessary permits and promise all the necessary remediation. This, the state can argue, is in the interest of the river and of local people that can be brought out of poverty through organized resource extraction. If this sounds fanciful, it bears mentioning that this is what has happened in Bolivia and, to a lesser extent, in Ecuador (see Chapter 6).

The Colombian Constitutional Court painted a picture of the Atrato River as the victim of greedy "humans", without any identifiable enemies that could in fact be targeted by the law. This kind of judicial proclamation, despite its seemingly strong rhetoric, is therefore very comfortable for the neoliberal state, which can go on scoring minor victories for "environmentalists" while maintaining its de facto course. It propagates stereotypical views of Indigenous and local people and shows its lack of serious commitment to radical solutions in rushing though decisions without any democratic process. The timeline that the court sets for the implementation of its orders is stunning: *four months* for the creation of a medium and long-term plan for the river; five months for an intergenerational agreement.

The contrast with the patient Māori approach is obvious. The culprit for the degradation of Te Urewera is not "humanity", but the colonial state. A correct diagnosis of the ill can therefore lead to innovative solutions. In the Colombian case, the apparatus of policy diffusion that has propagated the idea of guardianship as a total-

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izing model, while mixing it with particular rights, has influenced the court's judgment decisively.[4] However, local communities have started a necessarily slower process of dialogue that gets closer to the Māori notion of paying attention to a particular place.

Local deliberation has already started to question, for example, the environmental impacts of traditional mining pre-mechanization, and to ask to what extent those can be tolerated. It has also taken an approach that rebukes the claim that locals are ecocentric, inasmuch as they relate to the environment primarily through use. It is very interesting that in this case local communities had not previously been organized as such, nor was there a pre-existing ontological and philosophical system that rendered Atrato in a particular kind of way (Cagüeñas et al 2020). What comes out of this new experiment in river representation can be extremely significant for the future of Atrato, but the court order itself can eventually act as a straitjacket for that kind of innovation, even though it initially spurred it. Instead of the rights of Atrato being the tool that the state lacked for environmental protection, it may prove to be another tool that it can use to exclude locals (so far the state has had very little interest in the local experiments with representation) precisely under the guise of protecting the river.

Ganga and Yamuna

Ganga (also known as the Ganges) is both one of the world's best-known rivers, and one of the most polluted. In 2014, Muhammad Salim, a resident of the riparian town of Hardwar, "initiated public interest litigation in the High Court of Uttarakhand" to ask the court to compel the state to enforce the already existing legal protections of the river (Clark et al 2018, p.813). This case draws on many of the strands already discussed, but also introduces new elements that are significant for the further development of the rights of nature.

4 Coverage of the river rights cases have tended to lump them all together, particularly in media reports. Scholarly works, too, have hastily concluded that Atrato and Whanganui are analogous cases. My argument should cast serious doubts on this assumption.

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Initially, the Court ruled in favor of Salim and ordered the State of Uttarakhand to act by forming, within three months, a Ganga Management Board. When this was not respected by the state, the judge – Sharad Sharma – penned another judgment that granted legal personality to Ganga an Yamuna (an important tributary). The High Court ruled that "the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities, of a living person in order to preserve and conserve river Ganga and Yamuna" (UHC 2017, 11). The Court also ordered three specific government agencies to act as guardians of the river, explicitly using the doctrine of *in loco parentis*, the same doctrine used to appoint guardians to children or incapacitated adult humans. In this judgment the doctrine is explicit, whereas in other guardianship models it is merely implicit.

As part of the motivation for this decision the Court argued that the two rivers are "worshipped by Hindus. These rivers are very sacred and revered. […] 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" (IHC 2017, 4, 11). Immediately after this judgment, the appointed guardians appealed to the Supreme Court, which swiftly stayed the original order. The case is yet to be decided. Regardless of the eventual outcome, it is a very useful one to illustrate the complex interplay of totality thinking with local specificities.

The fact that the rights of nature are travelling to diverse places has been understood as a process of international policy diffusion, most notably by Kauffman and Martin (2017b). As we have seen, it makes sense to see these cases as being inspired by other instances elsewhere, most notably Ecuador, Bolivia, and New Zealand, which have become paradigmatic in their own ways. As scholarship has shown, the most instrumental organizations in diffusing rights for nature laws have been the Global Alliance for the Rights of Nature

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(GARN), CELDF[5] (already encountered earlier), and the UN Harmony with Nature Knowledge Network. These organizations have also become important in proposing rights for nature at the international legal level. The mechanism of policy diffusion pass, as Kauffman and Martin point out, through these channels.

Equally important has been the international press coverage of rights of nature cases, starting with Ecuador and really coming into its own with New Zealand. Whereas Ecuador could have seemed like an outlier, the New Zealand developments, and their assimilation by international media into fundamentally the same kind of case, has given a lot of hope that we are witnessing a growing trend that will increasingly influence laws in many different places. These mediatic channels are themselves influenced by the international policy network as to the general framework in which rights of nature are presented. These cases offer easy pickings for hopeful media coverage in a world awash in environmental doom. But they are also routinely inaccurate and very scant on details. For example, the very separate histories of Ecuador and New Zealand are almost always lumped together. This is also the case in coverage of the Indian judgment. Scholarship has been much more careful, of course, but also there, it is commonplace to see the Whanganui case presented as one of guardianship, and to see most cases of rights presented as 'emanating' from indigenous worldviews (with some exceptions of Macpherson, O'Donnell, and Sanders).

The case of Ganga and Yamuna, like that of Atrato, is influenced by the false presentation of Whanganui as a case of guardianship. Whereas in Ecuador, as we have seen, the issue of guardianship was not addressed, the New Zealand cases have generally been understood as only offering this innovation to theory and practice. The careful way in which Māori legal tradition has in fact subverted the ideas of rights and guardianship has been mostly unremarked. This subversion is itself good proof of the uneasy conceptual relationship

5 Recently, the original founders of CELDF have started another organization, the Center for Democratic and Environmental Rights (CDER). As apparent from the title itself, the issue of rights became even more entrenched than before.

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between rights and indigenous thinking, but the rights of nature have continued to be presented as coming out of, or 'translating', indigenous conceptions. The alliance between rights and national states has also been sidelined (with the notable exception of Rawson and Mansfield 2018).

The way in which the ecotheological history of rights has managed to become dominant and largely unquestioned matters because policy diffusion tends to happen along lines steeped in totality and with a moralistic framing of environmental harm. In the Indian case, moralizing nature came under the guise of the religious significance of the river, which is revered by many in India, though the Court only recognized its significance to Hindus. The plaintiff himself did not present his case in terms of religious significance; it was the judge that took the opportunity to introduce the idea that the religious/moral personality of the river deserves legal recognition.

In the Indian context, the idea of a juristic persons has a long history, going back to British colonial rule (Alley 2019, Berti 2021, Patel 2010). In the mid 19th century, the British introduced this concept so they could handle the complexities surrounding religious idols. They therefore used juristic person to format the being of idols in law. They were particularly interested in being able "to decide land, property, and entitlement disputes" (Alley 2019, p.4). As Doctor (2018) further explains, the juridical personhood of a religious idol "avoided having to sift through all the claims of tradition, while also neatly appearing to respect Indian sentiments by treating the idols as living persons" (in Alley, idem). The practice of legally personifying religious idols survived British rule and became a commonplace way of handling disputes over ownership, particularly in cases that involved gifts and other kinds of property being given to an idol by worshipers through, for example, wills.

The idea of juristic person grants idols the ownership of assets. This means that the goods of the idol are not public goods, but neither are they fully private, because they are supposed to be used for funding rituals and supporting pilgrimage (Alley 2019, Das Acevedo 2018). One of the key motivations of the Indian judiciary in upholding legal personhood of this kind has also been to facilitate the paying of taxes by idols, which can file their income declarations

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through their guardians, which are to take care of the idol as they would of an infant. The ownership of temple assets by the personified deity has given rise to different kinds of judicial decisions, adjudicating which deity can own which assets, how many deities can be owners, and so on (Berti 2021). This is to say that the interpretation of legal personhood for idols is a matter of continuous dispute, though the mechanism itself is widely accepted.

In recognizing the personhood of deities, judges do not necessarily attach it to a particular image, or embodiment, of the idol (in an object or statue). What is recognized are the human *purposes* embedded in such images, and in this sense idol personality is a recognition of human interests that are expressed through religious form. Colas (2012) argues that religious scholars are not unproblematically enthusiastic about the idea that idols are persons that can own assets. Idol personality "is hypothetical and has to be taken as a socio-religious convention" (in Berti 2021). Idol jurisprudence looks like idol politics because it ultimately adjudicates, as it was originally intended to do, between different ways of employing wealth that empower certain groups over others. Through this differential apportionment, different rituals or pilgrimages are promoted; different conceptions of right conduct, or rights to access religious sites, are weighted against each other.

For example, a controversial 1991 state-level decision, reversed by the Supreme Court, ruled that God Ayyappan, of the Sabarimala temple, did not wish to allow women between the ages of 10 and 50 (so of menstruating age; see Alley 2019) to enter the premises. The Kerala Hight Court justified its judgment by arguing that the deity "was conceived in the form of a renunciant" and he therefore expressed "the wish to continue to live in celibacy and austerity without being disturbed by the presence of women" (Berti 2021). Ayyappan evidently channeled sexist beliefs, but as lord of his assets he in principle had a right to them – an idea clearly justified by the High Court. I have pointed out consistently how rights of nature can be used selectively to bolster already existing power relations. This seems to also be the case for idol personality.

In the Indian legal tradition, there is a long history of public interest litigation. Unlike in the US, everyone can have standing to

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sue if done in the name of a public interest, which means that the kind of theory that Cristopher Stone proposed has less purchase in this context. In fact, this doctrine has given rise to judicial activism, because it allows "judges to use suo motu powers to bring a case forward without a petitioner" (Alley 2019, p.6), meaning that they can initiate action of their own accord. This is partly what happened in the Ganga and Yamuna case, where the plaintiff did not ask for legal recognition of the kind granted.

The reasons why the judge decided to grant legal personhood to Ganga and Yamuna are to some extent opaque, but it can be said that the international diffusion of the rights of nature had an important role to play, while interacting with a local legal tradition that inflected the case in specific ways. Given that Ganga is also a deity in Hindu religious traditions – Mother Goddess[6] – Judge Sharma used the idea of juristic person for deities to frame the river as just such a deity. This parallel is not explicit in the judgment but given the Indian legal context it is obvious that it informed the underlying thinking. The rights of the sacred rivers also departed from this tradition in important ways. The river, by becoming a legal person, does not also become self-owning, as in the case of Te Urewera. It does not have property, like other idols do. Instead, its personality is purely fictitious and attached to religious custom in loose ways so that it could introduce the idea of guardianship, which is where the legal proclamation connects with practice.

Judge Sharma charged the director of the national program Clean Ganga, the chief secretary of Uttarakhand, and the advocate general of the state, to be river guardians. The *parens patriae* doctrine is the basis for guardianship, the same doctrine used for minors and people that otherwise cannot fulfill, for different reasons, their own rights and obligations. Unlike in the New Zealand and Colombian cases, this is a more paternalistic view of rivers that are in the same breath pronounced to be sacred and to have the same rights as humans. In interviews with Varanasi residents,[7] Kelly Alley discovered that many did not share the idea that Ganga

6 It is important to note that the gendering is of the river, not of nature as such.

7 Varanasi is on the Ganges, but is not in the state of Uttarakhand.

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is a person – she is a God, nor that people could take care of her as parents, seeing that *she* is the Mother. This refusal to think in the same terms as the legal pronouncement reveals the distance between the decidedly top-down, elite judgment and the ways in which people that have relationships with the river conceptualize its existence.

The misalignment between the Court judgment and that of Varanasi residents has several levels. First and perhaps foremost, residents deeply distrust the state, for good reason. Central and regional bureaucracies have not lived up to official promises in terms of pollution reduction and the restoration of the river's health. Therefore, the appointment of state officials as guardians seems, at best, suspect. Secondly, religious framings around Ganga as goddess stress its independence from humans, as well as its own life that will, at some point, end. Alley reports one resident as saying that "thousands of years from now Ganga will not be here. After thousands of years, she will be gone. There will be rivers but not Ganga. Like the Saraswati river in Allahabad is finished. Yamuna river will also go like this" (p.10).

Grounded ways of thinking about the river, and most importantly of understanding human – river – deity relationships, escape the simple pronouncements of the law. In this sense, the concept of juristic person is in line with its British beginnings, as a mechanism of cutting through complexities. Ganga will die, and others will take her place, as the manifestations of deities are mutable. She cannot be vulnerable, or in need of protection, because she is all powerful. The way in which these conceptions relate to efforts at pollution reduction, for example, is a question to be asked, and a very important one. But it cannot be answered through simply declaring the river to be a legal person, precisely because this formulation was neither initiated by communities, nor does it seem to be widely accepted by them. It does not 'translate' their way of thinking.

Perhaps most surprisingly, the Court's decision on guardianship was not accepted by the guardians themselves. They promptly appealed to the authority of the Supreme court, which stayed the lower Court's decision. A guardian as construed by the Court would be fully responsible for the actions of the river, something explic-

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itly stated in the judgment. The Supreme Court wondered if flood victims could then sue the state – the parent of the river, really – for damages. It also justified its decision by noting that Ganga flows through several states, and it is unclear whether the judgment issued in Uttarakhand would apply to downstream states, and whether the parents of the minor would be responsible for pollution initiated in their state that would inevitably cross administrative borders.

The Court of Uttarakhand also used the mechanism of legal personality for mountains and glaciers. As the court states in the glaciers case, "a juristic person can be any subject matter other than a human being to which the law attributes personality for good and sufficient reasons" (Glaciers, 62-3). But, as O'Donnell (2018) shows, the doctrine of legal personality is extended to its maximum girth in being conflated with the notions of living entity, as well as "legal entity/legal person/juristic person/juridical person/moral person/artificial person" (138). Many of these concepts invoked by the Court are synonyms of the juridical person idea established in Indian legal tradition. But the inclusion of moral person/artificial person raises questions, not least about the relationship between moral and legal personality in a deeply religiously inflected context, as well as the meaning of artificiality side-by-side with supposedly obvious moral values. This seems to elevate potentially anything to the status of legal person as an ontological category, therefore emptying the power of the ontological by relegating it to whim.

The Indian case is good at showing further dendrites connecting the state and the rights of nature. The court identified the rivers Ganga and Yamuna as being sacred to Hindus, omitting to say anything about its status to other groups. Given Hindu nationalism and its influence on the Indian state, this may be dangerous (O'Donnell 2018). Vrinda Narain argues that "in the context of rising Hindu right-wing rhetoric, the Court's linking of the Hindu faith with national identity and the corresponding casting out of religious minorities implied by this method of argumentation by the court is cause for concern" (in Clark et al 2018, p.816). The potential nationalist uses of Ganga's legal personality have so far not materialized. Instead, the nationalist government that holds power both at state

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and central levels has distanced itself from the ruling, as evidence by their appealing to the Supreme Court.

If the Supreme Court judgment upholds the legal personality of the rivers, the avenue towards nationalism may as well be exploited. This can be done in two ways. First, the original judgment mandates participation of local communities. This kind of top-down mandate for participation rings hollow, as true participation tends to travel the other way around. Be that as it may, it is not a stretch to imagine that whatever participation may come about would be restricted to Hindus, because Ganga and Yamuna are *their* idols. Second, the Court adopted a very wide definition of environmental harm, stating that even the "plucking of one leaf" constitutes harm. Given current levels of pollution (also tied to industries promoted by the state), this is an extreme interpretation of what the law may achieve and of what may constitute harm. It seems to be a radical application of ecocentrism that may be combined with Hindu nationalism in potentially discriminatory ways. Is every person's plucking equal? Whatever may happen in the future of this judgment, it is safe to say that it gives more tools to the state than it takes away, regardless of the intentions motivating it.

The kind of ecocentrism that rights of nature have inherited is steeped in ecotheology. The Indian cases show this to be true from the perspective of polytheistic religions as well. Alley (2019) calls the framework at work here "spiritual ecology" (or sacred ecology). Spiritually inflected ecology is very old and common (see Berkes 2017), and on account of that also very varied. The Court ruling, however, is not based in the specificity of sacred *ecological* practices, but rather uses religious/legal personality to gloss over the existing relationships that construe the river (along its 2500km!) in different ways. This seems to be a different kind of ecotheology, not a sacred ecology.

As with all cases of rights of nature, close attention needs to be paid to the local contexts in which they appear. The Indian local traditions, in religious, political, and legal senses, have had a decisive influence on this case, but they also combined with the idea of the rights of nature being fundamentally ecocentric and applicable everywhere in more or less the same ways. Though it may seem that

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this case is tailored to particular needs – the pollution of the river, as well as particular beliefs – the holiness of the river, it trades much more in modernist abstractions cemented into legal traditions borrowed from Europeans. In fact, there is no local participation to speak of.

As high-minded as the Court may have been, it could not help but sneak into its pronouncement problems that can only be solved by going into the specific relationships that people entertain, as well as through tailored mechanisms of enforcement. The Court did not develop any kind of institutional or participatory framework to see through the protection of the rivers. It simply mandated guardians, who do not want to act as such. It gave the juristic person no funds, and no property. It said nothing about already existing interests in the river. And it is unclear how it interacts with already existing laws, which already prohibit much of what the Court wanted to prohibit.

This case renders the mechanism of judicial pronouncement for achieving rights of nature suspect, and should raise doubts regarding the dominant mechanisms of policy diffusion and on what they accomplish. The assumption that rights are primarily about ecocentric values and the protection of nature (as opposed to being primarily about new political configurations that may play in the favor of the state) has incentivized their presentation as all part of the same movement, a claim I will investigate in the next chapter. This has meant that any law, however contextually different or problematic, is quickly adopted as proof that the movement is gaining steam and that the world is finally turning towards ecocentric law. This has been further bolstered by the promotion of rights of nature as an international level solution, a strategy to which I now turn.

Universal Declarations

The history of human rights would not be the same without its Universal Declaration, a document that internationalized human rights while also laying an international framework for their protection. Similarly, rights of nature advocates have looked towards the international arena since before the case of Ecuador. In fact, the case of

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Ecuador itself was partly motivated by the ambition to gain international prominence, as I have documented in Tănăsescu (2013, 2016). This is why the first attempt to apply the Ecuadorian provisions was by using the idea that these constitutional rights apply extraterritorially (like human rights do). A group of plaintiffs, most involved with the drafting of Ecuador's constitution, sued BP for the Gulf of Mexico Deepwater Horizon oil leak on the grounds that it violated the rights of nature enshrined in the Ecuadorian constitution. The lawsuit went nowhere, but the point was not to actually win; the point was to make an international entry and to popularize the idea that rights of nature can, and should, become international law.

Several years later, in 2010, and with the explicit support of Evo Morales, then Bolivia's president, a Universal Declaration for the Rights of Mother Earth[8] was drafted and presented to the UN for consideration. Advocates modelled it explicitly on human rights declarations of the 20th century, believing that its adoption will usher in a new, international era of rights of nature. This may be so; and it may also be that the more cases at all legal levels there are, the more this kind of universal declaration stands a chance of being adopted. What is interesting from a critical perspective is to assess the intellectual genealogy of this proposal as well its relationship with liberal rights discourse.

It would be repetitive to dwell too much on the expression Mother Earth, as I have already pointed out the problematic gendering of nature that it accomplishes. The Universal Declaration for the Rights of Mother Earth would impose this kind of gendering everywhere through its adoption at the UN level. This, to my mind, would be a blow to indigenous conceptions, which are much more multidimensional and variegated. This kind of gendering accord well with ecotheology. And as Tola (2018) points out, it also goes seamlessly with the neoliberal idea that nature is first and foremost a producer, just like the stereotypical image of motherhood as fertility would suggest.

It may, however, be instructive to pause on how some indigenous philosophical traditions conceptualize the environment in

8 Available here: https://www.therightsofnature.org/universal-declaration/

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non-gendered ways. Merata Kawharu, writing specifically about Māori relations with the environment, explains that the surrounding world is conceptualized (and lived) as a living ancestor. This conception is given succinct expression in the saying "Māori walk backwards into the future" (p.222), which means that present generations take their cues from stories about past deeds of important ancestors. These past actions are mostly in relation to specific environments, which are in some sense personified, but in ways that need not be explicit about gender. Creation myths, too, portray the world as both male and female (Ranginui and Papatuánuku). The productivity of nature, which leads western conceptions towards the idea of Mother, is recognized through gender relations, or else through ancestor – environment relations. The gender of the ancestor is irrelevant, as the accent falls on her/his deeds.

If the environment is to be likened to anything, in Kawharu's account, it is not a person, nor a particular gender. Instead, it is akin to a *marae*, "forums where tikanga or customs are performed, discussed, and negotiated" (p.221). Notice that this is a dynamic, processual rendering of customary law itself, which is amenable to discussion and negotiation, as it is within any living culture. "The meeting house" (the physical one, *whare whakairo*), Pakariki Harrison explains, "is conceptualized metaphorically as a human body, usually representing the eponymous ancestor of a tribe" (in Kawharu 2010, p.228). He goes on to explain how the different parts of the building, elaborated in the famous Māori wood-carving style, represent parts of a body, such that inside the building people are held within the ancestor, just like they are held within the surrounding environment. The gender of the ancestor is not transferred to the environment. If we though that way, nature here would be male, given that tribal leaders were mostly men.

The environment as *marae* therefore consists of two different concepts: the body of the living ancestor, symbolized in the physical building, and the correct (or incorrect, as the case may be) way of acting that is informed by the relationship between ancestors and places. James Henare expresses the relationship between these two concepts thus: "when I look at these landscapes I see my ancestors walking back to me" (in Kawharu, p.228).

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In contrast to these textured conceptions, totality thinking is most starkly expressed in the Universal Declaration. It is framed to emanate from "we, the people and nations of Earth", which may very well be interpreted as a synonym for "humanity". The text of the declaration also makes the claim that human rights cannot exist without nature's rights because humans are part of nature. This claim accomplishes two things: it clearly establishes the genealogical connection between liberal human rights and rights of nature without engaging with the problems that it may pose; and it hides the many ways in which human rights and nature's rights are at odds, as we have already seen in the analysis of cases.

The language of the declaration also raises other fundamental questions. For example, it speaks of Mother Earth as both a living and indivisible being, while also granting rights (at the very least the right to exist) to all specific beings. Presumably, this includes all known pathogens as well as charismatic animals. In fact, it may include more, as the declaration also extends its protection to the abiotic realm, in an apparent nod to indigenous thinking. In practice, a declaration worded through an unreflective repetition of ecotheology would mean that powerful actors, including first and foremost states and multinational corporations, could use it selectively, as has so far happened in Ecuador and Bolivia (see Chapter 6). As has been firmly established, this would be largely to the detriment of the already disenfranchised.

Traces of the perpetuation of disenfranchisement through rights are already visible in certain key omission from the Universal Declaration as well as in the Colombian Atrato case. In the former, the only perceived enemy of nature is "capitalism", which has the benefit of at least getting closer to identifying a culprit but remains completely silent as to the crucial role of nation states in silencing revolt against the dominant mode of political economy. In the Atrato case, the court ruling was occasioned by illegal mining, but the court identifies as the ultimate culprit the human species, omitting to mention that illegal miners are often poor and excluded populations that are forced into that way of life by government policy. Rights of nature ire against illegal miners has also been expressed in Ecuador during one of the first cases of

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constitutional protection for nature's rights in the country. In that case, the Ecuadorian state used nature's rights to evict small-scale artisanal miners in a remote region of the country (Daly 2012). The same state that evicted artisanal miners has, since 2008, expanded corporate mining, often in indigenous territories.

Rights liberalism has evolved to be a growing kaleidoscope of rights that are incompatible with each other and therefore remain at the mercy of the state for resolution and effective application. This point has been made by many critical scholars of human rights (see for example Douzinas 2000), who show that the supposedly universal rights of humans are always differentially applied to suit the agenda of the nation state. Migrants don't have the same rights as citizens, for example. Human rights are inseparable from citizenship rights, which are their channel towards effective protection. In particular, socio-economic status has a decisive impact on one's human rights, as the poor are routinely treated as rightless and subjected to paternalistic state surveillance.

Similarly, the rights of nature add to the liberal kaleidoscope a tool for the state to satisfy certain environmental interests while advancing its largely extractivist agenda. Under conditions of a globalized capitalist economy, this will continue even if the world transitions to renewable energy, which is itself extractive of land and many other resources used in its production. As Bruno Latour pointed out in a public lecture delivered in 2021, the goal of mainstream political economy seems to be to pursue a kind of Total Production, where everything is integrated within a productive apparatus that yields 'economic value', whether in the form of 'ecosystem services' or consumer goods. Surely despite the best intentions of advocates, ecotheological rights participate in this dream of Total Production by extending rights to everything, while undermining radically different forms of living in particular places, as championed by many Indigenous Populations.

The rights of nature do not *inherently* do this. I have argued that a certain *kind* of rights, enamored with totality and completely uncritical of its own intellectual inheritance, can – perhaps despite themselves – do this. But the rights of nature harbor other possibilities as well, and the New Zealand cases are instructive here. If

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nothing else, advocates should be thanked for ushering in a new era of legal innovation. But like so much other legal and political innovation, the settling of orthodoxy risks uprooting the initial radical potential of the new idea. Hence critique is crucial, in order to be lucid about unintended consequences and to keep the innovative impetus alive.

In the next chapter, I will examine how the critique offered so far can help move the rights of nature towards a greater diversity of practice. I will also look at how practical experimentation and diversification can change our theoretical models for the better. Finally, we will see what legal innovation outside the hegemony of totality may look like and how rights advocacy can participate by becoming conscious of the inherently political nature of their favorite tool.

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