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## Where ordinary laws fall short: ‘riverine rights’ and constitutionalism

Elizabeth Macpherson <sup>a</sup>, Axel Borchgrevink<sup>b</sup>, Rahul Ranjan<sup>c</sup> and Catalina Vallejo Piedrahíta<sup>d</sup>

<sup>a</sup>School of Law, University of Canterbury, Christchurch, New Zealand; <sup>b</sup>Department of International Studies, OsloMet – storbyuniversitetet – Kjeller Campus, Norway; <sup>c</sup>Department of International Studies, OsloMet – storbyuniversitetet, Norway; <sup>d</sup>Faculty of Law, University of Bergen (UiB)

### ABSTRACT

Laws that recognise rivers and their ecosystems as legal persons or subjects with their own rights, duties and obligations have been associated with theories of environmental constitutionalism. However, the extent to, and manner in which, constitutional law (with its elevated status) has been instrumental in the conferral of these ‘riverine rights’ is still not well-understood. In this article, we consider the constitutional relevance of the recognition of rivers as legal persons or subjects in Aotearoa New Zealand, Colombia and India. We argue that in these three countries riverine rights are constitutional experiments: as small-scale, ad hoc and ultimately incomplete attempts to transcend seemingly ineffective regulatory frameworks for rivers. However, they are also incremental, and influential, steps in a broader project of more fundamental social and environmental reform.

### 1. Introduction

The recognition or bestowal of legal rights on the Atrato, Ganges and Yamuna, and Whanganui rivers (Table 1) has attracted intense interest in transnational scholarship. Like other novel, yet incipient, legal developments, much of this attention focuses on the ‘transformative’ potential of the legal person model<sup>1</sup> – to rebalance the power dynamics between humans and nature and enable real social and ecological change. Laws that recognise rivers and their ecosystems as legal persons or subjects with their own rights, duties and obligations, have been associated with theories of ‘environmental constitutionalism’; the constitutional incorporation of substantive and procedural environmental rights, responsibilities, and remedies to protect the natural environment.<sup>2</sup> These are attempts to ‘transcend “normal” politics and law, reaching deep into the moral

**CONTACT** Elizabeth Macpherson  [elizabeth.macpherson@canterbury.ac.nz](mailto:elizabeth.macpherson@canterbury.ac.nz)

<sup>1</sup>See O’Donnell (2017), p 503.

<sup>2</sup>Daly and May (2018), p 1; Daly et al (2017).

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**Table 1.** Riverine Rights in Aotearoa New Zealand, India and Colombia.

	Te Awa Tupua	Ganges/Yamuna /Glaciers	Atrato
Legal mechanism	Legislative	Judicial	Judicial
Original claimant	Whanganui <i>iwi</i> (tribe)	Mohammed Salim/ Lalit Miglani	Tierra Digna NGO on behalf of Afro descendent and Indigenous communities
Proponent of riverine rights	Crown	Judge	Judge
Constitution	Treaty of Waitangi, multiple statutes (including <i>New Zealand Bill of Rights Act 1990</i> ), conventions, common law rules, and customary law.	<i>Constitution of India 1950</i> (IN)	<i>Constitución Política de Colombia 1991</i> (COL)

fabric of a society that seeks to be good, as expressed through its constitutionalised political and legal order'.<sup>3</sup>

There is a broad range of existing and prospective models that position rivers as having some form of rights or personality around the world.<sup>4</sup> These include a mixture of judicial, administrative and legislative examples; made at various levels of government from local to international; concerning various types of ecosystems from specific rivers to broader manifestations of 'nature'; and involving a range of legal mechanisms such as rights of nature, legal or juristic persons or subjects, or models that recognise rivers or ecosystems as living entities.<sup>5</sup> For convenience, we use the term 'riverine rights' to very loosely group the 'cases'<sup>6</sup> from Colombia, India and Aotearoa New Zealand discussed in this article, although we acknowledge and accept the conceptual and practical differences between places, peoples and contexts, and undertake a contextualised and nuanced analysis of each case.

Despite their different circumstances, those driving riverine rights in these seemingly disparate cases have sought to elevate certain fundamental and inviolable interests (both of the river and sometimes of themselves), above the everyday business of river management. Put practically, certain interest groups (e.g. local communities, Indigenous peoples, NGOs, and even judges and politicians) have attempted to leverage riverine rights to 'win their battles' (including but not limited to claims for control and access) with respect to rivers; appealing to higher-level norms which have the potential to transcend dominant regulatory approaches and distributions.<sup>7</sup> These claims appeal to constitutional law's elevated status – with its hierarchy of 'special powers', which take priority over 'ordinary'

<sup>3</sup>Kotzé (2017), p 191.

<sup>4</sup>The expanding list includes (without limit) the Whanganui river in Aotearoa New Zealand; a number of rivers (including the Atrato) in Colombia; the Ganges and Yamuna in India; all rivers in Bangladesh; the Yarra river in Australia; and (more recently) the Magpie River in Canada.

<sup>5</sup>See Tănăsescu (forthcoming) and O'Donnell et al (2020). The existing research does little to theorise the differences between the various 'rights of nature' models with the exception of Tănăsescu and O'Donnell et al. Tănăsescu's recent work helpfully draws a distinction between what he calls 'ecothological' approaches that recognise rights for nature broadly (like the Ecuadorian Constitution) and place-based legal person models like in Aotearoa, which have distinct conceptual underpinnings. We acknowledge that the three riverine rights cases discussed in this article rely on a combination of ecothological and place-based concepts.

<sup>6</sup>We refer to these as 'cases' for heuristic reasons, although we note that the three examples involve different types of legal mechanisms and models, including statutory approaches.

<sup>7</sup>See Kauffman and Martin (2019), p 20.

laws. Yet, there is often said to be an ‘implementation gap’<sup>8</sup> in environmental constitutionalism; i.e. constitutions and their enforcers may well produce ambitious normative agendas about transformative environmental change, but these ambitions lead to little impact on the ground.<sup>9</sup>

It is with this potential and ambivalence in mind that we ask in this article: To what extent, and in what ways, has constitutional law (with its elevated status) been instrumental in the conferral of riverine rights? We choose to investigate this question through an exploratory comparative study of the three jurisdictions that are typically used as exemplars in contemporary literature and commentary for applying rights-based approaches to rivers: Colombia, India and Aotearoa New Zealand.<sup>10</sup> All three countries have recognised rivers as legal persons/subjects in varying ways and to varying degrees since 2016.<sup>11</sup> In doing so we consider whether the three riverine rights cases reflect the pragmatism of rights-based claims and strategic socio-ecological litigation and reform. We also consider whether the three riverine rights cases might be the result of activists ‘learning to play the legal game better’ or of judges, lawyers and politicians seeking to ‘make their mark’ through novel legal mechanisms inspired by alternative value-systems.

In our enquiry, we seek to make some broader observations relevant to the project of ‘transnational comparative environmental constitutionalism’.<sup>12</sup> By taking an interdisciplinary approach drawing on law and political and anthropological theory, we consider whether constitutions (broadly framed) are in fact the enablers of change they are often described to be, against the background of the complex political power dynamics of the specific cases. We take a broad approach to assessing ‘change’, ‘adaptation’ and ‘reform’, as socio-ecological phenomena. For example, we cannot measure improvements to the health of the river within the period, but we can make observations about the broader health of riverine communities as socio-ecological networks. We do not therefore seek to ascertain the extent to which riverine rights are practically or effectively implemented in each of the country studies (other than as reported in the academic literature), instead focusing on the design and content of legal and policy frameworks in their specific context.

We explore the constitutional significance of the three riverine rights cases via a detailed interdisciplinary study of the law, policy and scholarship relating to each case in its historical, political and cultural context.<sup>13</sup> Our transdisciplinary and transnational research team includes researchers from all three countries, fluent in the language and ‘legal language’ of each country.<sup>14</sup> We do not presume, however, to speak for Indigenous, Afro descendent or local peoples.

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<sup>8</sup>Daly and May (2018), p 4. See also Boyd (2012).

<sup>9</sup>This is especially the case in less-developed countries. See, e.g. Richardson and McNeish (2021).

<sup>10</sup>Hereafter, ‘New Zealand’, for brevity only.

<sup>11</sup>Our choice to focus on these countries is aided by them being the first three countries to provide (significantly) for riverine rights, with the largest amount of data available.

<sup>12</sup>See Kotzé (2017). See also Venter and Kotzé (2017).

<sup>13</sup>We define ‘law’ very broadly (in line with a socio-legal methodology) to include not just ‘law in the books’ but the expression of rights, entitlements and obligations in written and unwritten (customary) normative frameworks and socio-political strategies for environmental protection or access (legislation, case law, government and community policy and planning documents). See Hirschl (2014), p 13.

<sup>14</sup>See Curran (2006) on ‘legal language’.

We find that each of the three riverine rights cases, although quite different in its workings and context, has constitutional significance.<sup>15</sup> Each case is an attempt to reset the political power dynamics between governments and communities/interest groups. Each case uses the language of ‘rights’ to secure environmental and social objectives, and attempts to elevate those rights above ordinary regulation, appealing to constitutional norms. This may be done for a range of reasons, including (but not limited to) the furtherance of Indigenous political claims for self-determination over river governance and use; the influence of transnational environmental non-governmental organisations (NGOs) and the global rights of nature project;<sup>16</sup> and the personal ambitions of creative lawyers, politicians and judges who wish to ‘make their mark’.<sup>17</sup>

We find that the riverine rights cases do not completely succeed in their transformative endeavour, and each case has significant shortcomings in terms of the ability to transcend dominant regulatory regimes, and thereby they may have limited potential to enable real legal and practical change. Despite this, we argue, the riverine rights cases from Colombia, India and New Zealand can be characterised as tentative early steps towards more transformative change, and their broader influence throughout the legal and institutional culture of each country, can already be seen.

## 2. Environmental constitutionalism: conceptual tensions

### 2.1. *The normative superiority of constitutional law*

Constitutional law appeals to environmental lawyers because of its potential to transcend ‘ordinary’ regulation via the setting of high-level norms, which reflect fundamental human needs, principles, values or interests. This is important because changes in constitutional norms, or their interpretation, have the power to affect all other norms in a given legal system. According to May and Daly, ‘Environmental constitutionalism offers a way forward when other legal mechanisms fall short’.<sup>18</sup>

Constitutions take many different forms in comparative experience. There are written constitutions, including the French or Roman law derived constitutions typical of civil law countries,<sup>19</sup> like Colombia.<sup>20</sup> There are also unwritten constitutions, which may be spread across a combination of fundamental texts, prerogatives and doctrines of common law, typical of ‘Westminster system’ countries colonised by the British, like New Zealand.<sup>21</sup> Finally, there are traditions that bridge the ‘divide’, and include a mixture of civil style codified constitutions, common law doctrines and pluralist norms, like India.<sup>22</sup> Despite formal and contextual differences amongst and between constitutions around the world, ‘comparative constitutionalism’ – the ‘transnational migration of

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<sup>15</sup>We discuss the meaning of constitutionalism, and environmental constitutionalism in the following section and note, at the outset, that the concept of constitutional significance can be difficult to define, but we use it in the sense of alluding to constitutional law’s elevated or superior status over ‘ordinary’ law and regulation.

<sup>16</sup>See also Tănăsescu (forthcoming).

<sup>17</sup>See also Kauffman and Martin (2019), p 20.

<sup>18</sup>May and Daly (2015), p 18.

<sup>19</sup>On Latin American constitutionalism see Adelman (2014), p 508; Gargarella (2014).

<sup>20</sup>*Constitución Política de Colombia [Political Constitution of Colombia] 1991* (COL).

<sup>21</sup>Joseph (2014), p 4. Joseph refers to New Zealand’s constitution as, ‘cocktail of Westminster inheritance and local innovation’.

<sup>22</sup>Abeyratne (2018), p 307; Ram-Prasad (2013), p 676.

constitutional ideas' – has become 'a cornerstone of constitutional jurisprudence and constitution-making in an increasing number of countries worldwide'.<sup>23</sup> This transnational comparative constitutionalism has spread with reference to, but mostly independent of, international norms, which may set the tone for transformative constitutional agendas,<sup>24</sup> but are notoriously difficult to implement 'on the ground'.<sup>25</sup>

Constitutions serve a very important purpose in the legal systems of domestic countries. In liberal democratic theory, constitutions are the source of protection for fundamental human rights and needs, seen necessary to protect people from the tyranny of governments, pursuant to ideals like 'limited government' and the 'rule of law'.<sup>26</sup> Additionally, constitutions provide for positive obligations, stemming from the emergence of the welfare state, that spell out state duties to provide for the well-being of the people.<sup>27</sup> A key characteristic of constitutions is their 'normative superiority' above 'ordinary laws'.<sup>28</sup> They are sometimes described as 'supreme law',<sup>29</sup> especially where they entail the power for courts to 'strike down' acts that are inconsistent with or contravene them.<sup>30</sup>

The contents of constitutions typically include provisions that limit the power of the state, provisions that distribute power within various branches of government, and provisions that protect the rights of individuals.<sup>31</sup> Constitutions usually make a distinction between the rules for political decision-making (procedure), and the decisions themselves (substance).<sup>32</sup> This, Grimm explains, insulates fundamental values and processes from day to day pressures and conflicts, making the constitution stable yet adaptive to uncertainty and change.<sup>33</sup>

Because of constitutions' elevated status and shared values, people may be more likely to respect and follow them than ordinary laws and regulations concerned with more-mundane aspects of daily life.<sup>34</sup> However, constitutions are implemented through administrative decision-making, and usually enforced by specialist constitutional courts, or the highest levels of the judiciary. Their implementation is most effective where constitutional norms are 'self-executing', meaning that they can be enforced directly by the courts without secondary legislation.<sup>35</sup> They have even stronger normative force and stability where the constitution is 'entrenched', meaning that a certain increased parliamentary majority is needed to change it.<sup>36</sup>

Constitutions are typically seen as a model standard for legitimacy; a statement of what is right and what is wrong for a whole public to aspire to, forming part of 'the social contract'.<sup>37</sup> Constitutions are, 'the highest expression of legal ideals in any legal order,

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<sup>23</sup>Hirschl (2014), p 3; see also Ginsburg and Dixon (2011). See also Geiringer (2019), p 281 who shows how constitutional theories, as well as constitutional law is migrating as part of this transnational constitutionalism.

<sup>24</sup>Kotzé (2017), pp 11, 110. See also May and Daly (2015), p 31.

<sup>25</sup>Daly and May (2018), pp 1–2.

<sup>26</sup>Ginsburg, Huq, and Versteeg (2018), p 239.

<sup>27</sup>Singh (2018), p 652.

<sup>28</sup>May and Daly (2015), p 33; Grimm (2005), p 193.

<sup>29</sup>Joseph (2014), p 20.

<sup>30</sup>Palmer et al (2016).

<sup>31</sup>May and Daly (2015), p 38.

<sup>32</sup>Grimm (2005), p 194.

<sup>33</sup>Grimm (2005), p 194; Kotzé (2018), p 17.

<sup>34</sup>May and Daly (2015), p 33.

<sup>35</sup>Daly and May (2018), p 77.

<sup>36</sup>Hein (2020), p 79.

<sup>37</sup>Bosselmann (2008), p 169. See also Grimm (2005), p 194.

providing the clearest manifestation and evidence of a social order's values and guiding principles'.<sup>38</sup> As such, they represent the most venerated part of a legal system, and have been called a 'sacred text'.<sup>39</sup>

Because of constitutions' normative superiority, and implied legitimacy, they have been used in comparative history as vehicles for transformative structural changes: the Latin American constitutions of the twentieth century being a clear example.<sup>40</sup> Although it should be remembered that constitutions, as a 'hegemonic' liberal democratic ideal, have not always recognised legal and cultural pluralism, whereby 'large subaltern populations (often comprising distinct racial or ethnic minorities) were kept at arm's length from full economic or political participation'.<sup>41</sup> In particular, the constitutional legitimacy of settler colonial states is often assumed, without any legal or moral justification, especially in the absence of fair treaties, agreements and power-sharing with Indigenous peoples.<sup>42</sup> Further, constitutions are not necessarily a stable bastion for legitimacy, even where they are entrenched, and some countries (for example, in Latin America) have had multiple, successive constitutions (some of which have been used to justify tyrannical state acts) in a relatively short period of time.<sup>43</sup> This empirical reality casts doubt on constitutionalism's claim to moral superiority, and raises real implications for the rule of law.

## **2.2. Environmental law and constitutionalism: the next level?**

Environmental lawyers, scholars, judges and activists, frustrated by the inability of 'ordinary' regulation to respond to environmental concerns, are increasingly interested in constitutionalism, including learning from its use in other countries.<sup>44</sup> Because environmental degradation is 'one of the most pressing concerns in modern times', Kotzé contends that environmental care has been elevated 'from the "ordinary" legal level to the "higher", more enduring, constitutional level'.<sup>45</sup> Thus, Kotzé argues, environmental values belong among the fundamental values that are enshrined in a constitution; environmental protection is among those concerns for which the state should be responsible; and this obligation belongs to that set of higher-order laws to which ordinary laws need to conform.<sup>46</sup>

Over the last three decades, the provision for environmental protection or rights in national constitutions has expanded dramatically, and it is estimated that 150 constitutions now have some reference to environmental protection.<sup>47</sup> While the *UN Conference on the Human Environment* in Stockholm in 1972 is sometimes credited with initiating the drive towards environmental constitutionalism,<sup>48</sup> the great majority of these environmental references have been included after 1990.<sup>49</sup> This is partly because

<sup>38</sup>Kotzé (2018), p 16.

<sup>39</sup>Benedict (1987).

<sup>40</sup>Adelman (2014); Gargarella (2014).

<sup>41</sup>Ginsburg, Huq, and Versteeg (2018), p 240.

<sup>42</sup>Jones (2016), p 28.

<sup>43</sup>Adelman (2014); Gargarella (2014).

<sup>44</sup>See, e.g. Bosselmann (2008), p 159.

<sup>45</sup>Kotzé (2012), p 207.

<sup>46</sup>Kotzé (2012). See also May and Daly (2015), p 1.

<sup>47</sup>O'Gorman (2017).

<sup>48</sup>Boyd (2011). See also Shelton (2006).

<sup>49</sup>May (2006); Gellers (2017)

many domestic constitutions were rewritten from the 1990s onwards (providing opportunities for including environmental protections), but also due to growing international awareness about environmental issues. The growth in normative environmental provisions has been accompanied by a trend towards judicialisation of politics, in which ‘the domain of the litigator and the judge has radically expanded’ and activist lawyers and judges are increasingly producers of legal reform, especially in the constitutional law field of ‘rights’.<sup>50</sup>

The linking of environmental interests to existing procedural and substantive human rights protection has, in fact, cleared the way for the project of global environmental constitutionalism. This is the case because, in most legal systems, human rights already have constitutional status so slotting environmental rights alongside them gives similar status.<sup>51</sup> The connection between human rights and environmental rights is evident in principle 1 of the *Stockholm Declaration*, which reads:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.<sup>52</sup>

Many countries now include the ‘right to a clean and healthy environment’ in their national constitution,<sup>53</sup> which have been called ‘Fundamental Environmental Rights’.<sup>54</sup> As of March 2021, there were 110 countries that had implemented the right to a healthy environment in their constitution,<sup>55</sup> although courts have often been reluctant to enforce such rights, leading critics to claim that they are largely ineffective.<sup>56</sup>

### **2.3. Environmental constitutionalism, nature’s rights and Indigenous rights: strange bedfellows**

There remains a problematic mismatch between human rights and environmental objectives, especially given the ‘anthropocentric’ focus of human rights protection.<sup>57</sup> This anthropocentrism is the core concern of the global ‘rights of nature’<sup>58</sup> movement, which argues for the protection of nature (in both international and domestic legal frameworks) independent of, and perhaps in opposition to, the rights of humans.<sup>59</sup> The legal manifestation of postmodern rights of nature activism is often said to have started with the *Constitution of Ecuador*, which incorporated a protection of the rights of *Pacha*

<sup>50</sup>See Shapiro and Stone Sweet (2002); Couso, Huneus, and Sieder (2010).

<sup>51</sup>Shelton (2006), p 163. See Gilbert (2018).

<sup>52</sup>*Stockholm Declaration and Action Plan for the Human Environment 1972*. We note the outdated gendered language in the declaration.

<sup>53</sup>Shelton (2006).

<sup>54</sup>May (2006).

<sup>55</sup>Zimmer (2021).

<sup>56</sup>Weis (2018), p 838. See generally Gellers (2015) for an empirical study of the countries that have included environmental rights in their constitutions.

<sup>57</sup>Shelton (2006), p 170.

<sup>58</sup>We acknowledge that much of the theory on which rights of nature models are constructed, especially the ‘ecothological’ theory highlighted in the work of Tănăsescu, makes a moral claim about rights of nature being necessary to protect ‘Mother Earth’ from the evils of a homogenous and equally responsible ‘Humanity’. Such discourse also has ‘constitutional’ undertones, in terms of referring to a moral political order and what is good for society and the planet as a whole. See Tănăsescu (forthcoming); See also O’Donnell et al (2020).

<sup>59</sup>See Boyd (2017).

*Mama* (Mother Nature) in 2008,<sup>60</sup> although such constitutional rights of nature provisions often sit with other human rights protections, alongside the right to a clean and healthy environment.<sup>61</sup> This maintains the characteristic rights-based approach of environmental constitutionalism, but argues for the expansion of rights-holders beyond humans to include the natural environment as a whole, or specific parts of it,<sup>62</sup> what Tănăsescu calls ‘the expanding circle of moral concern’.<sup>63</sup>

The spread of transnational environmental constitutionalism, and in particular the extension of human rights protections to nature, also has a close (yet uneasy) relationship with the increasing recognition of collective Indigenous rights in comparative and international law.<sup>64</sup> The *ILO Convention 169*, the *United Nations Declaration on the Rights of Indigenous Peoples*, and customary international law now recognise Indigenous territorial and environmental rights,<sup>65</sup> including both their physical and cultural/spiritual elements,<sup>66</sup> and encourage states to recognise and provide for such rights. With reference to these international norms and as advocated by the transnational Indigenous rights movement, governments in Colombia and Aotearoa New Zealand have embarked on processes for redressing historical and contemporary territorial rights claims by Indigenous peoples; including claims to land, resources, and related political authority. These claims invariably come before the constitutional courts, or have constitutional implications.<sup>67</sup> In some places, like in Aotearoa New Zealand, this process of claims-making has led at times to the adoption of legal person models, in an attempt to reflect legal and ontological pluralism, via western legal concepts that approximate Indigenous law.<sup>68</sup>

Yet, there is increasing criticism of rights of nature theory and practice (and the broader project of transnational environmental constitutionalism) from the perspective of Indigenous rights. This is especially the case, as Tănăsescu points out, for models that seek to recognise or protect the rights of the totality of ‘Nature’ *vis a vis* all humanity, as opposed to the place-based relational models in Aotearoa New Zealand.<sup>69</sup> Rights of nature advocates emphasise alignment between Indigenous belief systems and their ‘eco-centric’ approaches,<sup>70</sup> however, the rights of nature movement has firmly western and

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<sup>60</sup>*Constitución de La República de Ecuador [Constitution of the Republic of Ecuador] 2008* (ECU).

<sup>61</sup>Shelton (2006), p 170.

<sup>62</sup>Weis (2018), p 858. Environmental constitutionalism is not necessarily restricted to rights-based protections. Weis explains that ‘most environmental [constitutional] provisions are not conventional rights provisions but provisions that indicate that the institutional responsibility for fundamental environmental values lie with the political branches and not with courts.’

<sup>63</sup>Tănăsescu (forthcoming).

<sup>64</sup>*International Labour Organisation Convention (No 169) 1989; Declaration on the Rights of Indigenous Peoples (UNDRIP), Opened for Signature 13 September 2007*. Article 26.1 of the UNDRIP states for instance that: ‘Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.’ The UNDRIP, while approved by a large majority of the UN General Assembly, is not legally binding. New Zealand was among the four countries voting against the UNDRIP, and Colombia one of the eleven countries abstaining.

<sup>65</sup>*International Labour Organisation Convention (No 169) 1989* articles 13 to 19; *UNDRIP* articles 25 to 30.

<sup>66</sup>*International Labour Organisation Convention (No 169) 1989* articles 13 and 14; *UNDRIP* article 25 and preamble.

<sup>67</sup>In Aotearoa New Zealand these are political settlements of claims made pursuant to New Zealand’s founding constitutional document: Te Tiriti o Waitangi/the Treaty of Waitangi 1840 between Māori and the British Crown. In Colombia, Indigenous collective rights, including to territory, are guaranteed in the 1991 Constitution. See Macpherson, Torres Ventura, and Clavijo Ospina (2020).

<sup>68</sup>See Martuwarra (2020); Te Aho (2009); Morris and Ruru (2010); Watts (2013); Milgin et al (2020), p 1211; Salmond (2017), p 299; Kauffman (2020). See also James (2020), p 2.

<sup>69</sup>Tănăsescu (forthcoming). See also O’Donnell et al (2020).

<sup>70</sup>See, e.g. Boyd (2017); Guzmán (2019).

non-Indigenous origins,<sup>71</sup> and has at times accidentally, and even wilfully, ignored Indigenous agency and difference.<sup>72</sup> Indigenous peoples have good reason to be suspicious of the ‘rights revolution’ for nature,<sup>73</sup> given their historical experience with liberal legal constructs.<sup>74</sup> Legal personhood or rights of nature activism may detract attention or energy away from radical Indigenous social and political agendas,<sup>75</sup> including the struggle for Indigenous sovereignty, control and ownership over natural resources and related political authority.<sup>76</sup> These concerns have important implications for environmental constitutionalism, around the need to respect pluralism and avoid repeating colonial injustices by overriding hard-won Indigenous rights.<sup>77</sup>

## 2.4. Environmental constitutionalism and symbolism

There are other criticisms of environmental constitutionalism as a normative goal. Kysar sees it as being largely a ‘symbolic’ exercise, as environmental constitutional provisions are generally ‘weakly enforced and vaguely specified’.<sup>78</sup> Environmental constitutionalism has been described as ‘green-washing’, ‘in the sense that the environmental provisions are beautifully written, but the judicial structure and political power-dynamics in the country is unlikely to permit their implementation’.<sup>79</sup> Many of the countries who recognise the right to a clean and healthy environment, for example, are major polluters.<sup>80</sup> The transnational comparative project of environmental constitutionalism may be methodologically fraught, as ‘it assumes that different constitutions are legitimately subjects of level comparison’, while constitutions are embedded in the (plural) historical, political and social context of their country.<sup>81</sup>

From a broader social science perspective, which investigates outcomes with reference to issues of power, political economy and institutional capacity, the fact that legal texts do not immediately translate into changed practices comes as no surprise. It is evident that law does not directly prescribe social practice; that private interests may resist public values; and that emergent norms are not immediately transformative. As May has written: ‘Environmental rights are still adolescents in constitutional time’.<sup>82</sup> It would be wrong to claim that there are no practical implications of environmental constitutionalism, and seemingly ‘symbolic’ changes may lead to more significant change in time. Even if fragmented, at times limited, and dependent on specific contexts, there are increasingly evident impacts of environmental constitutional provisions, through judicial, executive

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<sup>71</sup>Macpherson (2019).

<sup>72</sup>See O’Donnell et al (2020).

<sup>73</sup>To use a phrase coined by Boyd (2017).

<sup>74</sup>See Birrell and Dehm (2021), p 18. Birrell and Dehm warn of the risks inherent in adopting the liberal idea of the ‘white, European, male property-owner, which reaches its ‘apotheosis’ in the corporation as juridical person’, as part of a ‘juridical reconstruction and reanimation of the non-human within a modernist rights frame’ given the limitations of rights discourse as applied to humans.

<sup>75</sup>Tănăsescu (2020), pp 431–434; Coombes (2020).

<sup>76</sup>Marshall (2019); Jones (2016), p 176.

<sup>77</sup>See O’Donnell et al (2020). See also Macpherson, Torres Ventura, and Clavijo Ospina (2020).

<sup>78</sup>Kysar (2010), p 231. See also Daly and May (2018), p 1 and Geller (2015).

<sup>79</sup>Daly and May (2018), p 4.

<sup>80</sup>Daly and May (2018).

<sup>81</sup>May and Daly (2015), pp 9–10.

<sup>82</sup>May (2020), p 386.

or legislative channels.<sup>83</sup> This article adds to those examples by examining the influence of environmental constitutionalism for riverine rights.

### 3. Riverine rights in comparative law

In this section we explore the recognition or conferral of rights, personhood or subjecthood on particular rivers in Colombia, India and New Zealand, and consider the role of constitutional law in each case, including whether the riverine rights provided for have been secured through constitutional processes. In doing so we begin to draw inferences about the constitutional significance of each case, and the implications these might have for riverine rights to occupy an elevated position of superiority over ordinary environmental law and regulation.

#### 3.1. Colombia

Colombia is part of the civil law tradition, with a written constitution and primacy of legislated law. Despite numerous Indigenous peoples already occupying and exercising sovereignty over the land now known as Colombia, it was colonised by the Spanish in the fifteenth century, bringing disease, violence and dislocation.<sup>84</sup> The Spanish also brought slaves with them from Africa, as labour for the newly established colony, and their descendants remained when the Republic of Colombia gained independence from the Spanish Crown in 1810,<sup>85</sup> resisting slavery (*cimarronaje*) and playing vital roles in the struggle for independence. However, Afro descendants and their cultures continued to be persecuted after independence and, to escape and maintain their identities, many Afro descendent and Indigenous peoples found refuge in isolated jungles, including those of the Colombian Pacific.

Ideological differences regarding how the republic should be administered have marked much of Colombia's legal and political history, and Indigenous (4 per cent of the population) and Afro descendent (known as 'ethnic'; 12–14 per cent of the population) communities have a long history of resisting violence and defending their way of relating with each other and the land. Numerous civil wars were fought in Colombia during the nineteenth and twentieth centuries over whether the republic should be a federal or a unitary state, and whether it should be guided by liberal or conservative principles. The result of these wars were successive constitutional reforms, producing a total of fifteen national constitutions during the twentieth century.<sup>86</sup> The triumphant European bourgeois system of the time, a liberal democracy with its *Laissez-faire* scheme of minimal state intervention, was transferred to Latin America, which perpetuated social inequalities inherited from Europe within a political system that was not made to rectify or correct them.<sup>87</sup>

Bentham's Utilitarian Doctrine strongly influenced Colombia's constitutional and legal formation process. He believed that institutions and ways of life could be created and shaped by the appropriate laws, and so, 'a cult of legality as the supreme embodiment

<sup>83</sup>Daly and May (2018).

<sup>84</sup>Williams (2004), pp 10–14.

<sup>85</sup>West (1972).

<sup>86</sup>Valencia Villa (1997).

<sup>87</sup>Valencia Villa (1997).

of constitutional democracy is one of the main sources of the strategy of regulatory reformism of Colombian elites'.<sup>88</sup> For these reasons, Colombian constitutions have been called 'battle charters' (*cartas de batalla*), the result of political battles for constitutional reform.<sup>89</sup>

The cult of 'form' became the main characteristic of Colombian constitutionalism until the late twentieth century. The idealisation and mystification of constitutional texts with disregard for the needs of the non-elite population made Colombia a 'blocked society, a nation besieged by republican rhetoric whose leadership seems incapable or unwilling to share the power of the state and open the avenues of economic development and democratic modernization'.<sup>90</sup> This system endured until the 1990s when Colombia developed its current constitution.

The 1991 Colombian Constitution is one of the 'typical social rights constitutions' developed in Latin America during re-democratisation processes of the 1990s.<sup>91</sup> It emphasises human rights, multiculturalism, environmental protection, and a prevalence of substance (dignity and social equality) over form (the appropriateness of laws). This new approach is encapsulated in its overarching framework of the *Estado social de derecho*, meaning:<sup>92</sup>

a social state under the rule of law, organized in the form of a unitary republic, decentralized, with autonomy of its territorial units, democratic, participatory, and pluralistic, based on the respect of human dignity, the work and solidarity of the individuals who belong to it, and the prevalence of the general interest.

The 1991 Constitution has been called an ecological Constitution (*Constitución ecológica*), because it dedicates more than 30 articles to environmental protection. In particular, articles 79 and 80 recognise the collective right of all people to a healthy environment and the responsibility of the State to: protect the diversity and integrity of the environment; conserve areas of special ecological importance; plan the management and use of natural resources to guarantee their sustainable development, conservation, restoration or substitution; and prevent and control environmental deterioration.<sup>93</sup>

The Constitution also provides important protections of Indigenous and Afro descendent rights.<sup>94</sup> Afro-Colombians and Indigenous peoples found an important political opportunity for the advancement of their rights in the lead up to the writing of the 1991 Constitution. Emboldened by *ILO Convention 169*, they mobilised for the recognition of their ethnic rights, pushed for the inclusion of a multiculturalism and multiethnicity clause in the new Constitution, and argued for a new law to recognise their territorial rights. Article 330 of the Constitution recognised Indigenous territorial rights and relationships, and associated law-making power, as part of a reservation system (*resguardos indígenas*).<sup>95</sup> Law 70 of 1993,<sup>96</sup> foreshadowed in transitional article 55 of

<sup>88</sup>Valencia Villa (1997), p 95.

<sup>89</sup>Valencia Villa (1997).

<sup>90</sup>Valencia Villa (1997), p 70.

<sup>91</sup>Brinks and Blass (2018).

<sup>92</sup>Heller et al (2021), art 1.

<sup>93</sup>*Constitución Política de Colombia 1991* (COL) arts 1, 2, 8, 49, 79, 86, 88, 95, 333, and 366.

<sup>94</sup>See generally Macpherson (2019).

<sup>95</sup>*Constitución Política de Colombia 1991* art 330.

<sup>96</sup>*Law 70/1993* art 2 defines 'Black community' as 'the group of families of Afro-Colombian descent who possesses its own culture, shares a common history and has its own traditions and customs within a rural-urban setting, and which reveals and preserves a consciousness of identity that distinguishes it from other ethnic groups.' After the expedition of this law

the Constitution, recognises the rights of ethnic groups to collectively own the lands they have traditionally inhabited (called ‘*consejos mayores*’), and is known in Colombia as *la Constitución negra* (the Black People’s Constitution).<sup>97</sup> The new approach was based on ideas of ethnic identity, difference and culture, and enabled Indigenous and Afro descendent claims to be repositioned from equality and political participation, towards collective rights linked to their distinct culture and a special relationship with the land.<sup>98</sup> This constitutional project demanded not only the demarcation and collective ownership of land, but respect for racial and cultural difference in opposition to the state’s model of development,<sup>99</sup> pursuant to which ‘*se tienen que ir porque llegó el progreso*’ (they must leave because progress has arrived).<sup>100</sup>

Despite belonging to the civil law tradition, Colombia’s progressive judiciary (especially the Constitutional Court) has played a key role in developing expansive and emancipatory justice in Colombia.<sup>101</sup> Applying the foundational principle of prevalence of equal dignity over legal formalism (and the *Estado social de derecho*), ‘the judges themselves define influential visions of democratic constitutionalism, defending or expanding the welfare state and extending the benefits of socio economic and cultural rights to previously excluded groups’.<sup>102</sup> The Courts have produced a line of jurisprudence recognising and protecting the environment,<sup>103</sup> and the territorial rights of Indigenous and Afro descendent<sup>104</sup> communities.

As a civil law country, with a French-style Civil Code (transplanted to Chile by Andrés Bello and then to Colombia), the Colombian courts traditionally applied strict Roman law notions of legal persons, family, and contracts. Pursuant to this approach, legal personality (*personalidad jurídica*), which confers rights and obligations, could only be assigned to humans (*personas naturales*) and organisations of public and private nature (*personas jurídicas públicas y privadas*). However, the Colombian courts have developed a long line of jurisprudence in which they use the concept of the *Estado social de derecho* to broaden the notion of legal personality/subjectivity<sup>105</sup> to protect the rights of animals,<sup>106</sup> rivers,<sup>107</sup> and ecosystems,<sup>108</sup> and to treat Indigenous territories as a victim of

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Black communities have called for the recognition of diversity within the group, claiming differentiation for other Black Colombian identities: *raizales, palenqueros, comunidades negras and Afro-descendientes*

<sup>97</sup>Lemaitre (2009).

<sup>98</sup>Lemaitre (2009).

<sup>99</sup>Lemaitre (2009); Escobar (1997).

<sup>100</sup>Lemaitre (2009), 379.

<sup>101</sup>Lemaitre (2009).

<sup>102</sup>Brinks and Blass (2017), p 302.

<sup>103</sup>*Gustavo Moya Ángel y otros v Empresa de Energía de Bogotá y Otros [Gustavo Moya Angel and others v the Bogotá Energy Company and others]* (2014). See Felipe Guzmán Jiménez (2015), p 18. Rio Bogota, in which the Council of State also made a series of very prescriptive orders in response to serious environmental contamination of the river, although without recognising that the river was a legal subject

<sup>104</sup>*Consejo Comunitario Mayor Cuenca Río Cacarica v the Ministry of Environment et al* (2003) Constitutional Court of Colombia No T-955 at 81.

<sup>105</sup>See Calzadilla (2019).

<sup>106</sup>See, for example *Mag Luis Armando Tolosa Villabona* (2017). In this case the Supreme Court decided a constitutional action (*habeas corpus*) to protect the freedom and integrity of a captive bear. See further Nonhuman Rights Project, ‘Colombian Court Grants Writ of Habeas Corpus to Captive Bear’, <https://www.nonhumanrights.org/media-center/07-28-17-media-release-bear-chucho>.

<sup>107</sup>Richardson and McNeish (2021); Macpherson, Torres Ventura, and Clavijo Ospina (2020).

<sup>108</sup>See *Future Generations et al v Ministry of Environment* (2018) Colombia Supreme Court of Justice STC 4360. In this case the Supreme Court decided a constitutional action (*tutela*) to protect the rights of children and future generations in the context of climate change. The plaintiffs alleged that the Colombian State was not fulfilling its Paris Agreement

the armed conflict.<sup>109</sup> These are the building blocks for the decision in the case of the Río Atrato.<sup>110</sup>

The Atrato river was recognised by the Constitutional Court of Colombia to be a ‘subject of rights’ in 2016 as part of a constitutional action (or writ) called a *tutela*. The case was presented on behalf of several community councils and Afro-descendant and Indigenous organisations that live in the basin and on the banks of the Atrato river, who sought a declaration that their constitutional rights to life, health, water, and healthy environment had been violated as a result of the degradation of the river.<sup>111</sup>

The Atrato river is a tropical river and watershed (45,000 km<sup>2</sup>), which flows from the Andes northwards to the Caribbean through the country’s most socio-economically disadvantaged region, the Chocó. The region is abundant in natural resources and biodiversity, but has also been a place of conflict and contestation due to its history of plantations, mining, drug production, armed conflict and slavery. Although a Peace Accord was signed with the FARC-EP (*Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo*) – Colombia’s largest guerrilla movement – in 2016, national and international media and research reveal persistence of armed conflict as one of the areas worst affected by this ongoing violence.<sup>112</sup> The ELN (*Ejército de Liberación Nacional*) guerrilla continues to be actively engaged in armed struggle with the Colombian army. Dissident paramilitary and guerrilla groups, as well as organised crime continue to be actors of violent conflict in the country. The communities living alongside the river are Afro descendant (87 per cent), Indigenous peoples (10 per cent) and *mestizos* [Spanish and Indigenous descent] (3 per cent).<sup>113</sup> They have all been marginalised since the colonisation of the Americas in the sixteenth century, and are excluded from many aspects of social and political life.<sup>114</sup> Today almost half the population of Chocó lives in abject poverty, both the Indigenous and Afro descendent communities of the Atrato river depend on the river for their physical and spiritual sustenance, and have a deep interconnection with the river as a ‘space to reproduce life and recreate culture’.<sup>115</sup> However, in recent decades, the Atrato communities have become a target for armed groups who aim to displace them to take their land for sugar cane, coffee and banana plantations, wood exploitation, mining, and palm oil plantations, or to exploit their labour for illegal activities.<sup>116</sup> The Atrato has been contaminated with mercury and other toxic pollutants used for mining, and used to

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commitments to stop the deforestation of the Colombian portion of the Amazon rainforest. The case was decided in favour of the plaintiffs and included a declaration by the Court, on its own motion, of violation of the rights of the Amazon.

<sup>109</sup>See Izquierdo and Viaene 2018 Decree-Law 4633 of 2017, known as the Law of Victims for Indigenous Communities, incorporated the notion of territory as victim. Currently, the transitional justice tribunal (JEP), is investigating the case of violations of the rights of indigenous territory during the armed conflict between the Colombian State and the Farc-ep (Revolutionary Armed Forces of Colombia - People’s Army). Indigenous Magistrate Belkis Izquiero is in charge of the case See Izquierdo and Viaene (2018).

<sup>110</sup>Macpherson (2019); Felipe (2020).

<sup>111</sup>González Serrano (2020); Macpherson, Torres Ventura, and Clavijo Ospina (2020).

<sup>112</sup>See e.g. ABC Group (2020) ‘Rival illegal armed groups terrify communities in the Río Quito Chocó’, <https://reliefweb.int/report/colombia/rival-illegal-armed-groups-terrify-communities-rio-quito-choc>.

<sup>113</sup>*Centro de Estudios para la Justicia Social ‘Tierra Digna’ and Others v the President of the Republic and Others* [2016] Corte Constitucional [Constitutional Court], Sala Sexta de Revision [Sixth Chamber] (Colombia) No T-622 of 2016 (*‘Tierra Digna’*).

<sup>114</sup>Rodríguez Garavito (2012), pp 6–9; Bravo (2017).

<sup>115</sup>*Center for Social Justice Studies et al v Presidency of the Republic et al* (2016) Constitutional Court of Colombia T-622 at 165.

<sup>116</sup>Garavito (2012), pp 6–9; Bravo (2017).

transport tons of extracted materials, timber, weapons, drugs, and even dead bodies. The negligent Colombian state has failed to protect the people of the river (and the river itself) from the adverse impacts of such land uses.<sup>117</sup>

In 2016, when the Atrato case came before the Constitutional Court, the river had been severely degraded largely due to illegal resource extraction. The Court brought the social, economic, and cultural rights together with environmental provisions to comprise what it called the ‘biocultural rights’ of the Atrato river and the ethnic communities living by and from it. The Court found that the State had breached all the constitutional human rights protections alleged by failing to protect the river and its communities. Further, the Court recognised the Atrato River, its basin and tributaries, as an entity subject of rights of protection, conservation, maintenance, and restoration by the State and ethnic communities.<sup>118</sup> Additionally, the Court ordered the creation of several mechanisms for the realisation of those rights: a commission of guardians for the river; a panel of experts to assist the guardians; an integrated watershed management governance body comprised of national and regional administrative authorities; and a commission for the eradication of illegal mining and deforestation in the affected areas.<sup>119</sup>

The Atrato riverine rights case is a clear example of environmental constitutionalism. The case is a constitutional writ (*tutela*), and concerns the state’s violation of its constitutional obligation to protect human rights and the environment. But the case has greater significance within the broader project of modern Colombian constitutionalism, both in its texts and its judicial application; it is emblematic of the shift from formalism that favoured the interests of elites, to substantive social ideals of human dignity and respect for the marginalised or different.<sup>120</sup> The Court positions its decision to recognise the river as a subject of rights as a reflection of the belief-system of ethnic communities, including the notion of interdependence between humans and nature, applying the legal doctrines of dignity and solidarity beyond the human. But it is more accurately characterised as part of the larger battle Colombians of African descent and Indigenous peoples have been fighting for many years for legal protection of their fundamental rights, and cannot be understood independently from the history of violence in the region.<sup>121</sup>

The Constitutional Court’s ruling was surprising for two reasons. First, because it was decided in favour of people from the most neglected region of Colombia. Secondly, on its own motion, the Court declared a river to be a subject of rights, disposing of the strict legal notion of legal personality in favour of the inclusion of non-human subjects. It captured the imagination of environmental and social activists throughout (and beyond) Colombia, and has spurred a string of further cases in which rivers, forests and ecosystems have been recognised as legal subjects, using the Atrato case as a ‘precedent’.<sup>122</sup>

The Court built monitoring mechanisms into its design of remedies, to compel the various government agencies to undertake the structural changes required for its

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<sup>117</sup>Bonet (2007); Salazar (2020).

<sup>118</sup>*Tierra Digna* (n 205).

<sup>119</sup>*Tierra Digna* (n 205); Macpherson, Torres Ventura, and Clavijo Ospina (2020); Kauffman and Martin (2019).

<sup>120</sup>Lemaitre (2009), p 24. This has put the Constitutional Court at the global forefront of constitutional innovation by confronting difficult debates such as the judicialization of social and economic rights, euthanasia, discrimination against LGBTI people, same sex marriage, quotas of women in public institutions, and abortion.

<sup>121</sup>Lemaitre (2009).

<sup>122</sup>See Macpherson, Torres Ventura, and Clavijo Ospina (2020); Colombia Supreme Court of Justice, Mag Luis Armando Tolosa Villabona (2018).

implementation. This kind of experimental constitutionalism has been called ‘empowered participatory jurisprudence’, as it aims to be an instance of bounded democratic experimentalism whereby courts act as catalysts of collective and iterative processes of collective problem solving.<sup>123</sup> Like other unorthodox, structural social rights cases decided by the Constitutional Court of Colombia, changes have been seen over time.<sup>124</sup> These constitutional cases have served as tools for calling out structural inequality and creating new governance structures for the state to progressively transform complex problems.<sup>125</sup>

However, the case remains controversial, both legally and politically, because the Colombian civil and procedural codes do not contemplate legal rights for natural entities, which undermines the potential for its implementation. This is compounded by the weakness of Colombian environmental institutions and the fact that the state has little influence in Chocó, especially because of the ongoing armed conflict in the region. This political reality throws light on the ‘implementation gap’ in environmental constitutionalism, and leaves unanswered questions around the need for and efficacy of riverine rights.

### 3.2. India

India is a federal state with a unified, common-law legal system. It has a secular, pluralistic, national constitution, although its norms have been influenced by a combination of Muslim and Hindu law. Under British colonial rule, pre-existing Hindu and Islamic legal systems were replaced by a common-law system that was increasingly systematised and codified in the late nineteenth and early twentieth centuries. While this system and many of its codes were maintained after independence, the government developed a new and comprehensive written constitution.<sup>126</sup>

The 1950 Constitution, drafted over three years and approved by a constitutional assembly, is said to be longest constitution of any independent state. It offers a detailed outline of the division of power between the institutions of the newly independent state and is widely credited for forging a robust democratic system with important safeguards for minorities and vulnerable sectors of society. The Constitution, an elevated-status law itself, includes different hierarchies of rights. These include ‘fundamental rights’ at the highest level, which are enforceable by the courts with the power to strike down inconsistent acts (like the right to life and liberty in article 21), and lower-level Directive Principles of State Policy, which are not directly enforceable by the courts but give important directives to administrative bodies.<sup>127</sup>

The Constitution, as approved in 1950, was strong on social issues and equality, but silent with respect to the environment and its protection. In 1974, the *Water (Prevention*

<sup>123</sup>Rodríguez-Garavito (2019).

<sup>124</sup>Constitutional Court of Colombia *Mag Manuel José Cepeda Espinosa 2004*. In this case the Court declared that the humanitarian emergency caused by forced displacement constituted an ‘unconstitutional state of affairs’; See also Constitutional Court of Colombia. Mag. 2008.

<sup>125</sup>See Rodríguez-Garavito (2010).

<sup>126</sup>Singh (2018), p 656.

<sup>127</sup>*Constitution of India 1950* (IN) part IV arts 36–51. These are still constitutional rights, and although they are not directly enforceable by the courts via a power of invalidation have assisted the courts to expand the application of environmental rights to environmental problems. See Chandrachud and Ramanatha (2006).

*and Control of Pollution*) Act was passed, opening the way for environmental jurisprudence in postcolonial India.<sup>128</sup> The Act included water quality measures and regulated water pollution,<sup>129</sup> and empowered states to create the State Pollution Board for its enforcement. This was a concerted effort to respond to India's growing problem of water pollution,<sup>130</sup> yet it was poorly implemented,<sup>131</sup> and failed to understand the dynamics of India's caste system and embedded 'colonial notions of fouling and defilement'.<sup>132</sup>

Two years later, environmental provisions were included in the Constitution through its 42nd amendment. Importantly, article 48A provides, 'The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country', and Article 51A(g), states: 'It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.' These are not 'fundamental rights' but Directive Principles of State Policy (as defined above),<sup>133</sup> although, together with the *Water Act*, they made river protection an issue of constitutional importance. Still, their implementation remained poor.<sup>134</sup>

The Indian courts,<sup>135</sup> especially the Supreme Court, have played an important role in developing Indian constitutionalism,<sup>136</sup> widening the scope of key protections and introducing new legal measures.<sup>137</sup> The Supreme Court has developed a line of jurisprudence expanding the ambit of the right to life and liberty, to include, among other things, the right to food, health, dignity, education, clean air and water and freedom from environmental pollution.<sup>138</sup> The Supreme Court also developed a procedure for 'public interest litigation' in the 1970s, as a way to make justice more accessible for the poor and disadvantaged. The Court relaxed standing requirements so that a petitioner need not be personally affected to bring a constitutional case to court, and could bring a case on general public interest grounds.<sup>139</sup> While the initial rationale was to allow litigants to present cases on behalf of people lacking the economic resources to go to court, the admission of public interest litigation has also opened the way for environmental public interest cases to be heard by the Supreme Court.<sup>140</sup>

There have been successive public interest cases concerning the Ganga river, culminating in the Supreme Court's recognition of the human right to a clean and healthy environment. In 1985 *MC Mehta*, a lawyer and social activist, petitioned the Supreme

<sup>128</sup>*The Water (Prevention and Control of Pollution) Act 1974* (IN).

<sup>129</sup>See *The Water (Prevention and Control of Pollution) Act 1974* (IN) ss 17, 24-25, 32, 43.

<sup>130</sup>*The Water (Prevention and Control of Pollution) Act 1974* (IN).

<sup>131</sup>Gupta et al (2019), pp 313-327.

<sup>132</sup>Alley (2002), p 143.

<sup>133</sup>Bhatia (2019).

<sup>134</sup>Gupta et al (2019), pp 313-327.

<sup>135</sup>Neuborne (2003). With the Supreme Court at the apex, India has 21 state High Courts, and numerous subordinate courts. The Supreme Court also rules on disputes between states and has an advisory function to the executive.

<sup>136</sup>Krishnamurthy (2009.) With the Supreme Court at the apex, India has 21 state High Courts, and numerous subordinate courts. The Supreme Court also rules on disputes between states and has an advisory function to the executive.

<sup>137</sup>Bhatia (2019).

<sup>138</sup>For instance: *Maneka Gandhi v Union of India* AIR 1978 SC 597; *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295; *Sunil Batra v Delhi Administration* AIR 1978 SC 1675; *Francis Coralie Mullin v Administrator, Union Territory of Delhi* AIR 1981 SC 746; *Unni Krishnan v State of AP* AIR 1993 SC 645; *People's Union for Civil Liberties v UOI* AIR 2001 SC 454; *Narmada Bachao Andolan v Union of India* AIR 2000 SC 375; *MC Mehta v Union of India* (2004) 3 SCR 128.

<sup>139</sup>Chandra (2018).

<sup>140</sup>Faure and Raja (2010).

Court about the alarming level of pollution in the Ganga in Kanpur (Uttar Pradesh). The petition

sought the issue of a writ/order/direction in the nature of mandamus [...] restraining them from letting out the trade effluents into the river Ganga till such time they put necessary treatment plants for treating the trade effluents in order to arrest the pollution of water in the said river.<sup>141</sup>

The Court upheld the environmental protections in the *Water Act* and the Constitution, and directed the establishment of primary treatment plants for pre-treating effluent before release into the Ganga.

In 1986, a broader environmental law was passed (the *Environment Act*), regulating a wider spectrum of environmental impacts including the release of hazardous substances. Mehta drew on this additional law to bring further public interest litigation concerning the Ganga in 1988, in which the Court found water pollution to be a ‘public nuisance’.<sup>142</sup> The Court directed the municipal government to enforce environmental by-laws for the river, which initially brought down the level of pollution, however, its implementation was undermined by a lack of institutional capacity and pollution ultimately continued.<sup>143</sup>

The Ganga cases filed by MC Mehta spurred many further environmental cases, eventually leading to the Supreme Court clarification in 1991 that: ‘The right to live is a fundamental right under Article 21 of the Constitution and it includes the right to enjoyment of pollution-free water and air for full enjoyment of life’,<sup>144</sup> and in 1994 that the right to life:

encompasses within its ambit the protection and preservation of the environment, ecological balance, freedom from pollution of air and water, and sanitation, without which life cannot be enjoyed. Any contract or action which would cause environmental pollution ... should be regarded as amounting to violation of Article 21.<sup>145</sup>

This constitutional right to a clean and healthy environment, has since been recognised in hundreds of public interest cases in India, including the 2017 Ganga, Yamuna and Gliers (riverine rights) cases.<sup>146</sup>

In 2014, Mohammed Salim filed a public interest application before the High Court in Uttarakhand, citing the Government’s inaction in the face of illegal occupation and sand mining in the Ganga. In December 2014 the Court ordered the eviction of squatters, the end to sand mining, and the establishment of government bodies to enforce the protection of the river. Three years later, the High Court, dissatisfied with the lack of response from the State Government, issued a new judgment declaring the Ganga, Yamuna and all of its tributary, streams as the juristic/living entity having the status of a living person/legal person.<sup>147</sup> The Court used the example of religious idols,<sup>148</sup> which were already recognised as being juridical persons, as a precedent. Since the river cannot speak for

<sup>141</sup> *MC Mehta vs Union of India & Others* 1988 AIR 1115; 1988 SCR (2) 530.

<sup>142</sup> Pollution of water in the river – especially in the Kanpur led to death and sickness. *MC Mehta vs Union of India & Ors* 1988 AIR 1115; 1988 SCR (2) 530.

<sup>143</sup> Kelly, Ganga and Gandagi (1994), pp 127-145.

<sup>144</sup> *Subhash Kumar v State of Bihar* (1991) AIR 420.

<sup>145</sup> *Virendra Gaur And Ors v State Of Haryana And Ors* (1994) 6 SCR 78.

<sup>146</sup> Boyd (2011), p 174.

<sup>147</sup> *Mohd Salim v State of Uttarakhand & Ors Writ Petition* (PIL) No.126 of 2014.

<sup>148</sup> In the Indian legal system, religious idols are juridical persons, who can sue or be sued. Idols have the status of legal minor and are represented by legal guardian. See Patel (2010) pp 47–52.

itself, three state officials were named to act *in loco parentis* (in the place of a parent), effectively giving the river the status of a minor.<sup>149</sup>

Ten days later the same judge of the Uttarakhand High Court decided an unrelated petition filed by Lalit Miglani for the prevention of further recession of the Gangotri and Yamunotri Glaciers (the sources of the Ganga and Yamuna rivers), as well as the protection of nearby forests. The Court pronounced that '[T]he Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests[,] wetlands, grasslands, springs and waterfalls, legal entity/legal person/juristic person/juridical person/moral person/artificial person having the status of a legal person ...'.<sup>150</sup>

The Court in all decisions relied on the obligations to protect the environment in articles 48A and 51A(g) of the Constitution. But the Court's reasoning rested on the idea that these rivers are sacred and personified under Hindu belief-systems, drawing analogies to the personification of Hindu idols and to common law principles of *parens patriae*.<sup>151</sup> In the Glaciers judgment, there was also reference to India's international environmental commitments, to the moral duty to protect nature, and to New Zealand's *Te Urewera Act*. As Kelly explains, the decisions are a blend of environmental, religious and constitutional principles, creating something entirely new for the strategic purpose of enforcing river conservation.<sup>152</sup>

The Ganga, Yamuna and Glaciers decisions of the Uttarakhand High Court show how environmental constitutionalism is developing and extending in India. These cases are attempts to elevate the rights of rivers and ecosystems, where ordinary regulation has not been able to protect them, embedding notions of sacredness and fundamentalism.<sup>153</sup> They build on, and transform, existing constitutional principles to accommodate the non-human world, evident in other contemporary jurisprudence, such as recent animal rights cases.<sup>154</sup> This attempt at constitutional transformation, of extending the rights of humans to the natural world, is clearly expressed in the Glaciers decision:

Rivers and Lakes have [the] intrinsic right not to be polluted. Polluting and damaging the rivers, forests, lakes, water bodies, air and glaciers will be legally equivalent to harming, hurting and causing injury to [a] person.

Rivers, Forests, Lakes, Water Bodies, Air, Glaciers and Springs have a right to exist, persist, maintain, sustain and regenerate their own vital ecology system. The rivers are not just water bodies. They are scientifically and biologically living. The rivers, forests, lakes, water bodies, air, glaciers, human life are unified and are [an] indivisible whole. The integrity of the rivers is required to be maintained from Glaciers to Ocean.<sup>155</sup>

What impact the riverine rights decisions will have in India's complex socio-ecological context remains to be seen. Both decisions have been appealed to the Supreme Court by the Government of Uttarkhand and others, and the decisions have been stayed pending a

<sup>149</sup> *Mohd Salim v State of Uttarakhand & Ors Writ Petition* (PIL) No.126 of 2014 at 9.

<sup>150</sup> *Lalit Miglani v State of Uttarakhand* (PIL) No. 367 of 2017 at [62].

<sup>151</sup> Refers to the state in its capacity as the legal guardian of persons not sui juris and without natural guardians, as the heir to persons without natural heirs, and as the protector of all citizens unable to protect themselves. See Merriam-Webster Legal Dictionary, <https://www.merriam-webster.com/legal/parens%20patriae>.

<sup>152</sup> Alley (2019), pp 502, 507–508.

<sup>153</sup> O'Donnell (2018); Srivastav (2019).

<sup>154</sup> *AWBI v A. Nagaraja* (2010) 15 SCC 190.

<sup>155</sup> *Lalit Miglani v State of Uttarakhand* (PIL) No. 367 of 2017 at [62].

hearing.<sup>156</sup> It is unclear when they will be heard by the Supreme Court and what the outcome might be. Critics have pointed out a number of problems with the judgments, including: the Courts' reliance on Hindu religious arguments (which sits uneasily with the secular Constitution of pluralistic India); the jurisdictional difficulty of a state-based High Court making decisions that impact on other Indian states through which the Ganga flows (and eventually Bangladesh, where the Ganga reaches the ocean); the reliance on unwilling government agencies to act as 'guardians'; a failure to involve civil society and affected communities;<sup>157</sup> lack of clarity on the precise rights (and responsibilities) ascribed to rivers; and weak or non-existing enforcement mechanisms.<sup>158</sup>

Because of the jurisdictional problems with the Indian cases (related to the Federal status of water laws), it seems unlikely that the Supreme Court will allow them to stand. Yet, the pollution of the Ganga, discharge of toxic waste from industries, and melting of glaciers due to climate change remain urgent problems. Following the Supreme Court's track-record of building environmental constitutionalism in India, the possibility of a decision that somehow retains the idea of nature's rights or legal personhood should not be discounted. The decisions have already had an influence on two subsequent High Court decisions in Uttarakhand and neighbouring Punjab and Haryana that use the concept of *in loco parentis* to protect the rights of animals.<sup>159</sup> The High Court of Punjab and Haryana followed in 2020 by giving Lake Sukhna the rights of a living person. Although, admittedly all three subsequent decisions were made by Justice Rajiv Sharma, the same judge who decided the Ganga, Yamuna and Glaciers cases.<sup>160</sup> Echoes of the Ganga, Yamuna and Glaciers cases can be found in the decision of the Legislative Assembly of Madhya Pradesh to grant the Narmada river legal personality,<sup>161</sup> and in the ways that Indian environmental civil society organisations are using these decisions to justify their claims for protection of rivers and other natural entities. Seen this way, the decisions may be early judicial experiments, which can be built on in later, less jurisdictionally problematic, test cases, remaining an important first step in a longer process of deepening environmental constitutionalism.

### 3.3. Aotearoa NZ

New Zealand, known to its Indigenous Māori *iwi* and *hapū* (tribes and subtribes) as Aotearoa, was settled by the British after the signing of *Te Tiriti o Waitangi* (the Treaty of Waitangi) between the Crown and Māori chiefs in 1840.<sup>162</sup> The Treaty is the founding

<sup>156</sup>Special Leave to Appeal (C) No(s). 016879/2017The State of Uttarakhand and Ors Versus Mohd Salim and Ors Order dated 7 July 2017, stayed the ruling in the Salim case. Special Leave Petition (Civil) Diary No(s). 34250/2017Union of India vs Lalit Miglani, order dated 27 November 2017 stayed the ruling in the Miglani case. See also Jolly and Menon (2021), p 3 n 5.

<sup>157</sup>In the Glaciers judgement, this weakness seems to be acknowledged in the assertion 'However, we would hasten to observe that local inhabitants living on the banks of rivers, lakes, and whose lives are linked with rivers and lakes must have their voice too.' Yet there are no mechanisms to ensure this.

<sup>158</sup>O'Donnell (2018); Srivastav (2019); Jolly and Menon (2021); Chaturvedi (2019).

<sup>159</sup>*Narayan Dutt Batt v Union of India* (2018) (PIL) No.43 of 2014; *Karnail Singh v State of Haryana* (2019) CRR 533 2013.

<sup>160</sup>Sethi (2020).

<sup>161</sup>Jolly and Menon (2021), p 8. We have been unable to locate any primary sources relating to these cases.

<sup>162</sup>New Zealand is a constitutional monarchy and part of the British Commonwealth. See generally Joseph (2014).

constitutional document in New Zealand,<sup>163</sup> and sets out a basic agreement for the bicultural nation that emerged.<sup>164</sup> Thus, any consideration of constitutional law's role in, and impact on, riverine rights in New Zealand begins with, and remains bound by, the Treaty.<sup>165</sup>

Compared to Colombia and India, New Zealand constitutional law is complex and opaque. New Zealand does not have a written constitution in one single document, and its constitutional norms are spread across a number of pieces of legislation, rules of the common law, conventions and custom.<sup>166</sup> New Zealand also has relatively little direct constitutional protection of environmental rights or interests.<sup>167</sup> The *New Zealand Bill of Rights Act 1990* sets out the main human rights protections usually included in a written constitution, and attempts to implement the country's commitments under international human rights treaties.<sup>168</sup> However, the Act is not a 'supreme law', and inconsistent legislation that contravenes its human rights prevails over and is not invalidated despite the contravention.<sup>169</sup> The *Bill of Rights Act* is primarily concerned with civil and political rights, and includes no recognition or protection of environmental interests, like the right to a clean and healthy environment, the right to water and sanitation, or the rights of nature; nor does it refer to environmental objectives, obligations or concerns. New Zealand human rights law does not even recognise the Treaty of Waitangi or its principles, nor Indigenous rights more broadly.<sup>170</sup>

New Zealand's avoidance of mainstream environmental constitutionalism could be due to its relative lack of environmental 'strife',<sup>171</sup> which has driven environmental reforms in the context of major environmental crises in other countries like India and Colombia.<sup>172</sup> However, the resolution of political claims by Māori *iwi* and *hapū* pursuant to the Treaty of Waitangi has produced some interesting constitutional arrangements with respect to particular natural resources,<sup>173</sup> which have taken place outside core human rights legislation, and hold particular significance for environmental constitutionalism in New Zealand generally. Indeed, the Treaty was described by the former Chief Judge of the Māori Land Court as a 'Bill of Rights' for Māori and Pākēhā (non-

<sup>163</sup>See Simon (2016) who makes a case against the Treaty as a foundation of New Zealand as a nation, on the basis of many chiefs/tribes refused to sign the Treaty and that it has led to a racist, white, patriarchal basis for Crown/*iwi* relationships.

<sup>164</sup>See Jones (2016), p 176; Jones (2018), p 16.

<sup>165</sup>Coates (2018); Ruru (2018).

<sup>166</sup>Joseph (2014), p 1.

<sup>167</sup>The inclusion of environmental rights in the *New Zealand Bill of Rights Act* was proposed by a 2013 Constitutional Advisory Panel. See New Zealand Ministry of Justice (2013). See also Palmer and Butler (2018). Palmer and Butler, leading New Zealand constitutionalists, have recently called for the including of environmental rights in a supreme Bill of Rights.

<sup>168</sup>*New Zealand Bill of Rights Act 1990* (NZ) preamble.

<sup>169</sup>*New Zealand Bill of Rights Act 1990* (NZ) s 4. See generally Geiringer (2019), p 282.

<sup>170</sup>There has been historical resistance to the inclusion of the Treaty or Indigenous rights in the New Zealand Bill of Rights Act, because of Māori concern that to do so would dilute the Treaty's impact or undermine the succession of Treaty partnership with the British Crown. See Palmer and Butler (2018).

<sup>171</sup>See O'Gorman (2017), p 455 who makes this argument around 'strife' driving environmental constitutionalism in comparative experience.

<sup>172</sup>Although environmental and social issues are increasingly pressing in Aotearoa New Zealand. A recent Cabinet paper on the future of the *Resource Management Act* noted that and 94% of urban streams and 82% of streams in pastoral areas are not suitable for swimming at least for some of the time, and Māori are still disproportionately represented negatively across socioeconomic scales. See New Zealand Ministry for the Environment (2020a). Similar observations were made by the then the Prime Minister's Chief Science Adviser: Gluckman (2017), p 120.

<sup>173</sup>See generally Salmond (2017).

Māori) alike.<sup>174</sup> These arrangements include a long and evolving line of jurisprudence around the domestic force and significance of the Treaty and its principles,<sup>175</sup> which have important constitutional implications,<sup>176</sup> and continue to spark constitutional debate.<sup>177</sup> They also include a string of Treaty of Waitangi settlements, and related legislative and policy reform, which attempt to recognise the particular ancestral relationships Māori have with natural resources and establish new power-sharing arrangements for their governance.<sup>178</sup> Amongst these, is the Treaty settlement that recognises the Whanganui river (*Te Awa Tupua*) as a legal person, which has been described in and of itself as a ‘constitution’.<sup>179</sup>

Since the 1970s, with the influence of pan-global Indigenous activism, the New Zealand Government embarked on a process of attempting to repair the damage done by colonisation to Māori and the country as a whole. The Crown established the Waitangi Tribunal, to inquire into and make recommendations for the settlement of historical and contemporary breaches of the Treaty of Waitangi,<sup>180</sup> and began to negotiate and settle those grievances.<sup>181</sup> The Treaty was signed in both Māori and English,<sup>182</sup> but there were significant differences between the two versions, which has provoked ongoing political conflict between Māori and the Crown. The Māori version of the Treaty guaranteed to the Māori tribes ongoing sovereignty (known in Te Reo Māori as *tino rangatiratanga*) over their territories and people, while the English version only afforded them ‘undisturbed possession’ of their lands, estates, forests, fisheries and other properties.<sup>183</sup> For much of New Zealand’s colonial history, the Treaty was ignored, or (at best) its significance downplayed,<sup>184</sup> and Māori were subject to repeated social, cultural, environmental and structural injustices.<sup>185</sup> It is a fair assessment that the content, ‘spirit’, implications and potential of the Treaty in terms of constitutional law remain only partly realised,<sup>186</sup>

<sup>174</sup>Quoted in Burrows (2018).

<sup>175</sup>*New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641. An example of more recent and evolving constitutional jurisprudence is *Proprietors of Wakatū v Attorney-General* (2017) 1 NZLR 423.

<sup>176</sup>The orthodox view in *Te HeuHeu Tukino v Aotea District Māori Land Board* (1941) NZLR 590 was that the Treaty is only legally binding where directly incorporated in domestic legislation, but the courts are taking an increasingly generous interpretation of its relevance. See Coates (2018); Ruru (2018); *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641. An example of more recent and evolving constitutional jurisprudence is *Proprietors of Wakatū v Attorney-General* (2017) 1 NZLR 423.

<sup>177</sup>See Jones (2016); Coates (2018), p 171. There is a current Māori-led project for ‘constitutional transformation’ underway. See The Independent Working Group on Constitutional Transformation (2016).

<sup>178</sup>See, e.g. *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010* (NZ) for the Waikato River, which was recognised as a ‘living ancestor’ and ‘indivisible whole’ in a similar way to Te Awa Tupua, albeit without legal personality. See also the new policy frameworks for freshwater and biodiversity protection, Ministry for the Environment (2020b); Department of Conservation (2020). Both of these new policies, discussed below, recognise the interconnectedness of people and the environment, with particular reference to Māori ontologies framing natural resources as living, interconnected, ancestral beings. For an explanation of the Māori worldview and *Tikanga* with respect to water see Te Aho (2019).

<sup>179</sup>Sanders (2018). See Iorns Magallanes (2015) and Tanasescu (forthcoming) for discussion of the Urewera model in which a former national park is recognised as a ‘legal entity’.

<sup>180</sup>*Treaty of Waitangi Act 1975* (NZ).

<sup>181</sup>A framework for negotiation and settlement is provided for in Crown policy See New Zealand Office of Treaty Settlements (2015).

<sup>182</sup>Māori mostly signed the version in *Te Reo Māori* (the Māori language).

<sup>183</sup>*Te Tiriti o Waitangi (The Treaty of Waitangi) 1840* (NZ) art 2.

<sup>184</sup>See *Wi Parata v The Bishop of Wellington* (1877) 3 NZLR 72 which referred to the Treaty as ‘a simple nullity’.

<sup>185</sup>These injustices are summarised well in Waitangi Tribunal (2011), ‘Ko Aotearoa Tēnei: Report on the Wai 262 Claim’, <https://waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/>.

<sup>186</sup>See also Jones (2016); Coates (2018), p 171. There is a current Māori-led project for ‘constitutional transformation’ underway. See The Independent Working Group on Constitutional Transformation (2016).

although settlements like that for Te Awa Tupua are pushing the boundaries of New Zealand environmental constitutionalism.

Te Awa Tupua was recognised as a legal person as part of a Treaty settlement between the Crown and the Whanganui River *iwi* (sometimes known as Atihaunui or Ngāti Hau). This settlement followed a Waitangi Tribunal inquiry into the *iwi*'s claims with respect to the river, which took place in the 1990s.<sup>187</sup> The Tribunal noted that the river *iwi* have a special cultural and spiritual connection to the river, which they revere as a living ancestor,<sup>188</sup> and had maintained their claims to ownership and control of the river since the signing of the Treaty.<sup>189</sup> However, their access to the river for food gathering, navigation and ceremonial uses had been undermined or obstructed by Crown-authorized activity in the catchment, including agriculture, urbanisation, resource extraction and hydroelectric development. Further, their control and authority over river governance had been undermined by the vesting of regulatory power (unilaterally and without compensation) in the Crown,<sup>190</sup> which is now exercised by local authorities under the *Resource Management Act 1991*, under the broad purpose of 'sustainable management'.

The Tribunal framed the interests of the Whanganui *iwi* in the river in terms of 'ownership' of a 'single and indivisible entity comprised of water, banks, and bed', and recommended the return of ownership of the river to them.<sup>191</sup> However, the Crown maintained that the river could not be owned by the *iwi* as part of any settlement, as under New Zealand common law no one can 'own' water, which is vested in the Crown on behalf of the New Zealand public.<sup>192</sup> As a compromise, the settlement between the Crown and Whanganui *iwi* provided that the river would be given its own legal personhood, with ownership rights vesting in the river itself.<sup>193</sup>

The *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* was subsequently passed to give legal effect to the settlement, and to establish new governance arrangements for the river. The Act recognises the status of the river (and its tributaries) as 'an indivisible and living whole, comprising the Whanganui river from the mountains to the sea, incorporating all its physical and meta-physical elements'.<sup>194</sup> It declares that Te Awa Tupua is a legal person, with 'all the rights, powers, duties, and liabilities of a legal person',<sup>195</sup> which are exercised by the 'human face of the river'; another entity called Te Pou Tupua, charged with acting in the river's interests.<sup>196</sup> One representative on Te Pou Tupua is nominated by the Crown and the other by the Whanganui *iwi*, who are required to make decisions by consensus. The Act also establishes a complex, collaborative governance regime for the river involving Māori, municipal and central government

<sup>187</sup>Waitangi Tribunal (1999), pp 55–56.

<sup>188</sup>Waitangi Tribunal (1999), p xiii. See also Salmond (2017), p 300.

<sup>189</sup>Waitangi Tribunal (1999), pp 55–56. Māori brought their claims to the river before the courts in *In re the Bed of the Whanganui River* (1962) NZLR 600.

<sup>190</sup>Waitangi Tribunal (1999), pp 55–56.

<sup>191</sup>Waitangi Tribunal (1999), p 337.

<sup>192</sup>This is reflected in the *Water and Soil Conservation Act 1967* (NZ) s 21; *Coal Mines Amendment Act 1903* (NZ) s 14; *Water Power Act 1903* (NZ) ss 2, 5; *Resource Management Act 1991* (NZ) s 354.

<sup>193</sup>Te Aho (2014). The origins of this idea is usually credited to a 2010 research paper by Ruru and Morris, which referred to the Ecuadorian and Bolivian rights of nature laws. See Morris and Ruru (2010).

<sup>194</sup>*Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 12.

<sup>195</sup>*Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 14.

<sup>196</sup>*Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) ss 18–19.

and private users,<sup>197</sup> including a range of entities and encompassing a range of sectorial and community perspectives.<sup>198</sup>

The legislation prescribes fundamental values for the river's management (called 'Tupua te Kawa'), which are the 'intrinsic values that represent the essence of Te Awa Tupua',<sup>199</sup> and must be taken into account by administrative decision-makers.<sup>200</sup> They acknowledge the river as a source of spiritual and physical sustenance, feeding the resources within it and people living alongside it,<sup>201</sup> recognising the direct link between the health of the river and the health of the people. The values reiterate that the river is an indivisible and living whole from the mountains to the sea incorporating physical and metaphysical elements. They also acknowledge the responsibility of the Whanganui *iwi* for the river's health, that the large and small streams form one river, and the common purpose of all elements and entities in the river working towards the river's health and wellbeing.

The Te Awa Tupua model was driven by the concerns of the Whanganui *iwi* for authority and control over the river in accordance with their own values (for reasons including but not necessarily limited to environmental protection).<sup>202</sup> The river values are a significant embodiment of the customary law of the Whanganui *iwi*, reflecting their traditional knowledge as established resource managers,<sup>203</sup> and the recognition of the river as a living ancestor and legal person is an attempt to approximate the *iwi*'s relationship with the river.<sup>204</sup>

The Act can fairly be characterised as 'constitutional', as it 'addresses the structure of power in New Zealand and provides a framework for interactions between the Crown and *iwi*, with particular emphasis on processes and principles which affirm the values of *tikanga Māori* (Māori customary law), including encouraging consensus decision-making'.<sup>205</sup> Coates points out the ongoing relational redress inherent in the arrangement, constituting a 'subtle and incremental shift in the Crown–Māori constitutional relationship'.<sup>206</sup> The Act is an attempt to elevate the interests of the river above ordinary environmental regulation and its competing agendas,<sup>207</sup> by establishing 'fundamental' agreed values or objectives for the river (Tupua te Kawa). This elevated legal status reflects the standing of the river in *tikanga Māori* as 'superhuman',<sup>208</sup> with its own life-essence,<sup>209</sup> and the relationship between river and people as 'God-given'.<sup>210</sup>

<sup>197</sup>For a discussion of collaborative governance see Holley and Sinclair (2018).

<sup>198</sup>*Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) ss 27–35.

<sup>199</sup>See Good (2013), pp 35–36. Good discusses the difficulty, once rights for nature are recognised, of determining the content of such rights in the absence of the river's ability to speak for itself.

<sup>200</sup>*Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 15.

<sup>201</sup>*Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 13(a).

<sup>202</sup>Tănăsescu (2020), pp 445–446; Sanders 2018; Iorns Magallanes (2015), p 10.

<sup>203</sup>Macpherson and Clavijo Ospina (2018).

<sup>204</sup>I have characterised the model as essentially 'relational' in Macpherson (2021).

<sup>205</sup>Sanders (2018), p 231. See also Tănăsescu (2020), p 446. Similarly, Tănăsescu describes Te Urewera as a constitutional arrangement, which 'sets the framework for all subsequent legal and political governance of the territory'.

<sup>206</sup>Coates (2018), p 169.

<sup>207</sup>Barcan discusses the (attempted) use of legal personhood to transcend ordinary regulation in this way in See Barcan (2020), p 822.

<sup>208</sup>Waitangi Tribunal (1999), p 42.

<sup>209</sup>Waitangi Tribunal (1999), p 39.

<sup>210</sup>Waitangi Tribunal (1999), p 45.

However, despite its constitutional significance, the *Te Awa Tupua Act* does not manage to completely transcend ordinary environmental regulation. The Act does nothing to disrupt the existing distribution of rights held by non-Māori in the river. The water in the river remains vested in the Crown on behalf of the New Zealand public,<sup>211</sup> only the Crown-owned parts of the bed is vested in Te Awa Tupua, and the settlement has no impact on other public or private river uses, in a provision that expressly protects the rights of hydro-electric power generators.<sup>212</sup> Nor does the arrangement impact significantly on existing governance arrangements for the river under the *Resource Management Act 1991*, which the Waitangi Tribunal has separately observed as being ‘not Treaty-compliant’.<sup>213</sup> In reflection of this, the status of the river as Te Awa Tupua and the Tupua te Kawa, although a significant embodiment of *tikanga Māori*, cannot be determining factors when decisions are made affecting the river under other legislation.<sup>214</sup>

The *Te Awa Tupua Act* has been described as a ‘compromise’ between Indigenous advocacy and broader Crown strategy,<sup>215</sup> and an ‘attempt to reconcile competing world views with respect to freshwater’.<sup>216</sup> In settling with the Crown, the *iwi* conceded their claims to territory (at least pending the resolution of Māori freshwater claims at some point in the future)<sup>217</sup> and accepted a non-ownership model, in which the river owns its bed.<sup>218</sup> Māori in other parts of New Zealand have taken their water ownership claims to the courts, seeking ‘rangatiratanga’ (sovereignty) over all freshwater within their *takiwā* (territory).<sup>219</sup>

Indigenous scholars, including Jones, have pointed out that while the Te Awa Tupua settlement establishes a framework that reflects a Māori perspective on human relationships with the natural environment, this does not amount to the kind of recognition of Māori legal traditions that is necessary to establish a just relationship between Māori and the Crown.<sup>220</sup> Legal personality is an imposed, colonial, western legal construct, as distinct from the Māori worldview that natural landscape features have their own *mauri* (or life force). This similarly leaves the Te Awa Tupua model open to the criticisms (discussed above) that environmental constitutionalism is weakly implemented, and that rights of nature/legal personhood reinforce western hegemony within liberal democratic frameworks that fail to account for legal pluralism.

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<sup>211</sup>In this way, the Te Awa Tupua Act follows the approach taken in a number of earlier settlements, which vested the beds of rivers and lakes in *iwi/hapū* groups and focused on bringing Māori and stakeholders together with public authorities as part of co-management arrangements.

<sup>212</sup>*Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) ss 41, 46. According to the media, the hydroelectric power generator continues to divert 75 per cent of the Whanganui’s headwaters. See Lurgio (2019).

<sup>213</sup>Waitangi Tribunal (2019), p 65–66. The report criticised the Resource Management Act highlighting the government’s failure to recognise Māori rights and interests in water and recommended a new Treaty-compliant co-governance regime, which is currently under reform.

<sup>214</sup>*Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 15(5).

<sup>215</sup>Macpherson and Clavijo Ospina (2018).

<sup>216</sup>Te Aho (2019), p 1618.

<sup>217</sup>This is the subject of another claim before the Waitangi Tribunal and recent High Court claim to water ownership brought by another tribe, discussed below.

<sup>218</sup>Macpherson (2019), pp 119–120.

<sup>219</sup>Te Rūnanga o Ngāi Tahu, ‘Ngāi Tahu Takes Court Action to Protect South Island Lakes and Rivers’, <https://ngaitahu.iwi.nz/ngai-tahu-takes-court-action-to-protect-south-island-lakes-and-rivers/>. There is little available information about the claim as it is still at the pleadings stage, and the statement of claim is confidential. See *Tau v Attorney-General* (2020) NZHC 3063.

<sup>220</sup>Jones (2016), p 98. See also Te Aho (2019), p 1619 although she acknowledges that it appears to provide the strongest opportunity for more effective participation by Māori.

Despite the limitations of the Te Awa Tupua model, the broader regulatory framework for freshwater (and the environment) in Aotearoa New Zealand appears to be undergoing its own constitutional shift. This shift includes a similar tendency towards greater recognition of legal pluralism, and the Māori conception of rivers as interconnected, living entities, which may suggest a broader influence of *ad hoc* models like that of Te Awa Tupua.<sup>221</sup> These developments further confirm that the significance of the Te Awa Tupua model relates little to the conferral of legal personhood, and its key contribution concerns legal arrangements that support relationships between people and place.<sup>222</sup>

The National Policy Statement for Freshwater Management was revised in 2020. It adopts as a ‘Fundamental concept’, ‘*Te Mana o Te Wai*’ (The *mana* of water),<sup>223</sup> which (in language reminiscent of the *Te Awa Tupua Act*):<sup>224</sup>

... refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri [lifeforce] of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.

Decision-makers must ‘give effect to’ *Te Mana o Te Wai* when managing water,<sup>225</sup> and priority must be given to the health of the water ahead of the health needs of humans, and finally communities to provide for their social, economic, and cultural well-being, now and in the future.<sup>226</sup> The Statement sets out 6 principles relating to the role of Māori and other New Zealanders in the management of freshwater, which recognise the interconnectedness people with water, especially the ‘power, authority and obligations’ of Māori *kaitiaki* to care for water on behalf of future generations, as well as water’s own vitality and agency.<sup>227</sup>

The Statement also provides for the ‘integrated management’ of freshwater resources pursuant to the holistic Māori resource management approach, also included in *Te Mana o Te Wai*, known as ‘*ki uta ki tai*’ (from the mountains to the sea). This approach recognises ‘the interconnectedness of the whole environment, from the mountains and lakes, down the rivers to hāpua (lagoons), wahapū (estuaries) and to the sea; and (b) recognise interactions between freshwater, land, water bodies, ecosystems, and receiving environments’, and refers to the impact of cumulative effects across ecosystems and the need for coordination across regulatory institutions.<sup>228</sup> It is clear from the Environment Court decision in *Aratiatia Livestock Limited v Southland Regional Council*<sup>229</sup> that *Te Mana o te Wai* is already having a practical impact on water planning in New Zealand, including (in that case) the prioritisation of water’s ecological and spiritual health above resource exploitation for primary production. The Court provides an early discussion of the meaning and significance of *Te Mana o te Wai*, which it describes as an, ‘integral

<sup>221</sup>See also Te Aho (2019).

<sup>222</sup>See Macpherson (forthcoming) and Tănăsescu (forthcoming).

<sup>223</sup>*Mana* does not have a direct translation into English but encompasses ideas of spiritually-sanctioned power, authority and integrity. See Marsden (2003); Jones (2018), p 17.

<sup>224</sup>New Zealand Government (2020), para 1.3(1).

<sup>225</sup>New Zealand Government (2020), para 3.2.

<sup>226</sup>New Zealand Government (2020), paras 1.3(5), 2.1.

<sup>227</sup>New Zealand Government (2020), para 1.3(4).

<sup>228</sup>New Zealand Government (2020), para 3.5.

<sup>229</sup>*Aratiatia Livestock Limited v Southland Regional Council* (2019) NZEnvC 208.

part of freshwater management<sup>230</sup> and, ‘a fundamental shift in perspective around management of this natural resource’.<sup>231</sup>

Legislative reform of the *Resource Management Act 1991* is also underway,<sup>232</sup> which has major constitutional implications. The reform project follows the Government commissioned ‘Randerson Review’, which found that the Act has ‘not sufficiently protected the natural environment’, and includes ‘[i]nsufficient recognition of Te Tiriti and lack of support for Māori participation’.<sup>233</sup> In February 2021, the Government announced its intention to repeal the *Resource Management Act*, and replace it with a new environmental and planning law framework. The Cabinet proposal for the new legislation, released in February 2021, includes recommendations of constitutional significance, intended to (amongst other things) ‘protect and where necessary restore the natural environment (including the capacity to provide for the wellbeing of present and future generations)’ and ‘give effect to the principles of Te Tiriti o Waitangi and provide greater recognition of *te ao Maori* (Māori worldview), including *matauranga Maori* (Māori knowledge)’.<sup>234</sup> The Government’s proposal reaffirms the significance of *Te Mana o Te Wai*, and the related concept *Te Oranga o Te Taiao* (the *health* of the environment), which:<sup>235</sup>

Refers to the fundamental significance of the natural environment and the importance of prioritising its health and wellbeing. It conveys a holistic, intergenerational perspective expressed well in *te ao Maori*. In relation to freshwater management, *Te Mana o te Wai* has gained widespread acceptance and is now integral to the regulatory regime.

A key finding of the New Zealand experience of riverine rights, therefore, is the potential for small-scale or *ad hoc* developments, which ‘represent change and incremental progress’,<sup>236</sup> to set the stage for more fundamental environmental reforms. In this way, *Te Awa Tupua* can be seen as a constitutional experiment – indicative of potential new paths towards transformative change.

#### 4. Riverine rights – a way forward when ordinary legal mechanisms fall short?

The riverine rights cases from Colombia, India and New Zealand are examples of environmental constitutionalism. Each of the cases can be understood as an attempt to work around the limitations of regulatory frameworks for rivers, by going over and above them and appealing to fundamental rights and higher-level norms. The transcendent *Tupua Te Kawa* in the *Te Awa Tupua Act*, is an attempt to elevate the ‘fundamental’ rights of the river and set an ideal standard to influence decision-making about the river. The Atrato

<sup>230</sup>*Aratiatia Livestock Limited v Southland Regional Council* (2019) NZEnvC 208 at [21].

<sup>231</sup>*Aratiatia Livestock Limited v Southland Regional Council* (2019) NZEnvC 208 at [63].

<sup>232</sup>In 2017 the *Resource Management Act* was amended to enable *iwi* and *hapū* to enter into voluntary ‘mana whakahono ā rohe agreements’ (ss 58L-U), intended to increase Māori participation in collaborative governance of local resource management. In October 2020 the first mana whakahono ā rohe agreement was signed in New Zealand between Poutini Ngāi Tahu and the West Coast Regional Council.

<sup>233</sup>New Zealand Resource Management Review Panel (2020), pp 16, 20. The review panel recommended strengthening references to the Treaty of Waitangi including inserting a new *Tiriti* clause that would read: ‘To achieve the purpose of this Act, those exercising functions and powers under it must give effect to the principles of Te Tiriti o Waitangi’.

<sup>234</sup>Office of the Minister for the Environment (2021), para 28.

<sup>235</sup>Office of the Minister for the Environment (2021), para 81.

<sup>236</sup>Coates (2018), p 171.

river decision seeks to compel regulators to do something about the environmental degradation of the river and social deprivation of the people of Chocó, leveraging the ‘fundamental’ constitutional rights of Indigenous and Afro descendent peoples. The Ganges, Yamuna and Glaciers decisions were efforts to force the state to implement pollution control, combining constitutional rights, Directive Principles of State Policy, and Hindu religious norms.

This ‘elevation’ is carried out in each case by organs of the state (the Parliament in the New Zealand case, and the courts in the Indian and Colombian cases), by strategically using, interpreting and adapting existing constitutional law mechanisms.<sup>237</sup> This shows creativity on the part of bureaucrats, politicians and Indigenous leaders (in the case of New Zealand) and activist lawyers and judges (in the case of India and Colombia). These are clearly strategic cases, and they have made their ‘makers’ famous, sometimes to the surprise of local and affected people. So it may be a fair characterisation that the architects of these cases are both ‘learning to play the game better’ and hoping to ‘make their mark’. But in each case, this was done because existing legal mechanisms were perceived as inappropriate or unable to manage the social and environmental concerns and conflicts with respect to the rivers. In the Colombian and Indian cases the courts ‘justified their extraordinary actions by noting the need to address serious threats to important river ecosystems, and the communities that depend on them, in the face of government inaction’.<sup>238</sup> In the New Zealand case, the Treaty negotiators arrived at a legal mechanism that would respond to *iwi* concerns about the condition and management of the river without having to resolve contentious distributive claims. Each case is an attempt to rebalance power relations with respect to rivers by providing a relational forum for negotiation, conflict and compromise about their management and use, and to varying degrees and in varying respects involves government authorities, Indigenous and local communities, and other users.<sup>239</sup>

Does our study of the riverine rights cases support May and Daly’s contention that, ‘[e]nvironmental constitutionalism offers a way forward when other legal mechanisms fall short’?<sup>240</sup> Our observations suggest that this is correct to some extent. Each of the models recognises distinct Indigenous, spiritual, ethnic or community perspectives in which rivers are recognised as living entities with their own rights, and attempts to establish a river governance regime that reflects human responsibility and care for the river. The socio-cultural and practical implications of this change might be transformational. It changes the way regulators and communities see rivers, and enables relational legal pluralism via the integration of distinct worldviews as new ‘fundamental’ values and objectives.

However, the transformation is not complete. The *Te Awa Tupua Act*, for example, fails to impact significantly on existing regulatory frameworks under the *Resource Management Act*, and does nothing to disturb the existing distribution of property rights in the river. The Atrato decision has, so far, had no direct impact on existing legal or illegal uses of the river, and it is hard to see how a weak and absent state will be able to implement the Court’s orders. The orders in the Indian cases are stayed pending appeal, and there are major jurisdictional and technical issues with the judgments, meaning that they may not be upheld

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<sup>237</sup>See Kauffman and Martin (2019), p 262 who make this observation around the role of judges in the Indian and Colombian cases.

<sup>238</sup>Kauffman and Martin (2019), p 262.

<sup>239</sup>Macpherson (forthcoming).

<sup>240</sup>May and Daly (2015), p 18.

when they eventually come before the Supreme Court. This leaves the riverine rights models open to the criticisms often levelled at environmental constitutionalism, of being at best weak or symbolic, and even worse, to produce unintended complications during implementation.<sup>241</sup> This suggestion of ‘implementation gap’ leaves unanswered questions around whether riverine rights can fare any better than the ineffective environmental laws and institutions they are directed to transcend, and as the riverine rights cases inspire similar developments around the world, further empirical investigation into their implementation is needed to understand whether they are effective or produce unintended consequences.<sup>242</sup>

It is important to remember that in all three cases, environmental or human rights objectives could have been achieved without the recognition of the river as a legal person or subject. Public interest law standing, to bring constitutional law action on behalf of the environment and affected communities exists in all three jurisdictions. Which leaves us with the unavoidable impression that the constitutional significance of the riverine rights cases goes beyond the strictly legal.

The most significant finding from our comparative study is that the three *ad hoc* riverine rights cases (‘still adolescents in constitutional time’)<sup>243</sup> are beginning to have broader, yet profound, influence on mainstream environmental regulation. In New Zealand, the incorporation of Māori law and custom with respect to rivers in the *Te Awa Tupua Act* appears to be spreading throughout the broader regulatory framework, through concepts like *Te Mana o Te Wai*, which recognise the living and interconnected state of water resources and communities. The Indian cases have spurred a series of further rights of nature and animal rights decisions. In Colombia, the Atrato case has been plagued by complaints of poor engagement and implementation, but it has provoked a cascade of further judicial, administrative and legislative cases and proposals pursuant to which natural resources and their ecosystems have been recognised as legal subjects. The impact of these cases has spread beyond their borders, to inspire courts, legislatures, administrations and communities around the world.

It may not surprise, given their constitutional significance, that the riverine rights cases would have broader public influence as a ‘model standard for legitimacy’.<sup>244</sup> A key finding of our comparative study, therefore, is that small-scale or *ad hoc* developments may set the stage for more fundamental environmental reforms. In this way, the early riverine rights cases in New Zealand, India and Colombia can be seen as a constitutional experiment – revealing potential new paths towards transformative change.

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<sup>241</sup>Kauffman and Martin (2019), p 263.

<sup>242</sup>See Tănăsescu (forthcoming).

<sup>243</sup>May (2020).

<sup>244</sup>Bosselmann (2008), p 169. See also Grimm (2005), p 194.

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## Notes on contributors

**Dr Elizabeth Macpherson** is an Associate Professor in Environmental and Natural Resources Law at the University of Canterbury. Her research interests are in comparative environmental and natural resources law, human rights and Indigenous rights in Australasia and Latin America. She has published widely on these topics including the book *Indigenous Water Rights in Law and Regulation: Lessons from Comparative Experience* (2019, Cambridge University Press). She currently co-leads two major externally funded research projects: the Sustainable Seas National Science Challenge project funded by the New Zealand Government on *Law and Policy for Ecosystem-Based Marine Management*; and Norwegian Research Council funded project *Riverine Rights: Exploring the Currents and Consequences of Legal Rights for Rivers*.

**Axel Borchgrevink** is professor of Development Studies at Oslo Metropolitan University, and has a PhD in Social Anthropology from the University of Oslo. He has broad research experience, which includes anthropological fieldwork in Nicaragua, the Philippines and Cuba, and has published on local knowledge, rural development, development aid, civil society, conflict and democratization. His monograph *Clean and Green: Knowledge and Morality in a Philippine Farming Community* was published by Ateneo de Manila University Press in 2014. Currently he heads the Norwegian Research Council funded project *Riverine Rights: Exploring the Currents and Consequences of Legal Rights for Rivers*.

**Rahul Ranjan** is a Postdoctoral Research Fellow at the Department of International Studies, Oslo Metropolitan University, Norway. He works on the “Riverine Rights” project funded by the Research Council of Norway. His upcoming edited book is titled: “At Crossroads of Rights: Forest Struggles and Human Rights in Postcolonial India (Routledge Publication, December 2021). He is a recipient of the Louise Arbor studentship that funded his PhD at the University of London and worked with London’s Human Rights Research Network.

**Catalina Vallejo Piedrahíta** is a lecturer in the fields of Public Law and Peace Studies, and researcher with a focus on the role of law in the transformation of complex global conflicts. She is a postdoctoral fellow at the University of Bergen in Norway (2020-23), where she studies the multilevel governance of climate change in the Amazon. She is a core faculty member of the MA Program in Peace Studies at the University of Innsbruck, Austria, and is affiliated with the Law Faculty of Universidad Autónoma Latinoamericana (Unaula) in Colombia, where she researches the emerging jurisprudence on the rights of rivers in collaboration with the Oslo Metropolitan University. She holds a degree in Law, an MA in Peace Studies, and a Ph.D. in Law (2018); has written about the intersection between Peace Studies and human rights work, water rights in Colombia, and the role of litigation in the transformation of environmental conflicts, including climate change.

## ORCID

Elizabeth Macpherson  <http://orcid.org/0000-0003-1021-9930>

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