The rights of nature in colombian and indian case-law*

Los derechos de la naturaleza en la jurisprudencia colombiana e indiana

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Artículo de reflexión

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Abstract

Nature has long been a voice not heard by law. However, since the 1970s, the international community has begun to change its mindset and consider the environment as an object of legal interest. The environmental crisis that is threatening the planet, our common Home, and new epistemological approaches based on earth jurisprudence, have favored the emergence of the concept of "rights of Nature". At the constitutional level, they have been recognized in the Constitution of Ecuador in 2008. In addition, many other countries have passed

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laws that attribute legal personality to rivers, glaciers, animals, etc. This article compares the recent colombian and indian case-law that has recognized natural features as subjects of rights.

Keywords: rights of nature; ecological constitutionalism; harmony with nature; biocultural rights; sustainable development.

Resumen

La naturaleza ha sido, por largo tiempo, una voz no escuchada por el derecho. Sin embargo, desde los setenta del siglo pasado, la comunidad internacional ha empezado a cambiar de mentalidad y considerar el ambiente como un objeto de interés jurídico. La crisis ambiental que está amenazando el planeta, nuestra casa común, y nuevos enfoques epistemológicos basados en la *earth jurisprudence* han favorecido la emersión del concepto de "derechos de la Naturaleza". A nivel constitucional, han sido reconocidos en la Constitución de Ecuador en 2008. Además, muchos otros países han aprobado leyes que atribuyen personalidad jurídica a ríos, glaciares, animales, etc. El artículo compara la reciente jurisprudencia colombiana e indiana que ha reconocido componentes naturales como sujetos de derechos.

Palabras clave: derechos de la naturaleza; constitucionalismo ecológico; armonía con la naturaleza; derechos bioculturales; desarrollo sostenible.

> […] before these priceless bits of America (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.
>
> (Mr. *Justice* Douglas, *dissenting opinion* en *Sierra Club vs. Morton, Sec. Int*., 405 U.S. 727, 1972)

1. The path towards the recognition of Nature as a subject of rights

In the Judeo-Christian tradition, human beings are placed at the center of creation and they dominate Nature. However, and despite the reluctance with which the Catholic Church changes her mind,

Pope Francis, with the Encyclical *Laudato sii*, has heard Nature's cry of pain[1], inviting society, believers and not, to an ecological change in their relationships with creation. The Encyclical insists on the close connection between the mistreatment of the natural environment and the situation of extreme poverty in which almost 800 million people currently live (Informe Oxfam, 2018), suffering from hunger in a world that could guarantee to all the sufficient means of sustenance, if it were not overexploited by a voracious and highly unequal economic system.

The indissoluble relationship between poverty and ecological crisis has been underlined by most critical social studies, which defend the emergence of new epistemological paradigms from the Global South[2], through the recovery of indigenous cultural traditions, always linked to a rather harmonious relationship, and not hierarchical or exploitative, between the human being and Nature. In the legal field, this critical vision implies a rethinking of the traditional categories of environmental law, from a non-anthropocentric, but bio/ecocentric perspective. The change in perspective makes it possible to advance the idea of a new dogmatics of rights, which also includes, among legal subjects, non-human beings, such as Nature itself or its own components[3].

1 See also E. Galeano, *We Must Stop Playing Deaf to Nature*, en Aa.Vv., *Does Nature have Rights? Transforming Grassroots Organizing to Protect People and the Planet*, Pachamama Foundation, 2: «Nature has a lot to say, and it has long been time for us, her children, to stop playing deaf. Maybe even God will hear the cry rising from this Andean country and add an eleventh amendment, which he left out when he handed down instructions from Mount Sinai: ''Love nature, which you are a part of». Defense of Nature and the fight against poverty are the lines of development of the thought of Galeano and Paulo Freire, which have influenced the environmental movement in Latin America. Perhaps it is not by chance that an Argentine pope has signed the *Laudato sii.* Cf. J. Martinez-Alier, M. Baud and H. Sejenovich, *Origins and Perspectives of Latin American Environmentalism*, en F. de Castro, B. Hogenboom, M. Baud (eds.), *Environmental Governance in Latin America*, Palgrave Macmillan, 2016, DOI 10.1057/9781137505729, 43.

2 We refer to B. de Sousa Santos, *Una Epistemología del Sur*. *La reinvención del conocimiento y la emancipación social*, Buenos Aires, 2009. See out of the *Americas*, U. Baxi, *Towards a climate change justice theory? Journal of Human Rights and the Environment*, Vol. 7, No. 1, 2016, 7-31.

3 An exhaustive reflection can be found in M. Carducci, *Natura* (*diritti della*), in *Dig. Disc. Pubbl*., Milán, 2017, 486 ss.

This critical thinking has influenced the new Andean constitutionalism, particularly in Ecuador and Bolivia. Chapter VIII of the Ecuadorian Constitution of 2008 is entitled "Of the rights of Nature" and art. 71 affirms that "Nature or Pacha Mama, where life is reproduced and fulfilled, has the right to have its existence fully respected and the maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes". The norm recognizes to every person, community, people and nationality the legitimacy to demand to the public authority the fulfillment of the rights of the Nature. In addition, the State undertakes to encourage natural and legal persons, and groups, to protect Nature, and to promote respect for all the elements that make up an ecosystem. The art. 72 const. attributes to Nature an autonomous right to restoration, which will be independent of the obligation of the State and natural or legal persons to compensate individuals and groups that depend on the affected natural systems.

There are several other provisions that make up the Ecuadorian "Ecological Constitution"[4]. Some link the defense of Nature with another key concept of the "biocentric legal turn": *sumak kawsay* or good living. It is a concept of the Andean world views that, according to the preamble to the Constitution, represents the supreme objective of the State: to build a new form of citizen coexistence, a new social pact, in diversity (interculturality and plurinationality) and harmony with nature[5].

The Bolivian Constitution of 2009, even incorporating the *Aymara* equivalent of *sumak kawsay*, *suma kamaña*, does not go as far as the recognition of rights to Nature. However, this result has been achieved through legislative reforms, with Law 71 of 2010 (*Law on the rights of Mother Earth*) and Law 300 of 2012 (*Framework Law of Mother Earth and integral development to live well*).

4 For example, art. 250, which recognizes the territory of the Amazonian provinces as part of an ecosystem necessary for the environmental balance of the planet; or art. 395 sqq. on Nature and environment, biodiversity, natural heritage and ecosystems.

5 It was referred to S. Bagni, *Dal* Welfare State *al* Caring State?, in S. Bagni (*a cura di*), *Dallo Stato del* bienestar *allo Stato del* buen vivir. *Innovazione e tradizione nel costituzionalismo latino-americano*, Bolonia, 2013, 19-59.

The Bolivian Government has been the main promoter of another important initiative in defense of Nature in front of the United Nations. After President Morales' speech to the General Assembly in 2009, the UN proclaims April 22 International Mother Earth Day. Immediately afterwards, the Assembly adopts the first Resolution on Harmony with Nature. As of 2011, under reports drawn up by the Secretary General, the Assembly organizes an interactive debate on the subject every year and the *Harmony with Nature* program is officially created. Since 2016, the Assembly decides to formally include in this program a group of experts from *Earth Jurisprudence*, who are involved in a permanent virtual dialogue, with the aim of sensitizing world public opinion on the need for an ecocentric shift in all types of human relationships.

At the same time, several countries have implemented actions for the recognition of rights to Nature. For example, laws have been passed granting legal personhood to natural features, such as rivers, mountains, glaciers, etc., often in connection with the defense of the traditions and customs of indigenous peoples, as in Australia the Yarra River or in New Zealand the former Te Urewera National Park or the Te Waiū-o-Te-Ika River.

2. Purpose of the comparison and comparability criterion

In some countries, the recognition of rights to Nature has not passed through the legislative or constitutional channels, but through the case-law formant[6]. The goal of this research is to compare the various judgments in order to classify the legal instruments, parameters and arguments that the Courts have used for the recognition of the status of legal entity to rivers, lakes, glaciers, natural habitats, etc.

In Ecuador, on March 30, 2011, the Loja Provincial Court decided the case *Loja v. Vilcabamba* River, applying for the first time the art. 71 const. on the rights of Nature, to respect the life cycle of a river, threatened by excavation works realized for the construction of a new

6 The program *Harmony with Nature* coordinates the updating of a database of normative and jurisprudential acts where the rights of Nature are recognized throughout the world. Among the jurisdictions where there are judgments on the rights of Nature are: Colombia, Ecuador, India and the United States. See also L. Cano Pecharroman, *Rights of Nature: Rivers That Can Stand in Court*, in *Resources*, vol. 7, n.° 1, 2018, 1-14.

provincial road. The action is promoted by two foreigners residing in the area, under the universal standing recognized by law in the case of actions for the defense of constitutional rights. The sentence may seem like a great victory for the popular front that supported, since the constituent assembly, the idea of granting rights to Nature[7]. However, the ruling has remained practically unfulfilled, so much so that the plaintiffs appealed for non-compliance before the Constitutional Court, lamenting the lack of preparation of a Remediation and Rehabilitation Plan for Affected Areas, according to the technical requirements provided in the ruling of the Provincial court. The Constitutional Court, with judgment N°012-18-SIS-CC, of March 28, 2018, denied the breach, declaring that the actions promoted by public authorities must be considered as sufficient.

Subsequently, other judgments of Ecuadorian courts, both constitutional and ordinary, have repeatedly used art. 71 as a parameter[8]. However, this jurisprudence is not comparable to those of other countries, where the rights of Nature have not been expressly provided for in the Constitution or in the law. In fact, in Ecuador there is a constitutional norm that can be cited as a parameter; a constitutional provision about the direct and immediate application of constitutional rights by and before any public, administrative or judicial servant, ex officio or at the request of a party (art. 11, No. 3 const.); the absence of hierarchy

7 Cf., during the constituent process, A. Acosta, ¿Tienen derechos los animales? in *La Insignia*, January 10, 2008, and then the essays included in A. Acosta, E. Martínez (comp.), *El Buen Vivir. Una vía para el desarrollo*, Quito, 2009 and therefore A. Acosta, E. Martínez, *Los Derechos de la Naturaleza como puerta de entrada a otro mundo posible*, in S. Bagni (a cura di), *Come governare l'ecosistema*? - ¿Cómo gobernar el ecosistema? Bologna, 2018, DOI 10.6092/unibo /amsacta/5799, 13 ss. In addition, several writings by R. Ávila Santamaría in *El neoconstitucionalismo andino*, Quito, 2016.

8 V., for example, Constitutional Court, ruling No. 017-12-SIN-CC, April 26, 2012, on the limits of establishment in the Galapagos Islands; Second Temporary Civil and Commercial Judge of Galapagos, precautionary judgment No. 269-2012, on public works without environmental authorization; ninth Court of Criminal Guarantees of Guayas, trial pen. 09171-2015-0004, on illegal shark fishing; National Court of Justice, Specialized Criminal, Military Criminal, Police Criminal and Transit Chamber, case No. 2003-2014 - C.T., September 8, 2015, on the illegal killing of a jaguar; Constitutional Court, ruling No. 218-15-SEP-CC, on balancing the rights of Nature and the right to work (this is the first case on the matter, filed with an extraordinary protection action: cfr. F.J. Bustamante Romo Leroux, *Los derechos de la naturaleza en la jurisprudencia constitucional ecuatoriana, March 1, 2016*.

between constitutional rights (art. 11, No. 6 const.); the interpretative principle *in dubio pro natura* (art. 395, No. 4 const.). All this makes the defense of Nature mandatory for the judge.

If we consider only countries where the rights of Nature are not explicitly recognized, by law or in the Constitution, the first judicial case in history can be considered *Sierra Club v. Morton*, in 1972, decided by the US Supreme Court. The Sierra Club was a committee of citizens constituted for the defense of a natural area in the Sierra Nevada, Tulare County, California. It proposed an appeal against a development project presented by Walt Disney Enterprises to the local forestry authorities. The project included the construction of resorts, hotels, swimming pools and other facilities, in an area of 80 hectares, very close to the Sequoia National Park, with an investment of 35 million dollars. The district court of first instance accepted the appeal of the Sierra Club and adopted an order to suspend the execution of the project. Disney filed appeal and the Ninth Circuit Court reformed the first-degree sentence. The Sierra Club proposed *writ of certiorari* to the Supreme Court.

Nor can we use this case for comparative purposes, because the Supreme Court, by majority, denied the *certiorari* for procedural reasons, supporting the motivation of the Court of Appeal regarding the lack of standing of the Sierra Club. However, the sentence has been considered as the starting point of scientific reflections on *Earth Jurisprudence*, due to the separate opinions of Justices Douglas and Blackmun, favorable to the extension of standing for those who defend the rights of Nature. It should not be forgotten that the sentence was pronounced at a very different historical moment from the present, where there was practically no ecological awareness, both by the authorities and by ordinary people.

In consideration of everything we have been saying so far, the comparability criterion for our research derives from the combination of two elements: the jurisprudential recognition of the legal personality of Nature or its components, such as rivers, lakes, forests, animals, ecosystems. The absence of explicit norms in the Constitution that support the ecocentric perspective, below the anthropocentric one, typical of the right to a healthy environment.

These criteria are found in a series of recent judgments by the colombian and indian courts. Once the elements of comparability have been

established, the differences between the two legal systems must also be underlined, starting from the political, economic and cultural context.

The Indian Constitution dates back to 1950 and its "age" is reflected in the language with which the right to a healthy environment is guaranteed. The art. 48 («The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country») it is included in part IV entitled "Guiding principles of state policy", and not in part III, dedicated to fundamental rights. Environmental protection is, however, also recognized as a fundamental duty of Indian citizens (art. 51, let. g «to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures»).

The Colombian Constitution is more recent. For this reason, its language has been in some way influenced by the long international debate on the relationship between development, sustainability and environmental stewardship, originating from the 1972 Stockholm Conference on human habitat, and then by the Brundtland report of 1987 and the covenants that followed. In the art. 79 and 80 const. the right to enjoy a healthy environment and the duty of the State to protect the diversity and integrity of the environment and to conserve areas of special ecological importance are affirmed. In addition, the State undertakes to plan the management and use of natural resources, to guarantee their sustainable development, their conservation, restoration or replacement[9]. The Constitution, therefore, not only refers to the concept of a healthy environment, but also defends on multiple occasions the need to guarantee the "ecological" dimension of other rights such as property or economic development.

9 «Art. 79. All people have the right to enjoy a healthy environment. The law will guarantee the participation of the community in the decisions that may affect it. It is the duty of the State to protect the diversity and integrity of the environment, conserve areas of special ecological importance, and promote education to achieve these ends.

Art. 80. The State will plan the management and use of natural resources, to guarantee their sustainable development, their conservation, restoration or replacement. In addition, it must prevent and control the factors of environmental deterioration, impose legal sanctions and demand the repair of the damages caused».

The other element of distinction, which must be taken into account especially when making a comparison between the judicial instruments that the Courts use to achieve the same result, is the legal family to which each system belongs: a mixed system in India, with a strong Anglo-Saxon footprint; a civil law system in Colombia. This difference produces relevant consequences in terms of procedural instruments for the recognition and implementation of rights. However, the relevant powers that the courts have in a common law system also make it possible to set aside another formal difference between the cases analyzed, that is, the different hierarchical level of the courts that have pronounced the judgments that will be analyzed. In Colombia, in fact, we considered judgments of national courts of the highest level (Constitutional Court and Supreme Court of Justice); in India, a High Court of a Member State of the Union. The doctrine of precedent and judge-made law, the Public Interest Litigation (PIL) system and the broad powers of mandate and execution that all Indian courts have, confer on the jurisprudence that is going to be analyzed a particular relevance by the Indian order as a whole, thus cutting down the distance between the Courts and ensuring comparability between cases.

3. Colombia

3.1. The Atrato River case

The first sentence in chronological order is T-622 of November 10, 2016, issued by the Sixth Review Chamber of the Constitutional Court.

> Every person will have a protection action to claim before the judges, at any time and place, through a preferential and summary procedure, by himself or by whoever acts on his behalf, the immediate protection of his fundamental constitutional rights, when these are violated or threatened by the action or omission of any public authority. The protection will consist of an order so that the one with respect to whom the guardianship is requested, act or refrain from doing so. The ruling, which will be immediately enforced, may be challenged before the competent judge and, in any

> case, the latter will forward it to the Constitutional Court for eventual review. This action will only proceed when the affected party does not have another means of judicial defense, unless it is used as a temporary mechanism to avoid irreparable damage. (Art. 86.)

It is a protection action established by the Center for Studies for Social Justice "*Tierra Digna*", on behalf of various community councils in order to «stop the intensive and large-scale use of various methods of illegal mining and logging» in the department of Chocó, crossed by the Atrato River. The plaintiffs consider that these activities seriously endanger the traditional ways of life of the ethnic communities that live in that territory, 96% of its surface made up of collective territories of 600 black communities, grouped into 70 major community councils and 120 indigenous reservations.

Intensive mining destroys the river bed, produces discharge of highly polluting substances, such as mercury and cyanide, and disperses mercury vapors from waste treatment, so.

> "*The contamination of the Atrato River is threatening the survival of the population, the fish and the development of agriculture that are indispensable and essential elements of food in the region, which is the place where the communities have built their territory, their lives and recreate their culture*". (Sentencia T-622/16, 2016)

In addition, the plaintiffs denounce illegal logging; the lack of basic infrastructure for water sanitation, waste treatment, etc.; the increase in childhood illnesses, still fatal; the drastic reduction of navigability of the rivers; the decrease in life expectancy in the area (58.3 years compared to 70.3 on average in the rest of the country).

The constitutional parameters invoked are the fundamental rights to life, health, water, food security, a healthy environment, culture and the territory of the affected ethnic communities.

In the first degree, the administrative court of Cundinamarca resolves the claim as inadmissible, for procedural reasons, insofar as the protection of collective and non-fundamental rights was intended. That implied a different procedural action, that is, the popular action and not the protection action.

> The law shall regulate popular actions for the protection of collective rights and interests, related to heritage, space, public safety and health, administrative morals, the environment, free economic competition and others of the like that are defined in it. It will also regulate the actions originated in the damages caused to a plural number of people, without prejudice to the corresponding particular actions. Likewise, it will define the cases of objective civil liability for the damage inflicted on collective rights and interests. (Art. 88)

On appeal, the Council of State confirms the contested ruling. Instead, the Constitutional Court admits the action, considering that it is about defending both collective and fundamental rights of ethnic communities.

The motivation of the Court begins with the analysis of the formula "Social rule of law" provided for in the Constitution, which according to the interpretation of the Court, consists of both the recognition of ethnic-cultural diversity and the protection of the environment and natural resources (point 4.7). From its first years of activity, the Court had affirmed that the new Colombian Constitution could clearly recognize an "ecological constitution" and a "cultural constitution"[10] (point 5.22 ss.).

The final recognition of the rights of the Atrato River achieves the union of these two statutes of rights in the concept of biocultural rights, that is, the rights of ethnic communities (therefore, not only indigenous, but also Afro-Colombian) to administer and exercise guardianship over their territories and over the natural resources that make up their habitat, in accordance with their own laws and customs (Bavikatte, 2015). Biocultural rights thus represent the *trait-d'union* between environment and culture from a holistic perspective (point 5.11). The protection «of rivers, forests, food sources, the environment and biodiversity» is part of the standard derived from the principle of «ethnic and cultural diversity of the nation», according to which the State cannot impose a specific conception of the world.

10 In ruling T-411 of 1992, the Court interprets the Constitution in a systematic, axiological and finalist way, deducing the concept of ecological constitution from 34 constitutional provisions. See also the case-law cited in note 44 of the annotated judgment.

The Court then interprets the Constitution with a multicultural and developmental approach. It concludes by considering the public authorities responsible for omission in the face of the critical situation of violation of the fundamental rights to life, health, and a healthy environment of the ethnic communities of the Atrato river basin and of their biocultural rights, caused by over-exploitation of the extractive and forestry industry. The Court applies the precautionary principle and prohibits the use of toxic substances in mining activity. What's more «(ii) It will declare that the Atrato River is subject to rights that imply its protection, conservation, maintenance and in the specific case, restoration» (9.25). For the execution of the sentence, the Court orders the Colombian State to exercise its legal representation, together with the ethnic communities that live near the river. It orders the institution of a commission of guardians of the Atrato River, made up of a panel of experts, including WWF Colombia and the Humboldt Institute, with the aim of adopting the actions provided for in the ruling (plan to decontaminate the Atrato River basin and its tributaries; joint action plan to neutralize and definitively eradicate illegal mining activities; comprehensive action plan that allows the recovery of traditional forms of subsistence and food; conduct toxicological and epidemiological studies of the Atrato River, its tributaries and communities; a plan of verification of the execution of the sentence; adoption of the appropriate and necessary measures to ensure sufficient and timely resources) and periodically verify compliance.

This ruling pushes colombian constitutionalism beyond the sustainable development model, towards a new ecocentric dogmatics of law and environmental justice:

> «9.31. In other words, justice with nature must be applied beyond the human scenario and must allow nature to be a subject of rights. It is under this understanding that the Chamber considers it necessary to take a step forward in jurisprudence towards the constitutional protection of one of our most important sources of biodiversity: the Atrato River».

The Colombian Government has ensured follow-up to the ruling with the decree of the Ministry of Environment and Sustainable Development No. 1148 of 2017, of July 5, with which the Ministry

nominates itself as a representative of the rights of the Atrato River, and with the Ministerial Resolution No. 0907 of May 22, 2018, creates the Commission of Guardians of the Atrato River: the Communities' Guardians appointed by a series of local organizations, and the National Guardians, constituted by the Ministry of Environment and by members of various departments and interested local entities. The resolution, in accordance with the sentence, foresees that the Commission can hire experts, as soon as it deems it appropriate, selected from organizations and professionals who work in the field of environmental protection. In addition, it lists the functions of the Commission, corresponding to the tasks imposed by the Constitutional Court.

3.2. The case of the rights of the Amazon

On April 5, 2018, the Colombian Supreme Court of Justice, the civil cassation chamber, issued the ruling STC 4360/2018, signed by Judge Luis Armando Tolosa Villabona. It is a protection action instituted against the sentence of the civil court specialized in land restitution of the Superior Court of the Bogotá judicial district. The promoters are a group of 25 citizens, between 7 and 25 years old, resident in cities that are part of the list of cities most at risk from climate change. They want to contrast the «increased deforestation in the Amazon».

The constitutional parameters invoked by the plaintiffs are the same as in the case of the Atrato river (right to life, health and a healthy environment). Here, however, there is a different source of legal standing, insofar as the promoters recognize themselves as holders of these rights as representatives of the future generation that will be mainly affected by climate change.

Under the Paris agreement and the National Development Plan 2014-2018, among others, the State committed to reducing deforestation. However, the plaintiffs show that each year more hectares of forest are being lost every year (an increase of 44% between 2014 and 2015), due to land grabbing, illicit crops, illicit extraction, infrastructure and agro-industrial crops, illegal wood extraction. They consider the State responsible for not acting in accordance with its obligations. The court of appeal dismisses the action on formal grounds. On the

other hand, the Supreme Court admits the *tutela* action, affirming that the threatened rights have the rank of fundamental rights.

Regarding the merit of the case, the Colombian Supreme Court, like the Constitutional Court in the case of the Atrato River, considers that the legal system is moving from an anthropocentric model of environmental law ("autistic homomensura anthropocentrism") to an "anthropic ecocentric" model. However, the hard core of the motivation is different and is located in the principle of solidarity, declined both towards Nature, and above all, towards future generations. In some of its parts, the motivation seems almost mystical. The judge refers to the need to protect our "neighbor", who represents the "otherness", and its essence is in the other people who inhabit the planet, also including other animal and plant species, and subjects not yet born[11].

The solution of the case is based on intra-species solidarity and on the value of Nature itself. The conclusions are based on the principles of precaution, intergenerational equity and solidarity: with the first, the risk of harm is accepted; with the second, it is admitted that the rights of future generations may be affected; with the third, the responsibility of the State is founded by omission. The Supreme Court makes express reference to the ruling of the Constitutional Court in the case of Río Atrato. It uses the same formula to recognize the Amazon as a subject of law and orders the institutions, together with the plaintiffs and with the group of interested communities, to approve a plan to reduce deforestation and an intergenerational pact for the life of the Colombian Amazon.

4. India

The three Indian cases that are going to be analyzed below all arise from actions called Public Interest Litigation (PIL) and have been judged by the *High Court of Uttarakhand*. It is then a state court, and not a federal one.

11 The sentence in question could also be read as an expression of a contemporary trend towards the recovery of some ethical and moral principles, such as solidarity, fraternity and compassion. Recently, *Conseil constitutionnel, Décision* N° 2018-717/718 QPC *du 6 juillet 2018*.

4.1. Writ Petition (PIL) No. 126 of 2014, sent. March 20, 2017[12]

The plaintiff is a person living in the Haridwar district, Mohammad Salim, who opposes the development of excavation and construction activities on the banks of the Ganges River. The Court admits the appeal and prohibits the performance of these activities in the river basin and its tributaries in the upper zone. It also orders the Union Government to create a national institution for the integrated management of the Ganges basin, the *Ganga Management Board*, made up of federal officials and members appointed by the two States involved, Uttar Pradesh and Uttarakhand (Narain, 2017). However, the two States do not communicate the required names and that is why the plaintiff proposes a new action so that the first sentence is respected.

The motivation is mainly focused on justifying the recognition of the legal personality of the Ganges and Yamuna rivers, according to what is established by Indian law. The Court cites copious jurisprudence from the Supreme Court of India, which in turn refers to some historical precedents from the Judicial Committee and authoritative sources such as Pollock, Maitland, and Salmond. These sources verify the evolution of the concept of legal person, from ancient times, when even some human beings, such as for example slaves, were not considered people, until the modern recognition of legal personality to corporations, institutions, unions, trusts, as in India idols and divinities. Therefore, the Court defines «person», in legal terms as, «any entity (not necessarily a human being) to which the law recognizes rights and duties».

The motivation for this extension of meaning is described quite apodictically: «subserving the needs and faith of the society». For this reason, the Court considers it a duty to recognize the legal personality of the Ganges and Yamuna rivers. Paragraph 17 of the judgment lists the reasons of "public interest" that have been put at the bottom of this acknowledgment. For the Hindu population, the rivers

12 It is necessary to point out that the Government of Uttarakhand has appealed this ruling to the Supreme Court of India, which, pending the final verdict, has suspended the ruling of the High Court (*Order* of July 7, 2018).

are sacred and benefit the people half of the physical and spiritual sustenance since time immemorial. In addition, they guarantee the physical and mental well-being of the communities that live around its shores, from the mountains to the sea. Finally, the Court selects the public authorities that must act *in loco parentis* to protect, conserve and guarantee the health and well-being of the two rivers and their tributaries.

4.2. Writ Petition (PIL) No. 140 of 2015, sent. March 30, 2017

The same Court, a few days after the sentence mentioned above, issues another ruling related to the first, recognizing the glaciers where the two rivers originate as subjects of rights. This time, the sentence persists in a deeper way in the ecosystem relationship between man and nature.

The Court literally cites long passages from ecology treaties, which serve to scientifically substantiate the risk of irreversible loss of biodiversity, caused by the extinction of animal and plant species due to the overexploitation of natural resources and the destruction of unique habitats. Of extreme importance is the quotation of a passage where the deception in which we all believe is denounced, that is to say that the "green economy" and "sustainable development" represent the solutions to ensure, on the one hand, growth and on the other, environmental protection. The authors of the aforementioned research, Vikram Soni and Sanjay Parikh, strongly emphasize that the "narrative" of "green" and "sustainable" (together with the totemic idea of the precautionary principle) is today the bargaining chip for justifying the destruction of biodiversity, which can never be compensated, not even through reforestation, so «We have to remove the hypocrisy of these 'green' clichés from our dictionary before such language seals our fate» (p. 8).

The ecological dimension in this sentence goes above the cultural dimension, always present in the references to the veneration of trees as a divine symbol, both by the Hindu religion and in Buddhist philosophy.

The Court openly proclaims itself as a supporter of the new philosophy of the land: «The Courts are duty bound to protect the environmental ecology under the 'New Environment Justice Jurisprudence'».

The Court's activism is not hidden: «Besides our constitutional and legal duties, it is our moral duty to protect the environment and ecology». She not only recognizes rivers and lakes an intrinsic right not to be polluted («Rivers and Lakes have intrinsic right not to be polluted»), but it comes to equate the damage to the person, to the damage to Nature («Polluting and damaging the rivers, forests, lakes, water bodies, air and glaciers will be legally equivalent to harming, hurting and causing injury to person»). Finally, the statute of rights recognized for natural entities faithfully follows the formulation of art. 71 Ecuadorian constitution: «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. These are scientifically and biologically living» and beyond «We must recognize and bestow the Constitutional legal rights to the 'Mother Earth'».

In the sentence there is also a very quick reference to the rights of future generations («The past generations have handed over the 'Mother Earth' to us in its pristine glory and we are morally bound to hand over the same Mother Earth to the next generation»), that we have seen as a fundamental argument in the judgment of the Colombian Supreme Court. In the second part of the *ratio decidendi*, the Court turns again to the technical-formal aspect of *parens patriae* representation. On this subject, the Court plunders with many hands the American jurisprudence and doctrine.

4.3. Writ Petition (PIL) No. 43 of 2014, sent. July 4, 2018

Finally, the most recent ruling recognizes legal personality to the entire animal kingdom. The case arises from a PIL for the protection of the welfare of animals, in particular the horses that tow carts (*tongas*) on the border between India and Nepal, in the district of Champawat. The plaintiff regrets that the use of tow animals has no type of regulation and that horses are subjected to cruel efforts, they have to tow overloaded wagons for long distances, many arrive in India sick and remain on the sidelines of the street, unattended for days. All this, despite the fact that the Union had already approved, since 1960, a law for the prevention of animal abuse.

The sentence focuses mainly on the recognition of animal rights. Unlike the cases analyzed above, in the West this issue has already found a certain interest: various laws and some constitutions, such as eg. the German one, recognize animals some rights. In fact, due to some characteristics that animals share with humans to a certain extent, such as intelligence, altruism, and the ability to communicate, man has always felt more compassion for animals. For this reason, it has been more available to recognize a quasi-human legal status, extending the meaning of some concepts such as "right to life" or "subject of law".

The parameter used by the Court is precisely art. 21 India constitution, which recognizes the right to life and liberty. The Court, citing precedents from the Supreme Court of the Union, recalls how the word "life" has always been interpreted extensively, both in its ownership (including each form of life, not only human), and in its intrinsic sense (dignified life), in application of ecocentric principles. The legal instrument to guarantee the recognized legal status is the same as in the other cases, that is, the attribution of legal personality to the entire animal kingdom, and the recognition of all citizens of the State of Uttarakhand as persons *in loco parentis*. On this point, the Court cites the dissent of Judge Douglas in the *Sierra Club* case, of 1972, where he and his brother Blackmun supported the extension of standing to all those who benefit from a natural habitat. Douglas, in his dissent, cited Stone's renowned article "Should trees have standing" (Stone, 1972). The Court also uses the metaphor of Justice Douglas about the need to listen to the "voice" of Nature[13]: «We have to show compassion towards all living creatures. Animals may be mute but we as a society have to speak on their behalf».

Among the motivations used by the Court, there is even the cultural argument, which, however, is mentioned *ad abundantiam*, after the ecological argument. In particular, the Court recalls that in India many animals are considered sacred, and that one of the main

13 «The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water – whether it be a fisherman, a canoeist, a zoologist, or a logger – must be able to speak for the values which the river represents and which are threatened with destruction. [...] The voice of the inanimate object, therefore, should not be stilled».

features of the Indian culture is *ahimsa*, non-violence, understood to promote a totally vegetarian life.

5. Synthetic comparative reflections on some common axes

Beyond the elements of comparability initially assumed, and despite the differences in context that also exist and have been highlighted at the beginning, the comparison between the judgments that recognize the rights to Nature in Colombia and India has revealed some common axes. We are going to divide our observations according to three different areas: the procedural dimension; the substantial dimension; the style of the sentences.

The procedural actions that in both countries have allowed every citizen to request protection for the ecosystem have a similar ratio, consisting of guaranteeing access to justice for weak, normally disadvantaged categories. The Colombian Constitutional Court, motivating the standing of the promoters of the tutela action, affirms: «This possibility, which, it is insisted, seeks to facilitate access to justice for populations traditionally far from the judicial apparatus for reasons of geographic isolation, economic prostration or because of their cultural diversity, is fully justified within the framework of a comprehensive State of ethnic diversity and of the specificities that characterize those groups that identify themselves as culturally different from the dominant society. For this purpose, the Constitutional Court has relaxed the procedural conditions of the guardianships promoted to safeguard the fundamental rights of ethnically differentiated collectivities».

It is an objective very similar to the one used by the Supreme Court of India, at the end of the Seventies, to create the PIL. In the case of glaciers, the High Court of Uttarakhand cites a precedent from the Supreme Court of the Union, which explains the real intent of the PIL: «The proceedings in a public interest litigation are, therefore, intended to vindicate and effectuate the public interest by prevention of violation of the rights, constitutional or statutory, of sizeable segments of the society, which owing to poverty, ignorance, social and economic disadvantages cannot themselves assert —and quite often not even aware of —those rights. The technique of public interest litigation serves to provide an effective remedy to enforce

these group rights and interests». If the cultural, legal, and temporal context between the two cases were not so different, the hypothesis of the imitation of the Indian reasoning by the Colombian Court could be advanced!

Another common element between the two institutions, always in relation to their purposes, is the general efficacy recognized to the judgments. Both the protection action and the PIL, even if arising from specific cases, extend their effects beyond the plaintiffs, to all those who have been affected by the illegitimate situation.

There remains, however, a fundamental difference. To file a constitutional protection action, you have to demonstrate your own legal standing, that is, to be the holder of the threatened constitutional right. On the contrary, in the PIL each person can go for the protection of a public interest, without having to demonstrate to have been personally affected.

This procedural difference is the cause of another distinction on the substantial level. In Colombia, the protection of the pacha mama is a secondary consequence of the recognition of a different objective: to guarantee the cultural and identity rights of ethnic communities[14]. It is the only way to ensure a relevant legal situation for the plaintiffs, admitting their legal standing[15]. In India, on the other hand, as there is no probative standing problem, the Court has focused on substantiating Nature's subjective rights, in order to create a valid doctrine for the future. A very interesting argumentative profile common to the analyzed jurisprudence is the critical approach towards the concept of sustainable development (a little more hidden in Colombia, openly declared in India), with the consequent adherence to the new ecocentric doctrines on the rights of Nature.

14 Therefore, the protection of the healthy environment of the black communities acquires special relevance from the constitutional point of view, since it is a necessary condition to guarantee the validity of their lifestyle and ancestral traditions.

15 Francisca Pou, commenting on the ruling of the Colombian Supreme Court, underlines the fact that, in substantial terms, no novelties are introduced in the panorama of the rights recognized by the legal system. The objection is true, but it does not understand the necessary relationship between the cause of action and the specific writ available. Cf. F. Pou Giménez, *The Rights of Rivers and Forests and Apex Court Dynamics in Colombia: On Natural and Institutional Environments*, in *Int'l J. Const. L. Blog*, June 13, 2018.

The Colombian Constitutional Court, when it explains biocultural rights within the framework of international constitutionalism, affirms that its basic components (economic development and environmental sustainability) can hardly be reconciled: «Thus, in our constitutionalism —which follows global trends in the matter—, the environment and biodiversity have progressively acquired valuable socio-legal connotations. However, it has not been an easy process: the conceptual evolution of the law along with the recognition of the importance of "mother earth" and its multiple components in the face of the sustainable development strategy have been the product of a complex and difficult process that still generates controversy when trying to reconcile three elements at the same time: economic growth, social welfare and environmental protection in the understanding that this combination allows the possibility of sustainable use of resources in the present and in the future».

The Court of Uttarakhand is much more direct on the subject. It expressly cites the doctrine that invites the abandonment of the "fiction" of sustainable development, because only in this way can we concentrate on the elaboration of a new dogmatic of rights, based on the scientific acquisitions of ecologists to grant a further possibility of recovery to the ecosystem of our planet (v. *supra*, § 4.2). Finally, several passages of the judgments analyzed seem to be written in the assertive style of a certain US landmark jurisprudence.

The Colombian Constitutional Court, when it declares its commitment to the "ecocentric turn" of the legal order, affirms: «Now it is the time to start taking the first steps to effectively protect the planet and its resources before it is too late or the damage is irreversible, not only for future generations, but for the human species». The passage appears to be an ecological re-visitation of the peremptory invitation to the "here and now" in the Griffin case of 1964 on racial desegregation split with *Brown v. Board of Education* [16].

The High Court of Uttarakhand, on his side, in the most environmentally friendly passage of the judgment on the Ganges and Yamuna glaciers, declares: «It is the fundamental duty of all the citizens to

16 «The time for mere "deliberate speed" has run out». *Justice* Black, *delivering the opinion of the Court*, *Griffin et al. v. County School Board of Prince Edward County et al.*, 377 U.S. 218 (1964).

preserve and conserve the nature in its pristine glory» (p. 42), reproducing the incipit of the famous phrase by Justice Marshall on the institution of constitutional review in the United States.

The use of North American precedents by the Indian courts can easily be understood, not only because of the common law origins, but also because the Indian constitutional justice system has been inspired by the American model. Regarding the colombian case, it is evident that the Constitutional Court continues to understand the US constitutional justice model as an essential point of reference in the continent for the protection of fundamental rights, even if the current colombian constitutional justice system derives from the contamination between the Kelsenian model and indigenous prototypes.

In doctrine, comparisons had already been made between colombian and indian jurisprudence, on relevant issues of contemporary constitutionalism, such as the effective implementation of social rights or the protection of minorities[17]. However, the element of comparability was the activism of the Courts as guardians of the Constitution, with the aim of demonstrating the existence of a constitutionalism of the *Global South*.

The study that we have just finished supports this thesis, and still strengthens it.

In the first place, because, at least in environmental matters, judicial activism does not characterize only constitutional courts, but even ordinary ones, and even in appeal[18]. This data, together with the Ecuadorian case-law on the matter, allows to affirm that the protection of Nature and biodiversity from an ecological perspective represents one of the fundamental axes of the new narrative on *Global South Constitutionalism*.

17 On the comparability between the Colombian system and the Indian system v. D. Bonilla Maldonado (ed.), *Constitutionalism of the Global South. The Activist Tribunals of India, South Africa, and Colombia*, Cambridge et al., 2013, in part. 26-28.

18 For example, Amirante underlines the central role played by the judiciary in protecting the environment in India, with particular reference to the institution of a Green Court: D. Amirante, *Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India*, in 29 *Pace Envtl. L. Rev.* 441 (2012), http://digitalcommons.pace.edu/pelr/vol29/iss2/3, in part. 455: «Having considered all these elements, it must be noted that the main factor of the entire process for the establishment of the National Green Tribunal of India should be indicated in the judiciary itself».

On the other hand, the jurisprudence analyzed can be considered pioneer and prototypical for the construction of an Ecological Global Law, a product from below, which has to extend over state borders, according to modalities and techniques yet to be defined[19]. The very essence, ecosystemic and holistic, of this new *in fieri* law imposes this dimension, because the main legal subject of this order (Nature) has neither nationality nor citizenship, nor can it be geolocated, nor is it physically distinguishable from the source of threat (humanity), which is part of Nature. As Magalhães shows, Nature has never been considered by law, insofar as it is a "non-space" or, rather, it is an object outside the space that the law can know, the space within the borders of the States.

> Everything that exists is defined around what is seized. On a global scale, is as if each State was an island where all that is beyond its limit belongs to everyone, but indeed, belongs to no one. […] The common is not what by its nature is truly common but the remainder of the appropriation. (Magalhães, 2018).
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> Although ecology thinks of Nature in an ecosystem perspective, «it remains invisible to the law. Therefore, "global" is a new reality that is outside the legal frameworks built to date. (2018).

Through the jurisprudence analyzed, the Courts have made Nature legally visible. They have done so by reinterpreting standards and institutes normally used for different purposes. They have achieved

19 See the attempt to systematize the basis of the matter in L.J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene*, Oxford-Portland, Oregon, 2016. I have shared the idea that only ecological law can be considered global in Comparative law and… love: *contro la globalizzazione del diritto, per la globalizzazione del giurista*, in *Annuario di diritto comparato e studi legislativi*, 2017, 64. M. Carducci and L. Castillo criticize the concept of "global law", if deprived of an ecological dimension: M. Carducci, L.P. Castillo Amaya, *La Naturaleza como "Grundnorm" y "Tertium comparationis" del constitucionalismo global*,, in T. Bustamante, B. Gonçalves Fernandes, J.A. Leite Sampaio, É. Nacur Rezende, A.L. Navarro Moreira, J.V. Nascimento Martins e I. de Carvalho Enríquez (orgs.), *O funcionamento da Corte Constitucional: a interpretação constitucional, as práticas argumentativas, a teoria do direito e o comportamento judicial*, Anais do I Congresso Internacional de Direito Constitucional e Filosofia Política, Belo Horizonte, 2015, DOI: 10.17931/dcfp_v2_art16.

this result with the means that each national legal order made available to them. It is an invitation to interpret their own law from an intercultural perspective. The legal pluralism that characterizes these cultural contexts produces greater interpretive flexibility in the minds of judges, particularly in the environmental sphere. In addition, it does invite lawyers to the elaborate original models and to progressively improve them, instead of imitating Western legal paradigms.

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