

SYMPOSIUM ARTICLE

Constitutional Law, Ecosystems, and Indigenous Peoples in Colombia: Biocultural Rights and Legal Subjects[†]

Elizabeth Macpherson,* Julia Torres Ventura**  and Felipe Clavijo Ospina***

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Abstract

The recognition of rivers and related ecosystems as legal persons or subjects is an emerging mechanism in transnational practice available to governments in seeking more effective and collaborative natural resource management, sometimes at the insistence of Indigenous peoples. This approach is developing particularly quickly in Colombia, where legal rights for rivers and ecosystems are grasping onto, and evolving out of, constitutional human rights protections. This enables the development of a new type of constitutionalism of nature. Yet legal rights for rivers may obscure the rights of Indigenous peoples and their role in resource ownership and governance. We argue that the Colombian river cases serve as a caution to courts and legislatures elsewhere to be mindful, in devising ecosystem rights, of the complex and interrelated rights, interests and tenures of Indigenous peoples and local communities.

Keywords: Colombia, Ecosystem rights, Biocultural rights, Legal personhood

1. INTRODUCTION

Legal models that recognize or declare rivers and their ecosystems to be legal persons or legal subjects have emerged during this century as a possible tool for settling disputes between local communities and governments over natural resource management,

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* University of Canterbury School of Law, Christchurch (New Zealand).
Email: elizabeth.macpherson@canterbury.ac.nz.

** University of Canterbury School of Earth and Environment, Christchurch (New Zealand).
Email: julia.torresventura@pg.canterbury.ac.nz.

*** National University of Colombia, Universidad El Bosque, and former Law Clerk with the Constitutional Court of Colombia, Bogotá (Colombia).
Email: fclavijoo@unbosque.edu.co.

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through either legislation or judicial decisions. Such disputes often concern a natural resource that is subject to threat or under pressure and the failure of existing laws and institutions effectively to protect the resource from development. As such, legal person or legal subject models have emerged as new mechanisms to encourage governments to provide more effective and collaborative natural resource management, often involving local communities as ‘guardians’.¹

These developments are ad hoc, and in many cases have been driven by Indigenous, ethnic or local communities, who have experienced historical injustices in terms of land and resource dispossession. These communities hold distinctive relationships with nature or the environment which may be more reflective of ecocentric philosophical approaches than their western counterparts. In many cases they now have extensive land holdings or recognized rights to participate in or control natural resource management.

Some might argue that legal person or legal subject models are useful tools available to Indigenous peoples in settling claims to natural resources.² One example is the Whanganui River in Aotearoa (New Zealand), which was declared to be a ‘legal person’ in 2017 as part of a reparative settlement of the historical river claims of local Māori.³ Community activism for legal rights for rivers and ecosystems has occurred in countries as diverse as Mexico, the United States (US), and Bangladesh, although not always at the insistence of Indigenous peoples.⁴

One country where the recognition of rights for rivers and related ecosystems is developing particularly quickly is the South American nation of Colombia, where a number of Indigenous communities maintain traditional territories and continue to fight for recognition of their rights to control and manage natural resources. In late 2016 the Constitutional Court of Colombia declared the Atrato River, threatened by unlawful mining, deforestation, and contamination, to be an *entidad sujeta de derechos* (legal subject) with reference to the distinctive biocultural rights of the Indigenous and Afrodescendent communities who call the river region home. The Court’s decision reflects the community perception of the river as a spiritual being or ancestor that provides for life and culture and requires care and guardianship, and not merely as a resource to be exploited.⁵ As part of its orders for protection of the river’s rights, the Constitutional Court devised an innovative and complex collaborative governance scheme involving a number of government entities, non-governmental organizations (NGOs), and local and Indigenous ‘guardians’. The ruling emphasized the need for participation by Indigenous and Afrodescendent communities in decision making about their traditional river territory, and the key role to be played by Indigenous relationships with and knowledge of nature to further its protection.

¹ See generally C. Stone, *Should Trees have Standing? Law, Morality, and the Environment* (Oxford University Press, 2010).

² See, e.g., D. Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World* (ECW Press, 2017).

³ Te Awa Tupua (Whanganui River Claims Settlement) Act 2016 (NZ).

⁴ See generally E. O’Donnell, *Legal Rights for Rivers: Competition, Collaboration and Water Governance* (Routledge, 2018), pp. 15–22.

⁵ E. Macpherson & F. Clavijo Ospina, ‘The Pluralism of River Rights in Aotearoa, New Zealand and Colombia’ (2015) 25(6) *The Journal of Water Law*, pp. 283–93.

Several other courts and local or regional tribunals in Colombia have since handed down decisions that recognize ecosystems to be legal subjects, drawing on protections in Colombia's Constitution within the framework of its *Estado Social de Derecho* (or social welfare state based on the rule law).⁶ The Colombian Amazon, Río Cauca, Páramo de Pisba, Río de la Plata, Río Coello, Río Combeima and Río Cocora (Tolima Rivers), Río Otún, and recently the Río Magdalena (Colombia's most strategically important river),⁷ all of which have strong aquatic components, are now legal subjects with their own rights of protection, conservation, restoration, and maintenance.⁸ In July 2019, the executive branch of the Department of Nariño proposed an administrative decree to recognize the rights of nature and protection of priority ecosystems such as wetlands, lakes, and rivers.⁹ At the end of 2019, a Congressman put forward a broad reform initiative to recognize nature as a legal subject with its own rights within the right to a healthy environment enshrined in Article 79 of the Colombian Constitution.¹⁰

The Colombian government recently sought an opinion from the Inter-American Court of Human Rights on the duties of states that are emerging from various

⁶ See generally A. Maya-Aguirre, 'Implementing Environmental Constitutionalism in Colombia: Tensions between Public Policy and Decisions of the Constitutional Court', in E. Daly & J. May (eds), *Implementing Environmental Constitutionalism: Current Global Challenges* (Cambridge University Press, 2018), pp. 143–58; P.A. Acosta Alvarado & D. Rivas-Ramírez, 'A Milestone in Environmental and Future Generations' Rights Protection: Recent Legal Developments before the Colombian Supreme Court' (2018) 30(3) *Journal of Environmental Law*, pp. 519–26; L. Pecharroman, 'Rights of Nature: Rivers that Can Stand in Court' (2018) 7(13) *Resources MDPI*, pp. 8–9.

⁷ The Magdalena River crosses Colombia from south to north and 74% of the Colombian population live in its watershed: see R.A. Restrepo, *Los sedimentos del río Magdalena: reflejo de la crisis ambiental [Sediments of the Magdalena River: Reflection of the Environmental Crisis]* (Universidad Eafit, 2005), pp. 60–1.

⁸ *Juan Luis Castro Córdoba y Diego Hernán David Ochoa v. Ministerio de Ambiente y Desarrollo Sostenible y otros*, (2019) Tribunal Superior, Sala Cuarta Civil Medellín [Medellin State Superior Tribunal, Civil Court No. Four], N. 2019-076 (Colombia) (*Cauca River case*); *Personería Municipal de Ibagué Ministerio de Medio Ambiente y otros*, (2019) Tribunal Administrativo de Tolima [Administrative Tribunal of Tolima] (Colombia), (*Tolima Rivers case*); *Luz Marina Diaz y otros v. Empresa de Servicios Públicos del Municipio de La Plata – Huila*, (2019) Corte Constitucional [Constitutional Court], No. 2019-114 (Colombia) (*La Plata Huila River case*); *Juan Carlos Alvarado Rodriguez y otros v. Ministerio de Medio Ambiente y otros*, (2018) Corte Constitucional [Constitutional Court], Tribunal Administrativo de Boyacá [Administrative Tribunal of Boyacá], 15238-3333-002-2018-00016-01 (Colombia) (*Paramo de Pisba case*); *John Edison Parra Sánchez y Jesús Alberto Cardona López v. Ministerio del Medio Ambiente Nacional, Departamento de Risaralda, Municipio de Pereira, Municipio de Dosquebradas, Corporación Autónoma de Risaralda CARDER y empresa Aguas y Aguas de Pereira* (2019) 4th Juzgado de Ejecución de Penas y Medidas de Seguridad, Pereira, Risaralda [Fourth Tribunal of Execution for Penalties and Security, Pereira, Risaralda], Tutela 036-2019 (Colombia) (*Otún River case*); *Andrés Felipe Rojas Rodríguez y Daniel Leandro Sanz Perdomo v. Ministerio de Ambiente y Desarrollo Sostenible y otros*, (2019) Juzgado Primero Penal del Circuito de Neiva Huila [First Criminal Tribunal of the Circuit of Neiva Huila], 41001-3109-001-2019-00066-00 (Colombia) (*Magdalena River case*); *Andrea Lozano Barragán, Victoria Alexandra Arenas Sánchez, Jose Daniel y Felix Jeffry Rodríguez Peña y otros v. Presidente de la República y otros*, (2018) Corte Suprema de Justicia [Supreme Court], Sala de Casación Civil [Appeals Chamber], STC4360-2018 A (Colombia) (*Amazon case*).

⁹ L.M. Sanchez Pico, 'Nariño, primer departamento que reconoce los derechos de la naturaleza' [Nariño, First Department to Recognize the Rights of Nature], *RCN Radio*, 22 July 2019.

¹⁰ J.C. Lozada Vargas, 'Proyecto de Modificación del Artículo 79 de la Constitución' [Constitutional Amendment Project to Modify Article 79], 2019, available at: <https://www.camara.gov.co/derechos-de-la-naturaleza>.

international human rights in dealing with the environment. In response to this request, the Court linked the right to a clean and healthy environment¹¹ with growing transnational movements around the rights of nature.¹² In its ruling, and citing the *Atrato* case, the Court emphasized:

This Court considers it important to highlight that the right to a healthy environment as a standalone right, in difference ... [from] other human rights, protects all the components of the environment, like forests, rivers, oceans and others, as a legal end in itself, even in the absence of certainty or evidence of risk to individual persons. In this sense, the Court notes a tendency to recognize legal personality and, ultimately, the rights of nature not just in judicial decisions but also in constitutional laws.¹³

It is now fair to observe that the emerging concept of ecosystem rights is being shaped by Colombia's experience.¹⁴ Since the *Atrato* decision, around ten legal developments have taken place in Colombia (including court cases, administrative decrees, and legislative reform proposals) in which nature or natural resources such as rivers have been recognized as legal persons or legal subjects. Sometimes these developments refer to the rights or cosmologies of Indigenous peoples, including as guardians. At other times they recognize relationships between nature and local communities, small agricultural or peasant communities, citizens, or future generations.¹⁵ This begs the question for Indigenous peoples and local communities in other parts of Colombia and beyond whether legal rights for rivers and ecosystems can also help them in demanding better and more collaborative river and ecosystem management within traditional areas.

Acknowledging the comparative significance of the Colombian cases and the clear cross-fertilization of transnational examples of legal rights for rivers, in this article

¹¹ See J.H. Knox & R. Pejan, *The Human Right to a Healthy Environment* (Cambridge University Press, 2018) (for an analysis of the right to a healthy environment in international law).

¹² Inter-American Court of Human Rights, *Opinión Consultiva OC-23/17 solicitada por la República de Colombia sobre medio ambiente y derechos humanos* [Consultive Opinion OC-23/17 sought by the Republic of Colombia about the Environment and Human Rights], 15 Nov. 2017, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf.

¹³ *Ibid.*, para. 62.

¹⁴ Some of the countries that have referred to the *Atrato* case when granting legal personhood to rivers and ecosystems are Brazil, El Salvador, Mexico, Sweden, Uganda, and the US. See, e.g., United Nations (UN) General Assembly, 'Harmony with Nature: Report of the Secretary-General' (26 July 2019), UN Doc. A/74/236; Constitución Política de la Ciudad de México [Political Constitution of the City of Mexico], 2017 (City of Mexico Constitution); Constitución Política del Estado Libre y Soberano de Colima [Political Constitution of the State of Colima], 2017 (Political Constitution of the State of Colima); *Vecinos Laguna del Carpintero v. Presidente Municipal de Tampico Tamaulipas y otros*, (2018) Suprema Corte de Justicia de la Nación [Supreme Court of Justice of the Nation] Primera Sala [First Chamber] N. 307-2016 (Mexico) (*Laguna Carpintero* case); Lake Erie Bill of Rights, 2019 (US); 1855 Treaty Authority, 'Chippewa Establishing Rights of Manoomin on White Earth Reservation and Throughout 1855 Ceded Territory', 11 Jan. 2019 (US); Resolution to Amend the Ho-Chunk Constitution and Provide for the Rights of Nature, 19 Sept. 2015 (US); Amendment for the Rights of Nature in the Constitution of Sweden, May 2019.

¹⁵ See *Mohd Salim v. State of Uttarakhand & Ors*, WPIL 126/2014, (2017) (India) (*Ganges and Yamuna* case); 1855 Treaty Authority, n. 14 above; Ordinance of the City Council of the City of Santa Monica Establishing Sustainability Rights, 12 Mar. 2013 (US); Resolution Establishing the Rights of the Klamath River, Yurok Tribe, May 2019 (US); City of Mexico Constitution, n. 14 above; Paralelo 32, Ordenanza 11.462 Santa Fe Municipality, 2019 (Argentina); *Laguna Carpintero* case, n. 14 above; Political Constitution of the State of Colima, n. 14 above; Lake Erie Bill of Rights, n. 14 above; Resolution to amend the Ho-Chunk Constitution and Provide for the Rights of Nature, n. 14 above.

we examine the legal foundation of the key cases granting legal rights to rivers and ecosystems in Colombia and consider their potential relevance for Indigenous peoples. We do this through a detailed analysis of the most recent legal and political decisions to recognize ecosystems as legal subjects in Colombia, many of which are unknown to an English-speaking audience. Our analysis is contextualized through related and regional scholarship.

Although the cases analyzed in this article can only be understood properly in the particular constitutional and cultural context of Colombia, they all reveal important clues as to possible inroads for better protection of Indigenous river and ecosystem rights and interests elsewhere. They show how ecosystem rights are grasping onto, and evolving out of, constitutional protections, departing from western laws for the regulation of the natural world and developing a new type of constitutionalism for nature.

Yet our analysis of legal and political decisions on ecosystem rights in Colombia reveals that, although progressive legal developments are certainly happening, in some cases the courts ignore or obscure the rights and perspectives of Colombia's Indigenous peoples. This suggests that the courts have failed to engage deeply with the complex nature of Indigenous interests, tenures, and roles in river governance. For example, the Colombian Supreme Court's decision to recognize the Colombian Amazon as a legal subject, although theoretically groundbreaking in its recognition of the rights of future generations, apparently ignores the rights of Indigenous peoples to their traditional territories and their key role in the management and protection of river ecosystems. Various government and non-governmental bodies implementing the Amazon decision have picked up on this oversight and attempted to involve Indigenous communities in giving effect to the Court's orders. Yet, as we detail below, the courts in subsequent cases have also failed fully to appreciate the relevance of their judgments for Indigenous peoples, or the potential application of the *Atrato* concept of 'biocultural rights'. We argue that the Colombian river cases serve as a caution to courts and legislatures elsewhere to be mindful of the rights and interests of local communities and the social, cultural, and environmental complexities of land tenure.¹⁶

2. INDIGENOUS PEOPLES AND COLOMBIAN LAW

Since the Spanish colonization of Colombia in 1499 Indigenous peoples have suffered disposition and loss of their traditional territories and disrupted access to their water resources.¹⁷ Spanish conquerors explored Colombia in their search for gold and spices, poisoning the waterways, converting Indigenous peoples to slaves, and spreading fear

¹⁶ See also M.F. Solis, 'Derechos de la naturaleza y pueblos indígenas' [Rights of Nature and Indigenous Peoples] (2019) *Universidad Andina Simon Bolivar Boletín Electrónico Spondylus*; P. Lyver et al., 'Building Biocultural Approaches into Aotearoa: New Zealand's Conservation Future' (2019) 49(3) *Journal of the Royal Society of New Zealand*, pp. 394–411.

¹⁷ E. Macpherson, *Indigenous Water Rights in Law and Regulation: Lessons from Comparative Experience* (Cambridge University Press, 2019), p. 132.

and shame.¹⁸ Since definitive independence in 1819, Colombian legal frameworks have largely failed to include or benefit Indigenous peoples, and successive land policies and ‘agrarian reforms’ have gradually encroached upon and privatized Indigenous land-holdings.¹⁹ Some Indigenous lands have been retained and protected under the Colombian ‘*resguardo*’ [reservation] system or, in the case of Afrodescendent communities, in similar reservations called *consejos mayores* [councils].²⁰ However, Colombian governments have been unable or unwilling to address inequity in the distribution of land tenure and have almost completely ignored the question of Indigenous and Afrodescendent rights to water.

Approximately 24% of the territory of Colombia is Indigenous land. This land is the home of around 90 different Indigenous peoples based in 710 *resguardos*.²¹ The majority of this Indigenous territory is concentrated in the Amazon area of Colombia²² with a total of 26,217 hectares across 185 *resguardos*.²³ Afrodescendants or Afro-Colombian people comprise 10.5% of the population,²⁴ and live mainly on the Caribbean and Pacific coasts in deep social, economic and political marginalization.²⁵ Against this social context Indigenous and Afro-Colombian lands continue to be threatened by resource extraction (legal and illegal), including the industrialized rubber trade, logging, and mining.²⁶

¹⁸ E. Galeano, *Las Venas Abiertas de América Latina* [Open Veins of Latin America], Siglo XXI ed. (Monthly Review Press, 2004), p. 61.

¹⁹ B. Gomez Hernandez, ‘La Tenencia de la Tierra y la Reforma Agraria en Colombia [Land Tenure and the Agrarian Reform in Colombia]’ (2011) Enero-Junio, *Verba Iuris*, pp. 63–83; A.-M. Franco-Cañas & I. De los Ríos-Carmenado, ‘Reforma agraria en Colombia: Evolución histórica del concepto. Hacia un enfoque integral actual’ [Agrarian Reform in Colombia: Historical Evolution of the Concept. Towards a Current Integral Approach] (2011) 8(67) *Cuaderno de Desarrollo Rural*, pp. 93–119.

²⁰ See generally Gomez Hernandez, *ibid.*, pp. 68–70; Franco-Cañas & De los Ríos-Carmenado, *ibid.*

²¹ Departamento Administrativo Nacional de Estadísticas [Administrative Department of National Statistics], ‘Una Nación Multicultural: Su diversidad étnica’ [A Multicultural Nation: Its Ethnic Diversity], May 2007, available at: https://www.dane.gov.co/files/censo2005/etnia/sys/colombia_nacion.pdf. A total of 1,905,617 peoples self-recognized as part of an ethnic group.

²² R. Arango & E. Sanchez, ‘Los pueblos indígenas de Colombia en el umbral del nuevo milenio. Población, cultura y territorio: bases para el fortalecimiento social y económico de los pueblos indígenas’ [Indigenous Peoples of Colombia in the Threshold of a New Millennium. Population, Culture and Territory: Foundations for the Social and Economic Strengthening] (Departamento de Planeación Colombia, 2004), p. 43.

²³ Colombian Amazon Ampliación de Resguardos Indígenas en la Amazonia Colombiana [Extension of the Indigenous ‘Resguardos’ in the Colombian Amazon], available at: <http://siatac.co>.

²⁴ Departamento Administrativo Nacional de Estadísticas [Administrative Department of National Statistics], ‘DANE Ethnic Diversity’, available at: <https://www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/grupos-eticos/informacion-tecnica>.

²⁵ See, e.g., M.A. Velez et al., ‘¿La titulación colectiva es suficiente para proteger los bosques? Evidencia de las comunidades Afrodescendientes del pacífico colombiano’ [Is Collective Titling Enough to Protect Forests? Evidence from Afrodescendent Communities in the Colombian Pacific Region] (2019) *SSRN Electronic Journal* online articles, available at: <http://ideas.repec.org/p/col/000089/017137.html>; F. Urrea-Giraldo, ‘La población Afrodescendiente en Colombia’ [Afrodescendent Population in Colombia], in *Pueblos Indígenas y Afrodescendientes de América Latina y el Caribe: información sociodemográfica para políticas y programas* (CEPAL, 2005), pp. 219–45.

²⁶ J. Blanco, ‘Tierra, Autonomía y Ancestralidad, una Triada de Poder al Interior de la Jurisdicción Especial Indígena en Colombia’ [Land, Autonomy and Ancestrality, a Trilogy of Power Inside the Interior of the Indigenous Special Jurisdiction of Colombia] (2011) II *Revista Prolegómenos – Derechos y Valores*, pp. 25–44, at 30.

The collective property rights of Indigenous peoples are now protected by the Colombian constitutional framework within the ‘third generation of human rights’ and its protection of cultural and social rights. The Constitución Política de la República de Colombia [Political Constitution of the Republic of Colombia] 1991 (Constitution) recognizes the pluri-ethnic and multicultural character of Colombian society. The *resguardos* are protected in Article 329 of the Constitution, giving Indigenous *Consejos* [boards] specific management and decision-making powers over natural resources within their territories.²⁷ A number of other domestic laws also recognize the Indigenous *resguardos* and the Afro-Colombian right to collective land.²⁸

The constitutional protection of the land rights of Indigenous peoples makes no specific mention of Indigenous rights to water and, given that land and water are separately allocated and regulated under Colombian law, there is no explicit constitutional protection of an Indigenous right to water. Water is considered a ‘common good’, regulated by the Código Civil Colombiano [Colombian Civil Code] 1887 and Código Nacional de Recursos Naturales y de Protección al Medio Ambiente [Natural Resources and Environmental Protection Code] 1974. Private water use rights are allocated by way of an administrative concession, and nowhere in the Colombian water laws is there a specific provision for the use of water by Indigenous peoples or in Indigenous territories.²⁹ In order to protect water access for vulnerable people, water allocated for human use is prioritized by Decree 1541 (1978), on which Indigenous people too may rely for water access for basic human needs. However, in the context of weak government regulation and oversight,³⁰ private users have generally encroached upon customary and informal water use.³¹ The government has also relied at times on discourses of conservation and the common good as justification to evict Indigenous peoples from their territories or resources.³² This has enabled large elites to take advantage of the exclusion of local communities and Indigenous peoples from official water law frameworks and weak recognition of their water rights.³³

²⁷ See also Constitución Política de Colombia [Political Constitution of Colombia] 1991 (Political Constitution of Colombia), Art. 63.

²⁸ See Law 21 1991 (Colombia); Law 160 1994 (Colombia); Law 70 1993 (Colombia).

²⁹ Macpherson, n. 17 above, p. 140.

³⁰ For indicative media coverage, see ‘Bloqueo en la vía Panamericana deja un saldo de 13 heridos’ [‘Blockade of the Panamerican Highway Leaves a Toll of 13 Injured’], *El Espectador*, 14 Mar. 2019, available at: <https://www.elespectador.com/noticias/nacional/cauca/bloqueo-de-la-panamericana-en-cauca-deja-un-saldo-de-13-heridos-articulo-844917>.

³¹ I. Gentes, ‘Derecho de Aguas y Derecho Indígena: Hacia un Reconocimiento Estructural de la Gestión Indígena del agua en las Legislaciones Nacionales de los Países Andinos’ [‘Rights of Water and Indigenous Land: To the Structural Recognition of Indigenous Management of Water in the National Legislation of Andean Countries’] (2002) 1 *Revista de Derecho Administrativo Económico*, pp. 81–111, at 84–5.

³² See UN Human Rights Council, ‘Report of the Special Rapporteur on the Rights of Indigenous Peoples’ (11–29 Sept. 2017), UN Doc. A/HRC/36/46, available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/46; V. Tauli Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples, ‘Conservation a Pretext to Evict Indigenous Peoples’, *YouTube*, 22 Sept. 2016, available at: <https://youtu.be/xgBqSkWV5o>.

³³ M.C. Roa-García, P. Urteaga-Crovetto & R. Bustamante-Zenteno, ‘Water Laws in the Andes: A Promising Precedent for Challenging Neoliberalism’ (2015) 64 *Geoforum*, pp. 270–80, at 140; B. Duarte-Abadía & R. Boelens, ‘Disputes over Territorial Boundaries and Diverging Valuation

The rich biodiversity and mineral wealth of Indigenous territories has left their peoples highly vulnerable to resource conflict.³⁴ In the Colombian Amazon, for instance, illegal logging and clearing for agriculture and mineral extraction have produced constant conflict and environmental damage.³⁵ Colombia is generally considered to be hydro-rich, but water resources are unevenly distributed with the vast majority of water going to economic, private uses including agriculture and industry, at the expense of Indigenous communities who place a higher social and cultural value on water.³⁶ Neither constitutional protection nor water law frameworks have gone far enough to guarantee the rights of Indigenous peoples to own the natural resources within their territories, nor do they capture the dynamism of Indigenous and customary legal systems.³⁷ Ignoring the water rights of ethnic communities as a resource for life, livelihood, and cultural identity has become a source of conflict between governments and Indigenous peoples in an ongoing struggle for Indigenous water justice.

3. CONSTITUTIONALIZING ECOSYSTEMS IN COLOMBIA

The foundation of the Colombian Constitution is the concept of the *Estado Social de Derecho*, which means a social welfare state based on the rule of law, and accompanying guarantees of human dignity (*vida digna*) and common welfare (*bienestar general*).³⁸ The Colombian Constitution is often referred to as the ‘Ecological’ or ‘Green Constitution’ because of its broad environmental and natural resource protections, considered progressive in both the regional and international context.³⁹ More than 30 constitutional provisions protect environmental interests, including both rights and obligations. In particular, Articles 79 and 80 recognize the collective right of all people to a healthy environment. These provisions specify the responsibility of the state to (i) protect the diversity and integrity of the environment; (ii) conserve areas of special ecological importance; (iii) plan the management and use of natural resources and guarantee their sustainable development, conservation, restoration or substitution; and (iv) prevent and control environmental deterioration.⁴⁰

Languages: The Santurban Hydrosocial Highlands Territory in Colombia’ (2016) 41(1) *Water International*, pp. 15–36.

³⁴ See A. Acosta, *La maldición de la abundancia* [*The Curse of Abundance*] (Abya Yala, 2009).

³⁵ See, e.g., ‘La Colombia amazónica al desnudo’, *Semana Sostenible*, 2019, available at: <https://sostenibilidad.semana.com/medio-ambiente/articulo/la-colombia-amazonica-al-desnudo/44588>.

³⁶ Macpherson, n. 17 above, p. 139. In relation to the broad hydrological conditions in Colombia, see M. del Pilar García Pachón, *Régimen Jurídico de los Vertimientos en Colombia: Análisis desde el Derecho Ambiental y el Derecho de Aguas* [The Legal Regime for Wastewater in Colombia: An Environmental and Water Law Analysis] (Universidad Externado de Colombia, 2017), p. 23.

³⁷ Gentes, n. 31 above, p. 91.

³⁸ Political Constitution of Colombia, n. 27 above, Arts 1, 2, 366.

³⁹ O. Amaya Navas, *La constitución ecológica de Colombia: análisis comparativo con el sistema constitucional latinoamericano* [The Ecological Constitution of Colombia: A Comparative Analysis of the Latin American Constitutional System] (Universidad Externado de Colombia, 2002), pp. 149–279.

⁴⁰ Political Constitution of Colombia, n. 27 above, Arts 1, 2, 8, 49, 79, 86, 88, 95, 333, 366.

Alongside the protection of Indigenous *resguardos* in Article 329 of the Constitution and associated powers of management,⁴¹ the Constitution recognizes that Indigenous peoples have a responsibility to ‘oversee the conservation of natural resources’.⁴² It requires that exploitation of natural resources within Indigenous territories be done ‘without prejudice to the cultural, social, and economic development of Indigenous communities’ and ‘in decisions that are adopted with respect to said exploitation, the government will promote the participation of the representatives of the respective communities’.⁴³ These social and environmental protections sit uneasily within the Colombian Constitution alongside its pro-development elements, such as provisions enabling the privatization of certain public services.⁴⁴

Colombia has a reputation for having a strong judiciary, prepared to uphold the Constitution’s human rights protections. It sees itself as both a creator and enforcer of laws⁴⁵ compared with other Latin American countries of the civil law tradition such as Chile, which see the power to make law as something reserved for the legislature.⁴⁶ This might seem unexpected, given Colombia’s evident history of human rights abuses and the killing of environmental activists.⁴⁷ However, the Colombian Constitutional Court has taken a particularly active approach in developing its jurisprudence as a check on unbridled development, especially in the absence of strong administrative and legislative government.

Despite there being no specific recognition of a right to water in the Constitution, the Constitutional Court has developed a line of jurisprudence which attempts to protect the human right to water,⁴⁸ including for Indigenous communities, in reliance on protection under international law, which includes the Indigenous and Tribal Peoples Convention (ILO Convention 169),⁴⁹ which Colombia has ratified.⁵⁰ The Constitution has also provided authority for a wide range of public interest cases brought by NGOs and grassroots organizations in the defence of environmental or

⁴¹ Ibid., Art. 63.

⁴² Ibid., Arts 330, 5.

⁴³ Ibid., Art. 330.

⁴⁴ See generally R. Urueña, ‘The Rise of the Constitutional Regulatory State in Colombia: The Case of Water Governance’ (2012) 6(3) *Regulation & Governance*, pp. 282–99; Roa-García, Urteaga-Crovetto & Bustamante-Zenteno, n. 33 above.

⁴⁵ *José Manuel Rodríguez Rangel v. Enrique Chartuny González*, (1992) Corte Constitucional de Colombia [Constitutional Court of Colombia], T406/92, 5 June 1992 (Colombia).

⁴⁶ Macpherson, n. 17 above, p. 141.

⁴⁷ See ‘Colombia: “Staggering Number” of Human Rights Defenders Killed in 2019’, *UN News Global Perspective Human Stories*, 14 Jan. 2020, available at: <https://news.un.org/en/story/2020/01/1055272>.

⁴⁸ Roa-García, Urteaga-Crovetto & Bustamante-Zenteno, n. 33 above; G. Amparo Rodríguez & A. Gómez Rey, ‘La participación como mecanismo de consenso para la asignación de nuevos derechos’ [Participation as a Consensus Mechanism for Assignment of New Rights] (2013) 37 *Pensamiento Jurídico*, pp. 71–104.

⁴⁹ Geneva (Switzerland), 27 June 1989, in force 5 Sept. 1991, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

⁵⁰ See, e.g., *Marcos Arrepiche v. Alcalde del Municipio de Puerto López y el Gobernador del Meta* [Marcos Arrepiche v. Mayor of Puerto López and Governor of Meta], (2010) Corte Constitucional de Colombia [Constitutional Court of Colombia], T-143/10, 26 Feb. 2010 (Colombia).

Indigenous rights with regard to water,⁵¹ using the *acción de tutela* under Article 86 – a writ for the protection of constitutional rights. A key example of this is the case concerning the Río Bogotá, which flows through the country’s capital, regarded as one of the most polluted rivers in Colombia. In that case the *Consejo de Estado* [Council of State] made a series of very prescriptive orders in response to serious environmental contamination of the river, although without recognizing the river as a legal subject.⁵²

Since 2016 a string of Colombian constitutional cases have recognized the rights of natural resources or ecosystems as legal subjects.⁵³ As the institution charged with upholding the administration of justice and safeguarding the integrity and supremacy of the Colombian Constitution,⁵⁴ the Colombian courts have played a key role in the state’s expansion of ecosystem rights. Yet, at the same time, the courts have provided legitimacy for the use of state powers and the development of natural resources, requiring the government to comply with environmental and human rights obligations in the Constitution and find new ways to address urgent environmental and social issues. The developing jurisprudence has prompted a recent proposal for a Constitutional amendment to protect the rights of nature, as follows:

Nature, as a living entity and legal subject, will enjoy the protection and respect of the State and the people in order to secure its existence, habitat, restoration, maintenance and regeneration of its vital cycles, together with the conservation of its structure and ecological function.⁵⁵

In the following section we consider in more detail the constitutional cases that have recognized the rights of natural resources or ecosystems as legal subjects.

3.1. *The Atrato River as a Legal Subject*

Clearly the most significant development in the area of legal rights for nature to come out of Colombia is the November 2016 decision of the Constitutional Court in respect of the Atrato River,⁵⁶ Colombia’s third longest river. The Atrato is a major economic and strategic asset for the people who live alongside and use the river in Chocó. This is the poorest region of Colombia with an ethnic concentration of 97% Indigenous and Afrodescendent constituents.⁵⁷ The Atrato is also a major environmental asset and is

⁵¹ Maya-Aguirre, n. 6 above.

⁵² *Gustavo Moya Ángel y otros v. Empresa de Energía de Bogotá y Otros* [*Gustavo Moya Angel and Ors v. Bogotá Energy Company and Ors*] (2014) (Colombia). See also Luis Felipe Guzmán Jiménez, *Las aguas residuales en la jurisprudencia del Consejo de Estado: periodo 2003–2014* [*Wastewater in the Jurisprudence of the Administrative Court of Colombia: 2003–2014*] (Universidad Externado de Colombia, 2015), p. 18.

⁵³ UN ‘Harmony with Nature’, n. 14 above.

⁵⁴ Political Constitution of Colombia, n. 27 above, Arts 116 and 241.

⁵⁵ Lozada Vargas, n. 10 above, p. 1 (authors’ translation).

⁵⁶ See generally Macpherson, n. 17 above; Macpherson & Clavijo Ospina, n. 5 above.

⁵⁷ Departamento Nacional de Estadística, *Censo General 2005, ‘Proyecciones Nacionales y departamentales de población 2005–2020’* [‘National and Departmental Population Projections’] (2010).

part of a massive aquatic basin covering 40,000 square kilometres and 60% of the Department of Chocó, fed by more than 15 rivers and 300 streams.⁵⁸ The catchment area is heavily forested and rich in biodiversity, but this biodiversity is increasingly threatened by encroachment from illegal mining into remote and traditional territories (Indigenous reservations or *resguardos* and Afrodescendent *consejos mayores*).⁵⁹ The illegal mining threatens not only local and ethnic community livelihoods, but the particular cultural and spiritual connections the Indigenous and Afrodescendent communities of Chocó have with the Atrato River.⁶⁰ It has caused the extreme desecration of the river and corresponding impacts on human life, as dredging, mercury and cyanide are used in the mining process.⁶¹

The communities raised their concerns about the situation of the Atrato with Tierra Digna, a human rights NGO based in Colombia working with a number of Indigenous and Afrodescendent groups in Chocó. Until then the communities had met overwhelming ignorance or apathy from multiple levels of government, who had little presence or interest in Chocó. This inaction was compounded by the inability of existing legal frameworks to manage the region's growing environmental and humanitarian crisis.⁶²

Tierra Digna alleged in the *acción de tutela* that, in failing to control the activities of illegal miners in Chocó, the state had violated the claimants' fundamental rights to life, health, water, food security, a healthy environment, culture, and territory under the Constitution.⁶³ The claimants were successful, with the Court finding that the government had violated all of the fundamental constitutional rights alleged to have been breached through its failure to control and eradicate illegal mining in Chocó.⁶⁴ Significantly, the Court then recognized that the Atrato River, together with its basin and tributaries, is an '*entidad sujeto de derechos*' [legal subject] with its own rights of protection, conservation, maintenance, and restoration by the state and ethnic communities.⁶⁵

The Court made several prescriptive orders to implement its decision,⁶⁶ including that the rights of the river are to be represented by a guardian, with one representative from the government and one from the claimant communities, a concept borrowed from the model for the Whanganui River in Aotearoa (New Zealand).⁶⁷ Other orders

⁵⁸ 'Estructura Ecológica Principal de la Región del Chocó Biogeográfico' ['Main Ecological Structure of the region Choco Biogeographic'], *IIAP*, 2011, available at: <http://rioatrato.org>.

⁵⁹ See generally U. Oslender, 'Fleshing out the Geographies of Social Movements: Colombia's Pacific Coast Black Communities and the "Aquatic Space"' (2004) 23(8) *Political Geography*, pp. 957–85, at 980; 'Estructura Ecológica Principal de la Región del Chocó Biogeográfico', *ibid.*

⁶⁰ Macpherson & Clavijo Ospina, n. 5 above; Oslender, *ibid.*, pp. 980–1.

⁶¹ See generally Macpherson, n. 17 above, pp. 142–5.

⁶² *Centro de Estudios para la Justicia Social 'Tierra Digna' y otros v. Presidente de la República y otros*, Corte Constitucional [Constitutional Court], Sala Sexta de Revisión [Sixth Chamber] (Colombia) No. T-622 of 2016, 10 Nov. 2016, pp. 4–7 (*Atrato River case*).

⁶³ *Ibid.*, pp. 4–7.

⁶⁴ *Ibid.*, p. 158.

⁶⁵ *Ibid.*, pp. 158–9.

⁶⁶ *Ibid.*, pp. 157–60.

⁶⁷ See Macpherson & Clavijo Ospina, n. 5 above.

require the establishment of a number of collaborative fora for implementing various directives of the judgment, involving representatives from the communities, government, academia, and NGOs.

The most interesting aspect of the *Atrato* decision is its theoretical depth. Given the failure of existing legal frameworks and administrative efforts, the Court decided that a new theory of rights was needed to compel the government to do something about the Atrato River crisis.⁶⁸ It came up with a new constitutional theory of ‘biocultural rights’ based on a ‘profound unity between nature and the human species’.⁶⁹

The concept of ‘biocultural rights’ has been described as an innovative approach towards combining conservation with respect for Indigenous rights and community rights of stewardship for natural resources,⁷⁰ yet it needs further development in the comparative and theoretical literature. The Court in *Atrato* uses the term to mean something more than simply claims to property in the conventional sense of property as a measurable, commodifiable, and alienable resource.⁷¹ Rather, biocultural rights are collective rights of communities that carry out traditional roles of regulating nature as conceived of by Indigenous ontologies.⁷² The Court calls this ‘an alternative vision of the collective rights of the ethnic communities in relationship to their cultural and natural surroundings, which are called “biocultural rights”’.⁷³ According to the Constitutional Court in *Atrato*, biocultural rights connect the cultural rights of ethnic communities and their rights in natural resources, within the following parameters:

- (a) the multiple ways of life expressed as cultural diversity are inextricably linked to the diversity of ecosystems and territories;
- (b) the richness expressed in the diversity of cultures, practices, beliefs, and languages is the product of the co-evolutionary interrelationship of human communities with their environments and constitutes an adaptive response to environmental changes;
- (c) the relationships of different ancestral cultures with plants, animals, micro-organisms, and the environment actively contribute to biodiversity;

⁶⁸ *Atrato River* case, n. 62 above, pp. 33–4.

⁶⁹ *Ibid.*, p. 47.

⁷⁰ See generally K. Bavikatte & T. Bennett, ‘Community Stewardship: The Foundation of Biocultural Rights’ (2015) 6(1) *Journal of Human Rights and Environment*, pp. 7–29; M.C. Gavin et al., ‘Effective Biodiversity Conservation Requires Dynamic, Pluralistic, Partnership-Based Approaches’ (2018) 10(6) *Sustainability*, pp. 1–11, at 5; M.C. Gavin et al., ‘Defining Biocultural Approaches to Conservation’ (2015) 30(3) *Trends in Ecology & Evolution*, pp. 140–45; P. Lyver et al., ‘Building Biocultural Approaches into Aotearoa: New Zealand’s Conservation Future’ (2019) 49(3) *Journal of the Royal Society of New Zealand*, pp. 394–411; G. Sajeve, ‘Rights with Limits: Biocultural Rights: Between Self-Determination and Conservation of the Environment’ (2015) 6(1) *Journal of Human Rights and the Environment*, pp. 30–54.

⁷¹ See J. Watson Hamilton & N. Banks, ‘Different Views of the Cathedral: The Literature on Property Law Theory’, in A. McHarg, B. Barton & A. Bradbrook (eds), *Property and the Law in Energy and Natural Resources* (Oxford University Press, 2010), pp. 19–59, at 19.

⁷² *Atrato River* case, n. 62 above, p. 36.

⁷³ *Ibid.*, p. 42.

- (d) the spiritual and cultural meanings of Indigenous peoples and local communities about nature are an integral part of biocultural diversity; and
- (e) the preservation of cultural diversity leads to the conservation of biological diversity, so that the design of policy, legislation and jurisprudence should be focused on the conservation of bioculturality.⁷⁴

Perhaps most significantly, after centuries of poor environmental management by the government and its ignorance of Indigenous interests, the adoption of the biocultural rights concept in the *Atrato* case enables the Court to recognize the ‘jurisdiction’ of Indigenous peoples as regulators, stewards, and decision makers on the management of the river. It creates new opportunities for them ‘to participate in river sharing, governance and use’ as river guardians.⁷⁵

3.2. *The Colombian Amazon as a Legal Subject*

The next Colombian case to recognize a natural resource as a legal subject is the judgment concerning the Colombian Amazon, which responds to the alarming rate of deforestation in the Amazon rainforest, with an increase of 44% between 2015 and 2016. This destruction, and its associated social and environmental consequences, prompted the applicants in *Andrea Lozano Barragán y otros v. Presidencia de la República y otros* (*Amazon* case) to apply to the Colombian courts for protection of their constitutional rights as an *acción de tutela*.⁷⁶

The claimants in the case were 25 children and young people between the ages of seven and 25 who, in representing future generations, were gravely concerned about the impact of deforestation in the region of the Colombian Amazon tropical rainforest.⁷⁷ However, unlike the *Atrato* case, the *Amazon* claimants did not identify directly with an Indigenous group or rely directly on Indigenous constitutional protection, instead positioning their claims more broadly on behalf of future generations.

The damage to the Colombian Amazon, known as the ‘*pulmón del mundo*’ [lung of the Earth] is well documented in the *Amazon* case. It is caused by land grabbing, illegal logging, mining, agricultural expansion, and drug cultivation.⁷⁸ According to the claimants, this damage extends beyond the Amazon to other areas of the country, as it causes direct and negative effects on the water cycle, alters the ability of soil to capture and absorb water, affects water supply to the *páramos* (closed, high-altitude ecosystems) and other areas in Colombia, and impacts broadly on water availability.⁷⁹ The claimants argued that impacts of deforestation in the Colombian Amazon are on a global scale and have global consequences. The massive reduction in trees releases carbon into the atmosphere and reduces the potential to sequester carbon, causing a

⁷⁴ Ibid., para. 5.17 (authors’ translation).

⁷⁵ Macpherson, n. 17 above, pp. 159–60.

⁷⁶ *Amazon* case, n. 8 above, pp. 33–4.

⁷⁷ Ibid., p. 30.

⁷⁸ Ibid., p. 3.

⁷⁹ Ibid.

direct nexus between deforestation and the impact of climate change.⁸⁰ ‘Paradoxically’, the claimants explained, the Colombian Amazon region was better protected during Colombia’s long civil war, as the Fuerzas Armadas Revolucionarias de Colombia [Revolutionary Armed Forces of Colombia] (FARC) and paramilitary presence in the Amazon precluded development of the area.⁸¹ Since the signing of the peace agreement with FARC in 2016, the Colombian Amazon region has been ‘opened up’ to encroachment and development by (sometimes foreign) industry and business interests, with a proliferation of new roads and resource concessions.⁸²

On 5 April 2018 the Corte Suprema de Justicia [Supreme Court], presided over by Judge Luis Armando Tolosa Villabona, handed down its judgment in the *Amazon* case.⁸³ Firstly, the Court accepted that the children and young people could bring their claims on behalf of future generations on the basis that the *acción de tutela* can be sought by any person who requires the protection of fundamental rights and it does not require a specific age or citizenship status. Children and young people are experiencing the negative effects of environmental damage in the Colombian Amazon, the Court reasoned, and as such may legitimately request the protection of their rights to enjoy a healthy environment, life, and health.⁸⁴ Thus, recourse to the *acción de tutela* would be appropriate to enable the protection of the fundamental rights of the young claimants and future generations.⁸⁵

Like the *Atrato* case, the *Amazon* case rested on constitutional human rights protection, and the claimants argued that by failing to control the increase in deforestation in the Colombian Amazon, the Colombian government had violated various fundamental rights.⁸⁶ In relation to water, the Court considered the report of the Instituto de Hidrología, Meteorología y Estudios Ambientales [Institute of Hydrology, Meteorology and Environmental Studies] (IDEAM) on how deforestation alters water resources and water supply for the populations in this region that depend on it. The Court also relied on other expert evidence that greenhouse gas (GHG) emissions as a result of deforestation would increase pollutants in the watershed and affect water availability, including through prolonged periods of drought.

Although it is not the focus of this article, the precautionary principle⁸⁷ provided support for the Court’s radical plan for protection of the Colombian Amazon. The judgment stated that ‘we are late to act to stop global warming, but the precautionary

⁸⁰ Ibid., pp. 48, 49.

⁸¹ Ibid., p. 4.

⁸² ‘Base del Plan Nacional de Desarrollo 2018–2022: Pacto por Colombia’ [‘National Development Plan 2018–2022: Pact for Colombia’], available at: <https://colaboracion.dnp.gov.co/CDT/Prensa/PND-2018-2022.pdf>.

⁸³ *Amazon* case, n. 8 above.

⁸⁴ Ibid., p. 15.

⁸⁵ See also Acosta Alvarado & Rivas-Ramírez, n. 6 above, p. 526 (arguing that this case widens the scope of the *acción de tutela*, enabling Colombian courts to consider collective as well as individual rights).

⁸⁶ *Amazon* case, n. 8 above.

⁸⁷ See generally A. Shawkat & M. Sheikh Noor, ‘The Precautionary Principle in Biodiversity and Natural Resource Management: Institutional and Policy Challenges for a Sustainable Future’ (2018) 48(3/4) *Environmental Policy and Law*, pp. 187–203.

principle invites us to act now before knowing with complete detail the effects of this uncertain phenomenon and the effects on future generations which are unknown'.⁸⁸ The precautionary principle had similarly been relied upon by the Constitutional Court in the *Atrato* case, on the basis that the negative effects of illegal mining on the river and communities in the future are uncertain.⁸⁹

Finally, the Supreme Court in the *Amazon* case drew together its analysis by relying on the principle of solidarity in Colombian constitutional law. Article 1 of the Colombian Constitution guarantees a social welfare state based on the rule of law founded on principles that promote 'solidarity' between persons. The Court held that, in order to enable the *ius fundamental* protections enshrined in the Colombian Constitution, it was necessary to consider 'the other' in this process of solidarity. By 'other' the Court envisaged 'others that also inhabit the planet, either animal or plant'⁹⁰ and 'those yet to be born that also deserve to enjoy the same environmental conditions that we enjoy now'.⁹¹ This meant that the freedom of present generations to act could be limited by an obligation to '*no-hacer*' [do no harm]⁹² and instead assume the care and custody of natural resources and the future human world.⁹³

At the same time the Court recognized that 'an ethical duty of solidarity of the species requires equitable and wise consumption by present generations in order to preserve and secure the future subsistence of humankind'.⁹⁴ The Court explained that natural resources are shared among all habitants of the Earth, which includes descendants or new generations and plant and animal species, noting that a lack of future resources necessary to live could put the human species at threat. The Court emphasized the need for humans to take care of the environment, and to start thinking about our obligations to nature and humanity in general instead of focusing on individual rights to use resources.⁹⁵ As such, the Court adopted from the *Atrato* decision the idea of nature as a legal subject and declared the Colombian Amazon to be 'a right holder of the

⁸⁸ *Atrato River* case, n. 62 above, p. 9. Data provided by IDEAM indicated that 36% of the GHGs emitted by deforestation is an uncontrolled factor of CO₂ emissions in the country. Based on this evidence and the uncertainty of the future consequences on the environment and water provision, the Court stated the need to take corrective and preventive measures to stop illegal mining that could cause future unknown effects on the Amazon. The precautionary principle is regulated by Law 99 of 1993, jurisprudence of the judicial courts such as the Sentence in T-204/14, C-293/2002, C-703/2010, and in international environmental instruments to which Colombia has committed.

⁸⁹ *Atrato River* case, n. 62 above, para. 9.25. Cf. M. del P. García Pachón, 'La Corte Suprema de Justicia reconoce como sujeto de derechos a la Amazonia Colombiana' [The Supreme Court Recognizes the Colombian Amazon as a Legal Subject] (2018), available at: <https://medioambiente.uexternado.edu.co/la-corte-suprema-de-justicia-reconoce-como-sujeto-de-derechos-a-la-amazonia-colombiana>. García Pachón argues that the precautionary principle should not have been applied in the Colombian Amazon case because the extent and impact of deforestation was evident, with no lack of certainty in the scientific evidence requiring a precautionary approach.

⁹⁰ *Amazon* case, n. 8 above, p. 18.

⁹¹ *Ibid.*, p. 19.

⁹² For a discussion of the duty to 'do no harm' in accordance with the precautionary principle, see generally R. Atfield, 'To Do No Harm? The Precautionary Principle and Moral Values' (2001) 1(3) *Philosophy of Management*, pp. 11–20.

⁹³ *Amazon* case, n. 8 above, p. 21.

⁹⁴ *Ibid.*, p. 134.

⁹⁵ *Ibid.*, p. 18.

protection, conservation, maintenance and restoration by the State and the territorial entities that comprise it'.⁹⁶

In contrast to the *Atrato River* case, the Supreme Court in the *Amazon* decision did not consider the impact of deforestation and climate change upon the many Indigenous communities of the Amazon, who depend on access to water and land to survive and preserve their culture. The analysis of solidarity towards 'others' simply lumped Indigenous communities in with the other communities concerned about the Amazon, including the applicants, who lived in urban centres like Bogotá and were removed from the local context and its challenges. Meanwhile, large-scale projects run by powerful actors encroach on Indigenous land with state approval or acquiescence, prompting the mobilization of Indigenous communities to defend their land and water.⁹⁷

The *Amazon* case also failed to mention Indigenous land tenure, despite the fact that Indigenous territories (*resguardos*) cover 54.18% of the Colombian Amazon extension;⁹⁸ nor did it refer to the idea of biocultural rights or appoint guardians. Despite this fairly major oversight, the government has considered the need for participation by Indigenous groups in its implementation of the Supreme Court decision. The Court made a number of detailed orders for implementing the decision, calling on different government departments and entities and NGOs to perform specific functions and mandating the creation of a Plan de Acción [Action Plan] to combat deforestation effects and enforce the decision.⁹⁹ Within five months the central government was required to prepare the Pacto Intergeneracional por la Vida del Amazonas Colombiano (PIVAC) [Intergenerational Pact for the Life of the Colombian Amazon], with measures directed at reducing deforestation to zero. Local authorities were also asked to implement 'Territorial Arrangement Plans',¹⁰⁰ which may prove to be controversial if they interfere with Indigenous territorial autonomy.¹⁰¹

The Action Plan refers to a strategy called the 'Estrategia Bosques Territorios de Vida' [Forest Territories' Strategy for Life], created and funded by the UN Reducing Emissions from Deforestation and Degradation (UN-REDD) programme.¹⁰² The Strategy for Life recognizes the key role played by Indigenous peoples in combating deforestation in the Colombian Amazon, with the goal of consolidating 'territorial

⁹⁶ Ibid., p. 134.

⁹⁷ See D. Hill, "'Defending our Existence": Colombian Tribe Stands in Way of Oil Exploration', *The Guardian*, 2 Apr. 2019, available at: <https://www.theguardian.com/world/andes-to-the-amazon/2019/apr/02/colombia-siona-tribe-oil-exploration-territory-putumayo>.

⁹⁸ See generally Gentes, n. 31, above, p. 86; 'From Farms to Forests: Land Rights as an Impact', *Gaia Amazonas*, 2 July 2019, available at: <https://www.gaiaamazonas.org/recursos/videos/60>; 'Gaia Amazonas: Trece pueblos indígenas de la Amazonía colombiana recuperan más de 44.000 hectáreas de su territorio ancestral' [Thirteen Indigenous Groups in the Colombian Amazon recover 44,000 Hectares of their Ancestral Territory], *Gaia Amazonas*, 28 Nov. 2018, available at: <https://www.gaiaamazonas.org/noticias/51>.

⁹⁹ *Amazon* case, n. 8 above, pp. 47–50.

¹⁰⁰ Ibid.

¹⁰¹ Acosta Alvarado & Rivas-Ramírez, n. 6 above, p. 525.

¹⁰² UN-REDD Programme Collaborative Online Workspace, 'Bosques Territorios de Vida- Estrategia Integral de control a la deforestación y Gestión de los Bosques', available at: <https://www.unredd.net>.

governance of ethnic groups and agricultural and rural communities'.¹⁰³ The Action Plan provides that Indigenous peoples, their holistic vision and *resguardos* are a necessary part of the inter-institutional coordination for the proper management of the Colombian Amazon,¹⁰⁴ alongside related planning documents which emphasize the importance of Indigenous stewardship in tackling environmental problems.¹⁰⁵ Unfortunately, the Action Plan was created by the previous government administration and, as the incoming government is yet to formally mandate the Action Plan, its status is uncertain.

4. RIVERS AND ECOSYSTEMS RIGHTS AND INDIGENOUS PEOPLES IN COLOMBIA: A BIOCULTURAL IMPERATIVE

The *Atrato* and *Amazon* decisions have spurred a string of cases that have declared rivers and ecosystems to be legal subjects in Colombia. The Cauca River, together with its watershed and tributaries, was declared a legal subject by the Superior Tribunal of Medellín (a local tribunal in the Department of Antioquia) in June 2019, as a result of an *acción de tutela* for protection of the rights of future generations brought by local and rural communities in response to a hydroelectric development.¹⁰⁶ The Tribunal ordered the establishment of a governance structure similar to the arrangements in the *Atrato* case,¹⁰⁷ with a committee of guardians including government and community representatives,¹⁰⁸ and an expert advisory panel.

The *Cauca River* case was followed in June 2019 by the decision of the Administrative Tribunal of Tolima recognizing that a number of rivers making up the Tolima Rivers were legal subjects.¹⁰⁹ The decision was given in response to concerns about mining in the Combeima and Cocora Basin.¹¹⁰ This case was an *acción popular*¹¹¹ brought by a local municipality in order to protect the collective rights of the people of Ibagué whose water supply from the basin would be affected by the

¹⁰³ Ibid., p. 25.

¹⁰⁴ Ibid., pp. 92, 330.

¹⁰⁵ 'El Tratado de Cooperación Amazónica Planes y Programas' ['Plans and Programmes of the Amazon Cooperation Treaty'], available at: <http://www.oas.org/dsd/publications/unit/oea08b/ch03.htm#TopOfPage>; Ministerio de Ambiente y Desarrollo Sostenible and Ministerio de Agricultura y Desarrollo Rural, 'Plan de Acción para reducir la deforestación y hacer frente a los efectos del cambio climático en la Amazonía Colombiana – STC 4360 de 2018' ['Action Plan to Reduce Deforestation and Respond to Climate Change Effects in the Colombian Amazon'] (2018) (Action Plan for Colombian Amazon); UN-REDD Programme Collaborative Online Workspace, n. 102 above.

¹⁰⁶ *Cauca River* case, n. 8 above, p. 39.

¹⁰⁷ Ibid., p. 41.

¹⁰⁸ Ibid. The group met on 27 Feb. 2019 at the University of Antioquia (Colombia).

¹⁰⁹ Personería Municipal is the governmental office that protects human rights and the conservation of the environment in a municipality. It is part of the Office of the Inspector General of Colombia and in this case represents the people in a municipality.

¹¹⁰ *Tolima Rivers* case, n. 8 above.

¹¹¹ The writ of *acción popular* is provided in the Colombian Constitution for the 'protection of collective rights and interests related to the heritage, space, security, public health, administrative, moral, environmental, free economic competition and other similar matters': Political Constitution of Colombia, n. 27 above, Art. 88 (authors' translation).

mining.¹¹² The Tolima Tribunal found a ‘breach of the collective rights to enjoy a public space free of pollution, a healthy environment and ecological equilibrium, prevention of preventable disasters, security and public health’.¹¹³ It then declared the Coello, Combeima and Cocora rivers, their watersheds and tributaries to be legal subjects with their own rights of protection, conservation, maintenance and restoration.¹¹⁴ The Tribunal referred to international and comparative law and jurisprudence on the human right to water and food security in support of its decision, and grasped onto domestic jurisprudence around the Constitution and *Estado Social de Derecho*.¹¹⁵

As a precautionary and preventive measure, the Tribunal ordered the cessation of mining activities and permissions which could cause irreparable or irreversible damage to ecosystems and natural resources.¹¹⁶ As in the *Atrato* and *Cauca River* cases, the Tolima Tribunal created a collaborative governance regime (with representatives of the rural communities as guardians) and extended orders to create and act to decontaminate the river, and recover traditional forms of livelihood and food security.¹¹⁷ The Tribunal ordered the involvement of local communities, referring to ILO Convention 169,¹¹⁸ which at least led to the involvement of Indigenous and ethnic communities in the guardianship model.¹¹⁹ However, neither Indigenous nor ethnic communities participated directly in the action so they did not have the opportunity to voice their concerns or assert particular rights.

The Colombian river cases, whereby the courts are offering rights of nature as a pragmatic response to environmental conflict, challenge traditional legal paradigms. In this rapidly developing jurisprudence the judicial branch forces the executive government to take action in areas where it has previously neglected its environmental obligations of protection of the environment and the rights of Indigenous communities.

The strength of the *Atrato* case resides in the way in which the Constitutional Court combined cultural and environmental imperatives to develop a new concept of biocultural rights, drawing on the closeness of Indigenous and ethnic peoples and river ecosystems.¹²⁰ Biocultural rights, devised by the Court in the *Atrato* case in its analysis of third-generation human rights, account for the rights, interests, and tenures of Indigenous peoples by preserving practices related to the kinship of ethnic communities

¹¹² *Tolima Rivers* case, n. 8 above.

¹¹³ *Ibid.*, p. 146.

¹¹⁴ *Ibid.*, p. 149.

¹¹⁵ *Ibid.*, p. 63. The Tribunal reasoned that water pollution would affect vegetation, soil and drinking water, risking the availability of food and the health of the people who live in the area. Water access and the right to food are associated in international environmental law: see, e.g., ‘Dublin Statement on Water and Sustainable Development’, International Conference on Water and the Environment: Development for the 21st Century, Dublin (Eire), 26–31 Jan. 1992, available at: <http://www.wmo.int/pages/prog/hwarp/documents/english/icwedece.html>; UN, The Millennium Development Goal Report 2014, 4 Nov. 2015, p. 13, available at: <https://www.undp.org/content/undp/en/home/librarypage/mdg/the-millennium-development-goals-report-2014.html>.

¹¹⁶ *Tolima Rivers* case, n. 8 above, p. 125.

¹¹⁷ *Ibid.*, pp. 153–4.

¹¹⁸ N. 49 above.

¹¹⁹ *Tolima Rivers* case, n. 8 above, p. 140.

¹²⁰ Macpherson, n. 17 above, p. 154.

and their duty of stewardship towards nature.¹²¹ Biocultural rights open the door to Indigenous participation in environmental law frameworks while respecting Indigenous collective and territorial rights. This approach not only accords with legal and constitutional principles; it also reflects the reality of land and water rights, interests and tenure, and accounts for the traditional knowledge systems of Indigenous and tribal peoples as guardians.

However, as in the *Amazon* case, the tribunals in the *Tolima* and *Cauca* cases gave inadequate consideration to the possibility that ethnic communities might also have interests in the management of the rivers. Researchers have often documented the grave error made by water regulators when they ignore Indigenous normative systems, as Indigenous peoples contribute to improved management of water and land on their territories by drawing on their values, knowledge, and experience in resource management.¹²² Instead, governments should devise legal tools and mechanisms that allow Indigenous peoples and local communities to defend their territory from powerful development interests, and grant them the autonomy to manage their resources in their own cultural ways.

5. CONCLUSION

The recognition of the rights of rivers and related ecosystems is developing particularly quickly in Colombia, highlighting the potential for the concept of ecosystem rights to be shaped by the Colombian experience. Legal rights for rivers and ecosystems in Colombia are building a new type of constitutionalism for nature: a rights revolution beyond traditional western law.

At the start of this article we asked whether legal rights for rivers and ecosystems might help Indigenous communities in demanding better and more collaborative river and ecosystem management within their territories. On occasion, ecosystem rights cases have been led by, or decided with respect for, Indigenous peoples and ontologies, raising hope for such peoples (and local communities) in other parts of the world that legal rights for rivers might help them similarly to demand better and more collaborative river and ecosystem management within their traditional areas. In other cases ecosystem rights have provided a new way for local or rural communities to participate in river governance.

However, our analysis of the Colombian jurisprudence shows that its courts have sometimes ignored or obscured Indigenous perspectives, or have failed to engage deeply with the legal and institutional complexity of Indigenous rights, interests, and tenures. Although most recent cases have replicated the legal subject model put forward in the *Atrato River* case, the cases fail to recognize and respond to the unique connection that

¹²¹ See Lyver et al, n. 70 above, pp. 394–407; Bavikatte & Bennett, n. 70 above, pp. 10–11; A. Grear, ‘Editorial – The Discourse of “Biocultural” Rights and the Search for New Epistemic Parameters: Moving beyond Essentialisms and Old Certainties in an Age of Anthropocene Complexity?’ (2015) 6(1) *Journal of Human Rights and the Environment*, pp. 1–6; Sajeve, n. 70 above.

¹²² See, e.g., R. Boelens et al., ‘Contested Territories: Water Rights and the Struggles over Indigenous Livelihoods’ (2012) 3(3) *International Indigenous Policy Journal* online articles; I. Gentes, n. 31 above.

Indigenous peoples and Afro-Colombians have with their land and water. Subsequent cases have failed to acknowledge biocultural rights and the role of local communities in providing environmental stewardship in accordance with their culture.

This finding has transnational relevance for the rights of nature movement and the settling of Indigenous resource-related disputes more generally. It raises new questions about who is entitled to speak for nature (particularly rivers), and draws new legal paths for rural and even urban communities to participate in the management of rivers and the environment. Ultimately, only with strong community buy-in do legal rights for rivers and ecosystems offer the potential for increased Indigenous involvement in and control over natural resource management and, consequently, improved Indigenous-governmental relationships.