11

Rights of Nature

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11.1 INTRODUCTION: TOWARDS AN ECOCENTRIC APPROACH WITHIN CLIMATE LITIGATION

The protection of Nature[1] is one of the most effective ways to face climate change and must be an essential part of all plans to reduce global warming. Nature-based solutions to climate change, sometimes called 'natural climate solutions', involve the conservation, restoration, and better management of ecosystems to help remove carbon dioxide (CO_2) from the atmosphere. Effective use of nature-based solutions would make it possible to reduce global greenhouse gas emissions by up to a third by 2030.[2] The Working Group II contribution to the Intergovernmental Panel on Climate Change Sixth Assessment Report provides new and valuable insights into the importance of supporting natural pathways to reduce climate risks and, at the same time, improve people's lives.[3] Natural ecosystems not only contribute to reducing climate change by capturing CO_2 from the air and sequestering it in plants, soils, and sediments but also provide a wide range of other important benefits, such as cleaner air and water, economic benefits, and increased biodiversity, thereby bolstering our human rights and existence.

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[1] The word 'Nature' is capitalised as recognised and incorporated in UNGA Res 73/235, preamble twenty-ninth paragraph, and in the Report of the Secretary-General on Harmony with Nature, UN Doc A/74/236.

[2] Lera Miles and others, 'Nature based Solutions for Climate Change Mitigation' (*UNEP* 2021).

[3] Hans O. Pörtner and others (eds), *Climate Change 2022: Impacts, Adaptation and Vulnerability* (Cambridge University Press 2022).

Therefore, it is not surprising that Nature has emerged in some climate cases as a core (or collateral) element to be protected and a novel aspect for judicial discussions on climate change.

Likewise, the recognition of the rights of Nature and the ecocentric reinterpretation of the legal framework through climate cases contribute to reinforcing the rights of human beings to live in a healthy and clean environment, as well as granting Nature its own rights.[4] The 'ecocentric' perspective holds that the Earth's ecology and ecosystems (including its atmosphere, water, land, and all forms of life) have intrinsic value and seeks to protect environmental organisms even if they cannot be used by humans as resources. An ecocentric interpretation of law therefore places importance on the natural world, and although it may not involve the direct recognition of the rights of Nature, it is a step in that direction. In this chapter, the focus is particularly on an ecocentric interpretation as a transition to interpretations that ultimately uphold the rights of Nature in the context of the climate emergency. This interpretation is particularly critical in light of the debate regarding the appropriateness and ability of human rights to protect the environment from human impact.[5]

In fact, the personification of the environment through ecocentric legal interpretations continues to grow in popularity worldwide because it is an idea that ordinary people and communities can understand and support. This legal interpretation establishes scaffolding to shift the way humans see Nature from property to an understanding of the interconnected relationships between trees, lakes, and rivers. This view is not new for many Indigenous peoples around the world who see Nature not as separate from humans but rather as made up of beings in relation to themselves.

Therefore, the objective of this chapter is to identify emerging best practice in climate litigation on the topic of rights of Nature in judicial decisions to date. Section 11.2 analyses how courts have dealt with arguments relating to rights of Nature or incorporate an ecocentric perspective. Section 11.3 focuses on how courts have progressively introduced this ecocentric interpretation into climate litigation, contributing to emerging best judicial practice. Finally, Section 11.4 outlines the possibility of replicating some of the best practices in future litigation.

11.2 STATE OF AFFAIRS: RIGHTS OF NATURE BEFORE COURTS

Nature has traditionally been afforded legal protection because of the simple material, genetic, or productive utility it represents for human beings. In many countries, however, particularly in the Global South, rights of Nature have been recognised due to the relationship of particular populations with their local environments.

[4] Susana Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5(1) TEL 113.

[5] Rolston Holmes III, 'Rights and Responsibilities on the Home Plane' (1993) 18 YJIL 251. See also Conor Gearty, 'Do Human Rights Help or Hinder Environmental Protection?' (2010) 1 JHRE 7.

This recognition stems from an understanding of the inherently exceptional value of certain natural resources, as well as from the ecological and cultural dependence of some populations on Nature for subsistence. For many Indigenous communities, Nature is not simply a resource for survival but also a source of spirituality and sacredness, forming a basis for traditional cultures rooted in the interconnectedness of all living beings. However, modern levels of overexploitation and domination leave ecological systems and human cultures in critical condition. This vulnerability is aggravated by the climate emergency, which highlights the need to approach environmental protection from a more ecocentric perspective, rather than the traditional anthropocentric rule of law.

The rights of Nature have been commonly understood as 'the rights of the non-human species, elements of the natural environment and … inanimate objects for a continuous existence not threatened by human activities'.[6] Some jurisdictions go even further. The Ecuadorian Constitution of 2008 states in Article 71 that: '[t]he nature or Pacha Mama' is 'where life is realized' and that 'she has the right to have her existence fully respected and the maintenance and regeneration of [her] vital cycles, structure, functions and evolutionary processes'. In addition, the Constitution provides that '[e]very person, community, people or nationality may require the public authority to comply with the rights of nature' and, in Article 72, Nature is granted the right to restoration.[7]

Some judicial bodies in the Global South have recently linked the climate question to the ecological perspective, recognising constitutional protection for other forms of life beyond human life and acknowledging that an ecologically balanced environment is indispensable if fundamental rights are to be preserved. Recognition of the human rights dimensions of climate change is no longer sufficient to secure life in the climate emergency. Therefore, the new ecocentric interpretation of law qualifies as emerging best judicial practice, as it highlights Nature's right to be protected, directly or indirectly, as an important element for consideration in climate litigation.[8]

Ecuador, Bolivia, New Zealand, Bangladesh, Brazil, Colombia, and Mexico, among other countries,[9] have either issued court decisions, enacted laws, or

[6] David Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press 2017) 137. Several authors from around the world contributed, significantly, to this ecocentric interpretation of law including Christopher Stone in the United States, Godofredo Stutzin in Chile, and Cormac Cullinan in South Africa.

[7] ibid 293.

[8] Eduardo Gudynas, 'Los derechos de la naturaleza en serio. Respuestas y aportes desde la ecología política' in Alberto Acosta and Esperanza Martínez (eds), *La naturaleza con derechos. De la filosofía a la política* (Abya Yala 2011).

[9] Legal provisions recognizing the Rights of Nature, sometimes referred to as Earth Jurisprudence, include constitutions, national statutes, and local laws. See an exhaustive compilation at the UN Harmony with Nature website <www.harmonywithnatureun.org/rightsOfNature/> accessed 24 February 2024.

amended constitutions recognising the legal rights of Nature. Panamá recently enacted a 'Rights of Nature Law', guaranteeing the natural world's right to exist, persist, and regenerate.[10]

The recognition of the rights of Nature's different elements has proliferated in various jurisdictional venues. A good example is Ecuador, where two individuals brought an 'Accion de Proteccion' against the Provincial Government of Loja 'in favour of Nature, particularly in favour of the Vilcabamba River'.[11] The Criminal Chamber of the Court ruled that the government had violated the constitutional rights of the Vilcabamba River to exist and maintain its life cycles, structure, functions, and evolutionary processes by conducting excavation for the construction of a new provincial road. This case was the first success story of the rights of Nature under Article 71 of the Ecuadorian Constitution. The Chamber accepted that 'the action for protection is the only suitable and effective way to put an end to and immediately remedy focused environmental damage'. The judges applied the precautionary principle:

> [U]ntil it is objectively demonstrated that there is no probability or certain danger that the work carried out in a certain area will produce pollution or cause environmental damage, it is the duty of the constitutional judges to immediately protect and make effective the judicial protection of the rights of Nature, carrying out whatever is necessary to prevent it from being polluted, or to remedy it. Note that we even consider that in relation to the environment, we do not only work with the certainty of damage, but we aim at the probability[12]

The Chamber also recalled that the Constitution:

> without precedent in the history of humanity, recognises nature as a subject of rights …; it assumes as an evident and indisputable fact the 'importance of Nature', to such an extent that it considers 'that any argument in this respect is succinct and redundant', incorporating in the decision the idea that the damage caused to it is 'generational damage', which it defines as 'that which by its magnitude has repercussions not only on the current generation but that its effects will have an impact on future generations'[13]

The global case law to date has covered not only the protection of Nature itself, but also the protection and preservation of intangible and spiritual assets, such as sacred sites or ancestral knowledge. For example, in 2017, the High Court of the Indian state of Uttarajand ruled that the Ganges and its main tributary, the Yamuna, both considered sacred by millions of Hindus, were living beings and,

[10] Asamblea Nacional Ley No 287 Gaceta Oficial No 29484-A <www.gacetaoficial.gob.pa/pdfTemp/29484_A/GacetaNo_29484a_20220224.pdf> accessed 24 February 2024.

[11] *Wheeler v Director de la Procuraduría General* [2011] No 11121-2011-00010 (Provincial Criminal Court for Loja).

[12] ibid [5].

[13] ibid [7].

as such, had the right to be legally protected and not to be harmed and could be parties to disputes.[14]

Through this ruling, the Court explicitly recognised the rivers' legal personality. The Court ordered that the two rivers be represented by the director of the National Clean Ganga Mission, a government body that oversees projects and conservation of the river, as well as by the state's chief secretary and advocate general. This order served to protect the rivers from increasing pollution caused by both locals and thousands of visitors to this Himalayan region.[15] However, the Court stayed the ruling on appeal.

Similarly, New Zealand has declared the Whanganui River a living entity and appointed two guardians to protect its interests. While New Zealand has not yet formally adopted Nature's rights in any statutory or constitutional law, the nation has already recognised that Nature can have inherent rights by granting legal personality to lands and rivers. Thus, in 2013, the Tūhoe people and the New Zealand government agreed upon the Te Urewera Act, giving the Te Urewera National Park 'all the rights, powers, duties, and liabilities of a legal person'.[16]

In other countries, the rise of an ecocentric interpretation of law has taken the form not of the attribution of rights to Nature, but rather of obligations to protect Nature. Countries such as Switzerland, Portugal, France, Colombia, and Brazil have specified a set of governmental obligations to Nature and its protection. Colombia, in fact, offers a key example of the possibilities. In one decision, the Colombian Constitutional Court described the ecocentric interpretation as follows: 'It is a principle that radiates through the entire legal order corresponding to the State responsibility to protect the natural wealth of the Nation; 2. It is a constitutional (fundamental and collective) right held by all people through various judicial channels; and 3. It is an obligation of the authorities, society and individuals, by involving qualified duties of protection.' In addition, the Constitution establishes 'environmental sanitation as a public service and fundamental purpose of state activity'.[17]

The Constitutional Court refined this interpretation in the Atrato River case,[18] in which ethnic communities sued Colombia for illegal mining in the department of Chocó. The Court recognised the 'attribution of rights to Nature' and the obligation

[14] *Mohd Salim v State of Uttarakhand and others* Writ Petition (PIL) No 126 of 2014 (Uttarakhand High Court).

[15] The Indian Supreme Court later overturned the decision on the basis that declaring the rights of rivers was 'legally unsustainable'. See 'India's Ganges and Yamuna Rivers Are "Not Living Entities"' (*BBC*, 7 July 2017) <www.bbc.com/news/world-asia-india-40537701> accessed 27 February 2024.

[16] See Te Uruwera Act 2014, s 14 <www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183601.html> accessed 27 February 2024. Also see Te Awa Tupua Act 2017 <www.legislation.govt.nz/act/public/2017/0007/latest/whole.html#DLM6831458> accessed 27 February 2024.

[17] Sentence C-449 (Constitutional Court of Colombia 2015) [4.1].

[18] *The Atrato River Case*, Sentence T-622 (Constitutional Court of Colombia 2016).

to guarantee the protection, conservation, maintenance, and restoration of the Atrato River and Nature in general. The Court declared that the environment's 'integral elements … can be protected per se and not simply because they are useful or necessary for the development of human life', and therefore that 'the protection of the environment goes beyond the mere utilitarian notion'.[19] The Court also extended the protection to include 'biocultural rights': rights to life, health, water, food security, a healthy environment, and, importantly, to the culture and territory of the ethnic communities (Black and Indigenous) that inhabit the Atrato River basin and its tributaries.

The Court stated:

> [J]ustice with nature must be applied beyond the human scenario and must allow nature to be the 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. This interpretation finds full justification in the superior interest of the environment, which has been widely developed by constitutional jurisprudence and which is made up of numerous constitutional clauses that constitute what has been called the 'Ecological Constitution' or 'Green Constitution'. This set of provisions makes it possible to affirm the importance of a healthy environment and the interdependent link between human beings and the State.[20]

Following the trend of recognising rights of Nature and reinterpreting the different normative frameworks, the Advisory Opinion of the Inter-American Court of Human Rights (OC-23/17) stated:

> The Court considers it important to stress that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right. In this regard, the Court notes a tendency, not only in court judgments, but also in Constitutions, to recognize legal personality and, consequently, rights to nature.[21]

[19] Sentence C-123 (Constitutional Court of Colombia 2014) Section 1.

[20] ibid [12].

[21] See *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23, Inter-American Court of Human Rights Series A No 23 (15 November 2017) (IACtHR OC-23/17) [59].

11.3 EMERGING BEST JUDICIAL PRACTICE: NATURE PROTECTION TO FACE CLIMATE CHANGE

In climate litigation, arguments to recognise the ecocentric interpretation of law or even rights of Nature have begun to appear in different judicial cases worldwide as an important avenue through which to address climate change. The appearance of those novel elements in environmental court cases has allowed the development of certain judicial good practices to protect the rights of both humans and Nature against environmental degradation. Arguments constituting best practice have emerged by asking judges to consider an ecological interpretation of law when a particular activity has been found to be unacceptably harmful to the environment and living things. In other cases, courts have addressed the importance of the ecological integrity and intrinsic value of Nature, moving away from the utilitarian protection of Nature purely for the benefit of humans.[22] Another novel argument has been to prioritise the protection of vulnerable ecosystems over the expansion of carbon-based and greenhouse gas-generating activities, which compromise not only the well-being of Nature but also climate goals. Finally, certain cases have sought recognition of the right to a safe and stable climate based on the protection of the atmosphere as a common public good. It should be noted, however, that although all these practices incorporate an ecocentric interpretation of law, some still favour the rights of humans over those of Nature.[23]

In cases where emerging best practice has been identified, judges have focused their arguments on the rights that some legal systems already attribute to Nature, thus approaching an ecocentric interpretation of the law. Judges have especially relied on the right to integral conservation, the right to restoration, precaution against extinction of species and non-introduction of genetically modified organisms, and non-appropriation of environmental services. This practice is particularly innovative where the legal systems in question do not expressly recognise the rights of Nature.[24]

The following analysis will attempt to identify emerging best practice in the introduction of the rights of Nature to climate jurisprudence. The evolution of an ecocentric interpretation of law can be observed in several stages, beginning with the assumption of environmental degradation and its impact on human rights, followed by the recognition of the integrity per se of natural elements, and ultimately legal recognition of the rights and subjectivity of Nature or at least of some of its elements.

[22] Rafi Youatt, 'Personhood and the Rights of Nature: The New Subjects of Contemporary Earth Politics' (2017) 11(1) International Political Sociology 39.

[23] Burns H. Weston and Tracy Bach, 'Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice' (2009) Vermont Law School Research Paper 10–106.

[24] Kirsten Anker and others, *From Environmental to Ecological Law* (Routledge 2020).

11.3.1 *Reparation of Ecological Harm*

The need to repair and restore the ecological harm done to certain natural elements that are important for life can be identified as emerging best practice in climate litigation to date. Nature conservation and protection is not only a matter of ensuring the well-being of future human generations, but also a matter of doing justice to non-human living beings, who are equally affected by climate change. Hence, the ecocentric interpretation of law has developed in such a way as to promote ecojustice or ecological justice. This section will discuss several cases in which the argument of reparation of ecological harm was used successfully.

In Australia, in the case of *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited*,[25] the Court rejected the cost–benefit analysis presented by Warkworth Mining Limited in its appeal. This cost–benefit analysis sought to estimate, in monetary terms, the costs of the main intangible environmental, cultural, and social impacts of the expansion of the Warkworth Mine. The Court found that the analysis did not consider issues of equity or distributive justice by failing to give adequate regard to the entities on whom the mine's burdens would fall. Among the entities identified were threatened fauna in the area of disturbance and other components of biological diversity (such as ecological communities). The Court found that the integrity, stability, and beauty of these environmental components would be unacceptably impacted by the mine. This argument focuses not only on the benefits of biodiversity and ecosystem services for humans, but also on the additional concept of biodiversity and its elements as entities that have intrinsic value.[26]

The ecocentric interpretation of law in terms of ecojustice has been used not only to force reparation of ecological harm, but also as a moral argument to respect biodiversity. In *Shrestha v Prime Minister's Office of Nepal and others*,[27] the plaintiff's main request was for the government to enact a new climate law. The case presents, among other arguments, the severe impacts of environmental degradation, including climate change, on non-human life forms, biodiversity, wildlife, and ecosystems. Accordingly, the Nepalese Supreme Court declared:

> Climate change, exploitation of natural resources and environmental pollution have posed a threat to the existence of ecology and biodiversity. Such threats do not just affect the organisms living today but also cause irreversible damage to nature and pose an imminent threat to future generations. The matter of climate change

[25] *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48.

[26] See Anil Markandya, 'Cost Benefit Analysis and the Environment: How to Best Cover Impacts on Biodiversity and Ecosystem Services' (2016) OECD Environment Working Papers.

[27] *Advocate Padam Bahadur Shrestha v Prime Minister and Office of Council of Ministers and Others* [2018] Order No 074-WO-0283 (2075/09/10 BS) (Supreme Court of Nepal).

> and [the] threat posed by pollution is directly connected to the well-being of citizens who are guaranteed the right to clean environment and conservation under the Constitution.[28]

The Court thus recognised the need for moral, balanced, and responsible usage of the ecological resources that sustain humans and the lives of other organisms.

The concept of 'ecological harm' and arguments in favour of ecojustice are also found in the case *Notre affaire à tous and Others v France (L'affaire du siècle)*.[29] The plaintiffs argued for the recognition of a new general principle of law relating to the right to live in a sustainable climate system, also based on the concept of pure ecological damage ('préjudice écologique') as recognised in the French Civil Code. The court ruled that compensation for 'ecological damage'[30] was admissible and declared that the state 'should be held liable for part of this damage if it had failed to meet its commitments to reduce greenhouse gas emissions'. The recognition of 'pure' ecological damage, suffered exclusively by Nature, allows for an expansion of the system of civil liability for environmental damage, which was traditionally based on indirect damage suffered by the environment (damage to property, economic loss, and personal injury), as a mere instrument or object rather than the 'victim'.[31]

Reparation of ecological harm, therefore, abstractly represents the rights of Nature, or at least an ecocentric interpretation of law, because it allows plaintiffs to claim pure ecological harm, a harm that only affects ecosystems. It represents a significant step towards a kind of 'punitive ecology', which imposes measures and sanctions to bring about changes that respond to environmental damage and favour environmental protection.

11.3.2 *Preservation of Ecological Integrity and the Intrinsic Value of Nature*

In some climate litigation cases that have adopted an ecocentric approach, judges have based their decisions on another argument: the intrinsic value of natural elements. This argument recognises Nature's inherent value, its naturalness and wildness, and its degree of independence from human influence.[32] From this perspective, the

[28] ibid.

[29] *Notre Affaire à Tous and Others v France* [2021] No 1904967, 1904968, 1904972 1904976/4-1.

[30] The concept of 'ecological damage' was formally recognised in French Civil Code art 1247, which states that 'Ecological damage consisting of non-negligible damage to the elements or functions of ecosystems or to the collective benefits derived by man from the environment shall be compensable', and supported by 'anyone liable for ecological damage'.

[31] See Ivano Alogna, 'Environmental Law of France' in Nicholas Robinson and others (eds), *Comparative Environmental Law and Regulation* (Thomson Reuters 2018) [38].

[32] The concept of the intrinsic value of Nature appeared in a case in France, where the Tribunal de Grande Instance de Lyon did not limit its consideration to the impact of climate change on humanity but also noted the impact on non-humans. See No 19168000015 (2019).

extension of Nature's rights to ecosystems and species is a form of protection of Nature itself.

This argument is included in one of the first pieces of climate change litigation in Brazil, *PSB and others v Brazil (on Climate Fund)*,[33] filed on 5 June 2020, as a Direct Action of Unconstitutionality for Omission before the Brazilian Federal Supreme Court. The action challenged the Federal Union's failure, and specifically the lack of efforts by the National Climate Change Fund (Fundo Clima), to adopt administrative measures with the goal of supporting projects, studies, and financial activities aimed at climate change mitigation and adaptation. In a preliminary decision the court recognised the interconnections between the right to a healthy environment and other human rights (right to life, health, food security, labour), as well as the impacts of ecological disequilibrium on the livelihoods and cultural identity of traditional communities and Indigenous peoples.[34]

The Supreme Court found that the Federal Union, through its lack of action, had violated its obligation to protect Nature, as established in the Brazilian Constitution and in accordance with the precautionary principle.[35] The Court based its argumentation mainly on article 225 of the Constitution, which is the ecological matrix of the Brazilian legal system.[36] The article imposes a set of positive and negative duties on the state related to environmental protection: preserve and restore ecological processes; promote the ecological management of ecosystems; define special protected territorial spaces and their components; and protect fauna and flora.[37] The Supreme Court incorporates a kind of constitutionalisation of climate change, as it admits its importance in the constitutional protection of not

[33] *PSB and others v Brazil* [2022] ADPF 708 (Federal Supreme Court of Brazil) (*PSB ADPF 708*).

[34] ibid.

[35] ibid.

[36] See Constitution of the Federative Republic of Brazil art 225, 'Everyone has the right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy life. The Government and the community have a duty to defend and to preserve the environment for present and future generations'.

[37] See ibid art 225(1), 'In order to ensure the effectiveness of this right, it is incumbent upon the Government to: I – preserve and restore the essential ecological processes and provide for the ecological treatment of species and ecosystems; II – preserve the diversity and integrity of the genetic patrimony of the country and to control entities engaged in research and manipulation of genetic material; III – define, in all units of the Federation, territorial spaces and their components which are to receive special protection, any alterations and suppressions being allowed only by means of law, and any use which may harm the integrity of the attributes which justify their protection being forbidden; IV – demand, in the manner prescribed by law, for the installation of works and activities which may potentially cause significant degradation of the environment, a prior environmental impact study, which shall be made public; V – control the production, sale and use of techniques, methods or substances which represent a risk to life, the quality of life and the environment; VI – promote environment education in all school levels and public awareness of the need to preserve the environment; VII – protect the fauna and the flora, with prohibition, in the manner prescribed by law, of all practices which represent a risk to their ecological function, cause the extinction of species or subject animals to cruelty'.

only human life but also non-human life, due to its intrinsic value and the essential contribution of an ecologically balanced environment to the effectiveness of other fundamental rights.[38]

The Brazilian Supreme Court cited two important decisions of the Inter-American Court of Human Rights (IACHR) to connect the State's duty to protect biodiversity with the rights of Nature.[39] In the IACHR Advisory Opinion No. 23/2017, the Court established that the right to a healthy environment is a fundamental human right[40] and further stated that it is a state's duty to protect Nature because of Nature's inherent importance, distinct from its importance to humans.[41] The second decision mentioned is the judgment in *Indigenous Communities of the Lhaka Honhat Asociation (Our Land) v Argentina*,[42] where the IACHR stated that a state has the duty to 'respect', 'guarantee', and 'prevent' damage to the environment, as well as the responsibility for ensuring the right to food security and access to water, in particular for Indigenous communities.[43]

Referencing these arguments, the Brazilian Supreme Court in *PSB and others* recognised that 'the damage caused to the environment compromises biodiversity, fauna and flora, which represent enormous economic potential and a differential for the country. They undermine Brazil's credibility internationally and its ability to raise funds to fight deforestation and reduce greenhouse gases'.[44]

Another case pending before the Federal Supreme Court in Brazil is the *Political Parties v Union (Brasil) (on deforestation and human rights)*,[45] through Direct Action of Unconstitutionality by Omission to denounce the deforestation. The case raises the compliance of the Action Plan for the Prevention and Control of Deforestation in the Amazon (PPCDAm) and the lack of ambition of Brazil's Nationally Determined Contribution (NDC) to sanction illegal deforestation, as well as to achieve an 80 per cent reduction in the rate of deforestation. It also alleges non-compliance with Article 225 of the 1998 Federal Constitution (CF/88), concerning the ecological balance of the environment, and calls for urgent precautionary measures.

[38] *PSB ADPF* 708.

[39] *PSB and others v Brazil* [2022] ADO 59/DF (Federal Supreme Court of Brazil) (*PSB ADO 59/DF*).

[40] IACtHR OC-23/17 (n 22) [59].

[41] ibid [62].

[42] *The Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina* Inter-American Court of Human Rights Series C No 400 (6 February 2020) [71].

[43] See *The Saramaka People v Suriname* Inter-American Court of Human Rights Series C No 172 (28 November 2007) [82]. 'Land means more than merely a source of livelihood for them; it is also a necessary source for the continuity of life and cultural identity of the members of the Saramaka people. The lands and resources of the Saramaka resources of the Saramaka people are part of their social, ancestral and spiritual essence. In this territory, the Saramaka people hunt, fish and harvest, and collect water, plants for medicinal purposes, oils, minerals and timber'.

[44] *PSB ADO 59/DF* (n 40).

[45] *PSB and others v Brazil* [2022] ADPF 760 (Federal Supreme Court of Brazil).

Although not found in an express provision on the constitutional level in the European Union (EU), the intrinsic value of Nature is contained in directives and case law on Nature conservation. The assessment of significant effects on the integrity of 'Natura 2000' sites had relevance in case C-404/09, *European Commission v Kingdom of Spain*.[46] The European Commission alleged that Spain approved two open-cast coal-mining projects within protected areas of the Natura 2000 network without properly evaluating the environmental impacts of the mines. An investigation confirmed not only the existence of several open-pit coal-mining operations, but also that the open-pit mining activity was going to continue through newly authorised operations and those in the process of authorisation.

The Court of Justice of the European Union determined that the possible effects on the most vulnerable species had not been taken into account during the authorisation procedure, as required by the provisions of Directive 85/337 on Environmental Impact Assessment. This Directive requires the description and assessment of the important environmental effects of the disputed projects, including 'the direct, indirect and cumulative effects in the short, medium and long term … permanent or temporary' on all plant and animal life, soil, water, air, climate and the landscape, material assets and cultural heritage, as well as the interaction between them. With regard to the EU Directive 92/43 on habitats, the Court held that the consequences of these mining operations on grouse and brown bear cannot only be assessed in terms of direct destruction of critical areas, but must also be assessed with consideration for the greater fragmentation, deterioration, and destruction of potentially suitable habitats for their recovery, as well as the increase in disturbances for these species due to development.[47]

In *Save Lamu et al v National Environmental Management Authority and Amu Power Co. Ltd*,[48] the appellants challenged the issuance of an environmental and social impacts assessment (ESIA) licence to a coal-fired power plant that was to be located in the coastal Lamu County in Kenya.[49] Incorporating environmental and human welfare considerations, the Kenyan National Environmental Tribunal found, through the implementation of the precautionary principle, that such a project could increase the possibility and potential for acid rain, thereby killing fish and plants, as well as causing other adverse effects on forests, soil, and vegetation as a whole. Therefore, the tribunal ruled that if Amu Power Co. chose to continue with the project, it would have to carry out a new ESIA to prevent ecological damage.

[46] Case C-404/09 *European Commission v Kingdom of Spain* [2011] ECLI:EU:C:2011:768.

[47] ibid [197].

[48] *Save Lamu et al v National Environmental Management Authority and Amu Power Co Ltd* [2016] Tribunal Appeal No Net 196 of 2016 (Kenya Environmental Tribunal).

[49] See ESIA report <https://naturaljustice.org/wp-content/uploads/2021/01/Copy-of-the-EIA-Study-Report_merged.pdf> accessed 27 February 2024.

Although climate change is not at the centre of the Tribunal's analysis in these cases, mining activities have a significant impact on the Earth's climate system. Therefore, environmental impact assessment of these activities has a very important contribution to make to safeguarding the ecological integrity of natural areas and preventing further climate impacts.

11.3.3 *Recognition of Rights of Nature and the Protection of Fundamental Rights*

Best practice has also emerged in cases where courts have relied on fundamental rights to recognise the rights of Nature. The first successful climate case introducing the personhood of natural resources in Colombia was before the Supreme Court, in the case *Future Generations v Ministry of the Environment and Others*.[50] In its ruling, the Supreme Court adopted an ecocentric conception of the rule of law by recognising the rights of Nature. The Court declared the Amazon, as an ecological region and as an entity, a 'holder of protection, conservation, maintenance, and [restoration] from the State and its territorial entities'.[51] It further described the Amazon as a 'vital ecosystem for the global future', and stated that, in order to protect it, the Amazon is recognised as an entity 'subject of rights'.[52]

The Court based its decision on arguments focused on alterity and solidarity not only for every human on the planet in both present and future generations, but also for animals and plants, based '(i) [on the] ethical solidarity duty of the species and (ii) in the intrinsic value of nature'.[53]

In addition, the inherent meaning of ecojustice is evident in this case. The main reason for the Court's decision and ecocentric approach was the fact that deforestation of the Amazonian forest had already generated an increase in greenhouse gas emissions and temperature. In the view of the Court, these increases violated the rights of present and future generations. The absence of necessary efforts to prevent global warming also affected the ecological integrity of the ecosystem and the survival of other species. The Supreme Court went beyond the anthropogenic perspective and reiterated the ecocentric perspective, adopting a 'green' reading of constitutional postulates. In particular, the Court held that the concentration of greenhouse gas emissions in the atmosphere due to the deforestation of the Amazon causes imminent and serious damage not only to the plaintiffs but to all

[50] *Future Generations v Ministry of the Environment and Others (Demanda Generaciones Futuras v Minambiente)* [2018] 11001 22 03 000 2018 00319 00 (Supreme Court of Justice of Colombia) (*Demanda Futuras Generaciones*).

[51] ibid 45.

[52] About the case, see Paola Andrea Acosta Alvarado and Daniel Rivas-Ramíres, 'A Milestone in Environmental and Future Generations' Rights Protection: Recent Legal Developments before the Colombian Supreme Court' (2018) 30 JEL 519 (2018).

[53] *Demanda Futuras Generaciones* (n 51) 19.

the inhabitants of the Colombian territory and of the entire planet. This argument includes recognition of extraterritoriality and a collective consideration of the right to a healthy environment. In this sense, the Court explains:

> The principle of solidarity, for the specific case, is determined by the duty and co-responsibility of the Colombian State in stopping the causes that cause GHG emissions caused by the abrupt reduction forest of the Amazon, being imperative to adopt immediate mitigation measures, protecting the right to environmental well-being, both to the guardians, like the other people who inhabit and share the Amazonian territory, not only the national, but the foreign, along with all the inhabitants of the globe, including ecosystems and living beings.[54]

The constitutional parameters invoked in this case by the plaintiffs are the same as in the Atrato River case (right to life, health, and a healthy environment). However, the major difference between the two cases is that, here, the principle of solidarity applies to Nature for the benefit of future generations, in the sense that the claimants are recognised as having rights as representatives of future generations who will be primarily affected by climate change.[55]

The Colombian Supreme Court's decision in this case represents a significant step from an anthropocentric model of environmental law to a more 'anthropic ecocentric' model. This transition is evident when the Court recognises that the 'fundamental rights of life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem'.[56] In addition, the Court underlines the need to establish a relationship of intragenerational equity between species based on the ethical duty of solidarity that must exist between humans and Nature.[57] Ultimately, the Court declared that the Colombian Amazon was entitled to protection, conservation, maintenance, and restoration, and ordered the government to develop and implement action plans to halt deforestation.

Other cases in Ecuador reflect an ecocentric perspective to confront the climate crisis, although some of these cases do not appear in climate litigation databases. The Ecuadorian courts have considered the rights of Nature in various cases centred on mining activities, oil, and energy production that influence climate governance.[58]

[54] ibid 37.

[55] César Rodríguez-Garavito, 'Human Rights: The Global South's Route to Climate Litigation' (2020) 114 AJIL Unbound 40.

[56] *Demanda Futuras Generaciones* (n 51) 13.

[57] ibid 20.

[58] For example, cases of the mining concessions in the Los Cedros Biological Reserve (Case No 1149-19-JP) and the cases of mining in areas of ecological interest in the Upper Nangaritza region (Cases Nos 1232-19-JP and 2917-19-EP), pending before the Constitutional Court. Other cases are those involving violation of constitutional guarantees and rights of the nature and the Cofán de Sinangoe people (Process No 21333-2018-00266, judged by the Single Chamber of the Provincial Court of Justice of Sucumbios); the Waorani people (Process No 16171-2019-00001, judged by the Multi-competent Chamber of the Provincial Court of Pastaza) and the case of violation of the rights of nature due to the execution of the project of infrastructure for the supply of energy from the Dulcepamba river, pending before the Constitutional Court (Case No 502-19-JP).

A lawsuit filed by several Indigenous girls from the Ecuadorian Amazon sought to eliminate more than 400 gas-burning lighters associated with the exploitation of crude oil in that region – which caused the plaintiffs to suffer severe chronic diseases.[59] The action was initially denied. On appeal, however, the court ruled in favour of the plaintiffs.[60]

The decision recognises the violation of the rights of health, Nature, and a healthy environment, as well as the systematic failure of the Ecuadorian state to comply with international obligations on climate change. According to the Court, 'it is the obligation of the State, to put into mobility, the application of the precautionary principle that is based on the scientific doubt of this or that reaction caused by the activity of gas flaring in the so-called lighters'. The Court also states that 'nature is being affected, and its constitutional rights are being violated … since the burning of gas affects the air, biodiversity, due to the fact that this activity directly sends greenhouse gas emissions' and that 'with the burning of gas resulting from the hydrocarbon extractive activity, the constitutional rights of the inhabitants living in the area of influence of the aforementioned activity are not recognised'.[61]

A similar case was filed by civil society organisations and members of the Waorani Indigenous people of Miwaguno[62] in northeastern Ecuador, seeking to hold the Chinese oil company PetroOriental[63] that operates in the Amazon accountable for the burning and venting of gas in lighters during oil extraction and the consequent atmospheric pollution and direct effects on climate change. The plaintiffs argue that the company's actions constitute a permanent violation of human and Nature's rights. This lawsuit was the first in Ecuador to exclusively appeal to the relationship

[59] *Valentina and others v Minister of Environment and others* Process No 21201-2020-00170 <www.derechosdelanaturaleza.org.ec/wp-content/uploads/2021/05/3.-CASO-MECHEROS-SENTENCIA-PRIMERA-INSTANCIA.pdf> accessed 24 February 2024.

[60] ibid.

[61] The plaintiffs base their position on the IACtHR, which has ruled that the state, as the party responsible for environmental damage, is obliged to specify the extent of the reparations and the scope of reparations and the manner in which they are to be carried out. However, according to the plaintiffs, the measures decreed by the Court's Judgement under the heading of 'integral reparation' are far from compliant with the established and required parameters. Therefore, the case is now before the Constitutional Court by an extraordinary action. See *The Kaliña and Lokono Peoples v Suriname* Inter-American Court of Human Rights Series C No 309 (25 November 2015).

[62] Acción Ecológica, together with the International Federation for Human Rights (FIDH), the Union of People Affected by Texaco (UDAPT), and the Waorani community of Miwaguno. See 'Ecuador: Waorani Community Sues Fossil Fuel Company for Contributing to Climate Change' (*International Federation for Human Rights*, 10 December 2020) <www.fidh.org/en/region/americas/ecuador/ecuador-waorani-community-sues-fossil-fuel-company-for-contributing> accessed 27 February 2024.

[63] PetroOriental operates exploration blocks 14 and 17 in Orellana province, which yield about 10,000 barrels of oil per day. See 'Ecuador: Pueblo Waorani demanda a la empresa china PetroOriental por cambio climático debido a la contaminación del aire de torres petroleras en la Amazonía' (*Centre for Business and Human Rights*, 17 December 2020) <www.business-humanrights.org/fr/derni%C3%A8res-actualit%C3%A9s/ecuador-pueblo-waorani-demanda-a-la-empresa-china-petrooriental-por-cambio-clim%C3%A1tico-debido-a-la-contaminaci%C3%B3n-del-aire-de-torres-petroleras-en-la-amazon%C3%ADa/> accessed 27 February 2024.

between human and environmental rights and climate change.[64] The Court considered that protecting Nature and preventing and mitigating the effects of climate change are necessary to guarantee the constitutional rights of the inhabitants of the affected communities and to prevent future violations in similar circumstances. The constitutional rights of Indigenous peoples are violated by the significant contribution of greenhouse gas emissions to climate change, especially carbon dioxide, methane, soot, nitrous oxide, ozone, and water vapour. This violation of human rights comes in tandem with, and because of, a violation of the right of Nature to be protected, demonstrating the vital interdependence between the two.

In an unprecedented case, the Constitutional Court of Ecuador applied the constitutional provision on the rights of Nature. In the case *Reserva Los Cedros v Ecuador*,[65] the Court recognised the rights of Nature to safeguard the Los Cedros cloud forest from mining concessions. The Court ruled that the government of Ecuador is obligated to apply Article 73 of the Ecuador Constitution, which requires precautionary and restrictive measures be taken to prevent the extinction of species:

> It's not about a college or a conditioned option, but from a constitutional obligation derived from the intrinsic valuation that the Constitution makes of the existence of species and ecosystems, through the rights of nature. Indeed, the risk in this case is not necessarily related to affectations to human beings, although they can be included, but to the extinction of species, destruction of ecosystems or permanent alteration of natural cycles or other types of serious or irreversible damage to nature, regardless of such damage.

Based on the UN Framework Convention on Climate Change and other international norms, the Court also acknowledged: 'The Constitution expressly adds as part of this right to have a pollution-free environment, since pollution is one of the forms of human intervention in the environment that accelerates its degradation and makes it uninhabitable for himself and other living beings.' Consequently, the Court ruled that mining and all kinds of extractive activities in the Los Cedros Protected Forest would violate the constitutional rights of nature and are therefore prohibited in the forest. To enforce the ruling, the Court revoked the governmental authorisations granted to mining corporations to operate in Los Cedros. The Court also declared that the application of the constitutional rights of Nature is not limited to protected areas, such as Los Cedros, rather, as with any other constitutional

[64] See on the case 'Sobre el litigio climático contra PetroOriental' (*Accion Ecologica*, April 2021) <www.accionecologica.org/sobre-el-litigio-climatico-contra-petrooriental/> accessed 27 February 2024 and 'Organizaciones y comunidad Waorani demandan a la empresa PetroOriental ante jurisdicción ecuatoriana por su contribución al cambio climático' (*Accion Ecologica*, 10 December 2020) <www.accionecologica.org/wp-content/uploads/boletin-prensa-waorani-ESP.pdf> accessed 27 February 2024. Also see *Nixon and others v Minister of Environment and others*, Process No 22281-2020-00201.

[65] See *Reserva Los Cedros v Ecuador*, Case No 1149-19-JP/20 <http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhcnBldGE6J3RyYW1pdGUnLCB1dWlkOic2MmE3MmIxNy1hMzE4LTQyZmMtYjJkOS1mYzYzNWE5ZTAwNGYucGRmJ30=> accessed 27 February 2024.

right, it applies in the entire territory of the country. This case sets a precedent that is important not only for Ecuador but also for the international community to protect the integrity of forests and their biodiversity.

Another case of 'personifying the environment' can be found in the class action of the *Civil Association for Environmental Justice and others v Province of Entre Ríos and others*, filed in 2020 in the Argentinian Supreme Court against a government and municipality in Argentina for their alleged failure to protect environmentally sensitive wetlands. The plaintiffs brought the complaint with the aim of preserving the wetlands of the Paraná Delta, arguing that the Delta has its own rights.[66] The case was merged with *Equística Defensa del Medio Ambiente v Provincia de Santa Fe y ots*,[67] as both claim that this essential wetland ecosystem has the right to government measures for climate change mitigation and adaptation, due to the ecosystem services it provides. The Court in the latter case united recognition of the intrinsic value of biological diversity with consideration of the precautionary principle[68] and national jurisprudence regarding the principle of *in dubio pro natura*.[69] In order to safeguard the ecological integrity of the Paraná Delta, the Supreme Court, following the Climate Change Adaptation and Mitigation Law, ordered the establishment of an Environmental Emergency Committee to adopt effective precautionary measures to prevent and put out irregular fires in the area.

Both the precautionary and *in dubio pro natura* principles are also used by the Supreme Court of Pakistan, in the case of *D. G. Khan Cement Company v Government of Punjab*.[70] The Supreme Court of Pakistan upheld a decision by the Punjab provincial government prohibiting the construction of new or expanded cement plants in

[66] *Asociación Civil Por La Justicia Ambiental y otros v Entre Ríos* CSJ 487/2020. See <www.cij.gov.ar/nota-38022-La-Corte-Suprema-ordena-constituir-un--Comit--de-Emergencia-Ambiental--para-detener-y-controlar-los-incendios-irregulares-en-el-Delta-del-Paran-.html> accessed 27 February 2024.

[67] *Equística Defensa del Medio Ambiente Asociación Civil v Santa Fe, Provincia de y otros* CSJ 468/2020. See <https://cdh.defensoria.org.ar/wp-content/uploads/sites/3/2020/08/EQUISTICA-DELTA-DEL-PARANA.pdf> accessed 27 February 2024.

[68] The precautionary principle, reflected in United Nations 'Declaration of the United Nations Conference on Environment and Development' (1992) 31 ILM 874 (Rio Declaration) principle 15. The principle provides, 'where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.

[69] This emerging environmental principle is declared as Principle 5 of the IUCN World Declaration on the Environmental Rule of Law (2016) 'in cases of doubt, all matters before courts, administrative agencies, and other decision-makers shall be resolved in a way most likely to favour the protection and conservation of the environment, with preference to be given to alternatives that are least harmful to the environment. Actions shall not be undertaken when their potential adverse impacts on the environment are disproportionate or excessive in relation to the benefits derived therefrom'.

[70] *DG Khan Cement Company v Government of Punjab* [2021] C.P.1290-L/2019 (Supreme Court of Pakistan). See also Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2021 Snapshot' (*LSE Grantham Research Institute on Climate Change and the Environment*, July 2021) 10 <www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf> accessed 24 February 2024.

environmentally fragile areas. The decision emphasises the need to protect the rights of Nature itself: '[m]an and his environment each need to compromise for the better of both and this peaceful co-existence requires that the law treats environmental objects as holders of legal rights'. The decision also justifies the personification of the environment, saying 'the environment needs to be protected in its own right. There is more to protecting nature than a human centred rights regime'.

Therefore, the Lahore Tribunal emphasised the obligation of courts to treat the environment as a subject of law, because of the intrinsic value of nature and its natural elements, and to protect and preserve natural resources, because of their importance in reducing the effects of climate change. As a result, the Supreme Court rejected the company's challenges and upheld the government's ruling that new or expanded cement plants could cause further depletion of groundwater and other harmful environmental impacts. The arguments were based on the government's duty to uphold the precautionary principle in protecting the rights to life, sustainability, and dignity of the communities surrounding the project areas.

11.3.4 *Protecting the Atmospheric Commons through the Public Trust and the Right to a Stable Climate*

Following the global trend, human rights now play a central role in climate litigation. In fact, the cases described earlier in this chapter demonstrate how the 'greening' or 'ecocentric approach' to human rights and the collective consideration of the human right to a healthy environment offer a good starting point for rebuilding harmonious relationships between human beings and Nature.

As developed in Chapter 10, another emerging best practice is consideration of the atmosphere as a common good, as part of public trust.[71] The public trust principle, which is well established in US case law, is the proposition that the sovereign holds certain natural resources in trust for the public.[72] More than two dozen cases have been brought around the world based on 'public trust' arguments, each arguing that the state has a duty to protect public resources from harm.

This argument is closely linked to the anthropocentric idea that the fundamental right to life is inextricably tied to the right to a healthy environment, including a stable climate, as put forth in the ruling of *Clean Air Council v United States*.[73]

Following an expansive interpretation of the traditional public trust doctrine, these lawsuits are potentially important in terms of emerging best judicial practices. Both characterise the government as a public trustee – that is, the manager

[71] Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (Cambridge University Press 2014).

[72] Joseph Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1969) 68 Michigan Law Review 471, 484 (1969).

[73] *Clean Air Council v United States* 362 F.Supp.3d 237 (District Court of Pennsylvania 2019).

of those natural resources – including the atmosphere, air, and water – that are subject to the public trust. Therefore, the government has a fiduciary duty to protect and preserve those vital natural resources in trust for the people and for future generations.[74] Under the public trust doctrine, the government has a high, solemn, and perpetual duty to protect these special commons and the public's use of them from impairment, subordination, or alienation for private control. This trust establishes a legal relationship, just like a trust created with a bank as trustee, between the trustee, beneficiaries, and the commons in Nature. The public trust doctrine has connections derived from the due diligence principle or duty of care discussed in the *Urgenda* case.[75]

As in the legal or judicial recognition of the rights of Nature, the public trust doctrine calls for respect for the beingness or personhood of Nature, and at the same time ensures a citizen's right to bring an action to protect this personhood and the essential protected use of water or ecosystems. Therefore, if the government breaches or fails in its duty as trustee to protect the rights or beingness of Nature, citizens, as legal beneficiaries, have a right and standing to bring civil action against the government.

This doctrine is especially important because the protection of the atmosphere for the common good would result in the recognition and new constitutionalisation of the right to a stable climate, thus firmly establishing a government's fundamental duty to maintain climate stability. The recognition of the right to a stable climate to protect Nature is found in the case of *Institute of Amazonian Studies (IEA) v Brazil*.[76] The lawsuit alleges that the federal government has failed to comply with Brazilian emissions and annual Amazon deforestation rate reduction targets set out in the National Law on Climate Change Policy and fundamental rights, and calls for recognition of the explicit fundamental right to a stable climate for present and future generations under Article 225 of the Brazilian Constitution.[77] In order to remedy this situation, the plaintiffs ask the government to reforest an area equivalent to what was deforested to fulfil the duty of the state to protect the Amazon Forest.[78] The case was transferred to the Amazonas Court, due to an alleged connection between this case and the case of the *Federal Public Ministry against IBAMA*, a case in which the Public Ministry asked the government to put in place monitoring bases in ten critical areas of the Amazon to combat deforestation, as set out in the PPCDAm.

[74] *Juliana v United States* No 6:15-cv-01517-TC (District Court of Oregon 2016).

[75] *Urgenda Foundation v The State of The Netherlands* [2015] ECLI:NL:RBDHA:2015:7196 (District Court of the Hague).

[76] *Institute of Amazonian Studies (IEA) v Brazil* No 5033746-81.2021.4.04.0000.

[77] Lei 12187/09 Política Nacional de Mudança do Clima. See <www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/l12187.htm> accessed 27 February 2024.

[78] See Joana Setzer and Délton Carvalho, 'IEA v Brazil: Rights-based Climate Litigation to Protect the Brazilian Amazon' (*OxHRH Blog*, April 2021) <https://ohrh.law.ox.ac.uk/iea-v-brazil-rights-based-climate-litigation-to-protect-the-brazilian-amazon/> accessed 27 February 2024.

Both cases concern illegal deforestation in the Amazon, which aggravates the climate crisis and is directly linked to violations of the fundamental rights of traditional peoples and Indigenous communities. It is therefore understood that the right to a stable climate can only be guaranteed by preserving the Amazon rainforest, which is essential for both human life and ecological balance,[79] with clear intergenerational and global implications justifying the recognition of the right to a stable climate.[80]

After analysing these cases, judges see climate change, ecosystem degradation, and biodiversity loss as interdependent questions. Ecosystem degradation is caused by and exacerbates climate change, which is already one of the main drivers of biodiversity loss globally. Thus, the recognition of the right to a stable climate can play a key role in addressing the combined climate and biodiversity crises while contributing to accelerating transformative change towards Nature protection.

11.4 REPLICATION OF JUDICIAL BEST PRACTICES FROM THE ECOCENTRIC APPROACH

As the previous sections demonstrate, constitutional and legislative advances in terms of 'greening' the law are in different stages across different jurisdictions. Despite distinct normative realities, it is possible to recognise common characteristics in judicial discussions to confront the climate crisis. Recognition of the intrinsic value and autonomous specific rights of ecosystems essential for the balance of climate and biodiversity is the first step, followed by the expansion of 'personhood' and the 'personification of the environment' to move away from a human-centred rights regime towards an approach that includes elements of Nature such as plants, animals, and rivers.

The attribution of legal rights to Nature follows two basic lines of reasoning. First, that the legal and moral foundations for human rights rely in part on the belief that rights emanate from the simple fact of human existence, which implies that the same inherent rights should also apply to the natural world. A second and more pragmatic argument claims that humanity's very survival depends on healthy ecosystems and that protecting the rights of Nature is tantamount to protecting human rights and well-being. This last reason can be accommodated by both civil and common law systems. From this perspective, most cases present powerful examples of the increasing relevance of rights-based claims of environmental protection in the context of the climate emergency.

The cases discussed in this chapter are judicial responses to public interest litigation that require governments to take climate action to protect all natural

[79] *IEA v Brazil* (n 77).
[80] ibid.

life, including humans, from the worst impacts of climate change. While adopting ecocentric arguments, these court cases have had an impact on the protection of Nature.

Through mandates such as prevention, preservation, regeneration, and restoration, these cases provide the following elements of replicability, which can be modulated according to the greater or lesser proximity of judges and courts to the ecocentric interpretation of the legal framework (Nature-centred approach):

- Equating damage to Nature with damage to humans, which is a significant change from the way environmental law has traditionally protected Nature by limiting itself to regulating human impacts.
- Recognising the importance of ecosystems for climate change mitigation and adaptation, recognising the existing vulnerabilities and risks produced by the biodiversity lost.
- Safeguarding the human rights of present and future generations by requiring the protection of Nature as a life support. Although the protection of Nature may be a secondary consequence, Nature is central to guarantee human rights in the context of the climate emergency. The cases in Brazil could provide vital guidance to other courts interpreting the constitutional right to a healthy environment, including the right to a safe climate and the right to healthy ecosystems and biodiversity and in benefit of humans and non-humans.
- Recognising the personality and rights of Nature as having intrinsic value *per se* and recognising the eco-dependence of humans on Nature. A growing number of climate lawsuits related to ecosystem rights could set a precedent, even if their legal systems do not yet explicitly recognise those rights.

In particular, the use of substantive 'eco-principles' can help judges in different jurisdictions approach this reorientation of climate litigation from an ecocentric interpretation of the law. Principles such as precaution or *in dubio pro natura* play a fundamental role in the protection of the rights to life and sustainability, thus promoting a new ecocentric approach to climate litigation.

In this sense, courts in different countries are beginning to maintain a jurisprudential dialogue, applying the ecocentric perspective through these principles of law to act for the conservation of biodiversity by opposing extractive projects that contribute to exacerbating climate change through the destruction of natural ecosystems.

The serious risks posed by climate change and the essential importance of Nature in addressing climate impacts call for new legal perspectives that protect Nature to protect life, and that means overturning the overwhelming legal protection of the human interest that currently exists in law.

Achieving this reinterpretation of the law within the climate litigation can also benefit the protection of Nature in different degrees, through judges' recognition of:

- An 'ecocentric punitive and restorative approach of law': by shifting environmental protection out of the exclusive domain of public law and creating access to the remedies available in private law, such as compensation for damages, mandatory precautionary restoration measures, among others, promoting the so-called 'punitive ecology' and 'restorative ecology'.[81]
- An 'ecocentric utilitarianism of Nature approach of law': A preventive approach, judicially recognising the rights of Nature in order to protect human rights, including the human right to a healthy environment. At the same time, human rights-based approaches provide a powerful framework of analysis and basis for recognising the rights of Nature, granting protection beyond the realm of public law and empowering Nature protectors to proactively seek private legal solutions.
- A 'pure ecocentric approach of law': by recognising the interdependence and interconnectedness of Nature, asserting the intrinsic value of Nature and the right to be protected from climate change and degradation. This could imply granting 'personality', legally recognising Nature as a living being, equal to humans. Likewise, it supposes creating a fiduciary duty of all interested parties starting with States, companies, and society in general.

As a result, these cases have the potential to influence both environmental law and human rights law on a much broader scale than the jurisdiction of the courts. In particular, the legal pluralism that characterises these numerous cultural contexts produces greater interpretive flexibility in the mindset of judges, especially in relation to environmental law. Therefore, the replicability of the ecocentric interpretation of law to other jurisdictions depends not on the existence of a legal framework that expressly recognises the rights of Nature, nor on the influence of Indigenous peoples, but on recognising the importance of Nature in responding to the climate emergency.

11.5 CONCLUSIONS: FROM CLIMATE LITIGATION TO ECOLOGICAL JUSTICE

As global warming accelerates, ecosystems are being pushed towards collapse, bringing the human right to a healthy environment and other fundamental rights down with them. The anthropocentric conception of environmental protection is not enough to combat the effects of climate change.

[81] In particular, the application of the exclusively French concept of 'pure ecological damage' to the field of climate change is an important legal development and a new way to challenge government and corporate acts that are detrimental to climate change mitigation. This application may allow the expansion of the right to a healthy environment to include certain duties with respect to Nature and the recognition of a general climate obligation based on general principles of law. This argument could be extrapolated to other jurisdictions as a call for an approach that pairs the right to a clean environment with the duty to care for elements of Nature and ecosystems as a whole.

Climate litigation worldwide raises awareness of the importance of Nature and the development of more Nature-centred solutions as key to both protecting Nature and increasing societal resistance to climate change. This 'ecocentric' approach to climate litigation has developed mainly in the Global South, where most of the world's biodiversity is concentrated. Climate change, however, is a universal concern, and therefore the experience from the Global South can contribute to Global North climate litigation and strengthen the ecocentric perspective on rights.

Some courts have made Nature legally visible by reinterpreting and expanding the meaning of certain norms and legal institutions historically used for different purposes. Even so, recognition of the rights of ecosystems remains rare because recognition of the rights of Nature was seen as collateral to the climate litigation and because the ecocentric approach is still not widely used, compared to the traditional rule of law.

Nevertheless, recognition of the importance of an ecocentric perspective in climate litigation has been steadily growing, not only because it is a solution that can help save us from the climate emergency but also because of increasing respect for the existence of non-human life forms and greater understanding of their vulnerability to the effects of anthropogenic climate change. This growing recognition is important because, in many cases, the changing climate is not the centre of legal demands but is instead integrated into litigation as an issue that aggravates pre-existing environmental and socioeconomic problems. The treatment of climate change as merely an add-on threatens the realisation of fundamental rights and the preservation of carbon sinks.

Recognition of the rights of Nature allows people to view Nature as a being or life form connected to themselves and worthy of protection, thereby strengthening the relationship between humans and Nature. When this happens, people are more likely to fight to protect that relationship when Nature is harmed or threatened, and they will expect the law to recognise it as the status quo of a viable and sustainable being. Courts will then be more receptive and understanding, and they will therefore be more likely to articulate new interpretations of law and pass new laws and constitutional provisions that ensure the protection of Nature. Perhaps equally important, if not more so, people will become more likely to see Nature, ontologically speaking, as beingness and a concern of all humankind, surpassing the idea of Nature as exclusively a question of the culture and spirituality of Indigenous peoples. In this way, people can bring civil actions to insist that those new rights of Nature be protected, and the burden shifts to those who threaten these rights of Nature to prove that there is no likely harm to its elements.

The main arguments, which allow the ecocentric approach of global warming in climate litigation, are focused on the protection of essential ecosystems in order to maintain balance within the climate system. The approach to the climate crisis based on intergenerational and interspecies equity and solidarity allows the progressive recognition of the legal personality and rights of ecosystems threatened by

climate change. While all cases bring a different legal argumentation depending on the jurisdictional level, there is a common element between international, national, and local norms of how the climate, human rights, and children can only benefit from the application of clear ecological standards, thus allowing for greater ambition on climate and the protection of the ecological integrity of ecosystems.

In sum, the ecocentric interpretation of law is one of the promising emerging trends in climate litigation in that it centres ecosystems and other elements of Nature and considers the impacts and root causes of climate change, as well as life projects and ecological functions. The 'ecocentric climate litigation' reaches the causes and consequences of the climate emergency, unlike other cases of climate litigation. That is, responsibility towards Nature, offering prevention, repair, and accountability to address climate change. All of these allow a reinterpretation of the legal framework without the need to introduce a reform recognising the legal personhood of Nature and its inherent value and rights, while still protecting human rights and climate objectives. In this way, climate litigation can serve as a critical means of fostering ecological justice.