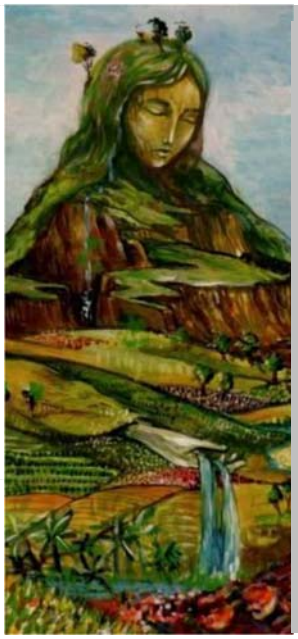

# JURISTIC PERSONHOOD FOR SACRED NATURAL SITES: A POTENTIAL MEANS FOR PROTECTING NATURE

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## ABSTRACT

The recognition that 'other-than-human' persons can be legal subjects has previously been adopted in forms of customary law but has been denied in most modern jurisdictions until recently. The legal concept of juristic personhood is rooted in *jus gentium* of Imperial Rome, which was also the basis of 'public trusts'. Juristic personhood has been expanded in some jurisdictions to include other 'legal subjects' with specific rights and obligations. Judges in India, for example, have recognised enspirited idols as having legal status with the same legal rights as human beings ever since the nineteenth century. Recently, several additional jurisdictions have recognised certain spiritual-natural entities as legal persons, making sacred rivers and mountains 'juristic persons'. In this article we review a number of recent cases from around the world that highlight this evolution of jurisprudence over time. The legal regime of juristic personhood may be an effective tactic for safeguarding enspirited sacred natural sites, because it conceptually resonates with the animistic world-view and relational ontologies of many Indigenous peoples. Further study (and litigation) is required for such an approach to become widely recognised, but it could become an effective tool for conservation of nature within community-conserved areas and protected areas.

**Keywords**: juristic personhood, sacred natural sites, protected areas, other-than-human persons, numina, ecocentrism, panentheism, spiritual governance, ICCA, OECM

## INTRODUCTION

With the realisation that loss of biodiversity and ecosystem services have become global crises (Ceballos et al., 2015; Ripple et al., 2017), there has been a recognition of the need to vastly increase the area of most landscapes and ecosystems under conservation management (Venter et al., 2014; Butchart et al., 2015; Wilson, 2016). Butchart et al. (2015) and others have pointed out that this will require approaches that go beyond conventional Western conservation frameworks, and have particularly advocated community-based management. Community-conserved areas have considerable potential as another form of area-based conservation, which could be enhanced and better secured for the long-term if they could also be endowed with legal recognition. Indeed, the 11th Aichi Target in the Strategic Plan for Biodiversity 2011–2020, drafted under the Convention on Biological Diversity, mentions "other effective area-based conservation measures" (OECM) as a basis for achieving 2020 targets of protection for ecologically representative areas (CBD, 2010, p. 9). Jonas et al. (2014) have suggested that these OECMs should include Indigenous Peoples' and Community Conserved Territories and Areas (ICCAs) that effectively conserve nature, even if that conservation is an ancillary outcome, not a primary objective, and only if the governance authority wants them to be recognised as such.

Many sacred natural sites (SNS) include biodiverse habitats or refugia that benefit from ritual protection in the context of animistic beliefs as distinct from protection motivated by a 'conservation ethic' (Kopnina, 2012) or legal prescriptions. While this may not apply to most SNS of mainstream religions, these SNS are often still important for biodiversity conservation. As far as many Indigenous peoples and local communities are concerned, the 'spirits of place' or *numina* that enspirit[1] most SNS are endowed with certain rights –'juristic persons', in all but name – and these communities

regularly invoke the *numina* enabling them to engage in 'spiritual governance' (Studley & Awang, 2016; Studley & Horsley, 2018).

SNS would be most effective as conservation areas if legal recognition was given to complement community-based customary ritual protection that is already in place. One possible nascent approach is to bestow *juristic personhood* on selected landscapes. Most conservation initiatives aimed at the legal protection of the environment are undertaken by *Homo sapiens* acting as the plaintiff (e.g. a person who brings a case against another in a court of law) and beneficiary. Under the aegis of juristic personhood, the *numina* that inhabit the SNS are themselves granted standing as plaintiffs in the defence of their domain, represented by a guardian, agent or 'next friend'.

Historically most European-based legal systems have "denied legal personhood to natural-spiritual entities" (Jonas pers. comm. 29/6/2017). This article highlights recent cases and trends in legislation that seem to be reversing that denial, based on notions of juristic personhood or nature rights. It can be argued that conceptually juristic personhood falls under the rubric of animism predicated on a posthuman world-view and ecocentric 'rights of nature' under the aegis of a pan(en)theistic world-view (Berry, 1988; Berry, 1996; McDermott, 2012; Nash, 1989; Zaleha, 2008).

## CONCEPTUAL UNDERPINNINGS

Animism is the most ancient, geographically widespread and diverse of all belief systems, adhered to today by some 300 million Indigenous people. It is predicated on the assumption that biophysical entities such as mountains, forests and rocks are typically enspirited by spirits or *numina* (Sponsel, 2007) or 'spirits of place' (ICOMOS, 2008).

A *numen* is a 'spirit of place' or genius loci that is present within an object or place (mountain, forest, spring, idol). *Numina* were very common in ancient Rome (Mehta-Jones, 2005), and the same concept continues to be widespread among Indigenous people throughout the world. In Tibet, for example, they are known as *gzhi bdag* (Tucci, 1980), and in the Andes they are known as *huacas* (Bunker, 2006), exemplified by *Pachamama*.

The posthuman represents a return to animism and constitutes a qualitative shift in thinking addressing the basic unit of common reference for our species, our polity and our relationship to the other non-human inhabitants of the planet (Clarke & Rossini, 2016).

Ecocentrism, in contrast, is a philosophy or perspective that places intrinsic value on all living organisms and their natural environment, regardless of their perceived usefulness or importance to human beings. It recognises that human beings have responsibility towards the ecosphere and moral sentiments that are increasingly expressed in the language of 'rights'. O'Riordan (1981) has suggested that Gaia has emerged as a popular symbol of ecocentrism primarily because it has come to be associated with the belief that humankind is not the most important species and human consciousness is not the only means through which nature should be judged and interpreted.

Panentheism, all is **in** God, is a related concept predicated on an intrinsic connection between all living things and the physical universe which accord with natural laws[2]. It assumes, however, that there is a separate and greater divine reality outside the material world. Panentheism is part of a gnostic mystic experiential tradition that is informed by Plato, Pierre Teilhard de Chardin and Thomas Berry by which all things are united under the world soul. Berry's mystic panentheism inspired movements for Earth Jurisprudence, Wild Law and Earth Law, although Berry himself emphasised the physical universe rather than the Earth (Berry, 1988).

## LEGAL FOUNDATION OF JURISTIC PERSONHOOD

Roman law recognised both *persona natura* (natural persons) and *persona ficta* (fictional persons) which were later known as 'juristic persons' (Gierke, 1954). 'Natural persons' is the term used to refer to human beings who have certain legal rights automatically upon birth, which expand as a child becomes an adult. A legal or juristic person refers generally to a 'legal subject' as an entity capable of holding rights, duties and capacities and includes both juristic and natural persons. This is not a human being, but one which society has decided to recognise as a 'subject of rights' and obligations (Shelton, 2015). These 'rights, duties and obligations' may include the capacity to sue or be sued, own or dispose of property, seek judicial relief, receive legacies, gifts and inheritances, incur debt, enter into contracts and comply with the laws of the state (de Vos, 2006). Perhaps the most familiar example of juristic personhood is the process of incorporating a business or trust, giving it many of the rights of a human being under the law, including certain protections and the right to sue in court.

The legal concept of personhood resonates with indigenous worldviews. In indigenous societies 'persons'

are not "a small select group of rational-minded individuals" (Oriel, 2014) but rather personhood is ascribed to a vast range of diverse human and non-human entities. From many indigenous perspectives human beings are not in a position to demarcate personhood, for they are just one element of a matrix of reciprocating persons that includes other-than-human persons (OTHP) such as *numina*.

This article aims to contribute to conservation practice by identifying legal tools (laws and rights) and legal regimes (juristic personhood and spiritual governance) that can safeguard SNS and protected areas. While it is important to avoid the mistake of valuing Indigenous peoples' and local communities' worldviews only if they contribute to conservation outcomes (Jonas et al., 2017), juristic personhood could create an interface and legal basis to bolster the effectiveness and endurance of OECM as sites for biodiversity conservation.

## RESILIENCE, EFFECTIVENESS AND SCOPE

There may be a temptation to ignore the potential of unconventional legal regimes such as juristic personhood to underpin conservation in enspirited SNS on the basis of an assumption that the underlying beliefs will not survive threats from globalisation and secularisation or that they are too limited in effectiveness or scale. We believe that this would be an error. Indigenous people have shown remarkable resilience and aptitude in recalibrating their cultures, and animism has not died (Tippett, 1973) or been replaced by secularism. Indeed, it has expanded and the communication tools of globalisation have allowed threatened Indigenous people groups to network with each other (e.g. Carlson, 2017). Tibetan lay people, for example, repeatedly have had to find ways of recovering their ancient culture within the space provided by official discourses (Studley & Awang, 2016). When China relaxed its religious policies in the 1980s, Tibetans and many other ethnic groups took full advantage. Many ethnic traditions were revitalised and celebrated and a profound nativisation of culture took place across the Tibetan Plateau. The revival of the *gzhi bdag* cult enabled lay Tibetans to reclaim their SNS as 'Tibetan' (Kolas, 2004) and it provided a means of defiance and ritual protest against oppression (Studley, 2005) Similarly, resurgent indigenous groups (often with a political agenda) have provided the impetus in New Zealand, India and Bolivia that has resulted in these countries granting juristic personhood to enspirited bio-physical entities.

The protection of SNS by most Indigenous people is not predicated on a conservation ethic but on ritual compliance enjoined by the *numina* that inhabits the SNS. The *numina* traditionally determine what constitutes 'good' and 'bad' behaviour within their jurisdiction – i.e. the SNS they inhabit (Studley, 2016). This phenomenon of *numina* acting as law-givers has been termed 'spiritual governance' (Bellezza, 1997, p. 41). Many SNS are actively patrolled by self-organised community protectors (Studley, 2016), who in some cases have been given legal authority even without designation of juristic personhood for the SNS.

Spiritual governance of SNS is also large in geographic scale, being a characteristic behavioural practice by which many of the world's Indigenous people ritually protect much of the world's biodiversity in SNS outside formal protected areas (Lynch & Alcorn, 1993). SNS are globally distributed and when aggregated may constitute 12 million km$^2$ or at least 8 per cent of the world's land surface (Bhagwat & Palmer, 2009). On the Tibetan Plateau alone, SNS have been estimated to cover 25 per cent of the territory (Buckley, 2007), or twice the size of Germany. Furthermore, SNS are nodes in a much larger ecological network and an integral part of the social fabric that permeates the whole landscape or territory.

Juristic personhood and spiritual governance can be important socio-cultural mechanisms that explain the extent of the spiritual dimension in the context of the wider landscape. Legal protection for SNS could complement spiritual governance and norm-based conservation with regulatory and judicial protections to make conservation more effective.

## LEGISLATIVE CHRONOLOGY OF JURISTIC PERSONHOOD AND 'NATURE RIGHTS' BASED ON EMBLEMATIC CASES

The granting of legal status to other-than-human entities has its origins in the Roman doctrine of public trusts which surfaced again during the 19th century in Colonial India. It has only been in the last twenty years that there has been a nascent trend to grant legal status and rights to spiritual-natural entities. These have been articulated in courts and legislatures under the aegis of legal rights for 'Mother Earth' in Ecuador and Bolivia, juristic personhood in New Zealand, India and Colombia, and the recognition of sacred natural sites in Africa. They are presented here in this order.

### The doctrine of public trusts

The doctrine of public trusts, which is well established in many countries, seems fit to provide an important staging post on the road to legal personhood (Shelton, 2015). The ancient laws of *jus gentium* referred to the rules and laws that were common in the nations within the Roman Empire, as formulated by the Byzantine

Emperor Justinian and later developed into the 'public trust' doctrine (Sandars, 1917) which held that the sea, the shores of the sea, the air and running water were common to everyone. This principle became the law in England, which distinguishes between private property capable of being owned by individuals and certain common resources that the monarch holds in inalienable trust for present and future generations.

Many common law courts have adopted and applied public trust law (Shelton, 2015). These laws confer trusteeship or guardianship on the government, with an initial focus on fishing rights and access to the shore, navigable waters and the lands beneath them. After the publication of an influential law review article by Joseph Sax (1970), courts in the United States began to expand the doctrine of public trusts and apply it to other resources, including wildlife and public lands (e.g. *Wade v Kramer*, 1984). This is included in the constitutions of Pennsylvania, Hawaii, Rhode Island and Alaska (Shelton, 2015). Public trusts, however, like corporations, are normally constituted only for the benefit of human beings. A more far reaching measure is required to confer juristic personhood and direct rights on other-than-human persons (OTHP) (Hallowell, 2002).

### The granting of legal status to other-than-human people

Various attempts have been made in modern times to accord legal status to OTHP. In 1925 colonial judges in India conferred juristic personhood on temples, idols and deities (e.g. *Mullick v Mullick*, 1925) contingent upon the enspiriting of an idol and Salmond's definition of 'person' (1913). Importantly, an idol (or a temple) does not develop into a juristic person until it is enspirited during a *Pran Pratishtha* ceremony

An enspirited idol of Radha Shyamsunderji (similar to the one above) was recognized as a "juristic person" in 1925 (Mullick v Mullick), Privy Council, Bombay High Court. With permission of Rrahul Yadav www.yadavhistory.com

An idol of Khrishna and Radha being enspirited at a pran pratisha ceremony at Sri Sri Radha Madhava Mandir, Kanpur, UP, India. In India enspiriting is required before the idol can legally become a "juristic person". Permission from ISKCON desiretree

(Mukherjea & Sen, 2013). Salmond defined 'person' (1913, p. 82) in the following way:

> So far as legal theory is concerned, a person is any being whom the law regards as capable of 'rights and duties'. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person even though he be a man.

In a seminal article, 'Should Trees Have Standing?', Stone (1972) argued that the granting of legal personality should not be limited to corporations and ships but should include animals, trees, rivers and the environment. Stone's innovation was to propose that the interests of nature should be represented in court by a guardian and that the burden of proof should rest upon the party that had allegedly compromised the integrity of the ecosystem or organism. Stone's comments echoed remarks made by US Supreme Court Justice William O. Douglas, who in a dissenting opinion argued in a landmark environmental law case (*Sierra Club v. Morton*, 1972) that environmental objects should have standing to sue in court.

In the years since Stone's and Douglas's comments, various innovations in law (outlined below in chronological order) have allowed for 'nature rights' to be recognised in Ecuador and Bolivia, 'juristic personhood' to be granted to biophysical entities in New Zealand, India and Colombia, and for SNS to be recognised in Africa.

### The case of recognising Mother Earth as a legal entity

In 2008, Ecuador became the first country in the world to declare in its constitution that nature is a legal entity. More specifically, nature was identified as *Pachamama*, an earth-goddess (mother goddess), who is a *huaca* or *numen* who may adopt the persona of the Virgin Mary (Derks, 2009). Both earth-goddesses and *numina* are world-wide phenomena which date from the Neolithic era. Under Articles 10 and 71–74, the Constitution (Republic of Ecuador, 2008) recognises the inalienable rights of ecosystems; gives individuals the authority to petition on behalf of ecosystems, and requires the government to remedy violations of *Pachamama* or

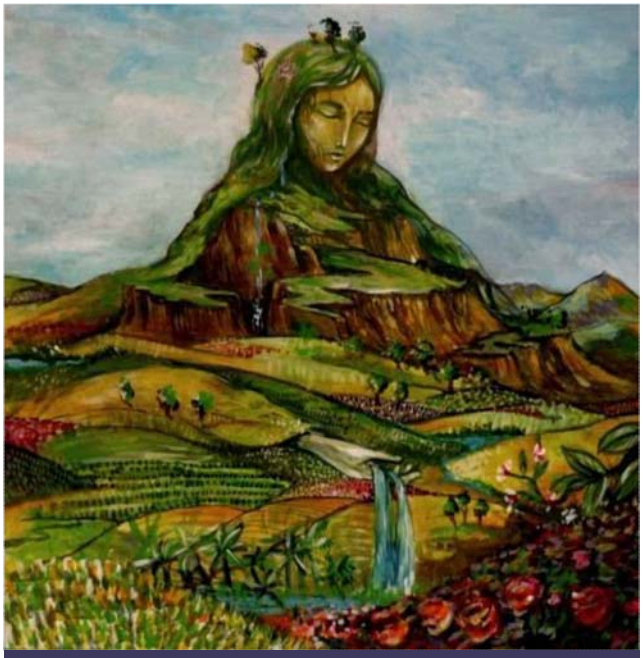
nature's rights. It states that: "Nature or PachaMama ... has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution" (Republic of Ecuador, 2008, Article 71).

On 21 May 2009, indigenous churches issued a joint declaration at the UN Permanent Forum on Indigenous Issues recommending that the forum recognise Mother Earth as a legal subject (World Council of Churches, 2009)

Bolivia followed Ecuador's example by similarly amending its constitution to give protection to natural ecosystems (Plurinational State of Bolivia, 2010). The amendments redefined the country's mineral deposits as 'blessings' and established new 'rights for nature', namely:

> ...the right to life and to exist; the right to continue vital cycles and processes free from human alteration; the right to pure water and clean air; the right to ecological balance; the right to the effective and opportune restoration of life systems affected by direct or indirect human activities, and the right for preservation of Mother Earth and any of its components with regards to toxic and radioactive waste generated by human activities (Plurinational State of Bolivia, 2010, Article 7).

Furthermore, the government appointed an ombudsman to defend or represent Mother Earth.



Bolivia enshrined natural world's rights with equal status for Pachamama in 2010. Permission from F Kemp http://shatfordcentre.com/osa/

The constitutional changes made by Bolivia and Ecuador both resulted from and have given new momentum to a 'Pachamama movement' (Weston & Bollier, 2013, p. 60) that has spread to sub-Saharan Africa, Australia, Canada, India, Nepal, New Zealand, United Kingdom and the United States. It has had a deep influence on *Harmony with Nature* resolutions in the United Nations (United Nations General Assembly, 2009; United Nations General Assembly, 2015; United Nations General Assembly, 2016). Efforts have also been made to secure a *Universal Declaration of the Rights of Mother Earth* at the UN, but these have not been forthcoming to date.

### The cases of *Te Urewera* and *Te Awa Tupua*, New Zealand

Although the foundations for 'ecosystems' to become juristic persons were first laid down by Stone and Douglas in the USA, the New Zealand government translated rhetoric into practice, when it introduced legislation that covered ecosystems.

In 2014, New Zealand was the first nation on Earth to give up formal ownership of a National Park, regulated through the Te Urewera Act (The New Zealand Parliamentary Counsel Office, 2014). The area known by the local *Tuhoe* as *Te Urewera* was declared a legal person with "all the rights, powers, duties and liabilities of a legal person" (The New Zealand Parliamentary Counsel Office, 2014, Clause 14(1)).

Personhood means that lawsuits to protect the land of *Te Urewera* can be brought on behalf of the land itself, obviating the need to show harm to a human being. The new legal entity is now administered by the Te Urewera Board which comprises joint *Tuhoe* and Crown membership who are empowered to file lawsuits on behalf of *Te Urewera* and "to act on behalf of, and in the name of, Te Urewera" and "to provide governance for Te Urewera" (The New Zealand Parliamentary Counsel Office, 2014, Schedule 6, Part 2, clauses 17a and 17b). *Tuhoe* spirituality is directly provided for in Board decision-making, whereby in performing its functions, the Board may consider and give expression to *Tuhoe tanga* (*Tuhoe* identity and culture) and the *Tuhoe* concepts that underpin nurturance, namely: *mana* (authority, identity), *mauri* (life-force), *kaitiaki* (spiritual guardians), *tikanga* (traditional custom), *ture* (societal guidelines), *tohu* (signs and signals), *tapu* (sacredness), *muru* (social deterrent) and *rahui* (temporary bans).

Three years later, the New Zealand House of Representatives passed the *Te Awa Tupua* (Whanganui River Claims Settlement) Bill (The New Zealand

The Whanganui River, New Zealand – declared a juristic person in 2017 © Geoff Cloake www.geoffcloake.co.nz

Parliamentary Counsel Office, 2016) at its third reading on 15 March 2017 (Scoop News, 2017), declaring that the Whanganui River was a legal person after 170 years of litigation by the Maori. The legislation established a new legal framework for the Whanganui River (or *Te Awa Tupua*) whereby "Te Awa Tupua is a legal person and has all the rights, powers, duties and liabilities of a legal person" (The New Zealand Parliamentary Counsel Office, 2016, Clause 14 (1)) predicated on a set of overarching 'intrinsic values', or *Tupuate Kawa*. The legislation makes provision for two *Te Pou Tupua* or guardians appointed jointly from nominations made by *iwi* (Maori confederation of tribes) with interests in the Whanganui River and the Crown. Their role is to: "act and speak on behalf of the Te Awa Tupua ... and protect the health and wellbeing of the river" (Clause 19 a and b). The *Te Pou Tupua* is 'supported' by a *Te Karewao*, or advisory committee comprising representatives of Whanganui *iwi*, other *iwi* with interests in the River and local authorities. The *Te Pou Tupua* enter into relationships with relevant agencies, local government and the *iwi* and *hapu* (sub-tribe) of the river[3].

Furthermore in a 'statement of significance' (schedule 8) recognition is also given to the *numina* or *kaitiaki* that inhabit each of the 240 plus rapids (*ripo*) on the Whanganui River and are each associated with a distinct *hapu*:

> The kaitiaki provide insight, guidance, and premonition in relation to matters affecting the Whanganui River, its resources and life in general and the hapu invoke (karakia) the kaitiaki for guidance in times of joy, despair, or uncertainty for the guidance and insight they can provide. (Schedule 8 (3)).

### The cases of the Ganga River and Uttarakhand Himalaya, India

On the 20 March 2017, the High Court of Uttarakhand in India (S*alim v State of Uttarakhand and Others*, 2017) declared that the: "Ganga and Yamuna Rivers and all their (115) tributaries and streams.... are juristic persons with all the corresponding rights duties and liabilities of a living person" (Clause 19).The court appointed three officials to act as legal custodians responsible for conserving and protecting the rivers and their tributaries and ordered a management board be established within three months. The court's decision was necessary because both rivers are "losing their very existence" (Clause 10) and both "are sacred and revered and presided over by goddesses" (Clause 11).

On 30 March 2017, the High Court of Uttarakhand re-examined a previous (failed) petition (*Miglani v State of Uttarakhand and Others*) and declared that:

> We, by invoking our *parens patriae*[4] jurisdiction, declare glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests, wetlands, grasslands, springs and waterfalls, legal entity/ legal person/juristic person/juridical person/ moral person/artificial person having the status of a legal person, with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them. They are also accorded the rights akin to fundamental rights/ legal rights (Clause 2).

In contrast to the earlier judgment, the court recognised the role of other riparian states (under the aegis of an inter-state council), community participation and the importance of extending juristic personhood to the Himalayan ecosystem. It appointed six government officials to act as persons in *loco parentis*[5] of the geographic features in the State of Uttarakhand and permitted the co-option of seven local representatives. The judgment quotes repeatedly from *Secret Abode of Fireflies* (Singh, 2009), which underlines the sacredness of mountains (as the abode of deities) and of certain Indian trees and plants, and emphasises the 'rights for nature'.

On 7 July 2017, in an apparent setback, The Supreme Court of India (*State of Uttarakhand v Salim*) 'stayed' the landmark judgment of 20 March (*Salim v State of Uttarakhand and Others*, 2017) that granted juristic personhood to the Ganga and Yamuna Rivers (and their tributaries). A stay is a suspension of a case or a suspension of a particular proceeding within a case. However, this stay resulted not from a challenge to juristic personhood, which was accepted by the Supreme Court, but as a result of ambiguity regarding accountability of damage done to the rivers (Times of India, 2017).

### The case of the Atrato River Basin, Colombia

On the 2 May 2017, it was publically announced in the national newspaper of Columbia, *El Tiempo* that the constitutional court had declared the Atrato River Basin a 'subject of rights' meriting special constitutional protection (ABColombia, 2017). The court called on the state to protect and revive the river and its tributaries and the Chocó. The state was given six months to eradicate illegal mining and to begin to decontaminate the river and reforest areas affected by illegal mining (some 44,000 ha). The court also ordered the national government to exercise legal guardianship and representation of the rights of the river (through an institution designated by the President of the Republic), together with the indigenous ethnic communities (mostly Emberas) that live in the Atrato River Basin in Chocó. The legislation may allow the Emberas to secure standing and protection for some of their *jaikatuma* or spirit mountains (Justicia y Pas, 2009) and defend their *Sitios Sagrados Naturales* or SNS (Organización Indígena de Antioquia) (OIA, undated, CRIC, undated).

The Ganges River, India, and its 115 tributaries declared as multiple juristic persons in 2017 by the Uttarakhand High Court, Nanital, Kumaon Region, Uttarakhand State, India. Permission from Richard Haley http://www.himalayamasala.com/

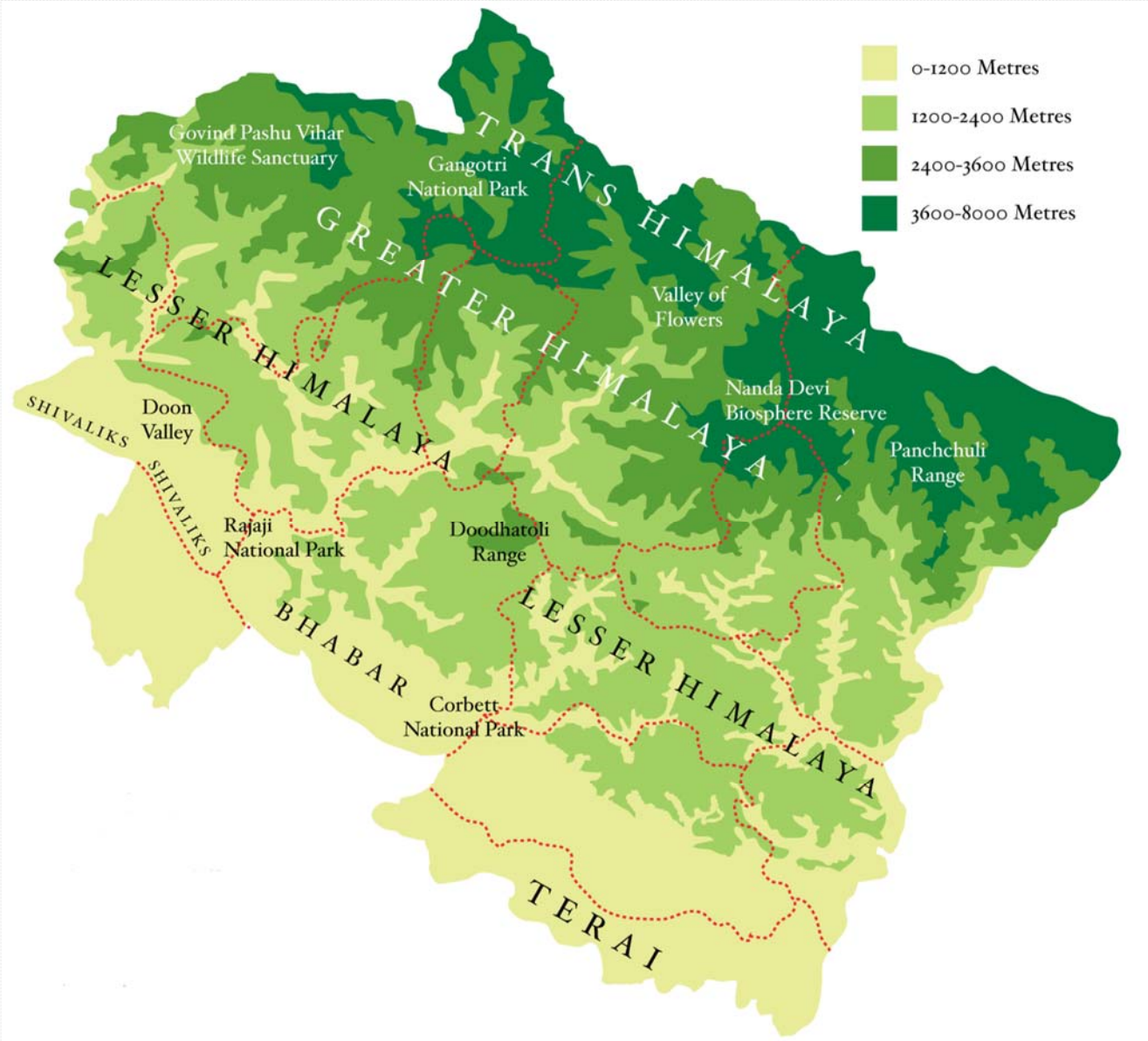
### The case of the African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights resolved in May 2017 to "protect Sacred Natural Sites and Territories" (Clause 44 (iv)). This was in response to a submission from the African Biodiversity Network (ABN) and Gaia Foundation of *A Call for Legal Recognition of SNS and Territories and their Customary Governance Systems* (ABN, 2016, p. 1), which was predicated on Gaian panentheism.

## LITIGATION BASED ON NON-HUMAN LEGAL PERSONHOOD

There is evidence that constitutional and legal provisions are beginning to give rise to litigation and enforcement based on the legal personhood of nature. In Ecuador there have been two cases:

The first lawsuit (*Wheeler v DPGEL*, 2011) was filed against the local government near Rio Vilcabamba in March 2011, which was responsible for a road expansion project that dumped debris into the river, narrowing its width and thereby doubling its speed. The project was also done without the completion of an environmental impact assessment or consent of the local residents. The




The Himalayan Ecosystem of Uttarakhand (India)– was declared as multiple juristic persons in 2017 by the Uttarakhand High Court, Nanital, Kumaon Region, Uttarakhand State, India. Permission from Rajiv Rawat ©1997-2010 http://uttarakhand.org

case was filed by two residents, citing the violation of the Rights of Nature, rather than property rights, by the damage done to the river. The case was especially important because the court stated that the rights of nature would prevail over other constitutional rights if they were in conflict with each other, setting an important precedent. The proceedings also confirmed that the burden of proof to show there is no damage lies with the defendant. Though the plaintiffs were granted a victory in court, the enforcement of the ruling has been lacking, as the local government has been slow to comply with the mandated reparations (Daly, 2012).

In a second case (REANCBRN, 2011) on June 2011 the government of Ecuador filed a case against illegal gold mining operations in northern Ecuador in the remote districts of San Lorenzo and Eloy Alfaro. The prosecution argued that the rights of nature were violated by the mining operations, which were polluting the nearby rivers. This case was different from the previous case in that it was the government addressing the violation of the rights of nature. The court's decision was also swiftly enforced, as a military operation to destroy the machinery used for illegal mining was ordered and implemented (Daly, 2012)

## DISCUSSION

### Matching indigenous beliefs with modern jurisprudence

Both anthropologists and lawyers recognise that there are major differences and tensions between indigenous beliefs and modern jurisprudence and have suggested alternatives to 'juristic personhood'. Bohannan (1957) has suggested that 'juristic' entities should be locally defined rather than by the court or government and Petrazycki (2011, p. 189–190) has suggested "legal relationships with animated entities" which resonates with animistic relational ontologies. Given the complexities and disparate nature of local definitions and norms it might be easier for enspirited SNS to be "integrated into the circle of 'legal subjects' in order to survive" (Stavru, 2016) and for the concept of juristic personhood to be infused with indigenous meaning (Cajete, 2000).

Clearly more research is required in order to address legal systems that do not appear to be fit for purpose and, under the aegis of legal pluralism and a sui generis framework, to identify legal systems predicated on ethno-jurisprudence and customary law.

### Congruence with animism

Juristic personhood resonates with the beliefs underpinning most sacred natural sites. SNS are typically enspirited by a unique geospecific spirit with a unique personhood capable of spiritual governance. This is predicated on a pluriversal animistic tradition which does not resonate well with ecocentrism, panentheism or pantheism. Ecocentrism is monistic and the concept of 'rights' is a construction from outside an indigenous animistic context (Solon, undated). Panentheism assumes an intrinsic connection between all living things and the physical world and focuses on gnostic mystic advancement in order to merge with the world soul, which is an alien approach for animists. Pantheism is popular in some conservation circles (Harrison, 2004). It does not recognise deities who are personal and anthropogenic and the approach robs particular life forms of their own measure of significance and agency (Plumwood, 1993) and discounts "the particularity of place and ecosystem and the diversity of life" (Northcott, 1996, p. 113).

### Legal acceptance

Colonial judges in India (*Mullick v Mullick*, 1925) were able to employ "the great legal freedom to personify, almost it would seem on a whim" (Naffine, 2009, p. 166) allowing them to infer juristic personhood on an idol and operating on the assumption that an enspirited idol certainly had standing. The colonial judges employed a line of reasoning that mirrors a key element of the argument in favour of legal standing for other OTHP; the directly affected parties deserve the courts' consideration of their interests, and may also require the courts to appoint appropriate legal representatives to argue their case for them (Totten, 2015). In this context, it appears perverse that dissenting justices in North America could only enquire about standing for natural entities in two cases (*Sierra Club v Morton*, 1972; *Reece v Edmonton City*, 2011).

Some scholars have suggested that extensive legislative change would be necessary to recognise legal standing for OTHP. A case such as *Reece v Edmonton City* (2011), however, suggests that it is already within the power of the judiciary to consider these issues. As Chief Justice Fraser (dissenting) asserted, unusual cases such as *Reece*[6] offer a fertile ground for the growth of law in a changing society. It appears that the judiciary already has at its disposal the legal tools necessary to accommodate standing for SNS and protected areas, and judges need only to make use of them (Totten, 2015).

There appears to be no reason why 'juristic personhood' cannot be used as part of a legal regime to ensure standing for protected areas (Sobrevila, 2008) and particularly for enspirited SNS. If *numina* or SNS are granted legal status as juristic persons they have standing as a plaintiff. If their bio-cultural integrity is compromised (if for example a SNS is threatened with clear felling), then they can seek redress in court through a guardian, and the burden of proof lies with the offending party/parties.

### The question of guardians

Although juristic persons have standing, they are also perpetual minors and require guardians to represent their interests (especially in court) ideally under the aegis of a local 'community of believers' (Marsilius of Padua 1324 in Emerton, 2015, p. 72). Marsilius embraced a form of democracy that views the people, or the 'community of believers', as the only legitimate source of political authority. He argued that sovereignty lies with the people, and that citizens should elect, correct, and, if necessary, depose their political leaders. In the context of Tibetan SNS, for example, appropriate guardians might be the hereditary village leader, or a trance medium, or a divination master that will establish the wishes and demands of the *numina*. There are a number of judicial options if minors are not represented. Under the aegis of Western jurisprudence, judges are able to appoint, by court order, a guardian a*d litum*[7] for the duration of the legal action or a state

guardian *parens patriae*[8] on a longer-term basis. In a Hawaiian court case (MKAH v BLNR, 2013), for example, a descendent of the *Kanaka Maoli* (native Hawaiians) wrote an *affidavit* (accepted by the court) that granted him power of attorney to act and speak on behalf of a spirit named *Mo'oinanea* that inhabits mount *Mauna Kea*.

### Scaling-up

Most enspirited SNS are small, such as those in SW China, and typically average 250 ha (Studley, 2016) and are therefore ritually protected by a small group of local people, which could represent the SNS in court. Challenges arise however in terms of standing for larger natural entities such as the Great Barrier Reef or the Mekong River. The Great Barrier Reef, an important cultural site for many Aboriginal and Torres Strait Islander peoples, is being degraded as a result of global carbon emissions (Marshall & Johnson, 2007), but who will represent it in court and who can be sued? The Mekong is especially sacred to Buddhist and animistic communities who live along its banks in the seven nations (Tibet, China, Myanmar, Lao PDR, Thailand, Cambodia and Viet Nam) through which it flows. It presents different problems because it crosses multiple borders and jurisdictions. As a result, appointing guardian(s) would require transnational regional cooperation, and enforcement would require several countries working together with several sets of national legislation.

### Future priorities

Given the current threatened status of SNS in many parts of the world and their lack of recognition, it would appear that the granting of juristic personhood to those SNS that are outside of recognised protected areas is more of a priority than those already under the aegis of conservation designations. Furthermore, juristic personhood is augmented by customary laws, *sui generis* frameworks and ritual protection of SNS that are often extant in indigenous societies. Although as a legal term 'juristic personhood' or its cross cultural equivalent does not exist in lay Tibetan and may not appear in the lexicons of many Indigenous people, as a concept it resonates with animist worldviews and ontologies (Studley, 2016).

Although SNS "occur in all IUCN categories of protected area" (Dudley, 2008) it is apparent that their extent, distribution and spiritual governance is largely unknown, and even less is known about SNS in the homelands of Indigenous people (Studley, 2016). It is vitally important especially when establishing or expanding protected areas to identify and map SNS and to record the expectations of the *numina* who inhabit the SNS and any customary laws that might affect conservation outcomes, positively or negatively.

## CONCLUSIONS

Recent legislation has provided conservationists with new ecocentric legal tools: 'nature rights' and 'earth law' and legal regimes; 'juristic personhood' and 'spiritual governance' to safeguard SNS and ecosystems. There is no reason why the legal regime of juristic personhood and ecocentric legal tools cannot both be used to safeguard protected areas and OECM, especially given the use of the latter in litigation in Ecuador (Daly, 2012) and the recent recognition of SNS in Africa (ACHPR, 2017) and elsewhere. The legal regime of juristic personhood and spiritual governance mediated by *numina* may be the optimal choice for safeguarding enspirited SNS because, unlike ecocentrism or panentheism, it conceptually resonates with the animistic worldview and relational ontologies of many Indigenous peoples.

Although the semantics vary, most of the Indigenous people who live closest to most SNS accept other-than-human personhood and experience culturally specific legal relationships with entities who are *de facto* juristic persons. These relationships are predicated on contractual reciprocity between local people and the *numina*, which provide protection and blessing providing they are honoured, appeased and empowered to exercise spiritual governance and custodianship over their domain.

Currently, many enspirited SNS in the homelands of Indigenous people are seemingly rendered 'invisible' or discursively excluded because they are owned and governed by other-than-human persons. This would seem to be a lost opportunity for conservation, as well as a disservice to Indigenous people. Recognition of enspirited SNS as juristic persons with legal standing should lead to their recognition by IUCN as a governance sub-type of ICCA and OECM under the aegis of a spiritual governance type. The result could lead to the safeguarding of SNS under national law and recognition internationally, a benefit for both Indigenous people and nature conservation. The concept of juristic personhood for rivers, glaciers and mountains could be a significant and effective addition to the tool-box available to conservationists and protected area managers.

## ENDNOTES

[1]Enspiriting is an animistic ritual (and sometimes liturgical) process whereby a spirit or numina is 'called down' or invoked by animistic humankind and invited to inhabit a biophysical entity (mountain, forest, rock, idol) which becomes enspirited permanently providing the spirit is honoured and appeased on a regular basis.

[2]Natural law is a philosophy asserting that certain rights are inherent by virtue of human nature, endowed by nature and that these can be understood universally through human reason.

[3]Most recently, the New Zealand government announced that it would grant 'legal personality' to a third site, Mount Taranaki, with the government and eight local Maori tribes acting jointly as guardians (Aigne Roy, 2017).

[4](parents of the nation) is a public policy power of the state to intervene as legal guardian of an entity in need of protection.

[5](in place of a parent) refers to the legal requirement of a person (or persons) to take on the responsibilities of a parent for another entity.

[6]The Queen's Bench of Edmonton Court decided on 20/8/2010 that the City of Edmonton had not violated the Animal Protection Act by keeping Lucy the Elephant in Valley Zoo. The application was brought forward by a number of organisations concerned for the health and welfare of Lucy, a lone Asian elephant kept at the zoo. In dismissing the appeal, the majority of the court upheld the finding below that the application for a declaration was an abuse of process. Leave to appeal to the SCC was refused [2011] SCCA No 447.

[7](guardian appointed by a court) is someone appointed by the court to represent a client for the duration of a particular legal action.

[8](parents of the nation) is a public policy power of the state to intervene as legal guardian of an entity in need of protection.

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## RESUMEN

El reconocimiento de que personas "que no son humanas" pueden ser sujetos de derecho había sido acogido anteriormente en formas de derecho consuetudinario, pero hasta hace poco había sido negado en la mayoría de las jurisdicciones modernas. El concepto legal de condición de persona está arraigado en el jus gentium de la Roma imperial, que también sirvió de base para los "fideicomisos públicos". La condición de persona ha sido ampliada en algunas jurisdicciones para incluir otros “sujetos de derecho” con derechos y obligaciones específicos. Tal es el caso, por ejemplo, de los magistrados en India, que desde el siglo XIX han reconocido a ciertos ídolos inspiradores como poseedores de una condición jurídica con los mismos derechos legales que los seres humanos. Recientemente, otras jurisdicciones han reconocido ciertas entidades naturales-espirituales como personas jurídicas, atribuyendo a ríos y montañas sagradas la condición de "persona jurídica". En este artículo, revisamos una serie de casos recientes de todo el mundo que destacan la evolución de esta jurisprudencia a través del tiempo. El régimen legal de la personalidad jurídica puede ser una táctica eficaz para salvaguardar los sitios naturales sagrados, porque resuena conceptualmente con la visión animista del mundo y las ontologías relacionales de muchos pueblos indígenas. Aunque se necesitan estudios (y litigios) adicionales para que este enfoque sea ampliamente reconocido, bien podría convertirse en un mecanismo eficaz para la conservación de la naturaleza dentro de áreas protegidas y áreas conservadas por la comunidad.

## RÉSUMÉ

La reconnaissance que des entités «autres que l'homme» peuvent être considérées comme des sujets de droit a déjà été adoptée sous forme de droit coutumier, mais elle a été refusée jusqu'à récemment dans la plupart de juridictions modernes. Le concept légal de personnalité juridique est enraciné dans le jus gentium de la Rome impériale, qui était aussi la base des «trusts publics». La personnalité juridique a été élargie dans certaines juridictions de façon à inclure d'autres «sujets juridiques» avec des droits et obligations spécifiques. Les juges en Inde, par exemple, ont reconnu depuis le XIXe siècle que les idoles des esprits avaient un statut légal et les mêmes droits légaux que les êtres humains. Récemment, plusieurs autres juridictions ont reconnu certaines entités spirituelles-naturelles comme des personnes morales, faisant des rivières et des montagnes sacrées des «personnes morales». Dans cet article, nous passons en revue un certain nombre de cas récents à travers le monde qui mettent en évidence cette évolution de la jurisprudence au fil du temps. Le régime légal de la personnalité juridique pourrait constituer une technique efficace pour sauvegarder les sites naturels sacrés, car il résonne sur le plan conceptuel avec les ontologies animistes et relationnelles de nombreux peuples autochtones. Des études complémentaires (et des procédures judiciaires) seront nécessaires pour qu'une telle approche devienne largement reconnue, mais elle a le potentiel de devenir un outil efficace pour la conservation de la nature dans les aires de conservation communautaires et les aires protégées.