19. The Recognition of the Rights of Nature in Latin America – The Lost Linkage with the Rights of Future Generations

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Abstract: *This Chapter involves a study on the Rights of Nature (RoN). RoN comprehends the establishment of a set of specific rights, as well as the recognition of a new legal subject (nature) at the national and at the international levels. For example, on the international level, various international forums slowly envision nature as a potential right holder. Even though this has yet to transpire in formulating and adopting an international treaty establishing that, the language of the RoN now commonly appears in different international soft law documents. Latin American jurisdictions have served as inspiration for those documents, since the recognition of RoN in the region has been considered as paradigmatic. However, the regional recognition of nature's rights has not been free of ambiguities, especially when it is considered together with the recognition of another new legal entity: the Future Generations. The interactions between those new right holders in Latin America have been scarcely studied; this contribution seeks to fill that gap.*

1. Introduction

Recognising the Rights of Nature (RoN) is part of a global trend, in which Latin America has been considered a success story. Specialised scholarship highlights that in some Latin-American jurisdictions, the recognition of RoN has been enshrined at the constitutional level or, alternatively, proclaimed by constitutional courts or tribunals. According to the scholarship on the subject, such recognition entailed a breakthrough in protecting nature as it extends legal protection to the environment for its intrinsic value.[1] The purpose of this Chapter is to subject that statement to critical analysis. Unlike much of the regional and international scholarship that has studied the rise of the RoN in Latin America, we will not assume that such recognition has occurred innocuously or that – in any case – it

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1 The terms 'nature' and 'environment' are different. While 'environment' refers to nature's attributes that human beings need to live, 'nature' also includes elements that, without directly benefiting humans, are part of the integrated cycles where living and non-living organisms develop and that make life possible. Although this differentiation can have philosophical significance (and even legal consequences) in this contribution we will use 'environment' and 'nature' synonymously.

has not caused complications in the legal systems where RoN have been incorporated.

To demonstrate our position, we will take into account two tendencies we have observed during the course of this research:

(a) Recognition of the RoN in the region has been executed without a detailed explanation of why this process was necessary. Some of the questions that remain unanswered are: Was the recognition of the RoN vital, bearing in mind that there were already legal frameworks in place in the Region protecting the environment? Was the recognition of the RoN warranted, bearing in mind the cost of implementing a new set of rights?
(b) It is a fact that that recognition usually occurs in connection with the implementation of the rights of future generations. It should be borne in mind that in both scholarship and adjudication these two sets of rights have been considered together as if they were part of a similar phenomenon. Indeed, the proclamation in the region of the RoN is usually followed by references to the rights of future generations. Are those two sets of rights connected? Furthermore, if they are connected, how does their normative interplay transpire?

To find answers to these questions, we will consider the legal reasons behind the recognition of the RoN in Latin America. This issue has scarcely been explored. That exercise will allow us to observe that the primary reasons for recognising the RoN have been procedural-based. For example, the proclamation of the RoN leads to the recognition of nature as an entity capable of holding rights – therefore – as a legal subject. As a result, nature has access to proceedings that are capable of protecting its interests, which were previously non-existent. Some of these proceedings are constitutional remedies which can protect nature directly. Another example of the procedural reasons behind the recognition of the RoN is that through those rights, the rights of future generations can be made effective. To explain this, it is important to bear in mind that the implementation of the rights of future generations faces theoretical and practical limitations. For example, in a dispute settlement context it is difficult to concretely determine the rights or interests of future generations. Without that determination, these rights and interests are merely rhetorical recognitions with no practical application.

After reviewing the procedural reasons for the recognition of the RoN mentioned above, we have found that in both cases the RoN have been

formulated directly or indirectly in connection with the rights of future generations and -in some cases- with the sole purpose of making the implementation of those rights possible. This suggests that the recognition of the RoN in Latin America has not been based on the value nature possesses in and of itself, but for the service it can provide to human interests. We will consider the inconsistency of that outcome, and the theoretical incompatibility between the Latin American practice in the matter and the reasons why the RoN were formulated in scholarship in the 1970s.

To explore all these points, we will begin (in Section 2 of this Chapter) by describing the emergence of the RoN in law and the particular theoretical discourse that promoted its recognition. At the same time, we will consider a similar trend that led ultimately to recognising the rights of future generations. In Section 3, we will describe the emergence of the RoN in Latin America and the considerations that scholarship has given to that process. With that in mind, we will revise the antecedents that allowed nature's personhood to be recognised in the region, such as the relativisation of humans' monopoly on the legal subjectivity given the recognition – to a certain extent – of animals' rights. In Section 4 we will review the recognition of the RoN in the jurisdictions of Ecuador, Bolivia and Colombia, and inquire into the reasons that led to that process. This exercise will allow us to see that the recognition of the RoN and its utilisation for procedural reasons is due to the lack of theoretical differentiation between the interests protected through the RoN and those protected through the rights of future generations. We will then explain how that lack of differentiation can have theoretical and practical implications.

2. Setting the Stage: The Rights of Nature and the Rights of Future Generations as Distinctive Discourses

The argument that nature can hold rights appeared in legal discourse 40 years ago.[2] The discussion centered on analysing the feasibility of the existence of those 'rights' on philosophical and legal grounds. An example

2 Nonetheless, this had some precedents. In this regard, Kauffman and Martin recalled that '[w]hile RoN law only emerged recently, RoN's normative foundations have developed over centuries in both Western and non-Western cultures.' See: Craig M Kauffman and Pamela L Martin, 'Constructing Rights of Nature Norms in the US, Ecuador and New Zealand' (2018) 18 Global Environmental Politics 47.

of this was the attempts to articulate the subjectivity of nature (or the subjectivity of sections of nature such as rivers, seas, lakes and land among others) in the 1970s. In the case of forests, that defense was made in the writings of Professor Christopher D Stone.[3] His thesis influenced legal scholarship in the United States, igniting a debate about the feasibility of recognising the RoN in the legal sphere. An important aspect of Stone's thesis is that it was a first defense of the existence of the RoN using normative language and not merely arguments based on environmentalist ethics. This made it possible to consider broadening the notion of legal personhood and, as a result, the reformulation of rights theory.[4]

After that first impulse, the existence of the RoN was received – albeit tenuously – in some individual votes of judges from the United States.[5] Thus, it became necessary not only to defend the existence of the RoN but also to clarify their content. Environmental ethics,[6] which is the discipline that influenced the formulation of the RoN in law, had already proposed three possible aspects of those rights by proposing that nature could have '(...) the right to exist, the right to continue to exist, and the right, if degraded, to be restored.'[7] These postulates were later transferred to the legal field.

3 Christopher D Stone, 'Should Trees Have Standing? – Towards Legal Rights for Natural Objects' (1972) 45 Southern California Law Review 450.

4 Stone mentions how in ancient times, children, women, enslaved people, or people with disabilities, hardly had the status of subjects of law; and that for their full recognition it was necessary to expand the notion of legal personhood. He also recalled that the next step in that direction was the recognition of the personhood of nonhuman entities, like corporations or companies. His statements are an accurate account of the expansion of legal subjectivity in the history of law. However, there is an element that is not sufficiently highlighted: the fact that whether in the case of children, women, enslaved people, or corporations, the legal interests protected by the Law always involved human beings. In the case of corporations, the presence of human interests is the reason for creating such fictions. This is fundamental since – as we shall see in subsequent sections of this Chapter – it is the human interest which seems to be behind the recognition of nature's personhood in Latin America.

5 For example, in the dissenting opinion of Justice Douglas, in the case Sierra Club v Morton (Secretary of the Interior), Certiotari to the United States Court of Appeals for the Ninth Circuit, No 70–34, 19 April 1972.

6 Andrew Brennan and Norva Y S Lo, 'Environmental Ethics' in Edward N Zalta (ed), *The Standford Encyclopedia of Philosophy* (Summer 2022 Edition) <https://perma.cc/U85H-D2VJ>. See, also: Roderick Nash, *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press 1989).

7 Olivier A Houck, 'Noah's Second Voyage: The Rights of Nature as Law' (2017) 31 Tulane Environmental Law Journal 31.

An example of the reception of those propositions in law is Article 4 of the Ugandan National Environmental Act of 2019, which states: '(...) nature has the right to exist, persist, maintain and regenerate its vital cycles (...).'[8] This also happened in the United States with the enactment of the Lake Erie Bill of Rights which stated that the lake had the right '(...) to exist, flourish, and naturally evolve.'[9] However, the most striking examples of the reception of the content of the RoN come from Latin America where that language was enshrined in provisions at the highest hierarchical level such as the Constitution of Ecuador. The reasons why the language of the RoN gained traction in this part of the world come down to several factors. One factor was the regional trend of expanding the theory on legal personality (which happened with the recognition – to a certain extent – of the legal subjectivity of certain animals). Another factor was that the language around RoN offered regional political parties the necessary legitimacy to implement social reforms by differentiating themselves from previous political models.

Be that as it may, the fact that Latin America is where the RoN have been most clearly recognised, and where the RoN have been codified more precisely (by explicitly pronouncing their content), does not mean that the process has been straightforward (this will be discussed in Section 4 of this contribution).

It is important to point out at this juncture that at the same time as the discussions on the RoN unfolded, the debate on the existence of obligations of current generations *vis-à-vis* future generations also arose in law. The theoretical problem linked to the acceptance of obligations towards future generations revolves around the feasibility of those obligations being able to operate in a legal system. That limitation results from the fact that those obligations would need to be fulfilled to benefit a group that may or may not exist in the future, and whose interests are not determinable in the present.[10] The task of defining who makes-up that group and their legal interests are enormous. Furthermore, the existence of obligations of one generation with respect to another forces the formulation of those obligations in a way that speaks of an entity capable of holding rights that

8 Mentioned in the Report of the Secretary-General, Harmony with Nature, Seventy-Fourth Session, Sustainable Development, A/74/236, 26 July 2019, para. 33.

9 ibid., para. 35.

10 See: Wilfread Beckerman and Joanna Pasek, *Justice, Posterity and the Environment* (OUP 2001) 11–28.

can be claimed. That leads to asserting the existence of a new subject of law (future generations).[11]

Therefore, the discussion regarding the recognition of nature's personhood runs parallel with the debate on the existence of the rights of future generations.[12] In fact, in Latin America, the discourse that defends the existence of the obligations of current generations *vis-à-vis* future generations cannot be separated from the RoN's discourse since – as we shall see below – both were formulated in a close and even intermingled manner (Section 4.1). One of the reasons for this is that the rights of future generations were expressed in such a way as to be placed close to the RoN.[13] This is because realising both notions required the expansion of the theory of legal subjectivity, and because both are linked to environmental matters.

However, it is crucial to bear in mind that both notions are still different. Both have particular theories supporting their existence and – thereupon – they legally materialize with different scopes of protection. For example, the rights of future generations do not aim at protecting only future generations' interests on environmental matters. The rights of future generations can encompass the protection of the interests of that group in other areas.[14] On the other hand, both of these new 'typologies of rights' adopt different

11 Regarding this discussion, see: Hendrik Philip Visser't Hooft, 'The Theory of Justice and our Obligations Towards Future Generations' (1987) 73 *Archiv für Rechts- und Sozialphilosophie* 30 and Bruce R Reichenbach, 'On Obligations to Future Generations' (1992) 6(2) Public Affairs Quarterly 207.

12 An example of this is the Constitution of Norway, which states that '(...) [n]atural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.' See: Axel Gosseries, 'On Future Generations' Future Rights' (2008) 16(4) Journal of Political Philosophy 446, 448. In the case of Latin America, the Constitution of Bolivia is to be highlighted. For some authors, that Constitution recognizes the RoN while recognizing – at the same time – in its Article 33, the rights of future generations. Article 33 of that instrument asserts that people have the right to a healthy, protected, and balanced environment, adding that its exercise should allow individuals and communities of present and future generations to develop in a normal and permanent way (Constitution of Bolivia of 2009). The parallel development of the right of future generations (to a healthy environment), with the RoN is not a coincidence; both appeared when environmental concerns acquired global prominence.

13 On both topics, see: Nuria Belloso Martin, *El Debate sobre la Tutela Institucional: Generaciones Futuras y Derechos de la Naturaleza* (Universidad de Alcalá 2018).

14 An example of this can be seen in the UNESCO Declaration on the Responsibility of the Present Generations Towards Future Generations of 1997. In that instrument, there is a recognition of future generations' interests to freedom of choice, human genome and biodiversity, cultural diversity, and cultural heritage. See: Declaration on

strategies when defending their existence, as each of them is supported by different philosophical theories. In fact, both notions respond to a different view on the paradigm shift around the relationship of human beings with nature; therefore, they are constructed differently in normative language.

To understand this claim, it is necessary to keep in mind that in the field of environmental ethics, the view that human beings are the only entity of value, and nature only an object of exploitation, is called the anthropocentric approach. There are also non-anthropocentric views, which include the biocentric and ecocentric approaches. RoN and the rights of future generations are expressions of the last two approaches respectively and – to some extent – use them as justification for their legal crystallisation.[15] Biocentrism refers to the protection of living beings for their intrinsic value. Part of this theory defends the attitude that not only humans but also other beings (especially sentient beings) require protection,[16] which leads to the recognition of animal rights. Furthermore, since that theory disconnects the legal protection to be afforded from the immediate benefits individuals would receive, it served as a basis for recognising environmental rights for those who are not yet born. On the other hand, ecocentrism argues that living beings and natural processes are worthy of protection[17], which served as the basis for the formulation of the RoN.

Over the years, the philosophical approaches that forged the new relationship between human beings and nature achieved greater clarity. In contrast, legal scholarship faced complications in achieving similar results.[18] The reason for this is that the incorporation of the RoN and the rights of future generations in law is an intricate exercise. For example, legal scholarship would need to incorporate both new sets of rights in a way that continued to respect the coherence of how law has traditionally worked. To achieve that, the legal scholarship would need to explain why it is indis-

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the Responsibilities of the Present Generations towards Future Generations, Adopted by the General Conference of UNESCO, 29th Session, 12 November 1997.

15 Although these acronyms cause certain problems, we use them for practical reasons. See: Lars Samuelsson, 'At the Center of What? A Critical Note on the Centrism-Terminology in Environmental Ethics' (2013) 22(5) Environmental Values 627.

16 See: Eduardo Gudynas, 'La Senda Biocéntrica: Valores Intrínsecos, Derechos de la Naturaleza y Justicia Ecológica' (2010) 13 Tabula Rasa 45, 50.

17 See: Francesco Allegri, 'Exploring Non-Anthropocentric Paradigms' (2019) 7 Relations: Beyond Anthropocentrism 7, 9.

18 María V Berros, 'Challenges for the Implementation of the Rights of Nature. Ecuador and Bolivia as the First Instances of an Expanding Movement' (2021) 48(3) Latin American Perspectives 192, 196.

pensable to recognise new subjects of law and also give concrete content to their emerging rights. Finally, the recognition of those subjectivities would need to be carried out in such a way as to respect the ethical reasons that propelled their recognition in the first place. Although this may not generate significant complexities at first glance, it could create several strains should any consequences of their recognition face adjudication.[19]

The Latin American experience in the matter is an example. The experience gained in the region shows that it is insufficient to simply recognise nature's and future generations' subjectivity for their rights to harmonise in the legal systems where they are incorporated. That means it is important to consider that those new subjects of law and their associated 'rights' have the potential of clashing with several institutions already in place. This has led some authors to consider that

> (...) experience with rights for nature has shown that their conceptual deficiencies have led to confusion, inefficiency, and arbitrariness,without any obvious environmental benefit. Multiple litigants pursuing conflicting goals have come to court claiming to speak on behalf of nature's rights, forcing courts not only to balance heterogeneous effects of policy choices but also to arbitrate between alternative plausible representational claims. Where nature's rights have been litigated, courts have struggled mightily to make sense of the inquiry before them.[20]

In this contribution, we will refer primarily to the recognition of RoN. Therefore, our focus will be on them and only incidentally on the problems linked to the rights of future generations. Thus, the theory behind the recognition of the right of future generations will not be dealt with in depth.

Ultimately, our goal is to elucidate the RoN through posing specific questions. For example, how should the defense of RoN be conducted from a procedural point of view? Who is entitled to initiate proceedings to defend those rights? What type of proceedings are viable for the protection of the RoN? Why are existing proceedings (established by administrative law or based on the protection of diffuse rights) insufficient to protect the environment? Moreover, why is it that the recognition of future generations' rights

19 In the Latin American adjudicative practice, those two sets of rights have faced challenges. That has made evident that their recognition, albeit in principle novel, requires adjustment or – at least – clarification.

20 Mauricio Guim and Michael A Livermore, 'Where Nature's Rights Go Wrong' (2021) 107(7) Virginia Law Review 1347, 1352.

to a healthy environment is not enough to protect nature? Furthermore, if nature's subjectivity is accepted, should its rights be defended by constitutional means – for example – through a writ of amparo (*accion de amparo* – action of protection)? These questions are fundamental and will be analysed by considering the practice and the legal instruments developed in Latin America.

The strategy we will follow will be to review the provisions and/or jurisdictional decisions adopted in three Latin American States: Ecuador, Colombia and Bolivia. In doing so, we will try to find answers to the above questions.

3. *The Emergence of the Rights of Nature in Latin America and the Scholarship Explaining that Trend*

In this section, we will revise the Latin American scholarship that deals with the recognition of the RoN. We will first describe the process by which the theory of legal personality has expanded in the region. Then, we will give an overview of the legislative techniques used to recognise the RoN, and finally, we will examine the regional adjudicatory practice highlighting the way academia has understood that process.

3.1. On the Dilution of the Monopoly of Human Legal Subjectivity in the Region

The theory of legal personality or theory of legal subjectivity enquires about who should be recognised as an entity capable of holding rights and duties in a specific legal framework. In this contribution, we will deal with that theory. The reason for this is that when the RoN and the rights of the future generations are seriously considered, they involve the recognition of legal entities entitled to a new set of rights; however, that exercise is one that faces complications. For example, recognising new subjects in law (like nature or the future generations) clashes with the classical theory of legal personhood. Regarding future generations, their incorporation implies the recognition of rights belonging to non-existing humans, creating several theoretical problems. For them to work, it will be necessary – as a first step – to determine who are or who could be considered part of those groups; an answer that is still much debated. On the other hand, their recognition

would need to be followed by giving content to their rights using today's standards, a job that could end up in the protection of interests that could turn out to be irrelevant for the future generations when they exist.

The RoN generate their own complications in that they allude to rights that are held by 'nonhumans.' How can law recognise rights belonging to nonhuman entities? Is the recognition of nature's subjectivity (through the RoN) based on technical legal reasons or does it happen for rhetorical reasons?

Furthermore, before incorporating those new legal entities into a particular legal system, it would be necessary to demonstrate that the classification of legal personhood recognised in law up until now is insufficient to protect one or more relevant societal interests.[21] And connected to that, any attempt to recognise any new legal entities would face the fact that, since the theory of subjectivity was framed in modern terms several institutions have been built on the presumption that (existing) human beings are directly or indirectly the only ones holding rights and duties in a legal system. As a result, expanding who or what can be considered a subject of law ends up affecting a normative system in its entirely.

For those reasons, it seems fair to say that with the inclusion of nature and future generations in certain legal systems, the traditional theory of legal personhood is progressively being eroded. Moreover, some would argue that the recognition of those new legal subjectivities exerts adverse effects on the predictability of the legal systems where they have been included, since who or what may or may not hold subjective rights becomes relativised.

21 These latter criticisms in turn face the fact that law is a human construction, and therefore humans will determine what law should encompass. Thus, humans decide who should be considered a rights holder. As Tur notes, '(i)f legal personality is the legal capacity to bear rights and duties, then it is itself an artificial creation of the law, and anything or anyone can be a legal person.' See: Richard Tur, 'The "Person" in Law' in Arthur Peacocke and Grant Gillet (eds), *Persons and Personality. A Contemporary Inquiry* (Blackwell 1988) 121. For a contrary position, see: Visa Kurki, *A Theory of Legal Personhood* (OUP 2019) 127–152. This reasoning is behind some of the decisions expanding the theory of legal personhood in Latin America. Examples of this, can be seen in the judgments recognising that certain animals have the status of subjects of law (i.e., the case of the chimpanzee Cecilia – Chimpanzee Cecilia case (2016) Tercer Juzgado de Garantías, Poder Judicial de Mendoza, P-72.254/15, (2016), and the orangutan Sandra – Orangutan Sandra case (2015) Poder Judicial, Ciudad de Buenos Aires, A2174–2015/0 (2015).

Bearing this in mind, we ask: why have RoN gained acceptance in some Latin American jurisdictions even though this acceptance could produce complications? We believe that the reasons for this can be better understood when it is recalled that in Latin America there are some precedents regarding the expansion of the theory of legal personhood. As a result, the expansion of legal subjectivity in the region by recognising nature's and the future generations' personhood has not been considered taboo. One should remember that legal personhood saw its expansion in law with the full recognition of children, women and the disabled, as well as with the recognition of legal entities and the recognition of States as sovereign entities. However, it also expanded (in more recent times), due to the impulse exerted by the recognition – up to certain limits – of animals' subjectivity. This tendency gained strength with the emergence of sectors defending animal welfare. Eventually, animals will start benefiting from protections that came close to some benefits humans enjoy as rights.[22] Those normative protections (whether recognising subjectivity or not to animals) were developed in the United States[23] and in Europe, generating doctrinal debates. In Latin America, a similar trend occurred; however, due to the region's need to solve problems speedily (because of the crises it constantly faces), those innovations were not backed up by scholarship. Be that as it may, it has been in Latin America where the recognition of animals' subjectivity has been more strikingly enunciated.[24] This helped the

22 However, whether such protection implies rights in their favour and therefore whether they can be subjects of law remains a matter of scholarly debate. For example, this issue is being analysed by the Max Planck Institute for Comparative Public Law and International Law <https://www.mpil.de/en/pub/research/areas/public-international-law/global-animal-law.cfm#head> accessed 28 September 2022. For an introduction to the matter, see: Anne Peters (ed), *Studies in Global Animal Law* (Springer 2020) and Saskia Stucki and Visa Kurki, 'Animal Rights' in M Sellers and M Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer 2020).

23 In the United States, legal actions (i.e., *habeas corpus*) have been filed with the intention to free captive apes. The results, however, were not successful. Nonetheless, the position of some judges showed a desire to protect those animals even when it was no possible due to procedural limitations. Those limitations arose since the proceeding used to air those claims required that the beneficiaries had legal subjectivity. On this, see: David Boyd, *Los Derechos de la Naturaleza. Una Revolución Legal que Podría Salvar el Mundo* (Santiago Vallejo trar, Heinrich Boll Stiftung 2020) 61–66.

24 See: Anne Peters, 'Rights of Human and Nonhuman Animals: Complementing the Universal Declaration on Human Rights' (2018) 112 AJIL Unbound 355, 356-ff.

regional judiciary to see that the classical theory of legal personality was not immovable, leading to further relaxations.[25].

An example of this happened in Argentina, where the legislation applicable to security dogs provided that after a certain time of service they could retire, receiving housing, health care and food at the expense of the State. The same happened with emotional support dogs, which were granted working conditions, schedules and vacations.[26] These advances were used to issue a ruling on the matter in Argentina. In that case, the plaintiffs asked the Court to grant a *habeas corpus* in favour of the orangutan Sandra. After some deliberation, the judiciary decided to grant the *habeas corpus*.[27] This was endorsed by the Judiciary of Buenos Aires,[28] which recognised '(...) the orangutan Sandra as a subject of law'.[29] Some Colombian courts

25 A former judge of the Inter-American Court of Human Rights, Zaffaroni, recalls that in the case of criminal law, animals have had an ambiguous position vis-à-vis the law. An example is the 'animal trials' where, among other curiosities, the confession of a sow was obtained. Zaffaroni's comments remind us that the theory of personhood, where the human being is the only subject of law, was formulated more recently than we thought. See: Eugenio Zaffaroni, 'La Pachamama y el Humano' in Alberto Acosta and Esperanza Martínez (eds), *La Naturaleza con Derecho. De la Filosofía a la Política* (Universidad Politécnica Salesiana 2011) 30.

26 Mentioned by: Alejandra Molano Bustacara and Diana Murcia, 'Animales y Naturaleza como Nuevos Sujetos de Derecho: Un Estudio de las Decisiones Judiciales más Relevantes en Colombia' (2018) 13(1) Revista Colombiana de Bioética 82, 93. Regarding the judgment of the ape Sandra, see: Maria V Berros, 'Breve Contextualización de la Reciente Sentencia sobre el Habeas Corpus en Favor de la Orangutana Sandra: Entre Ética Animal y Derecho' (2015) 41 Revista de Derecho Ambiental 154.

27 Orangután Sandra case (2014) Cámara de Casación Penal, Sala II, CC-C688321/2014/CFCI (2015).

28 Orangután Sandra case (2015) Poder Judicial, Ciudad de Buenos Aires, A2174–2015/0 (2015).

29 ibid., this trend was ratified during a proceeding initiated on behalf of a chimpanzee. In that case, the Mendoza Judiciary granted a *habeas corpus* to protect a chimpanzee and recognised thereto that it was undeniable that great apes (among which chimpanzees were included) were sentient beings and that therefore they could be considered nonhuman subjects of law. See: Chimpanzee Cecilia case (2016) Tercer Juzgado de Garantías, Poder Judicial de Mendoza, P-72.254/15, (2016) 30. In that decision, the tribunal added that great apes should be considered subjects of law, with legal capacity, but factually incompetent (ibid., 40). Regional scholarship has echoed the decisions taken by the Argentinian tribunals. See: Raúl Campusano Droguett, 'Sentencia de Alto Tribunal que Abre la Posibilidad de Reconocer Derechos a Animales de Acuerdo con Doctrina de Derecho Internacional' (2017) 36 Actualidad Jurídica 423; María Carman and María Valeria Berros, 'Ser o no Ser un Simio con Derechos' (2018) 14(3) Revista Direito GV 1139; Daniel J García López, 'Has de Tener un Cuerpo que Mostrar: El Grado Cero de los Derechos Humanos' (2018) 59 Isegoría 663; Visa

faced similar cases. One of those cases involved a request for a *habeas corpus* in favour of Chucho the bear.[30] At first instance, the *habeas corpus* was denied; however, in the second instance, it was granted.[31] The case reached the Constitutional Court of Colombia where the *habeas corpus* was overturned.[32]

In Latin America, it can be said that the recognition of animal 'rights' is still in the making; however, such progress has helped to relativise the traditional theory of legal personality. It is in this context that the recognition of RoN took place.

3.2. The Recognition of the Rights of Nature

In Latin America, the RoN have been recognised through legislation and jurisprudence.

3.2.1. The Case of Ecuador

The first legislative step to recognise the RoN happened in the Constitution of Ecuador of 2008 (currently in force). Article 71 of that instrument states that nature has the right to its existence and to the maintenance and regeneration of its vital cycles. In addition, Article 72 states that nature has the right to be restored. If those provisions seem equivocal on the establishment of the RoN, this is cleared up by Title II Chapter VII of the Constitution of Ecuador where the rights enunciated in Articles 71 and 72 are labeled as RoN. This is also confirmed by Article 10. That provision states that '(n)ature will be subject to those rights recognised by the Con-

Kurki, 'Legal Personhood and Animal Rights' (2021) 11(1) Journal of Animal Ethics 47, and Juan Camilo Herrera and Saskia Stucki, 'Habea(r)s Corpus: Some Thoughts on the Role of Habeas Corpus in the Evolution of Animal Rights' (*IConnect Blog*, 4 November 2017) <https://perma.cc/6FXY-M2ZT>.

30 For an analysis of this case, see: Macarena Montes Franceschini, 'Legal Personhood: The Case of Chucho the Andean Bear' (2021) 11(1) Journal of Animal Ethics 36.

31 See: Chucho the Bear case (2017) Sala de Casación Civil y Agraria, AHC4806–2017 – Radicación No 17001–22–13–000–2017–00468–02 (2017).

32 Insofar as the Court considered that, that would result in a breach of the right to due process as it would amount to using a manifestly inconsistent proceeding. See: Chucho the Bear case (2020) Constitutional Court of Colombia, SU016/20 (2020).

stitution'.[33] Then the remaining question is whether that recognition was only rhetorical or if it indeed intended to establish actionable rights. The Constitution of Ecuador opted for the latter option, insofar as the RoN in that jurisdiction can be protected through an action for protection and precautionary measures.[34]

Latin American scholarship highlighted the novelty of recognising the RoN at the constitutional level in Ecuador. That scholarship emphasised that the monopoly held by humans regarding who should be considered subjects of law ended up being relativised. Contrarily, the regional scholarship that criticised that recognition repeated the doubts cast in other parts of the world regarding the recognition of the RoN. For example, it was pointed out that that recognition would imply breaking the 'rights-obligations' structure every subject of law has to face. This is because nature cannot have nor make any obligation effective, and because it cannot enforce its rights. Ecuadorian scholarship has offered convincing counterarguments to those critics, and has[35] highlighted that the recognition of those rights was intended to leave behind the anthropocentric view of the relationship of human beings with nature. According to those views, the recognition of the RoN was justified by giving relevance to the indigenous vision of the relationship with nature, which was made possible thanks to the incorporation in the Constitution of notions such as the *Pacha Mama*

33 Constitution of Ecuador of 2008, Title II Chapter VII.

34 It must be borne in mind that although the Constitution of Ecuador mentions who can request protection for nature (art 71) it does not expressly indicate the avenues that can be activated to that end. The Ecuadorian doctrine agrees that the writ of *amparo* (action of protection proceeding) would be the suitable and appropriate way to do so. The Ecuadorian jurisprudence has endorsed this. In this regard, the Loja Provincial Court of Justice (LPCJ) in the Vilcabamba River case (Vilcabamba River case (2011) Provincial Court of Justice of Loja (Criminal Chamber), 11121–2011–0010 (2011) stated that the action for protection proceeding was the only suitable and effective way to put an end to the damage done to nature. In addition to that, precautionary measures have been granted for the protection of the rights of nature, for example in the Galapagos Islands' case. See: Rene Patricio Bedón Garzón, 'Aplicación de los Derechos de la Naturaleza en Ecuador' (2018) 14(28) Veredas do Dereito 13.

35 See: Ramiro Ávila Santamaría, 'El Derecho de la Naturaleza: Fundamentos' in Acosta and Martínez (n 25); Diana Murcia Riaño, *La Naturaleza con Derechos. Un Recorrido por el Derecho Internacional de los Derechos Humanos, del Ambiente y del Desarrollo* (Instituto del Estudios Ecologistas del Tercer Mundo 2012); Edwin Cruz Rodríguez, 'Derechos de la Naturaleza, Descolonización e Interculturalidad. Acerca del Caso Ecuatoriano' (2014) 31 Verba Iuris 15.

or the *Sumak Kawsay*.[36] However, those academics have offered little or no account of the practical implications of the recognition of the RoN in the Ecuadorian legal system. As a result, several questions have remained unanswered. For example: How should a court decide when the protection of the RoN comes at the expense of the protection of the rights of individuals? Furthermore: How should an Ecuadorian court decide when a dispute involves the clash of the RoN with the rights of future generations[37] (a situation that cannot be ruled out given the recognition of the rights of future generations in Articles 317 and 395 of the Ecuadorian Constitution)?[38]

3.2.2. The Case of Bolivia

Bolivia is the second State where the RoN were 'incorporated'. However, the Constitution of Bolivia of 2009 (currently in force) did not include them in its text. What was included in that instrument is the notion of *Buen Vivir – Vivir Bien* ('Good Living' – 'Live Well').[39] That concept has

36 See: Daniel E Bonilla Maldonado, 'El Constitucionalismo Radical Ambiental y la Diversidad Cultural en América Latina. Los Derechos de la Naturaleza y el Buen Vivir en Ecuador y Bolivia' (2019) 42 Revista Derecho del Estado 3; Edwin Cruz Rodríguez, 'Del Derecho Ambiental a los Derechos de la Naturaleza: Sobre la Necesidad del Diálogo Intercultural' (2013) 11(1) Jurídicas 95.

37 This can happen because the expansion of the theory of legal personhood affects the legal system as a whole. Furthermore, since several legal institutions are already in place based on the conviction that human beings are the sole subjects of the legal order, that situation is able to create tension. Then the inclusion of the RoN forces a systematic review of the existing legal institutions in the legal orders that have included nature's subjectivity. The regional scholarship has given little thought to the matter; however, some authors noticed the need to harmonise their constitutional provisions while including the RoN. In this last regard, see: Carla Cárdenas, 'Los Derechos de la Naturaleza y la Constitución en el Ecuador. Interrogantes sin Respuesta' (2009) 15 Revista de Bioética y Derecho 24.

38 Constitution of Ecuador of 2008, art 317: 'Nonrenewable natural resources are part of the unalienable heritage of the State and are not subject to a statute of limitations. In the management of these resources, the State shall give priority to responsibility between generations, the conservation of nature, the charging of royalties or other non-tax contributions and corporate shares; and shall minimize the negative impacts of an environmental, cultural, social and economic nature.'

39 Article 8.I of the Constitution of Bolivia states: 'The State adopts and promotes the following as ethical, moral principles of the plural society: ama qhilla, ama llulla, ama suwa (do not be lazy, do not be a liar or a thief), suma qamaña (live well), ñandereko (live harmoniously), teko kavi (good life), ivi maraei (land without evil) and qhapaj ñan (noble path or life).'

environmental implications and is conceptually similar to the notion of *Sumak Kawsay*[40], which was enshrined in the Constitution of Ecuador and helped in the recognition of the RoN in that jurisdiction. For some authors that parallelism would make it possible to conclude that the RoN were recognised in Bolivia.[41] However, as Gudynas mentions, although the mandate of Good Living was included in the Bolivian Constitution, neither nature nor the *Pachamama* were recognised as subjects of rights there.[42] To the contrary, some articles of the Bolivian Constitution mandate the State with achieving the industrialisation of nature. Attempts were made to correct that public policy with the issuance of two infra-constitutional provisions.

Consequently, on 21 December 2010, the Bolivian Legislative Assembly enacted Law No. 071 (Law of the Rights of Mother Earth).[43] However, the language used to structure that norm was not clear. Scholarship considers that issuing this norm implied the establishment of the RoN in Bolivia; nonetheless, such a statement must be taken with caution. Article 1 (object of the law) indicates that that instrument has '(...) the purpose of recognizing the rights of Mother Earth, as well as the obligations and duties of the State (...)'.[44] Mother Earth is defined as a dynamic living system made up of the indivisible community of all living beings.[45] That definition points to the notion of nature, so up until that moment it was reasonable to conclude that Law No. 071 intended to regulate the RoN. However, a doubt remained:

40 Article 14 of the Constitution of Ecuador states: 'The right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living (sumak kawsay), is recognized.' For its part, Article 275 states that: 'The development structure is the organized, sustainable and dynamic group of economic, political, socio-cultural and environmental systems which underpin the achievement of the good way of living (sumak kawsay). The State shall plan the development of the country to assure the exercise of rights, the achievement of the objectives of the development structure and the principles enshrined in the Constitution. Planning shall aspire to social and territorial equity, promote cooperation, and be participatory, decentralized, deconcentrated and transparent.'

41 See: Fernando Huanacuni, 'Los Derechos de la Madre Tierra' (2016) 3(4) Revista Jurídica Derecho 157, 166. From other latitudes, see: Cletus G Barié, 'Nuevas Narrativas Constitucionales en Bolivia y Ecuador: El Buen Vivir y los Derechos de la Naturaleza, Latinoamérica' (2014) 59 Revista de Estudios Latinoamericanos 9.

42 Eduardo Gudynas, 'Por que Bolivia no Reconoce los Derecho de la Naturaleza?' *Rimay Pampa* (La Paz, 4 June 2018) <https://perma.cc/5W9M-NXRA>.

43 Law No 071, Law of the Rights of Mother Earth, 21 December 2010.

44 ibid., art 1.

45 ibid., art 3.

Was the intention of the Bolivian legislator to establish a right holder or was the reference to nature's personhood only rhetorical? Law No. 071 seems to opt for the first option, since its Article 5 (legal character of Mother Earth) indicates that Mother Earth adopts the form of a collective entity of public interest.[46] However, it remains unclear as to what should be understood by a collective entity of public interest.

In our opinion, defining nature as a collective entity of public interest represents a middle ground formula. In other words, with the recognition of nature as a collective entity, the interests of nature are legally covered; however, nature's autonomy is not declared. This last step could not be taken given the obstacles of creating a legal person that is incapable of claiming their rights and due to the limitations to determining the scope of their particular interests. Because of that limit, nature was recognised as a legal entity, but a collective one where humans participate. For this reason, Law No. 071 added that Mother Earth and all its components (including humans) are holders of all the rights it recognises.[47]

Consequently, the RoN are also assigned to individuals, in what we label as a twist towards realism, as it is impossible for nature itself to claim its rights and express its interests. The result of that technique leads to the intermingling of humans' and nature's interests, making Law No. 071 a hybrid regulation in the matter. This becomes more apparent when Principle 4 of Law No. 071 is considered. That principle indicates that the State and any person shall respect, protect and guarantee the rights of Mother Earth with a view to achieving the well-being of current and future generations.[48] As we have explained, the philosophy that underlines the recognition of the rights of future generations (in its environmental facet) and that of RoN are different. If we consider Principle 4 of Law No. 071, the outcome is that the RoN end up subjected in their entirety to the benefit of current and future generations. This ends up subordinating the RoN to human interests. Bearing that in mind, it is not necessary to dwell on the specific rights recognised by Law No. 071 belonging to Mother Earth, since it subordinates them to individuals and it remains therefore doubtful that Law No. 071 truly recognises nature as an autonomous legal entity.

On 15 October 2012, Law No 071 was complemented with Law 300 (Framework Law on Mother Earth and Integral Development to Live

46 ibid., art 5.
47 ibid.
48 ibid., art 2.4.

Well).[49] This norm, far from establishing that the RoN are rights autonomously held by Mother Earth, stated that these rights were limited by the existing rights in the Bolivian legal system.[50] Along these lines, Article 15 of Law 300 established that the State had to promote the use and exploitation of the renewable natural resources of Mother Earth.[51] The provision added that to that end the State would implement actions for the progressive increase in the use and sustainable exploitation of nature's nonrenewable components.[52] In other words, Law 300's purpose was to promote a balanced exploitation of nature's resources rather than clarifying the scope of nature's personhood or how its rights should be understood or claimed. It must be said that the fact that the norm regulates the exploitation of natural resources does not imply by itself – as some authors assert – the denial of the possible recognition of the RoN in Bolivia. This is not an automatic conclusion that can be reached since all rights are limited and – in certain circumstances – need to be limited (even constitutional and fundamental ones). What can be drawn from the experience in Bolivia is that the RoN were recognised in a particular way, with certain subordination of those rights to the interest of human beings.

After considering both the Ecuadorian and Bolivian experiences, we can conclude that the recognition of the RoN by legislative means occurred without adequately considering the effects this would exert in those legal systems. Therefore, it falls to case law to fill that gap by explaining how the RoN can work coherently. Additionally, if the true intention of the legislators was to recognise nature as a subject of law, we should be able to witness

49 Law No 300, Framework Law on Mother Earth and Integral Development to Live Well, 15 October 2012.

50 For this reason, Article 4.1 of Law 300 (Principles – Compatibility and Complementarity of Rights, Obligations, and Duties) provides that the rights found in the legal system cannot be materialised without the others, and that no right can be above the others. Law 300 mentions that the rights referred to by Article 4.1 are the Rights of Mother Earth, Collective and Individual Rights, Fundamental Rights, and the Rights of the Urban and Rural Population to live in a just, equitable and solidary society (ibid., art 4.1). By 'just, equitable and solidary society', the norm states that means a society in which all people have sufficient capacities, conditions, means, and income to satisfy their material and social needs, without social class differences and poverty. That last section of the regulation points out the need to access nature to propel the economic development of the State, a goal that implies some restrictions to the RoN as its exploitation is needed to achieve those purposes.

51 ibid., art 15.1.

52 ibid., art 15.3.

the adjustment of the norms already in place in those jurisdictions in line with the new philosophy embodied by these new sets of rights. However, in neither of those two legal orders does that seem to have occurred.[53] In Ecuador, legislation has not only failed to implement the constitutional mandate embodied by the RoN; it has also privileged traditional pre-existing extractive conceptions. This led some environmental sectors to express critical views on the value of the recognition of RoN in Ecuador.[54] What is more, the recognition of the RoN – at a constitutional level – in that jurisdiction has not prevented an increase in environmental conflicts, given the State's interest in exploiting natural resources.[55] Something similar has occurred in Bolivia.[56] Regarding Bolivia, Murcia Reaño points out that '(t)he promotion of Mother Earth's rights has permeated little into domestic policy – in fact, the Defensoría de la Madre Tierra was never created – but it was a key element in the Bolivian environmental diplomacy, along with the discourse of good living.'[57] This last point is key – in both Ecuador and Bolivia – as it points out the recognition of the RoN for political reasons. For example, in Ecuador that might have happened to obtain support for the approval of the new Constitution of 2008, and in Bolivia that could

53 Contrary to that, the environmental legal framework in those States has not been adjusted to the recognition of nature's personhood. That is why Murcia Riaño iterated that in Ecuador no consistent case law was formed after the recognition of the RoN. Although the constitutional procedural mechanisms used in Ecuador to protect the RoN were copied from the Colombian constitutional model, in practice the Ecuadorian judiciary did not develop the judicial activism that happened in Colombia. See: Diana Murcia Riaño, 'Estudio de la Cuestión en los Ámbitos Normativo y Jurisprudencial' in Esperanza Martínez and Adolfo Maldonado (eds), *Una Década con Derechos de la Naturaleza* (Instituto de Estudios Ecologistas del Tercer Mundo 2019) 57.

54 Those groups have indicated that – in contrast – the laws that have been drafted and enacted since the approval of the 2008 Constitution, have aimed at guaranteeing control over the environment (i.e., by the issuance of Land Laws, Food Sovereignty Laws, Mining Law, Water Law, among others) guaranteeing in that way, the economic model needed by international capital. See: Natalia Sierra, 'La Avanzada del Post-Neoliberalismo Encubierta en un Usurpado Discurso de Izquierda' in *Sumak Kasay o Plan Nacional del Buen Vivir: ¿Que está Detrás del Discurso?* (Acción Ecológica 2012). Cited by: Diana Murcia Riaño (n 53) 58.

55 Rickard Lalander, 'Entre el Ecocentrismo y el Pragmatismo Ambiental: Consideraciones Inductivas sobre Desarrollo, Extractivismo y los Derechos de la Naturaleza en Bolivia y Ecuador' (2015) 6(1) Revista Chilena de Derecho y Ciencia Política 109, 114.

56 ibid., 135 and ff. See also: Marco Aparicio, 'Nuevo Constitucionalismo, Derechos y Medio Ambiente en las Constituciones de Ecuador y Bolivia' (2011) 9 Revista General de Derecho Público Comparado 1.

57 ibid., 60.

have happened for the strengthening of the government of Evo Morales. A review of this trend needs to be carried out by scholarship.

That said, the second way the RoN have been recognised in the region has been through case law. One of the Latin American legal systems with the highest judicial practice in the matter is Ecuador. One reason for that is that the RoN are expressly recognised there. We will review the decisions adopted by its courts in later sections of this contribution. For its part, due to the ambiguous recognition of the RoN, Bolivia has not developed relevant jurisprudence on the matter.

Despite this, it is worth noting that the reception of the RoN in a legal system does not depend on the legislative enshrining of those rights.

3.2.3. The Case of Colombia

Colombia is where, despite the lack of constitutional or infra-constitutional recognition of the RoN, their proclamation has been the most strongly made. The jurisprudence of various Colombian ordinary courts (as well as its Constitutional Court) has shaped the recognition of those rights.

The first decision on the matter was taken by the Constitutional Court of Colombia in the Atrato River case.[58] On that occasion, the Constitutional Court recognised the existence of the RoN based on the 'ecological constitution'. According to the Court, the 'ecological constitution' is made up of the constitutional provisions that deal with environmental matters and that, as a whole, support the recognition of the RoN and other environmental rights.[59] The Constitutional Court recognised the river's personhood due to the pollution and environmental degradation the river had suffered, as well as because of the government's inaction to stop that situation. From that moment on, a series of acknowledgements of nature's personhood followed; for example, the acknowledgement of the personhood of the Amazonia. This was declared by the Supreme Court of Justice (SCJ). The SCJ recognised the '(...) Colombian Amazonia as a 'subject of rights', entitled

58 Atrato River Case (2016) Constitutional Court of Colombia, T-622/16 (2016).

59 On the notion of the ecological constitution, see: José Humberto Ospina Herrera (2007) Constitutional Court of Colombia, T-760/07 (2007) and Demanda de inconstitucionalidad contra los parágrafos 6º (parcial) y 7º (parcial) del artículo 1º de la Ley 507 de 1999 (2000) Constitutional Court of Colombia, C-431/00 (2000). See also: Oscar Darío Amaya Navas, *La Constitución Ecológica de Colombia* (3rd edn, Universidad Externado de Colombia 2016).

to actions of protection, conservation, maintenance and restoration which would be performed by the State and the territorial entities comprising the State'.[60] For its part, the Administrative Court of Boyacá (ACB), while solving a dispute involving the Paramos (moorlands), took into account the decisions concerning the Atrato River and the Amazonia cases. The ACB indicated that the protection granted to the Paramos is '(...) self-executing, that is, as an autonomous fundamental right (...) for its protection there is no need for provisions prohibiting activities that threaten its conservation as a subject entitled to constitutional protection (...)'.[61] Another decision along the same lines was taken by the Superior Court of Medellín (SCM) – Fourth Civil Chamber, where the legal personhood of the Cauca River was declared.[62]

From the review we have made of the Colombian case law, it can be concluded that recognition of the RoN has permeated into different jurisdictional levels in Colombia. The decisions cited here are not all the decisions taken in that jurisdiction as far as the RoN are concerned; however, there is no doubt that in Colombia, the recognition of nature's personhood has been achieved thanks to the activism of the courts. An advantage of this way of right recognition is that – from the beginning – the rights have been formulated considering the practical and procedural dimensions involved in that exercise. That is why the recognition of RoN in Colombia shows that nature's personhood was produced with the intention of making its rights actionable.

The recognition of the RoN in Ecuador, Bolivia, and Colombia has been highlighted by scholarship as a breakthrough. However, the account given by scholarship to that experience describes that process as if it had occurred flawlessly[63] when that is not the case. The experience in Ecuador and Bolivia illustrates a series of theoretical problems. For example, in Bolivia, the

60 Amazonia case (2018) Supreme Court of Justice – Sala de Casación Civil, STC4360–2018, Radicación No 11001–22–03–000–2018–00319–01 (2018) 45.

61 Paramos case (2018) Administrative Court of Boyacá, 15238–3333–002–2018–00016–01, 9 (2018) 35.

62 Cauca River case (2019) Superior Court of Medellín – Fourth Civil Chamber, 2019–076 (2019).

63 Luisa Gomez-Betancur, 'The Rights of Nature in the Colombian Amazon: Examining Challenges and Opportunities in a Transitional Justice Setting' (2020) 25(1) UCLA Journal of International Law and Foreign Affairs 41, 72-ff; Elizabeth Macpherson, Julia Torres Ventura and Felipe Clavijo-Ospina, 'Constitutional Law, Ecosystem, and Indigenous Peoples in Colombia: Biocultural Rights and Legal Subjects' (2020) 9(3) Transnational Environmental Law 521, 532-ff.

recognition of the RoN exhibits limitations to the point that it is not possible to conclude that a real legislative recognition of nature's personhood happened there. In Ecuador, although the recognition of the RoN is clear, on the jurisdictional level it is difficult to see how those rights could be implemented coherently. In Colombia, we find similar contradictions when the cases involving the establishment of nature's personhood are analysed in detail.

As indicated in the introduction of this contribution, the approach we will use to assess the recognition of the RoN in the region will be to consider the procedural reasons that lead to that outcome, and from there we will determine if their implementation has been carried out in line with the philosophical values underpinning the incorporation of those sets of rights.

4. Unveiling the Reasons for the Implementation of the Rights of Nature in the Region

As we have indicated earlier, we believe that the recognition of the RoN in Latin America has not been performed consistently. We believe that there is a discrepancy between the procedural reasons that have pushed their recognition forward and the ethical reasons that sustain the RoN's formulation. It should be borne in mind that the ethical discourse that defends the incorporation of the RoN argues that their recognition should happen with a view to protecting nature for its value in itself; in other words, it is believed that nature should be protected based on the mere fact that it exists. However, after examining the case law in the region, we find that the ethical discourse that sustains the RoN, is at odds with the normative reasons behind the incorporation of those rights. In order to test our assertion, we will examine the procedural dimension behind the RoN's recognition in more depth.

After reviewing the case law in the matter, we have found at least two procedural reasons for the recognition of the RoN: (a) in order to channel certain environmental concerns through constitutional avenues (so nature's interest can be directly actionable), and (b) to allow the rights of future generations to work in practice. Concerning the first procedural reason, we see that through the recognition of nature's personhood it became possible to protect it through constitutional means. This happens because with such recognition, nature becomes worthy of protection for its own value. In

other words, nature can now be protected independently of the service provided to human beings. As a result, certain constitutional proceedings now can be initiated to protect nature's concerns without the mediation of a violation of the fundamental right of individuals to a healthy environment. For its part, the second reason for the RoN's recognition is that it helps to make the rights of future generations effective. In this latter scenario, there is an instrumentalisation of the RoN which could be at odds with the underlying ethical idea that has fostered nature's rights.

We will analyse in further detail the two procedural reasons for the recognition of the RoN.

4.1. Recognising Nature's Legal Subjectivity to Grant it Access to Constitutional Procedures

After considering the judgments adopted by some Latin American courts on the matter, we can confirm that in several cases the recognition of the RoN has been aimed at granting nature access to constitutional proceedings. It must be borne in mind that constitutional avenues have not been able to be directly activated to protect nature's interests. An example of this happened in Colombia as its courts could not provide protection to nature through those means, since they were considered to be used only for infringements of fundamental rights (which were considered to be held only by legal subjects in that jurisdiction). The disagreement with that limitation is one of the reasons why the great majority of the RoN in the region have been aired in the context of constitutional disputes. Plaintiffs have repeatedly tried to initiate constitutional processes to protect nature's interests using action of protection proceedings due to their promptness and the more straightforward way they are structured.

An example of that can be seen in the ruling handed down by the Constitutional Court of Colombia when the Atrato River was recognised as possessing legal personhood. The case began with a request filed before the Administrative Tribunal of Cundinamarca (ATC). The ATC decided not to process the request (*tutela action* – writ of *amparo*) since the petition was considered inadmissible. The ATC argued that the writ of *amparo* was intended to protect collective rights and not fundamental ones. That was a relevant argument that created a procedural obstacle. The ATC considered that there were other proceedings capable of protecting nature (or its components). According to the ATC, the appropriate procedure to be

activated was the popular action procedure (*proceso de accion popular*) and not an *amparo* procedure. The Council of State (Second Section) agreed and confirmed that decision. The Council of State recalled that the plaintiffs could present their claim before the 'popular judge' and that it was improper to attempt – through a writ of *amparo* – to substitute the applicable proceeding.

Deciding against that line of argumentation, the Constitutional Court of Colombia considered that the writ of *amparo* was appropriate, insofar as the rights involved were not only collective but also fundamental (such as the right to health and the principle of human dignity). The Constitutional Court considered as incorrect the argument held by the ordinary judges, that there were other applicable proceedings, such as a 'popular action procedure'. The Court considered the argument flawed on two grounds: (a) the harm under analysis involved both collective and fundamental rights, and (b) there were doubts about how effective a popular action proceeding would be in solving the problem. In this context, the Constitutional Court developed the existence of the RoN.

However, it should be noted that with the admissibility of the writ of *amparo* the possible harm to a fundamental individual right could have been determined. If that was correct, why did the Court consider it necessary to additionally recognise the RoN? The Court gives no straightforward answer. However, what should be kept in mind is that after establishing the legal personhood of the Atrato River, the Constitutional Court mentioned certain actions that the competent authorities had to implement. Was the recognition of the river's personhood done to make the authorities implement those actions? In our opinion, that is not very convincing; insofar as there are already means in place in the Colombian legal order that would have made it possible for the competent authorities to act with the sole order of the Constitutional Court.[64]

64 In this regard, it must be borne in mind that in Colombia, Ecuador and Bolivia (as in other States of the region), different mechanisms protecting the environment already exist. Indeed, Latin American States have established a convoluted legal framework that protects nature. This protection is exercised by specialised entities such as the ministries of environment, ministries of energy, mines and natural resources, supervisory bodies, or by the regional or local governments. Those entities are responsible for supervising any activity that might damage the environment. Furthermore, those same entities can issue precautionary measures, order the shutdown of works, and apply urgent measures, among other actions. Moreover, if those entities determine the responsibility of an individual or a company, they have the power to impose

Therefore, the reasons for recognition of the Atrato River's personhood should be looked for elsewhere.

As already mentioned, the reason behind that recognition seems to be rooted in the goal to make the activation of constitutional proceedings (such as a writ of *amparo*) possible in the name of the river. Once the river's legal personhood was recognised, that entity became a holder of rights (even fundamental ones) and – therewith – it became possible to activate constitutional proceedings directly in its favour. There are benefits for nature to have access to those procedures, compared to other avenues. For example, if we follow the position of the ordinary judiciary in the case, an alternative procedure to air the legal problem at stake could have been a popular action proceeding; however, that road faces limitations. First, a popular action proceeding is activated when there is a possible damage to a collective right (held by humans) and not to determine the possible infringement of the interests of nonhuman entities. Even if a popular action proceeding could be used to protect nature's interests, those proceedings entail longer procedural stages than those applicable to a writ of *amparo* proceeding which is urgent by nature.[65] Let us suppose another option is chosen, such as commencing administrative proceedings. In that case, those proceeding will require the presentation of evidence and the initiation of steps that could take years – due to its technicality – and the right of the other parties to appeal the decision before judicial instances.

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penalties and order the remediation of the environment. Then: what was the reason to extend legal personhood to nature if the governmental entities could carry out most of the measures that the Court determined? One possibility is that, even though national authorities had the competencies to act, they did not exercise them, so the problem needed to be solved innovatively. However, in different Latin American States the inaction of a governmental entity can be tackled through an 'enforcement action'. Moreover, if the Constitutional Court found a tendency of governmental agencies not to fulfil their duties (or where certain public policies had generated lack of protection for the environment) that Court had at hand constitutional procedures such as the declaration of an unconstitutional state of affairs (created by that Court itself and adopted by other of its peers in the region) to order an entity to modify or implement actions destined to stop a situation of structural unconstitutionality. Regarding this topic, see: Luis A López Zamora, 'Constitutional Tribunal of Peru' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (OUP 2021). Finally, if there was collective environmental damage, the Colombian legal system offered the possibility of starting a popular action (class action).

65 See: Hector Fix-Zamudio, 'The Writ of Amparo in Latin America' (1981) 13(3) University of Miami Inter-American Law Review 361 and Jose Maria Serna de la Garza, 'Amparo' in Grote, Lachenmann and Wolfrum (n 64).

It is in this context that the recognition of the RoN's happened in the Atrato River case. The decision to grant legal personhood to the river comes close to recognising rights for nature due to its intrinsic value. This is so because the dispute was solved with the admissibility of the plaintiff's writ of *amparo* (and the subsequent declaration of the violation of their right to water). The declaration of the river's subjectivity (RoN) is a step that was taken only to disconnect the constitutional protection of the river from any human interest that could be at stake. The judgment on the Atrato River case is an important step in the recognition of the RoN in Latin America; however, it is just as important to mention that the Constitutional Court referred to future generations' rights, and how they would benefit from the recognition of the river's personhood. Therefore, the RoN's proclamation in that case seems to have happened not only to protect nature for its own sake but also because of the service it could provide.

4.2. The Recognition of Nature and its Role in Making the Legal Personality of Future Generations Work

What we have just mentioned leads to the second procedural reason why the RoN might possibly have been recognised in Latin America. We said that in the regional experience, one of the newly recognised subjectivities (nature or future generations) had been used to make the other work. The utilisation of a subject of law in that way has gone unnoticed due to the lack of theoretical differentiation that exists between those two categories in Latin American scholarship[66] and in the jurisprudence of their tribunals. The result is the subordination of the values underlying the recognition of one legal personhood for the benefit of the values underlying the other.

66 In one of the most important books about the RoN from the region, references are made to those rights together with a plethora of allusions to the right of future generations, as if they would be necessarily interconnected. In other sections, it is implied that one could be a tool to ensure the enforcement of the other but without indicating the differences that those two sets of rights have. See the presentation and prologue of the book: Carlos Espinosa Gallegos-Anda and Camilo Pérez Fernández (eds), *Los Derechos de la Naturaleza y la Naturaleza de sus Derechos* (Ministerio de Justicia, Derechos Humanos y Cultos 2011). This lack of delimitation overlooks the fact that both sets of rights have a different view on the relationship that human beings should have with the environment.

In Ecuador, where the recognition of both sets of rights has been expressly included in the Constitution, the reference in its case law of both rights together is the result of the theoretical difficulty of dissecting the RoN from the rights of future generations.[67]

In Colombia, this has happened because of (a) the theoretical difficulty of differentiating both notions, but also due to (b) practical reasons.

67 In the case of Ecuador, this can be observed in the judgment adopted by the Civil and Mercantile Chamber of the Provincial Court of Azuay (PCA), Ecuador. See: Rio Blanco case (2018) Provincial Court of Azuay – Civil and Mercantile Chamber, 01333201803145 (2018). The PCA emphasised the reform undertaken by the Constitution of Ecuador through which a new economic model was imposed. That new economic paradigm established a non-extractive model based on the indigenous worldview of Good Living (*Sumak Kawsay*). That principle sought to find harmony between the person/community and the environment. In the PCA's view, the constitutional reform that happened in Ecuador aimed to end the extractive economic model, a shift that was vital for future generations so that they could enjoy the same quantity and quality of natural resources as we do. The Court added that based on that, the Constitution recognised different rights such as the RoN, land rights, and protection of biodiversity (ibid., 19). In this judgment, the PCA referred to the RoN together with future generations (although without necessarily referring to future generations as rights holders). Another example is the judgment taken by the Criminal Chamber of Loja (Ecuador), Judgment in Trial No 11121–2011–0010 (See: Vilcabamba River case (2011) Provincial Court of Justice of Loja (Criminal Chamber), 11121–2011–0010 (2011)). In that case, the Court enforced the RoN through an action of protection proceeding. As mentioned before, Ecuador is one of the jurisdictions where the RoN have been enshrined at the constitutional level; therefore, the Court could delve into certain considerations. The Court stated that nature's importance is so evident and indisputable that any discussion in that regard was redundant; however, it noted that it should not be forgotten that some damage caused to nature is 'intergenerational', consisting of damage that due to its magnitude has repercussions not only on the current generation but on future generations (ibid.). In a recent decision, the Constitutional Court of Ecuador referred to the RoN (in the Bosque Protector Los Cedros case). See: Bosque Protector Los Cedros case (2021) Constitutional Court of Ecuador, 1149–19-JP/20 (2021). The Constitutional Court recalled that the RoN include nature's right to (a) have its existence fully respected and to (b) maintain and regenerate its natural cycles (ibid., para. 25). The Court added that the RoN, like all constitutional rights, have full normative force and were autonomous (ibid., para. 35). Although the Constitutional Court did not elaborate on the autonomy of the RoN, it made it clear by the way it structured its judgment that those rights needed to be considered through a separate analysis than the one the human right to a healthy environment would require. This last judgment is important; however, the tendency in Ecuador so far is to analyse the RoN considering the damage their breach would entail to human interests. See: Girard D Vernaza Arroyo and Danelia Cutie Mustelier, 'Los Derechos de la Naturaleza desde la Mirada de los Jueces en Ecuador' (2022) 16(49) Revista IUS 285.

Examples of the first scenario can be spotted in the judgment delivered by the SCJ in the Amazonia case.[68] In that case, the SCJ stated that the protection afforded by the Constitution aims at benefiting each person individually but also the 'others'. By 'others', the tribunal meant the other people inhabiting the planet and the unborn,[69] therefore, referring to the rights of future generations. According to the Court, those rights were based on: (i) the ethical duty of solidarity between members of the human species and (ii) the intrinsic value of nature.[70] The Court's reasoning is – to say the least – confusing. Several contradictions arise. The one to be highlighted now is that the Court seemed to be able to make a connection between the RoN and the rights of future generations without giving any explanation.

The second reason why the RoN have been linked with the rights of future generations in Colombia is due to the difficulties of realising the right of future generations to a healthy environment. This is rooted in the fact that it is not possible to know today what the future generations (in the future) will consider relevant. The impossibility of accessing the content of the environmental rights of future generations (that is, what should be protected in concrete terms) makes the RoN an important device. The RoN can work as a conceptual tool that helps to abstractly objectify nature's value making some of its characteristics immovable. Then, what at first sight looked like the protection of nature for the value it had in itself, ultimately appears as a recognition destined to guarantee some of nature's features in order for those to be enjoyed by future generations.

68 Amazonia case (2018) Supreme Court of Justice – Sala de Casación Civil, STC4360–2018, Radicación No 11001–22–03–000–2018–00319–01 (2018). The proceeding started with an action of protection that sought to stop the degradation suffered by the Amazonia. Twenty-five children brought the case, so the dispute – at first view – involved the rights of future generations. However, in its decision, the Court went on to recognise the personhood of the Amazonia. How did the connection between the rights of future generations and the RoN develop? Was the recognition of the RoN necessary in the case? What analysis did the Court carry out and what distinctions did the Court make between both notions? According to the Court's reasoning, how do the two new legal personhoods articulate? The Court did not provide answers to those questions. On the contrary, in its reasoning it is evident that the Court intermingled the RoN with the rights of future generations as if both were implied, giving no explanation of why they both needed to be considered at the same time.

69 ibid.,18–19.

70 ibid., 19.

That reasoning can be found in the decision of the SMC in which the subjectivity of the Cauca River was proclaimed. On that occasion, the SMC drew a connection between the recognition of the RoN with the implementation of the rights of future generations. To that end, the SCM reviewed the constitutional provisions supporting the recognition of the rights of future generations, pointing out that they regulated the territorial transformation of Colombia in order to optimise the use of natural and human resources in pursuit of a decent existence for current and future populations. The SMC added that the Constitution implicitly recognised the dignity of future generations, which is a distinctive feature of the subjects of law. According to the Court, that implied not only the recognition of future generations' personhood, but also the possibility of their rights being protected through constitutional proceedings. To that end, the SCM concluded that there were no doubts about the crisis that affected the river's ecosystem, which needed to be preserved for the benefit of future generations so that, in front of that subject of rights (future generations) emerged another subject of law of no less importance: the river itself.[71]

A similar trend happened in the judgment of the SCJ in the Amazonia case. As previously mentioned, the SCJ recognised the RoN when considering the legal personhood of future generations. The Court left unclear the connection between the plaintiffs' request and the recognition of the RoN.[72] However, it added that the RoN is the central concept on which the intrinsic value of the environment is based, which led it to conclude that 'respect for itself' (intrinsic value) implied a respect for the parts that correspond to nature itself and of which – in turn – future generations will be part of.[73]

71 Cauca River case (2019) Superior Court of Medellín – Fourth Civil Chamber, 2019–076 (2019) Consideration No 8. Taking into account the Court's considerations in the case, it becomes impossible to understand the reasoning behind recognising the subjectivity of the Cauca River. That lack of clarity has procedural implications (given the possible lack of motivation of the judgment), but also makes it difficult to understand the reasons for recognising a new subjectivity. The lack of reasoning of the Court makes it difficult to refute or agree with its decision.

72 Amazonia case (2018) Supreme Court of Justice – Sala de Casación Civil, STC4360–2018, Radicación No 11001–22–03–000–2018–00319–01 (2018) 21. The Court limited itself to referencing the judgment issued by the Constitutional Court of Colombia in the Atrato River case and the case where the subjectivity of the Amazonia was recognised. ibid., 39 and 45.

73 ibid., 21.

The recognition of the RoN together with the recognition of the rights of future generations can also be seen in the judgment delivered by the Constitutional Court of Colombia in the Atrato River case. Early in the judgement, the Constitutional Court defined both sets of rights, clearing the way to make their differentiation possible.[74] Consequently, this case was an ideal occasion to elucidate the interaction between future generations' subjectivity and the RoN personhood. Nonetheless, this did not happen. On the contrary, in later sections of the judgment it is possible to observe that the Court subordinated the recognition of the Atrato River subjectivity to human needs. For example, the Court, in order to argue the need to proclaim the river's personhood[75], referred to the right to water and how illegal mining harmed food production (trees, crops, and fish), the sanitary conditions, and the cultural practices of the area,[76] all elements associated with the satisfaction of human beings. The Court finished by including

74 Atrato River Case (2016) Constitutional Court of Colombia, T-622/16 (2016). In this case, the communities living in the Atrato river basin filed a request before the Constitutional Court of Colombia. This decision has been highlighted as a fundamental decision in the recognition of the RoN; however, it is important not only because of the recognition of the river's personhood but also for the reasoning that the Court set out. In its reasoning, the Court clarified – albeit tenuously- the possible relationship between the rights of future generations and the RoN. The Court stated that the existing provisions and the pluralistic approach promoted by the Colombian Constitution made the relationship with the environment one in permanent evolution. From there, the Court added that at least three theoretical approaches could explain the transition towards protecting nature's interests in that legal system. At first, the relationship with nature was based on an anthropocentric approach, which conceived of human beings as the only *raison d'être* of the legal order and nature as a mere object. Subsequently, a biocentric approach appeared which claimed more solidarity and human responsibility. This approach advocated for the existence of man's duties towards nature and future generations. Finally, an ecocentric approach, which conceived nature as an authentic subject of rights emerged in scholarship (ibid., 5.5 and 5.6). The Court recalled that the biocentric vision derived at first from an anthropocentric conception, since at that time nature's protection was formulated to avoid a catastrophe that could extinguish human beings. Under this interpretation, nature was not a subject of rights, but an object at man's disposal; however, it differed from the purely anthropocentric approach insofar as it considered that the environment of a country did not belong exclusively to the people who inhabit it, but also to future generations and humanity in general (ibid., 5.8). As for the ecocentric vision, the Court indicated that based on that, nature's personhood was recognised, and that this last approach was grounded in the Colombian Constitution.

75 ibid., section 9.32.

76 ibid., section 9.30.

in its reasoning the importance of protecting the biological and cultural diversity of the nation for future generations.[77]

The question that immediately arises in all of those cases, is: Why did the courts find it necessary to recognise nature's personhood together with the subjectivity of future generations?

As already mentioned, one key issue in the recognition of the rights of future generations is the determination of who should be considered part of that group (whether those who have not yet been born or – at the same time – those who currently do not have the legal stand to protect their rights effectively, such as children). Another issue that arises is what is the exact scope of the rights of future generations? To say that future generations are subjects of law does not conclude their inclusion in a legal system. On the contrary, it is necessary to continue and determine the specific content of their rights. There is no doubt that future generations can regard some interests as valuable for their future existence included among which is enjoying a healthy environment. However, the environmental protection granted today in the light of today's values and concerns may be irrelevant for those groups in the future. In other words, the scope given to future generations' rights might be wrong from a historical perspective. Furthermore, if the legal maxim which states that all rights (even the constitutional ones) are not absolute is valid,[78] then a possible conflict between future generations' rights and individuals' rights now emerges. In those cases, a balancing exercise would need to be performed. However, a judge faced with that dilemma would need access to the specific content on future generations' interests. Only then would he or she be able to carry out a balancing exercise.

77 ibid.

78 That is part of a broader debate. In that debate, some scholars argue that all rights – even constitutional ones – are limited. According to that view, rights are legal recognitions that need to be contrasted and delimited by the other rights and values recognised in a legal order. Consequently, if they enter into conflict *inter se,* a proportionality test would be necessary. That exercise comes into play when a conflict between rights or between a right and a constitutional value arises. This does not exclude the possibility that in particular situations some rights can be formulated in such a way as to be absolute, such as the right not to be tortured or enslaved. Be that as it may, the possibility of enunciating absolute rights is exceptional, and to that end a precise technique is required. On this, see: John Finnis, 'Absolute Rights: Some Problems Illustrated' (2016) 61(2) American Journal of Jurisprudence 195 and Martin Borowski, 'Absolute Rights and Proportionality' (2013) 56 German Yearbook of International Law 385.

One of the conclusions of this contribution is that in some Latin American jurisdictions, the recognition of the RoN has been initiated to solve the obstacle mentioned above. To that end – in a legal system – a field of evident interest for future generations is recognised, and then is 'objectified' by granting it legal personhood. With that strategy, the new subject of law ends up with an area of protection that safeguards some of their minimal characteristic (their rights). The way nature's personhood has been recognised in Latin America demonstrates that its recognition has happened not for its intrinsic value, but for the service it can provide to human beings. That pattern can be observed in the case law of both Ecuador and Colombia. In those jurisdictions, the RoN are used as a bridge connecting the rights of future generations and the existing world. This seems to be the reason for the recognition of the RoN together with the rights of future generations in several judgments. Then, it is fair to call out the inaccuracy of the scholarship assertion that the recognition of the RoN in the region has occurred with the aim of recognising nature's rights autonomously. On the contrary, the judgments delivered by the Latin American courts demonstrate that the RoN play a role in making others' rights operative.[79]

5. Conclusions

In this contribution, we have explained that the RoN emerged in the legal discourse with the aim of protecting the interests of nature because of its intrinsic value. For its part, the rights of future generations (to a healthy environment) were recognised so as to prevent environmental degradation as that would benefit a collectivity that does not yet exist. In Latin America, those two categories – even though distinctive – have faced the tendency of being considered as expressions of a same phenomenon.

We have observed through our research that in Latin America the premises for the formulation of the RoN (nature's intrinsic value) have

79 Part of the Ecuadorian scholarship has indirectly recognised this, when stating that 'the tendency (...) to legally treat environment [nature] not as an object but a subject of law, constitutes a progress in Law. However, it has also been configured as a limitation of the power of the State concerning the indiscriminate use of renewable resources, which are fundamental for future generations'. See: Frank Mila and Karla Ayerim, 'El Constitucionalismo Ambiental en Ecuador' (2020) 97 Actualidad Jurídica Ambiental 5, 12. See also: Mario Aguilera and Mercedes Cóndor, 'La Iniciativa Yasuni ITT como Materialización de los Derechos de la Naturaleza' in Gallegos-Anda and Pérez Fernández (n 66) 213.

not been followed insofar as they have been subordinated to the rights of other legal subjects. That fact has created a fundamental inconsistency, which could end in the mimicry of those rights, if they were subjected – fundamentally – to the interests of others entities. If that were so, nature would remain an object in a legal system, and not a subject of Law. Thus, to maintain coherence with the ethical foundations that underline the recognition of nature's personhood, nature's rights should be – at least theoretically – conceptualised and articulated as autonomously assigned to nature. However, the review of the case law in Latin America shows that this has not been the case. In contrast, we have detected a conceptual confusion between the scopes of the RoN and the rights of future generations on environmental matters, and – even more – a trend of instrumentalising the RoN.

We concluded that the lack of honouring the ethical basis for the recognition of nature's personhood (i.e., by subordinating it to the rights of future generations) is rooted in the theoretical difficulty of differentiating the scope of nature's and future generations' rights, and in the need to overcome some of the procedural barriers that the rights of future generations face. Another factor that has made the autonomous implementation of the RoN difficult in Latin America, is the fact that if nature is released from the service it provides to human beings, that fact would lead to inevitable outcomes. For example, if nature were to be incorporated in a legal order autonomously, that would imply that nature's rights would shape the rights of the other legal subjects; situation that results from the fact that the rights of all right holders gain contour when contrasted with the rights of the other legal entities in a legal order. When this is considered together with the topic analyzed in this Chapter, the recognition of RoN would result in the re-shaping and reformulation of the individual environmental rights of human beings (including that of future generations) in accordance with the scope of the content of nature's rights. That would lead to other entanglements. For example, if we consider that the philosophical foundation for the recognition of RoN and the rights of future generations is different, then the possibility of conflicts between their rights could not be discarded. When all of these are considered, a fair conclusion is that using the RoN to make the rights of future generations effective, should not be considered a harmless exercise.

Doing so conceals that both set of rights could come into conflict, a situation which cannot be ruled out since their scopes are different. In this

contribution, we have highlighted that, while the purpose of the RoN is to protect nature in terms of existing and/or maintaining its vital cycles, the rights of future generations are not limited to environmental concerns. The rights of future generations include different facets of human life, such as the possible right to minimum social security, public medical care, and technology with respect for fundamental rights, among others.[80] To fulfil those other interests held by the future generations, nature's rights would need to be balanced inasmuch as all rights (even constitutional ones) face limitations when encountering coexisting rights worthy of protection.

Therefore, the recognition of RoN in conjunction with the rights of future generations – in some instances – could generate tension, and their instrumentalization as has happened in Latin America, requires a more critical assessment.

80 See: Gosseries (n 12).