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<Symposium Article>

Rights of Nature, Legal Personality, and Indigenous Philosophies^ψ

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Abstract:

This article investigates the relationship between legal personality for nature and indigenous philosophies by comparing two cases: the Ecuadorian Constitution of 2008 and the 2014 Te Urewera Act of Aotearoa, New Zealand. Through these case studies, the article considers the nature of indigenous relations with the concept of rights of nature, arguing that this relation is primarily strategic, not genealogical. The article engages with the concept of legal personality and shows that it is not a direct translation of indigenous conceptions, but rather a potential straitjacket for indigenous emancipatory politics. The radical character of indigenous ontologies is not fully reflected in the concept of legal personality. Furthermore, the way in which rights are granted to the natural environment is an important part of the effect such rights might have on indigenous communities. Despite some affinities between rights of the environment and indigenous philosophies, overstating the connection might constrain the radical political and legal implications of indigenous thought.

Keywords: <rights of nature; Te Urewera; legal personality; Aotearoa New Zealand; critical jurisprudence; indigenous law>

1. INTRODUCTION

The first constitutional rights of nature in history appeared in Ecuador, in 2008,¹ thus far the most prominent case of constitutional recognition² of rights for the natural environment. Other states have implemented the general model of rights for nature at different levels. In the United

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¹ *Constitución de la Republica de Ecuador* (Constitution of the Republic of Ecuador), Official Registry No. 449, 20 Oct. 2008 (Ecuador).

² The Constitution of Mexico City is the only other constitutional case that has arguably made steps towards recognizing the rights of nature. Art. 13.3 provides for a secondary law of nature's rights, but it relates to rights *to* nature. Furthermore, since constitutional importance arguably does not attach to constitutions only, other instruments enshrining rights of nature may also have constitutional importance in the sense that they change the context in which law and politics operate. See further n. 12 below.

States (US), several dozen municipal ordinances declare the rights of the municipal environment, inspired by the first such case in Tamaqua Borough, Pennsylvania, in 2006.³ In 2010, Bolivia adopted the Law of the Rights of Mother Earth,⁴ followed in 2012 by the Framework Law of Mother Earth and Integral Development for Living Well.⁵ New Zealand has so far recognized rights of the natural environment in two cases: for Te Urewera⁶ (a former national park in the North Island), and for the Whanganui River.⁷ Rights for Mount Taranakis are poised to soon become the third such case. The latest additions to this already impressive collection are Columbia, where the Atrato River received rights⁹ in 2017, and India, which recognized the rights of the Ganges and Yamuna Rivers.¹⁰ As is already apparent from this list, so far rights of nature have been most commonly bestowed on water bodies.

All cases have in common the appeal to rights in order to protect the natural environment¹¹. Ecuador is often seen as the pioneer that led the way, with other countries following suit in a classic example of a transnational movement. Although Ecuador is the only state to date with a constitution which grants rights to nature, other efforts can be interpreted as having similar

³ M. Margil, 'Building an International Movement for Rights of Nature', in M. Maloney & P. Burdon (eds), *Wild Law: In Practice* (Routledge, 2014), pp. 149-60.

⁴ *Ley de Derechos de la Madre Tierra* (Law of the Rights of Mother Earth), Plurinational Legislative Assembly, Law 071 of the Plurinational State, 21 Dec. 2010 (Bolivia).

⁵ *Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien* (Framework Law of Mother Earth), Plurinational Legislative Assembly, Law 300 of the Plurinational State, 15 Oct. 2012 (Bolivia).

⁶ *Te Urewera Act*, No 51, 2014 (New Zealand).

⁷ *Te Awa Tupua Act* (Whanganui River Claims Settlement), No 7, 2017 (New Zealand).

⁸ Ngati Maru are the latest iwi (out of eight) to sign an Agreement in Principle with the Crown, available at: <https://www.govt.nz/assets/Documents/OTS/12-month-progress-report-1-July-2017-to-30-June-2018.pdf>

⁹ *Centro de Estudios para la Justicia Social "Tierra Digna" v the President of the Republic* NoT-5.016.242, Corte Constitucional, Sala Sexta de Revision (Constitutional Court, Sixth Chamber), 10 Nov. 2016, (Colombia). See also E. O'Donnell & J. Talbot-Jones, 'Legal Rights for Rivers: What Does This Actually Mean' (2017) 32(6) *Australian Environment Review*, pp. 159-62.

¹⁰ *Mohd Salim v State of Uttarakhand & others*, WPPIL 126/2014 (High Court of Uttarakhand) 2017 (India). Also see E. O'Donnell, 'At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India.' (2017) 30(1) *Journal of Environmental Law*, pp. 135-44.

¹¹ For environmental constitutionalism and the rights paradigm, see D. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (University of British Columbia Press, 2011). For the rights of nature interpreted as mechanisms of political representation, see M. Tănăsescu, *Environment, Political Representation, and the Challenge of Rights* (Palgrave Macmillan, 2016). For environmental constitutionalism writ large, see L. Kotzé, 'A Global Environmental Constitution for the Anthropocene?' (2019) 8(1) *Transnational Environmental Law*, pp. 11-33.

constitutional significance.¹² More often than not, indigenous nations have been involved, in one way or another, in establishing rights for nature. Scholars, commentators, and indigenous leaders themselves have often argued that the rights of nature borrow heavily from indigenous ecocentric legal frameworks. Particularly in the cases of Ecuador, Bolivia, and New Zealand, the name of the rights-bearing entity itself suggests the recognition of ontologies and legal frameworks distinct from purely Western ones.¹³ Importantly, developments in the rights of nature have so far played out mostly in relation to water bodies, which themselves have important genealogical connections to many indigenous people.

This article is concerned with critically examining the relationship between nature's rights and indigenous philosophies. Two cases – in Ecuador and New Zealand – suggest that Western and indigenous conceptions of law are indeed being mixed in the discourse of rights of nature, but not always to the benefit of indigenous communities. This article will examine the relationship between the concept of legal personality for nature and the cosmologies of different indigenous nations, in order to reflect on the possibilities that a rights-based approach might offer to indigenous emancipatory projects. In developing this argument, the article will demonstrate that cases to date of granting rights to nature are attributable to parallel histories – these cases are rooted in local political contexts but have also been inflected by indigenous participation in specific ways. This means that, to date, the recognition of legal personality for nature cannot

¹² In particular Bolivia's Framework Law and New Zealand's deeds of settlement. For the constitutional significance of the Bolivian law, see P. Villavicencio Calzadilla & L. J. Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7(3) *Transnational Environmental Law*, pp. 397-424. For the constitutional significance of the New Zealand cases, see K. Sanders 'Beyond Human Ownership? Property, Power and Legal Personality for Nature in Aotearoa New Zealand' (2017) 30(2) *Journal of Environmental Law*, pp. 207-34. For the constitutional importance of the Ecuadorian case, see A. Acosta, 'El Buen (con) Vivir, una utopía por (re) construir: Alcances de la Constitución de Montecristi' (2011) 4(6) *Otra Economía*, pp. 8-31.

¹³ In Ecuador it is Pachamama that has rights (though the constitutional text uses the term interchangeably with "nature"; see section 5.2 below); in Bolivia it is Mother Earth. In New Zealand, the name of the legal entity created for Whanganui River is intrinsically connected to Māori tradition: Te Awa Tupua means 'river with ancestral power'. See Sanders, n. 12 above, p. 207.

be described as a single international movement for rights of nature, or as representing a single, linear and unproblematic influence of ‘indigenous cosmovisions’¹⁴ on the Western conception of rights.

Much scholarship on the rights of nature, whether in the form of rights for rivers, landscapes, or nature as such, works on the underlying assumption that to give rights to the natural environment responds to a form of ecocentrism found in indigenous philosophies. In this sense, rights of nature are considered to be, if not exactly of indigenous origin,¹⁵ then at least in accord with certain fundamental tenets of indigenous world-views. This article will first examine this assumed relationship between rights for natural environments and indigenous visions. The next two sections will then consider the particularities of this relationship in the cases of Ecuador and New Zealand. The article will argue that the rights of nature are neither ecocentric nor of indigenous origin. However, rights of nature developments could allow for further ontological hybridization, under particular conditions. To discover what these might be, it is useful to compare the two quite different cases of Ecuador and New Zealand.

Although there are other candidate cases available, Ecuador and New Zealand offer unique opportunities for parsing the relationship between rights of nature and indigenous philosophies. This is so because of the undeniably important role that indigenous communities have played in the development of rights of nature in both countries, and the strikingly different results of

¹⁴ See M. de la Cadena, ‘Indigenous Cosmopolitics in the Andes: Conceptual Reflections beyond “Politics”’ (2010) 25(2) *Cultural Anthropology*, pp. 334–70; E. Fitz-Henry, ‘Decolonizing Personhood’, in Maloney & Burdon, n. 3 above, pp. 133–48.

¹⁵ Although there are claims to this effect as well. For a history of the indigenous origin of *buen vivir* (see note 25 below) and the relation between these and the rights of nature, see P. Altmann, ‘El Sumak Kawsay en el discurso del movimiento indígena ecuatoriano’ (2013) 30 *Indiana*, pp. 283–99. For why the rights of nature specifically are not of indigenous origin, see Tănăsescu, n. 11 above, pp. 132–6.

these developments.¹⁶ The very different ways in which rights of nature have been granted in these two cases provides a useful opportunity to showcase inherent differences in the concept of rights of nature. It also reveals important differences between various indigenous experiences, therefore avoiding common generalizations of ‘the indigenous’. Although Ecuador and New Zealand together offer a great opportunity for analysis, the argument will develop one particular case, Te Urewera, in more detail. This particular case has been severely understudied so far, despite the fact that it represents a strikingly innovative use of rights of nature, as this article will demonstrate. In contrast, the article will only provide the necessary context for the Ecuador case and will then direct the reader to the significant body of scholarship that already exists on this case. In summary, these two cases provide particularly good opportunities for thinking through how the rights paradigm might affect the governance of indigenous territories, whether these include rivers, lakes or land.

In two articles critiquing the rights of nature in Ecuador and Bolivia,¹⁷ Kotzé and Calzadilla provide an implicit summary of the often assumed relationship between rights of nature and indigenous ways of thinking. The key to understanding this assumed relationship is the idea of ecocentrism, meaning that nature and natural entities (including landscape features, but also supernatural beings)¹⁸ have value in and of themselves, and not only instrumentally, in relation to people.¹⁹ The classic conception of rights, of undeniable Western origin, is understood as anthropocentric, that is to say only concerned with the rights of people in relation to land,

¹⁶ For a systematic overview of the differences between rights of nature cases, see M. Kauffman & P. L. Martin, ‘Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand’ (2018) 18(4) *Global Environmental Politics*, pp. 43-62.

¹⁷ Villavicencio Calzadilla & Kotzé, n. 12 above, and L.J. Kotzé & P. Villavicencio Calzadilla, ‘Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador’ (2017) 6(3) *Transnational Environmental Law*, pp. 401-33.

¹⁸ Supernatural from the point of view of Western ontology. As is argued in Section 5 below, many indigenous philosophies recognize beings according to their actions, and not their materiality. In this sense, place spirits and ancestors are themselves important actors, in no way inferior to landscapes but rather fundamental to them.

¹⁹ For the ecocentrism of nature’s rights, also see A. Acosta, *El Buen Vivir en el camino del post-desarrollo: Una lectura desde la Constitución de Montecristi* (Friedrich-Ebert-Stiftung-ILDIS, 2010).

animals and natural objects, and not in any meaningful way with nature itself.²⁰ The rights of nature are presented as a formulation that – perhaps paradoxically – borrows the idea of rights from the West to protect entities that have only ever been recognized ecocentrically in indigenous philosophies. Kotzé and Calzadilla go as far as referring to rights of nature and ecocentrism synonymously,²¹ a clear sign of the perceived affinity between indigenous thought and rights of nature, as recognized to date.

This supposed affinity is expressed even more strongly by other authors. Knauß,²² for example, refers to rights of nature as having the potential to ‘transcend European Modernity’, while Demos²³ considers these rights as having ‘deep roots in Indigenous cultural and religious traditions’. Similarly, Acosta and Gudynas²⁴ present nature’s rights as reflecting the indigenous notion of *buen vivir* (good living), also enshrined in Ecuador’s constitution.²⁵ They appear to agree with the characterization of nature’s rights, and of indigenous philosophies, as ecocentric. More generally, commentators on rights of nature routinely use the adjective ‘anthropocentric’ to describe Western legal ontology, which implies that the rights of nature are aptly described as ecocentric.²⁶

²⁰ This claim is ubiquitous in rights of nature advocacy. See, e.g., Margil, n. 3 above. Also see S. Borràs, ‘New Transitions from Human Rights to the Environment to the Rights of Nature’ (2016) 5(1) *Transnational Environmental Law*, pp. 113-43.

²¹ Kotzé & Villavicencio Calzadilla, n. 17 above, p. 408.

²² S. Knauß ‘Conceptualizing Human Stewardship in the Anthropocene: The Rights of Nature in Ecuador, New Zealand and India’ (2018) 31(6) *Journal of Agricultural and Environmental Ethics*, pp. 703-22. This transcendence would be achieved precisely because of the ecocentric credentials of nature’s rights.

²³ T. J. Demos, *Decolonizing Nature: Contemporary art and the politics of ecology* (Sternberg Press, 2016), p. 8.

²⁴ See Acosta, n. 12 above, and E. Gudynas, ‘La dimensión ecológica del buen vivir: entre el fantasma de la modernidad y el desafío biocéntrico’ (2009) 4 *OBETS: Revista de Ciencias Sociales*, pp. 49-54. See also E. Gudynas & A. Acosta, ‘La renovación de la crítica al desarrollo y el buen vivir como alternativa’ (2011) 16(53) *Utopía y praxis latinoamericana*, pp. 71-83.

²⁵ *Buen vivir*, or Sumak Kawsay in Kichwa, is a vision of development in harmony with nature, such that people are not placed above the natural environment but are situated within it. See authors in n. 24 above, as well as section 2 below for more on this notion. See also E. Gudynas, ‘Buen Vivir: Germinando alternativas al desarrollo’ (2011) 462 *América Latina en movimiento*, pp. 1-20; A. Acosta, *El Buen Vivir: Sumak Kawsay, una oportunidad para imaginar otros mundos* (Icaria, 2013).

²⁶ For further examples of the treatment of rights for nature as ecocentric, especially in the case of Ecuador, see Kauffman & Martin, n. 16 above, and M. Kauffman & P. L. Martin, ‘Can Rights of Nature Make Development

Claims of a strong connection between rights of nature (understood as ecocentric) and indigenous philosophies in this stream of scholarship can be taken as a call to modify the Western, anthropocentric conception of rights by means of an ecocentric, indigenous-inspired broadening of the concept of legal subjects. Several different assumptions are embedded in this account. Firstly, there is a perceived tension between anthropocentric and ecocentric legal thinking, evident through the matter-of-fact use of these terms to describe Western legal ontology versus the rights of nature. Secondly, nature as a subject of rights is understood as a totality; as Nature or Earth, a universal principle underlying all life. This is particularly so in the extant cases that do not focus on a particular territory, and instead grant rights to an underspecified nature.²⁷ Thirdly, the claimed ecocentrism of rights of nature implies that such rights are (at least potentially) ecologically beneficial.²⁸ Fourthly, indigenous peoples are considered to be empowered by rights of nature, as these rights are thought to partly emanate from their philosophies.²⁹ This standard account of the relationship between rights of nature and indigenous philosophies is neatly summarized by Kauffman and Martin as the codification ‘for Western legal purposes [of] the indigenous cosmivision that Nature is sacred, possesses its own rights, and is part of a living community in which humans exist’.³⁰ This suggests that nature is conceptualized in indigenous philosophies as already having rights.

More Sustainable? Why some Ecuadorian Lawsuits Succeed and Others Fail’ (2017) 92 *World Development*, pp. 130-42.

²⁷ This is, especially, the case for Ecuador and Bolivia. For the case of Ecuador, see Kauffman & Martin, n. 16 above, p. 48.

²⁸ Indeed, this is also evidenced in the fact that almost all scholarly consideration of the rights of nature is in the context of environmental (legal) scholarship.

²⁹ This claim is also substantiated by the strategic use of the rights of nature by indigenous activists in the run-up to the writing of the Ecuadorian Constitution. For details on this process, see M. Tănăsescu, ‘The Rights of Nature in Ecuador: The Making of An Idea’ (2013) 70(6) *International Journal of Environmental Studies*, pp. 846-61. For the idea that it is the indigenous that act as the ‘natural’ guardians of nature’s rights, see M. Tănăsescu, ‘Nature Advocacy and the Indigenous Symbol’ (2015) 24(1) *Environmental Values*, pp. 105-22. See also discussion in section 4 below.

³⁰ Kauffman & Martin, n. 16 above, p. 55.

With this background, the next section of this article reviews the context and legal provisions in the cases of Ecuador and New Zealand, before critically discussing these cases to assess whether they support the above assumptions.

2. THE RIGHTS OF NATURE IN ECUADOR

The provisions granting rights to nature in the Ecuadorian Constitution of 2008 have been the subject of extensive scholarship.³¹ This article therefore provides only an overview of the relevant context for the purposes of the present discussion.

In the case of Ecuador, the rights of nature were recognized in the context of a reorganization of the state around the citizens' revolution, an idea championed by Alianza País³² as well as its indigenous allies, particularly the Confederation of Indigenous Nationalities of Ecuador (CONAIE).³³ In order to bring about this revolution, then-president Rafael Correa called forth, as one of his first acts in office, a Constitutional Assembly that would draft a new constitution of the state.³⁴ The rights of nature were part of a wholesale reorganization of the state, a situation that was used as a window of opportunity³⁵ by a transnational policy network and an Ecuadorian political elite, which was inclusive of indigenous leaders³⁶ but by no means led by them. The opportunity created by Correa's call for a Constitutional Assembly was seized by a network of activists dedicated to the idea of rights for nature, and to indigenous politics more broadly.

³¹ See Tănăsescu, n. 11 and 29 above, on which much of this account draws.

³² A movement that came to power in 2006 with the election of Rafael Correa as President.

³³ The largest organization of indigenous nationalities in Ecuador.

³⁴ The assembly started deliberating in the latter half of 2007, in the town of Montecristi.

³⁵ J.W. Kingdon, *Agendas, Alternatives, and Public Policies*, 2nd ed (Longman Classics in Political Science, 2003), pp. 165-195.

³⁶ Tănăsescu, n. 11 above.

Like other countries struggling with a heritage of colonialism, the indigenous nationalities of Ecuador had lived through centuries of battles with successive colonizers. For them, the drafting of the Constitution in Montecristi presented a renewed opportunity to push for recognition of indigenous authority in indigenous territories. In earlier work, I have argued that the organized indigenous political forces exerted considerable influence on the inclusion of rights of nature in the Constitution. The support CONAIE lent within the Constitutional Assembly went much further than rights of nature and was centered on a package of rights that would strengthen indigenous authority more broadly.³⁷

The Ecuadorian Constitution can be interpreted as an exercise in the proliferation of rights. It affirms many conflicting rights, not least environmental provisions that clash with development-oriented ones.³⁸ The rights of nature should be understood as one set among an impressive array of rights, and therefore nature should be understood as one entity among a range of entities to be considered. In this sense, the Ecuadorian Constitution is not ecocentric as such, as it contains both ecocentric and anthropocentric provisions. Instead, the document serves as an example of the hegemony of rights in constitutionalism more generally.³⁹

The intellectual genealogy of granting nature rights in the Ecuadorian case can be traced back to the work of Christopher Stone,⁴⁰ and particularly to its reinterpretation in the works of Thomas Berry⁴¹ and Cormac Cullinan,⁴² as well as the practical legal advocacy of the

³⁷ Another key contextual element is the influence of the oil industry in the recent history of Ecuador. See Tănăsescu, n. 11 above.

³⁸ E.g., Art. 12 provides rights *to* water, while Art. 74 provides human rights to benefit from the environment.

³⁹ For the hegemony of rights generally, see T. Campbell, *Rights: A Critical Introduction* (Routledge, 2005). For the hegemonic expansion of rights into environmental protection in particular, see Boyd, n. 11 above.

⁴⁰ See in particular C. Stone, 'Should Trees Have Standing. Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review*, pp. 450-501; C. Stone, *Should Trees Have Standing?: law, morality, and the environment* (Oxford University Press, 2010).

⁴¹ T. Berry, 'The Origin, Differentiation and Role of Rights' (2001) *Earth Jurisprudence Conference*, pp. 21-24.

⁴² C. Cullinan, *Wild law* (Siber Ink, 2011). Also see P. Burdon, (ed.) *Exploring wild law: the Philosophy of Earth Jurisprudence* (Wakefield Press, 2011).

Community Environmental Legal Defence Fund (CELDF).⁴³ The particular policy network that was arguably instrumental in the inclusion of rights to nature in the Ecuadorian Constitution⁴⁴ shared a view of these rights as reflecting a logical historical progression from human-centeredness to the inclusion of more and more potential subjects. This is partly why the specific provisions dealing with nature's rights in the Constitution are drafted in very general terms. It also partly explains why 'nature' is constructed as a legal person, resembling the human person at the heart of human rights. It is worth quoting Articles 71 and 72 in full:

Art. 71. Nature, or Pachamama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.

All persons, communities, peoples and nations can demand public authorities enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.

The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.

Art. 72. Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems.

In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.

⁴³ CELDF was established in 1995 as a public interest law firm. It is now one of the main advocates for including rights of nature in community bills of rights, and is behind every such case in the US. See www.celdf.org. Through its relationship with the non-governmental organization (NGO) Fundación Pachamama, it also advised the Ecuadorian Constitutional Assembly on drafting their rights of nature provisions. Also see A. Rawson & B. Mansfield, 'Producing juridical knowledge: "Rights of Nature" or the naturalization of rights?' (2018) 1(2) *Environment and Planning E: Nature and Space*, pp. 99-119.

⁴⁴ Rawson and Mansfield, n. 43 above.

The rights established in these Articles are very similar to those proposed by Cullinan and Berry.⁴⁵ The question of standing, arguably one of the most crucial issues when it comes to the practical implementation of rights, is explicitly resolved by being granted to everyone, over and beyond the universal applicability of constitutional law itself. Other constitutional provisions are explicitly directed at strengthening indigenous territorial rights, and previous analyses have shown these to have been conceived of together with the rights of nature.⁴⁶ However, the constitutional rights of nature can only work to strengthen other indigenous territorial rights if the indigenous peoples themselves are inherently predisposed towards upholding such rights. In other words, the wide doctrine of standing, considered together with other rights granted by the constitution, nonetheless implies an assumed connection between indigenous people and nature's rights, as indigenous peoples were expected to be the 'natural' protectors of nature⁴⁷. This assumption, as the article argues in Section 5, is neither obvious nor particularly helpful in practice.

When speaking of 'the indigenous' in an Ecuadorian context, one tends to forget the diversity of indigenous groups. Yet, there are six indigenous nationalities in Ecuador's Oriente region alone,⁴⁸ the most numerous of which are the Kichwa.⁴⁹ The demographic dominance of the Kichwa is reflected in the term *sumak kawsay*,⁵⁰ a concept which, according to Acosta and Gudynas, has been instrumental in the development of rights of nature in Ecuador. The importance of the concept for the Ecuadorian Constitution in general is undeniable, as it

⁴⁵ Namely 'the right to be, the right to habitat, and the right to fulfil [one's] role in the ever-renewing process of the Earth Community'. Cullinan, n. 42 above, p. 101.

⁴⁶ See Tănăsescu, n. 29 above.

⁴⁷ *Idem*.

⁴⁸ Continental Ecuador is divided into three different regions: the coastal, the Sierra (the mountain range traversing it North to South), and the Oriente, namely the Eastern part of the country that comprises its Amazonian rain forest.

⁴⁹ The Kichwa are the most numerous indigenous nationalities in Ecuador, out of 13 in total. See <http://www.siise.gob.ec/siiseweb/>.

⁵⁰ Translated as good living in English and *buen vivir* in Spanish. See n. 25 above.

appears throughout the document, from the preamble onwards. Its appearance in the preamble suggests the foundational nature of this concept: it is supposed to frame everything that follows.

Others have shown the direct conflict between Articles 73 and 74 and other articles in the Constitution, particularly those related to development and resource extraction.⁵¹ Moreover, Article 74 sits uneasily with the previous articles, as it gives rights *to* nature, while relating these to the idea of good living. As Kotzé and Calzadilla show, the Ecuadorian Constitution does not manage to fit entirely within the frame of *sumak kawsay*. I have argued before that indigenous leaders supported the rights of nature as part of a package of increased recognition of indigenous authority in indigenous lands. What seemed most important for indigenous leaders was securing rights to govern their own territories, although the final constitutional text does not vest indigenous territories fully in indigenous descent groups.⁵²

The apparently contradictory relationship between *sumak kawsay* and rights of and to nature reveals the limitations of a theoretical interpretive framework that understands indigenous philosophies (and the rights *of* nature) as ecocentric, and western ontologies (and any rights *to* nature) as anthropocentric. Instead, this article argues in Section 5 that indigenous philosophies are *relational*, being able to encompass both intrinsic values *and* instrumental uses, through the wide deployment of anthropomorphism.⁵³

⁵¹ Kotzé & Villavicencio Calzadilla, n. 17 above.

⁵² For example, Art.261(11) places 'energy resources; mineral, oil and gas, and water resources, biodiversity and forest resources' under the jurisdiction of the state. Art. 408 further reinforces the vesting of mineral resources in the state. In contrast, Art.56(12) gives indigenous nationalities the 'right to restore, promote, and protect ritual and holy places, as well as plants, animals, minerals and ecosystems in their territories'.

⁵³ Defined by Descola as the 'tendency to detect human personhood in nonhumans'. Anthropocentrism, on the other hand, is the idea that 'humankind [is] the highest form of being and the template for judging all others'. In P. Descola, 'The grid and the tree: Reply to Marshall Sahlins' comment' (2014) 295(300) *HAU: Journal of Ethnographic Theory*, pp. 295-6. Also see P. Descola, *Beyond Nature and Culture* (University of Chicago Press, 2013); E. Viveiros de Castro, 'Exchanging perspectives: the transformation of objects into subjects in Amerindian ontologies' (2004) 10(3) *Common knowledge*, pp. 463-484. However, as Sections 5 and 6 will argue, the 'human personhood' that Descola uses to characterize anthropomorphism is not the equivalent of 'legal personhood'.

The fact that everyone in Ecuador has standing to represent nature's rights creates several problems. Theoretically, the issue of standing represents acknowledgment by the law of particular relations that justify a person speaking on behalf of rights holders who, for one reason or another, cannot speak for themselves. The constitutional framing in the case of Ecuador, and the explicit vesting of standing in anyone (regardless even of nationality), suggest that these were modeled on the concept of universal human rights,⁵⁴ that is to say on rights that are thought to be intrinsic and therefore can be invoked by anyone. In the case of human rights, their supposedly intrinsic nature derives from idea of the human person as having an intrinsic moral standing that the law of human rights recognizes.⁵⁵ Similarly, the Ecuadorian rendition of the rights of nature seems to construct a concept of nature as intrinsically morally significant,⁵⁶ and therefore its rights can be upheld by anyone.

As Anna Grear demonstrates,⁵⁷ the way in which we think of the entities that populate the law matters a great deal. The Ecuadorian Constitution encourages conceiving of nature as a legal *person*, a conception that risks mixing moral and legal notions in ways that are ultimately unhelpful because the idea of the person is always already modeled on a particular kind of being⁵⁸ (usually the human person, with set characteristics) and therefore potentially stifles the

⁵⁴ See Tănăsescu, n. 11 above.

⁵⁵ For this idea in human rights law specifically, see C. Douzinas, *The End of Human Rights* (Hart Publishing, 2000). For the idea that a very similar logic is at play in nature's rights, see Tănăsescu, n. 11 above.

⁵⁶ The constitutional text encourages this interpretation through the synonymous use of nature and Pachamama, and therefore also places the recognition of the moral intrinsic worth of nature firmly within indigenous philosophy.

⁵⁷ See A. Grear, 'Law's Entities: Complexity, Plasticity, and Justice' (2013) 4(1) *Jurisprudence* pp. 76-101. The terms legal entity/person/subject/personality/personhood are routinely used interchangeably, in both legal texts and scholarship. Instead of perpetuating this confusion, this article distinguishes between the use of 'legal person' and legal entity/personality/subjectivity. These last three terms are used as equivalents. For more on the important distinction between legal person and legal entity, see N. Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 *The Modern Law Review* pp. 346-367.

⁵⁸ See Tănăsescu n. 11 above. This further strengthens the interpretation of Ecuador's rights of nature as modeled on universal human rights, something further seen in the instrumental role that Ecuadorian activists are having in pushing for a Universal Declaration of the Rights of Mother Earth. For the assumptions baked into the notion of a legal person, and its confusion with the moral person, see Naffine, n. 57 above, pp. 357-361.

politically radical act of extending the circle of entities recognized by the law. If, following Grear's analysis, we interpret the rights of nature as inaugurating a new legal *entity*, then this new subject of the law has to be identified through its relations with other subjects (because 'entity' has no substantive or moral meaning as such). One way to identify this entity is through the doctrine of standing, which controls who can speak on its behalf and, therefore, the kinds of political uses these rights can be put to.

The Ecuadorian rights of nature, on this interpretation, encourage the inauguration of nature as a legal person who, by virtue of their intrinsic characteristics, can have a representative relationship with anyone. This apparently apolitical move opens up the possibility for very partisan political mobilization of the rights of nature, as already exemplified in judicial practice. For example, Daly shows how the government of Correa, itself very skeptical of nature's rights,⁵⁹ has successfully used such rights against small-scale artisanal miners.⁶⁰ In a different case,⁶¹ the claims of the Vilcabamba River were upheld against the provincial government, but the government was noticeably slow in implementing the court's judgment, though it did eventually do so.⁶² Of the 13 cases that Kauffman and Martin document in Ecuador, none of those brought by the government were lost. The wide variation in outcome between the various extant court cases⁶³ reveals the problems inherent in a formulation of nature's rights based on a universal subject (nature as person) and wide standing. It further reveals the seldom acknowledged discrepancy between the notions of legal person and legal

⁵⁹ See de la Cadena, n. 14 above, p. 336.

⁶⁰ *República del Ecuador Asamblea Nacional, Comisión de la Biodiversidad y Recursos Naturales, Acta de Sesión No 66* (15 June 2011). In this case the Interior Ministry of the Republic 'sought an injunction against illegal gold mining operations in two remote districts in the north of the country'. In E. Daly, 'The Ecuadorian exemplar: the first ever vindications of constitutional rights of nature' (2012) 21 *Review of European, Comparative and International Environmental Law*, pp. 63-66, at p. 65. The government won and, with the help of the national armed forces, quickly enforced the verdict in favour of nature's rights, destroying the property of the artisanal miners in the process. See also Tănăsescu, n. 11 above, p. 248; Kauffman and Martin, n. 26 above.

⁶¹ See Kauffman and Martin, n. 26 above, for an analysis of all extant cases to date.

⁶² See Daly, n. 60 above, p. 64 and Kotzé and Villavicencio Calzadilla, n. 17 above, p. 28.

⁶³ Also see Tănăsescu n. 11 above, pp. 129-132.

entity, and begins to question whether indigenous anthropomorphism can be aptly accommodated within the liberal concept of legal person. Lastly, the Ecuadorian experience contrasts in important respects with the New Zealand one, giving us grounds for a comparative analysis that reveals the very different genealogies of rights for nature in different places, and the different ways in which indigenous communities relate to the rights of nature.

3. LEGAL PERSONALITY IN NEW ZEALAND

3.1. *Te Urewera*

The first case of legal recognition of a natural entity in New Zealand concerned granting rights to Te Urewera, the ancestral home of Tūhoe people of Aotearoa New Zealand.⁶⁴ This section focuses on this case and does so for two reasons. Firstly, the *Te Urewera* case is significantly understudied, compared to the case of Whanganui River. Secondly, it contains all the elements that distinguish rights of nature in New Zealand from other jurisdictions, and therefore highlights the different ways in which the relationship between legal personality and indigeneity manifests.

The most important contextual background for understanding the legal personality of Te Urewera are the treaty negotiations between Māori groups and the New Zealand government. As Sanders explains, ‘the grant of legal personality to Te Urewera and the Whanganui river took place as part of the Treaty of Waitangi settlement process, through which the Crown acknowledges breaches of its obligations to Māori under the 1840 agreement’.⁶⁵ To understand

⁶⁴ Aotearoa is the original Māori name for the North island, now widely used for the entire country. See A. Salmond, *Tears of Rangi: Experiments across worlds* (Auckland University Press, 2017). Tūhoe are a Māori group that inhabit the lands of Te Urewera, currently having around 10,000 registered members. See J. Binney, *Encircled lands: Te Urewera, 1820-1921* (Bridget Williams Books, 2009).

⁶⁵ Sanders, n. 12 above, p. 213.

the importance of the Treaty settlement process, it is necessary to briefly reflect on the history of New Zealand's colonization.

The first significant contact between Europeans and Māori dates back to 1769,⁶⁶ when the *Endeavour*, captained by James Cook, landed on the eastern shores of the North Island. Seventy years and many missionaries and settlers later, the British Crown and many (but not all) Māori chiefs signed the 1840 Treaty of Waitangi, the most important document in New Zealand's history.⁶⁷ After the signing in Waitangi, the Treaty was taken across the island for additional signatures. Tūhoe have never signed,⁶⁸ though this does not mean that they, and their land, were not affected by this monumental event.

Indeed, starting in the 1860s, a period of aggressive colonization began, with land purchases and confiscations greatly expanding the settler populations. Demography shifted from Māori majority to Māori minority in little more than 50 years. The Māori population 'dropped from around [200,000] in 1840 to [40,000] in 1900. Epidemics of influenza, measles, diphtheria, and tuberculosis, as well as ill-health caused by changes in diet and living conditions, all affected the population. Other deaths, of course, occurred in battle with the colonizer ...'.⁶⁹ Te Urewera remained the last bastion of Māori *tikanga*,⁷⁰ as it was only in 1865 that the Crown 'confiscated much of [Tūhoe's] most productive land'.⁷¹ Between 1865 and 1871 there was a war between

⁶⁶ Technically the first known contact with Europeans was 13 December 1642, when Abel Tasman sailed past New Zealand. However, this encounter did not lead to landing or settlement. This would not occur until Cook's arrival.

⁶⁷ See C. Jones, *New treaty, new tradition: reconciling New Zealand and Māori law* (UBC Press, 2016).

⁶⁸ Ngai Tūhoe Deed of Settlement Summary (June 4, 2013). Also see Binney, n. 64 above.

⁶⁹ M. Jackson, 'The Treaty and the word: the colonization of Māori philosophy'. In O. Graham and W. P. Roy (eds.), *Justice Ethics, and New Zealand Society* (Oxford University Press, 1992), pp.1-10, at p. 2.

⁷⁰ Meaning law, way or custom. In legal discussions, the term is used to denote Māori law, that is to say legal custom of Māori origins and application. Much in the discussion of legal personality for nature centers around the idea that this construct represents a hybridization of *tikanga* Māori and Crown law.

⁷¹ Deed of Settlement Summary, n. 68 above.

the Crown and Tūhoe in Te Urewera which, by the Crown's own admission, devastated Māori groups through starvation, executions, and further appropriation of lands.⁷²

The Treaty of Waitangi was signed in two language versions, a Māori and an English one. The history of the difference between these two is extremely important and has been amply debated. One of the most contentious concepts for the purposes of the present discussion is that of *tinō rangatiratanga*. Jones explains that the term varies in meaning from 'self-government' to 'sovereignty' or 'full authority'.⁷³ The Waitangi Tribunal has argued that 'no one single English concept effectively captures the full meaning of the term' in part because, unlike sovereignty in English, it has spiritual connotations as well as implications of dominion over particular territories.⁷⁴ In the Māori version, Article two of the Treaty of Waitangi guarantees the chiefs *tinō rangatiratanga*.

Recent scholarship on the Treaty, as well as recent judicial decisions, has more or less settled on the opinion that, at the time of signing, the chiefs did not cede their sovereign ability to direct the life of the community or ownership of their lands.⁷⁵ The English text of Article Two reads:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.

⁷² V. O'Malley, 'Tūhoe – Crown Settlement – historical background' (2014) October *Māori Law Review*. Also see C. Finlayson, *Address to Tūhoe – Crown Settlement Day in Taneatua*, 23 August 2014. Available at: <https://www.beehive.govt.nz/speech/address-tuhoe-crown-settlement-day-taneatua>

⁷³ Jones, n. 67 above, p. 54

⁷⁴ *Ibid*, p. 56.

⁷⁵ Sanders, n.12 above; Jackson, n. 69 above.

The Māori version of this Article reads:

The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures.⁷⁶

What the Māori text refers to as *tinō rangatiratanga*, or the ‘unqualified exercise of chieftainship’, is in the English text ‘the full exclusive and undisturbed possession’.

Similar issues bedevil Article One of the Treaty. In the English version, ‘sovereignty’ was ceded to the Crown, while in the Māori version it was *kawanatanga*, or ‘governorship’.⁷⁷ English colonists and their successive governments increasingly acted as if the Treaty of Waitangi had transferred sovereignty of Aotearoa to the Crown, while Māori chiefs operated under the understanding that they had retained *tinō rangatiratanga*. Tūhoe have been consistent throughout this history in affirming *mana motuhake*, a term very close in meaning to *tinō rangatiratanga*. As Higgins explains, ‘distinctions between *mana motuhake* and *tinō rangatiratanga* are contextual rather than categorical, but while they have much in common, *mana motuhake* more strongly emphasizes independence from state and crown and implies a measure of defiance’.⁷⁸

Throughout the 19th century this defiance was also expressed through the sheltering of other Māori people that were fleeing persecution elsewhere,⁷⁹ such that ‘Richard Boast describes Te Urewera as the last “major bastion of Māori de-facto autonomy”’.⁸⁰ This autonomy was

⁷⁶ The standard translation used is that of Professor Sir Hugh Kawharu. See

<https://www.waitangitribunal.govt.nz/treaty-of-waitangi/translation-of-te-reo-Māori-text/>

⁷⁷ A. Erueti, ‘Conceptualizing indigenous rights in Aotearoa New Zealand’ (2017) 27(3) *New Zealand Universities Law Review*, pp. 715-743, at p. 717.

⁷⁸ R. Higgins, ‘Ko te mana tuatoru, ko te mana motuhake’. In M. Hickford and C. Jones (eds.) *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (Routledge, 2018), pp. 129-139, at p. 130

⁷⁹ Binney, n. 64 above.

⁸⁰ Higgins, n. 78 above, at p. 130.

officially recognized in law when, in 1896, ‘the Urewera District Native Reserve Act provided for local Tūhoe self-government over a 656,000-acre Reserve, and for decisions about the use of land to be made collectively and according to Tūhoe custom. The Act guaranteed the protection of Tūhoe lands, which could not be sold without Tūhoe consent and then only to the Crown’.⁸¹

The Act was never implemented, though it set a unique precedent in recognizing Tūhoe’s authority in Te Urewera. ‘Perhaps the most remarkable aspect of [the Act] was its intention to give effect to tino rangatiratanga or mana motuhake’.⁸² Despite this intention, the early 20th century saw blatant disregard for the Act, with ‘the government simply... buying land interests directly from individuals, in direct contravention of its own laws’.⁸³ As if to catch up with the reality on the ground, in 1922 the government repealed the Urewera District Native Reserve Act, putting an end to this early period of experimentation in plural sovereignty. Further shrinkage of Tūhoe land ensued, which led to massive emigration from the area. In 1954, Te Urewera became a national park, which seemed to seal its fate as a settler fantasy of nature forever stolen from within an intricate human-nature genealogy.

3.2. *Waitangi Tribunal and Te Urewera*

The Treaty of Waitangi Act of 1975 inaugurated the Waitangi Tribunal, ‘a standing commission of inquiry established to inquire into Māori claims that laws, policies, acts or omissions of the Crown are or were inconsistent with the principles of the Treaty of Waitangi’.⁸⁴ The Tribunal only has powers of recommendation, though this has not rendered it

⁸¹ Finlayson, n. 72 above.

⁸² C. Jones, ‘Tūhoe – Crown settlement – Tūhoe Claims Settlement Act 2014; Te Urewera report of the Waitangi Tribunal’ (2014) October *Māori Law Review*.

⁸³ O’Malley, n. 72 above.

⁸⁴ Sanders, n. 12 above, p. 208.

powerless. Indeed, ‘the tribunal began to have an influence on public policy, despite its lack of powers to compel the government to take notice of its recommendations’.⁸⁵ As Belgrave continues, ‘it was partly in recognition of this success that in 1985 the fourth Labour Government extended the tribunal’s jurisdiction back to 1840, with far-reaching consequence that were only dimly understood at the time’.⁸⁶ This set in motion the contemporary era of negotiations between the government and Māori *iwi* and *hapū* for breaches of the treaty.⁸⁷

The grant of legal personality to diverse landscapes in New Zealand should therefore be understood in the post-1985 context of treaty settlements. It is this historical period which elevates the Treaty of Waitangi to the most significant document in Māori – Crown relations. Before 1985, the Treaty of Waitangi had no particular legal status or force.⁸⁸ As Belgrave notes, ‘until the creation of the Waitangi Tribunal, no court or commission of inquiry had needed to define what was actually agreed to at Waitangi’.⁸⁹ The idea that Māori-Crown relations are defined by the differences in translation briefly summarized above is itself a late 20th century narrative that accords well with the contemporary period of treaty settlements.⁹⁰ It also shows that the Treaty, in the 19th century, ‘could not be pinned down to a single interpretation for its European participants, let alone among the more than 500 rangatira representing diverse Māori communities’.⁹¹

⁸⁵ M. Belgrave, *Historical frictions: Māori claims and reinvented histories* (Auckland University Press, 2013).

⁸⁶ *Idem*.

⁸⁷ Names for indigenous Māori descent groups. *Iwi* denotes a larger group than *hapū*.

⁸⁸ It still has no legal status akin to that of a constitution. Its only force comes through the Waitangi Tribunal, itself only having powers to recommend, but nevertheless extremely influential.

⁸⁹ Belgrave, n. 85 above.

⁹⁰ This point is further reinforced by the fact that the first study to take seriously the differences in translation of the Treaty was undertaken by Ruth Ross in 1972. See R. Ross, ‘Te Tiriti o Waitangi: Texts and Translations’ (1972) 6(2) *New Zealand Journal of History*, pp. 129-157.

⁹¹ Belgrave, n. 85 above.

As other scholars have shown, Tūhoe claims to Te Urewera, like *Whanganui iwi* claims to the Whanganui river, can be interpreted as complex diachronic negotiations about who owns the land, or more precisely about who has ultimate authority in governing the lands. Legal personality provides a provisional solution to this question.

3.3. *From Park to Legal Subject*

The history of treaty negotiations might suggest that Māori descent groups feature as fully equal participants in a process of negotiation. However negotiations always take place against a backdrop of state power to impose the general framework for discussion. Higgins makes the point that treaty negotiations force Māori to come together in ways that are not based on Māori custom. She argues that ‘the process that is placed upon iwi to create “mandated large natural groupings” by the Office of Treaty Settlements’ is itself an imposed framework.⁹² She continues: ‘...the settlement systems are not determined by Māori and often contravene *tikanga Māori*, or any “customary system of authority”’.⁹³ This has the potential to create tensions within Māori communities, as *tikanga* systems of membership might or might not correspond with official requirements for commencing negotiations. In the case of Te Urewera, it was Te Kotahi a Tūhoe that received the mandate to negotiate with the Crown for treaty settlements.⁹⁴

Negotiations between Tūhoe representatives and the Crown began in 2005. For Tūhoe, the return of Te Urewera under their authority was non-negotiable, although it was far from clear at the beginning what this return might look like. The government, in turn, feared that ‘negotiating Te Urewera and mana motuhake would lead to Tūhoe creating a separate nation

⁹² Higgins, note 78 above, at 132.

⁹³ *Idem*.

⁹⁴ Echoing Higgins’ point about the tensions that might be created by the requirement of a unified *iwi*, Binney recalls the internal struggles between *hapū* regarding who was the rightful representative of Te Urewera in negotiations with the Crown. See J. Binney, *Stories Without End: Essays 1975-2010* (Bridget Williams Books, 2010), pp. 364-5.

and closing borders and access to Te Urewera, which was still a National Park at the time. This sensationalism led to the Prime Minister removing Te Urewera from the negotiation table at the eleventh hour before the signing of the Agreement in Principle between the Crown and Tūhoe'.⁹⁵ This led to the halting of negotiations in 2010, because for Tūhoe 'Te Urewera and mana motuhake are inextricably linked'.⁹⁶ The refusal to negotiate further on the part of Tāmami Kruger, Tūhoe chief negotiator and senior leader of Te Kotahi a Tūhoe, forced the government back to the table and eventually resulted in the government granting legal personality.

Te Urewera Act of 2014 establishes Te Urewera as a *legal entity*, a term used consistently throughout the document. It is tempting to interpret this term as synonymous with legal person. Following Grear's analysis, however, the only commonality between legal entity and legal person is their initiation through a legal proclamation.⁹⁷ The tendency to treat legal persons and entities as synonymous is exemplified in Morris and Ruru's definition of legal person as 'an entity – a natural person, company or similar – that has legal rights and may be subject to obligations'.⁹⁸ The text of Te Urewera Act seems to prefer the term legal entity to define the legal status of Te Urewera, yet also sometimes uses the two terms synonymously. For example, Section 11.1 declares that 'Te Urewera is a legal entity, and has all the rights, powers, duties, and liabilities of a legal person'. This reflects the undertheorized nature of the difference between legal entities and persons, a difference that, as I argued earlier in the case of Ecuador, only really emerges when we consider the potential restrictions that these terms impose upon the practice of (politically) representing a nature with rights. Indeed, Section 11.2 mandates that the aforementioned rights, powers and duties must be exercised on behalf of Te Urewera

⁹⁵ Higgins, n. 78 above, p. 135.

⁹⁶ *Idem*.

⁹⁷ See Grear, n. 57 above.

⁹⁸ J. DK. Morris and J. Ruru, 'Giving voice to rivers: legal personality as a vehicle for recognising indigenous peoples' relationships to water?' (2010) 14(2) *Australian Indigenous Law Review*, pp. 49-62, at p. 53.

by Te Urewera Board, therefore designating a specific representative for the legal entity. Constructing Te Urewera as an entity can therefore be interpreted as a way of being transparent about the artificiality of the construction itself, thereby allowing the Board ample discretion regarding how to represent Te Urewera and its specific life-form.

The construction of Te Urewera as a legal entity in the context of the treaty negotiations is a compromise that avoids vesting land ownership either in Tūhoe or the government. It also avoids vesting full political authority either party, and instead opts for the construction of a Board that would be the de facto and de jure governor of Te Urewera, while the owner is Te Urewera itself. Indeed, Section 17 states that the board was ‘created in order to act on behalf of, and to “provide governance”’ to Te Urewera. Subsequent sections explicitly allow the Board to govern according to Tūhoe principles.⁹⁹ Tūhoe leaders have used the space opened up by the difference between ‘providing governance’ and ‘Tūhoe principles’: instead of opting for a conventional governance regime where people manage nature, Tūhoe ontology subverts the requirement of governance by recognizing natural entities themselves as capable of self-governance. This space of innovation is granted explicit approval by the law’s designation of Te Urewera as an entity, and therefore not modelled on pre-existing governance arrangements.

In this context of ontological mixing between the Crown and Tūhoe, the rules for appointing Board members, and the internal rules of decision making, become very important to understand how legal recognition might work in practice. Also important are the appointment panel, which consists of the trustees of Tūhoe Te Uru Taumatua,¹⁰⁰ the Minister of Conservation and with the Minister of Treaty Negotiations. In the first three years of

⁹⁹ 18.2 and 18.3.

¹⁰⁰ The seven trustees are available here: <https://www.ngaituhoe.iwi.nz/governance>.

functioning, the Board is composed of four representatives for both the Crown and Tūhoe. After the first three years of functioning, this changes to six members appointed by Tūhoe and three by the Ministers.¹⁰¹ The appointment panel can remove previously appointed Board members.

Section 31 establishes that ‘Board members must promote unanimous or consensus decision making, as the context requires’. Sections 33 and onwards lay down the various decision rules. If a decision cannot be reached by consensus and must be put to a vote, it must be carried by an 80% majority of those present and at least two members who were appointed by the Ministers. Section 40 declares that ‘financially speaking and for tax purposes, Te Urewera and the Board are the same person’.

According to the 2014 Act, the Board is tasked with drafting and following a management plan, Te Kawa o Te Urewera.¹⁰² One purpose of the management plan is ‘to set objectives and policies for Te Urewera’.¹⁰³ Te Kawa was drafted with strong input from Tāmāti Kruger, a chief negotiator and senior leader of Te Kotahi a Tūhoe, as well as Board member and chairman of Tūhoe Te Uru Taumatua, who had been instrumental in both negotiating the 2014 Act with the Crown. He turned the conventional framing of the relation between nature and management on its head and stated that ‘Te Kawa is about the management of people for the benefit of the land – it is not about land management’.¹⁰⁴ The next section of this article will discuss the difference between Te Urewera Act and Te Kawa, as this will be important in developing the relationship between Tūhoe *tikanga* and legal recognition for Te Urewera.

¹⁰¹ At the time of this writing, the second Board had commenced its term. In addition to Board members, the Te Urewera Act 2014 appoints a Tūhoe chairman in perpetuity.

¹⁰² Hereafter Te Kawa. Available at <https://www.ngaituhoe.iwi.nz/te-kawa-o-te-urewera>.

¹⁰³ Idem.

¹⁰⁴ Idem.

The language that characterizes future management plans in the Te Urewera Act falls squarely within a Western legal and managerial tradition dominated by outcomes, targets, and so on. As Carwyn Jones points out, Māori terms are heavily used in the preamble and historical parts of the documents (the symbolic ones), while there is ‘a general paucity of Māori language within the operational provisions of these instruments’. Arguably however, the Board brilliantly subverts this strategy in the management plan.¹⁰⁵

Te Urewera as a legal entity governed by a Board, itself governed by the self-drafted Te Kawa, is a wholly new arrangement that represents an innovative compromise in Māori – Crown relations. Strikingly, the issue of nature conservation is entirely vested in the Board, and therefore left open.¹⁰⁶ In fact, there is nothing particularly ‘environmental’ about the construction of Te Urewera as a legal entity. The provisions of the Te Urewera Act were not primarily motivated by environmental concerns, but rather by power relations between old rivals. This can also be said of the rights of nature provisions in the Ecuadorian Constitution.

4. COMPARING ECUADOR AND NEW ZEALAND

The Ecuadorian Constitutional Assembly and the Aotearoa Treaty settlement process can be characterized as parallel occasions for legal innovation. Though ostensibly involving different legal instruments, they are both rightly interpreted as constitutional. Indeed, the case of Te Urewera concerns a literally constitutional arrangement, as it sets the framework for all subsequent legal and political governance of the territory. In both Aotearoa and Ecuador, the history of colonial struggles is paramount for understanding the conditions under which the

¹⁰⁵ Jones, n. 67 above, p. 104.

¹⁰⁶ This is particularly striking in view of the history of Te Urewera as a former national park, and therefore under the former management of the Department of Conservation.

legal provisions under discussion were developed. Indigenous groups in Ecuador as well as Māori *iwi* and *hapū* have participated in processes of constitutional reform in the context of continuing struggles for recognition of their full authority in their territories. In this sense, legal rights of nature are the latest iteration in a history of conflict and negotiation over political authority.¹⁰⁷

This overarching similarity notwithstanding, Ecuador and New Zealand present strikingly different versions of rights of nature, both in substantive and genealogical terms. Kauffman and Martin theorize the difference between these and other rights of nature cases, along the axes of scope and strength. In terms of scope, Ecuador's rights of nature concern all of nature, while the New Zealand cases of always deal with a particular entity (here, Te Urewera). Ecuador gives specific rights, while Te Urewera is simply awarded 'legal personhood status'.¹⁰⁸ In terms of strength, Ecuadorian rights of nature seems to derive most of their force from being embedded in a constitutional provision, while Te Urewera draws strength from the fact that it has appointed representatives.¹⁰⁹ Kauffman and Martin view the latter as guardians, but this is misleading in several ways. In fact, the issue of guardianship is carefully *avoided* in the texts of the New Zealand laws. Māori philosophy does not place humans as guardians of the environment. For Māori, places are inhabited by *kaitiaki* (the term usually translated as guardian) that are specifically *not* human. The ethic of care is *kaitiakitanga*, variously translated as trusteeship or guardianship. But, as Merata Kawharu explains, 'implementing *kaitiakitanga* is as much about managing resources of the environment as it is about managing

¹⁰⁷ And, in both cases, the discussion has shown that rights and legal personality are not themselves enough to vest authority entirely in indigenous groups. In fact, legal personality in New Zealand was quite explicitly a way *around* vesting full authority in Māori descent groups.

¹⁰⁸ Kauffman and Martin, n. 16 above, p. 45.

¹⁰⁹ Kauffman and Martin, n. 26 above.

people'.¹¹⁰ This focus on managing people, as well as the reluctance to format nature according to a human form (for example, a person), is a major overlooked difference between Ecuador and Te Urewera. Strikingly, the Western notion of guardianship seems to be so deeply rooted that most commentators have read it into Te Urewera Act, even though there is no textual legal basis for doing so.¹¹¹

The issue of who has standing to act on behalf of nature is important insofar as it gives clues as to the likely politics of rights of nature in its various forms. Standing need not be interpreted narrowly as a legal requirement with applicability in court alone. Instead, it can be conceptualized as the right to speak on behalf of a legal entity, and therefore to represent it, in diverse fora.¹¹² Beyond court settings, anybody can speak for nature in Ecuador.¹¹³ In New Zealand, in contrast, only particular groups are morally, politically and legally justified in acting as representatives of the legal entities under discussion. This difference is more radical than is immediately apparent, not least because of the very different ways in which it allows indigenous philosophies to articulate specific ways of relating to environments not necessarily understood on the model of a (human) person.

¹¹⁰ In M. Kawharu, 'Environment as a Marae Locale', in Selby, Moore and Mulholland, *Māori and the Environment* (Huia Press, 2010), pp. 221-237, at p. 227.

¹¹¹ This also applies to Te Awa Tupua, the Act granting the Whanganui River legal rights. There, the legal entity created to represent the river is conceptualized as the human face of the river. See n. 7 above. Also see A. Salmond, G. Brierley, D. Hikuroa, 'Let the Rivers Speak: thinking about waterways in Aotearoa New Zealand' (2019) *Policy Quarterly* 15(3), pp. 45-54.

¹¹² For the link between legal standing and political representation, see M. Tănăsescu, 'The Rights of Nature: Theory and Practice', in D. Schlosberg and M. Wissenburg (eds.), *Political Animals and Animal Politics* (Palgrave Macmillan, 2014), pp. 150-163; Tănăsescu, n. 11 above. This link between legal personality, circumscribed standing, and representation more broadly understood, is also present in Te Kawa, which explicitly states that 'Te Urewera Board is the voice and servant of Te Urewera', over and beyond its legal protector.

¹¹³ There is nothing in the Ecuadorian constitution that would prohibit PetroEcuador, the state oil company, from speaking on behalf of nature.

Te Urewera Act creates Te Urewera as a legal entity¹¹⁴ and establishes a relationship of representation between this entity and a particular Māori group.¹¹⁵ In Ecuador, legal personality is created through substantive rights (to respect and to restoration), while the relationship between the thus created legal person and *any* group is left wide open. Importantly, the rights of nature invoked by the Ecuadorian Constitution are ‘intended to portray Nature’s right as being inherent to all of the Earth’s ecosystems, including those beyond Ecuador’s borders’.¹¹⁶ This is strikingly similar to human rights advocacy that portrays rights to be inherent in the human person, wherever she may be. It therefore appears that legal personality for nature in the Ecuadorian Constitution is modeled on the human person. As argued below, this can significantly limit the extent to which indigenous philosophies manifest in these rights.¹¹⁷

In summary, in order to understand the different scope and strength of the Ecuadorian rights of nature and Te Urewera, it is useful to conceive of these provisions as reflecting the difference between a legal entity and a legal person, introduced earlier through the work of Grear. The framing of Te Urewera as a legal entity allows the focus to shift onto its political representation by the Te Urewera Board, and therefore allows space for the development of Te Kawa away from the dominance of the human form in territorial politics. In contrast, understanding the

¹¹⁴ As a legal entity, Te Urewera has, besides legal standing, the right to enter contracts and own property. Further, on the interpretation given by Macpherson (2019) on the status of Wanganui River post-settlement, legal entities ‘may be entitled to human rights protections under the *New Zealand Bill of Rights Act 1990*, which under section 29 bestows certain human rights protections on legal as well as natural persons’. See E. Macpherson, *Indigenous Water Rights in Law and Regulation: Lessons from Comparative Experience* (Cambridge University Press, 2019), p. 117.

¹¹⁵ Including Te Awa Tupua, which has a very similar arrangement of legal personality for the river. See E. O'Donnell and J. Talbot-Jones, ‘Creating legal rights for rivers: lessons from Australia, New Zealand, and India’ (2018) *Ecology and Society* 23 (1).

¹¹⁶ In Kauffman and Martin, n. 16 above, p. 48.

¹¹⁷ Part of the difference between the Ecuadorian and New Zealand provisions can be accounted for by different intellectual histories. In genealogical terms, in New Zealand, the most influential scholars in developing Stone’s early work have been Jacinta Ruru and Alex Frame. See A. Frame and J. McLean, ‘Property and the Treaty of Waitangi: A Tragedy of the Commodities?’, in J. McLean (ed.), *Property and the Constitution* (Hart Publishing, 1999), pp. 224-34, and Morris and Ruru, n. 98 above. In Ecuador, it has been the work of CELDF and Alberto Acosta that has been most influential. See A. Acosta and E. Martínez, ‘La naturaleza con derechos: de la filosofía a la política’ (2011) *Polis, Revista de la Universidad Bolivariana* 10(29), pp. 479-485. From Stone spring two very different trees.

Ecuadorian law as creating a universal legal person with specific rights reproduces the centrality of the human and thus also runs the risk of mischaracterizing indigenous ontological commitments. In the final section, the article considers more closely Te Kawa as well as Amerindian ontologies in order to see how indigenous groups might benefit from rights of nature while also having to adapt to and occasionally work around them.

5. DISCUSSION

5.1 Te Kawa and Legal Personality

A close study of Te Kawa shows how Tūhoe philosophy both benefits from and has to work around the issue of legal recognition in order to develop itself and to deploy its authority. Te Kawa carefully avoids the issue of rights and instead uses the general notion of legal entity to carve a space for a genuinely relational ontology. Importantly, the availability of this space of intervention, hybridization and innovation is made possible by the notion of an entity already present in the Te Urewera Act itself. Te Kawa is quite explicit in circumventing the notion of rights per se, as well as shifting the focus away from the human as the model of legal status and towards as yet unexplored possibilities. Section 1.1 states that ‘as her [nature’s] children we are born with responsibility we are not born with power and rights’, an issue that is reflected through Tūhoe ontological hierarchy that disrupts ‘the notion of our false superiority over the natural world. In all decisiveness, we are returning to our place in nature, as her child’.

Whereas the Te Urewera Act 2014 mandated a classic management plan, Te Kawa sets out from the beginning to be a philosophical guidebook in finding one’s way in building relationships with the natural world. The assumption often present in Western commentaries, of an inherent connection between Māori and nature, is not only absent in Te Kawa, but actively challenged. The text announces that ‘for Tūhoe, time is needed to replace low capability, with

vigour, expertise and confidence in a stronger connectedness with Te Urewera'.¹¹⁸ In fact, 'for all, implementing the new Te Urewera Act and Te Kawa o Te Urewera will involve a process of unlearning, rediscovery and relearning'.¹¹⁹

The process of unlearning that the text refers to can be interpreted in light of the previous ontological mixing occasioned by colonialism and settlement. A particular connection with the land is as good as the practices that keep it alive, and does not rest in ethnic categories. The relationship of the Board with Te Urewera is seen as an occasion for relearning a tradition of ontological relationality, in which people are situated within natural phenomena that, through deep anthropomorphism, are brought into complex genealogical relations. The concept of legal personality is neither presented as an end in itself, nor as a particularly faithful rendition of *tikanga* Māori.

The idea that indigenous descent groups are to reinvent relationships with the land underlines the dynamic cultural and philosophical evolution of *tikanga* Māori, alongside settler influences. Te Kawa ends with a quote from T.S. Elliot: 'we shall not cease from exploration, and the end of all our exploring will be to arrive where we started and know the place for the first time'.¹²⁰ This insistence on self-reflection and evolution is extraordinary, but it does not follow automatically from the granting of rights. In fact, Te Kawa can be seen as an exceptional document precisely inasmuch as it transcends a narrow legalistic frame in order to fully engage with a reinvention of *tikanga* itself.

¹¹⁸ Te Kawa, n.102 above.

¹¹⁹ Tāmami Kruger often speaks of the need for self-reflection and further development of Māori philosophy and *tikanga*. See <https://e-tangata.co.nz/identity/tamami-kruger-we-are-not-who-we-should-be-as-tuhoe-people/>.

¹²⁰ Te Kawa, n.102 above.

Commenting on legal entity arrangements more broadly, Carwyn Jones argues that these ‘have assumed a de facto law-making role in many communities; any shift away from tikanga-based governance in the rules and operation on the PSGE [post-settlement entities and assets] is likely to be reflected more generally in a shift away from tikanga-based law-making in the community.’¹²¹ This implies, correctly in my view, that rights for natural entities are not inherently friendly to Māori ways of thinking, and might imply a transformation in indigenous relations to land away from customary ways. As Te Kawa shows, it takes concerted and ongoing political effort to affirm the authority of *tikanga* Māori, even after the legal recognition of Māori territories.

5.2. Amerindian Multinaturalism

The relational ontologies¹²² of Māori worlds are, in formal terms, also reflected in Amerindian ontologies. Beyond the idea of good living, Amerindian ontologies as described by Eduardo Viveiros de Castro¹²³ are deeply relational. Relational ontologies conceptualize the world as a series of relations: the primary beings of the world are not individuals separated by identity criteria, but rather are the relationships between inherently changeable beings. This allows such philosophies to escape the constraints of materialism, which relegates only ‘material objects’ to the status of reality, everything else being epiphenomenal. Instead, Amerindian ontologies (and to a large extent Māori ones) are able to live with a great many beings that are, from the outside, supernatural, whereas from the inside are simply beings in a relational world.¹²⁴

¹²¹ Jones, n. 67 above, p. 99.

¹²² The term refers to ways of seeing the world that posit the primacy of relations over material embodiments.

¹²³ Viveiros de Castro, n. 53 above.

¹²⁴ In Māori mythology, for example, *taniwha* are spirits that live in rivers, caves, or the sea, and that are tasked with guarding particular places. See Salmond, n. 64 above. Similarly, mountains, rivers, and landscapes are beings, because they *act*. Existence in relational ontologies is not about materiality, but rather about activity: whatever acts, exists.

In Amerindian philosophies, the world is understood to be connected, held together as it were, by the principle of humanity. As de Castro explains, ‘humankind is the substance of the primordial plenum or the original form of virtually everything, not just animals’.¹²⁵ This is because subjectivity, understood as subjective experience, is what connects all beings; differentiation is merely material. In other words, ‘the manifest bodily form of each species is an envelope (a “clothing”) that conceals an internal humanoid form’.¹²⁶ This deep form of anthropomorphism – literally, everything has interiority – sustains a relational ontology steeped in what Marisol de la Cadena calls ‘earth-practices’, defined as ‘relations for which the dominant ontological distinction between humans and nature does not work’.¹²⁷ The reason is two-fold: firstly, it is relations that are primary and, secondly, it is subjectivity that connects all beings.¹²⁸ In many Amerindian philosophies, Andean ones included, there is one humanity and there are many natures, a view that de Castro calls multinaturalism.

In the text of the Ecuadorian Constitution, Pachamama is an indigenous other-than-human figure that erupts in the political space of the state.¹²⁹ However, the equivalence in the constitutional text between this figure and Nature -- including in the Articles that grant rights to nature rights -- is deeply problematic, as it forces the radical potential of an indigenous cosmopolitics into the molds of modernist ontology. In particular, the constitutional text falls prey to the western obsession with totality, visible in the rendering of Pachamama as universal Nature, Earth as such, if somewhat animated by Amerindian ‘beliefs’. The Constitution manages to construct nature on the model of the human person, whereas indigenous philosophy, through its multinaturalism, universalizes the interiority of the human experience

¹²⁵ Viveiros de Castro, n. 53 above, p. 465.

¹²⁶ Idem.

¹²⁷ M. de la Cadena, ‘Indigenous cosmopolitics in the Andes: Conceptual reflections beyond “politics”’ (2010) *Cultural anthropology* 25(2), pp. 334-370, at p. 341.

¹²⁸ ‘Other-than-humans include animals, plants and the landscape’, idem.

¹²⁹ Idem.

(everything has a life of its own) and the dynamism and openness of material forms (and everything changes). From this perspective, it is the concept of a stable human person (with intrinsic characteristics and values) that can be destabilized by modelling it more closely on the dynamism and fundamental openness of nature. Instead, the rights of nature in the Ecuadorian case reinforce a Western view that attaches to nature the universalism which it had previously attached to human rights. The possibility of allowing indigenous ontology to disrupt the very notion of universalism seems, here, foreclosed.

There is an intrinsic relationship between the idea of rights and that of totality, both in terms of the full individual as recipient of rights,¹³⁰ but also of Nature as the subject of rights. Latour offers a useful critique of the idea of totality in political ecological thought, centred on the ways in which it renders other-than-human forces and actors as a unified globe, a sphere floating in space, which is the polar opposite of what deeply relational modes of being interact with.¹³¹ The idea of totality radically delocalizes interactions between undefined human beings and inherently dynamic natural assemblages. In relational ontologies it is *this* land, here and now, specific to a location and a people, that acts and is therefore given voice through particular partnerships with particular people, which themselves take their character from the land. Ecocentric philosophies, on the other hand, tend to speak for a totalizing, universal nature that stands above any one being. Amerindian ontologies are not ecocentric in this highly modernist sense. Notably, the advocates of a totalizing figure of nature seldom seem to reflect on their own positionality. For example, looking at the transnational policy network instrumental in Ecuador's rights of nature¹³² it is clear that a total universal nature is paired with a 'global citizen' who can afford a totalizing view.

¹³⁰ See Naffine, n. 57 above

¹³¹ B. Latour, *Facing Gaia: Eight lectures on the new climatic regime* (John Wiley & Sons, 2017).

¹³² Rawson & Mansfield, n. 43 above.

What is side-stepped in the operations of totality are precisely the myriad relationships that exist between, not nature on one side and individuals on the other, but rather between worlds and peoples. It is in this sense that the Te Urewera Act constitutes, in my view, the most significant innovation in nature's representation so far, precisely because of the minimalist grant of legal entity status and the determined focus on representative arrangements. Te Urewera, in contrast to nature's rights in Ecuador, is a particular place that enters into anthropomorphic relations with particular people, now potentially empowered to reinvent future relationships which can unsettle the definition of what constitutes a human as much as what constitutes 'nature'. The anthropomorphism of indigenous philosophy does not simply posit universal nature as fundamentally akin to human people, but rather signifies entry into genealogical ecological relations modelled on a particular natural entity itself, such as Te Urewera. It is the natural entity that sets the tone of the relationship.¹³³

The idea of nature as presented in the Ecuadorian Constitution has the potential to undermine the dynamism implied in relational ontologies. To be precise, inasmuch as relations are primary, the beings that are constituted through them are in flux; they change and adapt to new circumstances and new relations. Therefore, it is a 'nature out there' that is worshiped as an unchangeable form. Rather, Amerindian philosophies posit environmental relations in terms of reciprocal exchanges,¹³⁴ as do Māori ones. In this context, Article 72 of the Ecuadorian Constitution, which gives nature the right to be restored, might be particularly problematic in

¹³³ This is also why presenting Māori as guardians of nature is deeply problematic, first and foremostly to Māori themselves.

¹³⁴ In Māori philosophy, the concept of *utu*, roughly translated as reciprocity, is instrumental. Also, the idea of *whakapapa*, or genealogy, which always includes landscapes as members of an extended family; see n. 98 above. For *utu*, see J. Patterson, 'Utu, revenge and mana' (1989) 2 *British Review of New Zealand Studies*, pp. 51-61.

terms of the extent to which it affords other-than-human beings their own autonomy in changing.

6. CONCLUSIONS

The discussion in this article would suggest that the rights of nature are not an end state, but rather a historically contingent experiment in the ongoing pursuit of greater indigenous political authority. They do not come with environmental results embedded but will be subject to future representative efforts on behalf of the new legal entities. Crucially, future environmental results are themselves determined by the way in which rights are granted, which modality in turn depends on why they were granted.

The precise form that legal subjectivity arrangements might take will be influenced by indigenous participation in various ways. However, to understand indigenous philosophies as leading towards ecocentric law, in my view, misstates the issue. Many indigenous philosophies are not about centrism at all, but rather about a deep relationality that is context-specific. Ecocentrism risks sidestepping the notion of reciprocity, arguably a central issue for many indigenous philosophies, in favour of the issue of recognition, a Western onto-normative construct that is steeped in universalist and centrist thinking. Finally, an ecocentric analysis does nothing to change the argumentative form of anthropocentrism, but merely turns it upside-down.

I have also argued that understanding the rights of nature as inaugurating a legal entity – and drafting laws accordingly – potentially allows more hybridization of western and indigenous legal and political conceptions. This is so because an ‘entity’ need not be constructed according to the pre-determined and human-centric characteristics that travel together with the concept

of ‘person’. As Naffine points out, ‘legal rights are seen as a mere augmentation of what are taken to be innate moral attributions of “natural” persons’¹³⁵ something that conceals important distinctions ‘between legal rights and moral rights, legal personhood and moral personhood’.¹³⁶ Consequently, radically different ontological assumptions about what nature might be, and a radical de-centralization of the human person, are restricted in changing the fabric of law.

The most radical discourses of environmental law seem primarily concerned with an ‘extension of rights to living and non-living human and non-human entities in an effort to dissolve interspecies hierarchies’.¹³⁷ However, doing so further legitimizes the construct of rights itself, what Rawson and Mansfield call ‘the naturalization of rights’, and which they rightly point out has troubling colonial histories.¹³⁸ Even when opting for the formulation of nature’s rights within the more flexible construct of legal entity, it is not clear that the liberal rights history that models them on particular kinds of persons can be entirely sidestepped.¹³⁹ Just as importantly, the ways in which indigenous philosophies personify nature does not seem to be aptly translated by the Western concept of legal person. On the contrary, the legal person conceives of natural entities according to human criteria, whereas personifications of nature in indigenous thought naturalize the human person, bringing her into genealogical relations with particular lands.

¹³⁵ Quoted in Gear, n. 57 above, p. 88.

¹³⁶ *Ibid.*, p. 80.

¹³⁷ Kotzé and Villavicencio Calzadilla, n. 17 above.

¹³⁸ Rawson and Mansfield, n. 43 above.

¹³⁹ As noted in n. 114 above, Te Urewera comes under the jurisdiction of the Bill of Rights, and therefore its formulation within the Te Urewera Act as a legal entity might be pulled towards the concept of a legal person that has been fundamental to such bills.

The political implications of indigenous ways of life are vastly more radical than those of rights of nature. In identifying indigenous philosophies with rights of nature too closely, we run the risk of diminishing the radical potential of alternative political arrangements. The two cases examined in this article feature rights for nature as part of negotiations over political authority between indigenous groups and settler states. In Ecuador, this negotiation took the form of a liberal rights expansion. In Te Urewera, the negotiation was in important respects in open conflict with liberal rights, although it remains to be seen how far the concept of legal entity can move away from a liberal rights paradigm. As radical as nature's rights might first appear, they still need to convincingly show that they are able to incorporate indigenous philosophies on an equal footing. A fully equal (political and legal) engagement with indigenous worlds remains ahead of us.