

Realising Rights of Nature: Understanding the Variety of Legal Instruments



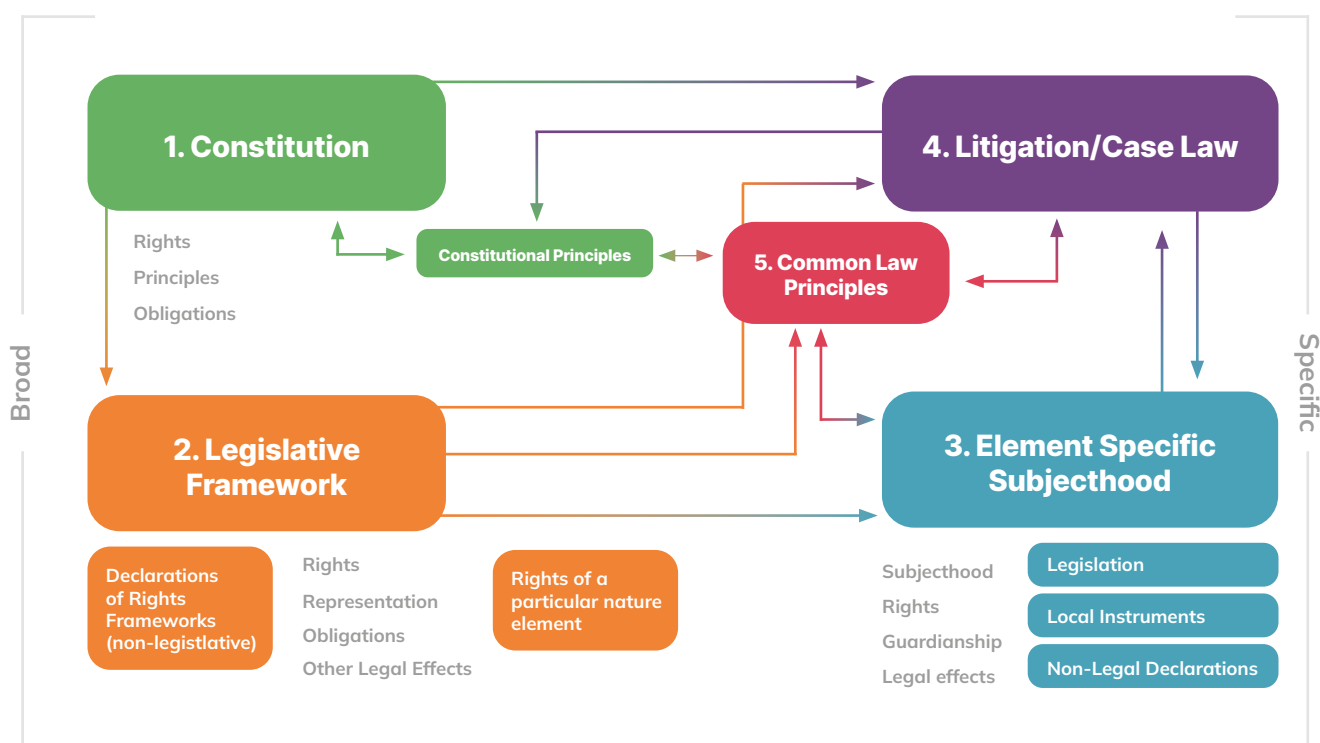
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by Alex May

Understanding the Variety of Legal Instruments

Rights of Nature laws and initiatives come in a variety of shapes and sizes. While they all work towards the same goal, it is vital to understand the diversity of instruments and how they interrelate for considering pathways for transforming legal systems and realising Rights of Nature.

This report maps out different types of Rights of Nature legal developments and how the pieces of the puzzle fit together. For campaigners, this report seeks to explain what the different types of legal instrument are, how they fit together, and what that means for realising Rights of Nature. While lawyers will be familiar with types of legal instruments, it is hoped that this classification is a useful framework, combining the type of law with how it realises Rights of Nature.

Figure 1: The Complete Diagram



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1. Overview – Rights of Nature

'Rights of Nature' is the idea that various elements of nature should have legal rights and the ability to act (via human representatives) in the legal system.

This approach is rooted in a different way of thinking than is currently dominant in western societies. Western worldviews are primarily 'anthropocentric' – human centred – meaning that they consider humans to be the most (or only) important beings. In these worldviews, the rest of the natural world is simply the human environment which is full of "natural resources" for us to make use of.

Rights of Nature is not one homogenous approach but a plurality of related approaches around the world. There are a range of philosophical or cultural foundations for Rights of Nature ideas, ranging from indigenous cosmologies to modern science. The idea was initially one part of the wider thinking of Earth Jurisprudence, though it risks becoming untethered and forgotten that there is more to an ecological legal transformation than just Rights of Nature. Despite the multiple different approaches which Rights of Nature is based on, these can be collectively understood as being 'ecocentric' worldviews, meaning that humans are recognised as being part of a wider natural world and that the rest of nature also has inherent moral worth. Humans are part of the wider natural world, not separate from or superior to some 'othered' conception of nature. Non-human entities are neither mechanistic nor random processes, but have agency, make decisions, seek to further their interests, and function as subjects instead of passive objects.

In whichever form, Rights of Nature thinking critiques anthropocentric approaches and posits a vision for how our legal system and society in general should be different, working towards living harmoniously with the rest of Nature. This report focuses on Rights of Nature legal instruments and does not discuss the wider legal critique and vision.

The core of Rights of Nature thinking is substantive moral and legal rights. The foundational moral rights are generally recognised as including the right to exist, the right to ecological integrity and the right to restoration.¹ The questions of which particular rights exist, what legal rights should be granted, and which aspects of nature should have rights are not necessarily straightforward, but they are beyond the scope of this report. Within a legal system, legal rights function to protect (nonhuman) interests of nature from being harmed by human activity, to require human intervention to protect them, and for ecological restoration where harm has occurred.

Rights of Nature is about granting legal rights to aspects of nature in recognition of these moral rights and/or so as to change our social order and realise a world in which the value of nature

¹ For example: the [Universal Declaration for the Rights of Mother Earth](#), [Universal Declaration on the Rights of Rivers](#), Article 2 of the [Law for the Mar Menor](#) in Spain.

is protected and ecological integrity is safeguarded. While this does ultimately also protect a healthy environment for humans to live in, Rights of Nature approaches are almost always based in a moral ecocentric worldview instead of just being an instrumental way to secure the conditions for human flourishing.

Nature is also granted the ability to participate in the legal system, as a legal subject which can act. This is usually known as 'legal personhood', though I think the language of 'subjecthood' is better because elements of nature are not persons. The legal subjectivity of nature does involve an element of fiction in the legal subjectivity of nature: there must always be human representatives acting for nonhuman nature and deciding on its behalf.² The crucial point is that the interests being served by law are different: it is the interest of the aspect of nature which has the right, can bring legal actions, whose rights-interference is implicated and who benefits from legal relief.³ This sort of representation of nature in law is a novel development, but legal interests being represented by another is not new: there are parallels with corporate entities being represented by directors and employees, officials acting in a public interest, trustees, and where a human individual without full capacity is represented by another.

Fully implementing Rights of Nature would be a significant transformation of the legal system, affecting all domains of law including property, criminal, tort, contract, human rights, and administrative law. It is becoming widely recognised that catastrophic ecological consequences are on the horizon and a colossal shift in how we live is needed. Less recognised is that our social orders and social structures must change as part of this. Rights of Nature thinking proposes radical changes to our legal system, but it is this scale of change which is vitally necessary if our legal systems are to work towards societies which live harmoniously with the rest of nature instead of supporting destruction of the natural world.

² This will be discussed further in Section 3.3.

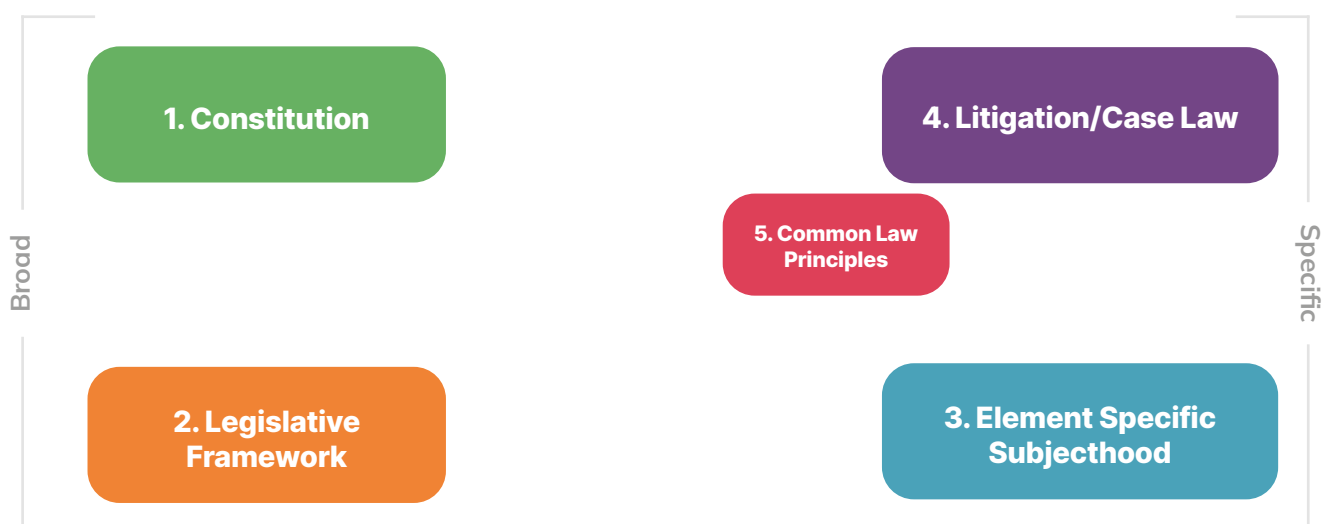
³ These elements were first set out in Christopher Stone's article 'Should Trees Have Standing? Towards Legal Rights for Natural Objects' (1972) *Southern California Law Review* 450, 458.

2. The Diagram

This classification was developed to understand the different types of legal instrument in terms of both what type of law they are and how they realise Rights of Nature. This approach allows for both clarity and nuance in describing particular initiatives or how multiple legal developments relate. As well as describing the different types of intervention, this classification can also be used to map out developments or proposed developments in different jurisdictions. This is not about compartmentalising different parts from each other but about mapping types and synergies between the different elements.

At the scale of the overview, the general classification and use of archetypes simplifies by necessity. Yet the different hybrids and variations of Rights of Nature legal instrument all have a place on this map.

Figure 2: Archetypes Only



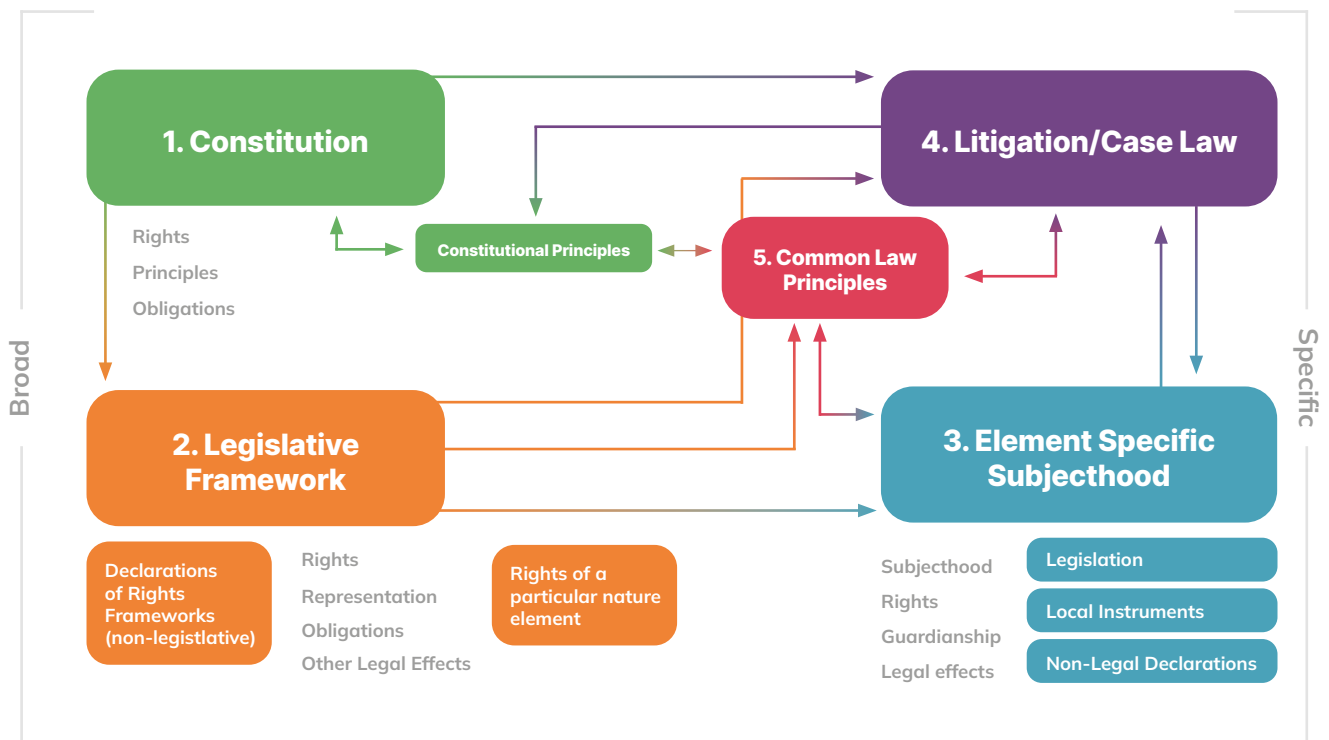
The basic is 5 different archetypes: Constitution; Legislative Framework; Element Specific Subjecthood; Litigation/Case Law; and Common Law Principles. The left side are 'broad' instruments; the right side are 'specific' instruments.

Figure 3: Types with notes and variations



Here, more detail has been added to the different types of instrument. For instance, a Constitution might typically include rights, principles and obligations (though does not always include all of these). Similarly, there are common variations of the particular types added (though not all possible variations are present). Element Element Specific Subjecthood could be legislative (national or sub-national), a local law instrument (eg a By-Law or a Municipal Ordinance), or a non-legal declaration. Another example is a (non-binding) declaration of rights, such as the Universal Declaration of the Rights of Mother Earth, which can be understood as similar to a legislative framework due to its general nature. This shows how various instruments and initiatives fit within different types and how they relate to each other.

Figure 4: Complete Diagram



The full version of the diagram includes arrows to show inter-relations and flows between different parts of a legal system, which will be discussed in the final section of this report.

The next section of this report will discuss the different types of legal instrument or element in detail.

3. Types of Instruments

This section is to set out the different types of Rights of Nature legal instruments in a way which is understandable to non-lawyers. The diagram is based on archetypes with common variations shown within their type or as a hybrid of different types. The most common variations are (1) local ordinances to nearby rivers as a sub-type of Element Specific Subjecthood and (2) non-legal declarations of Rights of Nature. By classifying instruments in this way, we can better understand what they do and how they interrelate: this is about complementarity, not compartmentalisation.

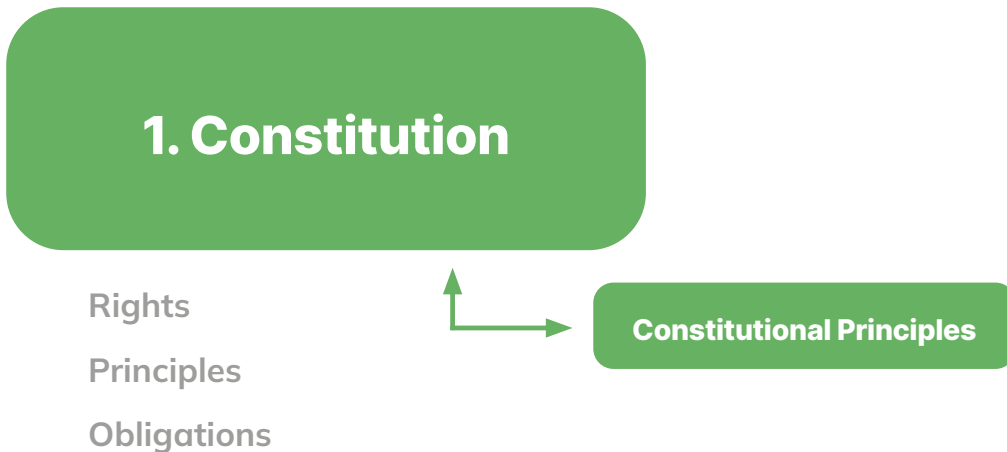
The four types which will be covered are:

- Constitution
- Legislative Framework
- Element-Specific Subjecthood
- Legislation and Case Law

Each section will include an explanation of that type aimed at non-lawyers, give examples from around the world, and give a brief analysis of each instrument type.

Note: this report is not seeking to provide exhaustive coverage of all global developments and has only selected the best examples for discussion.

3.1 Constitution



Top-left (1) is Constitution. Constitutions are the foundational structure of a state legal system and contain provisions fundamental to the legal order. The provisions are typically general, not detailed. Constitutional norms have primacy over legislation, allowing legislation which breaches them to be challenged through courts. Constitutions bind the government and other public bodies, and sometimes contain provisions which directly affect private individuals too, meaning that legal action can be taken directly on the basis of constitutional norms. As constitutional provisions are usually drafted quite broadly, this can be legally messy as courts have to develop the detail of a general provision. This can create Constitutional Principles which can be considered as constitutional even though they are developed by judges instead of explicitly in the constitution.

Example

Ecuador has expressly included Rights of Nature in its constitution, although in a weaker form than indigenous people and other campaigners were pushing for. Though implementation has been less forthcoming than hoped, there have been a few significant successful legal cases. Chile included Rights of Nature provisions in their 2022 draft constitution, though this was rejected by the subsequent plebiscite. In 2023 the Irish Citizens Assembly on Biodiversity recommended constitutional recognition of Rights of Nature as part of their proposals.

Analysis

Including Rights of Nature provisions in a constitution is a significant statement of their importance and can have significant legal effect, as it can enable cases to be brought directly. However, the lack of detail means that further legislation or significant judicial development is needed for a transformation of the legal system, and absent political implementation successful realisation relies on a strong and willing judiciary.

⁴ T Constitution of Ecuador 2008, Chapter 7 and Art. 83(6).

⁵ Most notably the 'Vilcabamba River Case': Richard Frederick Wheeler y Eleanor Geer Huddle c/ Gobierno Provincial de Loja, juicio 11121-2011-0010 (30 March 2011); and the Los Cedros case: Constitutional Court ruling No. 1149-19-JP/21 (dated 10 November 2021, published 1 December 2021), see also the Anima Mundi Law Initiative report 'Rights of Nature Case Study: Los Cedros Protected Forest' available at: <<https://www.animamundilaw.org/s/Anima-Mundi-Law-Initiative-case-study-Los-Cedros-April-2022>>.

3.2 Legislative Frameworks

2. Legislative Framework

Declarations of Rights Frameworks (non-legislative)

Rights
Representation
Obligations
Other Legal Effects

Bottom-left (2) is Legislative Frameworks. This is a body of law made by a legislative body which establishes some legal structure relating to a particular topic. Most regulatory regimes for a particular issue or type of law are made by a legislative framework. Such a framework usually has a medium or large scope, distinguishing it from legislation with narrower aims and making a more significant reform than a series of piecemeal changes.

Examples in the UK include the Town and Country Planning Acts, the recent Environment Act and various pieces of environmental legislation, the Human Rights Act, and various pieces of criminal law legislation. In jurisdictions with codified legal systems, most of the legal system is made up of legislative frameworks, whereas common law systems are messier and made up of an amalgamation of legislative frameworks, narrower legislation and case law.

Examples

The main examples of Rights of Nature instruments of this type are in Bolivia (Law 71 of 2010 and Law 300 of 2012), Peru (Law 2226 of 2021) and Panama (Law 287 of 2022). The Peru and Panama laws are new and their effect remains to be seen. The Bolivian legislation includes Rights of Nature, standing to bring actions, obligations on the state and public authorities, some duties for private individuals, the creation of two public authorities for Mother Earth, and legal principles. Sadly, Bolivia has seen little effect from this law, with governments unwilling to implement it and continuing instead with extractivist policies. There are also jurisdictions in which legislative frameworks have been proposed but not passed.

There are also Rights of Nature frameworks which are similarly general in scope but not legislative. These fit in this quadrant as non-legislative frameworks. The main existing examples of this are the Universal Declaration of the Rights of Mother Earth (which has not received meaningful ratification) and the Rights of Rivers declaration (which is a civil society initiative to urge states to implement these rights).⁶ In future, it could be that civil society initiatives of this nature grow in significance or that

⁶ The Universal Declaration for the Rights of Mother Earth; The Universal Declaration on the Rights of Rivers.

private organisations or public bodies commit to following a Rights of Nature framework which is non-legislative.

Analysis

Legislative frameworks are both broad and detailed, covering the scope and substance of what is needed for transformation or reform of that area of law. This significance means that they are perhaps the most important and effective component of Rights of Nature legal transformation. However, for the same reason, they are also much harder to make happen as sufficient political support in the legislature (and broadly in society) is needed and they are legally more complex.

The effect of the law will depend on its content and detail. The resulting legislation can often be weaker than initial proposals due to political negotiations and amendments. Much depends on how it is interpreted and implemented by the judiciary too, as with many laws, especially when it comes into conflict with other existing law or the legislation lacks principles to guide implementation. Of course, legislation in isolation is not enough to effect change, as the example of Bolivia makes clear: political will, a strong civil society or a judicial will to implement the law is usually necessary for it to have meaningful effects.

3.3 Element Specific Subjecthood

3. Element Specific Subjecthood

Subjecthood

Legislation

Rights

Local Instruments

Guardianship

Legal effects

Non-Legal Declarations

**This would typically be termed 'legal personhood'. However, this author's view is that referring to aspects of nature as 'persons' is anthropocentric language and developing new language to recognise non-human subjects is better.*

Bottom-right (3) is Element Specific Subjecthood* for one aspect of nature. Instead of being broad for the whole geographic scope of jurisdiction or components of the natural world, this would typically just cover one ecosystem, habitat, species or geographic area. It also would not necessarily include the recognition of a full set of rights, or might only include weaker forms of the rights. The overwhelming majority of interventions of this type have been in relation to an ecosystem or place, but it is also possible (and part of the original Earth Jurisprudence idea) for species and/or habitats to have subjecthood. Legal protections for endangered species can be understood as proto-Rights of Nature. The focus in Rights of Nature is usually at the scale of the collective, not the individual being, although conceptually individual beings fit within the Rights of Nature framework.

Subjecthood is the ability to act as a subject in the legal system, and having aspects of nature as subjects in the legal system is a key element of Rights of Nature and Earth Jurisprudence. Being a legal subject means that the aspect of nature can act in the legal system; bring cases based on its interests and rights against those who have harmed it or have duties towards it; and "own" itself (and perhaps other property). This could allow for proactive actions such as entering into contracts and consenting in advance to particular interactions instead of only bringing reactive litigation after a potential rights infringement.

Traditionally only humans ('natural persons') could be legal subjects, though it is only quite recently that all people were legal subjects with a full set of rights.⁷ Human organisations, such as business corporations, charities, public bodies and similar, are also legal subjects (known as 'legal persons') which are separate legal entities with humans acting as their representatives or agents.

Legal subjecthood is closely linked to having rights but technically distinct: having subjecthood and the

⁷ Historically, in the global north at least, various people were excluded from being full legal subjects, including women, children, non-white people, and slaves who were not legal subjects.

ability to act is conceptually separate from the rights and causes of action which the subject has. Rights of Nature is often described as ‘giving nature the same rights as humans’, but this simplifies a more complex question of what subjecthood means for different aspects of nature. Just as legal personhood means different things for different people in different legal systems, or the way that ‘natural persons’ (that is, actual humans) have different personhood and rights than other classes of ‘legal persons’ (such as incorporated entities – and perhaps these should be called corporate subjects instead?), legal subjecthood for aspects of nature should probably be distinguished from legal personhood for humans. It may be possible to have a limited subjecthood with the ability to bring cases based on a limited set of rights or interests. There have also been judgments which have recognised legal personality of an element of nature without recognising or granting a full set of rights. It could also be the case that different elements of nature are granted different forms of legal subjecthood or different sets of rights.⁸

For non-human aspects of nature, legal subjecthood will necessarily function differently from human subjecthood. While an aspect of nature would be ‘acting’ on its own behalf, it would of course need human representatives to interpret or decide the best interest and to bring the case. As is typically noted in discussions around Rights of Nature, there are various examples of people acting as representatives of natural persons who are unable to exercise their legal personhood fully, such as children and people without sufficient mental capacity, as well as officials who act on behalf of a broader ‘public interest’ and people representing a legal person (ie incorporated entity). The distinction is in the basis and effect of the cause of action, being in relation to the rights and interests of the aspect of nature with the legal remedy going to those interests. This is therefore different from environmental law and environmental rights: environmental regulation for human health; the human right to a healthy environment, and rights within this; or interests such as the enjoyment of the natural world are all based on human interests, not the interests of nature itself. Rights of Nature would also mean rethinking the notion of property, for humans who own land and for what it might mean for land, bodies of water or an ecosystem to ‘own itself’.⁹

Examples

The best known (especially among the public) and most successful examples of Rights of Nature instruments are legislative place-specific subjecthood, where one specific area or ecosystem is recognised as a legal subject with rights. One clear example is the Mar Menor in Spain (Ley 19/2022), which establishes a lagoon (including basin) as a legal subject with substantive rights and a tripartite system of guardians. Another significant set of examples are in New Zealand/Aotearoa, where Mount Taranaki/Taranaki Maunga, Te Urewera (a forest area) and the Whanganui River/Te Awa Tupua have each been given legal personality in a joint settlement with the indigenous Maori. Notably, however, these cases are about the relationship of indigenous peoples with their places and are therefore distinct from a “pure” approach to Rights of Nature and not easily replicable elsewhere.¹⁰

⁸ Article 1(6) of the Universal Declaration of the Rights of Mother Earth says “... all other beings also have rights which are specific to their species or kind and appropriate for their role and function within the communities within which they exist.” Aside from a separate Universal Declaration of the Rights of Rivers, this differentiated approach remains undeveloped in Rights of Nature law and scholarship.

⁹ This is a strange idea, and the philosophical legal position of whether a human owns themselves is not straightforward!

¹⁰ This is not to say that a “pure” approach to Rights of Nature is the best or only way, given that we ourselves are part of nature. This is only to say that the socio-historical development of the legislation, and the settlement, was indigenous people seeking to protect their territory and way of life. In this vein it is also worth noting that the resulting legislation was a compromise.

Variations

While legislation is the strongest version of this type, there are other versions as well. There have been many developments to recognise some sort of subjecthood (or rights) at lower levels in the legal system, such as through local ordinances, by-laws, tribal constitutions or in city constitutions. These usually range from purely symbolic to having local significance, because a local ordinance is almost always outranked by 'upstream' parts of the legal system and can only stay within its local scope.

There is also a hybrid between 2 and 3: a legislative framework which covers a particular type of nature-element. The most prominent example of this would be a Rights of Rivers instrument, which would apply to all rivers in a jurisdiction. This therefore goes beyond being site-specific, but only covers a slice of the natural world. For this reason, on the diagram I placed it closer to #2 than #3.

Element specific subjecthood can also be granted by court judgments as a result of specific litigation, which will be discussed below.

Analysis

The granting of legal subjecthood is legally significant, and because of the targeted nature it has been effective in a handful of cases as a Rights of Nature intervention. However, as it is done in a fragmented, piecemeal fashion, only these fragmented bits of nature are protected. It is therefore quite different to a broad legal transformation, and the rest of the natural world is unaffected. Additionally, while the granting of subjecthood typically involves recognising particular rights for this subject, these are usually stated without their effects and implications being thought through. These instruments therefore rely on significant judicial and perhaps political implementation afterwards when interacting with the rest of the legal system to develop the effects of each instrument.

3.4 Litigation and Case Law

4. Litigation/Case Law

5. Common Law Principles

Litigation and case law is the taking of legal action and the judicial outcome of such action. As the ultimate function of law, legal action can be brought on the basis of all types of legal instrument, as represented by the many arrows on the diagram: cases could be brought on the basis of constitutional norms; a specific legislative obligation or liability; on the basis of common law principles; in relation to the rights of a particular element of nature; or even procedural legislation in relation to a particular element. These interrelations will be discussed further in the final section of this report.

Litigation can also be pathbreaking in establishing new law, known as case law. There are a handful of Rights of Nature cases where novel litigation has been taken on by an “activist” judiciary willing to develop new legal ground in the absence of legislation.

There can be litigation for many different reasons across all domains of law. The majority of cases so far have been constitutional and administrative law, as state obligations are the most straightforward implementation of Rights of Nature. However, there would certainly be scope for tort law, criminal law and property law cases as Rights of Nature law matures.

When multiple successful cases have occurred, this can develop into a body of case law which enables further cases to be brought more easily. This is recognised on the diagram as ‘5. Common Law Principles’. It is also likely in this situation that element-specific subjecthood develops out of litigation, with the possibility of establishing guardianship and/or multiple cases being brought on behalf of one nature-subject.

Examples

There are two countries where Case Law has been the primary mode of developing Rights of Nature: Colombia and Bangladesh.

In Bangladesh, a case was brought by NGOs in relation to the Turag River and pollution around the river banks which public authorities had not adequately addressed.¹¹ The Supreme Court took the step of declaring the river a living legal entity with the state body the National River Conservation Commission as its legal guardian, based on the 'public trust' doctrine. The Court went even further, extending this legal status to all rivers in Bangladesh, giving a number of directions to public authorities and ordering minor legislative changes. This was not based on any legislation or constitutional principle but an activist court developing law to fill the gap.

In Colombia there have been a series of groundbreaking cases which have established Rights of Nature jurisprudence in the legal system. The first case was the Atrato River case,¹² brought against the government by a coalition of communities who lived in the river basin over various violations of their constitutional rights. It was declared inadmissible at first and second instance before it was heard by the Constitutional Court. The Court found against the government and recognised violations of the rights to health, water, healthy environment, culture and more of the communities living there. Yet it also developed the legal subjecthood of the Atrato River (including basin and tributaries), creating novel law based on the ecological nature of the constitution. The Court created a guardianship structure for the River, as well as ordering various specific actions of the government in relation to the River. In a subsequent case, the Amazon Rainforest case,¹³ the claimant group of children challenged the deforestation of the Amazon on the basis of the (human) Right to a Healthy Environment. The Supreme Court followed the direction of the Constitutional Court in the Atrato River case and interpreted the human right to have an ecocentric dimension, based loosely on the Constitution as well. They recognised the Amazon as having legal subjecthood and ordered various actions of public authorities. Following these two foundational cases, multiple further legal cases have been brought in relation to other rivers in the country.¹⁴ Notably, cases have also been brought by municipal authorities challenging national government actions and inactions.

Analysis

In a legal system which has Rights of Nature provisions already established, litigation is simply the means of enforcing and realising these rights. In this case, as with any legal action, the normal issues are whether there are funds available to fund the action and the attitudes of judges towards this emerging area of law.

Another key issue is standing: who is able to bring such litigation on behalf of non-human nature. The traditional approach to standing is that affected individuals can bring cases, as the ability to bring

¹¹ Bangladesh (Supreme Court of Bangladesh) – Human Rights and Peace for Bangladesh and others v Secretary of the Ministry of Shipping and others, Writ Petition No. 13989 of 2016). Further information can be found in the Anima Mundi Law Initiative report 'Rights of Nature Case Study Turag River' available at: <<https://www.animamundilaw.org/s/FINAL-RoN-CS-Bangladesh-Turag-River.pdf>>.

¹² Atrato River Case: Court judgment (Constitutional Court of Colombia) – Center for Social Justice Studies and others v Presidency of the Republic and others, Judgment T-622/16 (Nov. 10, 2016) <<http://www.corteconstitucional.gov.co/relatoria/2016/t-622-16.htm>>.

¹³ Amazon Rainforest Case (Colombia): Supreme Court of Colombia, STC4360-2018, radicación no. 11001-22-03-000-2018-00319-01 (Apr. 5, 2018) <<http://www.cortesuprema.gov.co/corte/index.php/2018/04/05/corte-suprema-ordena-proteccion-inmediata-de-la-amazonia-colombiana/>>.

¹⁴ For more information about these cases and the development of case law in Colombia, see the Rights of Rivers report s 4.2.2: Rights of Rivers by the NGOs Vance Centre, Earth Law Centre and International Rivers available at <<https://www.internationalrivers.org/wp-content/uploads/sites/86/2020/09/Right-of-Rivers-Report-V3-Digital-compressed.pdf>>.

legal action is (usually) based on a right being infringed. Where Rights of Nature are infringed in combination with human rights, such as the right to a healthy environment, indigenous cultural rights or property rights, standing is straightforward. Yet the point of Rights of Nature is that nature is the subject, not the affected humans. In some jurisdictions, legislation or a judgment tasks a state body/ies with protecting and enforcing Rights of Nature. In others, Guardianship structures are established for this purpose. Aside from these, there is a question of whether there should be a broader standing to bring cases instead of relying on one guardianship institution or a state institution. In this author's view, the best implementation of Rights of Nature would be to allow any natural or legal person to bring cases on behalf of nature. This democratises the protection of nature and removes the reliance on one guardianship structure or state bodies (which are typically already failing to adequately protect nature). Where appropriate, this standing would supplement Guardianship structures, allowing for a continuity of representation instead of ad hoc representation. The possible institutional designs and interrelations are too complex to cover further here.

In a legal system which does not have any Rights of Nature law, litigation has the potential to establish new case law which recognises subjecthood, creates substantive legal rights and could establish guardianship mechanisms. Yet for such litigation to be successful requires an activist judiciary, and most jurisdictions do not have a sufficiently activist judicial culture or legal norms for this to be viable. Campaigners may nonetheless choose to bring such cases as part of political campaigns or to raise awareness even where they are unlikely to succeed, or find possibilities of smaller, incremental wins which work towards realising Rights of Nature.

Jurisprudence developed through such case law is typically piecemeal and incremental, and often ends up being messier than a legislative framework. Even when a case is won, the outcome may not be as thorough or far-reaching as desired. For example, this may result in some form of subjecthood and/or guardianship being established, but without going further to establish a broader democratic approach to standing. When litigation goes against existing political institutions or social relations, implementation is an uphill battle, and political powers may even legislate to reverse a decision. One additional limitation of this course of action is that it can be very expensive to bring these cases, especially when they have a low chance of success. Sourcing funding is often difficult even for single public interest cases, let alone when multiple are needed.

Judicial activism is contentious, often controversial in political discourse and legal theory because it means judges going beyond representative political institutions (primarily the legislature and government). This is seen by many as illegitimate because of arguments that this 'goes against democracy' or that 'judges are meant to apply laws not make them'. The first question is a question of political and legal theory. It is simplistic to reduce 'democracy' to being only representational democracy, and a key function of constitutional norms and constitutional rights is to explicitly have judicial review over the actions of representative political institutions. Even though many legal systems do not include such norms in relation to nature or the environment, there are strong arguments which, in this author's view, justify such judicial activism to make up for failures of both existing political institutions and the society as a whole. In relation to the second question, this author's view is that this dichotomy does not exist in reality and is a matter of the extent to which judges develop existing law, fill gaps and respond

to failures of the legal system. Recognising that it is inherent in the judicial role to develop law, this argument collapses back into the need to justify the extent to which judges do so. Ultimately, judicial activism is an attempt by courts to move a situation forwards where existing political institutions have not taken adequate action.

These shortcomings are inherent in this type of legal intervention and this discussion was meant as an appraisal, not a discouragement. Using litigation to establish new Rights of Nature approaches is the main route available when legislative change is not possible, and as mentioned above, strategic litigation can be successful in changing the law and in political campaigning.

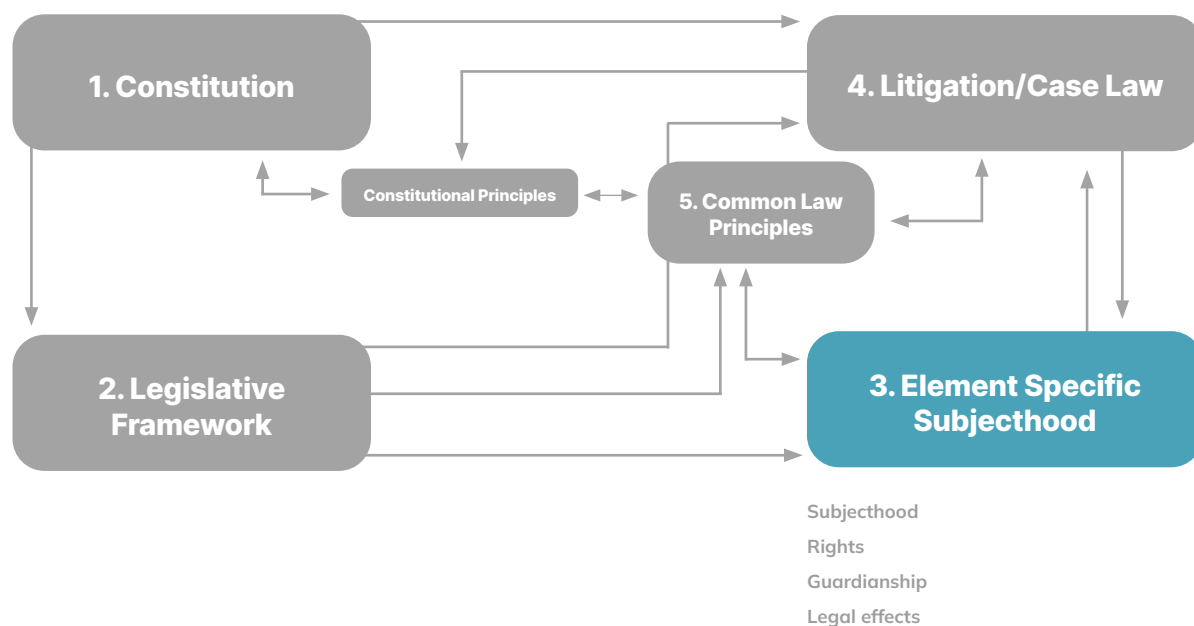
4. Interrelations and Case Studies

Having discussed the different types of legal instruments, what remains to be explored is the interrelations and dynamic between them. This is about the integration of multiple parts of a system, not the compartmentalisation of distinct approaches. The classification used in this report is helpful for comparing the developments in different jurisdictions and working towards further realisation of Rights of Nature.

Ultimately, for Rights of Nature to reach maturity and a legal system to be transformed, multiple (if not all) elements must be present. So far, no jurisdiction has reached maturity: jurisdictions with multiple successful cases do not yet have legislative frameworks or a fully developed set of case law; the jurisdictions with legislative frameworks do not have successful cases brought under the legislation nor established subjecthood of nature; and the jurisdictions which have granted legislative subjecthood to particular elements of nature have neither wider transformation nor any litigation.

Let's look at some case studies and hypothetical examples of developments in different jurisdictions to explore these interrelations.

Site-Specific Legal Subjectivity Only: New Zealand and Spain



This is the situation in New Zealand/Aotearoa and Spain.¹⁵ Legislation has enacted site-specific legal subjectivity for a few limited ecosystems and places, but the rest of the natural world is unprotected and the rest of the law unchanged. In New Zealand/Aotearoa, this legislation emerged as part of a settlement between the colonial state and indigenous Maori, and does not seem to have prompted much further consideration of Rights of Nature in the country.

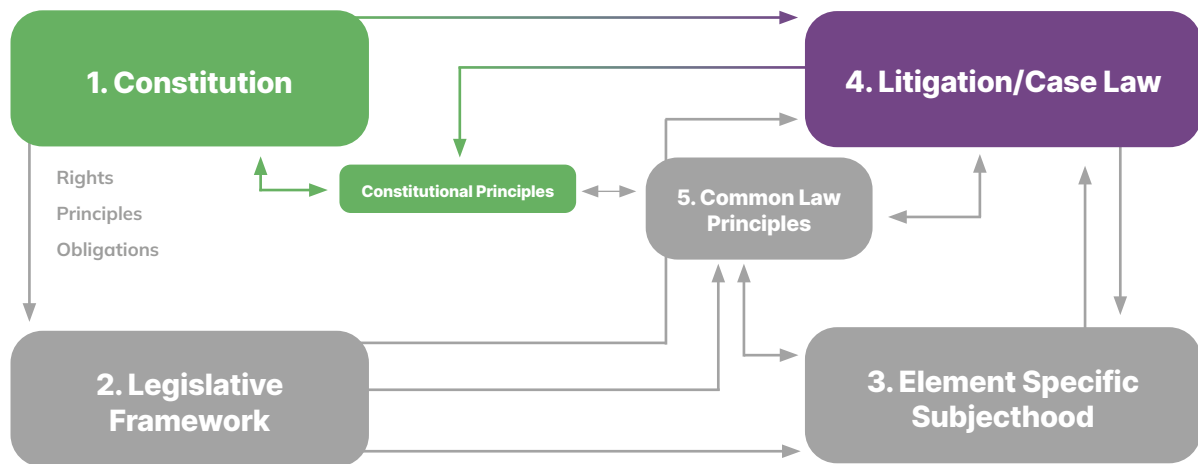
Neither jurisdiction has yet seen litigation or case law on what the effects or implementation of these the effects of the rights and subjecthood mean. This is especially significant in Spain, as the real-world effects will depend on substantive interpretation of the rights. Article 4 of the Law says:

“Any conduct that violates the rights recognized and guaranteed by this Law, by any public authority, private law entity, natural person or legal entity will generate criminal, civil, environmental and administrative liability, and will be prosecuted and sanctioned in accordance with criminal regulations. civil, environmental and administrative in their corresponding jurisdictions.”

This is broad and without detail, so the effect depends on judicial interpretation of interactions with other legal norms. This will include: interactions with other obligations public authorities might be under, such as in relation to human rights; interactions with existing environmental permitting regimes where activity in compliance with these regimes nonetheless infringes upon the substantive Rights of nature; and the extent of deference to public bodies and regulatory agencies.

¹⁵ In New Zealand/Aotearoa, Mount Taranaki/Taranaki Maunga, Te Urewera, and the Whanganui River/Te Awa Tupua have each been given legal personality in a joint settlement with the indigenous Maori. In Spain, the Mar Menor Lagoon was given legal subjecthood in September 2022: Spain, Ley 19/2022, de 30 de septiembre.

Constitutional Norms First: Ecuador



Ecuador was the pioneering Rights of Nature case study, including Rights of Nature (Pacha Mama) in their 2008 Constitution following a political settlement between a new President and the Confederation of Indigenous Nations in Ecuador (CONAIE). Despite this, political implementation and socio-ecological change has been limited, with successive governments preferring existing economic extractivist policies and practices and not taking adequate pro-nature measures, and there has not been further legislation.

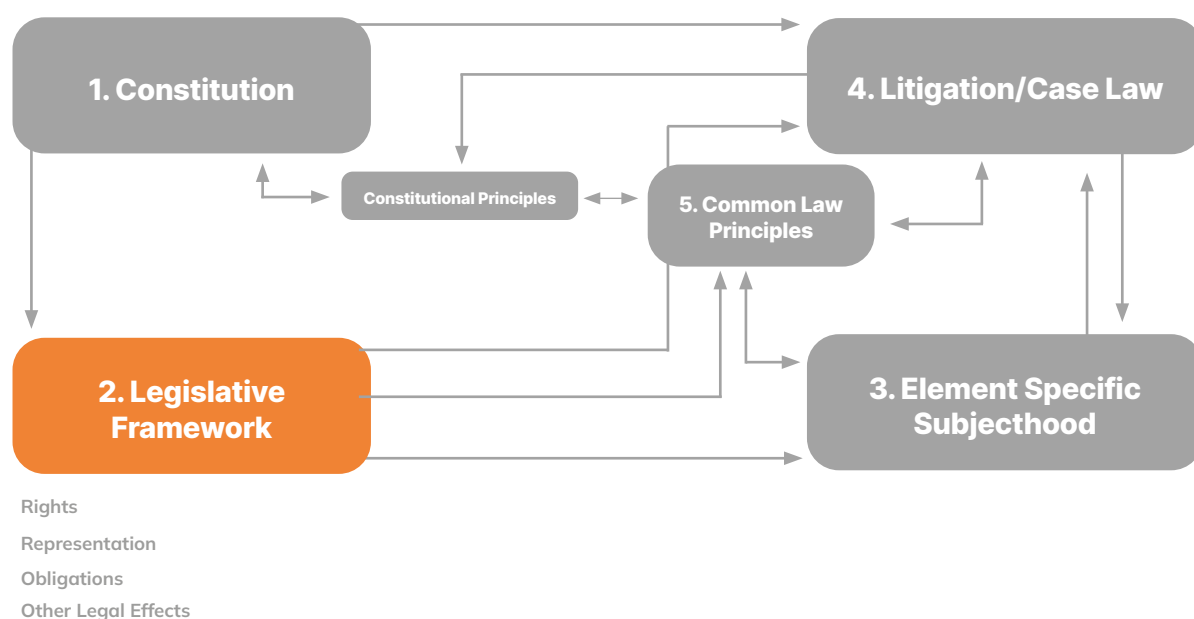
A number of cases have been brought in relation to Rights of Nature based on the Constitution, some of which have been successful. These include the Vilcabamba River case (2011) and the Cayapas-Mataje Ecological Reserve case (2012).¹⁶ The most significant case is the Los Cedros case (2021),¹⁷ in which the government's granting of mining permissions in the Los Cedros forest was challenged by the municipal government. The Constitutional Court ruled that these permits were in violation of the constitutional Rights of Nature and must be annulled, ordered that other activities which violated these rights should not be carried out, and ordered restorative action. This case was the most detailed exposition of these rights and made clear that these rights are not rhetorical but that there is a constitutional commitment towards harmony with nature.

Notably, as well as not having any Rights of Nature legislation, there is no specific guardianship or subjecthood for any element of Nature. This means that all that currently exists are ad hoc reactive cases, instead of a proactive legal role. Perhaps guardianship is not a necessary component of all legal systems, as the constitution grants broad standing for any person to bring cases on behalf of nature, or perhaps subjecthood and guardianship structures will develop in time.

¹⁶ For more see the Anima Mundi Law Initiative report 'Rights of Nature Case Study Nature / Pacha Mama (Ecuador)' available at <<https://www.animamundilaw.org/s/Anima-Mundi-Law-Initiative-case-study-Ecuador-April-2022.pdf>>. Vilcabamba River case: Ecuador, Richard Frederick Wheeler y Eleanor Geer Huddle c/ Gobierno Provincial de Loja, juicio 11121-2011-0010 (30 March 2011) available at <<https://www.elaw.org/content/juicio%2011121-2011-0010>>; Cayapas-Mataje Ecological Reserve case: Ecuador, Caso N.º 0507-12-EP, judgment No. 166-15-Sep-CC available at: <<http://doc.corteconstitucional.gob.ec:8080/alfresco/d/d/workspace/SpacesStore/b9f17431-df78-456e-9882-29d5aa360329/0507-12-ep-sen.pdf>>.

¹⁷ Ecuador, Constitutional Court ruling No. 1149-19-JP/21 (dated 10 November 2021, published 1 December 2021); See more at Anima Mundi Law Initiative report 'Rights of Nature Case Study Los Cedros Protected Forest (Ecuador)' available at <<https://www.animamundilaw.org/s/Anima-Mundi-Law-Initiative-case-study-Los-Cedros-April-2022>>.

Legislative Framework First



Introducing a legislative framework is perhaps the best way to establish Rights of Nature in a legal system, given the breadth and detail this would typically include, and would probably be the pathway chosen if a political party so inclined was in power.

So far, three countries have taken this step: Bolivia, Peru and Panama. The introduction in Bolivia seemed hopeful, again coming from an alliance of a left-wing political party with an indigenous leader and civil society groups including the peasants' union. The legislation came in two parts. The first piece of legislation (Law w71 of 2010) set out principles, rights and obligations, short of a complete legislative framework but analogous to a detailed set of constitutional provisions. The second piece (Law 300 of 2012) is far more detailed, with more detailed obligations, establishing a state Mother Earth Authority and Ombudsperson institution, and covering both Rights of Nature and the socio-economic policy of 'Buen Vivir' ["Living Well"] to attempt to harmonise social and ecological elements. However, despite this visionary law, state economic policy remains extractivist, the Ombudsperson's office still has not been established, and there have not been any cases brought in relation to Rights of Nature.

The Panama Act (Ley 287 of 2022) was introduced in February 2022 and took legal effect in February 2023. It includes: a range of Rights of Nature, including the right to restoration by damage against whoever caused it with such restoration also guaranteed by the state; obligations on the part of the State; administrative and economic implementation; and standing for every natural or legal person to take action to uphold the Rights of Nature. The Panama law is sufficiently new that implementation and effect remains to be seen. The Peru Act (Ley 2226-2021/CR) establishes Rights of Nature, obligations on behalf of the state legal principles. The main effects are on public bodies and the government with only limited effect on private individuals. Worth noting is the principle of 'in dubio pro natura' (Art. 2(a)), which requires the least ecologically impactful measures to be chosen.

In terms of interrelations, there are two obvious possible flows in the legal system. One is that cases can be brought under the legislation, which should be relatively straightforward given the explicit rights, obligations and standing contained therein. Bringing cases under the legislation would realise it and, through a number of cases, could establish a strong body of precedent or case law and familiarity with the laws which make it stronger. This is legally possible, yet does not seem to have happened in Bolivia. The second is the link between a legislative framework establishing general rights and element-specific subjecthood. The current approach in the Bolivian, Peru and Panama legislation is for obligations on state authorities which individuals have standing to enforce on a case-by-case basis. This, as above, means that there is only ad hoc reactive legal representation of Rights of Nature.

An alternative model would be for framework legislation to establish a standard Guardianship structure (or multiple standard structures) and a process for establishing these for various elements. This would link together the general rights with bottom-up representatives who safeguard particular elements of nature which they have a connection to. For a mature legal system in which elements of nature should be active (instead of just reactive), having representatives to consult with is better than waiting for a lawsuit to resolve a situation. This is particularly important when Rights of Nature has legal effects with regards to private individuals, not only public bodies.

These different options have respective advantages and disadvantages, and the classification used in this report is not meant to indicate that every element must be present. The Bolivian legislation was innovative and groundbreaking, existing before any of the element-specific guardians were established (whether through legislation or litigation), so was not a rejection of this approach. As mentioned in relation to Ecuador above, perhaps it is not strictly necessary to establish clear representatives of particular aspects of nature, or perhaps this is not even the best way of realising Rights of Nature. While it is needed in jurisdictions which do not have generally established Rights of Nature, it could be that broad standing with general Rights of Nature or a well-functioning state authority serves well to represent nature subjecthood on a case-by-case basis. Yet it is not a case of one or the other: it would be possible for both of these elements coexisting in one legal system. Framework legislation could establish a process by which guardianship bodies can be established for particular ecosystems or species which could either be instead of or in addition to broad standing and responsible public institutions. Each of these different approaches to representation has advantages and disadvantages, further discussion of which is beyond the scope of this report.

The third dynamic to consider is where the development of case law prompts either a legislative codification to establish a clearer legal framework, or perhaps the case law develops sufficient depth and clarity to be an established body of law. In the Bangladeshi Turag River case,¹⁹ the Court gave 17 directions, going beyond the immediate scope of the case and creating something which is in the direction of a legislative framework. It is not difficult to imagine a legislature seeking to implement Rights of Nature responding to the legal nudge to either create a proper legislative framework or patch particular aspects of the developing common law with narrower legislation. Of course, in the situation of an activist court developing new law without a significant foundation (whether Constitutional, Legislative or in Common Law), it is also easy to imagine a legislature which opposes Rights of Nature acting to legislate in the other direction instead.

¹⁹ See fn 11.

Conclusion

This section has shown how different types of legal instrument relate to each other and how Rights of Nature law is developing in different jurisdictions. While the classification and diagram seek to cover all varieties of Rights of Nature interventions in its scope, this report did not aim to cover all Rights of Nature developments or every possible interaction.

While a mature legal system based on a Rights of Nature approach certainly requires multiple elements of the legal system to be present, it may not be the case that every element is necessary. It is possible to imagine a legal system which develops Rights of Nature legislation, a process for element-specific subjecthood and establishing Guardians, and a healthy body of case law, yet no constitutional recognition of Rights of Nature. This would, of course, mean that the Rights are less protected than if they were constitutionally entrenched. Earlier in this report was discussion of whether Guardianship structures are necessary when compared to broad standing to bring cases ad hoc. Finally, though this may be a less likely and less desirable development, it could be possible for a mature and detailed body of case law to develop, perhaps alongside Guardianship structures for particular elements of nature, even without Constitutional or Legislative provisions.

This report has covered the multiple ways in which Rights of Nature can be realised, how these interrelate, and the different ways in which a legal system needs to be transformed. Having a clear understanding of the nuance and complexity involved in these developments will be helpful as Rights of Nature laws continue to be developed in particular jurisdictions and realised around the world.

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