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Right Attributions to Rivers: From Bio-Cultural Rights to the Rights of Future Generations

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Abstract. The research shows how the movement of the rights of rivers has open new spaces for subjugated people in Latin America such as Afro-decendent communities, indigenous communities, or the future generations to inject radically different legal and philosophical traditions. The research explores two pioneer cases of right attributions to rivers: Comunidades Afrodescendientes del Rio Atrato v. Presidencia de la Republica de Colombia (Afro-Colombian Indigenous Communities of the Atrato river v. Presidency of the Republic of Colombia) and Las Generaciones Futuras v. Ministerio del Medio Ambiente y Desarollo Sostenible (Future Generations v. The Ministry of Environment and Sustainable Development). These cases show that the rights of rivers are a necessary condition for human survival.

Keywords: right for rivers, linkage arguments, Latin American jurisprudence, philosophical traditions

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Права на реки: от биокультурных прав к правам будущих поколений

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Аннотация. Исследование показывает, как движение за права на реки открыло новые возможности для порабощенных народов Латинской Америки, таких как

афроамериканские общины, общины коренных народов или будущие поколения, которые привнесли радикально отличающиеся правовые и философские традиции. В исследовании рассматриваются два первых дела о присвоении прав на реки: «Комунидадес афро-колумбийские коренные общины реки Атрато против Президента Республики Колумбия» (Comunidades Afrodescendientes del Rio Atrato v. Presidencia de la Republica de Colombia) и «Будущие поколения против Министерства окружающей среды и устойчивого развития» (Las Generaciones Futuras v. Ministerio del Medio Ambiente y Desarollo Sostenible). Эти дела показывают, что права на реки являются необходимым условием выживания человека.

Ключевые слова: право на реки, аргументы о взаимосвязи, латиноамериканская юриспруденция, философские традиции

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Introduction

According to Mihnea Tănăsescu, one of the main contributions of the movement of the rights of nature is the opening of new spaces for subjugated people "to inject radically different legal and philosophical traditions into the Western mainstream" [1. P. 147]. For instance, in the official story of the Western philosophical tradition is claimed that the movement of rights of nature started with Christopher Stone's seminal paper "Should Trees Have Standing?" [2]. However, from an alternative point of view, one can recognize that at the same time Stone's paper was written, Latin American philosopher Godofredo Stutzin wrote a paper titled "La Naturaleza de los Derechos y los Derechos de la Naturaleza" (The Nature of Rights and the Rights of Nature) [3]. These two philosophers propose two incompatible justifications for the rights of nature. According to Stone, it makes sense to talk about the rights of nature, as we talk about the rights of corporations, both are legal fictions [2. P. 452]. For Stutzin, the rights of nature are the *conditio sine qua non* for a legal system to be able "to stop our rapid process of biosphere destruction" [4. P. 97]. In other words, while for Stone the language of the rights nature is a new expansion of the of the always developing legal imagination, for Stutzin the rights of nature are a necessary condition for human survival.

In this research, I want to show how the movement attributing rights to rivers in Latin America has open new spaces for subjugated people such as indigenous communities, Afro-descendant groups, traditional farmers and miners, victims of pollution, children, young people and future generations to injected into the mainstream of legal theory the notion of human dependency to rivers. In Latin

America, rivers have been conceived as rights holders in two ways. On one hand, as part of a larger natural entity that already have rights, a river has the same rights of the natural entity of which it is part of [5]. For instance, the *Political Constitution of Ecuador* (Art. 71) has recognized nature as a right holder. Given that rivers are a part of nature, the Constitutional Court of Ecuador recognized the rights of the Aquepi River in the 2021-case *Fanny Jacqueline Realpe Herrera v. Secretaría Nacional del Agua de Ecuador* (Fanny Jacqueline Realpe Herrera v. The National Water Secretariat of Ecuador). Similarly, in the District of Orurillo, Peru, the *Municipal Ordinance No. 006-2019-MDO/A*, declared that water – or *Yaku-Unu Mama* as the indigenous people in the area refer to it–is a subject of rights. Consequently, springs, rivers, ponds and lakes are subjects of rights as well. On the other hand, rivers have been recognized as right holders on their own in legislations and judicial decisions. For instance, in Brazil, *Law No. 387 of June 13, 2024*, recognized the rights of the Vermelho River and established it as a subject of special protection. In the same year, the Civil Chamber of the Court of Justice of Loreto in Perú recognized the rights of the Marañón River in the case *Federación de mujeres indígenas Kukama-Kukamiria v. República de Perú* (Federation of *Kukama-Kukamiria* Indigenous Women v. Republic of de Perú).

Developing the notion of human dependency on natural entities, I will study two pioneer cases attributing rights to rivers in Latin America: *Comunidades Afrodescendientes del Rio Atrato v. Presidencia de la Republica de Colombia* (Afro-Colombian Indigenous Communities of the Atrato river v. Presidency of the Republic of Colombia), 2016, and *Las Generaciones Futuras v. Ministerio del Medio Ambiente y Desarollo Sostenible* (Future Generations v. The Ministry of Environment and Sustainable Development), 2018. In these cases, the Colombian Constitutional Court and the Colombian Supreme Court, respectively, decided that the Atrato river and the Colombian Amazonia are right holders with the rights of protection, conservation, maintenance, and restauration. Briefly, this decision was inspired by the right attributions to the Whanganui River in New Zealand in the *Te Awa Tupua (Whanganui River Claims Settlement) Act* of 2017, under the justification that right attributions to rivers protects the cultural communities depending on them. However, for Latin American jurisprudence this is not enough, the protection of rivers is also a *conditio sine qua non* for human survival. Therefore, right attributions to rivers are not only justified by bio-cultural rights, but also by the rights of future generations.

Making explicit the connection between the rights of rivers and human rights, I will use a linkage argument. In this context, a linkage argument is a way of justifying rights attributions to rivers showing that its realization is indispensable for a well-accepted right, or group of rights [6; 7]. This is the structure of the linkage argument used in this research:

Premise 1: Everyone has a human right to something.

Premise 2: Rivers are necessary for enjoying that thing as a right, whatever that thing is.

> Premise 3: Attributing rights to rivers is necessary (or at least useful) for protecting and preserving rivers.
> Conclusion: Therefore, rights should be attributed to rivers [8. P. 112].
> Premise 1 establishes the well accepted, uncontroversial, rights. Premise 2 establishes a bridge between rivers and the enjoyment of the alleged well-accepted right. Premise 3 claims that attributing rights to rivers is necessary, or at least useful, for protecting rivers.

Using this argumentative structure, bellow I will show how the non-trivial relationship between Afro-descendants, indigenous and mestizo communities and the Atrato river lead the Colombian Constitutional Court to attribute rights to the Atrato river. Then, I will show how this strategy was the inspiration for the Colombian Supreme Court to confer legal rights to the Colombian Amazonia to protect present and future generations from climate change. I will conclude by reconstructing some objections and responding to them.

Rights attributions to rivers and biocultural rights

If Tănăsescu is right, and the movement of rights of nature have provided a platform for subjugated people to plant radically different legal and philosophical traditions [1. P. 147], then we should start this section by asking who these "subjugated people" are. In *Comunidades Afrodescendientes del Rio Atrato v. Presidencia de la Republica de Colombia* (Afro-Colombian Indigenous Communities of the Atrato river v. Presidency of the Republic of Colombia), they are Afro-descendent, indigenous and mestizo groups living in the geo-political region through which the Atrato river flows. More specifically, when the case under account was ruled, the population of that area was about 500,000 people. 87% of them are of Afro-descendant, 10% indigenous communities and 3% mestizo. 96% of this land is the collective territory of 600 Afro-descendant communities and 120 indigenous reservations. The 4% of the territory left is inhabited by mestizo farmers that have immigrated to the region (§ I.1.).

Premise 1, from the linkage argument, identifies the well-accepted group of rights to be supported by the rights of rivers. *Ex hypothesi*, these rights are uncontroversial or widely accepted by "the target audience" [7. P. 30]. This feature makes the justification of the first premise of this argument "shallow" because it does not require an independent normative justification for these rights. Instead, it suffices to identify the general acceptability of the right under consideration. Since, in these cases, the supported rights are constitutional rights, and in the legal community it is generally accepted that fundamental rights are included in political constitutions, then the Afro-descendent communities satisfy their burden of argumentation if they show that the supported fundamental rights are included in the *Political Constitution of Colombia*. According to the Colombian Constitutional Court, the rights of the Afro-descendant communities to be protected in this case were the right to subsistence (Art. 11); the right to cultural, ethnic and social

integrity (Arts. 1, 7), the right to not be subjected to forced displacement (Art. 12); the right to collectively own ancestral lands (Arts. 58, 63, 329); the right to public consultation regarding the extraction of natural resources from ancestral lands (Art. 103).

The Atrato river is necessary for the enjoying of these rights, i.e., Premise 2, because it is a unique ecosystem. It flows from the western branch of the Colombian Andes Mountains through the northwestern Colombian territory to the Gulf of Urabá in the Caribbean Ocean. This river is only 670 kms. long, but it is one of the rivers with the largest water flow of Colombia. Its basin of 24,854 squared miles, extends from the northwest of Colombia to the south of Panama, and it is constituted by 15 tributaries and about 300 ravines. It is also one of the most diverse ecosystems in the world. It hosts about 9,000 species of plants, 200 mammals, 600 birds, 100 reptiles, and 120 amphibians. Last, but not least, this basin is also rich in gold, platinum, woods, and it is considered one of the most fertile lands for agriculture in Latin America. According to the Court in *Comunidades Afrodescendientes del Rio Atrato v. Presidencia de la Republica de Colombia* (Afro-Colombian Indigenous Communities of the Atrato river v. Presidency of the Republic of Colombia), this environmental wealth has shaped the Afro-descendant and indigenous communities' styles of living. For instance, these communities perform practices of traditional agriculture scheduled around the river cycles and includes the farming of local foods such as corn, rice, chontaduro, plantain, cocoa, or sugar cane. Fishing is done with arrows and hand-made cast-nets. Mining applies traditional non-industrialized methods of gold and platinum extraction (§ 1).

Differently, when environmental deterioration does not allow ethnic communities to satisfy the basic needs of their individual members such as health and personal integrity, those individuals are forcedly displaced to other places where those basic needs are guaranteed, or, at least, where they are not threatened in a direct way. If the members of these ethnic communities are forcedly displaced from their own lands, not only the lives of the individuals of these communities are negatively affected, but also the social network keeping these communities together is eroded (§ 3.3).

This vital relationship between ethnic communities and the territories in which their culture, traditions and forms of life are developed is the rationale behind the biocultural rights. Briefly, these are the rights that ethnic communities have to steward their own territories, its natural resources and biodiversity in accordance with their traditional laws and customs. In this sense, biocultural rights protect ethnic communities whose forms of life depend on their territories and its environments by letting them to administer and protect their ancestral lands. According to the Court, the correlative obligation of these rights is the obligation of the Colombian state to protect both the different cultural communities inhabiting the Colombian territory and the rivers, forests, sources of food, environment and biodiversity allowing these communities to live according to their cultural perspectives (6.11).

Consequently, attributing rights to the Atrato river is necessary (or at least useful) for its protection, maintenance and restauration (Premise 3) because the omissions of the Colombian government have allowed for the increasing of industrialized illegal mining and logging. Given that these activities include heavy-duty machinery, and toxic materials like mercury, the Atrato river's environment is rapidly deteriorating. This is why the Court ruled that the Atrato river has the rights to protection, conservation, maintenance, and restauration.

This is the structure of the linkage argument:

> Premise 1: The Afro-descendent and indigenous communities of the Atrato river have the rights to subsistence; cultural, ethnic and social integrity; not be subjected to forced displacement; collectively own ancestral lands; and public consultation.
> Premise 2: Given its environmental wealth, the Atrato river is necessary for the Afro-descendent and indigenous communities to enjoy their rights.
> Premise 3: Since the Atrato river is rapidly deteriorating, it should be protected, conserved, maintained, and restored.
> Conclusion: Therefore, the Atrato river has the rights to protection, conservation, maintenance, and restauration.

Rights attributions to rivers and the rights of future generations

In *Las Generaciones Futuras v. Ministerio del Medio Ambiente y Desarollo Sostenible* (Future Generations v. The Ministry of Environment and Sustainable Development), 2019, the subjugated people are the future generations. To clarify, the plaintiffs in this case are 25 Colombian youth who, when the case was filed in 2019, were between 7 and 26 years old. Assuming they have an average life expectancy of 78 years, they will develop most of their adult lives in the period between 2041 and 2070, and part of their old age after that time. Given that their life extends further than the current adult generation, they are a future generation [9. P. 12]. In their complaint, the youth plaintiffs define a generation as "a group of people who, given their simultaneous historic experiences, share, to some degree, a worldview, a historic conscience, and a collective identity that is externalized in attitudes and behaviors" (§ 4.3.2). The simultaneous historic experience bringing this people together is their concerns about the future. Climate change will take a toll on them because, according to the predictions of the Colombian Institute of Hydrology, Meteorology and Environmental Studies (IDEAM), between 2041-2070, the annual temperature of Colombia is expected to gradually increase by 1.6 °C above pre-industrial levels. After this period, the average annual temperature could gradually increase by 2.14 °C above pre-industrial levels. This means that "the plaintiffs are the generation that will face the greatest climate-related impacts" and "unlike the present generation, the plaintiffs do not have the power to make decisions that effectively reduce greenhouse gas emissions and the rate of deforestation in the Colombian Amazonia" (§ 4.3.2).

The future generations establish Premise 1 when claim that

> First, the lack of compliance of the Colombian government regarding its duty of environmental protection that allowed the increase in of deforestation in the Colombian Amazon … violates our fundamental right to enjoy a healthy environment, contained in article 79 of the Political Constitution (CP)…Second, [this violation] … threatens our rights to life (arts. 1 and 11, CP), to health (art. 49), to food (arts. 1 and 65), to water (arts. 1, 79, 93, 94, 366). (§ 2)

Before reconstructing some of the arguments justifying why the Amazon river is necessary for enjoying these rights, we should explain the functioning of this ecosystem. The Colombian Amazon performs four main functions: it stabilizes water production cycles, maintains the soil's capacity to capture and absorb water, provides the water that reaches the highest peaks of the Colombian Andes mountains (which are the largest suppliers of water for Colombian cities), and it prevents global warming. First, the plaintiffs highlighted the role of forests as regulators of the water cycle. Forests absorb water from the soil and then, through evaporation and transpiration, return it to the atmosphere and produce new rain. This process, called recycled rain, produces 50% of the rainfall in the Amazon (§ 9.a.). Second, t the Colombian Amazon forest helps maintaining a stable process of water capture and prevents flooding. In effect, the roots of its trees control the flow of water in the subsoil, while reducing the rapid evaporation of water and decreasing excessive rainfall (§ 9.b.). Third, they argued that the Colombian Amazon regulates the climate, rainfall, and water in most of the Colombian territory. The water that evaporates in the Colombian Amazon rises into the atmosphere and reaches the Colombian Andes mountains, there it condenses and becomes rain that descends on the mountains, creating rivers that provide water to large cities, irrigate crops, and later become tributaries of the Amazon river (§ 9.c.). Finally, the Colombian Amazon helps prevent climate change because tropical forests, such as those in the Colombian Amazon, are one of the largest CO_2 sequesters. 55% of the CO_2 stored is in tropical forests (§ 9.d.).

First, for the future generations, protecting the Colombian Amazon blocks threats to the right to enjoy a healthy environment. According to IDEAM's Early Warning Bulletins, the highest rates of deforestation in Colombia are found in the Amazon forest. Additionally, "there are 1,122 species of flora and fauna threatened by deforestation" in this area. Given that the Amazon is considered one of the most biodiverse regions in the world and that many of its species are endemic, if the Colombian Amazon is not protected, many of these species will disappear forever (§ 5.2.). The future generations also remind us that the main consequence of deforestation in the Colombian Amazon is the emission of greenhouse gases, which, in turn, is the main cause of climate change (§ 5.2.). Second, according to the future generations, protecting the Colombian Amazon makes the right to life more secure, stable, and sustainable. In their words, "our survival depends on protecting the Colombian Amazon, as most of the essential goods we use (water, food, medicine,

fuel, construction materials, etc.) requires the well-functioning of this ecosystem" (§ 5.2.). Third, protecting the Amazon river also blocks threats that undermine access to water and the corresponding guarantee of protection of the ecosystems that produce this natural resource. On the one hand, such protection would reduce the likelihood of rainfall and water resources declining, as predicted if current deforestation rates in the Amazon rainforest continue. On the other hand, given that 50% of the rainfall that falls in the Colombian Amazon is recycled water, protecting the Amazon simultaneously protects this rain-producing ecosystem (§ 5.4.).

The Colombian Supreme Court agreed with the plaintiffs. For this Court, the fundamental rights to life, to health, to food, and to water are substantially bound to the environment because without a healthy environment human beings cannot survive. The increasing deterioration of the environment is a serious attack against fundamental rights. This is why, for the Court, the protection of future generations takes the form of specific limitations for present generations and imposes on them obligations regarding the preservation of the environment. Given that the plaintiffs justified that the omission and non-compliance of the Colombian government and authorities to protect the Colombian Amazonia threatens the future generations' fundamental rights to life, to health, to food, and to water, these restrictions and obligations materialized by attributing the rights of protection, conservation, maintenance, and restoration to the Colombian Amazonia.

This is the linkage argument under consideration:

> Premise 1: Present and future generations of Colombian children and young people have the rights to life, health, food, water, and to a healthy environment.
> Premise 2: The Colombian Amazon is necessary for the future generations to enjoying those rights.
> Premise 3: Given the hight rates of the forestation in the Colombian Amazon, attributing the rights to protection, conservation, maintenance, and restauration to the Colombian Amazon is necessary to protect the Colombian Amazon.
> Conclusion: Therefore, the Colombian Amazon has the rights to protection, conservation, maintenance, and restauration.

Right attributions to rivers and "totality"

Tănăsescu questions the way in which rights were attributed to the Atrato and the Amazon rivers. From his perspective, both the Colombian Constitutional Court and the Colombian Supreme Court incurred in a type of wrong generalization that he calls "Totality." That is, "[t]he kind of thought originating in Western Europe at the time of the Enlightenment that considers itself to be universal and therefore applicable everywhere and to everyone. It is the kind of thought that thinks in terms of "humanity" versus "nature", and that looks for essential qualities abstracted from any lived experience" [1. P. 96].

To spell out this definition, we can study two relevant instantiations of the concept of Totality used by Tănăsescu, the concept of Nature (with capital N), as Totality, and the concept of Humanity (with capital H), as Totality. While the former understands Nature as an abstraction detached from particularly located ecosystems, the latter conceives Humanity without taking into consideration single individuals with specific socio-economic backgrounds or particularly situated groups. For Tănăsescu, this "removal from actual environments … is the modern abstraction par excellence" [1. P. 34]. Such abstraction is reinforced by the Nature/Human divide that "obscures the fundamental role of political infrastructures in *causing* environmental destruction" (italics in the original) by "making it seem as if … is nothing but a problem of having the wrong kind of consciousness" [1. P. 101].

Tănăsescu remaks that the cases attributing rights to the Atrato and the Amazon rivers are "striking" because they are originated from specific places, but they use the language of Totality. For instance, referring to the Atrato river, he claims, "this case is both place-based in that legal personality applies to Atrato river, a particular being in a particular place, and is steeped in totality thinking" because "the court frames the legal personality of Atrato in terms of 'the planet' and 'humanity'" [1. P. 100]. These cases seem to be also guilty of the Nature/HunanHumanity versus Nature divide. The indication of this clash comes from the ways in which these cases evolved. According to Tănăsescu's reconstruction, they started as "a violation of the rights *to* nature of the local residents (as well as a host of other human rights) and [became cases] of rights *for* nature" [1. P. 99] (italics in the original). This means that from Tănăsescu's perspective the distinction between rights under consideration indicates the divide.

I partially agree with Tănăsescu on this. He is right highlining that wrong generalizations lead to wrong problem diagnosis and solution. For instance, in the Atrato case, the Court blames Humanity and its wrong relationship with nature of the devastation of the Atrato river. Instead, the Court should have done a diligent study of colonialism showing that "[t]he 21st century miners devastating the poorest region of Colombia are part and parcel of a transnational network of resource extraction that the state makes possible" [1. P. 103]. However, from my perspective, the cases studied are not guilty of the Nature/Human divide. What the development of the cases shows, as I made it explicit in this paper through the linkage argument, is not a clash between Nature and Humanity, but the fact that they are intrinsically connected. Citing the Colombian Supreme Court for the last time, without the appropriate "environment and ecosystem," the protection of fundamental rights ceases to be relevant because there would be no rights to protect: "subjects of law … will not be able to survive."

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