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La représentation de la nature devant le juge : approches comparative et prospective
La représentation directe de la nature ou de certains de ses éléments

Nature as a legal person

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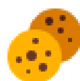
Abstracts

Français English
L'attribution de la personnalité juridique à la nature ou à certains éléments du monde naturel peut être observée comme un phénomène émergeant dans plusieurs doctrines et systèmes autour du monde. Le concept historique du public trust selon la common law a été élargi afin d'y intégrer le monde naturel ou certains de ses éléments qui en deviennent des bénéficiaires protégés. En même temps, divers « droits de la nature » ont été reconnus dans les constitutions de plusieurs pays. Un nombre croissant d'actions en justice et d'autres projets visent à faire reconnaître des primates non humains et d'autres animaux comme des personnes juridiques alors qu'en Nouvelle Zélande une rivière s'est vu attribuer la personnalité. Les conséquences, donc à la fois les avantages et les inconvénients, de cette approche de protection environnementale, sont présentées tout en méritant une étude plus approfondie.

Legal recognition of nature or some part of the natural world as having legal personality can be seen emerging in various doctrines and developments around the world. The historical concept of public trust has been expanded to make the natural world or parts of it the beneficiary of protection, while various "rights of nature" have been incorporated into the constitutions of several countries. A growing number of lawsuits and other projects are seeking to have non-human primates and other animals declared legal persons, while in New Zealand a river has been recognized as a person. The consequences, benefits and drawbacks, of this approach to environmental protection are outlined but need further study.

Index terms

Mots-clés : public trust, droits de l'animal, représentation, droits environnementaux, personnalité juridique
Keywords: public trust, animal rights, standing, environmental rights, legal personality
Lieux d'étude: Océanie



Full text

Introduction

1 Proponents of conceptualizing environmental protection as a human rights issue[1] see value-added in using respect for human rights to ensure an ecologically-sustainable society. It may be asked, however, whether "human" rights are preferable to rights for nature itself or elements thereof. If humans have rights, do non-humans? If not, what does it mean to declare a non-human species or nature as a whole to be a legal person? This contribution examines the current state of the law in various jurisdictions and the theoretical discussions that surround this issue.

2 A rights-based approach to environmental protection is the most recent of various analytical constructs that have been utilized in law in order to protect the natural world and ecological processes on which life depends. In general, legal measures can be grouped into four broad categories:

1. Traditional private tort and property law,[2] for centuries the primary avenue for mitigating or halting pollution in domestic legal systems.
2. public law regulation; general environmental protection statutes were enacted in the 1960s along with specific laws to ensure clean water, clean air, and the survival of endangered species[3];
3. market mechanisms[4]; and
4. constitutional rights or international human rights law.

3 The rights-based approach differs from the other models in several key respects. First, the approach can be interpreted to emphasize each human's right to a certain quality of environment, because that quality is linked to, indeed a prerequisite for, the enjoyment of a host of internationally and domestically guaranteed rights. Alternatively, the aproach can be interpreted to mean that the environment itself must be maintained in a healthy and ecologically-balanced state. Second, all legal systems establish a hierarchy of norms. Constitutional guarantees usually are at the apex and "trump" conflicting norms of lower value.[5] One of the values of being a "person" at law is that such status automatically confers certain rights, although not all persons have the same rights, as discussed below.

4 The concept of nature's rights and legal personality has been proposed in a variety of formulations, from legally enforceable rights, to "biotic rights" as moral imperatives, to human responsibilities and duties towards nature. Giving legal recognition to the intrinsic value of nature, by adding new "subjects" of law, is one far-reaching proposal. Some argue that this has already occurred[6] while others object that the ascription of rights to nature anthropomorphizes it to its detriment.[7] Still others view rights-conferring as one tool to enhance the value of nature.

5 A legal system in which the environment is a legal person with rights will approach issues differently from systems in which this aproach is not found. A system of biotic rights for nature had been described as "morally justified claims or demands on behalf of nonhuman organisms, either individuals or aggregates (populations and species), against all moral agents for the vital interests or imperative conditions of well-being for nonhumankind."[8] The same author posits a Bill of Biotic Rights that includes claims or demands for participation in the natural competition for existence; healthy and whole habitats; reproduction without artificial distortions; no human-induced extinctions; freedom from human cruelty, flagrant abuse or frivolous use; restoration of natural conditions disrupted by human abuse and the right to a fair share of the goods necessary for sustainability.

6 At present, no official international legal instrument takes this approach, albeit the World Charter for Nature proclaimed the intrinsic value of nature and a non-

governmental Universal Declaration of Animal Rights was proclaimed at UNESCO.[9] In national law, however, several innovative initiatives have emerged, and ancient doctrines are being reformulated to provide greater protection for nature and its elements. The latter is examined first, followed by a look at some of the new legal measures.

Public Trust: A Move towards Legal Personality?

7 The doctrine of public trust in Roman law held that navigable waters, the sea, and the land along the seashore constituted a common asset open for use by all.[10] From Roman law antecedents, early English common law distinguished between private property which could be owned by individuals and certain common resources which the monarch held in inalienable trust for present and future generations. Many common law courts have adopted and applied this law, conferring trusteeship or guardianship on the government, with an initial focus on fishing rights, access to the shore, and navigable waters and the lands beneath them.[11] The domain of common property cannot be destroyed or alienated by the legislature or the executive.[12] After the 1970 publication of an influential law review article by Joe Sax,[13] courts in the United States (US) began to expand the doctrine and apply it to other resources, including wildlife and public lands.[14]

8 US state constitutions revised or amended from 1970 to the present have incorporated pubic trust doctrine to provide greater protection to the environment.[15] In fact, every state constitution drafted after 1959 explicitly addresses conservation of nature and environmental protection.[16] One group among these constitutions calls for the acquisition and regulation of natural resources as part of the public trust. Another set of constitutional provisions expressly recognizes the right of citizens to a safe, clean or healthy environment, in a manner that also implies a stewardship over natural resources.[17]

9 The first constitutional recognition of environmental rights in the U.S. appeared in Pennsylvania in connection with the first Earth Day.[18] The author of the proposal said he intended to "give our natural environment the same kind of constitutional protection that [is] given our political rights."[19] The proposed amendment was approved overwhelmingly by voters in the state, on May, 18, 1971.[20] The provision, now Article I, section 27 of the state constitution, sets forth (emphasis added):

> Section 27. Natural resources and the public estate
>
> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

10 There are several evident features about this text. First, it declares the "people's" right to environmental amenities with a directive to the state to act as a trustee for the "public natural resources" of the state. The resources mentioned are declared to be common property and held for future as well as present generations.

11 Many state constitutional provisions, like the Pennsylvania provision quoted above, refer to long-established doctrines of public trust.[21] Pennsylvania courts have interpreted the state constitutional provision to mandate the management of public natural resources of the state.[22] A three-part test has emerged for judging the legality of state action under the constitutional provision,[23] but it must be noted that an overriding aspect of the test is its deference to decisions made by the government.[24]

12 Hawaii's constitution goes further than that of Pennsylvania, creating a public trust over all of the state's natural resources: For the benefit of present and future

generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.[25]

13 Other provisions are less direct, but rely on aspects of public trust doctrine, for example, conservation and common use.[26] Rhode Island's Constitutional amendment, added in 1986, focuses on public rights of access and use, coupled with a legislative mandate:

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state *with due regard for the preservation of their values*, and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.[27]

14 The public trust doctrine emphasizes the duties of the trustee and preserving the corpus of the trust for the future rather than the individual rights of the beneficiaries.[28] It thus takes a long term, transgenerational approach. Public trust doctrine only extends, however, to those natural resources that are designated as part of the corpus of the trust and may not protect the environment as a whole, especially when located on private property.[29] Whether or not the doctrine reaches private action and private lands depends on what constitutes the corpus of the trust, whether it is limited to navigable waters and public lands, or also includes wildlife, air, and mineral resources.[30]

15 In Louisiana, courts have required a cost-benefit analysis of any measure that is potentially harmful to the environment and demand that the government adopt the least damaging measure.[31] For example, in the case of *In re Supplemental Fuels, Inc.,*[32] an appellate court insisted that the state's department of environmental quality has a "constitutional mandate to determine that the adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare."[33]

16 Public trust doctrine generally guarantees the rights of the beneficiaries to reasonable access and use consistent with conservation. Courts in several states thus have upheld challenges to state measures that would restrict access to natural resources.[34] Relying on what it called "ancient traditions in property rights," an Alaskan court[35] found that common law principles "impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people.[36] Similarly, Alaskan courts have held that state tidelands conveyed to private parties must remain subject to a public trust easement unless the transfer itself would advance a specific public trust purpose or would not substantially impair the public interest in the tidelands.[37] Finally, the Alaska Supreme Court held in *Pullen v. Ulmer*[38] that "the public trust responsibilities imposed on the State … compel the conclusion that fish occurring in their natural state are property of the state for purposes of carrying out its trust responsibilities."[39]

17 Notably, most of the constitutional amendments were enacted because the ordinary political process failed to protect what the public viewed as the fundamental value of a healthy environment. The state inadequacies were perceived to involve a "race to the bottom"[40] because states compete for economic activities that will benefit their population and it was feared that industries would relocate if the costs imposed by environmental protection were to rise. There is some empirical evidence in the United States to support the view that businesses relocate or expand their activities to escape states with strong environmental laws.[41] Environmental protection thus gains with

constitutional provisions based in public trust doctrines that restrict the state legislature's ability to reduce environmental standards.

Nature as a Legal Person

18 As the legal provisions above indicate, public trusts, like national parks and other protected areas, establish a preferential legal status for specific ecosystems or their components, but they normally are constituted for the beneficial use of humans, not necessarily for the direct and primary benefit of the ecosystem or its elements. Public trusts have the advantage over parks, conservation zones, and wilderness areas because the former are normally given constitutional status, while the latter are established by ordinary legislation and can be abolished or diminished in the same way.[42] A more far-reaching measure, which has been proposed with only limited success is to declare some or all of nature to be a legal person with direct rights.

19 In his widely cited and influential article, 'Should Trees Have Standing?', Christopher Stone argued for conferring legal personality and rights on the environment because, as a rights-holder, the natural object would "have a legally recognised worth and dignity in its own right, and not merely to serve as a means to benefit 'us'....".[43] In his dissenting opinion in the landmark environmental law case, *Sierra Club v. Morton*,[44] Justice William O. Douglas argued that "inanimate objects" should have standing to sue in court:

> The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation…The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it.[45]

20 In the years since the article and judgment appeared, various innovations in law have moved in the direction proposed.

21 The arguments are varied but all recognize that legal personality is a policy decision, not a biological one.[46] In international law, states and intergovernmental organizations have legal personality; in domestic law, business and charitable organizations, municipalities and other government bodies are recognized as legal persons.[47] One basis for personhood rests on the interests of the entity in question. Another basis considers the interests of currently recognized human persons.[48] Persons have rights, duties, and obligations; things do not.[49] Although there have been challenges to this binary framework,[50] thus far most legal systems have maintained the distinction. As a result, creating new legal categories to address the rights of entities may encounter problems and resistence.[51]

22 "Natural persons," the term used to refer to human beings, have certain legal rights adhering automatically upon birth, rights which expand as the child becomes an adult. A legal or "juridical" person[52] refers generally to an entity that is not a human being, but one on which society has decided to confer specific rights and obligations. An entity labeled a natural person is genetically human, a distinction that may become more important as additional entities lay claim to personhood. In general, natural persons are entitled to priority over juridical persons, although this may be a diminishing feature. For the time being, society is developed by and for natural persons, and thus legal rights focus on this group.

23 A number of different factors have been proposed as a basis for according legal status.[53] Characteristics that have been used, either singly or in combination, include:

biological life, genetic humanness, brain development, ability to feel pain, consciousness/sentience, ability to communicate, ability to form relationships, higher reasoning ability, and rationality. According to the prominent legal philosopher Joel Feinberg, an entity must have interests to have moral status.[54] Steinbock adds that "interests" is a term of art which refers to the capacity of an entity to have a stake in things, and this capacity is contingent on the entity being sentient, or consciously aware.[55] "Interests" in this sense refers to an entity having "a sake or welfare of its own" and "the expression . . . is intended to emphasize the stake that conscious, sentient beings have in their own well-being."[56] If an entity does not have interests in the sense identified above, then legal personhood cannot be based on the protection of those interests for its own sake. Instead, a determination of legal personhood must be based on the protection of the interests of others. Legal personhood based on the interests of others may be more limited than legal personhood based on the interests of the entity itself. Legal personhood based on an entity's interests is not possible until the entity has actually developed interests. Prior to that development, legal personhood must be based on concerns about protecting the interests of others.

Nature as a whole

24 In 2008, Ecuador became the first country in the world to declare in its constitution that nature is a legal person.[57] Articles 10 and 71-74 of the Constitution recognize the inalienable rights of ecosystems,[58] give individuals the authority to petition on the behalf of ecosystems,[59] and require the government to remedy violations of nature's rights,[60] including "the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution."[61] The provisions were written by Ecuador's Constitutional Assembly with input from the Community Environmental Legal Defense Fund, a Pennsylvania-based non-governmental organization providing legal assistance to governments and community groups. Its drafts seek to "change the status of ecosystems from being regarded as property under the law to being recognized as rights-bearing entities."

25 Bolivia followed Ecuador in 2009 by similarly giving Constitutional protection to natural ecosystems, in order to override the immediate interests of residents. The constitutional amendment gives nature equal rights to humans. The 2010 Law of Mother Earth (*Ley de Derechos de la Madre Tierra,* Law 071) first implemented the amendment by redefining the country's mineral deposits as "blessings" and establishing new rights for nature. The law proclaimed the creation of the *Defensoría de la Madre Tierra* a counterpart to the human rights ombudsman office (the *Defensoría del Pueblo*). Nature's rights include: the right to life and to exist; the right to continue vital cycles and processes free from human alteration; the right to pure water and clean air; the right to ecological balance; the right to the effective and opportune restoration of life systems affected by direct or indirect human activities, and the right for preservation of Mother Earth and any of its components with regards to toxic and radioactive waste generated by human activities. In October 2012, Bolivia enacted an expanded version of the 2010 law. The new law, entitled *Framework Law on Mother Earth and Integral Development for Living Well*, recognizes Mother Earth as a "living dynamic system," and grants it comprehensive legal rights that are comparable to human rights.

26 Bolivia amended its constitution in large part due to pressure from its large indigenous population, who places the environment and the Earth, Pachamama, at the center of all life. The indigenous were responding not only to traditional cultural and spiritual demands, but also to the fact that the Andean mountain ecosystems have been particularly affected by climate change, with the melting of glaciers, loss of water, and spread of diseases to the highlands. Significantly, however, two leading Bolivian indigenous rights groups ,CONAMAQ and CIDOB, oppose the 2012 law, stating that it undermines indigenous rights by not requiring indigenous consent for development

projects, and promotes "standard development" that will continue to harm the environment.[62]

27 Implementation of the 2012 law may prove difficult for other reasons, as well. The right of Pachamama not to "have cellular structures modified," for example, means genetically modified seeds should be prohibited and phased out, although much of Bolivia's agricultural industry, including ninety percent of all soy, uses genetically modified seeds.

28 Further north, on November 16, 2010, Pittsburg, Pennsylvania became the first city in the United States to declare nature a legal person and to ban "fracking" within the city limits. The state legislature tried to override the decision, supported by the oil and gas industry. It adopted a 2012 law allowing gas companies to drill anywhere in the state without regard to local zoning laws. The Pennsylvania Supreme Court declared the law unconstitutional, however, restoring the city ordinance.[63] In the majority opinion, the justices cited Article 1 Section 27 of the Pennsylvania State Constitution, which guarantees the "right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." Dallas, Texas also recently adopted restrictions that bar hydraulic fracturing within 1,500 feet of a home, school, church, and other protected areas, effectively banning the practice within the city limits. In addition, voters in four cities in the state of Colorado recently succeeded in either banning or suspending fracking.

29 As the Pennsylvania case shows, constitutional provisions are beginning to give rise to enforcement litigation based on the legal personality of nature. *Wheeler c. Director de la Procuraduria General Del Estado de Loja*[64] was the first case in history to vindicate the Ecuadoran constitutional provisions. The lawsuit was filed against the local government in the southern region of Vilcabamba in March 2011, who were responsible for a road expansion project that dumped debris into the Rio Vilcabamba, narrowing its width and doubling the speed of its flow. The project was also done without an environmental impact assessment or consent of the local residents. Two residents brought the action alleging violations of the Rights of Nature. The court held against the local government, stating that the rights of nature prevail over other constitutional rights if they are in conflict with each other, setting an important precedent. The court also held that the defendant bears the burden of proof to show there is no damage. Unfortunately, compliance with the ruling and mandated reparations has been slow to arrive.

30 In March 2011, shortly after the Wheeler judgment, the government of Ecuador filed a case against illegal gold mining operations in northern Ecuador, in the districts of San Lorenzo and Eloy Alfaro. In this case mining operations were alleged to be polluting the river and thereby violating the rights of nature. This fact that the case was brought by the government may account for the swift verdict and its enforcement: a military operation was ordered to destroy the machinery used for illegal mining.[65]

Recognition of Specific Ecosystems

31 A well-known case report and agreement (*Tutohu Whakatupua*) from the New Zealand Wanganui Tribunal concerning the Whanganui River established legal personhood for the river, with the river's rights to be enforced through judicial action by appointed guardians.[66] The Wanganui River is the longest navigable river in New Zealand. The local Maori Iwi (tribe) and hapu (sub-tribes) hold the river sacred and consider the entire river system, including "all its physical and metaphysical elements from the mountains to the sea",[67] as a living being, *Te Awa Tupua*. The river itself has been the subject of a longstanding native title claim by the Iwi,[68] who claim possession of the river, its resources and the continued existence of *rangatiratanga* (chieftainship or ownership) over the river and its *taonga* (treasured tangible and intangible items).

32 In October 2011 the Iwi and the government signed a non-binding agreement to negotiate a final settlement over the river,[69] to "protect the health and wellbeing of the

Whanganui River for future generations".[70] Under the 2011 Agreement the special status of the river was to be recognised by legislation[71] and between two and six river trustees would be appointed in equal numbers by the government and the Iwi.[72] The purpose of the trustees would be to "promote and protect the Te Awa Tupua status and the health and wellbeing of the Whanganui River".[73]

33 In August 2012, the Minister for the Treaty of Waitangi announced that the government and Iwi had reached a preliminary agreement (*Tutohu Whakatupua*) on key elements for the protection of the Whanganui, including:

- Recognition of the status of the Whanganui River (including its tributaries) as Te Awa Tupua, an integrated, living whole from the mountains to sea;
- Recognition of Te Awa Tupua as a legal entity, reflecting the view of the River as a living whole and enabling the River to have legal standing and an independent voice;
- Appointment of two persons (one by the Crown and the other by the River iwi) to a guardianship role – Te Pou Tupua – to act on behalf of Te Awa Tupua and protect its status and health and wellbeing;
- Development of a set of Te Awa Tupua values, recognising the intrinsic characteristics of the river and providing guidance to decision-makers; and
- Development of a Whole of River Strategy by collaboration between iwi, central and local government, commercial and recreational users and other community groups. The strategy will identify issues for the river, consider ways of addressing them, and recommend actions. The goal of the strategy will be to ensure the long-term environmental, social, cultural and economic health and wellbeing of the river.[74]

34 The law based on the agreement reflects that the river is "a living entity in its own right …incapable of being 'owned' in an absolute sense".[75] Title to the river is to be vested in the name of the river (Te Awa Tupua), rather than with the Iwi or Crown trust.[76] The concept of river "trustee" was replaced by that of river "guardian" (or Te Pou Tupua). The intent is also expressed that the two guardians will "provide the human face of Te Awa Tupua" and "owe [their] responsibilities to Te Awa Tupua, not the appointors".[77] This reflects a change of status of the river from protected object to a rights-holder recognised for its "inherent value".[78] The guardians are to protect the health and wellbeing of Te Awa Tupua; uphold its status and values; act and speak on its behalf; and carry out the "landowner" functions over those parts of the bed of the Whanganui River held under the New Zealand Land Act 1948.[79]

Animal Species as Legal Persons

35 During the Middle Ages in Europe it was widely accepted that animals could be held responsible for the commission of crimes.[80] Several hundred trials are recorded of pigs, donkeys, dogs, and other animals that lived in close proximity to humans. Recent scholarly and activist attention has been devoted to questioning whether some or all living species should be recognized as legal persons. The international "Great Ape Project" seeks to imbue non-human primates with attributes of legal personhood--specifically "protections of the right to life, the freedom from arbitrary deprivation of liberty, and protection from torture."[81] Spain responded when the parliament's environmental committee voted in 2008 to approve principles committing Spain to the Great Ape Project.[82]

36 The legal status of animals continues to evolve.[83] Under common-law concepts, an individual could not allocate money in a testamentary disposition for the care of a surviving pet, but in the 1990s the United States adopted a national uniform law, allowing pet trusts for the first time.[84] Under some State laws, companion animals have moved from the category of corpus of a trust to beneficiary of a trust, making them at

least a quasi-legal person in this limited context. Some courts in the U.S. have recognized animals as named plaintiffs in lawsuits, although scholars note that this is not the general rule.[85]

37 In 1822, the United Kingdom (U.K.) passed Martin's Act, the first animal-cruelty law in the U.K.[86] The 1867 New York anti-cruelty law[87] was the first based on recognition that animals can suffer pain[88] and the law continues to restrict the use of animals by humans to prohibit the infliction of unnecessary pain, suffering, or death.[89] This may be attributed in part to the writings of Jeremy Bentham, who focused on the suffering of animals, believing that they suffer in the same way as humans, and proposed that the interests of animals to be free from suffering must be considered equally with the suffering of humans.[90]

38 More recently, the Marine Mammal Protection Act and the Endangered Species Act of the 1970s marked a major new concern coming to the fore relating to animals--the emergence of an environmental ethic in the law and the idea of protecting groups or species of animals.[91] The Endangered Species Act, for instance, had the effect of eliminating most domestic traffic in endangered species. The acts aimed at the protection of groups of wild animals and the broader ecology in which these animals live.

39 The law generally continues to treat animals as things, property, not persons.[92] Philosophical and legal thinkers who address animal issues are proponents of recognizing the legal personhood of animals in one form or another.[93] The German Civil Code (Bügerliches Gesetzbuch) goes some way towards establishing legal personhood, providing: “Animals are not things. They are protected by special statutes. They are governed by the provisions that apply to things, with the necessary modifications, except insofar as otherwise provided.”[94] Germans have gone beyond legislation and have amended their constitution to provide for protection of animals. Article 20a of the German Constitution (Grundgesetz der Bundesrepublik Deutschland) states: “Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with the law and justice, by executive and judicial action, all within the framework of the constitutional order.”[95] In the Northern Luzon province of the Philippines, the Ifugao Tribe had a law that stated: “Animals are attributed with legal personalities. It is an assault of a personal nature to maliciously kill an animal.”[96]

40 From 1992 to 2011, the Swiss canton of Zurich had a publicly paid lawyer whose role was to represent animals.[97] Switzerland, like several other European countries, has strong animal protection laws, but the group Swiss Animal Protection argued that officials rarely prosecuted animal cruelty cases and penalties were too mild to be an effective deterrent.[98] Thus, Zurich adopted a statute providing that, in every case involving animal cruelty, the animals must be represented by an attorney, akin to child abuses cases.[99] The animal attorney's role was to “[represent] the animals' interests as if the animal was a human being.”[100] In 2008, Zurich had 224 animal cruelty cases, a third of the nationwide total. The statutory position of an animal attorney was a legal institution designed to give expression to animals' interests in a direct way, through the intermediation of a legal official charged with ascertaining and promoting those interests “as if the animal was a human being.”[101] The statute only extended to cruelty cases, not to environmental harm detrimental to individual animals or species.

41 The social movement for animal rights believes the legal status of animals needs to be changed. On an ethical basis, the claim is that animals, like humans, have personal interests such as the avoidance of pain and death and, as such, should have legal personality so they may directly assert these interests in the legal system. Presently and historically, animals are placed by the legal system into the category of personal property. An unsuccessful PETA lawsuit against Sea World sought to free a particular wild-caught killer whale the group likened to a human slave (kept against his will) under the legal theory that the Fourteenth Amendment to the U.S. Constitution, which outlaws human slavery, also outlaws whale slavery.[102]

42 The idea that we might exclude from legal status an entity that meets all the attribute requirements for equal moral status with currently recognized persons, but that is not genetically human, raises the question of why genetic humanness matters.[103] It seems inconsistent to argue for the extension of legal protection to a non-sentient multi-celled human organism in the beginning stages of development (i.e., an embryo) and withhold such protections from fully developed sentient, and perhaps even rational, non-human animals.[104] If genetics is the sole basis for legal personhood, there must be some explanation as to why this characteristic is so important.[105] Thus far, as Jessica Berg comments, no one has provided a satisfactory argument. Humans and chimpanzees share over 98% of their genetic code; is the 2% genetic difference is a sufficient basis for according legal personhood, without some consideration of other factors?[106]

43 Science in the last fifty years has undertaken serious study of the cognitive and other abilities of animals.[107] It has been found that many animals have considerable cognitive abilities and rich emotional lives.[108] Quite a large number of animals have the ability to reason, solve problems, employ abstract thought and concepts, and use tools.[109] It has also been discovered that many animals have complex emotional lives, and are subject to grief, despair, anger, love, embarrassment, compassion, and empathy. “Spindle cells,” known to play a role in human emotions and apparently tied to the emotion of empathy, have been found to exist in the same parts of the brains of apes and certain whales as in humans.[110] This science relating to animal behavior may transform the status of at least some animals.

44 There may be good reasons to consider whether sentient animals should be given juridical personhood protections. Chimpanzees, bonobos, and gorillas have long-term relationships, not only between mothers and children, but also between unrelated apes. When a loved one dies, they grieve for a long time. They can solve complex puzzles that stump most two-year-old humans. They can learn hundreds of signs, and put them together in sentences that obey grammatical rules. They display a sense of justice, resenting others who do not reciprocate a favor.[111] “From the biological point of view, between two human beings there can be a difference of 0,5% in the DNA. Between a man and a chimpanzee this difference is only 1,23%. This similarity is proved, for instance, from the fact that chimpanzees can donate blood to humans, and vice-versa.”[112] Researchers working on dolphin intelligence argue that, given what is known about the cognitive and other abilities of dolphins, they should be treated as persons by the law, based on their intelligence[113] Thomas White, professor of ethics at Loyola Marymount University, Los Angeles, has said in this regard: “The scientific research . . . suggests that dolphins are ‘non-human persons' who qualify for moral standing as individuals.”[114]

Advantages and Limitations of Legal Personhood for Nature

45 Conferring legal personality on the Wanganui River or any other part of nature should allow legal action to be brought in the name of the person through a litigation guardian, or “guardian ad litem”.[115] While rules governing standing may already permit a government official or agency to represent a natural object as trustee on behalf of the public trust, this representation may not serve to protect the intrinsic value of the environment, especially where the government’s short term interests conflict with more long term ecological interests. Government bodies normally issue mining and forestry licenses,[116] controls water rights, and decides on oil exploration and exploitation permits. Such licenses and permits may generate considerable revenues for the state from domestic and foreign investors. Moreover, because governments are responsible to the whole human population of a State or country, a government may be more willing to permit a certain level of environmental degradation in the name of “sustainable development”.[117]

46 Problems also may arise if a part of an ecosystem is declared a legal person and detached from related and necessary components. A river, for example, cannot be fully protected without including the entire catchment area, including tributaries. The Whanganui agreement rightly combines the river, bed and banks into one entity, but it still allows nature to be divided into separate units.

47 Environmentalists may be concerned that inevitably the legal personhood of nature will have to be defended by humans. If these humans are appointed by the government, environmental concerns may not always be paramount. Any guardians will have responsibility for developing a management plan and deciding on what particular activities should be permitted. In theory, environmental agencies already undertake these responsibilities in respect to public lands and protected areas. It is unclear how much of a shift in perspective will occur by placing the focus on the area and not on the people.

48 In terms of environmental law, the conflation of indigenous and environmental rights has frequently been used to protect otherwise-vulnerable natural entities, as well as to introduce concepts foreign to Western legal systems but vital for environmental protection, such as intergenerational responsibility. However, indigenous beliefs do not necessarily protect the intrinsic value of nature; arguably, ideas about such value merely arose to prevent overuse of resources and ensure a group's survival. That environmental and indigenous interests can conflict has been demonstrated by Bolivia's attempts to introduce rights for nature being resisted by the Confederation of Indigenous Peoples of Bolivia, who believe they have been shut out of the process by environmental groups. In particular, the removal of a clause allowing indigenous groups to accept or reject megaprojects conducted on their lands is unpopular.

49 If given rights to sue, the legal person "nature" would become one of few non-human entities so endowed (ships, companies and trusts may all sue at present). Those in favor of rights for natural entities argue that allowing nature to sue in its own right would mean that more individuals who have previously escaped liability may face sanctions for their destructive behaviour, and provide an obvious plaintiff for cases involving environmental degradation. It would avoid the problem faced by environmentalists in the United States, who must argue that they themselves suffer harm through being unable to see a rare animal to prevent its habitat from being destroyed.

50 As with existing environmental litigation, causation may be problematic both in terms of criminal prosecutions and private suits by those suing on behalf of a natural entity, as it can be difficult to identify who precisely is responsible for an environmental problem, especially if the harm is caused by long-distance or long-term. In the case of the Wanganui River, proving who is responsible for pollution or farm run-off is not always straightforward and exacerbated if the standard of proof is one of criminal liability (proof beyond a reasonable doubt). In the Wheeler case in Ecuador, the court adjusted procedural rules by accepting evidence as to guilt based on probabilities, and emphasised that in cases involving nature's rights, the defendant bears the burden of proof given they generally have greater information as to the likelihood of environmental harm resulting from their activities.

Notes

1 *See* Neil Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 Stan. Envtl. L.J. 338 (1996)("the rights[-based approach starts rom the premise that every person has certain inalienable rights. Environmental degradation may violate those rights when it interferes with their exercise").

2 Private law is probably the oldest approach, and it resonates in the inter-state *Trail Smelter* arbitration. The arbitral panel, which found no international precedents on point, heavily relied on inter-state cases from within federal systems. Most of these judgments were, in turn, founded on concepts of *nuisance*, i.e., tort liability imposed because, after examining and balancing the benefits and burdens accruing to the two parties, one party's use of its property or resources was deemed an unreasonable interference with the other party's property or sovereign rights.

3 Christopher Schroeder suggests that the shift from private to public law has three advantages– "one procedural, one remedial and one substantive." On a procedural level, environmental regulation ideally determines levels of environmental quality through a public process that involves collective choices, rather than through a series of private actions and reactions (negotiation or litigation). Of course, this process may be distorted by a lack of transparency or lobbying by powerful interests, but in theory it offers the benefits of a democratic and participatory process. In remedies, the emphasis is on prevention rather than liability (although successful nuisance actions often led to injunctive relief to prevent further harm). Finally, substantively, the regulatory system sets levels of environmental quality that the cost-benefit or balancing approach used in tort actions cannot normally achieve, because the latter tend to rely on corrective justice rather than deterrence and they may underestimate the collective losses caused by environmental harm. Christopher H. Schroeder, *Lost in Translation: What Environmental Regulation Does that Tort Cannot Duplicate*, 41 Washburn L.J. 583 (2002).

4 Beginning in the 1980s, market-based approaches to changing human behavior emerged as an alternative to command-and-control and other approaches. In part, this move constituted a reaction to dense regulatory networks that were deemed inefficient and a drain on competitiveness and investment.See, generally, Klaus Bosselmann and Benjamin Richardson, eds., Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law and POlicy (1999).

5 See Kirsten Engel, *State Environmental Standard-Setting: Is there a "Race" and is it "to the Bottom"?* 48 Hastings L.J. 271 (1997).

6 See Anthony D'Amato and Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AJIL 21 (1991).

7 See Cynthia Giagnocavo and Howard Goldstein, *Laws Reform or World Re-Form*, 35 McGill L. J. 346 (1990).

8 James A. Nash, *The Case for Biotic Rights* , 18 Yale J. Int'l L. 235 (1993).

9 Jean-Marc Neumann, *The Universal Declaration of Animal Rights or the Creation of a New Equilibrium Between Species*, 19 Animal L. 91 (2013)

10 Justinian, Inst. 2.1.1. (T. Sanders Trans. 1st Am. ed. 1876).

11 See Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892); City of Milwaukee v. State, 214 N.W. 820 (Wis. 1927). Fishing rights, free access to the shore, and navigation are traditional rights that are reaffirmed in several state constitutions. See e.g., Calif. Const., art. I sec. 25; R.I. Const., Art. I, sec. 17, Ala. Const. art. 1 sec. 24.

12 See Commonwealth v. Newport News, 158 Va. 521, 164 S.E. 689 (1932): The jus publicum and all rights of the people, which are by their nature inherent or inseparable incidents thereof, are incidents of the sovereignty of the State. Therefore by reason of the object and purposes for which it was ordained, the Constitution impliedly denies to the legislature to power to relinquish, surrender, or destroy, or substantially impair the jus publicum..." Id. at 546, 164 S.E. at 697.

13 Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L.Rev. 471 (1970). See also Bernard Cohen, *The Constitution, the Public Trust Doctrine, and the Environment*, 1970 Utah L. Rev. 388.

14 See, e.g. Wade v. Kramer, 459 N.E.2d 1025, 1027 (Ill. App. Ct. 1984).

15 States in the U.S. have the power to provide their citizens with rights additional to those contained in the federal constitution, deciding that new issues involve fundamental matters that are of constitutional importance. See Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day 1970 to the Present*, 9 Fordham Envtl. L.J. 107 (1997).

16 For a listing of all environmental provisions in state constitutions, see Bret Adams et al., *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. Land Resources & Envtl. L. 73 (2002). The authors take a broad reading of the topic, including all provisions that touch on natural resources. They come to a total of 207 state constitutional provisions in 46 state constitutions.

17 See Ala. Const. art. VIII; Cal. Const. art. X, § 2; Fla. Const. art. II, § 7; Haw. Const. art. XI; Ill. Const. art. XI; La. Const. art. IX; Mass. Const. § 179; Mich. Const. art. IV, § 52; Mont. Const. art. IX, § 1; N.M. Const. art. XX, § 21; N.Y. Const. art. XIV; N.C. Const. art. XIV, § 5; Ohio Const. art. II, § 36; Pa. Const. art. I, § 27; R.I. Const. art. 1, § 17; Tex. Const. art. XVI, § 59; Utah Const. art. XVIII; Va. Const. art. XI, § 1. For discussions of these provisions, see: A. E. Dick Howard, *State Constitutions and the Environment*, 58 Va. L. Rev. 193, 229 (1972); Roland M. Frye, Jr., *Environmental Provisions in State Constitutions*, 5 Envtl. L. Rep. 50028-29 (1975); Stewart G. Pollock, *State Constitutions, Land Use, and Public Resources: The Gift Outright*, 1984 Ann. Surv. Am. L. 13, 28-29; Robert A. McLaren, Comment, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. Haw. L. Rev. 123, 126-27 (1990).

18 See Matthew Thor Kirsch, *Upholding the Public Trust in State Constitutions*, 46 Duke L.J. 1169-1210 (1997).

19 Franklin L. Kury, *The Pennsylvania Environmental Protection Amendment*, Pa. B. Ass'n Q., Apr. 1987, at 85, 87, quoted in Kirsch, supra n. 18 at 1170.

20 The vote was more than 3 -1 in favor of the amendment, with close to 2 million voters. See Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 Vill. Envtl. L.J. 123, 123-24 (1990) in Kirsch, supra n. 18 at note 3.

21 Kirsch, in fact, argues that all of the successfully invoked provisions rely upon public trust doctrine, asserting that "[e]ach of the successful provisions invokes some combination of the concepts undergirding the public trust doctrine: conservation, public access, and trusteeship." Kirsch, supra n. 18 at 1173. Provisions that refer to " trust," include Haw. Const. art. XI; Pa. Const. art. I, § 27; Va. Const. art. XI, § 3. For provisions outlining public trust principles, see Ala. Const. art. VIII; Cal. Const. art. X, § 2; Fla. Const. art. II, § 7; La. Const. art. IX; Mass. Const. § 179; Mich. Const. art. IV, § 52; Mont. Const. art. IX, § 1; N.M. Const. art. XX, § 21; N.Y. Const. art. XIV; N.C. Const. art. XIV, § 5; R.I. Const. art. 1, § 17; Tex. Const. art. XVI, § 59.

22 Payne v. Kassab, 312 A.2d 86 (Pa. Commw. Ct. 1973), aff'd 361 A.2d 263 (Pa. 1976).

23 Id. at 273.

24 In Snelling v. Department of Transportation, 366 A.2d 1298, 1305 (Pa. Commw. Ct. 1976) a court held that under part 1 of the test courts are not required to consider factors beyond those which state statutes mandate in evaluating projects which are potentially harmful to the environment. This seems contrary to the holding that the constitutional guarantee is self-executing, as it means that only violations of statutes are actionable under the constitution provision. See also Borough of Moosic v. Pennsylvania Pub. Util. Comm'n, 429 A.2d 1237, 1240 (Pa. Commw. Ct. 1981); Community College of Delaware County v. Fox, 342 A.2d 468, 480-82 (Pa. Commw. Ct. 1975).

25 Haw. Const. art. XI, § 1.

26 See, e.g, Ala. Const. art. VIII, § 3. Cf. Article XX, section 21 of New Mexico's constitution, adopted 1971: "The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water, and other natural resources of the state."

27 Rhode Is., Const. art. I, § 17.

28 Alaska's constitution, for example, guarantees the latter: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." Ala. Const. art. VIII, § 3. Rhode Island's Constitutional amendment, added in 1986, also focuses on public rights of access and use, coupled with a legislative mandate: The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values, and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.

29 For various approaches to the reach of the public trust, see: Scott W. Reed, *The Public Trust Doctrine: Is it Amphibious?* 1 J. Envtl L. & Litig. 107, 107-08, 118 (1986); Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis L. Rev. 269, 316 (1980); Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 Harv. Envtl. L. Rev. 393, 398-99 (1991).

30 For various approaches to this issue, see: Scott W. Reed, T*he Public Trust Doctrine: Is It Amphibious?,* 1 J. Envtl. L. & Litig. 107, 107-08, 118 (1986); Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis L. Rev. 269, 316 (1980); Alison Rieser, *Ecological Preservation as a Public Property Right*: *An Emerging Doctrine in Search of a Theor*y, 15 Harv. Envtl. L. Rev. 393, 398-99 (1991).

31 Save Ourselves, Inc. v. Louisiana Environmental Control Commission, 452 So. 2d 1152 (La. 1984); In re Rubicon, Inc., 670 So.2d 475, 483 (La. Ct. App. 1996) (assessing whether alternative projects, alternative sites, or mitigating measures would offer better environmental protection than the activity proposed, without unduly curtailing non-environmental benefits").

32 656 So.2d 29 (La. Ct. App. 1995).

33 Id. at 38.

34 See McDowell, 785 P.2d at 12. Subsequently, in Tongass Sport Fishing Association v. State, 866 P.2d 1314 (Alaska 1994), the court made clear that while the state cannot prevent specific groups from access to resources it may allocate the resource among various users. Decisions on allocation will be upheld if they are not unreasonable or arbitrary and proper procedures have been followed.

35 Owsichek v. State Guide Licensing & Control Board, 763 P. 2d 488 (Alaska 1988).

36 Id. at 495.

37 See CWC Fisheries, 755 P.2d at 1119-20 (citing Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435, 453 (1892)).

38 923 P.2d 54, 60-61 (Alaska 1996).

39 Id. at 60.

40 Debate over this issue is widespread in the U.S. See Richard Stewart, *Pyramids of Sacrifice?: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196 (1977); Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 Sup. Ct. Econ. Rev. 205 (2001); Clifford Rechtschaffen & David L. Markell, Reinventing Environmental Enforcement and the State/Federal Relationship (2003).

41 See *California: Environmental Regulations Force Commerce out of State, Business Roundtable Survey Finds*, 22 Env't Rep. Cur. Dev. (BNA) 1839 (Nov. 29, 1991); see also Kirsten Engel, *State Environmental Standard-Setting: Is There a "Race" and Is it "to the Bottom"?*, 48 Hastings L.J. 271 (1997).

42 The IACHR case involving a protected area in Panama demonstrated the limitations inherent in relying on ordinary legialstion. See Report Nº 88/03, Petition 11.533 (Inadmissibility), Metropolitan Nature Reserve v. Panama, Oct. 22, 2003.

43 Stone CD, Should Trees Have Standing? Toward Legal Rights for Natural Objects. Southern California Law Review 1972;45:450; W Kaufmann, Los Altos, 1974) p 8.

44 405 U.S. 727 (USSC 1972),

45 Id, at 741–43.

46 Byrn v. N.Y. City Health & Hosp. Corp., 286 N.E.2d 887, 889 (N.Y. 1972)("It is not true . . . that the legal order necessarily corresponds to the natural order . . .; it is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence"). Louisiana recently became the first US state to statutorily designate ex utero embryos as "juridical persons," with rights to sue and liability to being sued. La. Rev. Stat. §§9:121, 123 (1999).

47 Jessica Berg, *Of Elephants And Embryos: A Proposed Framework For Legal Personhood*, 59 Hastings L.J. 369 (2007).

48 Id.

49 See Wesley Newcomb Hohfeld, Fundamental Legal Conceptions 75-76 (Walter Wheeler Cook ed., 1923) (stating that all rights of persons are against other persons, and that there is no such thing as a right against a thing).

50 See, e.g., Cass Sunstein, Standing for Animals (with Notes on Animal Rights), 47 UCLA L. Rev. 1333, 1336 (2000) (suggesting that animals have rights, regardless of whether they have standing, and also that they should be given standing, even though they are not persons).

51 See, e.g., David Schmahmann & Lori Polacheck, The Case Against Rights for Animals, 22 B.C. Envtl. Aff. L. Rev. 747, 760 (1995) (pointing out that animal rights "must mean reposing in the government a wholly new and undefined set of powers, presumably to be exercised on behalf of an entirely new and vague constituency" and further questioning "[w]hat sort of fearsome bureaucracy would purport to institutionalize, standardize, and write regulations pertaining to animals' rights and interests implicated by all legislation").

52 Juridical persons are also referred to as "artificial," "juristic," and "fictitious/fictional" persons. See Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat) 518, 636 (1819) ("corporation is an artificial being"); Sanford A. Schane, The Corporation Is a Person: The Language of a Legal Fiction, 61 Tul. L. Rev. 563, 563-65 (1987) (referring to corporations as fictional persons).

53 See English, supra note 10, at 234-35 (noting that no single criterion can capture the concept of a person but that a "'person' is a cluster of features, of which rationality, having a self-concept and being conceived of humans are only part").

54 Joel Feinberg, Harm to Others 34 (1984).

55 Bonnie Steinbock, Life Before Birth: The Moral and Legal Status of Embryos and Fetuses 40-41 (1992).

56 Id. at 18.20.

57 2008 Constitution of the Republic of Ecuador. Political Database of the Americas (PDBA). http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html

58 Article 71. Nature, or Pacha Mama, 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 call upon public authorities to 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.

Article 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.

59 Article 10. Persons, communities, peoples, nations and communities are bearers of rights and shall enjoy the rights guaranteed to them in the Constitution and in international instruments. Nature shall be the subject of those rights that the Constitution recognizes for it.

60 Article 73. The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles. The introduction of organisms and organic and inorganic material that might definitively alter the nation's genetic assets is forbidden. See also Article 72, supra.

61 Article 71.

62 Carwil Bjork James, "Bolivia's new Mother Earth Law to sideline indigenous rights" Global Justice Ecology Project, Aug. 29, 2012.

63 Robinson Township et al v. Commonwealth of Pennsylvania, 52 A.3d 463 (Pa. Cmwlth. 2012).

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65 Id.

66 Whanganui River Management Trust Board, Record of Understanding in Relation to Whanganui River Settlement – Whanganui Iwi and the Crown (signed 13 October 2011), http://nz01.terabyte.co.nz/ots/

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67 Whanganui River Management Trust Board, n 54 at 1.2-1.3.

68 Waitangi Tribunal, WAI Claim 167 – Concerning the Treaty of Waitangi Act 1975 And a Claim in Respect of the Whanganui River (the Whanganui River Report) (1999) at 1.3.5-1.3.6, http://www.waitangi-tribunal.govt.nz/scripts/reports/reports/167/

98526190-56F9-4FDA-83B7-38AC13F83FDB.pdf viewed 1 February 2013; Whanganui River Management Trust Board, n 54 at 1.7-1.9.

69 Whanganui River Management Trust Board, n 54.

70 Whanganui River Management Trust Board, n 54 at 2.1.

71 Whanganui River Management Trust Board, n 54 at 3.8.

72 Whanganui River Management Trust Board, n 54 at 3.11.

73 Whanganui River Management Trust Board, n 54 at 3.8.

74 Finlayson, the Hon Christopher (Minister for the Treaty of Waitangi), Whanganui River Agreement Signed (30 August 2012), http://www.beehive.govt.nz/release/whanganui-river-agreement-signed viewed 7 January 2013. A copy of the preliminary agreement, Tutohu Whakatupua, can be found at http://nz01.terabyte.co.nz/ots/DocumentLibrary%5CWhanganuiRiverAgreement.pdf viewed 9 January 2013.

75 Tutohu Whakatupua, id, at 2.7.1.

76 Tutohu Whakatupua, id. at 2.10-2.13.

77 Tutohu Whakatupua, id. at 2.20.2-2.20.3.

78 Tutohu Whakatupua, id. at 1.8.2, 2.16.

79 Tutohu Whakatupua, id at 2.21.1-2.21.4.

80 Katie Sykes, Human Drama, Animal Trials: What The Medieval Animal Trials Can Teach Us About Justice For Animals, 17 Animal L. 273 (2011); Jen Girgen, The Historical and Contemporary Prosecution and Punishment of Animals, 9 Animal L. 97 (2003).

81 See GAP: Great Ape Project, The Great Ape Project: An Idea, A Book, An Organization, http://www.greatapeproject.org (last visited Nov. 22, 2007).

82 Thomas Catan, Apes Get Legal Rights in Spain, to Surprise of Bullfight Critics, The Times (London) (June 27, 2008) (available at http://www.timesonline.co.uk/tol/news/world/europe/article4220884.ece (accessed Apr. 3, 2011)).

83 David Favre, *Just What is Animal Law?* 92-Dec Mich. B.J. 16 (2013); Thomas G. Kelch, *A Short History of (Mostly) Western Animal Law, Part II*, 19 Animal L. 347 (2013).

84 Unif Trust Code § 408.

85 See e.g. N. Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988) (naming a species of owl as a plaintiff); N. Spotted Owl v. Lujan, 758 F. Supp. 621 (W.D. Wash. 1991) (naming a species of owl as a plaintiff); Mt. Graham Red Squirrel v. Yeutter, 930 F.2d 703 (9th Cir. 1991) (naming a species of squirrel as a plaintiff). See e.g. Cass R. Sunstein, Can Animals Sue?, in Animal Rights: Current Debates and New Directions 251, 259-60 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004) (noting that animals lack standing in some courts) [hereinafter Animal Rights: Current Debates].

86 Steven M. Wise, Rattling the Cage: Toward Legal Rights for Animals 43-44 (Perseus Bks. 2000).

87 NY Rev Stat § 375.2 *et seq.* (1867).

88 See *Grise v State,* 37 Ark 456 (1881).

89 See MCL 750.50b(2).

90 John Passmore, The Treatment of Animals, 36 J. Hist. Ideas 195, 211 (1975).

91 Marine Mammal Protection Act of 1972, 16 U.S.C. ss. 1361-1423h (2006). Endangered Species Act of 1973, 16 U.S. C. ss. 1531-1544 (2006).

92 Gary L. Francione, Animals, Property, and the Law 11 (Temple U. Press 1995).

93 E.g. Steven M. Wise, Drawing the Line: Science and the Case for Animal Rights 8, 231-40 (Perseus Bks. 2002) (arguing that certain animals, especially other primates like chimpanzees and bonobos--the closest genetic relatives to humans--should be recognized as having legal rights and legal personhood); Steven M. Wise, Rattling the Cage: Toward Legal Rights for Animals 7, 240, 267 (Perseus Bks. 2000) (same) [hereinafter Wise, Rattling the Cage].

94 § 90(a) I BGB (English version available at http://www.gesetze-im-internet.de/englisch_bgb/ (accessed Apr. 14, 2013)).

95 Art. 20a GG (English version available at http://www.gesetze-im-internet.de/englisch_gg/index.html (accessed Apr. 14, 2013)); see Claudia E. Haupt, The Nature and Effects of Constitutional State Objectives: Assessing the German Basic Law's Animal Protection Clause, 16 Animal L. 213, 214-15 (2010) (quoting Article 20a of the German Constitution)

96 Peter Paul, Some Origins of Laws and Legal Codes Regarding Animals, Part III, 5 Community Animal Control 16, 26 (1986).

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98 Id, at A12.

99 Voiceless: The Animal Protec. Inst., Our Interview with Antoine Goetschel, http://www.voiceless.org.au/Law/Inteviews/Our_Interview_with_ Antoine_Goetschel.html (accessed Apr. 3, 2011).

100 Id.

101 Voiceless: The Animal Protec. Inst., supra n..

102 *Tilikum v Sea World Parks & Entertainment, Inc,* 842 F Supp 2d 1259 (SD Cal, 2012). For a comment on the case, see, Symposium: A Slave By Any Other Name Is Still A Slave: The Tilikum Case And Application Of The Thirteenth Amendment To Nonhuman Animals, 19 Animal L. 221 (2013). The case presented, for the first time, the question of whether the US Constitution Thirteenth Amendment's protections can extend to nonhuman animals who, by any reasonable definition, are enslaved. The suit argued that the Thirteenth Amendment prohibits the enslavement of legally recognized persons who suffer from enslavement, regardless of their identity as a human or nonhuman animal.

103 See generally Paola Cavalieri, The Animal Question: Why Nonhuman Animals Deserve Human Rights 3-12 (Catherine Woollard trans., 2001); Animal Rights: Current Debates and New Directions (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) [hereinafter Animal Rights].

104 Bernard Rollin points out that if the potential to become rational is sufficient reason to grant non-rational humans moral status, animals should also be afforded moral status because they have the potential to evolve into rational beings. See Bernard Rollin, Animal Rights and Human Morality 33-34, 50 (rev. ed. 1992).

105 See L.W. Sumner, Abortion and Moral Theory 32-33 (1981) (discussing moral personhood and stating that a criterion of personhood "must have some plausible connection with the possession of certain moral rights" and "[t]here must, therefore, be some reason for thinking that it is in virtue of an entity's possessing just these properties that it has such rights, that these properties mark the crucial watershed between entities with these rights and entities without them").

106 Jessica Berg, supra. n. 46 at 403.

107 See Thomas G. Kelch, Globalization and Animal Law: Comparative Law, International Law and International Trde 38-64 (Kluwer L. Intl 2011).

108 Id. at 72.

109 It. At 40-64.

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116 In Guatemala, for example, the Ministry of Mines undertakes the environmental impact assessment for proposed activities and issues the permits. The state lacks a water law.

117 See eg Petroleum and Gas (Production and Safety) Act 2004 (Qld), s 3(1), contrast Booth v Bosworth (2001) 114 FCR 39; [2001] FCA 1453 at [115] (Branson J).

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