Rights of Nature

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Rights of Nature (RoN)

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One of the core tenants of posthuman theory is its focus on understandings of the agency of matter (Bennet 2010; Barad 2007; Braidotti 2013). However, the application of this theoretical work remains challenging. In parallel, over the past few decades, nature has begun to be recognised as having rights in certain contexts. The call for the environment to have legal rights, allowing it to bring claims in law on behalf of 'itself', could potentially foster a more posthuman legal system in which nature, itself, is recognised as a lively agent.

RoN provisions have been applied in different contexts in different ways. One core theme which emerges, however, is the role of Indigenous peoples. For example, Indigenous peoples played a key role in the recognition of RoN in Ecuador's 2008 constitution (Eisenstadt and Jones West 2019). The constitution 'celebrates' nature which is defined as 'Pachamama,' referring to the sacred deity revered by Indigenous peoples of the Andes (Republic of Ecuador 2008, Preamble). In New Zealand, Indigenous peoples also played a central role in the recognition of RoN. Here, RoN have been recognised through two agreements with local Māori activists, (the Whanganui *iwi* in relation to the Whanganui river or Te Awa Tupua and the Tūhoe *iwi* in relation got the Te Urewera forest) (Te Awa Tupua Act 2017; Te Urewera Act 2014). However, Indigenous people have not been involved in all instances of RoN recognition. For example, Indigenous groups are not involved in the proposed 'right of nature' Bill in the Philippines. Further, not all Indigenous peoples support a RoN approach. Some Australian Nations have, for example, rejected the approach, calling instead for stronger Indigenous environmental governance through 'Caring for Country' (Marshall 2020). It is, however, clear that Indigenous legalities have been central in the recognition of RoN (O'Donnell et al. 2020).

In 2008, Ecuador became the first country to recognise RoN constitutionally. Ecuador's constitution outlines nature rights as being inherent to the Earth, a status that applies nationally. This national coverage differs from other provisions, which focus on specific ecosystems. For example, in New Zealand, the Whanganui River and the Te Urewera forest have had their legal personality recognised. Here, the laws define the boundaries of the two ecosystems and thus provisions apply to these two specific areas — not nationwide. The latter is a more common approach to the application of RoN. From a posthuman perspective, recognition of RoN within a bounded area alone runs the risk of failing to recognise the ways in which humans, non-humans and environments are inter-connected beyond those boundaries. A posthuman informed approach to RoN must ensure these connections are adequately accounted for within the law (Jones 2021).

RoN provisions differ but they do share at least one key commonality: the linking of the health and wellbeing of the environment to that of the people who live there, allowing people to bring legal claims on behalf of nature. In coming to the Te Awa Tupua agreement (2017), for example, the Whanganui *iwi* argued that they are connected to the environment they live in and that the river is alive. The Act recognises the river as a legal person and the river and the people are deemed to be inseparable (Article 69(2)). To uphold the river's interests, a guardian body (Tu Pou Tupua) must be appointed and is authorised to speak on behalf of the river. Similarly, in Ecuador, the constitution (2008) states that humans are an inherent part of nature, and in the US, RoN provisions frame nature as being integral to human welfare (e.g. City of Pittsburgh 2010). The focus on community rights could be seen as a human-centered approach. However, posthuman theory calls, not for the displacement of culture for or by nature but, rather, for the need to focus on the nature-culture continuum (Haraway 1991; Åsberg 2017). By drawing out the entanglements between humans, non-humans, and the environment, a more reciprocal dynamic can be centred.

There are two central models of RoN recognition: models that recognise rights (as in Ecuador) and provisions that recognise nature's legal personality. In New Zealand a legal personality model has been used. This is because the *iwi* do not emphasise the concept of rights because, to *iwi*, nature is not property but is a living entity (Te Awa Tupua Act 2017, Article 13(a)). Accordingly, the concept of

guardianship is promoted. This preference, in part, explains the difference between provisions in New Zealand and, say, Ecuador. The different models result in different procedures. Unlike Ecuador's RoN laws, New Zealand's laws do not award inherent rights. Rather, legal personality is instilled. This grants the river and the forest (through their guardians) procedural access rights in New Zealand's legal system but does not give them special rights *per se*. The natural systems thus have the mediated right to petition the court or to receive reparations, for example, but do not have the right to be protected in and of themselves.

The differences between the design of RoN provisions impacts what happens when RoN clash with other rights. Ecuador, being one of the first states to recognise RoN, has some of the most developed jurisprudence in this area. Under the Constitution of Ecuador, nature rights are recognised but are not absolutely protected: the constitution (2008) situates sustainable development as core, seeking to balance environmental needs against development needs (Article 395). Central, however, is Article 395.4, which states that, 'In the event of doubt… it is the most favorable interpretation of' the 'effective force' or RoN provisions 'that shall prevail'. This, however, is not always the outcome, and RoN laws have, since 2008, developed within a highly politicised context (Kauffman and Sheehan 2019, 349). Environmental damage in Ecuador remains rampant, particularly in relation to industrial activity and oil extraction (Eisenstadt and Jones West 2019). Many provisions have yet to be adequately applied. Nevertheless, there are signs of real progress. Several cases have established a standard that killing any animal that is part of an endangered species constitutes a RoN violation (Judgment No. 09171-2015-0004). Other judgments have concluded that government construction projects cannot impede the ability of ecosystems or species to regenerate (Judgment No. 11121-2011-0010). The disruption of migration and breeding patterns has also been ruled as violating RoN (Judgment No. 269-2012) and RoN laws have been ruled to be transversal, sometimes challenging other rights, including property rights (Judgment No. 166-15-SEP-CC). However, the setting of standards in Ecuador took considerable effort and that this struggle is still very much ongoing (See: Kauffman and Sheehan 2019, 357).

In New Zealand, the Te Awa Tupua Act (2017) does not derogate from existing private rights in the Whanganui River. The Act states that any actor, public or private, must 'have particular regard to' the interests of the river (Article 15(3)) and must recognise the values of the Te Awa Tupua, which include treating the river as a living entity (Article 13). The New Zealand system has been set up so that 'decisions on how to balance the rights of ecosystems against the rights of other legal persons (e.g. individuals and corporations)… will still need to be made' (Kauffman and Sheehan 2019, 354). Standards will likely develop over time, much as in Ecuador. These Acts, therefore, while being key for Māori rights, are carefully constructed to ensure that they are framed around the neo/liberal, settler-colonial legal order, avoiding the outright prioritisation of RoN over, for example, corporate rights to exploit nature (Otto and Jones 2020). It remains to be seen how a court would rule in the instance of a clash between rights.

RoN have much in common with posthuman theory. RoN have the potential to provide a more integrated account of the environment, with RoN laws directly challenging 'the values of dominant political and economic systems, which view humans as separate from nature… [and] treat the elements of nature as objects for human exploitation...' (Kauffman and Sheehan 2019, 356). This aim very much aligns with posthuman theory and with its call for a greater understanding of the connection between human and non-human entities. However, crucially, the effectiveness of RoN in reaching these aims will depend on how nature and its rights are defined.

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