Revisiting Legal Pluralism: a comparative, socio-legal appraisal of the role of courts in the diffusion of innovative legal hybrids

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Abstract

This thesis investigates the agency of courts in countries with settler colonial pasts in the diffusion of innovative legal hybrids, such as rights of Nature. It takes a comparative, socio-legal perspective, appraising how courts (1) foster pragmatic compromises between the forms of social ordering of locals and settlers, and (2) contribute to decolonising jurisprudence. From a theoretical perspective, this thesis dissects conflicting theoretical and empirical approaches to legal pluralism. Its methodology engages with the spread of legal norms through inter-judicial exchanges across jurisdictions. It argues that the internal pluralism in jurisdictions impacted by colonisation has led to innovative legal solutions, based on the creative combination of conflicting legal traditions engaging in 'legal ecumenism' (de Sousa Santos).[1] This concept reflects the aspiration for a mutual acknowledgement and capacity to concede on each other's ways of arranging society. Based on this framework, it discusses and draws conclusions on the specific circumstances under which courts in those jurisdictions have been capable (1) to take inspiration from innovative legal solutions devised in other jurisdictions, and (2) articulate solutions that promote such legal ecumenism.

[1] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (3rd edn, Cambridge University Press 2020).

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A wise person once told me, "A PhD is never complete, but put to rest." Three years and four months later, I have reached the stage of letting go, and the end of my PhD. I would therefore like to take this opportunity to thank those who have championed me along the way, making this journey memorable.

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Glossary

Note to the reader: This glossary section provides a short and handy definition of some key terminology that is frequently used throughout the thesis. It is meant to guide and facilitate comprehension by the reader. However, concrete definitions, pertinent scholarly references, and analytical justifications of their use, will be found in the main body of the thesis itself.

Concept (in alphabetical order)	***Short definition***	***Full definition in body text (at page)***
Ad medium aquae	Common law doctrine which designates ownership rights of a river up to the centre line, to the landowners of the property bordering the river/stream.	95
Biocultural rights	A discourse which denotes right to communities who share a spiritual and cultural connection with Nature, and on the basis that their traditions, practices, and customs sustainably conserve the environment. Biocultural rights is a discourse which draws its jurisprudence from international legal sources, such as multilateral environmental agreements.	123
Contact zones	Spaces in plural societies in which conflicts exist, between peoples and their normativities. They are spaces which have led to the production of asymmetrical relationships of power between societal groups, such as hegemonic and counter-hegemonic groups.	21
Conviviality	Aspirational collective mindset of societies once riven by conflict(s), which characterises itself by striving for forms of future-oriented reconciliation; it not only aims at resolving past grievances, but envisages future forms of shared authority and equality between groups.	59
Cosmologies/ cosmovisions	A fundamental worldview or perspective of society.	14
Court	This research defines courts in a very open and broad manner, to include quasi-judicial bodies, such as transitional justice	25

	mechanisms. It defines courts as "legal entities" who have a level of judicial expertise, and are seen as agents in crafting and diffusing innovative legal hybrids, based on legal ecumenism.	
Decoloniality	Where coloniality can be described as any form of – mostly epistemic – colonial domination that pervades the end of institutionalised colonial regimes, decoloniality refers to a state of affairs in which coloniality has been overcome.	23
Embedded localities	Local characteristics which are unique and specific to certain social groups. Embedded localities include history, culture, legal norms, etc.	25
Epistemic extractivism	Processes which modify cosmologies in a manner which contorts its original meaning. Epistemic extractivism bears the risks of re-shaping cosmologies into tools for re-colonisation.	41
Globalised localisms	Processes in which embedded localities (see above) are "globalised", to become a universal standard or norm.	55
Hindutva	Political ideology for the promotion of Hindu nationalism.	145
Innovative legal hybrids	Solutions which creatively draw from the co-existing hegemonic and non-hegemonic ontologies and legal traditions, as methods to promote reconciliation and conviviality. These resolutions engage in a legal ecumenism.	22
Legal ecumenism	The aspiration for a mutual acknowledgement and non-dogmatic co-existence between hegemonic and counter-hegemonic worldviews epistemologies, ontologies that coexist in plural societies, such as contact zones. Framed as a cosmopolitan legality – or what will be known as, an innovative hybrid legal solution – legal ecumenism will represent the combination of hegemonic and non-hegemonic normativities in the articulation of legal solutions.	23
Legal translators	In jurisdictions demonstrative of internal legal pluralism, legal agents, such as courts and quasi-judicial mechanisms, translate political and cultural ideologies into languages of law, creating a 'legal vernacular', as such.	169

Localised globalisms	The ability of transnational practices to impact local conditions, and create localisations based on the integration and adaptation of transnational norms at the local level.	55
Loco parentis	English common law doctrine granting an individual or organisation the legal duty to act on behalf of a minor or young adult by taking on the responsibilities of a "parent".	150
Parens patriae	English common law doctrine used to establish state guardianship over those who cannot exercise it for themselves.	152
Pluriculturalisation of law	The pluralisation of legal cultures, through the embedding of local imaginaries in law.	169
Reconciliation	Collective mindset and willingness of societies riven by past conflict, which demonstrates greater degrees of inclusion and sociability, on the basis of instituting mechanisms of restorative justice, to reconcile past grievances between hegemonic and counter-hegemonic groups.	59
Saffronisation	The right-wing policy approach to implemented Hindu nationalist agenda (associated with Hindutva).	145
Subaltern	Subaltern refers to types of people who have been oppressed or marginalised, based on factors including – but not limited to – community, caste, race, ethnicity, physiology, gender, sexual orientation, and so on.	56
Subaltern cosmopolitanism	A concept which reflects a space for the inclusion of subaltern emancipatory projects. Subaltern cosmopolitanism builds upon cosmopolitan transitions of law, with a focus on the ability of legal tools, known as cosmopolitan legalities, to promote the inclusion of marginalised and oppressed sectors of society.	56
(Subaltern) cosmopolitan legality	A legal tool to facilitate the subaltern cosmopolitan transition of law.	56

Māori terminology

Hapū – a division of Māori people or community

Kaitiaki obligations – trustee obligations

Kaumatua – Māori elders

Ko au te awa, Ko te awa o au – Māori proverb which means "I am the River, The River is me"

Mana – spiritual and physical authority and power

Mauri – a spiritual life essence

Pākehā – European settlers of Aotearoa New Zealand

Rangatira – Māori chiefs

Rangatiratanga – authority/sovereignty of Māori chiefs

Taonga – ancestral treasure

Tapu – sacred

Te Ao Māori – "The Māori World"

Te Ao Pākehā – "The Pākehā World"

Te Kawanatanga katao – complete governance/right to govern

Tikanga – Māori customary law

Tupuna – ancestors

Tupuna awa – River ancestor

Whakapapa – genealogy

Whānau – kin

Abbreviations

ABS – Access and Benefit Sharing

AUC – Autodefensas Unidas de Colombia (United Self-Defence Forces of Colombia)

CBD – Convention on Biological Diversity

CGRFA – Commission on Genetic Resources for Food and Agriculture

CJEU – Court of Justice of the European Union

ELN – Ejército de Liberación Nacional (National Liberation Army)

EU – European Union

FARC – Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia)

IPLCs – Indigenous Peoples and Local Communities

JEI – Jurisdicción Especial Indígena (Indigenous Special Jurisdiction)

JEP – Jurisdicción Especial para la Paz (Special Jurisdiction for Peace)

MEAs – Multilateral Environmental Agreements

NGO – Non-Governmental Organisations

NGRBA – National Ganga River Basin Authority

NMCG – National Mission for Clean Ganga

PIL – Public Interest Litigation

SBSTTA – Subsidiary Body on Scientific, Technical and Technological Advice

SIVJRNR – Comprehensive System of Truth, Justice, Reparation, and Non-Repetition

SRL – Social Rule of Law

UN – United Nations

UNFCCC – United Nations Framework Convention on Climate Change

UNCCD – United Nations Convention on Combating Desertification

USAID – United States Agency for International Development

WIPO-IGC – World Intellectual Property Organization-Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

WTO – World Trade Organisation

Introduction

This thesis is ultimately an investigation into legal pluralism. However, where legal pluralism is an extensively researched and debated legal tradition, this thesis adds to the discussion by further nuancing its understanding, through the lens of legal ecumenism. Whilst the term legal ecumenism will be unpacked below,[1] in short, it is a concept which reflects the aspiration for a mutual acknowledgement between rival normativities, with the capacity to concede on conflicting ways of arranging society. The latter compromises are fostered with the goal of promoting reconciliation, or hopefully, future forms of equal and shared authority.[2] This research agenda is thus situated thematically within spaces of conflict, specifically, within areas with a colonial past and pervasive forms of coloniality. These spaces – which will be known as contact zones – are the key focus of this research. Indeed, the internal pluralism that exists within these societies, as a legacy of colonialism, has led to the emergence of innovative legal solutions which creatively draw from the co-existing ontologies and legal traditions as methods to promote reconciliation and conviviality. These resolutions engage in a legal ecumenism, and will within the context of this research, be known as innovative legal hybrids. Over the next six chapters, legal ecumenism will be appraised under the overarching assumption of its contribution to the decolonisation of legal jurisprudence, framed in this thesis as leading to subaltern cosmopolitan transitions of law.

Against this theoretical backdrop, the methodology employed herein focusses on the role of courts. More specifically, it investigates the diffusion of innovative legal ideas though inter-judicial exchanges across jurisdictions, and how courts borrow these ideas and methods from their peers in other jurisdictions to foster pragmatic compromises between forms of social ordering of locals and settlers in their own jurisdiction. It therefore discusses and draws conclusions on the specific circumstances under which courts have been capable (1) of taking inspiration from innovative legal solutions devised in other jurisdictions, and (2) articulating solutions that promote such legal ecumenism. To carry out this theoretically driven investigation, this project uses rights of Nature as an empirical testing ground. Rights of Nature is a rapidly growing field of law, which broadly relates to the legal subjectivisation of natural entities, to recognise Nature's inherent rights to exist, thrive, and regenerate. Albeit a discourse which has steadily garnered a global reach, rights of Nature have often been characterised by the legal precedents created within countries formerly submitted to colonial domination, and their non-western, or indigenous cosmologies – as in, indigenous worldviews or perspectives of society - which relate to Nature. Consequently, rights of Nature have often been found in contact zones, and, as we shall see throughout this thesis, are a fruitful field for the creation of legal compromises between the rival normativities of hegemonic and counter-hegemonic forces in societies. Accordingly, and in line with the above-mentioned methodology, this thesis revisits

[1] See Chapter 2, section 3.1, infra.
[2] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (3rd edn, Cambridge University Press 2020).

classic rights of Nature cases, whilst at the same time exploring new ones, to understand the role of legal compromises (in the form of legal ecumenism) in fostering pluralism in post-conflict spaces.

Before outlining the structure of this thesis, I would, however, like to emphasise that a comprehensive unravelling of rights of Nature as a legal discourse, is not the primary intention of this thesis. Rather, as previously stated, this thesis seeks to nuance an understanding of legal pluralism, as a theory and as a method, through the lens of legal ecumenism. Whilst rights of Nature are pertinent to the unfolding investigation, as the so-called empirical testing ground, this thesis hopes to re-imagine the potential role of law, and courts, in promoting decoloniality, through the articulation of legal compromises. Hence, whilst this thesis is clearly theoretically grounded, it relies on concrete genealogies of innovative legal hybrids, in the hope of offering practical insights of judicial methods for the promotion of ecumenical legal pluralism.

Against this backdrop, this thesis will be comprised of six chapters, and will be structured as follows.

In chapter 1, I begin by sketching the theoretical and methodological framework for assessing the diffusion of innovative legal hybrids through the agency of national courts. In this chapter, I introduce key concepts which will be fleshed out over the following ones, including, the terms known as 'contact zones', 'innovative legal hybrids', 'legal ecumenism', 'transjurisdictional diffusion of legal norms', and so on. I furthermore dedicate a portion of this chapter to unpacking comparative law, and justifying my selection of case studies – national courts in Aotearoa New Zealand, Colombia, and India – from a methodological standpoint. By critically analysing the terminological concepts of the Global North and Global South, the chosen case studies are rather favourably characterised as jurisdictions defined by the presence of contact zones, instead. I then conclude chapter 1 by relaying a cautionary note on epistemic extractivism.

In chapter 2, I fine-tune the theoretical framework. I begin this chapter by unpacking an understanding of legal pluralism, as a theory and as a method, in order to introduce the intentions of this thesis: to nuance an understanding of legal pluralism through the lens of legal ecumenism. By outlining the tensions between its main two traditions, I situate my perspective of legal pluralism as one which draws influence from both the legal-theoretical and the empirical-anthropological schools of thought, in an ecumenical fashion. I will refer to this idea as the joint understanding of legal pluralism as a theory and as a method. Against this backdrop, I trace the doctrinal contributions from William Twining,[3] Boaventura de Sousa Santos,[4] and Neil Walker,[5] in the collective make up of my theoretical framework. In particular, I outline Twining's theories on the diffusion of legal norms across legal orders, to frame the manner in which the transjurisdictional diffusion of innovative legal hybrids occurs. Exploring this theoretical prong, I make a

[3] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009).
[4] de Sousa Santos (n 2).
[5] Neil Walker, *Intimations of Global Law* (Cambridge University Press 2015).

point of Pierre Legrand's critique[6] on Alan Watson's transplant thesis,[7] to emphasise the importance of creating innovative legal hybrids as bespoke legal mechanisms. The latter emphasises the importance of tailoring diffused innovative legal hybrids to importer jurisdictions' social, historical, cultural, and epistemological localities, to support greater forms of legal pluralism. Moving on to the second theoretical prong, I build upon Santos' understandings of the production of global social asymmetry between hegemonic and counter-hegemonic groups, and the manner in which the subaltern cosmopolitan transition of law acts as a counter-hegemonic project to globalisation. Against this backdrop, I situate the pivotal role of national courts in promoting emancipation, specifically with intentions of promoting longer lasting forms of decoloniality, and how the latter is a project which supports the subaltern cosmopolitan transition. However, and arguably most importantly, I build upon, and define the concept of legal ecumenism, which is a central component of this theoretical framework as a concept which is key to the creation of innovative legal hybrids, articulated as legal compromises between rival legal normativities to overcome coloniality. In the third, and final prong, I unpack Walker's mappings of global law, to situate the global law perspective employed within this research agenda. Where this section dedicates a significant portion to defining key concepts, including global law and global justice, the role of double normativity, and the seven species of global law, I focus on building upon Walker's categorisations, to frame a global law perspective which simultaneously embraces degrees of convergence and divergence. Within this framing, I rely on Walkers compositive orientation of global law to theoretically frame the methodology applied herein. It envisions a bottom-up approach to the pluralisation of law, one which operates in a piece-meal fashion, through the application of bespoke normative principles or orientations in the pursuit of cosmopolitanism. To finalise this theoretical prong, I again emphasise the role of courts. In conclusion to chapter 2, I take a moment to think about my own perspective in approaching this research. I therefore delve into theories of utopianism,[8] to create a space for re-imagining the potential role of law and society in line with the subaltern cosmopolitan transition, and also, to introspectively consider my own positionality. Within this section, I emphasise that utopian theories need not only refer to idealistic and unattainable imaginaries, but instead, can be used to reconceptualise tangible and achievable realities beyond hegemonic (neoliberal) globalisation.

In chapter 3, I begin the comparative undertaking of the project, which will be carried out over the following three chapters. This chapter discusses the seminal legal decisions delivered by the Waitangi Tribunal, which set in motion the long process towards the recognition of rights to the Whanganui River[9] and the Te Urewera Forest,[10] and which ultimately triggered a process of trans-jurisdictional diffusion to courts in Colombia and India. Prior to delving into the concrete facts of the disputes, I firstly – albeit briefly –

[6] Pierre Legrand, *Negative Comparative Law: A Strong Programme for Weak Thought* (Cambridge University Press 2022); Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 Maastricht Journal of European and Comparative Law 111.
[7] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993).
[8] A Sarat, L Douglas and MM Umphrey, *Law and the Utopian Imagination* (Standford University Press 2014); Jens Theilen, Isabelle Hassfurther and Wiebke Staff, 'Towards Utopia–Rethinking International Law (Introduction)' (2017) 60 German Yearbook of International Law.
[9] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.
[10] Te Urewera Act 2014.

contextualise the colonial history of Aotearoa New Zealand, to demonstrate the apparent conflicts and tensions between Te Ao Māori (the "Māori world") and Te Ao Pākehā (the "Pākehā world"). Thereafter, I discuss the adjudication of the aforementioned disputes before the Waitangi Tribunal, to then outline the contours of legal subjectivisation for these natural entities. Discussing these legal decisions, I pay attention to the manner in which the Waitangi Tribunal carefully crafted legal resolutions in the style of legal ecumenism, whilst considering the extent to which these resolutions can be classed as bespoke legal mechanisms. Moreover, the relative "success" of these innovative legal hybrids in connection with promoting legal ecumenism, is assessed in light of their ability to foster compromise between the Māori and Crown Governments' rival normativities, whilst targeting their deep colonial cleavages in sight of promoting reconciliation. Nearing the conclusions of chapter 3, I begin to consider the potential limitations of innovative legal hybrids. More specifically, I foreshadow a critique which will be discussed in full in chapter 6, on whether legal resolutions modelled on compromise are capable of promoting the subaltern cosmopolitan transition of law, or whether they inevitably risk diluting the subaltern emancipatory claims of counter-hegemonic projects. Overall, however, this chapter lays the foundation for tracing the transjurisdictional diffusion of innovative legal hybrids crafted in the jurisdiction of Aotearoa New Zealand, in other courts.

In chapter 4, I continue the comparative analysis, by assessing the transjurisdictional diffusion of the innovative legal hybrids crafted in Aotearoa New Zealand, in the jurisdiction of Colombia. More specifically, I trace the influence of the legal precedents offered by the Waitangi Tribunal in specific cases heard before the Constitutional Court of Colombia, and the Special Jurisdiction for Peace, or in the original Spanish language, Jurisdicción Especial para la Paz (JEP). This chapter focusses on the dispute (heard before the former jurisdiction) which led to the legal subjectivisation of the Atrato River,[11] and a collection of cases (heard before the latter jurisdiction) which led to the recognition of territories as victims of armed conflict.[12] In a similar fashion to the structure of the previous chapter, I will firstly contextualise Colombia's colonial history, tracing the civil wars, and the internal armed conflict, to sketch the underlying tensions between Colombia's Indigenous Peoples and Local Communities (IPLCs) and the State. Thereafter, I will trace the transjurisdictional diffusion of innovative legal hybrids from Aotearoa New Zealand, first, in the Atrato River dispute, to demonstrate the influence of the legal precedents crafted by the Waitangi Tribunal in the rights of Nature construction for the Atrato. Importantly, I will critically analyse the latter decision against the framework of "biocultural rights", which was relied upon to construct legal personality for the

[11] Constitutional Court of Colombia (2016), Judgement T-622/16 (The Atrato River Case), (Translation; Dignity Rights Project, Delaware Law School, USA).

[12] JEP, Case 005, Auto 002, 17 January 2020 (Nasa territory called Cxhab Wala Kiwe); JEP, Case 002, Auto SRVBIT 079, 12 November 2019 (Awá territory Katsa Su); JEP, Case 002, Auto 094, 10 June 2020 (Esperara Siapiara territory Espere Eugja); JEP, Resolution SRVBIT, Caso 002, Auto 018, 24 January 2020 (Tumaco territory); JEP, Auto SRVR 226, 11 July 2023 (Cauca River).

River.[13] The latter analysis becomes an important contextualisation to demonstrate the "ornamental"[14] features of rights of Nature, whereby the trendiness of these rights has led to a snowballing effect of shallow resolutions, in which certain rights of Nature constructions lack the substantive legal measures to address the concrete disputes before them. Against this backdrop, I turn to the second tracing of the innovative legal precedents from Aotearoa New Zealand, in the cases heard before the JEP. Within this section, I assess the legal decision which led to the legal subjectivisation of the Awá territory, and also, the Cauca River, and their respective IPLCs accordingly, against the precedent of the Atrato River dispute. The explored cases before the Constitutional Court and the JEP will then be used to critically compare judicial methodologies for a bottom-up pluralisation, against those for a top-down pluralisation, in light of their ability to foster genuine future oriented reconciliation between IPLCs and the State in a spirit of legal ecumenism.

In chapter 5, we reach the final case study of this comparative analysis, which explores the transjurisdictional diffusion of innovative legal hybrids from Aotearoa New Zealand in two separate, but interconnected, cases, heard before the High Court of Uttarakhand. These cases led to the legal subjectivisation of the Ganges and Yamuna Rivers,[15] and also, the Gangotri and Yamunotri Glaciers and surrounding ecosystems.[16] Notably, this case study diverges from those previously explored on account of reflecting an example of legal transplants, as opposed to the reliance of foreign legal precedents to adjudicate the concrete dispute at hand. This case study therefore makes the important point on the unsuitability of legal transplants within the context of this research, connecting with Legrand's critical point of the importance of engaging with the localities of each dispute. Nevertheless, following suit of the previous case studies, this chapter will begin with an analysis of India's experience with British colonialism, and the establishment of social hierarchies between hegemonic and counter-hegemonic groups, with particular focus on the influence of the caste system and religion. Thereafter, I will critically assess the legal subjectivisation of the Rivers and Glaciers, assessing the extent to which the High Court was influenced by the legal precedents of Aotearoa New Zealand, and at the same time, their own jurisprudence relating to the framing of deities and idols as juristic entities. This chapter will then conclude on an important discussion relating to the advantages and disadvantages of the increasingly activist courts in India, in connection with the risk of blurring the separation of powers, by encouraging courts to overreach in their powers by stepping into the role of the legislature. This latter critique will feed into the discussions of chapter 6.

[13] Sanjay Kabir Bavikatte and Tom Bennett, 'Community Stewardship: The Foundation of Biocultural Rights' (2015) 6 Journal of Human Rights and the Environment 7; G Sajeva, When Rights Embrace Responsibilities: Biocultural Rights and the Conservation of Environment (Oxford University Press 2018); Sanjay Kabir Bavikatte, Stewarding the Earth: Rethinking Property and the Emergence of Biocultural Rights (Oxford University Press 2014).

[14] María Ximena González-Serrano, 'Rights of Nature, an Ornamental Legal Framework: Water Extractivism and Backbone Rivers with Rights in Colombia' [2024] Journal of Peasant Studies 1.

[15] Mohammed Salim v. State of Uttarakhand and Others, Writ Petition (PIL) No.126 of 2014 (December 5, 2016 and March 20, 2017), 4, (hereinafter referred to as Ganges case).

[16] Lalit Miglani v. State of Uttarakhand and Others, Writ Petition (PIL) No.140 of 2015 (March 30, 2017), (hereinafter referred to as Glaciers case).

In chapter 6, finally, I consider the transjurisdictional agency of national courts against the backdrop of the case studies, explored over chapters 3 to 5. As the crux of this research investigation, this chapter takes stock of the transjurisdictional diffusion of innovative legal hybrids from Aotearoa New Zealand to Colombia and India, to consider the agency of courts in the bottom-up pluralisation of global law, and their pivotal contribution in the subaltern cosmopolitan transition of law. Accordingly, I begin by defining the "pivotal" role of courts, outlining that whilst national courts are well placed to facilitate legal ecumenism, they are also in the position to hinder such. In consideration of the latter, I move on to discuss the conditions which have encouraged the diffusion of cosmopolitan legalities across contact zones. Which, when focussing specifically on the case studies, considers the influence of reconciliatory mandates and judicial composition. Relying on this information, I will critically assess the extent to which each jurisdiction explored herein, facilitated legal ecumenism. Thereafter, I re-engage with the theoretical framework to explore the agency of national courts from a global law perspective, whilst stressing the practical application of this research, albeit theoretically based. Then, in the final section, I conclude by reflecting on the role of legal ecumenism as a means of accommodating co-existing ontologies in post conflict spaces, and how striking a balance between the two traditional schools of thoughts, bears prospects for bridging the gap between legal pluralism as theory, and legal pluralism as practice.

Chapter 1

Assessing the diffusion of innovative legal hybrids through the agency of domestic courts: a conceptual and methodological framework

1. Contextualising the "global" rights of Nature as "local" innovative legal hybrids

Rights of Nature is fast becoming a world-wide legal phenomenon, ever since its first legal recognition within the United States, in which the Tamaqua borough was recognised as having legal rights.[1] Albeit a legal field which has gradually been expanding across countries in both the so-called "Global North" and "Global South", the ever-growing trend of rights of Nature has, arguably, garnered its global reputation from the creation of legal innovations originating in non-Western nations. Some of the most well-known examples include the 2008 constitutionalisation of Pachamama in Ecuador[2], and also, Bolivia's enshrinement of the Law of the Rights of Mother Earth in 2010 and the Framework Law on Mother Earth and Integral Development to Live Well in 2012.[3] In particular, these legal resolutions have gained prominence for being grounded on indigenous cosmovisions – such as *buen vivir* and *sumak kawsay*[4] – which echo, essentially ecocentric, mentalities of living well in harmony with Nature.[5] Significantly, the creation of these legal precedents has played a catalysing role in the diffusion of subaltern rights of Nature epistemologies and ontologies, as we are gradually seeing the recognition of diverse conceptualisations of

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[1] Tamaqua Borough, Schuykill County, Pennsylvania, Ordinance No. 612 of 2006; Mari Margil, 'Building an International Movement for Rights of Nature' in Maloney M and P Burdon (eds), *Wild Law — In Practice* (Routledge 2018), at 149-160.

[2] Constitución de la República del Ecuador (20th octubre 2008).

[3] Law of the Rights of Mother Earth [Ley de Derechos de la Madre Tierra], Plurinational Legislative Assembly, Law 071 of the Plurinational State, 21st December, 2010; Framework Law of Mother Earth [Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien], Plurinational Legislative Assembly, Law 300 of the Plurinational State, 15th October, 2012.

[4] Whilst buen vivir and sumak kawsay have often been used synonymously with one another, they have different epistemological and ontological roots, and also differ in their translation. Whilst it is outwith the scope of this thesis to dive into a comparative analysis of the two concepts, I will use both terms to encapsulate the idea of "living well in harmony with Nature". However, for an ethnographic exploration of the two concepts, see: Javier Cuestas-Caza, 'Sumak Kawsay Is Not Buen Vivir' (2018) 5 Alternautas.

[5] Louis J Kotzé and Paola Villavicencio Calzadilla, 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) 6 Transnational Environmental Law 401; Paola Villavicencio Calzadilla and Louis J Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7 Transnational Environmental Law 397; Mihnea Tănăsescu, 'The Rights of Nature in Ecuador: The Making of an Idea' (2013) 70 International Journal of Environmental Studies 846.

rights for Nature,[6] based on non-Western epistemologies, ontologies, and cosmovisions. At this moment, I would like to note that throughout this thesis I will be referring to the concepts of 'epistemology' and 'ontology' together. The reasoning behind this linguistic choice is to emphasise that the separation, or isolation, of these two concepts, sits uncomfortably with some Indigenous cosmologies in their kinship with non-human entities. The latter critique has been advanced by more-than-human theorists, such as Karen Barad. In fact, the inseparability between these two concepts relates to Karen Barad's theory of "agential realism", in which she speaks of epistemology and ontology as interwoven, thus contributing to the reality of society being formed on *intra-actions*.[7]

As mentioned in the introduction, "rights of Nature" are the empirical testing ground for this research. Where this thesis seeks to nuance discussions of legal pluralism, rights of Nature are an ample testing ground, on account of being a diverse field of legal scholarship, which is inherently versatile, appearing in both hegemonic and non-hegemonic societies. However, instead of tracing general rights of Nature trends more globally, I adopt a narrower and more specific approach, to investigate instances in which rights of Nature are being used as a legal compromise – an innovative legal hybrid - to resolve disputes between rival ontologies and normativities of hegemonic and counter-hegemonic segments of society, such as contact zones.

The concept of contact zone will be discussed in depth in the next chapter,[8] where I will tease out the theoretical underpinnings of my research. However, for the sake of presenting the methodology and the approach followed in this thesis, contact zones are defined as spaces in plural societies, in which 'rival normative ideas, knowledges, power forms, symbolic universes, and agencies meet in unequal conditions and resist, reject, assimilate, intimate, subvert each other giving rise to hybrid legal and political constellations in which the inequality of exchanges are traceable.'[9] Contact zones are characterised by conflict, particularly between rival normativities. They are hence spaces which have led to the production of asymmetrical relationships of power between societal groups, such as hegemonic and counter-hegemonic groups.

Acting as the origin story in this forthcoming comparative tour de force, I commence this investigation by unpacking the creation of innovative legal hybrids by the Waitangi Tribunal, in Aotearoa New Zealand.[10] In particular, the Waitangi Tribunal delivered one of the earliest (if not, *the* earliest) iterations of a rights of Nature legal resolution in the form of a legal hybrid, when settling the over a century long legal dispute

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[6] Rights of Nature have been legally enshrined in different formats, including – but not limited to - constitutional enshrinement, creation of national/federal law, local regulations, case law, and other legal documents such as local policy etc. See: 'Harmony With Nature - Law List' accessed 8 July 2024.
[7] Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press 2007).
[8] See Chapter 2, sections 3 to 3.1, infra.
[9] Boaventura de Sousa Santos, Toward a New Legal Common Sense: Law, Globalization, and Emancipation (3rd edn, Cambridge University Press 2020), at 560.
[10] See Chapter 3, sections 3 to 4, infra.

between the Māori and Crown Government, over the Whanganui River.[11] As part of the legal resolution which settled the ownership dispute, the Waitangi Tribunal delivered a report (the 1999 Whanganui River Report[12]), which recommended the recognition of the Whanganui River as a subject of rights. In the face of competing claims for ownership, the Waitangi Tribunal expressed a legal resolution mirroring an innovative legal hybrid*,* by striking a workable balance between Māori epistemologies and ontologies, philosophies, and cosmovisions on one hand, and hegemonic property rights inherited from British colonialism, on the other. Where innovative legal hybrids will be explained in more detail in section 2, at their core, they are legal resolutions which achieve a balance – or compromise – between hegemonic and counter-hegemonic epistemologies and ontologies.

The articulation of the Whanganui River as a subject of rights has set the wheels in motion for the development of rights of Nature jurisprudence in Aotearoa New Zealand.[13] However, the legal precedents issued by the Waitangi Tribunal also created transnational impact. Where the legal subjectivisation of the Whanganui River meant that Aotearoa New Zealand became one of the first countries in the world to recognise the legal personality of rivers, other countries soon followed. In fact, the Waitangi Tribunal created an impetus for the diffusion of innovative legal hybrids pertaining to rights of Nature, specifically, of rivers and waterways, across contact zones.

The trans-jurisdictional influence of the Waitangi Tribunal legal precedents can be analysed by tracing the diffusion of the latter legal precents in other jurisdictions. More specifically, by assessing the extent to which foreign courts rely on the legal precedents articulated by the Waitangi Tribunal, when adjudicating concrete disputes before them. For the present purposes of this thesis, I have traced the trans-jurisdictional diffusion of rights of Nature legal hybrids from Aotearoa New Zealand to Colombia and India. I have identified disputes heard before the Constitutional Court of Colombia,[14] the Jurisdicción Especial para la Paz (JEP),[15] and the High Court of Uttarakhand,[16] which have – to varying degrees – relied on the rights of Nature legal precedents by the Waitangi Tribunal to adjudicate these concrete disputes. I will therefore focus on these three countries (which include four jurisdictions), to make up the case studies, as the main comparative thrust of this investigation. The thesis will embark on this journey in full depth in chapters 3 to 5.

Before doing so, however, the present chapter will unpack the methodology. Against this backdrop, and before starting the comparative discussion of the trans-jurisdictional diffusion of innovative legal hybrids

[11] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.
[12] Waitangi Tribunal Report 1999: The Whanganui River Report.
[13] Other resolutions include, the legal subjectivisation of the Te Urewera in 2014 (which will also be explored in chapter 3), the 2017 recognition of Mount Taranaki having the same rights as a legal person, and, the recognition of rights, and creation of a redress framework, for the Whangaehu River (Waiū-o-Te-Ika) in 2018. See: Te Urewera Act 2014; 'Harmony With Nature - Law List' (n 6).
[14] Constitutional Court of Colombia (2016), Judgement T-622/16 (The Atrato River Case), (Translation; Dignity Rights Project, Delaware Law School, USA).
[15] Case 002, Auto SRVBIT 079, 12 November 2019 (Awa territory, Katsa Su)
[16] Mohammed Salim v. State of Uttarakhand and Others, Writ Petition (PIL), No.126 of 2014 (December 5, 2016 and March 20, 2017); Lalit Miglani v. State of Uttarakhand and Others, Writ Petition (PIL), No.140 of 2015 (March 30, 2016).

through the agency of domestic courts, this chapter will be complemented by a further chapter (2) in which I will discuss in depth the theoretical framework for my research. Both represent the methodological and theoretical framework for this thesis.

The remainder of the present chapter will be structured as follows: section 2, will formulate the overall hypothesis, the research questions which will guide this investigation, and the pathways of diffusion that will be traced. I will also contextualise using rights of Nature as an empirical testing ground to advance this research agenda. Then, in section 3, I will unpack comparative law, to discuss some of its advantages and disadvantages as a methodology. I will also frame the comparative law approach taken as part of this investigation. Section will then will define key concepts against the backdrop of this methodological framing, by contextualising national courts as agents of diffusion, and by defining trans-jurisdictional diffusion and how it can be traced. In section 5, I will further contextualise the methodology by unpacking the aforementioned case studies as contact zones as opposed to countries in the so-called "Global North" or "Global South". Following that, I will relay a note of caution on the diffusion of innovative legal hybrids and the risks of epistemic extractivism, as a preface to section 6, in which I conclude by re-iterating the importance of articulating innovative legal hybrids as bespoke legal mechanisms, and the pivotal role of courts therein.

2. The methodological approach of the thesis

This research seeks to investigate the role of national courts in the bottom-up pluralisation of global law, within the broader themes of encouraging the (subaltern) cosmopolitan transition of law, and furthering forms of decoloniality. Where coloniality can be described as any form of – mostly epistemic - colonial domination that pervades the formal end of institutionalised colonial regimes,[17] decoloniality refers to a state of affairs in which coloniality has been overcome.[18] On the basis of the latter, I argue that courts are pivotal actors, insofar as they are in key positions to articulate legal resolutions resembling legal ecumenism. This latter term is inferred from Santos' 3rd edition of "Towards a New Legal Common Sense: Law, Globalization, and Emancipation",[19] and stands for a novel perspective on legal pluralism. Without prejudice to an in-depth scrutiny of its strengths and potential weaknesses in the next chapter, legal ecumenism speaks to the mutual acknowledgement and non-dogmatic co-existence between hegemonic and counter-hegemonic epistemologies and ontologies, that exist in plural societies. They are key concepts which enable spaces for diverse projects of emancipation and a (subaltern) cosmopolitan transition of law. Resolutions modelled on legal ecumenism - dubbed as innovative legal hybrid solutions – are therefore central to the overall intentions of this thesis. Based on these assumptions, I intend to assess the catalysing role of the courts by analysing the following:

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[17] Aníbal Quijano, 'Colonialidad y Modernidad/Racionalidad' (1991) 13 Perú indigena 11, at 14.
[18] Pierre Legrand, Negative Comparative Law: A Strong Programme for Weak Thought (Cambridge University Press 2022), at 218.
[19] de Sousa Santos (n 9).

(1) The extent to which courts are taking inspiration from innovative legal solutions devised in other jurisdictions, and;
(2) Whether courts are bringing about forms of legal ecumenism in concrete disputes adjudicated before them.

Accordingly, I will firstly unravel the legal precedents expressed by the Waitangi Tribunal, specifically, those which have led to the recognition of the legal subjectivisation of the Whanganui River, and also, the Te Urewera Forest.[20] I then go on to trace the diffusion of the latter legal norms within key rights of Nature decisions of national courts in both Colombia and India. In particular:

(i) The 2014 Colombian Constitutional Court's decision granting rights to the Atrato River;[21]
(ii) The Colombian Special Jurisdiction for Peace's (the JEP) decisions recognising territories – and their respective indigenous peoples and local communities (IPLCs) – as victims of armed conflict;[22] and
(iii) The 2017 recognition of human status to the Ganges River, and status as a "living entity" to the Gangotri and Yamunotri Glaciers, by the Indian High Court of Uttarakhand.[23]

Accordingly, the diffused legal precedents will be assessed in light of their influence on the importer jurisdiction's construction of rights of Nature on one hand, and, the extent to which these resolutions bring about legal ecumenism, on the other.

For the present purposes of this thesis, I will be using the terminology IPLCs to encapsulate the various Indigenous and local groups, ethnic and Afro-Colombian communities that will be explored herein. However, this is not in disregard of their inherent differences, such as in terms of epistemologies, ontologies, and cosmovisions, but rather for the purposes of terminological clarity. Moreover, when referring to these groups as "Indigenous" it is not to deny their heterogeneity, but rather, to 'understand indigeneity as a global concept that unites people who have experienced colonial violence through the dispossession of their lands and constant marginalisation'.[24]

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[20] Te Awa Tupua Act (n 11); Te Urewera Act (n 13).
[21] The Atrato River Case (n 14), at 140.
[22] Up until 2023, the JEP has recognised natural territories, and the respective communities, as victims of conflict for 'territories of indigenous communities such as the Nasa, Awá, and Eperara Siapiadra [and] two Afro-Colombian communities' territories in Tumaco and the Cauca river.' See: Andrea Camacho Rincón and Germán Parra Gallego, 'Addressing Environmental Damages in Contexts of Armed Conflict through Transitional Justice in Colombia' (2023) International Review of the Red Cross 1; Alexandra Huneeus and Pablo Rueda Sáiz, 'Territory as a Victim of Armed Conflict' (2021) 15 International Journal of Transitional Justice 210; JEP, Case 005, Auto 002, 17 January 2020 (Nasa territory called Cxhab Wala Kiwe); JEP, Case 002, Auto SRVBIT 079, 12 November 2019 (Awá territory Katsa Su); JEP, Case 002, Auto 094, 10 June 2020 (Esperara Siapiara territory Espere Eugja); JEP, Resolution SRVBIT, Caso 002, Auto 018, 24 January 2020 (Tumaco territory); JEP, Auto SRVR 226, 11 July 2023 (Cauca River).
[23] Mohammed Salim v. State of Uttarakhand and Others (n 16); Lalit Miglani v. State of Uttarakhand and Others (n 16).
[24] For more information please Nina Silva's article, who relies on Sheryl Lightfoot's understanding of "indigeneity": Nina Bries Silva, 'Indigenous Judges at the Special Jurisdiction for Peace: Reimagining the Role of Transitional Justice Judges' (2025) International Journal of Human Rights 1, at 3; Sheryl Lightfoot, Global Indigenous Politics: A Subtle Revolution (Routledge 2016).

In what should now be very apparent, this research is built upon a methodological framework which seeks to (re-)envisage pluralism in the global legal sphere, in line with a subaltern cosmopolitan transition. Facilitating the latter transition, national courts are centred as agents of change, insofar, as they are capable of diffusing innovative legal hybrids on one hand, and articulating legal ecumenisms, on the other, when adjudicating concrete disputes that fall before them.

Legal ecumenism is therefore the analytical benchmark for assessing the pivotal role of courts in the subaltern cosmopolitan transition of law, used to critically assess the creation of innovative legal hybrids, and the extent to which these resolutions reflect a genuine balance between conflicting hegemonic and counter-hegemonic epistemologies and ontologies. As part of this analysis, the forthcoming chapters hope to demonstrate the agency of courts in this regard, by investigating their ability to articulate these innovative legal hybrids as bespoke legal mechanisms. Specifically – by re-engaging with what Legrand has dubbed, 'the unbearable localness of law'[25] – these resolutions are assessed in light of their ability to be moulded to the importer jurisdictions' embedded localities, including their social, historical, cultural, and epistemological environment, in recognition of the limitations of legal transplants, which will be discussed in chapter 2.[26]

Before turning to an explanation of the comparative law method employed herein (section 3), and how transjurisdictional diffusion is traced and appraised in my research (section 4), it is important to make a methodological and terminological clarification. Throughout this project, the work and decisions of a number of judicial and quasi-judicial mechanisms will be assessed, all of which differ in terms of their legal status, role, and composition. As the figure below demonstrates,[27] these "legal entities", feature national courts, tribunals/quasi-judicial bodies, as well as judicial mechanisms. This methodological choice was made to fully capture the agency of "courts" – using this term in a very broad, non-technical sense - in the transjurisdictional diffusion of innovative legal hybrids, and interconnectedly, in the decolonisation of jurisprudence. Henceforth, always keeping in mind the due recognition of the institutional and procedural differences between these legal bodies, I will refer to them as "courts" throughout this thesis, for the sake of terminological simplicity.

Figure 1. Legal status, role, and composition of the case studies.

Case study	Waitangi Tribunal (WT)	Constitutional Court of Colombia	Jurisdicción Especial para la Paz (JEP)	High Court of Uttarakhand

[25] Pierre Legrand (n 18).
[26] Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 Maastricht Journal of European and Comparative Law 111; See: Chapter 2, section 2.2, infra.
[27] Table 1, infra.

Legal Status	Standing Commission of Inquiry	National Court, with a specialised mandate in constitutional matters	Transitional Justice Mechanism	State High Court, Highest court of the State of Uttarakhand
Mandate	Investigates claims brought by the Māori against the Crown, relating to alleged violations of the Treaty of Waitangi 1840.[28] Acting as a commission of inquiry, the Waitangi Tribunal listens to claims, and makes (non-binding) recommendations, which are then directed to the Government.[29]	Adjudicates matters of constitutionality between state institutions, and between individuals or protected groups and the state. Responsible for interpreting the constitution, and reviewing the constitutionality of laws and treaties.	Tasked with investigating and redressing the violent crimes committed during of the internal armed conflict between 1st of January 1990 to the 1st of December 2016.[30]	Established as a 'court of record' with 'all the powers of such a court including the power to punish for contempt of itself.'[31]
Composition of judicial members	Mix of legal and non-legal experts, underscoring the bicultural nature of the WT: 1. All judges from the Māori Land Court (both Māori and Pākehā) sit on the WT. 2. Experts or	Composed of an uneven number of judges, which have varying specialities of the law. They are elected by the Senate of the Republic for a single term of eight years.[33]	The Special Jurisdiction for Peace is composed of indigenous and non-indigenous judges.[34] The JEP was established to include four Indigenous and four Afro-Colombian justices, becoming the	Each High Court of India 'shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint.'[36]

[28] Guide to the Practice and Procedure of the Waitangi Tribunal: A Comprehensive Practice Note Issues under Clause 5(9) and (10) of Schedule 2 to the Treaty of Waitangi Act 1975.
[29] Treaty of Waitangi Act (1975), s.5.
[30] Andrés Gustavo Mazuera Zuluaga and Liliana Damaris Pabón Gieraldo, 'The Special Jurisdiction for Peace in Colombia: Possible International Conflicts of Jurisdiction' (2020) 17 Jurídicas 29.
[31] The Constitution of India (1949), [as on 1st May 2024], Part VI, s.215.
[33] Political Constitution of Colombia (1991), Art.239.
[34] Bries Silva (n 24).
[36] Political Constitution of Colombia (n 33), s.216.

	specialists in other disciplines (anthropology, history, Māori studies, linguistics). [32]		first transitional justice institution to do so.[35]	

3. A comparative law approach

The methodology outlined above takes a comparative law approach. However, before arguing for the benefit of comparative legal studies for the purposes of the present research agenda, I would like to briefly unpack a grounding of comparative law methods,[37] and the promises and perils they bear.

The essence of comparative law, as described by Edward J. Eberle, is simply, 'the act of comparing the law of one country to that of another.'[38] Traditionally, comparative law has been used to understand foreign laws and cultures, it is a legal method, which, in its simplest form, has been used to catalogue similarities and differences between different legal orders.[39] Considering the increasing interdependence of nations under globalisation, comparative law has also been used in other ways, including, for tracing the transplantation of legal regimes, or for understanding possible convergences of laws which transcend cultural barriers, leading to a unification/harmonisation of legal norms and doctrines.[40] Zweigert and Kötz were of the position that a comparative analysis of different legal systems can support pursuits of finding a "better solution" to address problems in one's own legal system.[41]

In practice, one approach which has dominated comparative law studies, despite its theoretical contestations – including that of the postmodernism critique, outlined below - is the functional approach. In the words of Uwe Kischel...

[32] Richard P Boast, 'The Waitangi Tribunal in the Context of New Zealand's Political Culture and Historiography' (2016) 18 History of International Law/Revue d'histoire du droit international 339, at 348.
[35] ibid, at 2.
[37] I would also like to emphasise the briefness of this grounding, as comparative law methodology has been extensively discussed, from a variety of different angles. It would therefore be outwith the scope of this thesis to delve into such a comprehensive discussion of the literature, and so, I will focus on a framing of comparative law which contextualises the methodology employed herein.
[38] Edward J Eberle, "The Methodology of Comparative Law" (2011) 16 Roger Williams University Law Review 51, at 52.
[39] P. Ishwara Bhat, 'Comparative Method of Legal Research: Nature, Process, and Potentiality' in P Ishwara Bhat (ed), Idea and Methods of Legal Research (Oxford University Press 2019), at 268 -273.
[40] ibid, at 53.
[41] In the words of Zweigert and Kötz, '[T]he method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a life time by even the most imaginative jurist who was corralled in his own legal system...it extends and enriches the 'supply of solutions' and offers the scholar of critical capacity the opportunity of finding the 'better solution' for his time and place.' See: ibid, at 271. Also see: Jonathon Hill, "Comparative Law, Law Reform and Legal Theory" (1989) 9 Oxford Journal of Legal Studies 101, at 102.

> ...'[m]odern functional comparative law does not use any preconceived or even national legal categorization or terminology. Rather, it investigates legal norms in their environment, which includes not only legal, but also extra-legal and cultural factors; it is functional in the sense that it examines the actual function of legal norms in this environment. This approach is grounded on the understanding that legal institutions are not abstract constructs, but, in the final analysis, tools to solve real interpersonal, social, or economic problems. At its heart, comparative law is thus always the comparison of solutions which different legal orders offer for specifical practical problems. This is the core of functional comparative law.'[42]

Functional comparative law, however, is not without its limitations, and in fact raises pertinent questions as to the suitability of comparative legal studies to find *real solutions* in other legal systems due to the 'difference[s] between law in books and law in action; the influence of legal culture; the understanding, significance, and scope of a foreign solution to a legal problem; and the possible importance of extra-legal factors which affect the solution to real problems or which offer such solutions in the first place.'[43] To explain, comparative law requires more than merely looking at the law as is written, but additionally requires consideration of the law in action. This involves consideration of diverging legal practices between jurisdictions, but also, of the influence of cultural norms in shaping legal phenomena. 'We [thus] need to excavate the underlying structure of law to understand better what the law really is and how it actually functions within a society. To do this, we need to explore the substructural forces that influence law. These can be things like religion, history, geography, morals, custom, philosophy or ideology, among other driving forces.'[44] However, barriers to comparative law do not stop there. There are additional hurdles in terms of language, and the legal training of comparative lawyers.

Taking the former, differences in language can create translation difficulties when comparing legal systems. For example, of the three legal systems I compared within this project, using Colombia as a case study posed potential problems vis-à-vis English translations of key legal documents. In fact, whilst an English translation of the judgement of the Atrato River dispute was available, the key citation referring to the jurisprudence of Aotearoa New Zealand was only present in the Spanish original text. Thus, without access to an English translation of these key Spanish passages and their citations, essential information for the comparative analysis regarding the diffusion of legal norms between the legal systems of Aotearoa New Zealand and Colombia, would not have been identified. Moving to the latter barrier, the predicaments around the legal training of lawyers engaging in comparative studies are complex. First, there is the criticism of whether the comparatist can conduct an effective comparative analysis of a different legal system, if they do not have legal training in said other legal system. Alan Watson proposed the superficiality of comparative law on this basis, stating that 'it is hard enough to know in detail one branch of the law of one system, but to know the history of that branch and its relationship with that of some other system (and thus to possess

[42] Uwe Kischel, Comparative Law (Oxford University Press 2019), at 8.
[43] ibid, at 9.
[44] Eberle (n 38), at 52.

a knowledge of the history of that as well) is nigh-impossible.'[45] Second, there are further issues on whether the comparatist may have an ethnocentric bias or lack of objectivity owing to their legal training in their native legal system.[46] The latter has been criticised on the assumption that a functional comparative approach to law is *supposed* to come from a neutral standpoint.[47] However, the idea that neutrality can be achieved when engaging in comparative legal studies, is arguably misguided. In the opinion of Günter Frankenberg...

> ...'[s]uppressing emotions and striving to avoid value-judgments do not however make the comparatist a residence of non-ethnocentric neutral territory, for such a land simply does not exist. On the contrary, the fictitious neutrality stabilizes the influence and authority of the comparatist's own perspective, and nurtures the good conscience with which comparatists deploy their self-imposed dichotomies, distinctions and systematizations. The objective posture allows the comparatist to present and represent her own assumptions and what she observes in a scientific logic, with the balances and measure that project neutrality and conceal the weighter's complicity with both selection of the units on the scale and the objects to be measured. This ethos of value freedom suppresses how language, interests and experiences, which even the comparatists concede are culture-based, contribute to the comparison.'[48]

Moreover, the inevitability of the ethnocentric bias can also become problematic where comparative is law is used to find the 'truth', as a singularly conceived reality. For instance, if there was one objective truth of 'legal cultures, traditions, systems, facilities, styles, origins, solutions, and ideas',[49] the lens of the comparatist could encourage the *othering* and/or the exoticisation of foreign legal cultures.

Comparative law has been described as 'elastic and ill-defined'.[50] It is a method which has been exposed to wide criticism, for its 'excessive doctrinalism, shuttered attitudes to interdisciplinary inquiry, timidity in approaching broad-gauge study, as well as tendencies to superficiality, triviality, obscurantism, and exoticization – not to mention claims of ultimate irrelevance.'[51] The benefits of comparative law as legal methodology have been openly contested. However, without disregard, or disagreement, to the validity of the above critiques, I argue for the benefit of conducting comparative legal studies to benefit this research agenda, but not strictly in the functional comparative approach. In fact, I find particular contention with the functional approach in the following two regards: first, where it intends to promote the idea of unification or harmonisation of legal systems; and, second, where the comparative law approach is presumedly neutral, absent of the comparatist's social, cultural, and political values. Taking each point in turn, I find contention with the former, as the comparative approach employed herein does not seek a

[45] Annelise Riles, "Wigmore's Treasure Box: Comparative Law in the Era of Information" (1999) 40 Harvard International Law Journal 221, at 237.
[46] Günter Frankenberg, 'Critical Comparisons: Rethinking Comparative Law' (1985) 26 Harvard Journal of International Law 411, at 425.
[47] Kischel (n 42), at 92.
[48] Frankenberg (n 46), at 425.
[49] ibid, at 426.
[50] ibid.
[51] George A Bermann and others, "Comparative Law: Problems and Prospects" (2011) 26 American University International Law Review 935, at 936.

convergence of legal systems, but rather, the promotion of legal pluralism. In fact, a key part of this project's argument is that, whilst courts may draw inspiration from one another when adjudicating concrete disputes, they must tailor their legal resolutions to their native legal systems' social, historical, and cultural localities. In other words, it argues that one solution crafted in one legal system, is likely unsuitable to resolve the problems in another legal system, *without* being re-fashioned to the importer jurisdiction's local normativities. This latter argument aligns with the critique on legal transplants advanced in chapter 2.[52] In this regard, this comparative approach looks towards the diversification and pluralisation of legal systems, on the belief that there is no singular truth, or singular *better solution,* to a certain problem. Rather, it perceives legal resolutions as local-cultural phenomena. This is not to say that there may be similarities in methods, as chapter 6 will explore some of the "conditions" in which judges were more likely to facilitate legal ecumenical resolutions.[53] Turning to the latter point, and aligning with Frankenberg's opinion outlined above, I believe it is impossible to conduct any comparative law analysis with complete neutrality, but rather, any analysis will be formed through the lens of the comparatist's social, historical, and cultural grounding. Whilst this could be problematic in terms of *othering* and *exoticisation* of other legal systems, if the comparatist maintains an awareness of these risks, and strives towards not imposing what the law *is* or *ought to be,* they can instead offer a perspective of law, which may be contested or agreed with. In this regard, I believe a comparatist's approach is not about finding definitive truths, but is rather, one of opening up alterative perspectives and readings of the law. Whilst it is outwith the scope of this thesis to delve into the various critiques of the functional approach, I would like to highlight the affinities between this approach and the postmodern critique. To which Kischel has summarised a simplified understanding of the postmodern critique of functional comparative law in the following:

> The basic consequences of applying postmodernism to comparative law are evident: The emphasis on the diversity of values and perspectives, when directed at comparative law, results in the opposition to all efforts at legal harmonization and to the idea that legal systems are converging. The postmodern approach also opposes legal and cultural imperialism, and, in particular analysis of a foreign legal system through the lens of the observer's own native legal system. The attempt to establish neutral or generally applicable terms, as suggested especially by functionalism, must appear to postmodernists as pointless from the outset. Postmodern comparative law must also categorically reject every attempt at evaluation, for instance during the final step in many comparative studies in which the author searches for the best solution to a legal problem. The deconstruction of texts will lead to the discovery that all concepts and categories in comparative law are riddled by internal inconsistencies. Since texts can have no unambiguous meaning, we must reject any concentration on written law in the form of statutes or judge-made law. The same goes for any attempt to derive clear, consistent legal principles form such sources[54]

[52] See Chapter 2, section 2.2, infra.
[53] See Chapter 6, section 3, infra.
[54] Kischel (n 42), at 100.

In consideration of the latter discussion, and perceiving that the comparative approach adopted here is closer to the postmodernist position rather than the functional approach, the comparative law applied within this context seeks (1) to understand the manner in which norms are migrating between legal systems, and (2) to unpack the conditions which are more conducive to accommodating judicial methods for restructuring law, by overcoming conflicts between rival normativities, and encouraging bottom-up pluralisations.

With the comparative methodology unpacked, I will now discuss the manner in which the trans-jurisdictional diffusion is traced and appraised within my research, in the following section.

4. Understanding the trans-jurisdictional diffusion of law

The trans-jurisdictional diffusion of law is a central component to this thesis, based on the presumption that the diffusion of legal norms, concepts, and methods has the potential to imbue deeper levels of legal pluralism within law. In particular, the trans-jurisdictional diffusion of innovative legal hybrids is thought to play a key role in the subaltern cosmopolitan transition of law, on account of diffusing, and promoting the inclusion, of non-western, hitherto marginalised legal phenomena. Where the theoretical underpinnings of this notion will be teased out in detail in chapter 2, I will focus here on the methodology of the trans-jurisdictional diffusion of law, and how it has been applied within the context of the chosen case studies.

As part of the methodological framework of this thesis, national courts will be identified as agents of diffusion. This hypothesis is based on the trend that national courts, in general, have been engaging in forms of cooperation and communication – including through methods of inter-judicial dialogues – as a response to globalisation. One such example of this phenomenon has been the growing culture of cross-fertilisation and diffusion of legal norms between jurisdictions, where courts have increasingly been taking influence from legal decisions created in other jurisdictions, leading to a form of judicial globalisation, or what Anne Marie Slaughter has termed, an 'emerging global community of courts'.[55] Naturally, the latter has contributed to the profusion of interactions between legal systems and actors across horizontal and vertical networks, and also, to the diversification of legal phenomena, in what could be described as a pool of heterogeneous legal judgements. National courts have played a significant role in this regard, both as norm internalizers and norm creators. In this dual role, national courts are able to 'incorporate foreign precedents into their decisions (acting as "norm internalizers"), but also generate decisions that foreign courts incorporate into their jurisprudence (acting as "norm creators").[56] They are thus hubs of normative

[55] Anne-Marie Slaughter, A New World Order (Princeton University Press 2005); Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191; Anne-Marie Slaughter, 'Judicial Globalization' (1999) 40 Virginia Journal of International Law 1103.

[56] Philip M Moremen, 'National Court Decisions as State Practice: A Transnational Judicial Dialogue' (2006) 32 North Carolina Journal of International Law and Commercial Regulation 259, at 262.

authority,[57] who by practicing the role of norm internalizer or norm creator (or both), contribute to the transnational diffusion and cross-fertilisation of legal phenomena.

Whilst the latter description has previously been used to describe processes of judicial dialogues, the methodology herein explored, alternatively, focusses on judicial exchanges. This terminological choice relies on the basis that judicial dialogues often refer to a bi-directional exchange of legal phenomena between jurisdictions[58], whereas judicial exchanges instead relate to the uni-directional flow of legal materials from one jurisdiction to another (which more accurately captures the global web of diffusion occurring from multiple sites of normative authority).[59] Within the context of the chosen case studies, the Waitangi Tribunal acted as norm creator, by articulating the innovative rights of Nature legal hybrids. In so doing, the Waitangi Tribunal triggered processes of diffusion, whereby the Constitutional Court of Colombia, the JEP, and the High Court of Uttarakhand, responded, as norm internalizers.

Evidence of such trans-jurisdictional diffusion of norms can be found in forms of explicit and implicit diffusion. Where the former is illustrative of clear and direct incorporation of a foreign precedent within an importer jurisdiction's decision-making, the latter is more elusive, speaking to the subtler form of influencing the cosmologies or attitudes of judicial members, not explicitly referenced, and therefore, more difficult to trace. Considering the scope of this thesis, and the intentions to trace the diffusion of innovative legal hybrids within the adjudication of concrete disputes by national courts, I will focus on explicit judicial exchanges, by flagging the incorporation of foreign legal precedents within importer jurisdictions' decision-making, through explicit citation, referencing, or dissenting opinions.[60] Additionally, however, the cases heard before the JEP may amount to an implicit diffusion of legal norms, insofar as the national court did not directly cite or refer to the jurisprudence of other jurisdictions (including that of the Colombian Constitutional Court). Nevertheless, the case law of the JEP – as we will see in chapter 5 – arguably builds upon the Colombian Constitutional Court decision which takes influence from the legal precedents of the Waitangi Tribunal. The cases heard before the JEP can hence be analysed as an implicit diffusion of legal norms, assessed by analysing any traceable influences or similarities between the JEP legal resolutions, and the diffused innovative legal hybrid.

In the context of the chosen case studies, I have pinpointed moments in which the national courts in Colombia and India engaged in a trans-jurisdictional diffusion of norms, by relying on the foreign legal

[57] Recognising courts as hubs of normative authority resonates with Walker's theory on Global Law and Global Justice particularly when he conceptualises the "producers" of global law. See Chapter 2, section 4.2, infra.

[58] For more information on the role of (inter-)judicial dialogue and its role in the creation of a "global community of courts", see: Slaughter 'A New World Order' (n 55); Slaughter, 'Judicial Globalization' (n 55); Slaughter, 'A Global Community of Courts' (n 55).

[59] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009).

[60] An interesting example of an explicit trans-jurisdictional diffusion of legal norms, which is not of focus for this thesis, has been demonstrated by the inclusion of Ecuador's conception of Pachamama into the 2018 constitutional amendment for the French Constitution (1958) and Charter of Fundamental Rights (2004), which referenced '[l]a nature ou Pachamama', and also, the 'inspirée de la Constitution équatorienne' Assemblée National, Démocratie Plus Représentative, Responsible Et Efficace (No 911), Amendement No CL786, (22nd Juin 2018), see: 'Harmony With Nature - Law List' (n 6).

precedents created by national courts in Aotearoa New Zealand. For instance, the Constitutional Court of Colombia explicitly cited the jurisprudence surrounding the recognition of the legal subjectivisation of Nature which crystallised out of the 1999 Whanganui River Report, within the judgement of the Atrato River case.[61] When recognising the river as a subject of rights, the constitutional court iterated:

> 'The most recent case of protection of the rights of Nature came to be in New Zealand after 2012. It is an agreement with legal force, subscribed between the government of New Zealand and the community of the Māori aboriginees of the Whanganui river, the protector of the river - the third most important of the country - for hundreds of years. In the agreement, which is currently enacted in law - Te Urewera Act 2014 -, the government of New Zealand recognises the river the same legal status of a person or a corporation, that is to say, it grants the right of existence, to be maintained, and to prosper, together with the obligation to be respected. Under that design, as a legal person or entity subject of rights, the river has two legal guardians: the government of New Zealand and the community of the Whanganui river, who jointly comprise a committee of management and protection.' [62][63]

Then furthermore, in the decision to recognise the Ganges and Yamuna Rivers as entities with human status, the High Court of Uttarakhand took broad inspiration from rights of Nature developments globally, but took special consideration of the legal precedents crafted in Aotearoa New Zealand following the passing of the 2017 Te Awa Tupua Act. When recognising the Glaciers as legal persons, however, the High Court made an explicit reference to the 2014 Te Urewera Act within the judgement, noting that:

> '[t]he New Zealand Parliament has enacted 'Te Urewera Act 2014' whereby the 'Urewera National Park' has been given the legal entity under Section 11 of the Act. The purpose of the Act is to preserve, as far as possible, Te Urewera in its natural state, the indigenous ecological systems, biodiversity and its historical cultural heritage.'[64]

Considering these two examples in tandem, it is fair to assume that both the Constitutional Court of Colombia and the High Court of Uttarakhand have engaged in the borrowing of legal norms from the jurisdiction of Aotearoa New Zealand, hence acting as agents of trans-jurisdictional diffusion of legal norms - at least on a surface level - as demonstrated through these explicit citations. However, the final methodological tracing of the diffusion of innovative legal hybrids from the Waitangi Tribunal to the JEP, diverges slightly from the above explored methodology. As aforementioned, the JEP did not engage in an

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[61] The Atrato River case (n 14).

[62] The original citation is in Spanish, and includes the following: 'El más reciente caso de protección de los derechos de la naturaleza se dio en Nueva Zelanda a partir de 2012. Se trata de un acuerdo con fuerza de ley suscrito entre el gobierno de Nueva Zelanda y la comunidad de aborígenes maoríes del río Whanganui, protectora del río -el tercero más importante del país- por cientos de años. En el acuerdo, que actualmente es ley -Te Urewera Act 2014-, el gobierno de Nueva Zelanda le reconoce al río, el mismo status legal de una persona o de una corporación, es decir, le concede el derecho a la existencia, a ser mantenido y a prosperar, junto con la obligación de ser respetado. Bajo este diseño, como persona jurídica o entidad sujeto de derechos el río tiene dos guardianes legales: el gobierno neozelandés y la comunidad del río Whanganui, que conforman conjuntamente una comisión de administración y protección.' See ibid, at 140.

[63] It is important to mention there is a slight inaccuracy in the Constitutional Court of Colombia's judgement. For more information on this, see footnote 4 in Chapter 4, section 1, infra.

[64] Kelly D Alley, 'River Goddesses, Personhood and Rights of Nature: Implications for Spiritual Ecology' (2019) 10 Religions 502, at 507.

explicit diffusion of legal norms, but rather, may be classed as having engaged implicitly. To trace the implicit diffusion of norms, which speaks to the subtler form of influencing the cosmologies or attitudes of judicial members, it is necessary to find moments of influence which point to the JEP building the innovative legal hybrids crafted in Aotearoa New Zealand, especially the inclusive and participatory judicial methodology displayed in the exercise of its jurisdiction. As part of the case study on the JEP, the cases herein explored are centred around the recognition of territories and their respective IPLCs as victims of armed conflict. In what will become clear in chapter 4, the development of the jurisprudence on victims of armed conflict (within Colombia) has broadly drawn upon the rights of Nature jurisprudence developed in Colombia, specifically of that in relation to the legal subjectivisation of natural entities. Considering the decision by the Constitutional Court recognising the Atrato River as a subject of rights was the pioneering case for rights of Nature within Colombia, the JEP have arguably been influenced by the Constitutional Court's jurisprudence. On the basis that the Constitutional Court engaged in the borrowing of legal methods from the jurisdiction of Aotearoa New Zealand, the JEP may have indirectly relied upon the innovative legal hybrids of the Waitangi Tribunal, which may constitute an implicit diffusion of law accordingly.

Henceforth, as part of the overarching comparative analysis herein explored, I will trace the trans-jurisdictional diffusion of innovative legal hybrids from the jurisdiction of Aotearoa New Zealand, to the Constitutional Court of Colombia and the High Court of Uttarakhand, and the JEP.

Where these case studies have been selected on account of demonstrating different degrees of trans-jurisdictional diffusion, they have furthermore been grouped collectively as contact zones. In the following section I will justify this terminological classification, whilst furthermore justifying the methodological selection of contact zones as case studies.

However, before that, I would like to take a moment to caveat, or rather, explain, the methodological choice of using India as a case study, as the discussion in chapter 6, following the comparative analysis over chapters 3 to 5, leaves this case study feeling like the "odd one out". The main reason for this apparent discrepancy is that the disputes explored in India (chapter 5) were initially brought before the High Court of Uttarakhand to resolve a violation of property rights. Conversely, the disputes explored before the Waitangi Tribunal (chapter 3), the Constitutional Court of Colombia and the JEP (chapter 4), collectively dealt with historical grievances associated with colonialism, to varying degrees. Based on the different contextual foundations in which these disputes were grounded, the conclusions drawn from the Indian case study were of a different nature to those from the Aotearoa New Zealand and Colombia case studies.

Nevertheless, despite what may *prima facie* seem a mismatch, the case study on India has its place within this thesis for two reasons. First, the Indian case study met the selection criteria of this project on paper, aligning precisely with the methodological choice of tracing the transjurisdictional diffusion of innovative legal hybrids between courts, outlined above. Thus, and to avoid the trap of "cherry picking", India became one of the case studies of this project, despite not fulfilling the initial promise it presumedly bore. Second, the

Indian case study ultimately facilitated a critique of legal transplants, and an argument for the important role of courts to engage with the concrete facts of the disputes that fall before them, in this manner, India completes the comparative case law analysis, and will be explored in more depth in chapter 5.

5. Why contact zones? A justification of methodological and terminological choices

From a methodological standpoint, this thesis traces the trans-jurisdictional diffusion of law between national courts in Aotearoa New Zealand, Colombia, and India. In this section, I will delve into the justification of this particular choice, providing detail about the terminological definition of contact zones and the methodological choice to use the latter as case studies.

The jurisdictions addressed in this thesis have specifically been chosen for two reasons: (1) there are clear and traceable pathways of trans-jurisdictional diffusion between these three nations (from Aotearoa New Zealand, to Colombia and India) and, (2) they fall into the category of contact zones, insofar, as they represent spaces in which rival normative ideas and cultures exist between hegemonic and counter-hegemonic social groups (e.g., between IPLCs and the State, such as the Māori and Crown Government). They can therefore be designated as "breeding grounds" for the inception and development of innovative legal hybrids, as contact zones represent fields in which cross-cultural dialogues, and the interaction and articulation of diverse normative visions can occur.[65]

It is therefore important to qualify why I have decided to categorise the jurisdictions, in which these case studies unfold, as contact zones, as opposed to – the more generally known terms – countries in the Global North or Global South. As I shall now turn to, each country's experience with colonialism and the postcolonial transition, has defined the internal structures and social dynamics of that country. For some countries, they fall more easily in the category of Global North or Global South. For many other countries, they are more accurately characterised as a hybrid of both terms, insofar as they are defined by the presence of their hegemonic and counter-hegemonic social groups. Accordingly, these countries – and the chosen case studies – fall more neatly, into the description of contact zones.

To illustrate this latter point, the following section will contextualise the concepts of the Global North and Global South, and how their terminological definitions have been shaped by a history of colonialism. I will then situate the case studies within the characterisation of contact zones, and furthermore summarise the benefits of using contact zones as case studies within the context of this thesis.

4.1. Global North v Global South: a cultural divide

References to the Global South and Global North – which should not be misconstrued as references to a geographical division of countries split by the Northern and Southern hemisphere – have often been

[65] Mary Louise Pratt, Imperial Eyes (Routledge 1992), at 4-6; de Sousa Santos (n 9), at 599.

oversimplified by the binary characterisations of the Global South as non-Western, poor, and undeveloped nations, and those in the Global North as Western, rich, and developed.

Whilst there are some truths to these characterisations, the reality, is much more complex.

Although the history of colonialism and imperialism has been inextricably linked to the exacerbation of economic inequalities between the so-called Global North and Global South[66] – leading to the polarised characterisations of rich and poor countries[67] -, colonialism has also played a hand in the subjugation of certain cultures, epistemologies, and ontologies.[68] European colonialism in particular, was the expansionist practice motivated by the pillaging of natural resources, of lands, and the violent exploitation of human workforces further afield. As a colonial pursuit, justified – politically and morally –through the expansion of Christianity in the first instance[69], colonial empires sought to assert their control over nations, and set the normative standards accordingly, in line with their mission to *save* the "savage nations" from their "barbaric ways."[70] Notably, colonialism has persisted through the years, under the guise of different faces. For example, the end of the Great War (World War I) brought with it the establishment of the League of Nations Mandate System, in 1919, which granted authority for foreign rule over former colonies as part of the sacrosanct mission of civilisation.[71] Then again, post-World War II, ideals of development replaced the normative standards associated with the period of civilisation, yet continued to perpetuate a 'global hegemony [which speaks] to a purely Western genealogy of history, robbing peoples of different cultures of the opportunities to define the forms of their social life.'[72] Colonialism has thus been culpable in entrenching asymmetrical hierarchical relationships of power between Western and non-Western nations.[73] In particular, by universalising Eurocentric narratives, and setting the latter as the global normative standard, colonialism has encouraged the exclusion and marginalisation of non-Western narratives. The latter process relates to a practice known as globalised localisms, (discussed in more depth in chapter 2),[74]

[66] Immanuel Wallerstein, The Modern World-System I: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century, (vol, University of California Press 2011).
[67] In addition to Worlds System Theory (cited above), theories on ecologically unequal exchange provides a useful illustration on the role of economics in the production of asymmetrical relationships of power between the "core" and periphery", especially where the latter traps peripheral countries into economically unsustainable patterns of trade. For more information, see: Stephen G Bunker, Underdeveloping the Amazon: Extraction, Unequal Exchange, and the Failure of the Modern State (University of Chicago Press 1988).
[68] Balakrishnan Rajagopal, *International Law from below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003).
[69] Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011) 61 University of Toronto Law Journal 1.
[70] Khaled Al-Kassimi, 'ALBA: A Decolonial Delinking Performance towards (Western) Modernity–An Alternative to Development Project' (2018) 4 Cogent Social Sciences 1546418, at 5; Mustapha K Pasha, 'The 'Bandung Impulse' and International Relations' [2013] Postcolonial theory and international relations: A critical introduction 144.
[71] Martti Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism' (2011) 19 Rechtsgeschichte 9, at 155-156.
[72] Gustavo Esteva and W Sachs, 'Development. The Development Dictionary: A Guide to Knowledge as Power' (1992) 18 Population and Development Review 1, at 9.
[73] Antony Anghie, Imperialism, Sovereignty and the Making of International Law, vol 37 (Cambridge University Press 2007); Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2007) 27 Third World Quarterly 739.
[74] See Chapter 2, section 3, infra.

whereby 'a given local phenomenon is successfully globalised' and transformed into the global normative standard.'[75] Globalised localisms have facilitated the creation of asymmetrical hierarchical relationships of power between hegemonic and non-hegemonic powers, and have in turn, shaped the underpinning terminological concepts of the Global North and Global South. Significantly, definitions of these two concepts transcend the economic qualifications of being rich or poor, as references to the Global North and Global South are additionally differentiated by their legal cultures, cosmovisions, epistemologies, and ontologies.[76] More often than not, these legal cultures, cosmovisions, epistemologies and ontologies have been hierarchically organised, with precedence often being designated to Western legal cultures, over non-Western legal cultures. In section 4.2, I will outline a specific example of the latter dynamic of relevance to this thesis, which demonstrates the dominance of Western conceptualisations of Nature as property, over non-Western understandings which perceive Nature as an intrinsic being, one which is subject to rights, and incapable of being owned.

Whilst it can sometimes be helpful to use the concepts Global South and Global North - especially since the latter phrasing is more commonly used and generally well-known -, they are often too simplistic, and instead, require more nuance.

For example, designating countries either within the Global North and Global South may create assumptions that countries are statically aligned with these characterisations. The latter categorisation therefore pays a disservice to the ability of countries to slide between, or straddle both definitional concepts, in response to evolving situational dynamics, such as the post-colonial transition. Furthermore, the binary categorisation creates assumptions that countries are defined wholeheartedly as a Global North or Global South country. To which, the latter fails to capture the inherent plurality of nations containing diverse hegemonic and counter-hegemonic social groups, and the variety of Western and non-Western epistemologies, ontologies, cosmovisions, and cultures, therein. Conversely, the terminological designation of contact zones is capable of capturing the required nuance of countries which reflect such plurality, as a concept which embraces the hybridity of both the Global North and Global South. Contact zones are therefore suitable as case studies for the unfolding research, as hotbeds for the creation of innovative legal hybrids, and interconnectedly, as key exemplars of Western and non-Western epistemologies, ontologies, cosmovisions, and cultures in tension. The notion of 'contact zones' will be defined and discussed in full depth in the next chapter.[77]

To further contextualise the differences between Western and non-Western epistemes, the following section will highlight how Western and non-Western epistemological foundations are divided by culture. I will therefore expand on an example of the cultural divide between Western and non-Western epistemologies and ontologies vis-à-vis Nature as property, or Nature as an intrinsic being. Thereafter, I

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[75] de Sousa Santos (n 9), at 215.
[76] Francis Adyanga Akena, 'Critical Analysis of the Production of Western Knowledge and Its Implications for Indigenous Knowledge and Decolonization' (2012) 43 Journal of Black Studies 599.
[77] See Chapter 2, section 3.1, infra.

will briefly conclude by noting the risks of epistemic extractivism, especially when dealing with culturally specific epistemologies, ontologies, and cosmovisions.

4.2. Epistemic extractivism: a cautionary note

Culture has been a central component in shaping the epistemological and ontological differences of Western and non-Western legalities. Considering the influence of culture on societal constructs - including in relation to values, normative standards, belief systems, ethics and morality, traditions, political constructs and so on – culture has furthermore been a defining feature of Western and non-Western rights of Nature epistemes. In this context, the impact of varying cultural mindsets vis-à-vis Nature has fed into the epistemological foundations of Western and non-Western approaches to governing Nature, where non-Western legalities have often emulated ecocentric sensibilities, and Western legalities remain noticeably anthropocentric. Anthropocentrism and ecocentrism have often been discussed in a binary setting. On one hand, anthropocentrism, 'has fundamentally informed not only the way modern law constructs, categorizes and orders nature, but also the manner in which law protects nature',[78] framed for the benefit of humans, as opposed to Nature in its own right. Anthropocentric approaches are often grounded in the perception of human dominance over Nature, and the 'instrumentalist rationality and possessive individualism, [which] turns nature into property and subjects it to exploitation as of right.'[79] On the other hand, ecocentrism, which has been built upon theories of Earth Jurisprudence and Wild Law, is a non-anthropocentric approach to governing the environment, which reconceptualises the legal relationship between humans and Nature. Earth Jurisprudence posits that 'the rights of nature are given equal, if not more, weight than human rights',[80] and proposes that humans have an 'ethical responsibility as stewards to prevent activities which harm the planet [based on]… the idea that there is an intimate connection in nature between all animate and inanimate entities.'[81] Based on this theoretical foundation, ecocentric approaches have attempted to reconceptualise the relationship between humans and Nature outwith the anthropocentric narrative, in opposition to Western conceptualisations of human dominance over Nature. To briefly contextualise the influence of anthropocentrism and ecocentrism in Western and non-Western approaches to rights of Nature, I will contrast the above-mentioned rights of Nature decisions involving the 2006 recognition of rights to the Tamaqua borough in the United States[82], and the 2008 constitutionalisation of Pachamama in Ecuador.[83]

As aforementioned, the construction of rights for Nature from the Western viewpoint has remained characteristically human-centred, or for a better choice of word, anthropocentric. One example, which can

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[78] Vito De Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' (2015) 27 Journal of Environmental Law 91, at 95.
[79] S Adelman, 'Rethinking Global Environmental Governance' in E Daly, J May and L Kotzé (eds), *New Frontiers in Global Environmental Constitutionalism* (United Nations Environment Programme 2017), at 299.
[80] ibid, at 301.
[81] ibid, at 301.
[82] Tamaqua Borough (n 1).
[83] Constitución de la República del Ecuador (n 2); See Chapter 1, section 1, supra.

be drawn from the human-oriented language employed in the Tamaqua borough judgement, which stressed, '[t]he land application of sewage sludge in Tamaqua Borough poses a *significant threat to the health, safety, and welfare of the citizens* and environment of Tamaqua Borough', and that the '[f]ailure to properly manage sludge may have *adverse effects on human health* and the environment.'[84] Although the Tamaqua Borough was a landmark case for rights of Nature (in the United States), which furthermore demonstrated attempts at shifting the paradigmatic focus from forms of anthropocentricism to ecocentrism, it remains strikingly pale in comparison to the ecocentric sensibilities of non-Western rights of Nature epistemologies and ontologies. Conversely, non-Western epistemologies and ontologies are often emulated through the cultural cosmovisions which recognise the intrinsic value of Nature, and hence veer away from human-centred language.[85] For example, Article 71 of the Ecuadorian Constitution epitomises this notion, by recognising '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.'[86] The Ecuadorian Constitution then went one step further, by enshrining the indigenous cosmovision, *sumak kawsay,*[87] to guide Ecuadorians in a good way of living in harmony with Nature, as an accompaniment to the recognition of Nature's intrinsic value as a sacred and spiritual being.

The tensions between Western and non-Western rights of Nature epistemologies and ontologies are grounded upon degrees of anthropocentrism versus ecocentrism, translated into the conflicts between perceptions of Nature as property on one hand, and Nature as an intrinsic being, on the other. Significantly, however, the former narrative has dominated the legal field, and often been set as a universalised normative standard in the governance of nature. In other words, Western/anthropocentric approaches to governing Nature have become a globalised localism.[88] However, in what could be described as an ecocentric turn in environmental governance more generally, we are increasingly seeing legal resolutions recognising Nature as a subject of rights based on non-Western epistemologies, ontologies, and cosmovisions, which in turn, are diverging from these anthropocentric or Western legal constructs.[89]

Rights of Nature have often been portrayed as ecocentric legalities, and characterised as pioneering legal phenomena which have been built upon non-Western epistemologies, ontologies, and indigenous cosmovisions. However, describing rights of Nature as wholly ecocentric may be misleading, insofar as the latter creates assumptions that rights of Nature are legal phenomena devoid of anthropocentric essences. In contrast, rights of Nature are legal tools capable of embracing both forms of anthropocentrism and ecocentrism in their construction. One clear example of the latter is reflected in the Tamaqua Borough case, which embraced forms of ecocentrism on one hand by recognising the Borough as a subject of rights, and

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[84] Tamaqua Borough (n 1), at section 3.
[85] Stefan Knauß, 'Conceptualizing Human Stewardship in the Anthropocene: The Rights of Nature in Ecuador, New Zealand and India' (2018) 31 Journal of Agricultural and Environmental Ethics 703.
[86] Constitución de la República del Ecuador (n 2), Article 71.
[87] ibid, at preamble, Article 14, 250, 275, 387.
[88] See Chapter 2, section 2, infra,
[89] Tănăsescu (n 5); Mihnea Tănăsescu, 'Rights of Nature, Legal Personality, and Indigenous Philosophies' (2020) 9 Transnational Environmental Law 429.

then forms of anthropocentrism on the other, by attributing these rights to benefit humans. In this regard, situating rights of Nature within the strict binary of anthropocentric/ecocentric falls short of capturing the ability of these rights to fluctuate between the poles of these two characterisations.[90] Furthermore, subscription to these binary categorisations also raises further questions and concerns, including, the following:

(i) Would describing rights of nature as wholly ecocentric legalities negate any involvement of the human/person within the construction of these rights?
(ii) Then additionally, would describing rights of Nature as ecocentric legalities conflict with the human-centric framework in which rights are granted through legal personhood, and in turn, dilute the *sui genris* character of rights for nature accordingly?

Taking on board these concerns in my research going forward, I will be appraising rights of Nature, not as anthropocentric or ecocentric legalities, but rather, as a fluid combination of both, one which can embody legal ecumenism between cosmovisions, epistemologies and ontologies in contact zones of post-colonial societies.

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The tension between Nature as property and Nature as an intrinsic being incapable of being owned, will be a recurrent theme throughout each case study, one which the creation of innovative legal hybrids attempts to reconcile. However, I will first acknowledge the potential risks that are intrinsic to creating – and in turn, diffusing – innovative legal hybrids, as such 'creativeness' may promote forms of epistemic extractivism, or (cultural) appropriation. The risks associated with epistemic extractivism are contextualised within the context of translating traditional and indigenous cosmovisions into concrete forms of law.

To draw on a prominent example, I return to the concept of *buen vivir,*[91] and how it has often been subject to – what some have termed – 'well-intentioned appropriation.'[92] The latter concept refers to a process whereby subaltern epistemologies and ontologies/indigenous cosmovisions, such as *buen vivir* or *sumak kawsay,* are (re-) discovered and then translated into Western (or Global North) contexts. In some situations, these concepts have been relied upon in attempt of re-envisaging anthropocentric models of environmental governance, to promote ecocentric transitions. In others, there are risks associated with the modification of these concepts in such a manner that diverges away for their core ideals, leaving a contorted version of

[90] For a more in-depth and thought-provoking critique on using lenses of anthropocentrism and ecocentrism in the conceptualisation of environmental law, see: Vito De Lucia, 'Beyond Anthropocentrism and Ecocentrism: A Biopolitical Reading of Environmental Law' (2017) 8 Journal of Human Rights and the Environment 181.
[91] Buen Vivir and sumak kawsay, as already aforementioned above, have been used synonymously to relay respective indigenous cosmovision relating to live well in harmony with Nature. However, it is important to stress that buen vivir is a translation of sumak kawsay, and as is the case with all translations, may miss certain cultural nuances if not properly embedded into its original context. See: Javier Cuestas-Caza (n 4).
[92] Philipp Altmann, 'The Commons as Colonisation – The Well-Intentioned Appropriation of Buen Vivir' (2020) 39 Bulletin of Latin American Research 83, at 83-97.

the original epistemology.[93] In the worst-case scenario, the latter may promote forms of epistemic extractivism,[94] by re-fashioning these epistemologies and ontologies into tools for recolonisation, speaking to the 'mindset that works with the ideas of the subaltern, not to bring them into dialogue with Western or other ideas, but to colonise them by introducing them in a subordinated position in the hegemonic knowledge.'[95] A careful balance must therefore be struck between encouraging the diffusion of innovative legal hybrids as a method of encouraging the bottom-up pluralisation of global law, and ensuring these epistemologies and ontologies do not become subject to forms of epistemic extractivism.

In practice, and as we shall see throughout the forthcoming case studies, national courts in contact zones, who are engaging in the borrowing or importing of innovative legal hybrids from other jurisdictions, are at risk of promoting forms of epistemic extractivism. Aware of the risks associated with epistemic extractivism, and hopefully accompanied with efforts to avoid the latter form of appropriation, domestic courts are therefore in pivotal positions to articulate these resolutions as bespoke legal mechanisms, to mirror the locally embedded legal cultures.[96]

Turning to the final section of this chapter, I will now conclude this methodological framework by acknowledging the various theoretical questions this methodology raises, as a preface to chapter 2.

6. Prefacing the agency of courts and the role of legal ecumenism

As part of this chapter, I have outlined the methodological framework which investigates the role of national courts in the bottom-up pluralisation of global law, within the broader themes of encouraging the (subaltern) cosmopolitan transition of law, and furthering forms of decoloniality. More specifically, I have focussed on the methodology of trans-jurisdictional diffusion, and how it is applied within the context of the chosen case studies.

Noticeably, however, this methodological framework has raised a number of important theoretical questions, which must be addressed. These questions include the following.

(i) What role does the trans-jurisdictional diffusion of innovative legal hybrids play in the (subaltern) cosmopolitan transition of law?
(ii) What is the relevance of diffusing innovative legal hybrids as bespoke legal mechanisms as opposed to legal transplants?

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[93] For example, there are some tensions with the incorporation of buen vivir – drawn from sumak kawsay, as in, the cosmovision of the Quechua people of the Andes, - in the Bolivian Constitution of 2009. In particular, because the cosmovision speaks to living in harmony with Nature, and is built upon indigenous philosophies, customs, and practices which reject forms of (neoliberal) extractivism. This tension then becomes apparent when considering the incorporation of the latter cosmovision alongside other constitutional reforms which, 'signal a move towards a developmental approach that prioritises ecological balance over relentless growth'; Rapid Transition Alliance, 'Buen Vivir: The Rights of Nature in Bolivia and Ecuador' (2 December 2018) accessed 16 July 2024.
[94] Chris Prentice, 'Reorienting Culture for Decolonization' (2013) 27 Continuum 4.
[95] Altmann (n 92), at 93.
[96] "Bespoke" legal mechanisms will be defined in depth in chapter 2, see Chapter 2, section 2.2, infra.

(iii) What is legal ecumenism, and what is the relevance of this legal concept in the bottom-up pluralisation of law, and therefore, the subaltern cosmopolitan transition of law?

(iv) Why are national courts the focus of this thesis?

These questions will be addressed in chapter 2.

Chapter 2

A bottom-up approach towards the pluralisation of global law: fine-tuning the theoretical framework of the thesis

1. Setting the theoretical scene

At its base conception, legal pluralism acknowledges the co-existence of various normative orders within a given society, which maintain the capacity to interact with one another in a variety of different ways. Legal pluralism is a complex legal discourse, with roots in the anthropological study of colonised societies, and the impact – and dominance - of imported European legal systems on pre-colonial legal orders therein. The latter, termed by Sally Engle Merry as "classic legal pluralism", speaks of the inherent plurality within colonised societies, paying attention particularly to the 'intersections of indigenous and European law'.[1] However, since the 1970s, scholars have increasingly been applying the concept of legal pluralism to noncolonised spaces, to reframe legal pluralism as a concept that only exists between the colonised and settlers. Instead, legal plurality can be found between 'dominant groups and subordinate groups, such as religious, ethnic, or cultural minorities, in migrant groups, and unofficial forms of ordering located in social networks or institutions."[2] Moreover, in the move towards "new legal pluralism", 'plural normative orders are found in virtually all societies',[3] beyond the relationships between official (as in, state law) and unofficial (non-state law), forms of normative ordering exist within the same social field. To draw comparisons between the two, the former, speaks of 'legal pluralism in postcolonial societies [and how it] is about striking diversity between the multiple coexisting forms of law, and the manifold consequences of these contrasts; [the latter, as in] transnational legal pluralism is [conversely] about the multiplicity of legal regimes, which might conflict on points but usually are not radically diverse.'[4] In this manner, legal pluralism has been the subject of extensive discussion by anthropologists, legal theorists, and sociologists, from a variety of different angles, owing to its broad definitional interpretation.

In my theoretical framework, I am going to make a point of legal pluralism. However, I engage with legal pluralism in recognition that it is a highly contested and diverse area of legal scholarship, which has

[1] Sally Engle Merry, 'Legal Pluralism' (1988) 22 Law & Society Review 869, at 872.
[2] ibid, at 872-3.
[3] ibid, at 873.
[4] Brian Z Tamanaha, Legal Pluralism Explained: History, Theory, Consequences (Oxford University Press 2021), at 158.

extensively been discussed by a range of notable academics (including, Brian Tamanaha,[5] Sally Falk Moore,[6] John Griffiths, Paul Schiff Berman, Gunther Teubner,[7] Boaventura de Sousa Santos, and others, to name a few). In consideration of such, legal pluralism can be characterised - mainly – by two traditional schools of thought, which are themselves, in tension with one another. To position my own perspective, it is important to firstly contextualise these two intellectual legal traditions, and the tensions hanging between the two, to secondly, highlight the potential conflicts existing within my own theoretical perspective.

Considering the vastness of legal pluralism, and the wealth of literature within this discourse, we can categorise legal pluralism within the following two strands. The first is drawn from sociologically inspired legal theory, pioneered by German legal scholars and sociologists such as Niklas Luhmann, and Gunther Teubner, who have often relied on social systems theory, and frameworks of autopoiesis, to understand legal pluralism. This conception of legal pluralism has been driven from the legal-theoretical corner, albeit lending itself to empirical research, to theorise society as inherently plural, owing to the existence of various levels of self-referential social subsystems. Examples of social sub-systems include law, but also, the state, art, education, family, religions, and so on.[8] Moreover, legal pluralism through the systems theory and autopoietic lens observes the relationship between law and other social fields, such as, politics and economics. Accordingly, this school of thought has connotations to liberal-conservative perspectives of legal pluralism, standing in contrast to the second strand of legal pluralism, which is grounded in empiricism and anthropology, by linking the impacts of colonialism, capitalism, and globalisation, to the creation of legal and social plurality. Within this strand of legal pluralism, the works of de Sousa Santos are well-known, but also legal scholars such as Liselotte Viaene,[9] Saskia Vermeylen,[10] and Alexandra Huneeus,[11] all of whom have been relied upon within this thesis. However, one well-known example of legal pluralism through an

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[5] ibid; Brian Z Tamanaha, 'Legal Pluralism across the Global South: Colonial Origins and Contemporary Consequences' (2021) 53 Journal of Legal Pluralism and Unofficial Law 168.

[6] In Moore's investigation of legal pluralism, she has pioneered a definition of semi-autonomous social fields, to contextualise spaces in which pluralism exists. Expanding upon the latter, a 'semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance. The analytic problem of fields of autonomy exists in tribal society, but it is an even more central analytic issue in the social anthropology of complex societies. All the nation- states of the world, new and old, are complex societies in that sense. The analytic problem is ubiquitous.' See: Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 Law & Society Review 719, at 720; Sally Falk Moore, 'Legal Pluralism as Omnium Gatherum' (2014) 10 FIU Law Review accessed 5 November 2024.

[7] Teubner in particular, has been responsible for developing legal pluralism through the theoretical framing of autopoiesis, initially developed by Niklas Luhman. For more information on Teubner's development of legal pluralism see: Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World-Society' in Gunther Teubner (ed), Global Law Without a State (Aldershot: Ashgate 1996); Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1991) Cardozo Law Review.

[8] Hugh Baxter, 'Niklas Luhmann's Theory of Autopoietic Legal Systems' (2013) 9 Annual Review of Law and Social Science 167.

[9] Liselotte Viaene, 'Can Rights of Nature Save Us from the Anthropocene Catastrophe? Some Critical Reflections from the Field' (2022) 9 Asian Journal of Law and Society 187.

[10] Saskia Vermeylen, 'Comparative Environmental Law and Orientalism: Reading beyond the 'Text' of Traditional Knowledge Protection' (2015) 24 Review of European, Comparative & International Environmental Law 304.

[11] Alexandra Huneeus and Pablo Rueda Sáiz, 'Territory as a Victim of Armed Conflict' (2021) 15 International Journal of Transitional Justice 210.

empirical-anthropological lens can be found in de Sousa Santos' "Towards a New Legal Common Sense", specifically relating the creation of Pasagarda law within a favela in Rio de Janeiro. Within this example, Santos describes the creation of an unofficial socio-legal order known as Pasagarda law, or "Law of the Oppressed", in response to the political and economic repression exerted upon the citizens living within the favela, by the State. In this example, Pasagarda law represents the manifestation of a separate legal system, unique and separate from the Brazilian State legal system, holding as a reflection of plurality produced in response to subjugation by a hegemonic power.[12]

Considering these two intellectual traditions in tandem, they are operating from oppositional poles when it comes to legal pluralism. Where the former understands pluralism from traditional, legal theoretical framings, the latter is more empirically grounded, in the sense of understanding the consequences of lived realities which have generated normative social and legal plurality. Within this context, there are tensions between these two schools of thought. Santos has even made clear his criticisms of Teubner's autopoiesis analysis which speaks of the inter-dependence of subsystems, and the assumption that societal conditions co-exist alongside law, rather that creating impact and shaping such.[13] In particular, Santos struggles to reconcile Teubner's analysis with the 'decades of extensive and rich research on the sociology of law', and to his mind, finds 'the debate on the proceduralization or reflexiveness of law is to a great extent a false debate. It starts from a conception of the autonomy of law on the liberal state – law as autonomous vis-à-vis the state – that is, in my view, utterly wrong.'[14] However, the criticisms were not one sided, as Teubner has also critiqued Santos' analysis of Pasagarda law, opining that "'[p]ostmodern jurists love legal pluralism. They do not care about the law of the centralized state with its universalist aspirations.'" In response, Santos strongly rejected Teubner's position as a 'careless misrepresentation' of his work.[15] Whilst tensions have been fostered between these two academics, they also reflect the broader tensions existing between their oppositional paradigms on legal pluralism. However, the latter dynamic does not dictate that all perspectives on legal pluralism subscribe wholeheartedly to more radical understandings of the legal-theoretical, or empirical-anthropological tradition. Instead, there are perspectives which sit between these poles, finding affinity with the characteristics defining either school of thought. For example, Santos agrees with Twining's interpretation of his position, where Twining posits that there is a 'tendency to romanticise pluralism, especially in the context of reactions against codification, centralisation and claims to monopoly of state power.' In agreement, Santos states 'there is nothing inherently good, progressive, or emancipatory about 'legal pluralism'. Indeed, there are instances of legal pluralism that are quite reactionary.'[16] Premised with

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[12] Boaventura de Sousa Santos, *Law Against Law: Legal Reasoning in Pasargada Law* (Yale University 1974); Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (3rd edn, Cambridge University Press 2020), at Chapter 4.
[13] Teubner's rejection of the impacts of societal conditions on shaping law has been captured in the following: 'Is not 'interdiscursivity' in law and society much more dense than mere transitory perturbations could ever produce? And do we not find in the coevolution of law and society significantly more elective affinities than the mere coexistence of structural drift would provide for?' See: Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (n 7).
[14] de Sousa Santos, 'Toward a New Legal Common Sense: Law, Globalization, and Emancipation' (n 12), at 65-66.
[15] ibid, at 111; Teubner, 'Global Bukowina: Legal Pluralism in the World-Society' (n 7), at 1443.
[16] ibid, at 111.

the disconnect between Teubner and Santos' understandings of legal pluralism, and thus between the legal-theoretical and anthropological-empirical schools of thought, Twining creates a middle ground in which Santos' finds relatability. In fact, Twining's perspectives on legal pluralism resonate with Santos, on account of paying attention to sociological considerations which impact the shaping of law. Moreover, Twining makes a point of challenging mono-narratives of law moulded through the Western paradigm, on the assertion that a socio-legal lens to understanding the '[d]ifferences in respect of cosmologies, values, political ideologies, cultures, and traditions are part of the essential background in understanding law.'[17]

In consideration of the above, and albeit recognising the tensions between these two traditions of legal pluralism, I situate my own perspective between these two poles. On one hand, I borrow from the anthropological perspective, by investigating legal pluralism created from the imposition of colonial legal orders in previously non-colonised spaces, and the plurality generated by the conflicts occurring between peoples, their normativities, epistemologies and ontologies. I therefore draw inspiration in the first instance from Santos, and his empirically based understanding of legal pluralism to understand pluralism rooted in colonialism. On the other hand, and whilst I fully embrace the anthropological-empirical lens of legal pluralism, I engage with elements of the traditional legal-theoretical school of thought. In particular, I observe the pluralism created from exchanges occurring between institutions. Which, as stated in my first chapter, looks towards the plurality created form the trans-jurisdictional diffusion of norms between national courts. In this regard, my theoretical framing is also influenced by the legal-theoretical tradition, in particular, by Neil Walker's mappings of global law and global justice.[18] Moreover, I additionally borrow from Twining, who provides a theoretical "middle-ground" for legal pluralism, between the oppositional dynamics of Santos and Walker. Reflectively, whilst Twining's theories are closer to legal-theoretical perspectives on legal pluralism, in comparison to Santos - by looking at the diffusion of norms from a global perspective within the context of globalisation – he nevertheless emphasises the necessity of taking a socio-legal lens to understanding law.[19]

In awareness of the apparent tensions between the different intellectual traditions, I intend to pull these theoretical strands together, to further nuance an understanding of legal pluralism drawn from these traditions, under the concept of legal ecumenism. Further nuancing legal pluralism comes from the perspective of not only challenging universalisms and the risks the latter create in perpetuating overgeneralisations and singular narratives in inherently plural spaces, but to also understanding co-existing pluralism in post-conflict areas. In this manner, legal ecumenism hopefully becomes a vehicle for conceptualising subaltern cosmopolitan transitions of law, through the enabling of spaces for diverse projects of emancipation, facilitated through the mutual respect of co-existing socio-legal orders.

[17] ibid, at 8.
[18] See Chapter 2, section 4, infra.
[19] See Chapter 2, section 2, infra.

Against this backdrop, this chapter will be dedicated to unpacking the theoretical backbone of this research, in order to address key questions of my methodological approach. Delving into different theoretical strands, I hope to:

(i) Outline how the trans-jurisdictional diffusion of innovative legal hybrids takes place, and why it is important to internalise diffused legal phenomena to the embedded localities of importer jurisdictions.
(ii) Define legal ecumenism, and highlight how the latter acts as a cosmopolitan legality with the potential of encouraging the subaltern cosmopolitan transition of law (which I will also define).
(iii) Frame the role of national courts in the bottom-up pluralisation of law.

Henceforth, in section 2, I will begin my theoretical analysis by unpacking key sections of Twining's book, "General Jurisprudence: Understanding Law from a Global Perspective"*,* in particular, those which relay his perspective on the diffusion of legal norms across legal orders. Within this section, I will briefly touch upon the works of Alan Watson and Pierre Legrand, to take a critical stance on legal transplants within the broader realm of legal and normative diffusion. In section 3, I will focus on de Sousa Santos' theories of subaltern cosmopolitanism and build upon his concept of legal ecumenism by inferring from the context of his third edition of "Towards a New Legal Common Sense: Law, Globalization and Emancipation".[20] As the final theoretical prong, section 4 reflects on theories of global law and global justice which have been mapped out by Walker, in his "Intimations of Global Law".[21] Whilst the main substantive sections will be dedicated to unpacking these theories, section 5 will summarise the influences of these key theories on the overall construction of this theoretical framework, which investigates bottom-up approaches towards the pluralisation of global law, within thematic frameworks of promoting cosmopolitanism and decoloniality. Thereafter, the final concluding chapter will turn to a reflection on my positionality in approaching this research, as a preface to the unfolding investigation, by touching upon theories of utopianism, and the construction of a utopian mindset.

2. Lessons from Twining: the diffusion of norms across legal orders

Understanding general jurisprudence from the global perspective is an inherently complex task. Where Twining has asserted that legal academic culture has tended to perpetuate a Western bias, with tendencies to be 'state-oriented, secular, positivist, 'top-down', Northo-centric, unempirical, and universalist in respect of morals,'[22] globalisation has challenged this narrative. Instead, globalisation has highlighted the increasing interconnectivity of economies and world cultures, and that in order to paint a more realistic (yet more convoluted) picture of general jurisprudence, we must look beyond our ethno-centric narratives of law. Globalisation has furthermore encouraged us to investigate general jurisprudence through a socio-legal lens,

[20] de Sousa Santos, 'Toward a New Legal Common Sense: Law, Globalization, and Emancipation' (n 12).
[21] Neil Walker, *Intimations of Global Law* (Cambridge University Press 2015).
[22] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009), at 6.

as '[d]ifferences in respect of cosmologies, values, political ideologies, cultures, and traditions are part of the essential background in understanding law.'[23] In adopting such an approach, cosmopolitan visions of law are particularly advantageous, in the manner in which they encourage a construction of general theories or frameworks 'beyond "modern" or "Western" societies to cover the whole world.'[24] A cosmopolitan jurisprudence would thus confront universalist conceptions of law, and if conceived within the Kantian cosmopolitan ideology of pursuing the 'highest good", would embrace plurality and diversity, on the basis of striving for fair and equitable representation within law.[25]

As one of the central components to this theoretical framework, I rely on Twining's theory which outlines the diffusion of legal norms across jurisdictions, to conceptualise the pluralisation of law, amidst the tensions with constitutionalism. Accordingly, and against this backdrop, section 2.1 unfolds what is meant by the diffusion of legal norms, and how pathways for diffusion may be traced within global legal frameworks situated beyond their ethno-centric biases. Thereafter, section 2.2. foreshadows the risks of legal transplants, highlighting that whilst legal norms may be diffused across jurisdictions, cosmopolitan transitions require the creation of bespoke legal solutions, tailored to the embedded cultural, historical, and social localities in which they are found.[26] Although subaltern cosmopolitanism will be explained in more depth in section 3, cosmopolitanism broadly, refers to a project for promoting inclusion and participation.

2.1. Revisiting pathways for diffusion

Globalisation reveals the true intricacies of global governance, in which interconnecting hierarchical and heterarchical structures complicate the tracing of legal diffusion. Albeit slightly naïve, the traditional (Western-centric) global legal systems and subsystems (formal and informal) assumed that the diffusion of legal norms pertained to an action whereby one country – typically an "advanced" civil or common law legal system, usually identifiable as a hegemonic or colonial empire – transfers 'legal rules or institutions though the agency of governments involving formal enactment or adoption at a particular moment in time (a reception date) without major change.'[27] The institution of these legal norms were assumed as diffused to "less developed" or colonial countries, in order to 'bring about technological change ('to modernise') by filling in gaps or [by] replacing prior local law.'[28] Whilst there is some truth to this perspective (and was in fact a common practice of colonial empires in the subjugation of countries during colonialisation), it is but one perspective/pathway for diffusion, which fails to capture the larger, and more complicated, global diffusion network. Twining henceforth recognises, but does not define as absolute, a more complex

[23] ibid, at 8.
[24] William Twining, 'A Post-Westphalian Conception of Law' (2003) 37 Law & Society Review 199, at 204.
[25] Lorena Cebolla Sanahuja, Toward Kantian Cosmopolitanism (Springer 2017), at Chapter 6.
[26] Pierre Legrand, Negative Comparative Law: A Strong Programme for Weak Thought (Cambridge University Press 2022); Pierre Legrand, 'On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations' (2002) 10 European Review of Private Law 61.
[27] Twining, 'General Jurisprudence: Understanding Law from a Global Perspective' (n 22), at 277.
[28] ibid.

mapping which situates the diffusion of legal phenomena from a global perspective, in the following manner:

(i) Sources of diffusion are vast and can occur omnidirectionally: from a single exporter to various destinations, from a single exporter to multiple sources, or from multiple sources to multiple destinations.

(ii) Diffusion does not only take place from one national legal system to another, but instead, may follow other horizontal paths of diffusion (e.g., 'regional-regional or sub-state local-local'[29]), across different levels of ordering and geographical locations.

(iii) The legal phenomena subject to diffusion are not necessarily just strict legal concepts and legal institutions, but may include 'any 'legal' phenomena or ideas'. Importantly, this broader conceptualisation would therefore include cultural variations of legal phenomena, such as those from informal legal orders which are not formally recognised by national/international law (e.g., some traditional knowledge/indigenous customary practices).[30]

(iv) Whilst some agents of diffusion may be governments, they are not the only ones. Instead, agents of diffusion include 'colonists, missionaries, and merchants' or 'slaves, refugees, believers, and jurists'[31] These actors make it possible to diffuse legal phenomena through alternative, informal means – as opposed to forms of formal enactment or adoption, such as the passing of legislation – including through literature, or oral traditions such as storytelling.

(v) Whilst diffusion has traditionally moved from developed/Western countries, to less developed/non-Western countries, this is not the only pathway. Alternatively, diffusion may occur between less developed countries, or from less developed to developed countries.

(vi) It is unlikely that diffused law will wholly replace prior law of the reception source. However, it may add, adapt, or replace segments of the pre-existing local law.[32]

Pathways for diffusion can be infinitely conceived depending on the conceptualisations and intentions of diffusion, and therefore, each approach must be viewed as unique and variable in accordance with its context-dependent circumstances.

Taking into consideration the methodology outlined in chapter 1,[33] I will trace the diffusion of legal norms between national courts in jurisdictions formerly subjected to colonial domination, specifically, Aotearoa New Zealand, Colombia, and India. The tensions between hegemonic and counter-hegemonic segments of society in these jurisdictions give rise to contact zones. Accordingly, these jurisdictions fall under Twining's idea of non-Western countries, on account of being hubs and sources for non-Western epistemologies and ontologies. In accordance with Twining's revised mapping of global norm diffusion, I trace the diffusion

[29] ibid, at 280.
[30] Vermeylen (n 10).
[31] Twining, 'General Jurisprudence: Understanding Law from a Global Perspective' (n 22), at 282.
[32] ibid, at 280-283.
[33] See Chapter 1, section 2, supra.

of legal norms between these jurisdictions, including broad cultural variations of legal norms from formal and informal legal orders. Within the overarching narrative of conceptualising a bottom-up pluralisation of law, I will therefore be tracing the diffusion of innovative legal hybrids across contact zones, to first understand the degree to which importer jurisdictions integrate – rather than replace – these norms within the pre-existing legal order, and second, the extent to which the latter facilitates legal ecumenism. Before moving onto the second theoretical prong – which conceptualises legal ecumenism in connection with the creation of innovative legal hybrids, and the role of this legal concept in envisaging a (subaltern) cosmopolitan transition – the following section will briefly expand upon the risks of diffusing legal transplants.

2.2. The limitations of legal transplants

In what has been described as a "sub-discipline" of comparative law,[34] legal transplants are a widely discussed field of law, the origins of which have primarily been attributed to Otto Kahn-Freund and Alan Watson. However, and whilst both authors were intent on 'revitalising comparative law as a discipline', to compare legal systems beyond the cataloguing of their similarities and/or differences,[35] their approaches to legal transplants are opposing.[36] Where 'Kahn-Freund was particularly concerned about the use of legal comparison as a tool for law reform, and thus his application of the term transplantation was a deliberate effort to evoke the complications and hazards of transferring part of one living system to another. Watson, by comparison, was untroubled by the idea of legal rules moving across jurisdictional boundaries.'[37] This latter scholar, who defined legal transplants as a methodology of norm diffusion in which a rule is moved 'from one country to another, or from one people to another',[38] eschewed the belief of law as a social-cultural norm. Moreover, within his diffusion-based theory, Watson relayed legal transplants as one of the reasons for normative change occurring in other legal systems, owing to the exportation of legal models from one legal order to the other. In their simplest form, he believed legal transplants to be a relatively straight-forward method of norm diffusion that speaks to a broader framework of the continual borrowing of rules,[39] in which norms can travel easily owing to the assumption they 'are not a reflection of society.'[40] Conversely there are those – the *culturalists*[41] and *contextualists*[42] - who argue that 'for a transplant to be

[34] For more in-depth summaries of legal transplants as a sub-discipline of comparative law, see: John W Cairns, 'Watson, Walton, and the History of Legal Transplants' (2012) 41 Georgia Journal of International and Comparative Law 637; Margit Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 63 The American Journal of Comparative Law 583; William Twining, 'Social Science and Diffusion of Law' (2005) 32 Journal of Law and Society 203.
[35] See Chapter 1, section 3, supra.
[36] Toby S Goldbach, 'Why Legal Transplants?' (2025) 15 Annual Review of Law and Social Science 583.
[37] ibid; Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1, at 5.
[38] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993), at 21.
[39] ibid, at 107.
[40] Goldbach (n 36), at 592; Alan Watson, 'From Legal Transplants to Legal Formants' (1995) 37 American Journal of Comparative Law 469.
[41] Annelise Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005) 53 Buffalo Law Review
[42] Twining 'Social Science and Diffusion of Law' (n 34); Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 Maastricht Journal of European and Comparative Law 111.

successful, the transplanted law must "fit" with the "institutional context in which justice is administered in a particular country.'[43] This view is more aligned with the position of Kahn-Freund, who moreover, influenced Pierre Legrand and his strong critique of Watson's transplant thesis. In fact, when picking apart Watson's thesis from a critical lens, the practical application of legal transplants can be controversial when considering, what Legrand has termed, *the unbearable localness of law*.[44] Legrand finds particular contention with Watson's transplant thesis, where the latter has dismissed the interconnections between law and society, attesting that '[c]hange in the law is independent from the workings of any social, historical, or cultural substratum; it is rather – and rather more simply – a function of rules being imported from another legal system.'[45] In what appears to be a whole-hearted rejection of Watson's transplant thesis, Legrand criticises the limitations of legal transplants in being able to fully capture a representative mapping of the interactions between legal orders. Legrand criticises Watson's proposition that one set of legal norms (most likely those created within Western legal constructs) can be universally applied, irrespective of other jurisdictions' societal variabilities. He furthermore rejects Watsons's refusal to perceive law as a social construct - shaped by local social, historical, and cultural externalities -, and his assertion that legal transplants are 'considered in isolation from society' and are therefore easily transplantable.

Recognising the binary created by the contrasting visions of Watson and Kahn-Freund (and moreover with Legrand), it is important to emphasise that legal transplants discourse has developed between these two poles, rather than wholeheartedly subscribing to one or the other. One example includes Teubner's understanding of 'legal irritant', which sits precisely between these two ideals to explain how some legal systems are more likely to undergo forms of transplant, compared to others.[46] Reflectively, the development of legal transplant literature appears to be aligning more with the *culturalist* perspective mentioned above, 'under which outmoded legal formalism was replaced by realist, socio-politico-culturalist theories that consider law as a living social construct'.[47] Moreover, 'legal culture was offered as a key determinant of the viability of transplantation; complete isolationism and hermeneutical closeness were replaced by a vision of law as rooted in this cultural/social framework, but also amenable to various influences among them foreign ones.'[48] Whilst it is outwith the scope of this thesis to track the various ways in which legal transplants have been studied, I would like to emphasise the various directions in which transplantations have been traced, and the possibilities for various exporters of legal norms, who can transplant partial or full legal systems. In this regard, it is essential to conceive legal transplants discourse beyond its dichotomies, to understand it rather as a discourse existing fluidly on a spectrum of characteristics. One method for comprehending this complex web of transplants, as provided for clearly by Margit Cohn, was through the mapping of

[43] Goldbach (n 36), at 592.
[44] Legrand, 'Negative Comparative Law' (n 26).
[45] Pierre Legrand, 'The Impossibility of "Legal Transplants' (n 42), at 112.
[46] Margit Cohn, 'Legal Transplants: A Theoretical Framework and a Case Study from Public Law' in Mathias Siems and Po Jen Yap (eds), The Cambridge Handbook of Comparative Law (Cambridge University Press 2024), at 428; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 The Modern Law Review 11.
[47] Cohn (n 46), at 428.
[48] ibid at 428.

transplantation processes across a set of typologies. For example, Cohn organised a mapping of transplants under a set of typologies ordered by sovereignty (the freedom of choice of the transplant, from colonial imposition to innovation), by motivation (ranging from good faith to malice), and by outcome (relating to the various forms of conformity with the originally transplanted rule).[49]

However, and despite the critiques, I want to highlight some examples of how legal transplants have in practice, led to the replication of legal norms in reception jurisdictions - to more or less successful degrees – in the field of international environmental law. Jonathan B Weiner has discussed how some developments of climate change treaties can be attributed to the vertical legal borrowing, or *transplantation,* of legal phenomena from national law.[50] In particular, he discusses how regulatory concepts of integration and incentivisation integrated within the 1992 United Nations Framework Convention on Climate Change (UNFCCC),[51] and the 1997 Kyoto Protocol,[52] were taken from national law. Where integration meant the inclusion of '(1) a comprehensive scope addressing not only energy-sector CO_2 but also the sources and sinks of all major greenhouse gases (including CO_2, methane, nitrous oxide, and several other gases)' incentivisation mechanisms included '(2) flexible market-based incentive systems that allow voluntary reallocation of national emissions limits, including "joint implementation," "emissions trading," and the "Clean Development Mechanism" (CDM).'[53] Wiener demonstrates how these mechanisms were integrated into these climate change treaties by borrowing from the national environmental law of countries, such as Canada, New Zealand, and the United States. To expand on the latter example, Wiener highlights how the UNFCCC embraced the suggestions of the United States' Department of Justice in 1989 to adopt a comprehensive approach and implement a scheme for emissions trading. Ultimately, these ideas fed into Articles 3[54] and 4[55] of the UNFCCC, respectively.[56] Moreover, the Kyoto Protocol[57] adopted provisions for emissions trading, in response to the insistence of the Clinton administration. Whilst Wiener focusses on the vertical legal borrowing relating to climate change treaties, he also highlights elsewhere to other

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[49] ibid, at 427- 441.

[50] JB Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2001) 27 Ecology Law Quarterly 1295.

[51] United Nations Framework Convention on Climate Change (9 May 1992) 1771 UNTS 107, (1992) 31 ILM 851.

[52] Kyoto Protocol to the United Nations Framework Convention on Climate Change, (10 December 1997), 2303 U.N.T.S. 162.

[53] Wiener (n 50), at 1309.

[54] For example, Article 3 includes that '[t]he Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.' See: UNFCCC (n 51), Art. 3(3).

[55] Moreover, Art 4 includes provisions for emissions trading, and the recognition of such to be jointly implemented by parties. See ibid, Art. 4(2(a)).

[56] Wiener (n 50), at 1312.

[57] See: Kyoto Protocol (n 52), at Art. 6 & 17, and also Art. 12 for the integration of the Clean Development Mechanism.

suspected instances in which international environmental law has borrowed from national law, in the following:

> 'Vertical legal borrowing has also been observed from time to time in international environmental law, though again without the depth of analysis that comparativists have accorded to transnational legal borrowing. For example, the precautionary principle was borrowed from German law ("Vorsorgeprinzip") into international treaties on marine pollution, and later into treaties on atmospheric pollution. The treaty recently negotiated on Persistent Organic Pollutants (POPs) borrows from the Swedish approach to "sunset" periods for toxic chemicals. One review suggests that the "concept of the [World Heritage Convention] can be partially credited to an American Russell Train", who suggested expanding the U.S national parks systems into a worldwide network. That review also suggests that the 1973 Convention on International Trade in Endangered Species (CITES) was conceived by the United States at the same time that the U.S. developed its domestic Endangered Species Act. On the other hand, the same review argues that although the U.S. spurred negotiation of the London Convention on ocean dumping, this treaty was ultimately patterned on a regional treaty rather than on U.S. law. None of these discussions, however, explains why the international treaty drafters borrowed from national law (rather than drawing their ideas from other places), nor do they address when such vertical borrowing is desirable'.[58]

In another example, and in a similar vein to the research conducted herein, Mrinalini Shinde - who engaged in a functional comparative methodology - used a case-based approach to map some of the legal transplantations of the legal personhood of rivers.[59] Through this approach, Shinde traces key judicial decisions across a variety of jurisdictions to demonstrate how legal transplantation has contributed to 'an emerging transnational jurisprudence regarding the rights of rivers as legal persons, and the rights of nature, providing similar functions of protecting and trusteeship over the natural resource and personality of the river.'[60] Importantly, Shinde highlights that the legal transplantations have led to the diversification of the jurisprudence recognising the legal subjectivity of rivers, and not the convergence of legal systems, or harmonisation of laws.[61] Whilst I align with Shinde's analysis which highlights how these "legal transplants" have led to a diversification of legal phenomena I would however like to emphasise that I find particular contention with the concept of legal transplants, similarly to Legrand – as seen below -, and will therefore be using the terminology *judicial exchanges, diffusion* and *trans-jurisdictional changes.*[62]

Turning back to Legrand's contestation, he speaks to the idea of law as a socially malleable construct, one which is moulded to the importer's social, historical, cultural, and epistemological local environment, and one which may furthermore be diversely construed in accordance with the interpreter's cultural code.[63] When speaking of the unbearable localness of law, Legrand expounds the idea that law can be pluralistically

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[58] Wiener (n 50) at 1307.
[59] Mrinalini Shinde, 'Legal Transplants as Seen in the Comparative Analysis of Judicial Decisions on the Environmental Personhood of Rivers' (2021) 7 RGNUL Student Research Review 85.
[60] ibid, at 107.
[61] ibid.
[62] See Chapter 1 section 4, supra.
[63] Legrand, 'The Impossibility of "Legal Transplants' (n 42), at 114-115.

conceived – as legal norms and doctrines become diversified in response to these social, historical, and cultural localities - in essence, rejecting universalised conceptions of law. In this vein, I agree with Legrand's proposition on the impossibility – or in my opinion, the unsuitability – of legal transplants,[64] as they forego meaningful engagement with '[d]ifferences in respect of cosmologies, values, political ideologies, cultures, and traditions...' which are essential to understanding law, from a global (and comparative) law perspective.[65] Furthermore, when scrutinising legal transplants in accordance with the "travelling well" concept explored by Twining – which relates to the ability of concepts (i.e., legal phenomena) to transcend legal and cultural orders in a cross-cutting manner, leading to their inevitable integration[66] - legal transplants appear limited in their diffusion capabilities, as their universalistic tendencies stunt their ability to permeate historical and cultural barriers. Legal transplants appear ill-equipped – at least in this context – to deal with the required diversity and plurality demanded by theories of cosmopolitanism at the global level.

Taking into consideration Twining's theories on the diffusion of legal norms, and also, Legrand's critique on the transplant of legal norms, I take this moment to iterate their contributions to this theoretical framework. Which, to conceptualise a more nuanced understanding of legal pluralism through legal ecumenism, it is key to understand the capacity of diffused innovative legal hybrids to become bespoke legal mechanisms. Bespoke in this context relates to the ability of innovative legal hybrids to accommodate and mould themselves to fit within importer jurisdictions' social, historical, cultural, and epistemological localities. Stressing the limitations of legal transplants, and their perpetuation of top-down impositions of legal norms, innovative legal hybrids created as bespoke legal mechanisms, maintain the prospects for facilitating the bottom-up pluralisation of law. The latter hence becomes an important analytical benchmark for the facilitation of legal ecumenism.

At this juncture, I now turn to the second prong of this theoretical framework, which focusses on unpacking a working definition of legal ecumenism, inferred from Santos' work. Within this section, I will rely on Santos' conceptualisation of subaltern cosmopolitanism and the creation of cosmopolitan legalities, to understand the role of the latter in facilitating legal ecumenism, and in turn, the emancipation of oppressed classes in contact zones.

3. Santos and subaltern cosmopolitanism: the desire for legal ecumenism in contact zones

In the third edition of "Towards a New Legal Common Sense"*,* Santos discusses law's emancipatory potential, in the era of post-modernity characterised by neoliberal globalisation. Relying on world-system-

[64] ibid, at 114.
[65] Twining, 'General Jurisprudence: Understanding Law from a Global Perspective' (n 22), at 8.
[66] ibid, at 43.

theory and structuralist approaches,[67] Santos portrays globalised power structures as reproducing asymmetrical hierarchical relationships between core, semi-peripheral, and peripheral countries. Previously in chapter 1, I discussed the impacts of colonialism on the creation of asymmetrical relationships between countries, and how the latter has shaped the definitional concepts of the Global North and Global South. Noticeably, the terminology of core, semi-peripheral and peripheral countries builds upon the latter, but is shaped through an economic lens. Therefore, in summary...

> ...'core countries tend to be the wealthiest, most technologically advanced, most industrialized, and most powerful both economically and militarily. Periphery countries have the least-diverse economies, the lowest level of industrial and technological development, and a less-skilled workforce. Semi-periphery countries occupy the space between these two extremes.'[68]

In this regard, the terminology of core has often been referred to in connection with the Global North, whereas peripheral has been connoted with the Global South. The terminology for semi-periphery henceforth fluctuates between the two.

In Santos' conceptualisation of a globalised world, he advances the proposition that 'there is no genuine globalism', and that '[u]nder the conditions of the modern world system, globalism is the successful globalization of a given localism.'[69] Santos hence illustrates two different ways in which globalisation can shape the structures of the modern world system, which are in themselves, two sides of the same coin. The first side, which I touched upon in chapter 1,[70] relates to the process of globalised localism*,* in which 'a given local phenomenon is successfully globalised' and transformed into the global normative standard. On the other side of the coin, localised globalisms describes the ability of transnational practices to impact local conditions, and create localisations based on the integration and adaptation of transnational norms at the local level.[71] Santos relates these processes of globalisation to the production of global social asymmetry, highlighting the tendencies of core countries to perpetuate - and often benefit from - globalising Western localisms. Conversely, peripheral and semi-peripheral countries in turn, are placed at the receiving end of localised globalisms.

Relying on the theoretical framing of global social asymmetry, Santos perceives the globalised world as inherently unbalanced and predominantly Western. In fact, Santos describes the modern world system as having experienced forms of 'globalisation from above' or, 'hegemonic globalisation', as a consequence of the globalisation of Western localisms. Accordingly, Santos' theoretical framing relays how the West has predominantly set global normative standards, and shaped societal and institutional structures accordingly. Globalised localisms can therefore be related to the universalisation of Eurocentric/Western narratives and

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[67] Walter L Goldfrank, 'Paradigm Regained? The Rules of Wallerstein s World-System Method' (2000) Journal of World-Systems Research 150.
[68] 'World Population Review: Semi-Periphery Countries 2024' <https://worldpopulationreview.com/country-rankings/semi-periphery-countries> accessed 20 January 2025.
[69] de Sousa Santos, 'Toward a New Legal Common Sense: Law, Globalization, and Emancipation' (n 12), at 213.
[70] See Chapter 1, section 4.1, supra.
[71] de Sousa Santos, 'Toward a New Legal Common Sense: Law, Globalization, and Emancipation' (n 12), at 215.

normativities, and consequentially, the creation of asymmetrical relationships of power between core and semi-/peripheral countries. The latter asymmetry has been measured against experiences of social inclusion and social exclusion. More specifically, the dynamics of asymmetrical relationships of power often finds core countries experiencing higher degrees of hyper-inclusion, whereas peripheral countries experience higher degrees of social exclusion and marginalisation.[72]

Santos creates an illustration of social exclusion between countries through his portrayal of the stratified civil society. As a brief contextualisation, Santos recognises three variations of civil society: the intimate, the strange, and the uncivil civil society. If all three groups were depicted as situated within concentric circles with the core representing the state, and if the civil societies are closer to the state (the core of the concentric circles), they experience higher levels of social inclusion. The first concentric circle around the core represents the intimate civil society, who enjoy the highest levels of social inclusion by having access to and enjoying all levels of rights (i.e., civil and political, socio-economic and cultural rights) and close access to economic markets and public resources. Moving outwards to the second concentric ring, we see the strange civil society, who with further distance from the state, experience a mix of social inclusion and exclusion. The strange civil society therefore have less access to rights compared to the intimate civil society (mainly accessing civil and political rights, with less access to socio-economic and cultural rights). At the outer-most ring which represents societies with the most pervasive forms of social exclusion, and little to no access to rights, the uncivil civil society are found.

As an approach to combat the hierarchical asymmetries he identifies and decries, Santos advocates for the necessity of a counter-hegemonic approach to globalisation, to emancipate the subaltern from entrenched forms of social exclusion. Subaltern cosmopolitanism – which builds upon cosmopolitan transitions of law, with a focus on the ability of legal tools, known as (subaltern) cosmopolitan legalities, to promote the inclusion of marginalised and oppressed sectors of society[73]- offers a space for the inclusion of subaltern emancipatory projects. For context, the terminology "subaltern" has been coined in postcolonial studies, with particular reference to the writings of Italian Marxist philosopher Antonio Gramsci (1891-1937), and more recently in Gayatri Chakravorty Spivak's "Can the Subaltern Speak".[74] Specifically, '[t]he term subaltern refers to any person who is subordinated due to their community, caste, class, race, ethnicity, physiology, gender, sexual orientation etc.,'.[75] At this point, Santos' analysis informs this theoretical framework, especially his understanding of cosmopolitan legalities – in the form of legal ecumenism – to promote emancipation in so-called contact zones. To explain the latter point, section 3.1 will firstly contextualise contact zones, and their relevance for this research, and secondly, section 3.2 will define legal

[72] For more information on the stratified civil society, see ibid, at 542-544.
[73] For a more in-depth analysis of the conditions in which cosmopolitan legalities can occur, see ibid, at 553-559.
[74] Gayatri Spivak, 'Can the Subaltern Speak', (1988), 14 Die Philosophin 27, 42-58.
[75] For more information on the definition of subaltern in connection with the post-colonial critique see: Anand Maurya, 'Spivak: Making of the Subaltern' (30 June 2022) accessed 2 July 2024; Gayatri Spivak, '"Can the Subaltern Speak?" Revised Edition, from the "History" Chapter of Critique of Postcolonial Reason' in Rosalind Morris (ed), Reflections on the History of an Idea (Columbia University Press 2010).

ecumenism, and how it acts as a cosmopolitan legality. Thereafter, before turning to our final theoretical prong in section 4, I will take a moment in section 3.3 to highlight that whilst courts have not remained unscathed from globalised Western localisms, they can play a pivotal role in subaltern cosmopolitan transitions, an example of which is the focus of this thesis: by facilitating legal ecumenism(s).

3.1.Emancipation in the contact zones

As briefly mentioned in chapter 1,[76] contact zones are spaces in pluralistic societies, in which 'rival normative ideas, knowledges, power forms, symbolic universes, and agencies meet in unequal conditions and resist, reject, assimilate, imitate, subvert each other giving rise to hybrid legal and political constellations in which the inequality of exchanges are traceable.'[77] Unequal exchanges are a consequence of the interactions between diverse social groupings, and because of their dominant or subordinate social standings (e.g., the state vis-à-vis indigenous groups/local communities), they experience varying degrees of conflict with one another, which in turn, are reflected in their asymmetrical relationships of power. Contact zones are spaces of striking plurality, characteristic of cultural clashes between hegemonic and subaltern groups and competition between normative ideals, political and legal cultures, and ideologies.

Authors such as Mary Louise Pratt, in her book "Imperial Eyes", has made explicit the impact of colonialism and imperialism on the creation of contact zones, highlighting the latter as…

> '…social spaces where disparate cultures meet, clash, grapple with each other, often in highly asymmetrical relations of dominations and subordination – like colonialism, slavery or their aftermaths as they are lived out across the globe today…the space of colonial encounters [as] the space in which peoples geographically and historically separated come into contact with each other and establish ongoing relations, usually involving conditions of coercion, radical inequality, and intractable conflict.'[78]

Pratt makes clear the inextricable link between colonialism and the creation of contact zones. In this regard, it is indisputable that colonialism has entrenched conflicts between pre- and post-colonial social and legal orders through the importation of colonial empires' legal orders into colonised jurisdictions, which has acted as a method of exerting control and subjugation of counter-hegemonic societies by replacing prior law. Santos, however, perceives this formulation of contact zones as too stark of a contrast between competing cultures, insofar as it denies any common ground between their rival normativities. Whilst Santos does not deny the impact of colonialism on the creation of unequal exchanges between hegemonic and counter-hegemonic groups, he asserts that contact zones 'may involve selected and partial cultural differences, the ones that in a given time-space find themselves in competition to provide meaning for a given course of action.'[79] Additionally, Santos attests that these unequal exchanges extend well beyond the colonial era, as its aftermath still impacts postcolonial societies – perhaps in a less explicit manner – today.

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[76] See Chapter 1, section 1 and 4, supra.
[77] de Sousa Santos, 'Toward a New Legal Common Sense: Law, Globalization, and Emancipation' (n 12), at 560.
[78] Mary Louise Pratt, *Imperial Eyes* (Routledge 1992), at 4-6.
[79] de Sousa Santos, 'Toward a New Legal Common Sense: Law, Globalization, and Emancipation' (n 12), at 559.

In this regard, Santos adopts a slightly softer definition of contact zones, which recognises the unequal power distribution, but perceives contact zones as 'social fields in which different movements/organizations meet and interact to reciprocally evaluate their normative aspirations, practices and knowledges'.[80] Based on the latter conceptualisation, and with the intentions of furthering a counter-hegemonic project to globalisation, Santos perceives contact zones as spaces for the interaction and articulation of diverse normative visions. By translating contradictory perspectives through cross-cultural dialogues accordingly, these divergent societies can become so-called *cosmopolitan contact zones,* by working towards aspirations of shared authority.[81]

Considering these two definitions in tandem, this research finds itself situated between both conceptualisations of contact zones. On one hand, this research does indeed look at the creation of unequal societal and legal structures between social groups inherited from colonialisation (reflected in the chosen case studies). This research therefore aligns with Pratt's understanding of contact zones, insofar as the latter are spaces characterised by unequal exchanges, asymmetrical power relations, and frequent social exclusion of subordinate – or subaltern - social groups due to the domineering presence of hegemonic groups (and their cultures, epistemologies, ontologies, and cosmovisions). Building upon this, and on the other hand, I also agree with Santos's analyses that cultural clashes within contact zones may manifest in more nuanced fashions, through partial cultural differences as opposed to incompatible polarities between social cultures. They are hence viewed as spaces in which cross-cultural dialogues may take place. In turn, and through these dialogues, conflicting social groups within contact zones may work towards versions of shared authority,[82] to further forms of subaltern cosmopolitanism or decoloniality. It is therefore in this context where legal ecumenism becomes key, and will therefore be discussed as a cosmopolitan legality in the following section.

3.2. Legal ecumenism as a cosmopolitan legality

Legal ecumenism, albeit not defined by Santos, can be contextualised by looking at the origins of the word ecumenism itself. Ecumenism – or interdenominationalism - is the theology of promoting unity and cooperation between different denominations of Christianity. At its core, unity does not mean uniformity, but rather, speaks to the importance of recognising and respecting fundamental differences between denominations of Christianity, in an effort of promoting their cooperation and co-existence.[83]

Legal ecumenism draws inspiration from this notion – and in the context of promoting forms of subaltern cosmopolitanism – I define as the aspiration for a mutual acknowledgement and non-dogmatic co-existence between hegemonic and counter-hegemonic worldviews, epistemologies and ontologies that coexist in

[80] Boaventura de Sousa Santos, 'The Future of the World Social Forum: The Work of Translation' (2005) 48 Society for International Development 15, at 20.
[81] ibid, at 20.
[82] Janet Conway, 'Cosmopolitan or Colonial? The World Social Forum as 'contact Zone' (2011) 32 Third World Quarterly 217.
[83] 'Ecumenism | Definition, Christianity, History, Importance, Examples, & Facts | Britannica' accessed 21 May 2024.

plural societies, such as contact zones. Framed as a cosmopolitan legality – or what will be known as, an innovative hybrid legal solution – legal ecumenism will represent the combination of hegemonic and non-hegemonic epistemologies and ontologies in the articulation of legal solutions. As will be explored in more depth in chapter 6, courts are seen as pivotal actors who are in key positions to – ideally – facilitate legal ecumenism when adjudicating concrete disputes that fall before them, where their articulation of innovative hybrid legal solutions, such as rights of Nature, can strike an operational compromise, balancing hegemonic and counter-hegemonic epistemologies and ontologies, accordingly.[84]

Santos frames the relative success of cosmopolitan legalities to promote forms of cosmopolitanism, on account of the ability of these legal tools to encourage forms of inclusion and sociability of subaltern groups (and therefore their subaltern emancipatory projects) in contact zones. Santos therefore categorises different forms of contact zones, labelled violence, co-existence, reconciliation, and conviviality, which represent lower to higher forms of inclusion moving from left to right. To briefly capture these varying notions in turn, *violence* represents contact zones with the lowest forms of inclusion, as spaces in which hegemonic groups are responsible for the subjugation, marginalisation, and destruction of subaltern groups. Moving along the spectrum, *co-existence* are spaces reflective of a cultural apartheid between divergent groups. Within these contact zones, hegemonic and counter-hegemonic societies co-exist, however, forms of cultural cross-fertilisation between these groups are discouraged or prohibited. *Reconciliation* are contact zones which demonstrate greater degrees of inclusion and sociability, on the basis of instituting mechanisms of restorative justice, to reconcile past grievances between hegemonic and counter-hegemonic groups. Then finally, *conviviality* are contact zones which achieve the highest forms of inclusion, by striving for forms of future-oriented reconciliation, which not only resolves past grievances, but encourages forms of shared authority and equality between groups. Contact zones reflective of *conviviality* can hence be associated with what Santos recognised as the cosmopolitan contact zone.[85]

At the risk of stating the obvious, it is clear that forms of subaltern inclusion range widely across this spectrum, with subaltern exclusion experienced strongest within zones of violence. Conversely, the highest forms of inclusion and sociability, of subaltern groups and therefore their subaltern projects of emancipation, are found in zones of conviviality. With the intent of encouraging (subaltern) cosmopolitan transitions of law, cosmopolitan legalities which promote forms of restorative justice (reconciliation), or even – more ambitiously – future-oriented forms of shared authority (conviviality), are therefore most desirable. This latter form of legal ecumenism is understood as especially suitable for promoting lasting forms of decoloniality.

[84] See Chapter 6, section 2, infra.
[85] de Sousa Santos, 'Toward a New Legal Common Sense: Law, Globalization, and Emancipation' (n 12), at 559-561.

Considering the focus of this thesis is to investigate the pivotal role of national courts in the subaltern cosmopolitan transition of law, the following section will discuss the capacity of courts to facilitate, or impede, agendas of counter-hegemonic projects of emancipation.

3.3. Courts as hegemonic or counter-hegemonic legal agents?

Within the context of globalisation, Santos makes note of the increasing protagonism of courts, and the 'global call for the rule of law and the reform of judicial systems.'[86] In so doing, he questions whether this demand on the judicial system is part of the hegemonic agenda, or whether, courts are, or can, play a role in counter-hegemonic projects against globalisation. Within this context, Santos has highlighted that some courts in semi-peripheral and peripheral jurisdictions, are exposed to external pressures from 'global hegemonic institutions and countries.'[87] The latter has been recognised as forms of high intensity globalisation, and include examples of international assistance provided by the World Bank, USAID, and other American institutions, to Central and Eastern Europe. In particular, these institutions have exerted external pressures on these countries, by investing in democracy and rule of law programmes within these regions to create a reliance on law and the judicial sector, by boosting the market economy through 'economic reform, privatization, marketization and contractualization.'[88] As a consequence, the 'legal and judicial reforms [in Central and Eastern Europe] are being driven by strong international pressures – a form of high-intensity globalization, for which, especially in the economic legal field, American law, rather than continental European law, provides the model.'[89] Nevertheless, recent problems relating to compliance in both Poland (under the prior conservative-nationalist government) and Hungary hint towards the shallowness of rule of law reforms brought about by high-intensity globalisation pressures. For example, both countries have demonstrated degrees of resistance towards rule of law related rulings issued by the Court of Justice of the European Union (CJEU) and the European Court of Human Rights, leading the Polish government to defy both the European Commission and CJEU, 'by referring the matter to the Constitutional Court [who later] declared, in October 2021 that the Court had exceeded its powers and that the EU Treaty is partly incompatible with the country's constitution.'[90] While these tensions have eased now in Poland, under the new liberal, pro-European government, they pervade in Hungary and start emerging in other EU Member States, like Slovakia and Austria, where similar illiberal pulsions have promoted conservative-nationalist coalitions to government. There is thus a point to be made about the potential conflicts that may arise when external pressures are at odds with the internal demands of reception countries. Recognising such, Santos even contrasts the legal and judicial reforms experienced by Central and Eastern European countries with Southern European countries, whose democratic transitions have

[86] ibid, at 370.
[87] ibid, at 375.
[88] ibid, at 381-382.
[89] ibid, at 382.
[90] Eric Maurice, "The Rule of Law: The Uncertain Gamble on Conditionality" (March 13, 2013) <https://www.robert-schuman.eu/en/european-issues/660-the-rule-of-law-the-uncertain-gamble-on-conditionality> accessed January 20, 2025.

instead been assisted by 'domestic resources in response to internally defined needs and aspirations, and with the purpose of reintegrating their legal and judicial systems in the democratic tradition and the continental European legal culture.'[91]

Moreover, Latin American countries have not remained unscathed from the pressures of judicial reform by foreign development policies from the United States, and to lesser degrees, European countries.[92] Noticeably, however, instances of high intensity globalisation have created conflicts with the internal demands for reform in some Latin American countries, as can be exemplified by Colombia's experience with USAID. Within these contexts, in which jurisdictions have been focussing often on their transitions from dictatorship to democracy, reform pressures have been met with resistance, on account of focussing on judicial independence, due process, and ensuring judicial review, and less on improving access to justice.[93] To illustrate the latter point, USAID has been responsible for funding law reform programmes in Latin America since the early 1960's, with a focus on providing political, as opposed to just technical assistance, within the most recent "generation" of law reform programmes. To which, controversially, USAID's 'objectives [are] to promote democracy even against the resistance of the host country.'[94] Emulating a sense of coerced implementation, USAID in dispensing its mandate, has created tensions with the agendas of receptive nation-states, including Colombia. For example, as part of the American agenda to address the war on drugs, increased intervention by USAID has been responsible for putting pressure on the Colombian administration to address said crisis through increased policy creation, which has consequently undermined Colombia's governmental autonomy. One example of the latter includes USAID replacing the Gaviria administration's proposal to allow drug traffickers to turn themselves in in exchange for softer penalties, for an 'all-out repressive strategy aimed against the Cali Cartel'.[95] The conflicts generated between these competing agendas has hence played a role in the failure of most reforms in Colombia.[96]

There is thus a point to be made on the incompatibility of imposing reform programmes from one country to another, through processes of high-intensity globalisation, because of their inability to accurately respond to the internal working dynamics of that country. The latter point can thus be reflected upon in connection with the limitations of legal transplants discussed above[97] by relating the tensions generated by externally imposed legal programmes, to the inability of transposed legal constructs to travel well in different cultural contexts. There is thus a degree of tailoring which is required, resembling that of the judicial and legal reforms in Southern European countries, to respond to the 'internally defined needs and aspirations' of

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[91] de Sousa Santos, 'Toward a New Legal Common Sense: Law, Globalization, and Emancipation' (n 12), at 382.
[92] Santos has noted that Latin America has experienced external pressures (and therefore forms of high intensity globalisation) from many external organisations – including 'USAID, the World Bank, the Inter-American Development Bank, the U.S. Justice Department, the Ford Foundation, and the European Union (collectively through some of its members)' – with USAID international assistance being offered as early as the 1960s. Such programmes focussed on legal education and law reform; legal aid; and, court reform. See ibid, at 387-388.
[93] ibid, at 382.
[94] ibid, at 388.
[95] ibid, at 395.
[96] ibid, at 388.
[97] See Chapter 2, section 2.2, supra.

receptive jurisdictions.'[98] Moreover, the manner in which reform programmes have been imposed, particularly within Latin American countries, can be critiqued for undermining the autonomy of reception countries, and also, for helping establish Western or Eurocentric ideals of democracy as the global normative standard. Taking this point into consideration, the global imposition of rule of law programmes, which have generated specific ideals of democracy and judicial activism in the form of the increasing protagonism of courts, can be described as a hegemonic project of globalisation. We must then consider whether democracy at the global level can be conceptualised as a non-hegemonic project, and if so, whether courts can play a role as counter-hegemonic agents.

Democracy, or more specifically, democratic theory, speaks of '[a] 'symmetrical' and 'congruent' relationship between political decision-makers and the recipient of political decisions.'[99] When theorising the prospects for democracy, in response to the 'global call for the rule of law and the reform of judicial systems',[100] Santos provides two cautioning notes. In the first, he states that 'prospects for democracy will heavily depend on the possibility of democratizing global interactions and social relations', especially in consideration of the asymmetrical relationship of power, and unequal exchanges, created as a result of globalisation. Then in the second, he relays that democracy is a national project, one rooted in the national economy and culture. Therefore, where the 'symmetry and congruence [required by democratic theory] are not re-established at the global level, national democracy will be an endangered species.'[101] Within this context, Santos differentiates between two forms of democracy: representative and participatory democracy. Whilst both subscribe to the basic features of democracy, such as 'political accountability, transparency, protection, and participation',[102] they differ significantly.

Representative democracy on one hand, relates to the system of governance, whereby political representatives in the form of political parties are elected by citizens, to indirectly govern the political community. It is grounded on delivering 'governability and gives priority to the value of freedom over the value of equality'.[103] However, it has been associated with hegemonic globalisation, as a framework which strives towards world capitalism through the promoting of neoliberal economic globalisation and free markets.

Participatory democracy, on the other hand, subscribes to the same basic features of democracy, but is however focussed on ensuring all citizens have access to participate in decision-making processes that directly impact them and their lives. It is hence a counter-hegemonic form of democracy which, 'according to their capacity to empower citizens and achieve social justice…seek[s to work towards] a dynamic equilibrium between freedom and equality.'[104] It hence recognises the systematic harms and social

[98] de Sousa Santos, 'Toward a New Legal Common Sense: Law, Globalization, and Emancipation' (n 12), at 382.
[99] David Held, 'Democracy: From City-states to a Cosmopolitan Order?' (1992) 40 Political Studies 10, at 25.
[100] de Sousa Santos, 'Toward a New Legal Common Sense: Law, Globalization, and Emancipation' (n 12), at 370.
[101] ibid, at 407.
[102] ibid.
[103] ibid.
[104] ibid.

inequalities created as a result of capitalism, and that only 'unified opposition to global capitalism can reduce, if not eliminate, such harm.'[105] However, when conceptualising participatory democracy, Santos relayed that the demands for meeting the latter requires careful consideration of the following:

(1) Striking a careful balance with judicial activism and politics, insofar as judges should be responsive to societal developments in their capacity as law interpreters and appliers, whilst not overreaching in their powers to become law creators;

(2) addressing structural issues which perpetuate systemic harm such as those which have exacerbated global social asymmetry, including, capitalism, or in this context, colonialism;

(3) expanding access to law and justice, including the kind of individuals/groups of individuals, and the types of law and justice they should have access to; and

(4) elevating democracy from the national level, to include international and transnational realms too, in an effort of targeting the apparent systemic injustices and harms.

Recognising both representative and participatory democracy as two oppositional frameworks would however be inaccurate. The reality, in fact, is much more complicated, as democratic frameworks are more likely to fluctuate between these two models, or, be represented as a hybridisation of both. Situating the role of courts within these two democratic frameworks, does however highlight the ambiguity of their role, but also, their reflexivity to promote certain agendas, and factors such as 'scale, time frame and context of political struggles [will] also condition the nature of judicial intervention.'[106] This latter notion has been encapsulated by Santos in the following:

> 'The global focus on the role of law and the judicial system is part and parcel of the hegemonic type of democracy, representative democracy, and as such, it is a form of hegemonic globalization. However, to the extent that subordinate groups across the globe manage to intensify social struggles in such a way as to inscribe the goal of participatory democracy in the political agenda and resort, for that purpose, among other means, to the intervention of courts, the latter will operate as a form of counter-hegemonic globalization.'[107]

On that note, Santos does emphasise that courts are not always central to the broader political strategies of promoting participatory democracy. In fact, depending on the 'political content of the laws to be implemented and the degree of freedom of the judges to interpret them, the patterns of training and recruitment of judges and prosecutors, and the vulnerability of courts to political patronage or to corruption', [108] courts may be part of the political strategy, or actively removed from such. In consideration of the latter, and in the context of this thesis, it is important to stress the *pivotal* role of courts, as agents in

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[105] ibid, at 411.
[106] ibid, at 414.
[107] ibid, at 416.
[108] ibid, at 416-17.

strategic positions to enable, or boycott, counter-hegemonic projects to globalisation. Courts are influenced by their internal agendas, but also by the situational dynamics outlined above, and thus within the context of this thesis, courts are strategically placed to either facilitate, or hinder, certain agendas. Courts motivated by forms of reconciliation, or even better, by conviviality, are therefore better placed to support the facilitation of legal ecumenism, and in turn, counter-hegemonic projects for subaltern cosmopolitanism.[109]

Engaging with Santos's theoretical framings has been crucial in developing a definition of legal ecumenism, whilst also outlining the pivotal role of courts within the context of this thesis. Moreover, this section has highlighted key historical elements which provide the contextual background for this research project, in particular, the impact of colonialism in the creation of asymmetrical relationships of power, and unequal exchanges between hegemonic and non-hegemonic groups. Against this backdrop, I now turn to the final prong of this theoretical framework, which turns to an examination of Walker's theories of global law and global justice, to justify the significance of engaging with constructivist and historical-discursive factors in the operation of law from a global law perspective.

4. Walker's intimations of global law: bottom-up approaches to global justice

In his writings and in his seminars, Twining has often spoken about his avoidance of 'g-words' such as 'global' 'globalising' and 'globalisation'.[110] By creating this rule, he sought to avoid overly general and false – universal, ethnocentric, and simplified - narratives of global law, which have often paid a disservice to the complex web of hierarchical and heterarchical structures contained within our global web of legal systems and subsystems, including non-legal forms of social ordering.[111] These doubts, as noted by Walker, ponder Twining's 'reservations about global law as a closed category [which also] derive from and reflect a more general set of reservations about globalisation as a closed category.'[112] The latter moreover makes a concession to Legrand's more radical stand on the inability of legal norms to move between legal systems through transplantation, on account of being grounded in, and receptive to, their local environments.[113] 'What moved, he [as in, Legrand] argued, were simply decontextualised propositions.'[114] In lieu of Twining's

[109] See Chapter 6, section 2, infra.
[110] Twining, 'General Jurisprudence: Understanding Law from a Global Perspective' (n 22), at 14.
[111] For example, Twining has relayed that 'it is also tempting to assume that different levels of relations and of ordering are neatly nested in a hierarchy of concentric circles ranging from the very local, through sub-state, regional, continental, North-South, global, and beyond to outer-space. But the picture is much more complicated than that: it includes, empires, alliances, coalitions, diasporas, networks, trade routes, and movements; 'sub-worlds' such as the common law world, the Arab world, the Islamic world, and Christendom; special groupings of power such as the G7, the G8, NATO, the European Union, the Commonwealth, multi-national corporations, crime syndicates, and other non-governmental organisations and networks. Talking in terms of vertical hierarchies obscures such complexities. It is especially important for lawyers to be sensitive to the significance of boundaries, borders, jurisdictions, treaty relations, any legal traditions.' See ibid, at 14-15.
[112] Walker (n 21), at 9.
[113] See Chapter 2, section 2.2, supra.
[114] Thomas Horsley, 'Constitutional Reform by Legal Transplantation: The United Kingdom Internal Market Act 2020' (2022) 42 Oxford Journal of Legal Studies 1143, at 1146.

reservations to 'g-words', Walker embarks on a journey to define global law, and to furthermore map the different species of global law and their relationship to various forms of global justice.[115] On this basis, he looks at law beyond the 'insulated 'black box' of doctrine, institutions, culture, and education', and instead traces the expansive – and reflexively evolving – movements of global law. Importantly, he views his analysis from the point that the global legal space is not...

> ...'a series of self-contained and clearly demarcated jurisdictions both between states and their respective municipal laws…and between this general domain of national law and an international law…whose own horizons are limited to the statist point of view…, but [instead,] as a pattern of heavily overlapping mutually connected and openly extended institutions, norms and processes.'[116]

Global law, as perceived by Walker, operates on the margins of transnational law, understood as being more akin to a planetary legal discourse functioning beyond the confines of the state in response to the decentralisation of state sovereignty.

At its base conception, Walker defines global law as 'any practical endorsement of or commitment to the universal or otherwise global-in-general warrant of some laws or some dimensions of law.'[117] The commitment to universality, however, does not indicate that the sources, pathways, and manifestations of global law are solely being drawn from the planetary level (e.g., United Nations), or operating in a top-down fashion (e.g., the universal application – without exception – of international law doctrines such as *jus cogens*). Rather, Walker speaks about the universal or global warrant of laws as having an intimated quality insofar as different visions of global law – which can be variably characterised by their sources, receptivity to their regulatory environment, and their tendencies of promoting legal convergence or divergence, as we shall see below – and how they project specific and unique realities of global justice.[118]

In this section, I will first briefly emphasise the manner in which Walker describes global law as responding to double normativity. Against this backdrop, I will explore the different characteristic visions of law, which promote forms of legal divergence or legal convergence, also known as the "seven species of global law", in section 4.1. Thereafter, I will discuss the compositive orientation to achieving global justice in the form of legal pluralism in section 4.2.

Walker conceives of global law as linked to a double normativity. In connection with the intimated quality of global law, this double normativity refers to the latter's differentiable manifestations, insofar as 'each and every species of global law responds to the diversity of other forms of law by acting upon some of these diverse other forms of law. Each and every species of global law, therefore, is predicated on the existence

[115] Neil Walker, "The Gap between Global Law and Global Justice" in Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press 2017).
[116] ibid, at 16.
[117] Walker, 'Intimations of Global Law' (n 21), at 18.
[118] ibid.

of these diverse other forms of law, and would lack both orientation and traction in their absence.'[119] Double normativity speaks to the varying degrees to which visions of global law are shaped, depending on their ascription to forms of convergence or divergence, or a combination of both. Specifically, Walker describes visions of global law as existing fluidly upon a spectrum of characteristics, in which one side represents stronger senses of convergence, and the other, stronger senses of divergence, and depending on where a vision of global law is situated on this continuum of characteristics, a manifestation of global law will be shaped accordingly.

In its simplistic form, Walker understands visions of global law aligned with convergence-promoting approaches, to 'involve one or both of the attributes of hierarchy and normative singularity', and then divergence-accommodating approaches to be 'characterised by the twin themes of heterarchy and normative plurality.'[120] As we shall see below, a global law approach which balances both forms of divergence and convergence - for example, a hybridised vision of global law which resonates with the historical-discursive species therein - appears particularly advantageous within the context of this research. Such a hybridised vision would accommodate a conceptualisation of global pluralism, which avoids 'unanchored idealism'. Pluralism, conceived as a tangible reality, is a central claim of this thesis. It is one which seeks to understand how the facilitation of legal ecumenism, as a pragmatic compromise between hegemonic and non-hegemonic parties in contact zones, may credibly lead to reconciliation, and aspire, ideally, to conviviality. In this manner, where this thesis argues for a bottom-up pluralisation of global law, it does not argue for unruly pluralism, in awareness of the limitations – or implausibility - of absolute pluralism in any social system, including in global law. Hence, to prevent what Walker denotes as 'an uncompromising normative approach [which] courts the danger of a naïve or hubristic utopianism',[121] striking a careful balance between forms of divergence and convergence is key to unlocking legal compromises, which are central to legal ecumenism.

I will now discuss the seven species of global law, which Walker identifies in his work.

4.1.The seven species of global law

In his intimations, Walker categorised seven species of global law, three convergence-promoting approaches (structural, formal, and abstract-normative), three divergence-accommodating approaches (laterally co-ordinate, functionally-specific and hybrid), and one species which simultaneously subscribes to both convergence and divergence approaches (historical-discursive).

Before turning to a brief description of each global law species in turn, it is important to qualify some of the characteristics of these variations of law depending on their position on the convergence-divergence spectrum. Convergence, at face value, projects ideals of universality, unity, and homogeneity. Depending

[119] ibid, at 132-133.
[120] ibid, at 56.
[121] Walker, 'The Gap between Global Law and Global Justice' (n 115), at 3.

on the degrees to which visions of global law embrace convergence-promoting characteristics, they encourage varying degrees of constitutionality, and convergence (which, going from left to right, is experienced in its stronger to weaker forms), across the structural, formal, and abstract-normative species of global law. Whilst both structural and formal approaches to global law reflect more authoritative and constitutionalist frameworks, abstract-normative approaches reflect convergence holistically through the creation of common normative frameworks, such as through the universalisation of cosmopolitan framing principles (e.g., human rights regime). On the other side of the spectrum, we have species of law which fall under the divergence-accommodating category – demonstrating increasing divergence moving from the laterally co-ordinate, functionally-specific, to the hybrid species of global law – and which embrace characteristics of heterarchy and pluralism.[122] Whilst these species of law stray from essences of uniformity and hierarchy which are characteristic of convergence, some divergence-accommodating approaches are still tainted with forms of universalism as demonstrated by their tendencies (or attempts) to confine diversity across transnational legal orders. Then, the final species of global law, which neither subscribes wholeheartedly to either convergence or divergence, embraces both forms of constitutionality and convergence on one hand, and heterarchy and pluralism on the other, to varying degrees.

4.1.1. Convergence-promoting approaches

As the species of global law promoting the strongest vision of convergence, the structural species has been depicted by Walker as operating through a globally encompassing normative framework. With aspirations for planetary reach, structural visions of global law are emulated through entrenched institutional structures, with the capacity for imposing a top-down framework through a strong executive or legislative body, such as the UN Charter.[123] Importantly, the normative design of the structural species dictates that national actors and laws are subordinate to international institutional structures. The institutional design of the UN has been associated with the structural species, as a framework with planetary-style reach, created post World War II for the 'reconstruction of international law and international relations'.[124] Albeit the UN's universal characterisation, there are limits to its structural capacity. For example, international law is only binding on states that wish to undertake international obligations, and is therefore quintessentially relative and voluntary. However, at the same time, there are a few *jus cogens* norms within this framework, meaning the principles of peaceful settlement of disputes,[125] and also, the prohibition of the use of force,[126] are mandatory. Moreover, any resolutions adopted by the UN Security Council in accordance with chapter VII of the UN Charter,[127] relating to threats and breaches to peace, are binding on all states, whether UN members or not. Then finally, the supremacy clause contained within Article 103 of the Charter, places the

[122] Walker, 'Intimations of Global Law' (n 21) at 106-130.
[123] Charter of the UN Charter and the Statute of the International Court of Justice (1945), (hereinafter referred to as UN Charter).
[124] Walker, 'The Intimations of Global Law' (n 21), at 60.
[125] UN Charter (n 123), Art 2(3).
[126] ibid, Art 2(4).
[127] ibid, Chapter VII.

treaty as superior to other sources of international law, creating a loose hierarchisation of international legal structures.[128]

Moving along the convergence continuum, the formal species of global law also recognises the higher authority of international law but embraces forms of legal formalism by entrenching a top-down/monist, hierarchical system of rules[129] (for example, through the implementation of binding international legal doctrines such as *jus cogens*). Interestingly, structural and formal species of global law are not mutually exclusive but are rather complimentary in creating a top-down 'world order'. Where structural species of global law support the imposition of planetary-wide institutional legal structures, formal species of global law, interconnectedly, entrench international doctrines and laws.

In a slight divergence from the first two convergence-promoting species of global law, abstract-normative species speaks more to the creation of generic normative standards and rules which connect transitional legal orders. More specifically, claims of the abstract normative species (for example, the instillment of cosmopolitan framing principles) 'embrace all invocations of certain core ideals, basic principles or broad normative templates or orientations, as means to guide, constrain or otherwise condition more local and specific elaborations of legal order.'[130] Walker, however, caveats the creation of these generic normative standards as closely relating to the rules of positive law, and in his words, 'abstract-normative approaches help supply what we might call an architecture of 'layered positivity', with the global lawyer itself deemed to possess the form and status of a positive law, however generally pitched, that is superimposed upon more concrete local forms of positive law.'[131]

4.1.2. Divergence-accommodating approaches

Under the divergence-accommodating umbrella of global law, Walker describes the laterally co-ordinate approach as one which seeks to reconcile apparent clashes between diverse, inter-locked, and overlapping legal regimes. At its core, this species of global law is grounded in resolving disputes. This species therefore relates to legal discourses of conflict management, including 'legal discipline[s] we know as the conflict of laws, or as private international law'.[132] Recognising the plurality between interdependent legal regimes and the potential risks for conflict, laterally co-ordinate species of law seek to reconcile said tensions by encouraging 'plurality and heterarchy rather than unity and hierarchy.'[133] It is important to note that this species of global law is also evolving beyond the nation-state – and in consideration of the 'greater number of boundary problems between an expanding number of non-state legal orders equipped with their own

[128] In particular, Article 103 states, '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' See: ibid Art 103.
[129] Walker, 'Intimations of Global Law' (n 21), at 61-63.
[130] ibid, at 70.
[131] ibid, at 70-71.
[132] ibid, at 106.
[133] ibid, at 106.

courts or other dispute resolution mechanisms'[134] - therefore includes non-state dispute resolution mechanisms, such as those offered by the United Nations (UN), European Union (EU), 'regional systems of economic and political integration, the WTO and other specialist regimes of public international law, as well as a great variety of private or hybrid forms of ordering.'[135]

Alternatively, the functionally-specific species replicates a segmented approach to global law. This species has been demonstrated through discourses such as societal constitutionalism,[136] which recognise the presence of functionally differentiated spheres (or regimes[137]) throughout the post-national space, which - due to their unique internal value preferences and specific forms of institutional structuring - lack cohesion (and therefore forms of convergence) due to their inherent differences and plurality. Accordingly, functionally-specific species of law are themselves segmentary. More specifically, functionally-specific species of global law are distinct and diversely applicable legal tools, applied in a piece-meal fashion to accommodate the various value preferences and normative standards of each functionally differentiated sphere.[138]

Last amongst the divergence-accommodating approaches, is the hybrid species of global law. As the species of global law which promotes the most divergence, the hybrid species related to the reconceptualization of classical legal discourses, to reshape law through a fusion of different legal disciplines in order to offer resolutions to new and perplexing problems. For example, Walker has exemplified hybrid species of global law to include humanity's law, through a combination of 'international criminal, humanitarian and human rights law towards the ends of human security'.[139] He also includes in this category the so-called Lex Pacificatoria, a sub-category which entails a fusion of local and international legal norms often found in periods of transitional justice in post-conflict societies.[140] Finally, it also includes the sub-category of international law of recognition, as a general legal framework which recognises the diversity of 'non-state peoples and entities: former colonies, ethnic groups, minorities, etc.',[141] where these hybridisations offer opportunities for the reconceptualization of law, through the 'decentring of a 'hard' doctrinal approach to disciplinary developments.'[142] In this latter context, Walker also seems to coincide with Santos[143] in conveying the unique role of court judgements and treaties in re-imagining these legal fusions at the global

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134 ibid, at 106.
135 ibid, at 106.
136 Gunther Teubner, Constitutional Fragments: Societal Constitutionalism and Globalization (Oxford University Press 2012); Angelo Golia and Gunther Teubner, 'Societal Constitutionalism (Theory Of)' (2021) Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper.
137 Walker has highlighted that '[f]unctionally specific global legal projects, often called regimes, can be found in areas as diverse as climate change, the preservation of cultural goods, nuclear proliferation and criminal law, to name but a few.' See: Walker 'Intimations of Global Law' (n 21), at 120.
138 ibid at 118-125.
139 Richard Collins, 'The Slipperiness of "Global Law"' (2017) 37 Oxford Journal of Legal Studies 714, at 724.
140 ibid, at 732; Christine Bell, On the Law of Peace: Peace Agreements and the Lex Pacificatoria (Oxford University Press 2008).
141 Collins (n 139), at 724; Ti-Chiang Chen, The International Law of Recognition (Рипол Классик 1951).
142 Walker, 'Intimations of Global Law' (n 21), at 129.
143 See Chapter 2, section 3.3, supra.

level. The latter is of particular relevance to this theoretical framework, specifically, where courts are perceived as pivotal actors in the bottom-up pluralisation of law through the articulation of innovative legal hybrids.

4.1.3. Historical-discursive approaches

Collectively, the above explored species of global law have fallen, to varying degrees depending on their position on this spectrum of characteristics, into the categories of either convergence-promoting or divergence-accommodating. However, the final species of global law- the historical-discursive species – is more fluidly inclined, and instead, finds balance between the two characteristic poles of convergence and divergence. Historical-discursive species of global law reconceptualise traditional legal discourses (which often operate at the national level) at the global fora, and include examples of Global Administrative Law[144] and Global Constitutionalism.[145] As it is beyond the scope of thesis to provide an in-depth analysis of the varying historical-discursive species of global law, I will briefly reflect on how forms of Global Constitutionalism may straddle forms of convergence and divergence simultaneously.

At its' base conception, forms of constitutional law instil ideals of top-down normative authority, such as that dictated by a constitution, or even on a more global scale, the UN Charter, to govern the state in a uniform and harmonious style. At this level (as in, the state/national level), and in this form, constitutional law fits well within the convergence-promoting species of law. However, re-imagining forms of constitutionalism at the global level opens up opportunities for this species of global law to engage with the convergence-divergence paradigm in a more, or less, hybridised manner, depending on the intentions to encourage degrees of homogeneity (or singularity) or plurality within these constitutional frameworks. For example, on one end of the spectrum, Walker has highlighted that global constitutionalisms accommodating degrees of singularity resemble structural and formal species of global law, insofar as they promote convergence characteristics and a top-down constitutional framework.[146] On the other, global constitutionalism as plurality finds closer affinity with the laterally co-ordinate or functionally-specific species of global law, by responding to the profusion of transnationally diversified systems or functionally differentiated spheres. To which an example of global constitutionalism as plurality can be identified within theories of societal constitution.[147] This latter version of global constitutionalism adopts a segmentary, and differentiated approach to constitutional governance. Because of the incommensurable plurality of diverse systems (and therefore the inability of a central constitutional body to govern these systems homogenously), global constitutionalism as plurality embraces forms of heterogeneity, and divergence-promoting characterisations in its reconceptualization as a global legal discourse. Taking into consideration these two perspectives of global constitutionalism, the intimated quality of global law becomes much more apparent

[144] Nico Krisch and Benedict Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 European journal of international law 1.
[145] Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2006) 8 Theoretical inquiries in law 9.
[146] Walker, 'Intimations of Global Law' (n 21), at 59-63, 91-94.
[147] Teubner (n 136); Golia and Teubner (n 136).

within the historical-discursive species. In fact, the latter species of global law are defined by their fluid nature, and ability to traverse across the convergence-divergence spectrum, in response to double normativity, outlined above.[148] Owing to these fluid inclinations, historical-discursive species of global law are diverse, and are tailored to the degrees to which they promote forms of convergence and divergence.

Within the context of this thesis, I take a historical-discursive approach to global law. By anticipating law as an inherently fluid phenomenon, I rely on the historical-discursive species to understand a perspective of global law which strikes a balance between promoting convergence, and accommodating divergence. I hence adopt a global law approach which assesses the convergence of ideals relating to the promotion of subaltern cosmopolitan transitions of law, on one hand, which additionally facilitates divergence through the bottom-up pluralisation of law, on the other. By combining such an approach, I hope to appraise the agency of courts in diffusing innovative legal hybrids across jurisdictions, to enable diverse projects for emancipation, in turn.

4.2. A compositive orientation to achieving legal pluralism

Section 4 has thus far focussed on defining global law, the seven species of global law and the role of double normativity, to then conclude specifically on the relevant global law species relied upon in this thesis. For the sake of the completeness of the theoretical framework, however, it is also necessary to frame the relationship between global law and global justice, and how different orientations of global law may work towards closing the gap between these two concepts. Therefore, where global law relates to any practical 'endorsement of or commitment to some existing or, at least, arguably emergent form of legal practice, Global Justice typically speaks to a goal as yet not fully attained or standard as yet not fully realised.'[149] Although Walker has identified six possible orientations between global law and global justice,[150] I focus on the compositive orientation of global law, and how it works towards forms of justice in connection with subaltern cosmopolitan transitions of law.

For context, compositive orientations of global law are bottom-up contributions to global justice, which are sourced amongst the lower levels of governance – such as in the regional or national – and influence spheres of global justice in a cumulative and aggregative fashion.[151] Significantly, compositive orientations perceive global law's influence as piece-meal, as law is applied through the application of bespoke 'normative principles or orientations'[152] to represent diverse claims (of diverse social spheres), as opposed to being applied uniformly to the benefit of a consolidated holistic entity. Compositive orientations

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[148] See Chapter 2, section 4, supra.
[149] Walker, 'The Gap between Global Law and Global Justice' (n 115), at 2.
[150] Walker has dubbed these six orientations of global law as the 'six c's', to which he identified that 'Global Law can be regarded as in some significant sense constitutive of Global Justice, or as (partially) compositive of Global Justice, or as collateral to the achievement of Global Justice, or as compensatory for its relative absence, or as only contingently related to its achievement, or as culpable in its failure. These different orientations vary in accordance with several factors.' For more information on the six c's and their orientations towards different forms of global justice, see ibid, at 16-26.
[151] ibid, at 18.
[152] ibid, at 18-19.

therefore operate in a disparate and uneven fashion, which albeit working towards common goals of global justice, follow diverse paths and tailor their legal approach accordingly. In this regard, we see similarities between compositive orientations of global law and the functionally-specific and hybrid species of global law, as their attempts to accommodate normative plurality resonate with the "segmented model". Accordingly, the compositive orientation of global law is particularly relevant for this research, in the following two regards. First, compositive orientations align with the methodology outlined in chapter 1,[153] which seeks to understand the prospects for a subaltern cosmopolitan transition of law, through a bottom-up pluralisation of its legal structures. Then second, a compositive orientation will also be useful to test whether the case studies selected can be interpreted and portrayed as a connected thread of horizontally diffusing patterns of decoloniality. However, it is important to emphasise that where patterns of decoloniality can be traced, they may manifest diversely, as decoloniality may be specific and unique to the localities of the jurisdiction in which it is occurring.

Additionally, and as an essential part of the global law paradigm, Walker speaks of the diverse producers of global law, which may include, 'legislators, administrators, judges, innovative practitioners and a broader category of framer-jurists that reaches into the academy'.[154] Producers of global law therefore play a fundamental role in their facilitation of law in their contributions towards the ultimate goals of global justice. In the context of this research, the agents, or producers*,* of global law are judges, specifically through the creation of innovative legal hybrids following the adjudication of concrete disputes that fall before them. Whilst this research speaks about the pivotal role of judges from national courts in the bottom-up pluralisation of law - as they benefit from their close proximity to the parties and the facts of the disputes in which they are tasked to adjudicate - they are also hubs/sources of global law. Specifically, judges are seen as sources of global law as they are able to articulate legal resolutions which give a platform for the inclusion of marginalised epistemologies and ontologies, by devising innovative legal hybrids that resonate with legal ecumenism. In this manner, judges are perceived as actors capable of contributing to the bottom-up pluralisation of global law, specifically by creating tailored and bespoke legal resolutions which contribute to tangible normative diversity. An exploration into the agency of national courts will therefore be a crucial part of this investigation, explored in chapter 6.[155] In this chapter, I will pay attention to the ability of national courts to facilitate the bottom-up pluralisation of law through the articulation of legal compromises known as legal hybrids, whilst unpacking the conditions which influence courts to facilitate the subaltern cosmopolitan transition of law.

Concluding this section on the understanding that I will employ a historical-discursive perspective to analysing global law, whilst furthermore borrowing Walker's compositive orientation to understand the relationship between global law and global justice, I now turn to the penultimate section of this chapter.

[153] See Chapter 1, section 2, supra.
[154] Walker, 'Intimations of Global Law' (n 21), at Chapter 2; Walker, 'The Gap between Global Law and Global Justice' (n 115), at 211
[155] See Chapter 6, section 2, infra.

Therefore, in the following, I will summarise the key contributions of Twining, Santos, and Walker, which make up my overall theoretical framework.

5. A theoretical proposition for the bottom-up pluralisation of global law

In accordance with the underlying theme of my research, which discusses the bringing together of ontologies in conflict into a space of mutually respected co-existence, these theoretical framings, and the authors from which they are drawn from, have been brought together in an ecumenical fashion. However, before turning to an exploration of my positionality, and recognising the density of the analyses thus far explored, I take this opportunity to briefly summarise the previously discussed theories and their contribution to framing the bottom-up pluralisation of global law.

This first prong influenced by Twining's theory on the diffusion of legal norms, explored the pathways for legal migration, the type of legal phenomena that can be diffused, and the manner in which diffused legal norms are integrated by importer jurisdictions. By highlighting the complex map of the diffusion of legal phenomena from a global perspective, Twining has highlighted that pathways for diffusion are unique in their conceptualisation, but also, in their reception.[156] Depending on the context in which legal phenomena have been diffused, legal norms can be diversly reconceptualised, if tailored to the importer jurisdictions' embedded social, cultural, and historical, localities.[157] The latter point becomes increasingly apparent when considered in tandem with the risks of legal transplants,[158] which demonstrated the limitations of diffusing legal phenomena across jurisdictions through transplantation, without consideration – or more accurately, adaptation - of diverse and different context-dependent situations.[159] I hence rely on Twining's theories to frame the trans-jurisdictional diffusion of legal norms – particularly the diffusion of rights of Nature legal hybrids – between national courts in contact zones. Considering the intentions of this thesis, this theoretical prong attests that the diffusion of legal phenomena, in the form of legal hybrids, can encourage cosmopolitan transitions of law and forms of decoloniality, through the bottom-up pluralisation of global law. This theoretical prong therefore stresses that whilst the diffusion of legal norms has the potential to embrace deeper levels of legal pluralism - as legal hybrids can promote the inclusion of non-Western/marginalised legal phenomena – they must be tailored to the importer's embedded localities.

The second prong builds upon the latter, to contextualise the necessity for a (subaltern) cosmopolitan transition of law, as a counter-hegemonic approach to globalisation.[160] In particular, this prong investigated key components of Santos' understanding of the production of global social asymmetry – through

[156] Twining, 'General Jurisprudence: Understanding Law from a Global Perspective' (n 22).
[157] Legrand, 'Negative Comparative Law: A Strong Programme for Weak Thought' (n 26).
[158] Legrand, 'The Impossibility of "Legal Transplants' (n 42).
[159] ibid; Legrand, 'On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations' (n 26).
[160] de Sousa Santos, 'Toward a New Legal Common Sense: Law, Globalization, and Emancipation' (n 12).

globalised localisms, and localised globalisms – the different forms of emancipation within contact zones and their prospects for promoting long lasting forms of decoloniality, and the pivotal role of courts in encouraging subaltern cosmopolitan transitions. Most importantly, however, this section relied on Santos' theory to define legal ecumenism as a cosmopolitan legality, in order to frame the role of the latter in the subaltern cosmopolitan transition of law.[161] Within this context, legal ecumenism is represented within the creation of innovative hybrid legal solutions (through rights of Nature), as a legal resolution capable of articulating a compromise between hegemonic and non-hegemonic epistemologies and ontologies. It is therefore a central component of the theoretical framework, which focusses on the role of courts in the bottom-up pluralisation of global law, through the articulation of compromises between conflicting epistemologies, and the diffusion of innovative hybrid legal solutions accordingly.

The third prong encompasses the global law analyses of this research, taking point from Walker's intimations of global law.[162] By unpacking definitions on global law, the role of double normativity, the seven species of global law, and the gap between global law and global justice, I rely on Walker's theoretical mapping to illustrate the global law perspective employed herein. Accordingly, this theoretical framework stresses the receptivity of global law to embracing deeper forms of plurality, however, to prevent unanchored idealism, also embraces certain degrees of convergence. Resonating with the historical-discursive species, the global law approach analysed here seeks to straddle the divide between forms of divergence, such as by encouraging the bottom-up pluralisation of global law on one hand, whilst balancing the latter with essences of convergence through collective goals of encouraging the subaltern cosmopolitan transition of law, on the other. This theoretical framework therefore relies on Walker's compositive orientation of global law, to envisage a bottom-up approach to the pluralisation of law, which operates in a piece-meal fashion, and applies bespoke normative principles or orientations in the collective pursuit of cosmopolitanism. Finally, Walker, like Santos, puts critical emphasis on legal operators. Courts (in particular, national courts), are perceived as producers of global law, who through the adjudication of concrete disputes that fall before them, are able to create innovative legal hybrids. They are hence perceived as actors in pivotal positions to articulate legal hybrids, and to contribute to the bottom-up pluralisation of law, and a subaltern cosmopolitan transition accordingly.

Based on the influential theories of each author, each prong contributes to the theoretical foundation in which the rest of this research is based as outlined in the previous sections. In the following, I will finalise this chapter by unpacking my own positionality and perspective that I employ throughout this research.

[161] Santos does not define legal ecumenism in his third edition of 'Towards a New Legal Common Sense', therefore, the definition employed within this research has been developed by me within this project, inferred from the context of the latter book.
[162] Walker, 'Intimations of Global Law' (n 21); Walker, 'The Gap between Global Law and Global Justice' (n 115).

6. A space for re-imagining law's emancipatory potential

Before moving on to discuss the case studies in the next three chapters, I will conclude the methodological and theoretical portion of this thesis by reflecting on theories of utopianism, to outline my positionality. Where the remainder of this section will unpack key tenets of specific utopianism theories, I would, however, like to preface this section by iterating my reasoning for relying on these theories, in a refusal that utopianism can only be connoted with idealistic, or beyond rational imaginaries. Instead, I approach utopianism from the perspective that utopian theorisations allow for a re-imaging of law, and society, outwith its current limitations and parameters. I thus believe that theorising within utopian framings is a useful exercise to understand the capabilities, and the role, of law, to re-envisage societal framings beyond their hegemonic realities. I therefore intend to dedicate the remaining sections of this chapter to expand a conceptualisation of utopianism as a future-oriented mindset. This mindset will be relevant in two ways: first, to re-imagine the role of law in encouraging a more cosmopolitan (and decolonial), but realistic alternative societal vision vis-à-vis neoliberal globalisation; and second, to introspectively consider my own positionality in approaching this research.

Therefore, section 6.1. will first unfold the origins of utopianism as a theory, exploring its unrealistic beginnings and connotations to false universality and Western hegemony. I will thereafter expand specifically on utopian theories developed by Phillip Allott[163] and Ernst Bloch[164], to inform the construction of my own utopian mindset. In section 6.2. I will consider pluralistic forms of utopianism in connection with encouraging cosmopolitan transitions of law, and ergo further forms of decoloniality by imbuing deeper levels of pluralism which open up spaces for counter-hegemonic projects of emancipation. Then, section 6.3 will be dedicated to laying bare my own positionality, and the benefits of adopting a utopian mindset in approaching this research.

6.1. Utopianism as a mindset

Utopianism has been defined as 'the belief that everything can be perfect, often in a way that does not seem realistic or practical.'[165] As a derivation of Sir Thomas More's coining of the term, utopia has been ambiguously referred to as both a 'no-place and a good-place', recognised as a *perfect imaginary world.[166]* Evading a concrete conceptualisation of utopianism/utopia, interpretations have exuded ideals of its impossible nature and unrealistic imaginings. If utopianism is therefore emblematic of this quixotic reality, what are the benefits of thinking of law, specifically global law, within a utopian mindset? Considering the current geo-political realm – ravaged by inequalities in consequence of 'imperialistic military interventions, outrageous wealth disparities, disgraceful and dehumanising treatments of migrant, large-scale degradation

[163] Philip Allott, *Eutopia: New Philosophy and New Law for a Troubled World* (Edward Elgar Publishing 2016).
[164] Ernst Bloch, *The Principle of Hope.* 1959. Translated by Neville Plaice, Stephen Plaice, and Paul Knight (1995).
[165] 'Utopianism Noun - Definition, Pictures, Pronunciation and Usage Notes | Oxford Advanced Learner's Dictionary atOxfordLearnersDictionaries.Com' <https://www.oxfordlearnersdictionaries.com/definition/english/utopianism#> accessed 12 February 2025.
[166] Thomas More, *Utopia* (1516). Translated by Paul Turner (2003), 5 and 121.

of the environment…'[167] to name but a few – a rethinking of global law within a utopian mindset could open up spaces for law's emancipatory potential. Accommodated through a utopian mindset, conceptualisations of alternative societal realities, ones in which law is utilised as a counter-hegemonic tool, could be realised.[168] However, to promote the latter, this rethinking must be conducted in a manner that diverges from utopianism's connotations to false universality and the ubiquitous nature of Western hegemony.[169] This version of utopianism starkly deviates from More's initial envisioning of Utopia, in which Utopia is perceived as 'conquered by somebody called Utopos, who was responsible for transforming a pack of ignorant savages into what is now perhaps, the most civilised nation in the world.'[170] Detaching from this colonial imaginary,[171] the form of utopianism discussed within the context of this research pursues a decolonial line of thought, with efforts of composing a more cosmopolitan realisation of such a mindset. But what will that mindset look like? To get a clearer picture, the following section will expand upon and differentiate between Allott's theories of Utopian v Eutopia, and Bloch's theories on abstract and concrete forms of utopianism. I will then conclude by drawing together my utopian mindset, based on aspects of the aforementioned theories.

6.1.1. Utopia v. Eutopia

As a key characteristic of More's functional vision of Utopia, the role of law is minimal. In fact, law is perceived as a malevolent force capable of spoiling the status quo of the utopian ecosystem; '[j]ust as utopians scorn legal systems, legal systems scorn utopia.'[172] Where More's utopian imagining views law as a tool that obfuscates the truth, and 'turn[s] things upside down',[173] Allott adopts a different approach.

Allott articulates an understanding of Utopia where law is a foundational component contributing to the operations of this sociological nebula. He then differentiates between Utopia (recognised as nowhere) and Eutopia (as in, a happy or good place),[174] and builds upon the latter as a reachable and attainable reality.[175] Within the universe of Eutopia, law becomes a tangible asset which can be deployed alongside 'four human power' – memory, imagination, knowledge, and emotion[176] – to assist conceptualisations of a future reality of Eutopia. These human powers are used as methods for reimagination, to investigate alternative future realities, re-thought through positive mindsets based on hope. These imaginings resonate with Bloch's ideals of *docta spes,* as in educated hope, which combine hopeful thinking with reason, to create a realistic

[167] Jens Theilen, Isabelle Hassfurther and Wiebke Staff, 'Towards Utopia–Rethinking International Law (Introduction)' (2017) 60 German Yearbook of International Law, at 316-317.
[168] de Sousa Santos, 'Toward a New Legal Common Sense: Law, Globalization, and Emancipation' (n 12), at 553.
[169] Theilen, Hassfurther and Staff (n 167), at 326-327.
[170] ibid, at 327.
[171] Sally Engle Merry, 'Race, Inequality, and Colonialism in the New World Order' (2006) 40 Law & Society Review 235, at 235-247.
[172] Kenji Yoshino, 'Of Stranger Spaces', Law and the Stranger (Stanford University Press 2010), at 211 & 218.
[173] Theilen, Hassfurther and Staff (n 167), at 336.
[174] Allott (n 163).
[175] Wiebke Staff, 'Customary International Law: A Vehicle on the Road from Istopia to Eutopia?' (2018) 60 German Yearbook of International Law 423, at 428.
[176] Theilen, Hassfurther and Staff (n 167), at 342.

and attainable future vision. Alongside these human powers, a process of defamiliarization is also employed, as in, a process of unveiling or unmasking the sociological realities of the current Utopia. This component of Allott's theory reveals that 'the societal structures surrounding us are human-made and not some "mysterious natural phenomenon".'[177] Therefore, processes of defamiliarization not only expose the current social reality, but also create opportunities for a contestation of such reality, in an effort of working towards aspirations of Utopia (or more accurately, Eutopia).[178]

In the same vein of recognising societal structures as a product of human creation, so are the tools which can be empowered for their reshaping: such as, law. Whilst this methodology echoes that of Bloch and his concrete utopias - as we will see below[179] -, this form of Utopia utilises 'elements already present in reality', such as the law, to reshape alterative future visions. Whilst a comprehensive analysis of Allott's Eutopia is not feasible within the remaining space of this chapter, I will incorporate influences of his theory on Eutopia within my own conceptualisation of utopianism as a mindset. Specifically, I embrace the idea of Eutopia as a future oriented framework for visualizing alternative realities based on hopefully reimagination. In addition to these future-oriented reconceptualizations – facilitated through the operationalisation of the aforementioned human powers and processes of defamiliarization – I also perceive law as a tool for empowering processes of reimagination.

6.1.2. An orientation of future, dreams, and educated hope *(docta spes)*

Contributing to an understanding of utopianism, Bloch's theory differentiates between abstract and concrete utopias.[180] However, these differentiations are grounded upon Bloch's understanding of utopianism as grounded on future-oriented hopeful thinking, specifically, within the ideal of dreams and dreaming of a better life.[181] This process of dreaming, however, is not founded upon unrealistic aspirations, but rather, functions as an anticipatory process in which dreams can be envisioned in accordance with reasoned logic and scrutiny.[182] This incorporation of cognitive rationality, in tandem with hopeful (re-)imagination, allows Bloch to highlight the differences between concrete forms of utopianism and abstract forms. Bloch distances himself from these abstract Utopias, such as those dictated by More's envisioning of Utopia based on 'pure wishful thinking',[183] as the latter speaks to the ideals of utopianism as an impossible or unattainable reality. Instead, concrete Utopias are 'based on anticipatory elements already present in reality: It focusses on real possibilities.'[184] Despite appearing contradictory to the base conception of Utopia, Bloch contends that essences of reality do not conflict with imaginings of Utopia. Rather, based on the

[177] ibid, at 345; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006), at 601.
[178] Yoshino (n 172), at 212.
[179] See Chapter 2, section 6.1.2, infra.
[180] Bloch (n 164).
[181] Theilen, Hassfurther and Staff (n 167), at 340.
[182] Bloch (n 164), at 126.
[183] ibid, at 164.
[184] Theilen, Hassfurther and Staff (n 167), at 340.

implementation of reasoned logic and scrutiny, in tandem with future-oriented (i.e., educated hope, or *docta spes*), reality plays a fundamental role in the reenvisaging of attainable future social visions.

In the same fashion, I will borrow key components of Bloch's theoretical perspective to inform my own utopian mindset within the context of this thesis. Therefore, in addition to the influences drawn from Allott's Eutopia, I situate my utopian mindset within the concrete form, to reconceptualise a future societal vision which facilitates a realistic and attainable cosmopolitan transition of law. In accordance with this foundational aspect of reality, I intend to embrace the elements already present in our reality – such as law – to encourage the required re-imagination and progress towards this Utopia. Employing an optimistic or hopeful mindset, I perceive law as a tool capable of re-shaping a future vision in accordance with the cosmopolitan transition of law. Importantly, as has been highlighted thus far, embracing forms of pluralism are at the centre of cosmopolitan transitions of law, insofar as creating space for the inclusion of marginalised or excluded peoples (their epistemologies, ontologies, cultures, cosmovisions, histories and so on), heterarchically. On this basis, what would it mean to conceptualise pluralistic utopias as an avenue to encourage cosmopolitan transitions within the context of this thesis?

6.2. Pluralistic utopias

Pluralism is a constant and recurrent theme woven throughout this research agenda. On the premise that the cosmopolitan transition of law is presumed to be facilitated through the bottom-up pluralisation of global law, accommodating pluralism is therefore a core value of the Utopia (and utopian mindset) here conceived. Whilst chapter 1 focussed specifically on the methodology on the pivotal role of national courts in this bottom-up pluralisation - especially through the facilitation of legal ecumenism[185] – here, I will speak in broader terms on the role of pluralism in challenging hegemonic discourses and the universalisation of ethnocentric narratives, such as those perpetuated by Western localisms.[186] Utopianism in the context of encouraging forms of cosmopolitanism veers away from ideals of universality attached to the grand blueprint ideology,[187] and rather, hopes to achieve deeper levels of pluralism. The latter therefore seeks to embrace the divergent forms of pluralism, whilst also converging on ideals of promoting cosmopolitanism, and in essence, embodies the historical-discursive species of global law expounded by Walker.

To unpack what is meant by pluralistic utopias, we can firstly contrast the latter with More's utopian imagining of "the perfect imaginary world" and its replication of universalised homogenisation. Instead, pluralistic utopias (created within the frames of Eutopia and concrete forms of Utopia outlined above), open up spaces for cosmopolitan transitions of law through the disintegration of its hierarchical structures, by instead, pursing a transformation to a heterarchical system. This structural transition would therefore facilitate the (re-)creation (or re-interpretation) of legal jurisprudence to recognise and accommodate

[185] See Chapter 1, section 2, supra.
[186] de Sousa Santos, 'Toward a New Legal Common Sense: Law, Globalization, and Emancipation' (n 12); Twining, 'General Jurisprudence: Understanding Law from a Global Perspective' (n 22).
[187] For more information on a critique of 'grand blueprint' ideals of utopianism, and the concurrent risks of said utopia being controlled by a small group of 'elites', See Karl Popper, *The Open Society and Its Enemies* (Routledge 2012).

plurality and diversity of the global demos, ensuring inclusivity and equitable representation in law. The latter therefore diverges from singular conceptions of Utopia, as 'pluralistic utopias would be an acknowledgement of the varying perspectives of proposals for the improvement of world governance, while at the same time dispensing with the legal culture that creates a hierarchy of values.'[188]

If we were to abstractly visualise pluralistic utopias, we can imagine the existence of various societal orders operating across a horizontal plane. Within each social order, actors have the power to dictate their own conceptualisation of their own future Utopia, based on their own internal value preferences and normative standards. Accordingly, pluralistic Utopias would represent the presence of uniquely differentiable social orders, which – because of their apparent differences - co-exist and co-habit the same spatial plane. Whilst the operation of each social order is naturally independent, they have the opportunity to cooperate with other social orders for the promotion of common goals, such as, for example, cosmopolitan transitions of law. If we then borrow the influential tools to re-conceptualising Utopias – which, as outlined above, refer to the application of human powers and processes of defamiliarization borrowed from Allott's theories,[189] and also, methods for future-oriented dreaming using reason, logic, and scrutiny as posited by Bloch[190] – these social orders would have the capacity to (re)imagine their unique, alternative, and attainable, societal realities/Utopias. If these social orders were henceforth to dream of these future realities, and also, use the legal materials (present and) specific to that order, each individual utopia could metamorphosize from a future conceptualisation, to a present and lived reality.

Embracing pluralistic utopias, accordingly, could hence galvanise forms of resistance to hegemonic powers of law,[191] by diversifying the epistemological and ontological field, instead of encouraging a subscription to top-down, homogenic, and universalised constructions of law. In this manner, imbuing plurality within global law is an essential strategy to dissolving law's imperialistic essences, as 'politically, international [or in this context, global] law needs ongoing strategies of decolonisation – which highlight the contingency of its foundations and draw out what is lost and excluded in each actual founding.'[192] It is in this respect, that cosmopolitanism becomes central (seen as embracing forms of convergence as a guiding goal) and where the role of legal ecumenism, is fundamental to securing plurality.

In consideration of the preceding analysis, I concur that a utopian mindset does not necessarily act as an impediment. But rather, a utopian mindset acts as a beneficial tool to reenvisaging alternative and attainable societal realities that can accommodate forms of global justice, and in this context, forms of cosmopolitanism. By envisioning alternative utopias, we can open up spaces to analyse what the law is, but

[188] Dorothy Makaza, 'Towards Afrotopia: The AU Withdrawal Strategy Document, the ICC, and the Possibility of Pluralistic Utopias' (2018) 60 German Yearbook of International Law 481, at 506.
[189] See Chapter 2, section 6.1.1, supra.
[190] See Chapter 2, section 6.1.2, supra.
[191] Bhupinder S Chimni, 'Third World Approaches to International Law: A Manifesto', in A Anghie, BS Chimni, K Mickelson, and OC Okafor (eds) *The Third World and International Order* (Brill Nijhoff 2003).
[192] Sundhya Pahuja, 'Decolonization and the Eventness of International Law' in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge-Cavendish 2011), at 102.

also, challenge current forms of law in order to understand what the law *can* do. I therefore embrace this utopian mindset throughout the forthcoming chapters.

6.3.A dreamer's positionality

So far, I have engaged with theories of utopianism to construct a mindset which offers conceptualisations for alternative, but tangible, future realities. However, as stated above, the benefits of constructing the utopian mindset were twofold. I therefore use the remainder of this chapter to iterate my own positionality in approaching this research, with a sense of candour, as I will cover topics which focus on – but are not limited to – the impacts of colonialism on global social asymmetry; the histories, cultures, epistemologies and ontologies of indigenous peoples and local communities; and the construction of legal resolutions based on non-Western cosmovisions. Albeit not sharing in these experiences, and therefore limited in fully comprehending some of these ideologies, I approach this research from the angle of trying to carve out a space for a reconceptualization of law in relation to cosmopolitan transitions. However, and as we shall see throughout his thesis, one of the underpinning themes relates to encouraging forms of co-operation, or at the very least, co-existence between conflicting groups, and therefore, their conflicting cultures, epistemologies, and ontologies. Therefore, recognising that the stain of colonialism and imperialism remains a lived reality for many today, cooperation should not be assumed or taken for granted. It is on that note in which I assert that this research is not proposing a fool-proof theory and methodology which guarantees the so-called decolonisation of law, but instead, offers an opportunity to reimagine the role of law in cosmopolitan transitions, with the additional hope that this creates space to promote forms of decoloniality.

In recognition of this, however, I still situate myself as a dreamer. But not a dreamer who is dangerously idealistic and optimistically utopian. A dreamer who instead founds their utopian mindset within the concrete form of Utopia, based on ideals of future-oriented dreaming, rational logical scrutiny, and hope. It is within this mindset that I hope to reimagine an alternative, and tangible, social reality vis-à-vis neoliberal globalisation, one in which law can play a role in the cosmopolitan transition of law, and in turn, encourage forms of decoloniality by opening up spaces for counter-hegemonic projects to bloom.

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With the theoretical and methodological scene set, it is now time to embark on the comparative case law analysis. The forthcoming three chapters will be dedicated to tracing the diffusion of innovative legal hybrids in the form of rights of Nature across Aotearoa New Zealand, Colombia and India. In order to investigate the trans-jurisdictional diffusion of legal norms between these three jurisdictions, I will assess the extent to which the Constitutional Court of Colombia, the JEP, and the High Court of Uttarakhand have been influenced by the legal precedents of the Waitangi Tribunal, when adjudicating the concrete disputes that have fallen before them. As the main thrust of this analysis, I will be paying special attention to the extent in which these courts have embedded their rights of Nature resolutions in their local historical, social, and cultural contexts, assessing the extent to which these resolutions resemble bespoke legal mechanisms, and therefore, facilitate genuine legal ecumenisms.

Chapter 3

Aotearoa New Zealand: A foundation for the diffusion of rights of Nature

1. Introduction

I will dedicate the next three chapters to tracing the diffusion of innovative legal hybrids in the form of rights of Nature across national courts in Aotearoa New Zealand, Colombia, and India. Our first stop in this comparative *tour de force* is Aotearoa New Zealand, and therefore, this chapter will outline the manner in which the Waitangi Tribunal articulated an innovative legal hybrid, which triggered a process of trans-jurisdictional diffusion of law. In particular, I will investigate two concrete disputes adjudicated before the Waitangi Tribunal which led to the legal subjectivisation of Nature, primarily, of the Whanganui River (also known as Te Awa Tupua)[1] and Te Urewera Forest.[2] These legal decisions were fundamental for several reasons, including, but not limited to: (1) setting the tone for reconceptualising relationships with Nature outside the property rights paradigm, within Aotearoa New Zealand, and beyond; (2) creating legal resolutions – recognised as innovative legal hybrids - which struck a balance at the contact zone between hegemonic epistemologies (inherited English common law) on one hand, and counter-hegemonic epistemologies and ontologies (Māori customary law), on the other; and (3) for articulating legal resolutions designed to target deep colonial cleavages, and work towards forms of reconciliation, between the hegemonic and counter-hegemonic groups of Aotearoa New Zealand.

Although this chapter will investigate the disputes which led to the legal subjectivisation of both the Whanganui River and Te Urewera Forest, I will emphasise the importance of the former dispute for several reasons. First, the former dispute, which versed over the ownership of the Whanganui River, produced one of the earliest (if not, *the* earliest) iterations of a rights of Nature innovative legal hybrid in Aotearoa New Zealand. The latter hybrid will therefore be treated as the first point in which diffusion takes place, within the context of this thesis. Second, the Whanganui River dispute is a clear example of the painstakingly slow negotiation process which led to the compromise of epistemes between Tikanga Law (Māori customary law) and Pākehā law (inherited English common law). This dispute has been characterised by slowness, as one of Aotearoa New Zealand's longest running cases, dating back to 1873 and "ending" with the passing of the 2017 Te Awa Tupua Act and the recognition of the Whanganui River as a subject of rights. However, because of this pace, actors involved in the negotiation of the innovative legal hybrid were able to

[1] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.
[2] Te Urewera Act 2014.

meaningfully engage with their rival normativities and competing epistemologies and ontologies, to incorporate the latter in a hybrid rights of Nature resolution accordingly. In this manner, this case highlights the indispensable role played by the Waitangi Tribunal, to firstly, put to bed the over-a-century long dispute of ownership, and secondly, to promote forms of reconciliation between the Māori and Crown Government in the spirit of decoloniality.

This chapter hopes to illustrate the important role of the Waitangi Tribunal in triggering innovative legal compromises between competing epistemological, ontological, and cosmological visions of Nature, in response to the adjudication of concrete disputes that have fallen before them. As the origin story for this research investigation, I hope to outline the contours of these innovative rights of Nature legal hybrids crafted in Aotearoa New Zealand. Understanding the contextual background of the contact zone from which these legal hybrids emerged, and what shape they take in response, will therefore be essential in prefacing both chapters 4 and 5, where I will discuss the influence of the latter legal precedents in Colombia and India.

To set this foundational scene, this chapter explores the historical context of colonialism within Aotearoa New Zealand in section 2, highlighting the underpinning (social and legal) tensions between the Māori and Crown Government that has divided their two worlds: Te Ao Māori and Te Ao Pākehā. In section 3, I will unpack the over a century long legal dispute (known as Wai 167) which versed over the ownership of the Whanganui River between the Māori and Crown Government, paying special attention to the adjudication of Wai 167 by the Waitangi Tribunal, as the final court to hear this case. I will therefore highlight the role of the Waitangi Tribunal in delivering a ground-breaking report (the 1999 Whanganui River Report) which led to the eventual recognition of the Te Awa Tupua as an indivisible living entity and as a subject of rights. To finalise this section, I will then outline the contours of the legal subjectivisation of the Te Awa Tupua, noting the construction of legal personality based on Māori cosmovisions. epistemologies and ontologies, and furthermore, the creation of a guardianship body. Section 4 will then discuss the secondary, but equally as important, legal dispute which versed over the ownership of the Te Urewera Forest, which led to its legal subjectivisation through the Te Urewera Act in 2014.[3] I will once again focus again on the construction of legal personality and formation of the Te Urewera Board, to map the conceptualisation of this innovative legal hybrid. In section 5, I will conclude by summarising the genealogy of innovative legal hybrids by the Waitangi Tribunal, in response to the adjudication of the concrete disputes outlined above.

2. Te Ao Māori and Te Ao Pākehā: the underpinning tensions between the two worlds of Aotearoa New Zealand

In the 1830s, Aotearoa was an independent, Māori governed nation. However, Aotearoa began to experience the creeping effects of settler colonisation, as a frontier outpost for the 'British penal colony in

[3] ibid.

New South Wales',[4] and as a home to an increasing number of British settlers (known as Pākehā) as part of the extensive British settlement plan in the late 1830s. Trade and commercial activities operating out of Aotearoa relied on good working relationships between the Māori and Pākehā. However, their relationship was not always peaceful, and was often characterised by outbursts of violence between the two groups. Pākehā settlers requested British intervention to resolve their unruly relations with the Māori, but the Crown Government was reluctant to interfere until later faced with the threat of native land being annexed by other European nations, such as France.[5]

In 1839, the British Government decided to intervene. William Hobson was sent to Aotearoa, acting as a representative on behalf of Queen Victoria, with the purpose of establishing Aotearoa as a British colony and to secure Crown sovereignty. With the intent of extending British rule, to govern British subjects and secure commercial interests in Aotearoa, Hobson invited Māori chiefs (rangatira) to sign the Te Tiriti o Waitangi in 1840. As part of Hobsons' persuasion tactics to gather rangatira signatures for the Te Tiriti o Waitangi - known as the Treaty of Waitangi in English - Hobson downplayed the impacts of British sovereignty on the authority of Māori chiefs (rangatiratanga).[6] The Treaty of Waitangi was eventually signed by more than 500 rangatira Māori, and even though some Māori refused to sign the treaty, and others were never granted the chance (as we will see below[7]), the Colonial Office in England declared British sovereignty over the entirety of Aotearoa on the 21st of May 1840, inclusive of the tribes who did not sign the agreement.[8]

The Treaty was thought to signal a cooperative relationship between the Crown and Māori going forward, however, the English version of the Treaty of Waitangi held a different interpretation to the Māori Te Tiriti o Waitangi. Based on the inconsistent translation between the English and Māori version, the Māori and Pākehā had different expectations of treaty provisions, which inevitably led to breached provisions, and an ensuing conflict between the Māori and Crown Government.[9]

To briefly outline the different translations between each treaty, Article 1 of the English version outlined the Māori's agreement to 'cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty'.[10] In return, Article 2 'affirmed that the Queen of England guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof

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[4] Claudia Orange, Te Tiriti o Waitangi: The Treaty of Waitangi, 1840 (Bridget Williams Books 2017).
[5] Paul Moon, '"Amenable to Civil Power": The Influence of the Periphery on British Policy on New Zealand, 1831 to 1837' (2022) 50 The Journal of Imperial and Commonwealth History 478, at 482.
[6] 'The Treaty in Brief' (Manatū Taonga – Ministry for Culture and Heritage), accessed 3 September 2024.
[7] See Chapter 3, section 4, infra.
[8] The Treaty in Brief' (n 6); Janet McLean, 'Crown, Empire and Redressing the Historical Wrongs of Colonisation in New Zealand' (2015) 15 New Zealand Law Review 187.
[9] Orange (n 4).
[10] The full provision is captured in Article the First, which states: 'The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.' See: Te Tiriti o Waitangi (Treaty of Waitangi) 1840, Article the First.

the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession'.[11] Inclusive within the latter provision, the Māori are entitled to alienate land they no longer wished to retain, to the Crown, for an agreed upon price,[12] a provision which is translated correctly in both English and Māori version.

In contrast, Article 1 of the Māori translation of Te Tiriti o Waitangi, found the rangatira grant the Queen *te Kawanatanga katoa,* as in governance/government over their land. Article 1 therefore did not include the ceding of sovereignty, as understood in the English translation, on the basis that there was no understanding, or precedent, for the concept of sovereignty within Māori culture. Therefore, by signing Te Tiriti o Waitangi, the Māori agreed to a form of governance by the Crown, but not, absolute sovereignty. Then in Article 2, the Māori translation uses the wording *e tino rangatiratanga* to relay the agreement by the Queen to uphold 'the full chieftainship of the *rangatira,* the tribes and all the people of New Zealand over their lands, their dwelling-places and all of their prized possessions.'[13] Where the translation between the English and Māori version of the Treaty in Article 2 appears less problematic in comparison to Article 1, the Māori translation of Article 2 remains slightly different by emphasising the full chieftainship of Māori over their *taonga katao* (all treasured things).[14]

As aforementioned, the conflicting expectations resulting from the mistranslation of the Treaty of Waitangi, led to breaches of Treaty provisions. In particular, and as we shall see throughout this chapter, the Crown's assumed ownership and sovereignty over Māori land, entrenched conflicts with the Māori, leading to a collection of disputes being brought before the national courts of Aotearoa New Zealand. Where these disputes were grounded upon conflicting understandings of the Treaty of Waitangi - based on the misinterpretation of Crown sovereignty and the breach of treaty provisions on account of the illegitimate extension of Crown ownership over Māori lands accordingly - these disputes were furthermore characterised by the broader cultural and legal clashes between Te Ao Māori and Te Ao Pākehā (as in, the Māori "world" and the Pākehā "world").[15] Where the latter two worlds collectively co-habit the space of Aotearoa New Zealand, and represent vastly different epistemological, ontological, and cultural normativities, they have not been perceived as equals. In fact, and in consequence to the long-lasting effects of colonialisation, which have led to the persistent alienation and dispossession of Māori land, Te Ao Pākehā emerged as a domineering presence across Aotearoa New Zealand, at the expense and exclusion of Te Ao Māori.

Against this background, the rest of this chapter explores the important role of the Waitangi Tribunal in addressing the rival normativities between Te Ao Māori and Te Ao Pākehā in the concrete disputes heard

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[11] ibid.
[12] ibid.
[13] Anne Salmond, 'Tears of Rangi: Water, Power, and People in New Zealand' (2014) 4 HAU: Journal of Ethnographic Theory 285, at 298.
[14] Orange (n 4).
[15] Salmond (n 12).

before them. As a special jurisdiction created to hear the claims brought by the Māori against the Crown over Treaty interpretations, the mandate of the Waitangi Tribunal has been indispensable in (1) resolving historical grievances of the Māori as a result of colonisation, and (2) by opening up a space for the inclusion of Māori epistemologies, ontologies, and cultures which are representative of Te Ao Māori. In particular, the Waitangi Tribunal have been fundamental in resolving concrete disputes through the articulation of innovative legal hybrids, which strike a balance between the hegemonic and counter-hegemonic epistemologies and ontologies from Pākehā law and Tikanga law.

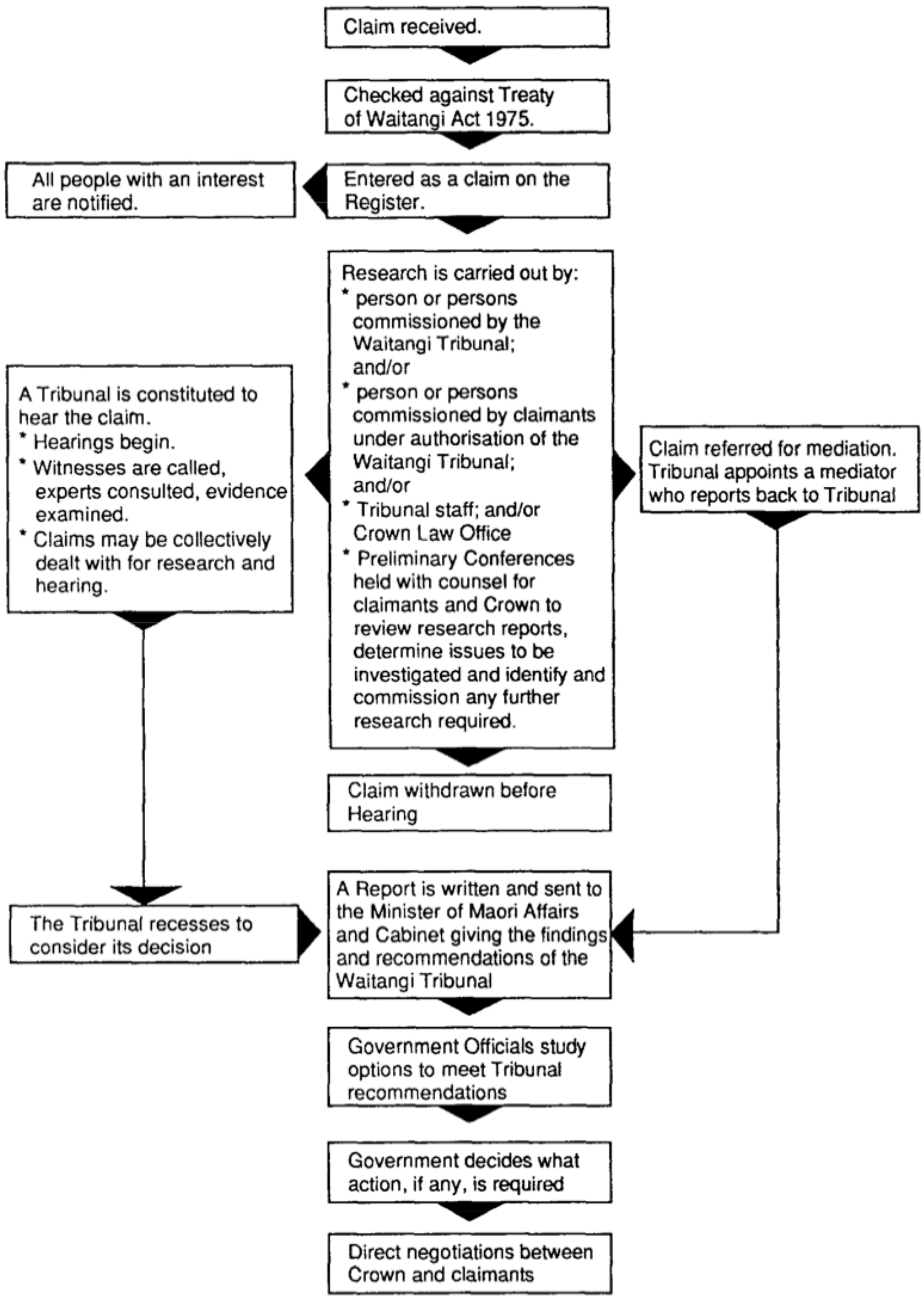
Referring back to the point made in chapter 1[16] on the varying legal status, roles and composition of the legal entities explored within this thesis as 'courts', it is worth expanding on the precise status and nature of the Waitangi Tribunal, as certain features of this body are unique from the other courts explored herein. As already highlighted above, in figure 1,[17] the Waitangi Tribunal is a standing commission of inquiry, meaning, its main functions are to inquire and report on claims submitted by Māori[18] relating to alleged violations of the Treaty of Waitangi.[19] The Tribunal does not have the power to deliver binding resolutions – and is therefore not a "court", per se – but is rather, a body with the power to issue non-binding recommendations which are then to be considered by the state government.[20] As an inquisitorial body with broad statutory authority to 'regulate its own procedures and [...] conduct its own research',[21] the Tribunal '...seeks to produce a comprehensive and authoritative report and provide recommendations to inform the Crown and to guide it in remedying any prejudice the Tribunal has found – whether by compensation, legislative or policy reform or any other remedial measures.'[22] It is a body comprised of legal and non-legal experts. The legally qualified experts, including all the (Māori and non-Māori) judges from the Māori Land Court, preside over the Tribunal. However, the standing commission is also assisted by non-legal experts, who instead possess specialist knowledge on Māori studies, anthropology, linguistics, and history.[23] The Tribunal is a "bi-cultural body", meaning, 'many of its members are Maori *kaumatua* (elders, experts in custom and Maori language and oratory).'[24]

The Waitangi Tribunal takes a unique approach to dealing with the claims relating to alleged violations of the Treaty of Waitangi, which in and of themselves, are linked to Aotearoa New Zealand's colonial past. The Tribunal conducts elaborate historical inquiries into the submitted claims, investigating acts and omissions by the Crown, such as the confiscation of Māori land, the impacts of the Native Land Court,

[16] See Chapter 1, section 2, supra.
[17] ibid.
[18] Treaty of Waitangi Act (1975), section 6.
[19] Guide to the Practice and Procedure of the Waitangi Tribunal: A Comprehensive Practice Note Issued under Clause 5((0 and (10) of Schedule 2 to the Treaty of Waitangi Act 1975 (August 2023).
[20] Treaty of Waitangi Act (n 18), section 5.
[21] Guide to the Practice and Procedure of the Waitangi Tribunal (n 19), section 3.3.
[22] ibid.
[23] Richard P Boast, 'The Waitangi Tribunal in the Context of New Zealand's Political Culture and Historiography' (2016) 18 History of International Law/Revue d'histoire du droit international 339, at 348.
[24] ibid.

governmental purchasing of Māori land, consequences of the civil war and so on.[25] The claims process itself has been illustrated by Evelyn Stokes – a previous member of the Waitangi Tribunal - in figure 2 below.

Figure 2: Claims process of the Waitangi Tribunal[26]



[25] ibid, at 350; Richard P Boast, 'The Waitangi Tribunal: "Conscience of the Nation", or Just Another Court?' (1993) 16 The University of New South Wales Law Journal 223.
[26] Evelyn Stokes, 'The Treaty of Waitangi and the Waitangi Tribunal: Maori Claims in New Zealand' (1992) 12 Applied Geography 176, at 183.

Unpacking the claims which fall under the remit of the Tribunal, Richard Boast has identified six key characteristics of the process, which includes the following:

(i) Extensive research is conducted to support the inquiry process, such as, an investigation into the legal history of claims, by experts such as academic historians who specialise in Māori history. Said experts then compile their research into large reports. This research is 'funded by the Waitangi Tribunal itself, by public bodies, and by the government directly.'[27]

(ii) There is a great deal of preparation before the main hearings, including through preliminary hearings. This stage of inquiry involves 'pleadings, research, evidentiary problems, the issues to be addressed and so on', and often takes one to two years.[28]

(iii) The location of the hearings are usually on the claimant's *marae,* meaning, the specific ceremonial centre or meeting house for that particular Māori group. During the hearings, '[e]vidence can be given in Maori, but in practice most testimony, questioning, and cross-examination is conducted in English.'[29]

(iv) There are, however, similarities with the Tribunal's claims process and normal court procedure. Claimants are represented by lawyers, in the submission of claims, cross-examination, and provision of evidence. To which the Crown also represented by their own lawyers, rely on their own historical experts. There is also a legal aid fund which the claimants can access, to support their claim. Owing to the breaks that often happen between hearings, this stage of the inquiry may take up to a year or longer.

(v) The hearings heard before the Waitangi Tribunal are often grouped as collective claims under the one inquiry, which is designated a "Wai" number (which, in the present cases explored in full below, fall under Wai 167 for the Whanganui River dispute, and Wai 894 for the Te Urewera dispute). However, '[t]he multi-party dimension of the process can cause procedural problems when it comes to the management of cross-examination and operating and closing submissions: claimant counsel, who mostly know one another well, manage these matters themselves on a co-operative basis. There can however sometimes be real tensions amongst claimants, and some claimant groups will be divided politically inter se, with different factions or groupings bringing separate claims. The Tribunal is well-used to the complexities of Maori society.'[30]

(vi) The final recommendations of the Tribunal are encapsulated within a report. This report also contains vast material on the historical inquiry of the claim, information outlining the relevant parties' experiences, background information to the claim, and the legal argument itself etc.

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[27] Boast, The Waitangi Tribunal in the Context of New Zealand's Political Culture and Historiography' (n 23), at 353.
[28] ibid, at 354
[29] ibid.
[30] ibid.

It is important, however, to outline some critiques of the claims process under the jurisdiction of the Tribunal. First, it is a lengthy, and arguably, slow system in which to pursue forms of justice. Albeit a common critique of courts in general, the very nature of the Waitangi Tribunal is dedicated to conducting an historical inquiry, meaning, it takes a great deal of time to trace the claims' legal history, and to also, listen and report on relevant parties' experiences of the claim. For example, the Whanganui River Report (Wai 167) dedicated a full chapter (approximately 50 pages) to recounting both the Māori, and - to a lesser degree -, Pākehā perspectives, of the underpinning dispute.[31] In this regard, it must be considered to what extent the Waitangi Tribunal is the best, or most efficient forum, to pursue these types of claims. Second, and interconnectedly, numerous authors have criticised the 'Waitangi Tribunal's approach to history [as] 'presentist' or teleological, or that it applies inappropriate and over-rigorous canons of behaviour to government actions in the past.'[32] Third, it is important to consider the influence of the Waitangi Tribunal vis-à-vis the other branches of government, or in other words, where it stands in consideration of the separation of powers. Considering the Waitangi Tribunal is a commission of inquiry, with no substantial adjudicative powers -insofar that it is unable to deliver binding resolutions -, it has been criticised as being 'diversionary and impugned as lacking in authority.'[33] The latter thus questions to what extent the Waitangi Tribunal can hold the government to account if their acts and omissions violate the Treaty of Waitangi, or whether the Aotearoa New Zealand system supports parliamentary supremacy.[34]

In a brief retort to these criticisms, it is important to stress that the mandate of the Waitangi Tribunal is one of promoting transitional justice, specifically, for relating to the colonial grievances of the Māori. In this manner, the historical inquiry - albeit a unique judicial process which also takes a long period of time - is essential to unravelling the Māori's colonial harms relating to the acts and omissions of the Crown in violation of the Treaty of Waitangi. From a transitional justice perspective, the forum's inquisitorial nature aligns with the ideals of promoting access to justice, by facilitating the inclusion of Māori experiences relating to their colonial grievances, through dialogical approaches. This process, in turn, finds the Waitangi Tribunal engaging in a bottom-up judicial methodology of the Waitangi Tribunal (discussed in more depth in section 6[35]), as in, a method beneficial to facilitating the inclusion of Māori normativities in law. As we shall see in chapter 4,[36] the JEP, a legal entity established with a transitional justice mandate, also engages in a bottom-up judicial methodology, as a method of translating local normativities of IPLCs into concrete legal resolutions. Regarding the "presentist" critique, it is the precise mandate of the Waitangi Tribunal to investigate historical grievances associated with colonialism, and thus an investigation into the past behaviour of the government is required. However, Boast adds to this critique, iterating that in his opinion

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[31] Waitangi Tribunal Report 1999: The Whanganui River Report, at 55 – 104.
[32] Boast, The Waitangi Tribunal in the Context of New Zealand's Political Culture and Historiography' (n 23), at 357.
[33] Paul Havemann and Kaye Turner, 'The Waitangi Tribunal: Theorising Its Place in the Re-Design of the New Zealand State' (1994) 1o Australian Journal of Law and Society 165, at 180.
[34] Edwin Morrison and Andrew Coffin, 'K3 Insights: Summoning Ministers, the Waitangi Tribunal and the NZ Constitution' (*K3 Legal Accounting Human Resources*) <https://www.k3.co.nz/insights/summoning-ministers-the-waitangi-tribunal-and-the-nz-constitution> accessed 3 May 2025.
[35] See Chapter 6, section 4.2, infra.
[36] See Chapter 4, section 4, infra.

the Tribunal lets the 'private sector off the hook' by focussing obsessively on the acts and omissions of the Crown, which to him, 'is a more serious distortion of New Zealand history'.[37] Whilst I agree with the latter perspective, this does not exclude the importance of the Tribunal's role in addressing the Crown's colonial responsibilities. Turning to the final comment on the separation of powers, the power of the Waitangi Tribunal is, at the end of the day, recommendatory. The Tribunal is therefore limited in their ability of holding their government to account for their historical acts and omissions relating to their colonial grievances vis-à-vis the Māori. There thus requires a degree of political will and cooperation by the state government, to take on board the recommendations of the Tribunal in addressing these historical grievances. This notion has been captured by Havemann and Turner in the following...

> 'The Tribunal was never intended to dispense "reparative justice". It was and remains a body to hear claims that the Crown's acts or omissions prejudiced Maori, to determine the meaning of Treaty rights in relation to such claims and to report its findings and make recommendations as to remedies to the Crown. Sharp suggests that the Tribunal has consistently repressed its reparative tendencies and expressed a preference for "mildness, conciliation and negotiation" to reach achievable goals toward the constructing of a more peaceful and just future.'[38]

Hence, whilst it is true that authority of the Waitangi Tribunal is limited in the overarching framework of the separation of powers, in practice, their recommendations appear to have been met with the political will of the government. More specifically, and as this chapter explores, the recommendations of the Waitangi reports have triggered legislative change, which acknowledges and apologises for the colonial harms of the Crown on one hand, and facilities the inclusion of previously marginalised Māori normativities within law, by embedding such within innovative legal hybrids, on the other.

The following two sections will now focus on two concrete disputes heard before the Waitangi Tribunal which verse over the contested ownership of Nature, and which led to the articulation of innovative rights of nature legal hybrids. In section 3 (which we shall turn to momentarily), I will centre my investigation on the dispute of ownership over the Whanganui River. Then in section 4, I will focus on the ownership dispute over the Te Urewera Forest.

3. Te Awa Tupua as an indivisible living entity

In 1999, the Waitangi Tribunal delivered a ground-breaking report – the Whanganui River Report – spearheading rights of Nature developments within Aotearoa New Zealand.[39] The report addresses the century-long legal dispute of ownership over the Whanganui River, as part of the Tribunal's specialised jurisdiction to hear the historical grievances brought by the Whanganui iwi, a Māori community, against the

[37] Boast, The Waitangi Tribunal in the Context of New Zealand's Political Culture and Historiography' (n 23), at 357.
[38] Havemann and Turner (n 33), at 10.
[39] Whanganui River Report (n 31).

Crown.[40] As part of their remit, the Tribunal investigated the Whanganui iwi's claims which alleged the Crown's acts and omissions were contributing to the environmental, ecological, and cultural degradation of the Whanganui River. Upon conclusion of the case, the Waitangi Tribunal found the Crown to be in violation of section 2 of the Treaty of Waitangi, which guarantees Māori's exclusive and undisturbed possession of land for the Chiefs and Tribes of New Zealand 'as long as it is their wish and desire to retain the same in their possession'.[41] As the final court to hear this dispute, the Waitangi Tribunal compiled their findings and recommendations into the Whanganui River Report. The latter report featured substantive recommendations for a future settlement, which would lead to the negotiation and adoption of the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. In addition to a settlement agreement of $80 million to redress the damages resulting from the Crown's acts and omissions, the 2017 Act acknowledged the Whanganui River as a subject of rights.[42] Aotearoa New Zealand, consequently, became the first country in the world to recognise the legal personality of rivers.

Although the basis for the dispute was grounded on a contestation of ownership over the Whanganui River - claimed by the petitioners to be guaranteed to the Māori under the Treaty of Waitangi – the dispute itself, was much more complex. In fact, the dispute was complicated by the inherent epistemological and ontological clashes of ideologies concerning 'ownership' and 'property' between Tikanga law and Pākehā[43] law. Conceptualising these tensions are key to understanding both the legal argument underpinning Wai 167 (explored in section 3.2) and the concretisation of the Whanganui River as an indivisible living being in the 2017 Te Awa Tupua Act (section 3.3), and therefore, section 3.1 will unpack the cosmovisions, epistemologies and ontologies, which define Māori's relationship with the Whanganui River.

3.1 Māori Cosmovisions: Ko Au Te Awa, Ko Te Awa Ko Au

Māori cosmovisions speak to the inseparability of Māori and Nature, in which the natural world and all the elements contained within (including human beings, non-human animals, and nature) are innately interconnected. Based on these interconnections, or 'whakapapa' (i.e., genealogy), Māori recognise the natural world as '"tupuna" (ancestors), "whānau (kin), and imbued with "mana" (spiritual and physical authority and power) and "mauri" (a spiritual life essence).'[44] Based on these deeply cultural and spiritual connections with Nature, Māori cosmovisions carve out spaces for relationships based on equality and respect, emulating reciprocal relationships with obligations between humans and the natural world. These relationships of reciprocity are founded upon the conception that the natural world and all the creatures

[40] Te Tiriti o Waitangi (Treaty of Waitangi) (n 10).
[41] ibid, s.2.
[42] Te Awa Tupua Act (n 1), s 12 & 14.
[43] Pākehā is the terminology used to refer to the European settlers of Aotearoa New Zealand, or any non-Māori person. For more information on the contestation over this concept and the tracing of its genealogical foundations, see: Jodie Ranford, '"Pākehā", Its Origin and Meaning', ACE papers, Issue 6: Graduate Student Work - Issues in Contemporary Education, Paper 8.
[44] Krushil Watene, 'Valuing Nature: Māori Philosophy and the Capability Approach' (2016) 44 Oxford Development Studies 287, at 292.

that inhabit it are kin, and that accordingly, these relationships give rise to 'kaitiaki' (or trustee) obligations. Kaitiaki obligations entail duties of conservation, protection, and enhancement of Nature,[45] as Māori relate to Nature in the sense of belonging to the natural world, as opposed to owning it. The latter sentiment can be captured in the following: 'the resources of the earth did not belong to man but rather, man belonged to the earth, Man as well as animal, bird, fish could harvest the bounty of mother earth's resources but they did not own them.'[46] The assumption of owning Nature is where we see some of the most prominent divergences between Māori customs and the Western legal tradition, in particular, where the latter dictates Nature to be a commodity, exploitable for economic and material gain. The Western legal tradition, as touched upon in chapter 1,[47] emphasises ownership over nature by qualifying such in terms of property rights, finding its roots in the Judeo-Christian school of thought which advances an anthropocentric view of the natural world based on the dominion of man over nature. Contrastingly, Māori ideology destabilises this hierarchical notion, instead, welcoming a heterarchical relationship with Nature, built upon mutual respect, reciprocity, and kaitiaki.

For Māori, Te Awa Tupua 'is a living being and ancestor with its own mauri, mana and tapu. To Aithaunui, it was their "tupuna awa"[48].'[49] The Māori depend on the River and its resources for spiritual, cultural, and physical sustenance, just as the River depends on the Māori for its conservation, protection, and enhancement. The relationship between the Whanganui iwi and the Te Awa Tupua is emphatic of an ancestral connection, which is not only grounded on a relationship of mutual respect and concurrent kaitiaki obligations, but also, on the recognition of the intrinsic value of Te Awa Tupua as Nature. Te Awa Tupua is therefore an indivisible living entity, one which cannot be treated as a separate entity or be divided up into proprietary elements in accordance with English property rights. Within the context of the Whanganui River dispute, epistemological clashes between Tikanga law and Pākehā law were therefore most apparent when English common law doctrines and statutes were applied to adjudicate the dispute of ownership. As I will explore in section 3.2, the application of the Pākehā doctrines and statutes confined Nature into a strict property rights paradigm and nurtured a sense of alienation between Māori cosmovisions and land ownership. To explain, the idea of property inherently clashes with Māori cosmovisions which perceive the Te Awa Tupua as 'taonga', as in, an ancestral treasure. Where property has been characterised as 'something in the outside world, separate from oneself',[50] Māori conceptualise the Te Awa Tupua 'as a whole and indivisible entity'[51], whose essence is encapsulated in the proverb 'Ko au te awa, Ko te awa o au' – which

[45] Waitangi Tribunal Report (2011), WAI 262, Wellington: Legislation Direct.
[46] M Marsden and T.A.C. Royal, 'The Achievement of Authentic Being: God, Man and Universe, a Māori View' (2003), at 67.
[47] See Chapter 1, section 4.2, supra.
[48] Translates to 'River Ancestor'.
[49] Whanganui River Report (n 31), at 261.
[50] Margaret Jane Radin, 'Property and Personhood' (1982) Stanford Law Review 957, at 966
[51] The Whanganui River Report (n 31), at 24 and 46; Liz Charpleix, 'The Whanganui River as Te Awa Tupua: Place-Based Law in a Legally Pluralistic Society' (2018) 184 The Geographical Journal 19, at 22.

translates to 'I am the River, The River is me'.[52] The ideology of ownership thus appears incommensurable between Tikanga and Pākehā law, boiling down (in its simplistic form) to conflicting perceptions of either owning Nature, or belonging to it.

Conceptualising the relationship between the Whanganui iwi and the River through the Māori cosmological lens eventually became the epistemological foundation recognising the legal subjectivisation of Te Awa Tupua. The latter, however, was not an easy feat, and was instead a painstakingly long process, strewn out across a century, traversing several courts and parliamentary forums. In the following section, I will trace the legal argument versing over the ownership of the Te Awa Tupua. In particular, I will highlight how the application of English common law doctrines and statutes placed ownership with the Crown and consequently sequestered Māori cosmovisions, epistemologies and ontologies.

3.2 Tikanga v Pākehā law: the legal argument

From the first parliamentary petition in 1873, to the final negotiation settlement between the Māori and Crown Governance in 2012, the Whanganui River dispute was emblematic of the inherent conflict between the Māori and Crown government, and the long road to reconciliation in the spirit of decolonisation. In the following, I will outline key milestones in the legal argument of Wai 167, prior to the adjudication of the concrete dispute before the Waitangi Tribunal.

The Whanganui iwi first petitioned Parliament in 1873, to (1) challenge the Government's acts and omissions which contributed to the degradation of the River, including the operation of a steamer service which extracted minerals on the riverbed,[53] and (2) to receive acknowledgement and retribution for the years of discrimination experienced by the Māori in relation to their colonial grievances with the Crown. The Whanganui iwi challenged the Crown in a bid to preserve the River's health for future generations, on the allegation that the Crown's activities (and failure to take preventative action) degraded the ecological vitality of the River, the surrounding ecosystem, and the animals that lived within. Interconnectedly, the Whanganui iwi alleged that the Crown's activities negatively impacted the spiritual and cultural connection shared between the River and the iwi. The basis for the petition was grounded on the assertion that the Crown's acts and omissions were violating the Māori's rights of ownership, including their rights to access and have full enjoyment of the Whanganui River. The Māori claimed they had maintained ownership over the River and its tributaries since the signing of the Treaty of Waitangi in 1840, stating that the Treaty guaranteed their exclusive and undisturbed possession of land for 'as long as it is their wish and desire to retain the same in their possession'.[54] The Whanganui iwi claimed they had sovereignty over their land, and

[52] The Office of Treaty Settlements, Ruruku Whatkatupua Te Mana O Te Awa Tupua (2002), Office of treaty Settlements.
[53] It is also important to note that the Crown did not consult with the Whanganui iwi before commencing operations of the steamer service.
[54] Te Tiriti o Waitangi (Treaty of Waitangi) (n 10), s.2.

on the basis that they did not freely or knowingly give up their rights, their ownership rights had not been extinguished with the signing of the Treaty of Waitangi,[55] or been ceded to the Crown through land alienation.

In the quest for justice and the enforcement of Māori river rights, the dispute entered the courts in 1938. The first submission was heard by the Native Land Court,[56] a court established to enable the purchasing of traditional Māori land by Pākehā settlers, by converting communal land titles to individual titles. The Native Land Court was tasked with investigating the ownership titles of the Whanganui River and its bed, specifically, the part which encompassed the 'tidal limit at Raorikia to its junction with the Whakapapa River above Taumarunui.'[57] Judge Browne, who presided over the case, was asked to consider whether the Māori had ownership over the River 'according to native custom, at the time of the Treaty of Waitangi in 1840'.[58] If the Māori were considered *not* to have ownership over the Te Awa Tupua in 1840, then ownership would have been vested with the Crown. However, if the Māori were recognised as having ownership over the River in 1840, the Native Land Court then had to consider whether the Māori still held ownership in accordance with their native customs and usages.[59] Notably, the Native Land Courts' jurisdiction was limited to considering which party had ownership over the Whanganui River, based on the ownership titles of the bed alone. In accordance with the Native Land Act 1931,[60] the Native Land Court had jurisdiction to investigate ownership titles relating to land, with no provisions permitting the court to investigate titles relating to rivers.[61] Therefore, the Native Land Court's investigation did not take into consideration the other elements which comprise the Whanganui River, and was hence unable to appreciate 'the Māori concept of the physical, spiritual, and cultural qualities of the river as a unified whole.'[62] Nevertheless, in consideration of the claims by both parties, the court rejected the Crown's argument that the Whanganui Māori did not retain ownership of the River and the riverbed when signing the Treaty of Waitangi.[63] Instead, the Native Land Court delivered a crushing defeat for the Crown, ruling that the Whanganui iwi had retained ownership over the River in accordance with their customs and usages.[64]

Six years later, the Crown brought an appeal to the Native Appellate Court in 1944, on the assertion that Māori native custom 'did not recognise exclusive native ownership of beds of navigable rivers, nor that the

[55] The petition in question related to the Timber Floating Bill (1873) LE1/1973/10, NA Wellington, see: Whanganui River Report (n 31) at 4.
[56] Established through the Native Lands Act (1862) & (1865) (29 Victoriae 1865 No 71).
[57] Whanganui River Report (n 31), at 198.
[58] ibid at 198.
[59] ibid.
[60] Native Land Act 1931 (21 GEO V 1931 No 31).
[61] Whanganui River Report (n 31), at 198.
[62] ibid, at 198.
[63] The Native Land Court rejected all five grounds put forward by the Crown. For more information, see ibid at 203-205.
[64] ibid, at 203.

bed of a river or lake was land covered with water.'[65] Additionally, the Crown attempted to persuade the Native Appellate Court that there was no guarantee that all non-alienated land in New Zealand belonged to a Māori tribe or hapū. Considering the appeal, all six judges delivered separate judgements upholding Judge Browne's decision. Furthermore, Chief Justice Shepherd held that the Crown had not provided enough evidence to disprove Judge Browne's decision.[66]

Nevertheless, victory for the Māori was short lived. Following the decision by the Native Appellate Court, the Crown appealed to the Supreme Court, seeking an issue of writs to prevent the Whanganui Māori from obtaining ownership titles for the riverbed from the Native Land Court[67] (renamed Māori Land Court in 1947).[68] In a significant turn of events, the Supreme Court supported the Crown's submission, and in 1949 ruled that the ownership of the riverbed was vested with the Crown in accordance with section 206 of the Coal Mines Act 1925 (originally section 14 of the Coal-mines [Act] Amendment Act 1903[69]), which stated:

> 'Save where the bed of a navigable River is or has been granted by the Crown, the bed of such River shall remain and shall be deemed to have always been vested in the Crown, and, without limiting in any way the rights of the Crown thereto, all minerals, including coal, within such bed shall be the *absolute property of the Crown*.'[70]

Stressing the unambiguous nature of the provisions contained within section 206, the Supreme Court held firmly that the Whanganui riverbed was part of Crown land, and therefore the Crown had not 'acted in a confiscatory manner in so acquiring it.'[71]

Shortly after vesting ownership titles with the Crown, the Whanganui iwi approached the Royal Commission to review the Supreme Court decision. In 1950, the Royal Commission delivered a report,[72] finding that, in the exception of the Coal-mines Act,[73] the Māori maintained ownership of the Whanganui River based on their customs and usages. The Royal Commission furthermore acknowledged that 'according to equity and good conscience…the claimants [were] entitled to compensation for the loss of their rights to the bed of the river.'[74]

Unsatisfied with the report of the Royal Commission, the Crown moved the case to the Court of Appeal in 1953, who later referred questions to the newly established Māori Appellate Court. The Court of Appeal

[65] ibid, at 205.
[66] For more information on the reasoning of judges on the Native Appellate Court, see ibid, at 205-206.
[67] The King v Morison and Another [1930] NZLR 247 (SC).
[68] Whanganui River Report (n 31), at 207.
[69] Coal-mines Act Amendment Act 1903 (3 EDW VII 1903 No 80).
[70] ibid, s.14(1); Coal-mines Act 1925 (16 GEO V 1925 No 39), s.206.
[71] Whanganui River Report (n 31), at 211.
[72] Sir Harold Johnston, 'Report of Royal Commission Appointed to Inquire into and Report on Claims Made by Certain Māoris in Respect of the Wanganui River', AJHR, 1950, g-2 (doc a 77, vol 1(6)), pp 1-3.
[73] Coal-mines Act Amendment Act 1903 (n 69), s.14.
[74] The decision by the Royal Commission also included the recognition that the Māori were owed compensation for gravel extraction activities carried out by the Crown. See: Whanganui River report (n 15), at 4 & 218-220; Johnson 'Report of Royal Commission' (n 72), at 14

were asked to determine '(a) [w]hether, immediately prior to the Coal-mines Act Amendment Act 1903, Māori, under their customs and usages, held the soil or any other rights to the bed of the Whanganui River between the tidal limit at Roarikia and the junction of the Whanganui and Whakapapa Rivers above Taumarunui', and '(b) to what Māori, hapu, tribe, or other groups of Māori (if any), the riverbed or other rights belonged.'[75] Delivering their judgement in 1962,[76] the Court of Appeal finalised this period of litigation by finding the Māori's customary ownership rights over the River to be extinguished. The Court of Appeal recognised ownership of the River as belonging to the Crown, by relying on the long-held interpretation of section 14 of the Coal-mines Act Amendment Act, and the common law doctrine *ad medium aquae*.[77] In this case, *ad medium aquae* recognised that the owners of the adjoining land to the Riverbed, possessed ownership of the River, up to the centre line. Ownership was therefore vested with the Crown, as the Native Land Court inquiry identified the adjoining landowner titles as belonging to the Crown, since the signing of the Treaty in 1840.[78]

Despite the Court of Appeal extinguishing Māori ownership rights, the plaintiffs pursued another parliamentary petition seeking compensation. The Whanganui River Māori Trust Board (who were created in 1988) were awarded an interim payment of $140,500 to address issues such as gravel extraction of the River.[79] However, in the face of continued obstruction to Māori traditional rights, the Whanganui River Māori Trust Board brought a claim to the Waitangi Tribunal on behalf of the Whanganui iwi in 1990, to assert their rights to 'ownership, management, and control' over the Whanganui River.'[80] In the following, I will outline how the Waitangi Tribunal fundamentally reversed the case law of the previous courts, by diverging from the reliance on English common law to vest ownership of the Whanganui River with the Crown. Instead, and as we shall see below, the Waitangi Tribunal considered whether the Māori freely or knowingly relinquished their rights of ownership over the Whanganui River. The Waitangi Tribunal additionally engaged extensively with Māori cosmovisions which perceived the river as an indivisible living entity, to recognise Te Awa Tupua as a subject of rights.[81]

3.3 The Waitangi Tribunal and Wai 167

The Waitangi Tribunal – which was established in 1975 by an Act of Parliament,[82] in response to increasing concerns over the interpretation of the Treaty of Waitangi[83] – was the final court to hear this case. As already mentioned, the Tribunal has advisory powers and is responsible for providing expertise and advice

[75] Whanganui River Report (n 31) at 220; In re the Bed of the Wanganui River [1955] NZLR 419 (doc a 77, vol 2(7)).
[76] In re the Bed of the Wanganui River (ibid).
[77] Whanganui River Report (n 31), at 376.
[78] ibid, at 4.
[79] ibid, at 4.
[80] FM Brookfield, 'The Waitangi Tribunal and the Whanganui River-Bed' [2000] New Zealand Law Review 1, at 12.
[81] Charpleix (n 51).
[82] Treaty of Waitangi Act 1975 (n 18).
[83] ibid, s.5(2).

to ensure policies and legislation are aligned with treaty interpretations.[84] Although the Tribunal does not have legal powers, it is comprised of seven judicial members (at least four with Māori heritage) who are responsible for providing judicial expertise, to inform legislative developments in accordance with the Treaty of Waitangi.[85]

In a divergence from the decision-making of previous courts, which vested ownership titles with the Crown in accordance with section 14 of the Coal-mines [Act] Amendment Act 1903 and the common law doctrine *ad medium aquae,* the Waitangi Tribunal focussed on whether the 'Māori *freely* and *knowingly* disposed of their customary River interests and their traditional mana or control.'[86] Accordingly, the Tribunal found the Crown to be in violation of article 2 of the Treaty, which guarantees Chiefs and Tribes of New Zealand exclusive and undisturbed possession of their lands *as long as it is their wish and desire to retain the same in their possession.*[87] The latter violation was based on the Tribunal's findings which found: (1) the Māori did not willingly dispose of, or alienate land to the Crown with the signing of the Treaty in 1840, and (2) the ownership titles were vested with the Crown based on the application of English common law and statutes, specifically those which dictated the Crown's ownership of the Whanganui River was based on their ownership of the *bed* of the tidal reaches.[88]

As part of the decision-making, the Waitangi Tribunal considered several points to reasonably conclude that the Māori did not freely, or knowingly, relinquish their ownership rights over the River, and that the application of English common law and statutes breached principles of the Treaty of Waitangi. First, the Māori had actively participated in various forms of direct action against the Crown Government, with the hope of asserting their ownership rights. The Waitangi Tribunal noted the efforts of the Whanganui iwi, as evidenced by the submission of parliamentary petitions, claims before courts, and their active participation in form of protesting.[89] Second, no negotiations or agreements were struck between the Māori and Crown Government for the relinquishment of land. Then third, the alleged extinguishment of Māori customary rights and ownership were based on the Crown's own statutes and presumptions of English law, which, constituted a violation of article 2 of the Treaty of Waitangi, and furthermore, the English Laws Act 1858. The latter piece of legislation was instituted to ensure indigenous groups would be governed by their own

[84] See Chapter 3, section 2, supra.
[85] The Waitangi Tribunal used to be made up of three judges, with one position designated for a judge from the Māori Land Court. This was then increased to seven in 1984. See: Charpleix (n 51), at 20.
[86] Whanganui River Report (n 31), at 267.
[87] This article refers to the agreement between the Crown with the Māori, specifically on the latter's ability to retain their land in accordance with the following stipulations: 'Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.", see: The Treaty of Waitangi (n 10), Article 2.
[88] Whanganui River Report (n 31), at 276.
[89] ibid, at 4.

laws and practices on the assumption of British sovereignty, and that English law would only be applied to British settler colonies in New Zealand. The Crown was found to have violated the English Laws Act, as the assumption of Crown ownership based on the application of English common laws and doctrines failed to recognise the jurisdiction of Māori laws and customs.[90] Furthermore, the application of English common law and statutes conflicted with Māori laws and customs which treat the Whanganui River as an indivisible whole, as the former divided the River into segments through property rights. In conclusion, the Waitangi Tribunal found the Crown to have breached article 2 of the Treaty, on the basis that the Māori had not freely or knowingly relinquished their ownership rights to the Crown, and therefore, the Crown's assumed ownership over the Whanganui River obstructed Māori sovereignty (rangatiratanga) over their ancestral treasure (taonga).

Based on the aforementioned reasoning, the Waitangi Tribunal found the ownership of the Te Awa Tupua to be vested with the Whanganui iwi. As part of Tribunal's advisory remit, they compiled their findings into the Whanganui River Report, spurring the painstakingly slow negotiation process which eventually led to the creation of the 2017 Te Awa Tupua Act. The Tribunal provided for the following recommendations:

> "We propose first that, whatever is done, the authority of Atihaunui in the Whanganui River should be recognised in appropriate legislation. It should include recognition of the Atihaunui right of ownership of the Whanganui River, as an entity and as a resource, without reference to the English legal conception of river ownership in terms of riverbeds. We further propose that any settlement should protect existing use rights for their current terms and provide for continuing public access. Broad parameters for the terms of access will, however, need to be agreed. It should be clear that the public right is theirs not as of right but by permission. This settlement may require joint management of the Whanganui River on a regular basis, and in that event, it should allow for the deployment of Atihaunui people. It would be necessary to provide funding of the functioning of the Whanganui River Maori trust Board, and if need be, this might be built into local authority levies."[91]

In the next section, I will unpack the contents of the Te Awa Tupua Act, to highlight the significance of this piece of legislation for recognising the legal subjectivity of the Whanganui River based on Māori cosmovisions, and furthermore, for paving the way to achieving forms of reconciliation between the Māori and Crown Government by instilling a legal compromise.

3.4 The Te Awa Tupua Act

The 1999 Whanganui River Report featured substantive recommendations which attempted to reconcile clashing ontologies, whilst at the same time carve out a future settlement between the Māori and Crown Government. The latter recommendations triggered processes of negotiation, whereby a legal compromise was agreed upon, and then concretised with the adoption of the 2017 Te Awa Tupua Act. The 2017 Act

[90] The Treaty of Waitangi (n 10), Article 2.
[91] Whanganui River Report (n 31), at 343.

was significant for ending the over-a-century long legal dispute versing over the ownership of the Whanganui River, and, for signalling new beginnings in the relationship between the Māori and Crown Government, based on future-oriented co-operation and reconciliation. Within this section, I will outline the 2017 Act's recognition of Te Awa Tupua as a subject of rights,[92] highlighting how the legislative framing of legal personality relied on Māori cosmovisions, and included the construction of a guardianship body based on co-management. I will furthermore analyse how the 2017 Act concretised an innovative legal hybrid, based on rights of Nature.

Following the recommendations by the Waitangi Tribunal in 1999, the Māori and Crown Governments engaged in a series of negotiations, with a final settlement being reached in 2012. The legislative framework of the 2017 Te Awa Tupua was based on the latter settlement agreed between the Māori and Crown Government, and was hence founded on the principles of: (1) 'Te Mana o Te Awa – recognising, promoting, and protecting the health and wellbeing of the River and its status as Te Awa Tupua',[93] and (2) 'Te Mana o Te Iwi – recognising and providing for the mana and relationship of the Whanganui Iwi in respect of the River.'[94]

With respect to these framing principles, the 2017 Act recognised the Te Awa Tupua as having 'all the rights, powers, duties, and liabilities of a legal person'.[95] The 2017 Act therefore enshrined the Te Awa Tupua as a subject of rights. In an effort to uphold *Te Mana o Te Iwi,* legal personality of Te Awa Tupua was framed around the Whanganui iwi cosmovisions which perceive 'Te Awa Tupua [as] an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all of its physical and metaphysical elements.'[96] Embodying legal personality in such a manner, the Act encapsulates the Māori notion of Te Awa Tupua as an indivisible living entity, which cannot be physically divided up between the River, the bed, the tributaries, and so on. In the same vein, by relaying that Te Awa Tupua comprises of physical and metaphysical elements, the Act nods to the Māori understanding of Nature as their ancestor (tupuna) and their kin (whānau), which is imbued with this spiritual and physical authority and power (mana), and a spiritual life essence (mauri).

The latter approach to legal subjectivisation opposes the understanding of Te Awa Tupua as an entity subject to ownership, in particular, ownership bestowed through divisive property rights. Instead, by enshrining legal subjectivity through the Māori cosmological lens, the 2017 Act emulates the heterarchical relationships between humans and Nature, by furthermore enshrining the kaitiaki obligations that relationship encompasses.

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[92] Te Awa Tupua Act (n 1), s 12 & 14.
[93] Whanganui Iwi and the Crown, Tutohu Whakatupua – Record of Understanding in Relation to the Whanganui River Settlement, (30 August 2012), at section 1.11.1.
[94] ibid, at section 1.11.2.
[95] Te Awa Tupua Act (n 1), s.14(1).
[96] ibid, s.12.

As part of the legal subjectivisation of the Te Awa Tupua, the 2017 Act established the Te Pou Tupua,[97] which is the guardianship body tasked with acting as the human face on behalf of, and in best interest of the River. The Te Pou Tupua are instilled with a stewardship role,[98] and are responsible for upholding the rights, duties, and liabilities granted to the Te Awa Tupua through the 2017 Act,[99] including through court proceedings. In this regard, the Te Pou Tupua are the body responsible for upholding the status, the intrinsic values, and essences of Te Awa Tupua (Tupua te Kawa). Notably, the guardianship body is created in the style of co-management, which carves out a role for the Māori and Crown Government, in the governance of the River.[100] The Te Pou Tupua is supported by two additional bodies, the advisory group Te Karewao*,* and the strategic body, Te Kōpuka.[101] The Te Karewao is tasked with advising and supporting the Te Pou Tupua in performing their functions,[102] and the Te Kōpuka is tasked with collaboratively coordinating with the Te Pou Tupua to 'advance the health and well-being of Te Awa Tupua', in particular, through the Te Heke Ngahuru (the Whole of the River Strategy).[103]

With the passing of the 2017 Act (finally) drawing the century long legal dispute to a close, the concretisation of the legal subjectivisation of Te Awa Tupua was fundamental for several reasons. First, for containing an explicit apology by the Crown, for the colonial harms perpetuated against the Māori.[104] The colonial apology outlined the motivations of the Crown 'to atone for its past wrongs, and begin the process of healing'.[105] The apology furthermore marked the Crown's intentions to promote reconciliation and co-operation with the Māori, on the basis that 'this settlement marks the beginning of a renewed and enduring relationship between the Whanganui Iwi and the Crown that has Te Awa Tupua at its centre and is based on mutual trust and cooperation, good faith, and respect for the Treaty of Waitangi and its principles.'[106] Second, the 2017 Te Awa Tupua Act enshrined an innovative legal hybrid, which in and of itself, reflected a legal resolution based on a compromise of epistemes. Specifically, this innovative legal hybrid struck a careful balance between the competing cosmovisions of Te Ao Māori and Te Ao Pākehā.[107] On one side, basing Te Awa Tupua's legal personality on Māori cosmovisions - specifically those which perceive Te Awa Tupua as an indivisible living entity – represented the cosmovisions from Te Ao Māori. On the other hand, the operationalisation of Te Awa Tupua's rights, duties, and liabilities, through a co-management scheme, somewhat concedes to the inherited property rights scheme, and therefore to the cosmovisions of Te Ao

[97] ibid, s.18-19.
[98] ibid, s.19.
[99] ibid, s.14(2).
[100] ibid, s.20(1-2).
[101] The Te Kōpuka are comprised of 'representatives of persons and organisations with interests in the Whanganui River, including iwi, relevant local authorities, departments of State, commercial and recreational users and environmental group.' See ibid, s.29(2).
[102] Te Awa Tupua Act (n 1), s.27(1).
[103] ibid, s.30(1); Christopher Rodgers, 'A New Approach to Protecting Ecosystems' (2017) 19 Environmental Law Review 266, at 269.
[104] Te Awa Tupua Act (n 1), s.70.
[105] ibid, s.70(f).
[106] ibid, s.70(f).
[107] Salmond (n 13).

Pākehā. Albeit recognised as an innovative legal hybrid due to the compromise of epistemologies and ontologies from Māori customary law and English common law, the concession to property rights, and therefore to Te Ao Pākehā*,* is a point of contention amongst some Māori communities who remain wary of the rights of Nature agenda in general, and the risks associated with the latter over risks of encroaching recolonisation. Whilst the latter concern will be explored in more detail in section 4, I take this opportunity to stress that the compromising nature of innovative legal hybrids is not necessarily an impediment, but rather, creates opportunities for a 'gradual interweaving [of] divergent philosophies or approaches rather than trying to force a convergence of horizons.'[108] The nature of compromise becomes advantageous in pluralistic societies, as a method for promoting the inclusion of diverse normativities. In the context of the Whanganui River dispute, the articulation of a legal compromise was fundamental for not only mediating the epistemological conflicts between Tikanga law and Pākehā law, but furthermore, for carving out space for the inclusion of Māori epistemologies and ontologies. In this regard, the articulation of an innovative legal hybrid by the Waitangi Tribunal, encouraged forms of reconciliation between the Māori and Crown Government, by fostering a sense of co-existence between their rival normativities. Innovative legal hybrids hence abstain from 'a "theory of everything" in which only one reality is possible and only one set of assumptions about the world can prevail',[109] and instead, creates opportunities for the realisation of plural and diverse normative visions.

In conclusion to section 3, we can assume the Waitangi Tribunal has played an important role in opening up spaces for the inclusion of Māori epistemologies and ontologies through the articulation of a rights of Nature legal hybrid. In response to the adjudication of the dispute versing over the ownership of the Whanganui River, the Waitangi Tribunal triggered the process towards devising an innovative legal hybrid. As aforementioned, the latter resolution reflects an innovative legal hybrid by striking a careful balance between the competing epistemological visions of Te Ao Māori and Te Ao Pākehā*,* and their competing normativities of Nature as property, and Nature as an indivisible living entity. What is furthermore significant about this innovative legal hybrid is the manner in which it has been created to promote forms of reconciliation between the Māori and Crown Government, by instilling methods for future-oriented cooperation in the spirit of decoloniality.

In the following section, I will turn to a second example, in which the Waitangi Tribunal adjudicated the dispute versing over the ownership of the Te Urewera Forest. In a similar fashion to the preceding discussion, the forthcoming section will unfold the legal dispute heard before the Waitangi Tribunal. In particular, I will contextualise the background to the dispute, the legal argument heard before the Waitangi Tribunal, and similarly, the conflict of rival normativities between Tikanga and Pākehā law relating to the ownership of Nature. Thereafter, I will outline the manner in which the Waitangi Tribunal articulated an innovative legal hybrid as a resolution to the ownership dispute, which was later concretised in the Te

[108] ibid, at 303.
[109] ibid, at 285.

Urewera 2014. I will furthermore emphasise the judicial remit of the Waitangi Tribunal to create a bespoke legal mechanism, by tailoring the innovative legal hybrid to the relevant cosmovisions of the parties to the dispute.

4. The Te Urewera: once a national park, now a living entity

In a similar vein to the Whanganui River dispute, the Waitangi Tribunal was confronted with an additional, yet connected, dispute of land ownership over the former national park, the Te Urewera. As a brief summary, the Ngāi Tūhoe (hereinafter referred to as the Tūhoe) brought a claim to the Waitangi Tribunal against the Crown Government, with the intentions of asserting their ownership over the Te Urewera Forest. The Tūhoe challenged the Crown, asserting that the Crown's increasing encroachment of Tūhoe land constituted a violation of Treaty provisions. Confronted with this legal dispute, which similarly mirrored the contestation of ownership over the Whanganui River,[110] the Waitangi Tribunal applied the same legal reasoning to then offer an innovative rights of Nature legal hybrid as a resolution to the case. The innovative legal hybrid was concretised within the Te Urewera Act 2014,[111] which led to the legal subjectivisation of the Te Urewera, and creation of a guardianship body to uphold the rights, duties and liabilities granted therein. Whilst the Te Urewera Act was enacted three years prior to the passing of the 2017 Te Awa Tupua Act, the legislative framework contained within was significantly influenced by the adjudicative reasoning by the Waitangi Tribunal in Wai 167, and the 2012 negotiation settlement which framed the legal subjectivisation of the Te Awa Tupua. In fact, since the Te Urewera report focussed primarily on the various grievances of Māori communities, the influence of the Waitangi Tribunal's recommendations in Wai 167 are understood to have triggered the concretisation of a legal compromise within the 2014 Te Urewera Act. Albeit the similarities underpinning the disputes of both the Whanganui River and Te Urewera Forest, the articulation of an innovative rights of Nature legal hybrid for the Te Urewera was more contentious. In line with the briefly mentioned criticisms on the wariness of rights of Nature by some Māori communities, the creation of this hybrid legal "solution" can be perceived as diluting the initial emancipatory claims of the Tūhoe to regain dispossessed land, by instead, institutionalising a compromise through co-management.

In section 4.1, I will outline the background to the Te Urewera dispute, highlighting the violent history between the Tūhoe and Crown Government, and how the continued dispossession of Tūhoe land by the Crown underpinned the Te Urewera ownership dispute. In section 4.2, I will then analyse the legal argument heard before the Waitangi Tribunal which ultimately led to the articulation of an innovative legal hybrid. Considering the findings of the Waitangi Tribunal led to the creation of two pieces of legislation, I will dedicate section 4.3 to outlining the 2014 Tūhoe Claims Settlement Act,[112] and section 4.4 to the Te

[110] See Chapter 3, section 3, supra.
[111] Tutohu Whakatupua – Record of Understanding in Relation to the Whanganui River Settlement (n 93).
[112] Tūhoe Claims Settlement Act 2014.

Urewera Act.[113] Within the latter section, I will unpack the concretisation of the innovative legal hybrid within the Te Urewera Act 2014, highlighting the way legal personality and the creation of the Te Urewera Board has been enshrined within law. This section will furthermore highlight the efforts by the Waitangi Tribunal to articulate the latter resolution as a bespoke legal mechanism. Thereafter, I conclude this section by alluding to the criticisms of the articulated rights of Nature legal hybrid, on the dilution of the Tūhoe's full emancipatory claims.

4.1 Background to the Te Urewera dispute

Over the course of British colonial rule, the Tūhoe have had a contentious and brutal relationship with the Crown. The hostility between the Tūhoe and Crown began in 1840, with the Tūhoe not being given the opportunity to sign the Treaty of Waitangi, and the Crown asserting their authority over the Tūhoe and their lands, nonetheless.[114] From then on, interactions between the Crown and Tūhoe were characterised by violence. Specifically, where the Tūhoe were fighting for self-determination, independence and re-possession over their Native lands, the colonial forces responded with the destruction of Tūhoe lives, homes, lands, crops, and livestock. As part of the colonial pursuit, the Tūhoe were subject to the pervasive invasions by the British forces, which led to the gradual dispossession of their lands.[115]

In the mid-1860s, the Crown began to confiscate native lands that were previously under the full customary control of the Tūhoe, as part of the collective punishment for Māori rebellions against the sovereignty of the Crown during 1840s-1860s. Although the Tūhoe were not involved in the rebellion, a prejudice was created, which was exacerbated when claims through the Compensation Court returned majority of the confiscated land to the Māori, except to the Tūhoe.[116] Thereafter, a civil war broke out in the Te Urewera, which was waged by the Crown until 1871, 'as it sought to apprehend those responsible for the 1865 death of Crown official Fulloon and then capture Te Kooti following his escape from Crown detention.'[117] Again, the Tūhoe's involvement during the civil war was minimal,[118] but, the Te Urewera was used as a safe haven for those who were displaced or defeated. As a consequence for harbouring "fugitives" of the war, the Crown implemented 'scorched earth tactics, and [were] responsible for the execution of unarmed prisoners and the killing of non-combatants. In 1870, Tūhoe were forced out of Te Urewera and detained at Te Putere, where they suffered further hardship. The wars caused Tūhoe to suffer widespread starvation and extensive loss of life.'[119] For decades after, Tūhoe land was gradually chipped away through land sales with

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[113] Te Urewera Act (n 2).
[114] 'Wai 894: Te Urewera Pre-Publication Part I | Waitangi Tribunal' <https://www.waitangitribunal.govt.nz/news/wai-894-te-urewera-pre-publication-part-i-2/> accessed 30 August 2024.
[115] Vincent O'Malley, 'Tūhoe-Crown Settlement – Historical Background' (Māori Law Review, October 2014) accessed 18 March 2024.
[116] Tūhoe Claims Settlement Act (n 112), s.8(1-2).
[117] ibid s.8(3).
[118] O'Malley (n 115).
[119] Tūhoe Claims Settlement Act (n 112), s.8(3).

rival tribes on the perimeter of the Te Urewera,[120] and was furthermore sold secretively to 'needy individuals in the aftermath of the war that would later have to be repaid in land.'[121] Significantly, land was being lost to both the Crown and private buyers in various ways, including through the repayment of debts - in which tribes would have to relinquish ownership over land as a form of payment-, and furthermore through fraudulent activities.[122] During the early 1890s, '[c]olonisation became largely a matter of legal procedure rather than military might'[123] through the purchasing or confiscation of land. In this regard, the 'process of survey and title adjudication in which formerly communal and customary titles were replaced by legal ones empowering individuals to sell their piece of the tribal patrimony was one that many Tūhoe leaders had fought tirelessly to exclude from their district.'[124] In 1896, Parliament enacted the Urewera District Native Reserve Act, to protect remaining Tūhoe land from further sale, whilst furthermore providing for a 'local self-government over a 656 000-acre Urewera Reserve, and for decisions about the use of land to be made collectively and according to Māori custom.'[125] However, where the Urewera District Native Reserve Act was enacted to establish a self-governing reserve for the Tūhoe, the Crown undermined the protection provisions granted by the Act, and furthermore, did not implement those provisions to accommodate Tūhoe self-government. Moreover, where the Tūhoe wanted the 1896 Act to include provisions which banned land sales, the legislation, instead, reserved land purchasing rights to the Crown.[126]

By 1921, Tūhoe autonomy was made obsolete, as a consequence to the continual undermining of Urewera self-government, and the loss and fragmentation of Tūhoe land. With the passing of the Urewera Lands Act 1921-1922, the Urewera Consolidation Scheme amalgamated the Crown's ownership titles of Urewera lands, leading to their 'outright ownership to around half the district.'[127] The Crown then established the Te Urewera as a national park in 1954, and without consultation with the Tūhoe, or recognition of their special interest in the Te Urewera or governance of the park, expanded the park's reach to encompass more land in 1957 and 1982.[128] These conservation measures were perceived as culturally insensitive, as 'the park overlapped most of the native reserve, [and hence symbolised] local perceptions of injustice in conservation legacies'[129] Based on the years of violence and injustice, broken promises to the Tūhoe regarding their self-government, and extensive land loss, the Tūhoe sought to assert their claim for ownership over the Te Urewera, and their 'demand[s] for mana Motuhake, [as in] self-determination or autonomy'.[130]

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120 O'Malley (n 115).
121 ibid.
122 ibid.
123 ibid.
124 ibid.
125 Tūhoe Claims Settlement Act (n 112), s.8(6).
126 O'Malley (n 115); Te Urewera Pre-publications Report, Part III, Section 13.6.
127 O'Malley (ibid).
128 Tūhoe Claims Settlement Act (n 112), s.8(10).
129 B Coombes, 'Nature's Rights as Indigenous Rights? Mis/Recognition through Personhood for Te Urewera' (2020) 1–2 Espace populations sociétés. Space populations societies.
130 O'Malley (n 115).

Based on the preceding overview, I will briefly trace the adjudication of the Te Urewera dispute in section 4.2, before turning to an explanation of the concretisation of the Te Urewera as an entity subject to rights, in section 4.3.

4.2 Adjudication before the Waitangi Tribunal

On the 31st of March in 1987, the Tūhoe brought their first claim to the Waitangi Tribunal, under the authority of the 1975 Treaty of Waitangi Act. Bringing their historical grievances to the Waitangi Tribunal, the specialised court considered 40 claims, collectively falling under Wai 894, as the Combined Record of Inquiry for the Urewera District Inquiry. As part of the investigation, the Waitangi Tribunal were tasked with investigating the issues of land alienation and dispossession which were accommodated through the enactment of the Urewera District Native Reserve Act, Urewera Consolidation Scheme, and recognition of the Te Urewera as a national park. Further issues which have escaped the scope of this chapter, but are nonetheless relevant, include the ownership disputes over Lake Waikaremoana and the Eastern Bay of Plenty Raupatu, and furthermore, the grievances associated with the Maunapōhatu invasion.[131] As part of these claims, the Waitangi Tribunal considered the intertwined social impact of 'economic deprivation, urbanisation, colonisation [and], the loss of traditional methods'[132] on the Tūhoe. From 2003 until 2005, the Waitangi Tribunal heard evidence from various claimants involved in Wai 894, and compiled their findings into eight extensive volumes, to assist with settlement negotiations. As part of the inquiry, the presiding officer Judge Patrick Savage, highlighted key themes which characterised the dispute, including: '[t]he Crown's defeat of promised self-governance; [t]he Crown's repeated broken promises; [e]xtensive land loss; and [t]he creation of a national park in Te Urewera which came to symbolise dispossession.'[133] In conclusion to their inquiry, the Waitangi Tribunal found the Crown to be in breach of the Treaty of Waitangi. Specifically, the court found that the Crown was responsible for the land alienation, dispossession, and purchasing of up to of 75 percent of native land, which not only breached the Treaty, but 'caused significant prejudice to the peoples of Te Urewera.'[134]

The Tribunals' findings lay the foundations for two pieces of legislation which formed the resolution to the dispute. First, the Tūhoe Claims Settlement Act 2014,[135] which outlined the settlement between the Crown and Tūhoe, and secondly, the Te Urewera Act 2014,[136] which recognised the Te Urewera as an entity subject

[131] ibid.
[132] ibid.
[133] 'Tūhoe-Crown Settlement – Tūhoe Claims Settlement Act 2014; Te Urewera Report of the Waitangi Tribunal – Māori Law Review' <https://maorilawreview.co.nz/2014/10/tuhoe-crown-settlement-tuhoe-claims-settlement-act-2014-te-urewera-report-of-the-waitangi-tribunal/> accessed 30 August 2024.
[134] 'Wai 894: Te Urewera, Pre-Publication Part III Released | Waitangi Tribunal' <https://www.waitangitribunal.govt.nz/news/wai-894-te-urewera-pre-publication-part-iii-released-2/> accessed 30 August 2024.
[135] Tūhoe Claims Settlement Act (n 112).
[136] Te Urewera Act (n 2).

to rights. I will take this opportunity to briefly outline key components of the Tūhoe Claims Settlement Act in section 4.3, before moving on to unpacking the Te Urewera Act in section 4.4.

4.3 Tūhoe Claims Settlement Act

The Tūhoe Claims Settlement Act was adopted with the purpose of recording 'the acknowledgements and apology given by the Crown to Tūhoe in the deed of settlement',[137] and 'to give effect to certain provisions of the deed of settlement that settles the historical claims of Tūhoe.'[138] The Act traces a summary of the historical interactions between the Tūhoe and Crown Government (outlined in section 4.1), which act as the basis for the settlement. As one of the primary intentions of the legislation, the Act outlines a collection of acknowledgements and an apology for the colonial harms perpetuated by the Crown. Amongst many other acknowledgements, the 2014 Settlement Act includes provisions recognising…

> 'The Crown acknowledges that Tūhoe did not sign the Treaty of Waitangi in 1840. The Crown's authority over New Zealand rested in part on the Treaty, and the Crown's Treaty obligations, including its protective guarantees, applied to Tūhoe. The Crown acknowledges that it has failed to meet many of its Treaty obligations to Tūhoe. Despite the previous efforts of Tūhoe, the Crown has failed to deal with the long-standing and legitimately held grievances of Tūhoe in an appropriate way, and recognition of those grievances is long overdue. The sense of grief and loss suffered by Tūhoe and the impact of the Crown's failings endure today.'[139]

Furthermore, the Settlement Act encompasses an apology by the Crown, for the many counts of violence, injustices, and discrimination, perpetuated again the Tūhoe by the Crown, and furthermore, for the failure of the Crown to uphold their obligations under the Treaty of Waitangi.[140] In a similar sense to the apology featured at a later moment in the Whanganui River Act, the Tūhoe Claims Settlement Act outlines the intentions by the Crown to promote future-oriented co-operation with the Māori, as part of their intended promotion of reconciliation. Specifically, the Act states, '[t]hrough this apology and settlement the Crown hopes to honestly confront the past and seeks to atone for its wrongs. The Crown hopes to build afresh its relationship with Tūhoe and that this new relationship will endure for current and future generations.'[141] The Tūhoe Claims Settlement Act then furthermore includes provisions for cultural redress,[142] commercial redress,[143] with a further provision for financial redress of up to $170 million.[144]

In addition to the settlement reached between the Tūhoe and Crown Government as part of the resolution to Wai 894, the 2014 Te Urewera Act was negotiated and adopted. I will now unpack the latter legislation in the following section.

[137] Tūhoe Claims Settlement Act (n 112), s.3(a).
[138] ibid, s.3(b).
[139] ibid, s.9(1).
[140] For a more comprehensive account of the apology contained within the settlement act, see ibid, s.10.
[141] ibid, s.10(7).
[142] ibid, s.21-50.
[143] ibid, s.51-87.
[144] 'Tūhoe-Crown Settlement – Tūhoe Claims Settlement Act 2014 (n 133).

4.4 Te Urewera Act

In 2014, the Te Urewera Act was enacted, recognising the 'Te Urewera [as] a legal entity, [which] has all the rights, powers, duties, and liabilities of a legal person.'[145] Establishing the Te Urewera as a subject of rights, the Te Urewera Act removed all vestiges of ownership from the Crown, and removed any recognition of the Te Urewera as a national park under the National Parks Act 1980.[146] Not only does the Te Urewera Act recognise the Te Urewera as an intrinsic being, but the Act provides for the preservation and conservation of its natural systems - including its indigenous ecological systems and biodiversity - as a site of historical and cultural heritage.[147] The Act outlines intentions to 'strengthen and maintain the connection between the Te Urewera and Tūhoe',[148] and to furthermore, 'provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all.'[149] To fulfil the latter aspirations, the Act guides parties in the preservation and conservation of the Te Urewera, with further provisions for the respect of Tūhoetanga, which gives expression to the Te Urewera.[150] Tūhoetanga, which can be described as Tūhoe traditions or the essence of being Tūhoe, encompasses 'the people, the land, the assets; these things [which] give form to longevity and force – ihi, mauri and mana to whānau, hapū, iwi. It is the language, the culture, the identity that Tūhoe reaffirms through wānanga, hui, reunions, whaikōrero, kapa haka and the Tūhoe Ahurei.'[151] The Te Urewera Act crafts legal personality around Tūhoe cosmovisions which give expression to the Te Urewera. Specifically, the legislation encapsulates Tūhoe perceptions of Te Urewera as a spiritual place with its own mana and mauri,[152] but furthermore…

> 'For Tūhoe, Te Urewera is Te Manawa o te Ika a Māui; it is the heart of the great fish of Maui, its name being derived from Murakareke, the son of the ancestor Tūhoe. […] For Tūhoe, Te Urewera is their ewe whenua, their place of origin and return, their homeland. […] Te Urewera expresses and gives meaning to Tūhoe culture, language, customs, and identity. There Tūhoe hold mana by ahikāroa; they are tangata whenua and kaitiaki of Te Urewera.'[153]

Noticeably, the Te Urewera Act constructs legal personality in a similar fashion to the Te Awa Tupua Act: by relying on Māori cosmovisions which define Nature. It is, however, important to stress that the latter two pieces of legislation tailored the framing of legal personality to the cosmovisions of each respective Māori group. Simply put, the Te Awa Tupua is inclusive of the Whanganui iwi's conceptualisation of Te Awa Tupua, whereas the Te Urewera Act reflects the Tūhoe's understanding and relationship with the Te Urewera. In this regard, the Te Awa Tupua Act and Te Urewera Act are both constructed as bespoke legal

145 Te Urewera Act (n 2), s.11(1).
146 ibid, s.12(2(c)).
147 ibid, s.4(b).
148 ibid s.4(a)
149 ibid.s.4(c).
150 ibid, s.5.
151 'Being Tuhoe Who We Are' <https://www.ngaituhoe.iwi.nz/being-tuhoe> accessed 2 September 2024.
152 Te Urewera Act (n 2), s.3(2).
153 ibid, s.3(4),(5),(6).

instruments, by adapting the construction of legal personality to their respective Māori epistemologies, ontologies, and cosmovisions.

In addition to granting legal subjectivisation to the Te Urewera, the 2014 Act provided for the creation of the Te Urewera Board, to act as the operational body tasked with upholding the rights, powers, duties, and liabilities of the Te Urewera. Again, there are striking similarities between the creation of the Te Urewera Board and Te Pou Tupua (the guardianship body for Te Awa Tupua), as the Te Urewera Board was created in the style of co-management to open up roles for the Tūhoe and Crown in the shared governance of the Te Urewera. The Te Urewera Board was initially comprised of eight members for the first three years following the date of settlement, four members appointed by the trustees of Tūhoe Te Uru Taumatua and four by the Ministers (Minister, and the Ministers of the Treaty of Waitangi Negotiations).[154] Once three years had elapsed, the membership to the Te Urewera Board changed to a representation of six trustees appointed by the Tūhoe Te Uru Taumatua, and three appointed by the Ministers.[155]

In consideration of the aforementioned articulation of the Te Urewera's legal subjectivisation, the Waitangi Tribunal was responsible for triggering an innovative legal hybrid, which was later embedded within the Te Urewera Act. Specifically, this innovative legal hybrid emulates a compromise of the epistemologies and ontologies, between the competing normativities of Tikanga and Pākehā law in a similar manner to the Te Awa Tupua Act, relating to the treatment of Nature as property. Such a compromise has been reflected in the creation of legal personality for the Te Urewera based on Tūhoe cosmovisions (and therefore Tikanga law) on one hand, balanced with the concession to Pākehā law through the operationalisation of the legal hybrid through a co-management scheme, on the other.

Nevertheless, it is important to note that the creation of an innovative legal hybrid as a resolution to the ownership dispute over the Te Urewera, did not align, nor fulfil, the full emancipatory claim of the Tūhoe. Despite the Te Urewera Act significantly advancing the recognition of Tūhoe epistemologies, ontologies, and cosmovisions, whilst furthermore recognising their rights to ownership over the Te Urewera, the settlement did not include any return of dispossessed native land to the Tūhoe. In fact, where the initial emancipatory claims of the Tūhoe were grounded on the reclamation of dispossessed land – amongst other claims for te mana motuhake o Tūhoe – the Crown representatives asserted that the return of alienated land was non-negotiable, on the premise that the Te Urewera 'was now public land and all New Zealanders owned it, and loved it.'[156] Ultimately, this notion was later encapsulated within the Te Urewera Act, which in addition to recognising the importance of strengthening the connection between the Te Urewera and Tūhoe, and respecting Tūhoetanga, the Act expressed…

[154] ibid, s.21(1)(a)&(b).
[155] ibid, s.21(2)(a)&(b).
[156] Tāmati Kruger, 'Tāmati Kruger: We Are Not Who We Should Be as Tūhoe People | E-Tangata' (18 November 2017) <https://e-tangata.co.nz/identity/tamati-kruger-we-are-not-who-we-should-be-as-tuhoe-people/> accessed 19 January 2025.

'Te Urewera is also prized by all New Zealanders as a place of outstanding national value and intrinsic worth; it is treasured by all for the distinctive natural values of its vast and rugged primeval forest, and for the integrity of those values; for its indigenous ecological systems and biodiversity, its historical and cultural heritage, its scientific importance, and as a place for outdoor recreation and spiritual reflection.'[157]

On the basis of emphasising the relevance of the Te Urewera for all New Zealanders, the Te Urewera Act carved out a sense of co-ownership through co-management. Where co-management accommodated the creation of an innovative legal hybrid, and was motivated by forms of co-operation and reconciliation under the Tūhoe Claims Settlement Act, this legal mechanism, nonetheless, can be perceived as a compromise of the Tūhoe's emancipatory claim. Legal resolutions based on compromise therefore pose a problem to the fulfilment of some subaltern emancipatory claims. If we consider that innovative legal hybrids are grounded on striking compromises – between rival normativities, epistemologies, ontologies, and cosmovisions – are legal hybrids then suitable legal tools to promote the subaltern cosmopolitan transition of law, where a compromise dilutes the desires of certain subaltern emancipatory claims?

With this last question deliberately left unanswered, as chapter 6 will discuss at length the latter critique of innovative legal hybrids in connection to their ability to promote the subaltern cosmopolitan transition,[158] I now move to the conclusions of this chapter.

5. Conclusion

At this stage, it is undeniable that the Waitangi Tribunal has accommodated the articulation of rights of Nature as legal hybrids, in response to two concrete disputes versing over the ownership over the Whanganui River and Te Urewera Forest. Both these legal hybrids have been reflected in the creation of legal mechanisms designed to recognise Nature as a subject of rights. Significantly, these resolutions have been dubbed as innovative legal hybrids insofar as they both embrace a balance of rival normativities between Te Ao Māori and Te Ao Pākehā. These resolutions, which have been concretised into national legislation, bare striking similarities. Both the Te Awa Tupua Act and the Te Urewera Act rely on Māori cosmovisions to frame legal personality of Nature, and additionally create provisions for the operationalisation of the rights, duties, and liabilities, granted to Nature, through guardianship or representative bodies. Albeit their similarities, both innovative legal hybrids enjoy a bespoke legal construction, through the tailoring of unique Māori cosmovisions. What is furthermore significant is that the creation of these innovative legal hybrids within the framing of promoting co-operation have been designed to target the deep colonial cleavages between the Māori and Crown Government, and to promote forms of reconciliation in the spirit of decoloniality. In this way, the compromise formula devised in 1999 by the Waitangi Tribunal and subsequent negotiated legislative development sought to bridge the divide in

[157] Te Urewera Act (n 2), s.3(8).
[158] See Chapter 6, section 4.2, infra.

the contact zone between conflicting epistemologies and ontologies. At the same time, it must be stressed that full reconciliation remains elusive, and that significant parts of the affected Māori communities reject the compromises achieved.

Using the findings from this chapter, the next chapter traces the trans-jurisdictional diffusion of the rights of Nature legal hybrids from Aotearoa New Zealand to Colombia. Specifically, by exploring concrete disputes heard before the Constitutional Court of Colombia and the JEP, I will unpack the extent to which these national courts have relied on the precedents created by the Waitangi Tribunal, to adjudicate the concrete disputes which have fallen before them.

Chapter 4

Colombia: The development of Rights of Nature from the Atrato River to the Awá Territory

1. Introduction

As our second stop in this comparative tour de force, this chapter investigates the trans-jurisdictional diffusion of rights of Nature, understood as legal hybrids, from Aotearoa New Zealand to Colombia. In particular, this chapter will unpack specific disputes heard before the Constitutional Court of Colombia and the JEP, which have – to varying degrees - relied on the precedents of the Waitangi Tribunal. In the first half of this chapter, I seek to unravel the extent to which the Constitutional Court of Colombia took influence from the latter precedents when granting rights to the Atrato River.[1] Then in the second half of the chapter, I trace the diffusion of the Waitangi Tribunal's legal precedents in the decisions of the JEP, which recognised territories, and their respective IPLCs, as victims of armed conflict.[2] These concrete disputes are examples of national courts in Colombia engaging in a trans-jurisdictional diffusion of norms, by explicitly, or implicitly, citing Aotearoa New Zealand jurisprudence on rights of Nature, which crystallised out of the Whanganui River Report in 1999. Recapitulating the pathways of trans-jurisdictional diffusion between Aotearoa New Zealand and Colombia outlined in chapter 1,[3] the Constitutional Court explicitly cited the jurisprudence of the Waitangi Tribunal when recognising the river as a subject of rights. In particular, the Constitutional Court included within their judgement:

> 'The most recent case of protection of the rights of Nature came to be in New Zealand after 2012. It is an agreement with legal force, subscribed between the government of New Zealand and the community of the Māori aboriginees of the Whanganui river, the protector of the river – the third most important of the country – for hundreds of years. In the agreement, which is currently enacted in law – Te Urewera Act 2014 – the government of New Zealand recognises the river the same legal status of a person or a corporation, that is to say, it grants the right of existence, to be maintained, and to prosper, together with the obligation to be respected. Under that design, as a legal person or entity subject of rights, the river has two legal guardians: the government of New Zealand and

[1] Constitutional Court of Colombia (2016), Judgement T-622/16 (The Atrato River Case), (Translation; Dignity Rights Project, Delaware Law School, USA).
[2] JEP, Case 005, Auto 002, 17 January 2020 (Nasa territory called Cxhab Wala Kiwe); JEP, Case 002, Auto SRVBIT 079, 12 November 2019 (Awá territory Katsa Su); JEP, Case 002, Auto 094, 10 June 2020 (Esperara Siapiara territory Espere Eugja); JEP, Resolution SRVBIT, Caso 002, Auto 018, 24 January 2020 (Tumaco territory); JEP, Auto SRVR 226, 11 July 2023 (Cauca River).
[3] See Chapter 1, sections 2 and 4, supra.

> the community of the Whanganui river, who jointly comprise a committee of management and protection.'[4]

In the cases heard before the JEP, however, the methodological framework alludes to an implicit borrowing of legal norms. The latter is based on the understanding that the JEP did not explicitly cite the legal norms from Aotearoa New Zealand, but appears to have drawn influence from the rights of Nature jurisprudence developed in Colombia which relates to the legal subjectivisation of natural entities. On the basis that the subjectivisation of the Atrato River is a pioneering rights of Nature case in Colombia, this chapter argues that the JEP was influenced by the Constitutional Court's jurisprudence, which drew largely from the legal precedents of the Waitangi Tribunal. The second half of this chapter will therefore assess the extent to which the JEP may have indirectly relied upon the innovative legal hybrids of the Waitangi Tribunal, which in turn, would constitute an implicit borrowing of legal norms.[5]

In an effort to trace the influence of innovative legal hybrids from Aotearoa New Zealand in the above-mentioned jurisdictions of Colombia, this chapter will adopt the following structure. In section 2, I will detail the historical, anthropological, and geographical context of Colombia, providing contextual background to the existing contact zones between rivalling epistemologies, ontologies and normativities. Specifically, I trace Colombia's colonial legacy, experience with the civil wars, and the period of transitional justice as part of the peace process. Section 3 then focusses on framing the Constitutional Court of Colombia's decision to recognise the Atrato River as a subject of rights. Whilst this section will focus on contextualising the legal dispute and the eventual framing of rights to Nature, I will discuss this case against the backdrop of the conceptual framework of 'biocultural rights', as the basis relied upon by the Constitutional Court in crafting legal personality for the Atrato River. Within this section, I will furthermore allude to the legal precedents of the Atrato River dispute, which have encouraged the development of "ornamental" rights of Nature in Colombia. The latter term will be used to illustrate courts which have drawn influence from Atrato River precedent to recognise Nature as a subject of rights, but have encouraged the creation of "decorative" rights of Nature resolutions which lack the necessary substantive legal measures to address the concrete disputes before them. These "ornamental" rights of Nature resolutions, which embody a form of top-down pluralisation will then be contrasted with cases heard before

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[4] At this moment, I would like to stress that there appears to be an inaccuracy in the statement of the Constitutional Court, whether due to mistranslation or otherwise, as the jurisprudence referred to by the Court relates to the 2017 Te Awa Tupua (Whanganui River Claims Settlement) Act, not the 2014 Te Urewera Act. Despite the technical inaccuracy, the latter does not, however, invalidate the trans-jurisdictional diffusion of innovative legal hybrids from Aotearoa New Zealand to Colombia. Furthermore, the original citation in Spanish, entails the following: 'El más reciente caso de protección de los derechos de la naturaleza se dio en Nueva Zelanda a partir de 2012. Se trata de un acuerdo con fuerza de ley suscrito entre el gobierno de Nueva Zelanda y la comunidad de aborígenes maoríes del río Whanganui, protectora del río -el tercero más importante del país- por cientos de años. En el acuerdo, que actualmente es ley -Te Urewera Act 2014-, el gobierno de Nueva Zelanda le reconoce al río, el mismo status legal de una persona o de una corporación, es decir, le concede el derecho a la existencia, a ser mantenido y a prosperar, junto con la obligación de ser respetado. Bajo este diseño, como persona jurídica o entidad sujeto de derechos el río tiene dos guardianes legales: el gobierno neozelandés y la comunidad del río Whanganui, que conforman conjuntamente una comisión de administración y protección.' See: Corte Constitucional (T-622 de 16) (The Atrato River Case original Translation in Spanish), at 140.

[5] See Chapter 4, section 4, infra.

the JEP in section 4, which conversely, encourage a bottom-up pluralisation. In particular, I will discuss the legal disputes heard before this specialised jurisdiction, which led to the recognition of territories and IPLCs as victims of armed conflict. Falling under the territorially specific macro-cases, known as cases 04 and 05, these disputes led to the legal subjectivisation of the Awá territory, and also, the Cauca River, and their respective IPLCs accordingly. After contextualising the legal disputes and their rights of Nature framings, I will discuss these legal disputes against the backdrop of the Atrato River precedent. In section 5, I will use the cases outlined above to comparatively analyse bottom-up and top-down judicial methodologies of pluralisation, to conclude on the advantages of bottom-up pluralisations in the subaltern cosmopolitan transition of law.

2. The colonial legacy of Colombia: the civil war and the peace process

Colombia has been defined by a long and cyclical history of violence, rooted in Spanish colonialisation and the integration of Colombia as a Spanish colony in 1525.[6] After centuries of Spanish colonial rule - characterised by the subjugation, perpetuation of violence and exclusion of native peoples, including through the coerced assimilation of indigenous groups to Catholicism[7] - Colombia (then Nueva Granada) gained their independence from Spain in 1819 following the Battle of Boyacá, led by pro-independence revolutionary leader Simón Bolívar. Over the course of the 19th century, Colombia has been shaped internally by the recurrent civil wars between the Liberal and Conservative parties, and externally by the territorial wars with neighbouring states, the last of which led to the secession of Panama in 1903, owing to direct intervention by the United States. Around the mid 1940's, the political feud between the Liberals and Conservatives intensified following the assassination of Jorge Eliécer Gaitán in 1948,[8] spurring a decade of violence known as *La Violencia,* which accumulated the deaths of more than 200,000 people.[9] In an attempt to achieve a political settlement, the Liberal and Conservative governments formed a coalition under The National Front Government, to co-operate in the shared governance of Colombia. On the basis that no other political parties were able to run during this time, poverty and exclusion of rural Colombians increased, whilst Colombian latifundist elites benefitted from the disproportionate control and ownership over the majority of the land. In the context of the Cold War, guerrilla and insurgent groups emerged in response, leading to the creation of the Revolutionary Armed Forces of Colombia (FARC) in 1964, the National Liberation Army (ELN) in 1970, and M-19 in 1971. Frustrated with the political system which privileged Colombian elites, and perpetuated inequalities amongst the poor, these newly established guerrilla groups relied on armed struggle as a method to achieve political change. However, to support their political motivations, these groups sourced funding through criminal activities, by kidnapping and blackmailing

[6] Sarah Woods and Richard McColl, Colombia (3rd edn, Bradt Travel Guides 2015), at 23.
[7] Mary Van Buren, "The Archaeological Study of Spanish Colonialism in the Americas" (2010) 18 Journal of Archaeological Research 151, at 159-163.
[8] Woods and McColl (n 6), at 23.
[9] A Farnsworth-Alvear, M Palacios and AMG López, *The Colombia Reader: History, Culture, Politics* (Duke University Press 2016); Catherine C Legrand, "The Colombian Crisis in Historical Perspective" (1982) 28 Canadian Journal of Latin and Caribbean Studies 165, at 170-173.

citizens, and by producing and trafficking illicit substances. Around this time, paramilitary groups were created as an opposition to the guerrilla groups, including the United Self-Defence Forces of Colombia (AUC), who albeit having connections to the Colombian Government and Army, were also involved in the drug trade. From then on, paramilitary and guerrilla groups were engaged in an ongoing conflict across Colombia, which has been characterised by the death and disappearance of peoples, increase of sexual violence, and the forced displacement of millions of Colombians.[10]

Premised with atrocities and mass humanitarian violations, the 1991 Political Constitution of Colombia (also known as the "Human Rights Constitution") was enacted, as an 'attempt to address the armed conflict and end hostilities with certain guerrilla groups.'[11] The Constitution was 'indeed transformative in nature – seeking to instantiate a law-based process of social change', by providing for a range of legal innovations to ensure distributive justice through the protection of civil and political rights, and socio-economic rights.[12] The latter mechanisms included the creation of the *tutela,* a constitutional mechanism which allows individual(s) to access the Constitutional Court to protect their fundamental rights (explored in more detail in section 3), and furthermore, to pursue class actions to protect collective interests.[13] At the core of the 1991 Constitution is the recognition to protect the inherent cultural diversity and ethnic pluralism of Colombia.[14] To which the latter was premised on the recognition of Colombia as 'a social state under the rule of law, organized in the form of a unitary republic, decentralized, with autonomy of its territorial units, democratic, participatory, and pluralistic, based on respect for the human dignity, work, and solidarity of the individuals who belong to it, and the prevalence of the general interest.'[15]

Since the 1980's, more specifically, since the administration of President Besliario Betancur (1982-1986), the Colombian government have engaged in peace negotiations with FARC and other guerrilla groups. However, most initiatives have failed, and often ended up with the continuation of violence and armed conflict within Colombia. For example, considerable efforts were made by President Pastrana's government, who initiated a dialogue with FARC from 1998 until 2002. Their efforts included the 'demilitarisation of 42,000 square kilometres around the Caguán River basin, a jungle area in the south of Colombia',[16] an area which became to be known as *despeje,* or the "withdrawal zone". However, faced with the increasing insurgency of FARC within the withdrawal zone, and a lack of political will by both FARC and the government to effectively negotiate an end to the conflict, Pastrana announced the re-entry of

[10] Ana María Ibánez, "Forced Displacement in Colombia: Magnitude and Causes" (2009) 4 The Economics of Peace and Security Journal 48.
[11] David Bilchitz and Raisa Cachalia, *Transitional Justice, Distributive Justice, and Transformative Constitutionalism: Comparing Colombia and South Africa* (Oxford University Press 2023), at 10-12.
[12] ibid.
[13] ibid.
[14] Political Constitution of Colombia (1991), Article 7.
[15] ibid, Article 1.
[16] Renata Segura and Delphine Mechoulan, "Made in Havana: How Colombia and the FARC Decided to End the War" (New York: International Peace Institute 2017), at 6.

military forces into El Caguán, marking the end of unsuccessful peace negotiations.[17] However, in 2010, Juan Manuel Santos was elected as President of Colombia and reinvigorated attempts for a negotiation settlement to resolve the armed conflict. In 2012, the Colombian Government engaged in negotiations with FARC, and eventually struck a Peace Accord in 2016, marking the end to the conflict with that guerrilla faction. However, the conflict pervades and remains latent, especially with the ELN. The Peace Accord,[18] which came to fruition as part of the motivations for transitional justice, led to the creation of the specialised jurisdiction for peace, also known as the JEP. As we will see in more detail in section 4, the JEP have been tasked with addressing some of the most serious and systematic humanitarian violations over the course of the armed conflict.

Albeit a brief contextualisation for a complex history of violence and brutality, the legacy of colonialism remains perceptibly prevalent within Colombia. Colonialism has entrenched asymmetrical relationships of power between hegemonic and non-hegemonic groups in Colombia, which have nonetheless remained starkly apparent today. In recognition of these systematic inequalities, which have only become more transparent in the face of ongoing armed conflict, the State Government have attempted to address these issues, through governmental peace initiatives, the creation of the Human Rights Constitution, and the signing of the 2016 Peace Accord. However, in the forthcoming sections, I will be focussing on the role of the judiciary in addressing these ingrained inequalities and cleavages across contact zones, in concrete disputes brought before the Constitutional Court of Colombia and the JEP. Where the latter jurisdiction will be discussed in section 4, and will focus on disputes which led to the recognition of territories and their respective IPLCs as victims of armed conflict, the next section will unpack the jurisprudence of the Constitutional Court. Specifically, section 3 will dive into Colombia's pioneering rights of Nature case, which granted rights to the Atrato River, its basin, and its tributaries.

3. The Constitutional Court of Colombia and the Atrato River Dispute

To fully understand the legal dispute which led to the recognition of the Atrato River as a subject of rights, I will firstly contextualise the background to the case, by situating the relevance of the Atrato River and surrounding environment, to the claimants of the dispute. Thereafter, I will outline the legal argument and judicial decision in section 3.1, and then discuss the latter against the backdrop of biocultural rights in section 3.2.

The Atrato River is Colombia's third largest and most navigable river, which spans across the Colombian Pacific Coast and flows into the Caribbean Sea. Located in the Chocó region, the Atrato River and the surrounding ecosystems are biodiverse hotspots, due to a combination of high temperatures and

[17] It is also important to note that 'mistakes in handling of negotiations, violence from spoilers, including from paramilitaries supported by rogue parts of security forces, coordination problems between politicians and the armed forces, as well as competition between different guerrilla groups have also contributed to the failure of previous talks.' See ibid, at 8.

[18] Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (24th November 2016).

precipitation. The Chocó is an ancestral region primarily inhabited by Black/afro-descendent communities (87%) and indigenous communities (10%)[19] who have historically resided along the riverbank. These communities rely on the Chocó for spiritual and cultural fulfilment, and furthermore, for physical nourishment. To fulfil the latter, ethnic communities engage in traditional practices of artisanal mining, agriculture, fishing, and hunting.[20] The practices of the ethnic communities have, however, been under threat because of the intensive illegal mining and logging of rich natural resources (such as gold and timber) within the Chocó, and the ongoing internal armed conflict (outlined above).[21] The impact of illegal mining on the ethnic communities living in the Chocó, and the environmental consequences therein, was challenged within the Atrato River dispute, on account of the impacts of the former on the violation of the ethnic communities' fundamental rights.[22]

Before unravelling the legal argument underpinning the dispute, it is important to firstly contextualise the impact of mining on the ethnic communities inhabiting the Chocó. Mining in the Chocó ranges from artisanal, semi-mechanised, mechanised, and industrial mining (also known as mega-mining), and moving from left to right, represents forms of mining with low to high impact on the environment and communities living therein. Ethnic communities living in the Chocó have traditionally practiced artisanal mining, an ancestral practice involving the manual extraction of materials to separate minerals without the use of chemicals. It is a practice which has been the primary source of income for many of the ethnic communities, and an oral tradition learned through generational teaching.[23] Artisanal mining deviates greatly from semi-mechanised and mechanised mining, on account of being less invasive and destructive. In fact, semi-mechanised mining builds upon artisanal techniques, to improve extraction efficiency using motor pumps, hydraulic elevators, and small suction dredges. Moreover, mechanised mining uses 'heavy machinery, including backhoes, dredges, motor pumps, bulldozers and dump trucks',[24] and also, high quantities of chemicals including cyanide and mercury. Within the Chocó, there have been pressures to abandon traditional, less harmful (but also less productive) forms of mining by guerrilla and paramilitary groups, who depend on mechanised forms of mining to fund their activities and the civil war. Within the context of the Atrato River dispute, the negative impacts of mechanised mining were central to the claim, on account of being directly correlated with the degradation of the Atrato River and surrounding environment, and the health of the ethnic communities. With regards to the former, high levels of toxic chemicals found in the

[19] In addition to afro-descendent and indigenous communities, the Choco is also inhabited by a smaller percentage of mestizo communities. See Atrato River Case (n 1), section I (Background).
[20] ibid.
[21] See Chapter 4, section 1, supra.
[22] It is worth mentioning that the Inter-American Court of Human Rights has a long track record of issuing interim precautionary measures against Colombia, to protect IPLCs in Colombia against the consequences of the internal armed conflict. For more information see: Rebecca Bratspies, '"Territory Is Everything": Afro-Colombian Communities, Human Rights and Illegal Land Grabs' (2020) 4 Human Rights Law Review Online 290; Clara Sandoval, 'A Critical View of the Protection of Refugees and IDPs by the Inter-American System of Human Rights: Re-Assessing Its Powers and Examining the Challenges for Future' (2005) 17 International Journal of Refugee Law 43.
[23] The Atrato River Case (n 1), para. 7.22.
[24] Philipp Wesche, "Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision" (2021) 33 Journal of Environmental Law 531, at 536.

Atrato were associated with biodiversity loss[25] - which included traditional species of fish, ancestral plants and trees -, and also, the deterioration of aquatic ecosystems.[26] In addition, the discharge of cyanide and mercury into the River created a host of health problems, which led to an increase of spontaneous abortions, skin, fungal and vaginal diseases;[27] of diseases such as malaria and dengue due to the degradation of water quality;[28] and, an increase in severe neurological disorders, memory loss, and tremors.[29] In addition to impacts on the physical health of the ethnic communities, the degradation of the surrounding environment caused significant cultural changes, and a loss of custom for the ethnic communities of the Chocó.[30] More specifically, the loss of plant and animal species forced ethnic communities to adapt their traditional agriculture, hunting, and fishing practices.[31] The imposition of mechanised mining also prevented the ethnic communities from practicing artisanal mining, as mechanised mining dominated the Chocó, and eradicated spaces in which the oral tradition of artisanal mining could be learned and practiced. Finally, the pollution of the Atrato River has created a strain upon the cultural relationship shared between the ethnic communities and the River, which is the social and cultural centre for the ethnic communities, 'where they identify themselves as a people, where they wash their clothes, bath, play, swim, fish and share cultural and recreational activities.'[32] The resulting pollution from mechanised mining has severed an important link between the Atrato communities and the River, by impeding their ability to engage in their cultural traditions over legitimate fears of serious health problems.

The worsening situation in the Chocó has persisted because of the poor, essentially non-existent, regulatory framework governing illegal mining in this region of Colombia, torn by civil war between the guerrilla and paramilitary groups. Despite the existence of a few regulations designed to govern mining, they were ineffective in controlling and regulating mercury, one of the primary chemicals responsible for causing devastating environmental and humanitarian impacts. For example, in 2013, Colombia signed the Minamata Convention on Mercury,[33] which was designed to 'protect human health and the environment from anthropogenic emissions and releases of mercury and mercury compounds.'[34] However, and although Colombia enacted the latter convention through Law 1658 of 2013, as an attempt to create tools for the control and regulation of mercury, the majority are not applicable and still require revision. Moreover, the Mining Code, which was established through Law 658 of 2001, does not include any provision pertaining to the regulation of mercury.

Premised with weak governmental control over areas in conflict and an ineffective regulatory framework to govern illegal mining, socio-economic inequalities have burgeoned, leading to disproportionate experiences

[25] The Atrato River Case (n 1), paras. 9.16 to 9.17.
[26] ibid, para. 9.14.
[27] ibid.
[28] ibid.
[29] ibid.
[30] ibid, paras. 7.24 and 9.17.
[31] ibid, para. 9.17.
[32] ibid, para. 9.14.
[33] Minamata Convention on Mercury (2017) 3201 UNTS.
[34] ibid, Art 1.

of marginalisation and social exclusion of the communities inhabiting the Chocó. The latter has been most apparent in 'the evident lack in health care, education, housing, transport and infrastructure; and economy almost exclusively focused on gold mining; and difficult geographic and climate conditions that increase the costs of production and isolate the department from the rest of the country.'[35] Accordingly, the Chocó has experienced extreme levels of poverty (with 48.7% of the population living in dire poverty at the time when the case was heard in 2016), with around 82.8% of the population not satisfying the minimum requirements for basic needs.[36] Recognising the Chocó has been an arena of conflict for guerrilla and paramilitary groups,[37] and the state,[38] and interconnectedly an area for illegal mining, ethnic communities have been at the mercy of perverse marginalisation, exclusion, and violence.

Against this backdrop, the Atrato River dispute sought to challenge the intensification of unchecked illegal mining within the Chocó and the insufficient regulation by the state government, on account of the latter constituting a violation of the ethnic communities' fundamental rights. More specifically, the Atrato River dispute challenged the intensive and large-scale illegal mining and logging, which caused 'harmful and irreversible consequences on the environment, [which affected] the fundamental rights of ethnic communities and the natural balance of the territories they inhabit.'[39] In the following section, I will outline the legal argument heard before the Constitutional Court of Colombia, and the consequential decision to recognise the Atrato River as a subject of rights.

3.1. The legal journey to the recognising Atrato River as a subject of rights

The Atrato River dispute was brought to the courts by the non-governmental organisation (NGO) Tierra Digna, on behalf of ethnic communities living in the Chocó. Tierra Digna brought the claim to challenge various Colombian governmental agencies with the intention of obtaining environmental protection.[40]

> 'Tierra Digna is a Colombian organization dedicated to the defense of communities affected by economic policies and projects that threaten their territories and lead to human rights violations and environmental devastation...they challenge legally and politically unjust structures and powerful actors involved, such as the State, military and transnational corporations.'[41]

Interestingly, the Atrato River case differs from the other cases studies explored within this project, on account of the litigants – Tierra Digna - being a third party, acting on behalf of affected communities. On this basis, it is important to highlight that the intentions of the NGO may have shaped the legal

[35] Wesche (n 24), at 535.
[36] The Atrato River Case (n 1), at 8.
[37] Francisco Gutiérrez Sanín, "Telling the Difference: Guerrillas and Paramilitaries in the Colombian War" (2008) 36 Politics & Society 3.
[38] The Atrato River Case (n 1), at 7.
[39] ibid, para. 2.1.
[40] Viktoria Kahui, Claire W Armstrong and Margrethe Aanesen, 'Comparative Analysis of Rights of Nature (RoN) Case Studies Worldwide: Features of Emergence and Design' (2024) Ecological economics 221, at 14.
[41] 'Tierra Digna | FOR Peace Presence' <https://peacepresence.org/what-we-do/tierra-digna/> accessed 26 June 2025.

argumentation of the case, as whilst the courts have agency, they are exercising such in response to the litigant's argument. Thus, and as we will see below, the Atrato River case focusses primarily on addressing the implications of environmental degradation and pollution on the ethnic communities' fundamental rights, based on Tierra Digna's legal argument.

Regarding the claim, Tierra Digna filed an *acción de tutela* before the Administrative Tribunal of Cundinamarca on the 27th of January 2015, to enforce the protection of constitutional rights.[42] The tutela is a legal mechanism enshrined within the 1991 Political Constitution of Colombia, designed to 'effectively protect constitutional rights, the rule of law, and democratic participation.'[43] The tutela allows individuals to access to the Constitutional Court, *to protect their fundamental rights upon the exhausting of other measures*. In this regard, the tutela defence mechanism has broadened access to justice for many plaintiffs in Colombia. Within the Atrato River case, Tierra Digna used the tutela to bring a claim before the Constitutional Court of Colombia, to request the protection of the ethnic communities' fundamental rights to life, health, water, food security, a healthy environment, to culture, and to territory. The plaintiffs asserted that the illegal mining and logging in the Choco violated the ethnic communities' fundamental rights, and alleged the defendant parties (Ministry of Housing, City and Territory; Ministry of Agriculture and Rural Development; The Ministry of Mines and Energy; the Ministry of Health and Social Protection; and the Mayor of Carmen de Atrato)[44] failed in their duty to effectively regulate and control these activities. As part of their request, the plaintiffs asked the constitutional judge to 'issue a series of orders and measures to detail structural solutions to the serious health, socio-environmental, ecological and humanitarian crisis that exists in the Atrato River Basin, its tributaries and surrounding territories.'[45]

To briefly capture key moments of the legal dispute, the acción de tutela was initially heard before the Administrative Tribunal of Cundinamarca, who responded to the plaintiffs by stating the claim could not proceed under the act of tutelage. The Tribunal found the acción de tutela not to be a suitable legal mechanism to defend the plaintiff's interests, as the claims pertained to the protection of collective rights and not fundamental rights. The Tribunal iterated that the plaintiffs should pursue this claim under a popular action.[46] Moreover, the Tribunal argued that the plaintiffs did not meet the constitutional requirements of exhausting other measures before attempting to enforce fundamental rights through the

[42] The Political Constitution of Colombia enshrines the tutela, stating, '[e]very person has the right to file a writ of protection before a judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whomever acts in his/her name for the immediate protection of his/her fundamental constitutional rights when that person fears the latter may be violated by the action or omission of any public authority.' See: Political Constitution of Colombia (n 14), Art 86.
[43] Manuel Iturralde, "Access to Constitutional Justice in Colombia: Opportunities and Challenges for Social and Political Change" in Daniel Bonilla (ed), Constitutionalism of the Global South. The Activist Tribunals of India, South Africa, and Colombia (Cambridge University Press 2013).
[44] Defendant entities were expanded by the Chamber following the finding of the judicial inspection. On April 29th of 2016, the Chamber linked three further state entities to include, the Ministry of Finance and Public Credit, the Special Administrative Unit of Information and Financial Analysis (UAIF), and the Office of the Attorney General of the Nation. See The Atrato River Case (n 1), paras. 3.3 to 3.7, & section III (Actions in Review).
[45] ibid, para. 2.10.
[46] ibid, section II (Judicial Decisions Under Review).

tutela. Therefore, the plaintiffs should have 'made use of the complaint contained in Article 41 of Law 472 of 1998 to address the failure to comply with the judgments in the popular action venue', before filling for an acción de tutela.[47]

The plaintiffs filed an objection against the ruling of first instance, alleging the Tribunal judge failed to take into account (i) the 'violation and threat to the fundamental rights of the communities in the class action; (ii) [the] irregularities in the judicial process of the *acción de tutela;* and (iii) the execution of other judicial actions that have not been effective.'[48] The plaintiffs objection sought to contest the Tribunal judges' finding that a class action was an appropriate judicial mechanism, as opposed to the tutela. It should also be noted that the Tribunal framed the suitability of class action, by ruling that the plaintiffs claim was grounded on pursuing the protection and safeguarding of collective rights, in particular, the collective rights to the 'environment in connection with the right to food.'[49]

Presented with the objection by the plaintiffs, the State Council declared the claim to be inadmissible. The State Council confirmed the ruling of first instance, stating the act of tutelage was an unsuitable judicial defence based on the opportunity of the plaintiffs to pursue the claim under popular action, and furthermore, by finding no violation of the collective rights presented to the courts.[50] Specifically, the State Council relayed that the plaintiffs had 'failed to demonstrate the irreparable harm or the ineffectiveness of the class actions for protection of the rights that they consider violations'.[51]

Following an Appellate Review in 2015, and a judicial inspection of the serious situation in the Chocó,[52] the case was brought before the Constitutional Court of Colombia. In contrast to the findings of the previous courts, the Constitutional Court did not accept the inadmissibility of the case based on the understanding that other judicial defence mechanisms, such as class action, were available. Instead, the Court found the claim could be processed under the acción de tutela*,* by reasoning the ineffectiveness of class actions to deal with the complex and structural problems – outlined in section 3[53] –underpinning the dispute. The tutelage action was therefore recognised as an appropriate remedy to protect the plaintiff's fundamental rights. Therefore, under the authority of the tutela[54] (and other provisions enshrined in the Political Constitution,[55] and Articles 31 to 26 of Decree 2591 of 1991), the Constitutional Court had the competency to revise the judgements of the previous courts.

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47 ibid.
48 ibid.
49 ibid.
50 ibid.
51 ibid.
52 As part of the judicial inspection, the Sixth Chamber of Revision 'decided to make a new link of three state entities and request information related to the case under the study of the Ministry of Finance and Public Credit, the Special Administrative Unit of Information and Financial Analysis- UAIF – and the Office of the Attorney General of the Nation.' See ibid, section III (Actions in Review).
53 See Chapter 4, section 3, supra.
54 Political Constitution (n 14), Article 86.
55 ibid, Article 241(9).

Considering the complexity of the claim, and the various issues affecting the plaintiffs' fundamental rights, the Constitutional Court noted the serious 'humanitarian, social-cultural and environmental situation [within] the Department of the Chocó',[56] and how the latter situation was rooted in a long history of colonialism. The Court highlighted that the Chocó has been affected by the internal armed conflict, which has led to marginalisation, violence, and displacement of the ethnic communities living within. Moreover, the Court highlighted that the exacerbation of perverse poverty has been linked to…

> '(i) a colonial legacy of weak or non-existence political-administrative institutions; (ii) difficult geographic and climatic conditions that increase the costs of production and "isolate" the district from the rest of the country and, at the same time, favor the settlement of illegal armed groups; (iii) an extractive economic structure focused exclusively on the exploitation of natural resources; in particular, the mining of gold, silver, and platinum; and (iv) the isolation of the district from the national economic activity.'[57]

From the perspective of the Ombudsman, the latter structural issues, which have been exacerbated by the presence of illegal armed groups and an increase of illegal mining in the Chocó, 'generated an unprecedented humanitarian crisis…that demands the joint action of the State, its institutionalism and territorial entities at all levels to give attention and final solution to the serious crisis that the Department is experiencing,'[58] The Constitutional Court were therefore tasked with determining…

> …'whether due to the illegal mining activities in the Atrato River Basin (Chocó), its tributaries and surrounding territories, and whether by the omission of the state authorities sued (in charge of dealing with this situation, both at the local and national levels), there is a violation of the fundamental rights to life, health, water, food security, a healthy environment, and to the culture and territory of the active ethnic communities.'[59]

Taking into consideration the aforementioned structural issues, and the concurrent impacts of the illegal mining in the Chocó, the Constitutional Court found the defendants to have violated the plaintiff's fundamental rights. The Constitutional Court based their findings on the following reasoning. First, the Court found the defendant entities to have violated the plaintiffs' rights to life, health, and a healthy environment on account of being fully aware of the crisis of illegal mining in the Chocó, and omitting to take effective action to address the illegal mining activities, and the dumping of toxic chemicals and mercury in the Atrato River.[60] Second, the Court found the defendant entities had violated the plaintiff's rights to water and food security, again, for omitting to take effective action to address the pollution of the Atrato River caused by the illegal mining.[61] Third, and finally, the Court found the defendant entities to have violated the ethnic communities' fundamental rights to territory and culture, for allowing the continuance

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[56] The Atrato River Case (n 1), para 9.4.
[57] ibid, para. 9.4.
[58] ibid, para. 9.5
[59] ibid, at section III (Considerations and Basis)
[60] ibid, para. 9.26.
[61] ibid, para. 9.34.

of illegal mining in the Chocó, which ended up 'threatening and completely transforming [the ethnic communities'] traditional ways of life.'[62]

To address the violations of the ethnic communities' fundamental rights, the Constitutional Court issued a series of corrective measures, including the construction of a comprehensive plan to decontaminate the water sources of the Chocó.[63] Importantly, however, the Court ordered the Atrato River, its basin, and tributaries, be recognised as a subject of rights, entitled to the 'protection, conservation, maintenance and restoration by the State and ethnic communities.'[64]

When recognising the Atrato River as a subject of rights, the Constitutional Court took influence from the legal precedents articulated by the Waitangi Tribunal.[65] In recapitulation, the Constitutional Court explicitly cited the jurisprudence relating to the legal subjectivisation of the Whanganui River,[66] taking direct inspiration from the 2012 negotiation settlement that preceded the 2017 Te Awa Tupua Act.[67] The Constitutional Court engaged in a borrowing of legal norms with Aotearoa New Zealand, drawing influence from the innovative rights of Nature legal hybrids expressed by the Waitangi Tribunal, in the 1999 Whanganui River Report. Where the latter hints towards a trans-jurisdictional diffusion of legal norms, the influence of the Waitangi Tribunal's legal precedents can furthermore be found within the Constitutional Court's articulation of rights to the Atrato River.

For instance, the Constitutional Court mirrored the Waitangi Tribunal's approach to legal guardianship, by creating a guardianship body in the style of co-management, inclusive of a role for the Colombian Government, and a representative of the ethnic communities, in order to uphold the rights of the Atrato River.[68] Moreover, the Constitutional Court requested the creation of an advisory team to support the Atrato River guardianship body, similar to the advisory body (Te Karewao) and strategic body (Te Kōpuka) created to support the Te Pou Tupua in 'advanc[ing] the health and well-being of Te Awa Tupua'.[69] In particular, the Constitutional Court appointed the members of the Humboldt Institute and WWF Colombia – with the help of external entities who wish to contribute to the protection of the Atrato River and its

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[62] ibid, para. 9.41.
[63] Specifically, the court ordered 'The Ministry of the Environment, the Ministry of Finance, the Ministry of Defense, Codechococ and Corpouraba, the Governments of Chocó and Antioquia, and the defendant municipalities will be ordered [338] – with the technical support of the Humboldt Institute, the Universities of Antioquia and Cartagena, the Pacific Environmental Research Institute, WWF Colombia and other national and international organizations determined by the Attorney General's Office – and in conjunction with the Plaintiffs, within a year after the notification of the sentence is designed and put in place a plan to decontaminate the water source of the Chocó, beginning with the basin of the Atrato River and its tributaries, the riverine territories, recovering their ecosystems and avoiding additional damages to the environment in the region. This plan will include measures such as: (i) the reestablishment of the Atrato riverbed, (ii) the elimination of a banks formed by mining activities and (iii) the reforestation of areas affected by legal and illegal mining.' See ibid, at para. 10.2.
[64] ibid.
[65] See Chapter 4, section 1, supra.
[66] Please see footnote 4 on the technical inaccuracy in the Constitutional Court's judgement, at Chapter 4, section 1, supra.
[67] The Atrato River Case (Original Translation) (n 4), footnote 315.
[68] The Atrato River Case (n 1) para. 10.2.
[69] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s.30(1); See Chapter 3, section 3.4, supra.

basin[70] - to act on the advisory team, based on their expertise and development of the Bita River protection project in Vichada.[71]

It is, however, important to note that the Constitutional Court of Colombia took a different approach to the Waitangi Tribunal when legally subjectivising the Atrato River. Comparatively, where the Waitangi Tribunal framed legal personality of the Whanganui River and Te Urewera Forest based on Māori cosmovisions, epistemologies, and ontologies,[72] the Constitutional Court relied on biocultural rights. As the Court stated in its Atrato judgement:

> '[…] considering the scope of protection of the international treaties ratified by Colombia in the field of environmental protection, the Ecological Constitution and biocultural rights (grounds 5.11 to 5.18), which proclaim the joint and interdependent protection of human beings with nature and its resources, the Court will declare that the Atrato River is subject of rights that imply its protection, conservation, maintenance and in this specific case, restoration. […] it is necessary to remember that the central premise on which the conception of bioculturality and biocultural rights are based is the relationship of profound unity between nature and the human species. [...] These elements must henceforth be taken into account as parameters for the protection of the rights of the environment and nature, from a biocultural perspective.'[73]

Whilst biocultural rights will be unpacked critically below, in brief, it is a discourse which denotes rights to communities who share a spiritual and cultural connection with Nature, and on the basis that their traditions, practices, and customs sustainably conserve the environment. Nevertheless, biocultural rights is a discourse which draws its jurisprudence from international legal sources, such as multilateral environmental agreements (MEAs). In this regard, I will argue that the Constitutional Court adopted a top-down approach by framing legal personality through biocultural rights,[74] instead of emulating the bottom-up approach of engaging with the unique cosmovisions of IPLCs party to the dispute, modelled by the Waitangi Tribunal. I will adhere to the opinion that, whilst on a surface level, the notion of biocultural rights appears as instrumental and capable of accommodating spaces of cultural and legal pluralism, it is nonetheless, a controversial doctrinal notion with the capacity for locking IPLCs into the myth of the "noble savage", putting any emancipatory projects of self-determination in jeopardy.[75] Moreover, the specific reliance of the Constitutional Court on an imported doctrinal construct to establish legal subjectivity, rather than on a legal-anthropological study of the claimants' cosmovisions, also raises questions. In the next section, I will delve into the doctrinal contours of biocultural rights, to assess the Constitutional Court's reliance on the latter jurisprudence in creating legal subjectivity for the Atrato River.

[70] Including, 'public and private entities, universities (regional and national), research centers on natural resource and environmental organizations (national and international), community and civil society wishing to join the protection project of the Atrato River and its basin.' See The Atrato River case (n 1), para. 10.2.
[71] ibid.
[72] See Chapter 3, sections 3 and 4, supra.
[73] The Atrato Rive case (n 1), para. 5.10.
[74] ibid, paras. 5.11 to 5.18 and 9.32.
[75] Giulia Sajeva, 'Rights with Limits: Biocultural Rights–between Self-Determination and Conservation of the Environment' (2015) Journal of Human Rights and the Environment 30, at 45.

By taking a critical perspective on biocultural rights, I criticise top-down approaches to framing legal subjectivity, to thereafter highlight the advantages of bottom-up approaches in the construction of innovative legal hybrids. The latter point will be pertinent in the forthcoming chapter 6, to frame how meaningful engagement with embedded and local legal cultures facilitates future-oriented reconciliation between hegemonic and counter-hegemonic parties, and in turn, legal ecumenism.

3.2. Biocultural rights

Biocultural rights came to the fore as 'Indigenous peoples and community organizations fighting for the recognition of customary land rights [...] insist[ed] that communities who have historically conserved ecosystems (and are most affected by any adverse environmental impacts) are best suited to make decisions about these ecosystems.'[76] In a move away from techno-bureaucratic solutions of governing nature, through top-down, non-consultative processes which ultimately led to the 'de-legitimization of local knowledge and decision-making', biocultural rights were proposed as an alternative.[77] Emerging with the confluence of three social movements – the post-development movement, the commons movement, and the movement for the rights of indigenous people[78] – biocultural rights gained relevance for underscoring a common goal to protect ecosystems through the recognition of rights to communities with an intrinsic connection with Nature.

Biocultural rights are an internationally developing jurisprudence which draw influence from the wording of MEAs such as the Convention on Biological Diversity,[79] the Nagoya Protocol,[80] and other international legal instruments.[81] The CBD was the first international treaty to recognise the interconnection between biodiversity conservation and IPLCs' traditional practices.[82] Outlining the intrinsic relationship between IPLCs and Nature, and the relevance of their cultural practices for the sustainable conservation of the environment, the CBD 'obliges state parties to safeguard these traditional ways of life by ensuring the integrity of their cultures, encouraging customary use of biological resources, and upholding local decision-making structures.'[83] The rights contained within the CBD are further complimented by Indigenous

[76] Sanjay Kabir Bavikatte, Stewarding the Earth: Rethinking Property and the Emergence of Biocultural Rights (Oxford University Press 2014), at 5.
[77] ibid.
[78] ibid, at 6; For more information on these three movements and the influence in the emergence of biocultural rights, see ibid, pp 6 – 16.
[79] Convention on Biological Diversity (5 June 1992) 1760 UNTS 79, (1992) 31 ILM 822 (hereinafter, CBD).
[80] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilisation to the Convention on Biological Diversity (29 October 2010) 3008 UNTS 3 (hereinafter, Nagoya Protocol).
[81] Biocultural rights also draw on other United Nations (UN) treaties and legal instruments, such as: the United Nations Framework Convention on Climate Change (9 May 1992) 1771 UNTS 107, (1992) 31 ILM 851; the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, (17 June 1994), 1954 UNTS 3, (1994) 33 ILM 1328; the UN Food and Agriculture Organisation; UN Forum on Forests, and the International Union for the Conservation of Nature. See: Giulia Sajeva, When Rights Embrace Responsibilities: Biocultural Rights and the Conservation of Environment (Oxford University Press 2018), at 77.
[82] CBD (n 79), Art 8(j) and Art.10(c).
[83] Bavikatte 'Stewarding the Earth' (n 76), at 17.

declarations, such as the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). In particular, Article 25 of UNDRIP states that 'Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.'[84] Biocultural rights have undergone a degree of crystallisation within international law. In fact...

> '[n]early every CBD body, including the Working Group on Article 8(j); the Working Group on Access and Benefit Sharing (ABS); the Working Group on Protected Areas; and the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) has become a fertile ground for conceptualizing and realizing biocultural rights...The discourse on biocultural rights is spilling over from the CBD to UN and international fora and other environmental conventions such as the World Intellectual Property Organization-Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO-IGC), the Commission on Genetic Resources for Food and Agriculture (CGRFA), the UN Convention on Combating Desertification (UNCCD), and the UN Framework Convention on Climate Change.'[85]

Nevertheless, biocultural rights are not entrenched within law. They appear in a fragmented manner in international legal instruments, declarations – such as those outlined above – national laws, and court cases.[86] Notably, IPLCS are increasingly participating within this rights-based framework for the purpose of empowering their rights to self-determination and self-governance. In fact, the biocultural framework has...

> ...'supported Indigenous peoples' well-being and self-determination in Panama, New Zealand, and Canada [...], assisted in the processes of Indigenous self-governance in Oaxaca communities [...], inspired biocultural resource management models for forest habitats in rural Mexico [...], and demonstrated the relationship between biocultural and natural conservation in South America [...].'[87]

These are but a few examples of IPLCs endorsing biocultural rights.

Turning precisely to the form of biocultural rights, they 'denote all the rights required to secure the stewardship role of communities over the lands and waters, and build upon values, world views, practices, knowledge, and institutions of indigenous peoples and local communities beneficial for the conservation of the environment.'[88] Sajay Kabir Bavikatte, a pioneer of biocultural rights, describes the latter as rights of communities 'that have historically cared for their ecosystems […] irrespective of whether or not they have

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[84] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 13 September 2007 (UN Doc. A/RES/61/295, 2 October 2007), Art.25.
[85] Bavikatte 'Stewarding the Earth' (n 76), at 19-20.
[86] Sajeva, 'When Rights Embrace Responsibilities: Biocultural Rights and the Conservation of Environment' (n 81) at 142.
[87] Gabriel R Nemogá, Amanda Appasamy and Cora A Romanow, 'Protecting Indigenous and Local Knowledge Through a Biocultural Diversity Framework' (2022) 31 Journal of Environment and Development 223, at 229.
[88] Sajeva, 'When Rights Embrace Responsibilities: Biocultural Rights and the Conservation of Environment' (n 81), at 78.

formal title to it.'[89] Biocultural rights hence infer a 'duty of care and protection' for Nature based on a history of stewardship, as opposed to the attribution of property rights and ownership in the Western sense. In this regard, IPLCs are often designated as holders of biocultural rights, on account of their spiritual and cultural ties to Nature, which have moreover sustained the conservation of the environment through their traditional knowledge, practices, and customs.

It is precisely because of the purported instrumentality of the lifestyles of IPLCs which contribute to the conservation of the environment, that biocultural rights recognise their collective rights to 'lands, resources, culture, and customary law.'[90] Put differently, biocultural rights are described as a 'bundle' or 'basket' of rights, which are granted to promote two interconnected foundational interests: ensuring the preservation of IPLCs' rights to cultural diversity and self-determination, in tandem with the continued *sustainable* conservation of the environment.[91] They hence contain substantive and procedural rights – which are not static, but adapt to the nuances of different contextual environments to ensure the conservation for the environment and protection of cultural diversity and traditions. Broadly, they encompass, but are not limited to, the substantive rights to land and natural resources, to self-determination, to cultural identity, and the procedural right to access, to justice, and to prior informed consent.[92] Framed as adaptable rights, biocultural rights bare prospects for encouraging bottom-up pluralisations of law, especially post-litigation. One example, which in the view of Giulia Sajeva moves in the direction of biocultural rights, was the creation of the Te Awa Tupua Act,[93] following the ownership dispute over the Whanganui River.[94] In particular, and as outlined in chapter 3, the Act contributed to a form of pluralisation by tailoring its approach to recognising legal personality of the Whanganui River, based the Whanganui iwi's cosmovisions, and relationship with the River.[95] In particular, the Te Awa Tupua (1) 'recognizes as members of the Whanganui iwi those descendants of the local tribes...who have exercised customary rights and responsibilities with respect to the Whanganui river';[96] (2) 'acknowledges that the river is a source of physical and spiritual significance for the iwi, and that the concept of Te Awa Tupua strengthens their responsibilities in 'relation to the care, protection, management, and use (Part 3, clause 69) of the river in accordance with their customary laws, values, and practices',[97] and; (3) 'encapsulates in state law the world views and culture

[89] ibid at 78.
[90] Sanjay Kabir Bavikatte, Stewarding the Earth: Rethinking Property and the Emergence of Biocultural Rights (n 76) at 112-115; Sanjay Kabir Bavikatte and Daniel F Robinson, 'Towards a People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing' (2011) 7 Law, Environment and Development Journal 35, at 50; Sajeva 'When Rights Embrace Responsibilities' (n 81), at 79.
[91] Sajeva ibid, at 110-114.
[92] For a comprehensive list of biocultural rights, see: Sajeva, 'Rights with Limits: Biocultural Rights–between Self-Determination and Conservation of the Environment' (n 75), at 39-40; Sajeva 'When Rights Embrace Responsibilities: Biocultural Rights and the Conservation of Environment' (n 81) at 110.
[93] Te Awa Tupua Act (n 69).
[94] Sajeva "When Rights Embrace Responsibilities: Biocultural Rights and the Conservation of Environment' (n 81), at 94.
[95] See Chapter 3, section 3, supra.
[96] Sajeva 'When Rights Embrace Responsibilities: Biocultural Rights and the Conservation of Environment' (n 81), at 93.
[97] ibid, at 93-94.

of the Maori people through the recognition of a river as a subject not only worthy of protection but also holding legal standing'.[98] Nevertheless, despite demonstrating affinities with biocultural rights discourse, Sajeva was of the opinion that it was too early (at the time of writing her monograph in 2018), to see whether the Act would balance the rights and interests of IPLCs with environmental interests, especially considering the role of co-management between the Crown government and Whanganui iwi.[99]

However, at the core of the notion of biocultural rights, as derived from the doctrinal interpretation of specific provisions of MEAs, is the highly controversial duty of stewardship.[100] Rather than rights-holders for the sake of their own self-determination, their role as ecological stewards implies that IPLCs become duty holders, obligated to conserve the environment in accordance with their own traditions and customs, for the benefit of all humankind (in this case, the rights-holders). Indeed, decoupling the rights of IPLCs from the duty of stewardship would appear *prima facie* as less conducive to ecological conservation. In Sajeva's words, '[s]imply providing rights to land and natural resources, rights to self-determination, and rights to preserve distinct cultural identities does not imply – much less guarantee – that the interested community/people will maintain its sustainable lifestyle forever.'[101] Yet, conditioning the enjoyment of these rights to the duty of sustainable stewardship may also lead to scenarios of sanctions, or in extreme situations, a loss of rights, if IPLCs were to abandon their traditional ways of life.[102]

The construct of biocultural rights therefore bares the risk of trapping IPLCs in the myth of the ecologically noble savage, or in other words, the expectations that they live, and will continue to life in perpetuity, traditional and sustainable lifestyles.[103] It is thus a teleological paradigm of rights granted to communities that crucially conditions the protection of their cultural heritage to its functionality of stewardship of endangered ecosystems, yet at the expense of their self-determination, with the additional risk of re-colonisation. Biocultural rights thus confer a highly problematic bundle of rights, which should be granted cautiously, in full awareness of the risks they entail.

We must then consider why the Constitutional Court of Colombia chose to frame legal personality for the Atrato River and its basin, through a biocultural rights lens.[104] The Constitutional Court used biocultural rights to frame legal personality of the Atrato and to portray the idiosyncratic relationship of interdependence between the ethnic communities living in the Chocó, and the River. In this regard, the Constitutional Court recognised the ethnic communities of the Chocó as appropriate holders of biocultural

[98] ibid, at 94.
[99] ibid.
[100] Biocultural rights move beyond Traditional Resource Rights on account of the obligations pertaining to the duty of stewardship. For more information on traditional resource rights, see: Darrell A Posey, Traditional Resource Rights: International Instruments for Protection and Compensation for Indigenous Peoples and Local Communities (IUCN, Gland, Switzerland and Cambridge, UK, 1996).
[101] Sajeva 'When Rights Embrace Responsibilities: Biocultural Rights and the Conservation of Environment' (n 81), at 113.
[102] ibid.
[103] Kent H Redford, 'The Ecologically Noble Savage' [1991] Cultural Survival Quarterly 1 accessed 2 February 2024.
[104] The Atrato River Case (n 1), paras. 5.11 to 5.18.

rights, based on their 'history of stewardship'. Within the context of the dispute, the Court acknowledged the intrinsic relationship between the ethnic communities and the River, highlighting how the latter is essential for the former's physical, spiritual, and cultural existence, and how the operations of the illegal mining have threatened such. Yet in spite of these rather doctrinal considerations, the Court undertook no (explicit) legal-anthropological justification of the legal traditions and customs which shape and regulate the relationships between the ethnic communities and the Atrato, as the Waitangi Tribunal did in its 1999 Report on the Whanganui River. Furthermore, the Court relied explicitly on the notion of 'biocultural rights' to emphasise the intrinsic connection between these communities and Nature, on the belief that such an approach could 'extend the participation of ethnic communities in the definition of public policies and regulatory frameworks, and guarantees the conditions conducive to the generation, conservation and renewal of their knowledge systems' within the framework of SRL [Social Rule of Law]'.[105]

From a methodological perspective, the Constitutional Court undeniably drew inspiration from the 1999 Whanganui River Report of the Waitangi Tribunal and the then ongoing negotiations between the Crown Government and the Whanganui iwi that eventually led to the adoption of the 2017 Act,[106] in order to borrow the idea of the subjectivisation of the River. When discerning the terms in which this novel legal hybrid was to be embedded in the Colombian constitutional and legal systems, however, the justices relied on the problematic notion of 'biocultural rights', which in turn, draws on the interpretation of specific provisions of the CBD, Nagoya Protocol, and other environmental-related UN instruments. In so doing, however, the Colombian constitutional justices took a different methodological path to the one taken by the Waitangi Tribunal in 1999, which conversely construed its recommendations exclusively on an anthropological analysis of the ethnic communities' customs and traditions in connection to the Whanganui River. Whilst the Atrato River case was a flagship judgement for rights of Nature in Colombia, the top-down, doctrinal approach taken, lacks meaningful engagement with the ethnic communities' epistemologies and ontologies, which arguably hinders its potential to achieve a genuine future-oriented reconciliation between the ethnic communities and the State Government. Nevertheless, in accordance with its pioneering nature, the Atrato River case set a legal precedent which catalysed the role of rights of Nature in Colombia. This snowballing effect has led to other rivers, including, but not limited to, the Magdalena[107] and Cauca Rivers,[108] being recognised as subjects of rights, to address the impacts of the pollution caused by the extractive industries, and to protect the rights of the communities and Rivers therein.[109] In these cases, the

[105] ibid, para. 9.30.
[106] Please see footnote 4 on the technical inaccuracy in the Constitutional Court's judgement, at Chapter 4, section 1, supra.
[107] Juez Primero Penal del Circuito, Neiva-Huila (2019), Radicado No: 41001 3109 001 2019 00066 00, at 2-4.
[108] Tribunal Superior de Medellin (2019), Sentencia No 28. Radicado No: 05001 31 03 004 2019 00071 01, at 19.
[109] María Ximena González-Serrano, 'Rights of Nature, an Ornamental Legal Framework: Water Extractivism and Backbone Rivers with Rights in Colombia' (2024) Journal of Peasant Studies 1, at 9-10.

plaintiffs demanded the recognition of the Magdalena[110] and Cauca[111] as a subject of rights in accordance with the legal precedent set by the Atrato River case, in order to compensate the social, economic, cultural and environmental damage suffered by the Rivers and respective communities. Within their rulings, both courts 'recognized not only the river but also future generations as subjects of rights. For the rivers, the rights to protection, conservation, maintenance and restoration were issued without proper definitions; for future generations, the rights to water, health, a dignified life, and healthy environment.'[112] However, the development of rights of Nature in Colombia, in the above manner, has been criticised by María Ximena González-Serrano for 'not meaningfully extend[ing] constitutional environment law', and instead, giving 'rise to an ornamental law'.[113] González-Serrano uses the term ornamental to elucidate the decorative features of rights of Nature in Colombia, insofar as they pick up on the 'trendiness' of the discourse, but lack practicality, insofar as not containing the substantive measures required to address the underpinning conflicts arising between riverine communities and extractive industries in the River basins. Ornamental rights of Nature thus hint towards the tendency of courts to recognise rights to Nature, as part of the snowballing effect amidst the 'high media boom and political attention' of rights for Nature.[114] The latter is most apparent when considering that the claims demanding the subjectivisation of the Magdalena and Cauca Rivers to the same status as the Atrato River were spearheaded by activists and independent lawyers – as opposed to the riverine communities, social organisations and social movements with experiences of the 'long history of contestation and resistance in the basins'.[115] At this juncture, there is a point to be made about the suitability of borrowing, or being influenced by, the judicial methodologies employed in the Atrato River dispute, which emulate a form of top-down pluralisation. When speaking of top-down pluralisation, I am referring to the reliance by courts on imported doctrinal constructs, such as biocultural rights, as reflected in the Atrato River case. Conversely, bottom-up pluralisations source legal authority from the legal epistemologies, ontologies, and cosmovisions from the parties of concrete disputes, including those held by IPLCs. When considering the extension of rights of Nature to both the Magdalena and Cauca Rivers, the judgements appear to have drawn influence from the top-down judicial methodology favoured by the Constitutional Court, which in turn, lacks the substantive mechanisms to address the underlying

[110] In the lawsuit pertaining to the subjectivisation of the Magdalena, the claim referred to jurisprudence arising out of the Atrato River dispute in the following: 'The plaintiffs demand the protection of the fundamental rights to health, to a healthy environment, and to a dignified life of the communities that are located in the area of influence of the Magdalena River due to the El Quimbo Hydroelectric Project, as well as the situation of wastewater discharge by the communities described. They request that the Magdalena River be declared a subject of rights, on the occasion of the precedent developed in Judgement T-622 of 2016 and Judgement No. 38 (…) of 2019, in order to find strategies to compensate for the social, economic and cultural environmental damage caused to the Magdalena River' See: Juez Primero Penal de Circuit, Neiva-Huila (2019) (n 107), at 4.

[111] In the submission before the court, the plaintiffs demanded the judge, 'declare the Cauca River a subject of rights, on the occasion of the provisions of Judgement T-622 of 2016", and in consequence "that the violation of the alleged fundamental rights be declared and that the entities involved be ordered to adopt protocols, strategies, guidelines and actions aimed at finding immediate solutions to compensate for the environmental, social, economic and cultural damage caused to the Cauca River.' See: Tribunal Superior de Medellin (2019) (n 108), at 19.

[112] González-Serrano (n 109), at 10.

[113] ibid, at 11-12.

[114] ibid, at 10; Liselotte Viaene, 'Can Rights of Nature Save Us from the Anthropocene Catastrophe? Some Critical Reflections from the Field' (2022) 9 Asian Journal of Law and Society 187, at 187.

[115] González-Serrano (n 109).

conflicts caused by the activities of extractive industries. In consideration of the latter, I agree with González-Serrano, that the development of rights of Nature jurisprudence in Colombia, which have been catalysed by the Atrato River judicial precedent, are indeed, ornamental. Be that as it may, rights of Nature in Colombia have evolved since the Constitutional Court's iteration, to reflect a judicial application of legal subjectivisation which significantly facilitates the bottom-up integration of IPLCs' epistemologies and ontologies. Whether by teasing out best practices – such as by learning from the past practices of the Constitutional Court -, and/or being motivated by the specialised mandate of restorative justice post-armed conflict, the creation of the specialised court – the JEP – appears to have engaged with the cultural localities of the law. In fact, the JEP's facilitation of open dialogues with indigenous peoples, articulation of indigenous cosmovisions by indigenous judges, and operationalisation of the latter, has accommodated meaningful interaction with, and bottom-up elevation of, marginalised legal knowledges, in a legal ecumenical fashion.

Henceforth, the following section seeks to contrast the judicial methodology employed by the JEP, against that of the Constitutional Court of Colombia. By comparatively analysing bottom-up and top-down judicial methodologies employed by national courts in Colombia, I hope to conclude by alluding to the benefits of a bottom-up judicial methodology for encouraging genuine forms of future-oriented reconciliation between parties in conflict, with greater prospects for encouraging legal ecumenism. In the next section, I will trace disputes heard before the JEP which led to the recognition of territories and their respective IPLCs, as victims of armed conflict. In accordance with the methodological framework, the chosen disputes heard before the JEP are dubbed as examples in which the national court engaged in an implicit diffusion of legal norms from Aotearoa New Zealand. The latter is based on the understanding that the JEP drew influence from the rights of Nature jurisprudence in Colombia, including that which was pioneered by the Constitutional Court in the Atrato River case (which drew largely from the legal precedents of the Waitangi Tribunal). Therefore, I will begin section 4 by contextualising the specialised remit of the JEP, and their role in investigating so-called 'macro-cases'. Thereafter, in section 4.1, I will outline the role of the JEP in the collective development of plural and bespoke rights of Nature hybrid solutions, through the crafting of legal resolutions which have been tailored to the unique cosmovisions of each community and their relationship to their territory. Accordingly, I will contextualise the latter by unpacking the 'Katsa Su case' which recognised the Awá territory (the Katsa Su) and thirty-two indigenous communities as victims of armed conflict. I will furthermore touch upon examples from investigations under case 04 and 05 respectively, including the JEP's recognition of the Cauca River as a victim of armed conflict (following the legal subjectivisation of the Cauca by the High Court of Medellín).[116] The recognition of the Katsa Su and Cauca River will be pertinent in section 4.2, for drawing a direct comparison of the precedents created by the JEP against the backdrop of those influenced by the Constitutional Court of Colombia. In other words, this section engages in a comparative analysis of top-down judicial methodologies, against bottom-up

[116] See Chapter 3, section 3.2, supra.

judicial methodologies, to relay the benefits of the latter judicial methodology in accommodating the elevation of marginalised legal knowledges, in a more legal ecumenical fashion.

4. The JEP: a jurisdiction recognising territories and communities as victims of armed conflict

After more than six decades of civil war in Colombia, the 2016 Peace Accord[117] was signed between the Colombian Government and the Revolutionary Armed Forced of Colombia (FARC) guerrilla group. As part of the push for transitional justice, the peace agreement signalled an end to the internal armed conflict in Colombia. Significantly, this agreement brought with it the creation of the JEP, a specialised jurisdiction tasked with investigating and addressing the violent crimes of the armed conflict spanning between the 1st of January 1990 to the 1st of December 2016. As already highlighted in Figure 1,[118] the JEP is a judicial mechanism, rather than a traditional court. It was created as the justice component for the Comprehensive System of Truth, Justice, Reparation, and Non-Repetition (SIVJRNR), as part of the Peace Agreement. The JEP is a judicial organ part of the transitional justice framework in Colombia, which takes an investigative approach to addressing the disproportionate harms experienced by the ethnic communities over the course of the internal armed conflict. There are two distinct components to this transitional justice framework, which, first, includes 'an investigation model that is based on the selection and prioritization of cases', and second, 'a victim-centred system, for which its main purpose is not retribution for the crimes committed, but reparation for the damage caused and the restoration of broken ties with a view to laying the foundations for non-recurrence.'[119] The JEP is comprised of three justice chambers, the Amnesty and Pardon chamber, the chamber for the Determination of Legal Situations Chamber, and the chamber for the Acknowledgment of Truth, Responsibility and Determination of Facts and Conduct.[120] The latter chamber, in particular, is responsible for 'selecting and investigating the most emblematic cases or situations of the armed conflict', known as "macro cases".[121] The JEP operates through dialogical and adversarial procedures. The former procedure 'seeks to establish a dialogue between the victims and defendants so that they can provide as much truth as possible about what happened'.[122] Through such, the Recognition chamber can determine responsibility based on the facts and give the defendant an opportunity to acknowledge their responsibility accordingly. Based on the outcome of acknowledged criminality, restorative sanctions will be imposed with no custodial sentence. However, 'if a person belatedly

[117] Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (n 18).
[118] See Chapter 1, section 2, supra.
[119] Eduardo Cifuentes Muñoz, 'JUSTICE FOR PEACE: The Restorative Model in the Special Jurisdiction for Peace', *Conference Northern Ireland and Colombia: Lessons from Peace* (2022).
[120] Rocío Quintero M, 'Colombia: The Special Jurisdiction for Peace, Analysis One Year and a Half After Its Entry into Operation' (2019).
[121] Alexandra Huneeus and Pablo Rueda Sáiz, 'Territory as a Victim of Armed Conflict' (2021) 15 International Journal of Transitional Justice 210, at 219.
[122] Cifuentes Muñoz, 'JUSTICE FOR PEACE' (n 119).

acknowledges his responsibility, a custodial sentence of 2 to 5 years is imposed.'[123] In the event the defendant does not acknowledge responsibility, 'the adversarial procedure is activated, and the case is sent to the Investigation and Accusation Unity (UIA), which charges before the Section with Absence of Acknowledgement of the Tribunal for Peace. An adversarial trial is held and, if the person is found guilty, according to the probative evidence provided, a sentence of 15 to 20 years in prison is imposed.'[124] At its core, the main function of the JEP pertains to the unveiling and acknowledgement of truth, which are central to Colombia's transitional justice architecture.

Essential to the operations of the JEP, are of course, the judges. As already outlined in Figure 1,[125] the JEP became the first transitional justice framework in Colombia to include both Indigenous and Afro-Colombian judges.[126] These judges have played an important role, in what will come to be known within this thesis, as legal translators of indigenous cosmologies.[127] However, it important to note, that whilst some of the judges sitting on the bench of the JEP are Indigenous and Afro-Colombian,[128] coming from the Cauca and – mainly – Sierra Nevada region, it is impossible for them to represent the 115 indigenous groups that inhabit Colombia.[129] Nevertheless, these judges are essential actors in the articulation of indigenous epistemologies, ontologies and cosmovisions into the language of law, by relating to, and understanding such, through the lens of their own experiences. Nina Silves captured this sentiment in the following…

> …'Although Indigenous judges do not embody the full ethnic diversity of the country, these judges can more easily and appropriately interact with Indigenous communities, their legal systems and worldview because of their Indigenous identity, experience with Indigenous groups, and commitment to the Indigenous people's struggles. Judge *Ochoa* states with that regard: 'One does not know the cosmovision of each Indigenous group but one has the sensibility to approach it'.'[130]

Moreover, and on the basis of the prevalent diversity of peoples, there is a point to be made about the nominal grouping of diverse Indigenous and local communities in Colombia under the umbrella term of "IPLCs". Which, when considering the significantly different cosmologies, epistemologies, and ontologies, between these groups, IPLCs may appear as terminologically unrepresentative of their inherent differences. However, IPLCs has been employed, at least within the context of this project, to discuss and compare the normativities of different indigenous and local groups, in a clear and coherent way. IPLCs is therefore grouping terminology which recognises the inherent differences between these communities. Recognising these differences is crucial for the forthcoming analysis,[131] which observes how the JEP engages with the

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[123] ibid.
[124] ibid.
[125] See Chapter 1, section 2, supra.
[126] See Chapter 3, section 2, supra.
[127] See Chapter 6, section 2.1, infra.
[128] The JEP is also inclusive of non-indigenous judges. See Figure 1 in Chapter 1, section 2, supra.
[129] Nina Bries Silva, 'Indigenous Judges at the Special Jurisdiction for Peace: Reimagining the Role of Transitional Justice Judges' (2025) International Journal of Human Rights 1, at 5.
[130] ibid, at 6.
[131] See Chapter 4, section 4.2, infra.

various epistemologies, ontologies, and cosmovisions of these groups - including Indigenous, Afro-Colombian, Roma peoples, and so on – to play a role in ensuring their representation within law.

At this moment, it is important to note that we are beginning to see some of the similarities between the mandates and composition of the JEP and the Waitangi Tribunal,[132] which will be relevant for the discussions in chapter 6. Significantly, where both are underpinned by a transitional justice mandate, and in turn, have created space for the inclusion of indigenous judges, and mechanisms for unearthing the perspectives of these historical grievances, which underpin their disputes. Whilst the rest of this chapter will now focus on unpacking select cases heard before the JEP, it is important to emphasise that these similarities will inform the analysis and conclusions drawn in chapter 6.

As aforementioned, the JEP prioritises the investigation of so-called "macro-cases", which pertain to 'the most serious systematic and representative acts in the conflict',[133] within its temporal remit. Out of these, three territorially specific macro-cases are relevant for this thesis – case 02, 04, and 05 – that include serious and systematic violations of humanitarian law and associated socio-environmental harms within a number of municipalities of Colombia. Each macro-case addresses a collection of disputes pertaining to specific Colombian municipalities, which involve different ethnic communities and their respective territories. For example, case 02 deals with the municipalities of Nariño (specifically Tumaco, Ricuarte and Barcoas), case 04 with the municipalities of Antioquia and Chocó, and case 05 with the municipalities in Cauca.[134]

Remarkably, throughout the investigation of these cases, the JEP have contributed to the development of rights of Nature jurisprudence, by recognising territories and their ethnic communities, as victims of armed conflict.[135] In particular, the JEP has built upon previous rights of Nature jurisprudence which recognises legal subjectivity to Nature – including that of the Constitutional Court of Colombia outlined above – in order to expand the notion of harm and reparation in connection to non-human entities, including to animals and the spiritual world.[136] It is important to note that the JEP has contributed to the pluralisation of bespoke hybrid legal solutions when adjudicating the disputes under each territorially specific macro-case, by tailoring each resolution to the individual cosmovisions of each community and their relationship with the territorial entity. However, case 02 spurred this process when recognising the Awá territory and their ethnic communities as victims of armed conflict, and therefore I will focus primarily on the judicial methodology employed in the latter case in the following section.

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132 See Chapter 3, section 2, supra.
133 Laura Ordóñez-Vargas, LC Peralta Gonzalez and Enrique Prieto-Rios, 'An Econcentric Turn in the Transitional Restorative Justice Process in Colombia' (2023) 17 International Journal of Transitional Justice 107, at 114.
134 ibid, at 114.
135 Up until 2023, the JEP has recognised natural territories, and their respective communities, as victims of conflict for 'territories of indigenous communities such as the Nasa, Awa, and Eperara Siapiadra [and] two Afro-Colombian communities' territories in Tumaco and the Cauca river.' See Andrea Camacho Rincon and German Parra Gallego, 'Addressing Environmental Damages in Contexts of Armed Conflict through Transitional Justice in Colombia' (2023) International Review of the Red Cross 1, at 10; JEP, Case 005 002/2020 (n 2); JEP Case 002 079/ 2019 (n 2); JEP, Case 002, 094/ 2020 (n 2); JEP Case 002 018/20 (n 2); JEP Case 226/2023 (n 2).
136 Marisol De la Cadena, *Earth Beings: Ecologies of Practice across Andean Worlds* (Duke University Press 2015).

4.1. The Katsa Su Case

In the Katsa Su case, the JEP recognised victim status to the Awá territory and the indigenous communities that inhabit it. Upon request by the plaintiffs, the Katsa Su and the Awá communities were recognised - collectively and individually – as direct and indirect victims of the internal armed conflict on the basis that their territories 'are living beings with "an identity and dignity that constitutes them as subjects of rights."[137]

Before tracing the JEP's engagement with rights of Nature jurisprudence, and their reliance on the latter to develop the jurisprudence recognising territories and IPLCs as victims of armed conflict, it is important to note how the JEP has benefitted from a specialised mandate for transitional justice, facilitated by a judicial composition inclusive of indigenous judges.[138] In fact, the recognition of the Katsa Su and the Awá peoples as victims of armed conflict has been facilitated by an open dialogue between the JEP and the indigenous communities, as part of the mechanism set up during the negotiation of the Peace Accord to promote national reconciliation through restorative justice.[139] Moreover, Article 35 of the law which established the JEP accommodated the latter by recognising both indigenous and Black communities' justice systems, and also, by mandating the JEP to coordinate with these communities over matters of their concern.[140] In the context of these dialogues, the role of Judges Belkis Izquierdo and Ana Manuela was indispensable and instrumental for the ultimate delivery of the resolution(s).[141] Through this open dialogue and direct engagement with indigenous and Black communities, the JEP has been capable of accommodating and diversifying the juridical concepts of territory and harm, by integrating those crafted in other legal traditions (i.e., those articulated outside the hegemonic Colombian property rights regime). In particular, the judiciary re-engaged with various conceptualisations of victimhood and territories enshrined within the *Ley de Víctimas*[142] and following Decrees – which, following informed (and separate) consultations between indigenous, Black, and Roma[143] communities, differentiated their experiences of harm in connection to displacement, tailored in dependence to their unique connections with their land. Whilst these Decrees did

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[137] Kristina Lyons, '"Nature" and Territories as Victims: Decolonizing Colombia's Transitional Justice Process' (2023) 125 American Anthropologist Association 63, at 67; JEP Case 079/19 and JEP Case 099/20 (n 2).

[138] The transitional justice mandate, and a composition inclusive of indigenous judges are characteristics which are also shared by the Waitangi Tribunal. Both components have contributed to judicial methodologies for bottom-up pluralisations, and ultimately assisted the promotion of subaltern cosmopolitan legalities across contact zones. For more information, see Chapter 6, section 3, infra.

[139] Gwen Burnyeat and others, 'Justice after War: Innovations and Challenges of Colombia's Special Jurisdiction for Peace | LSE Latin America and Caribbean' (3 April 2020) <https://blogs.lse.ac.uk/latamcaribbean/2020/04/03/justice-after-war-innovations-and-challenges-of-colombias-special-jurisdiction-for-peace/> accessed 8 February 2024.

[140] Huneeus and Sáiz (n 121), at 218.

[141] Ordóñez-Vargas, Peralta Gonzalez and Prieto-Rios (n 133), at 122.

[142] Ley 1448 de 2011 (Junio 10) por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones. [Law 1448 of 2011 (June 10th) by which measures of attention, assistance and integral reparation are dictated to the victims of the internal armed conflict and other provisions are dictated.] (Hereinafter referred to as Law 1448 of 2011).

[143] Decreto-Ley 4633 de 2011 (Diciembre 09) por medio del cual se dictan medidas de asistencia, atencion, reparacion integral y de restitucion de derechos territoriales a las victimas pertenecientes a los pueblos y comunidades indigenas [Decree 4633 of 2011 (December 9th) through which measures are issued for the assistance, support, integral reparation and the restitution of territorial titles to the victims belonging to indigenous peoples and communities]. (hereinafter referred to as Decree 4633 of 2011).

not go as far as to recognise their territories as victims, Decree 4633 included indigenous people's perception of their territories as living entities which have been subject to harm as a result of the armed conflict,[144] and Decree 4635 highlighted the impacts of environmental degradation on Black communities' cultural identity.[145]

By way of furthering the concept of victimhood, however, the JEP recognised specifically the Awá territory as a victim of conflict. Following an informed consultation with the Awá peoples, the JEP framed the legal subjectivisation of the Katsa Su based on the Awá peoples' relationship with their territory, and on their experience of harm and how it relates to the severing of their spiritual connection with the Katsa Su. Following this consultation, the JEP resolution articulated a bespoke construction of rights, by tailoring the legal norms of territory and harm in relation to the specific historical, cultural, and spiritual considerations of the communities and territory at hand. In particular, the resolution reiterated the Awá peoples understanding of their territory, in their own words, and including the following:

> "This conception of territory is clearly distinct from the Western notion of territorial management, control, planning, or ordering, which presumes that between human beings and nature there exist relations of dominion subject/object, when, in reality, for the Awa´ social relations are not limited to human relations. The environmental management of the Awa is the product of tense and complex relations between different beings of nature, with whom, through constant negotiation and respect for norms that regulate the material and symbolic use of nature, we construct a balanced cohabitation. The notion of the human as the only being responsible for taking decisions about the future of the natural world is alien to the Awa cultural logic ...For these reasons ... when we speak of the territory of the Awa indigenous peoples we refer—even without Western society being fully aware of it—to the entirety of collective and individual fundamental rights that should be respected and fostered."[146]

By recognising the Katsa Su as a victim, the JEP acknowledged the territory as an entity subject to legal rights and standing within the Colombian legal system – thus advancing rights of Nature jurisprudence in Colombia – whilst at the same time, contributing to the pluralisation of legal norms pertaining to territories under the larger umbrella of property rights. The latter is even more apparent if we consider case 02 in conjunction with the macro-cases 04 and 05. The JEP's articulation of bespoke solutions have in fact played an active role in creating a heterogenous space for othered epistemologies and ontologies. These resolutions have enabled spaces for the inclusion of indigenous cosmovisions which relate to Nature, which stand apart

[144] Decreto-Ley 4634 de 2011 (Diciembre 09) por medio del cual se dictan medidas de asistencia, atencion, reparacion integral y de restitucion de derechos territoriales a las victimas pertenecientes al pueblo Rrom o Gitano [Decree 4634 of 2011 (December 9th) through which measures are issued for the assistance, support, integral reparation and the restitution of territorial titles to the victims belonging to the Rrom or Gipsy people], Art.3 para 3. (Hereinafter referred to as Decree 4634 of 2011).
[145] Decreto-Ley 4635 de 2011 (Diciembre 09) por medio del cual se dictan medidas de asistencia, atencion, reparacion integral y de restitucion de derechos territoriales a las victimas pertenecientes a comunidades negras, afrocolombianas, raizales y palenqueras [Decree 4635 of 2011 (December 9th) through which measures are issued for the assistance, support, integral reparation and the restitution of territorial titles to the victims belonging to black, afrocolombian, Raizal and Palenqueras communities], Art.9. (Hereinafter referred to as Decree 4635 of 2011).
[146] Huneeus and Sáiz (n 121); JEP Resolution 079/19 (n 2), at para. 5.

from hegemonic conceptualisations of Nature as an exploitable resource, including those contained within the Colombian property rights regime. Examples within the Department of Nariño, include the JEP recognising victimhood status to the Eperara Euja - the territory of the Eperara Siapidara indigenous people - in 2020.[147] In particular, the resolution recognised the Eperara Euja as a victim of armed conflict based on the Sia peoples understanding of their territory, by incorporating the following:

> 'In the world of the Siapidara the figure of the 'Tachi Euha, Tachi Trua,' our mother earth, our world, dominates the activity of humans and their relations with nature, with animals, with other human beings. The earth, mother and origin of all human goods, is also the central element in the Sia worldview. The earth is the place where for hundreds of years our people have lived and worked. We have constructed our homes using and caring for natural resources. In our territories there exist places of which we tell stories that occurred long ago. In them our predecessors lived, and therefore we have a right to live, [as we are] its sons and daughters.'[148]

The JEP also recognised the territories of two Black communities within Nariño as victims of armed conflict, by articulating their relationship with their territory within a resolution recognising how…

> '[The Black communities of Tumaco] have established a permanent link with the rivers of the gulf and its estuaries, which integrate the populated centers with the remote settlements...As the Hileros Organization has said, 'for Black communities, territory has a special meaning; it is the place where their worldview and cultural logic is created, and above all it is the space necessary for the survival of the collective subject of the Black people [Pueblo Negro].'[149]

Additionally, and under macro case 05, the JEP recognised victim status to the Great Nasa Territory of the Cxhab Wala Kile, by expressing that '[f]or indigenous peoples and especially for the Nasa, the Uma Kiwe (territory) is conceived as a living being that forms an integral part of the Nasa; she feels, she must be nourished and cared for ...'. .[150]

Remarkably, where the JEP has advanced the notion of victimhood over land-based territories, the JEP has furthermore extended the latter judicial methodology – which attributed victim status to territories based on the respective IPLCs epistemologies, ontologies, and cosmovisions – to recognise the Cauca River as a victim of armed conflict. Albeit previously recognised as a subject of rights by the Superior Court of Medellín,[151] the JEP adopted an alternative judicial methodology to (1) recognise the victimhood status of the Cauca, and (2) address the harm suffered by the ethnic communities and Nature as a result of the internal armed conflict. Falling under macro case 05, the court investigated the serious damage suffered by the Cauca, for being used as a mass grave by paramilitary groups, and furthermore, for being subject to the dumping of mercury associated with illegal mining, and chemicals derived from the production of illicit

[147] See Huneeus and Sáiz (ibid), at 221; JEP Case 094/20 (n 2), at para. 82.
[148] Huneeus and Sáiz (ibid), at 221; JEP Case 094/20 (n 2), at para. 82.
[149] Huneeus and Sáiz (ibid); JEP Case 018/2020 (n 2), at para. 116.
[150] Huneeus and Sáiz (ibid), at 220; JEP Case 005, Auto 002/20 (n 2), at para. 13.5.
[151] Tribunal Superior de Medellin (2019) (n 108); See Chapter 4, section 3.2, supra.

substances.[152] Following a petition by the Afro-Colombian Community Councils of Northern Cauca, the JEP investigated the systematic killing and dumping of people in the Cauca River over the course of 2000 to 2004, noting the severe impact on the surrounding communities and environment, and on the intrinsic connection shared between the ethnic communities and Nature. Recognising these crimes against Nature as serious breaches of international humanitarian law, the JEP granted the Cauca River the status of victimhood in 2023, in an effort to promote reconciliation.[153]

Collectively, these examples highlight the indispensable role of the JEP in (1) diversifying the legal concepts, of territory, victim, and harm, and (2) in pluralising bespoke rights of Nature legal resolutions. Importantly, in what will be discussed in the forthcoming section, the legal resolutions expressed by the JEP avoid the trap of ornamentalisation, by favouring a bottom-up pluralisation, instead of a top-down pluralisation when crafting legal resolutions to resolve the disputes before them. More specifically, the JEP - who have benefitted from a judicial mandate to promote forms of reconciliation, and institutional legal mechanisms to facilitate open dialogues – have avoided said ornamentalism, by meaningfully engaging with IPLCs' experiences, epistemologies, ontologies, and cosmovisions to articulate legal resolutions which address their historical grievances. Moreover, the creation of legal resolutions in such a manner, has accommodated the formalisation of IPLCs' epistemologies and ontologies, and related customary laws accordingly. Where the mandate and methodology of the JEP have significantly contributed to the pluralisation of Colombian rights of Nature discourse, it connectedly, appears to have accommodated a form of co-existence of potentially competing and conflicting legal norms. The latter, in essence, resembles a legal ecumenism, and will therefore be discussed in more depth in chapter 6.[154] The following section, however, will briefly discuss the judicial methodologies offered by the Constitutional Court of Colombia (and thereafter the Superior Court of Medellín), against that of the JEP, to briefly conclude on the advantages of bottom-up judicial methodologies for pluralisation in the concrete embedding of othered or marginalised epistemologies and ontologies, and interconnectedly, for instilling genuine forms of future-oriented reconciliation between IPLCs and the State.

4.2. Bottom-up v top-down pluralisations

Taking a step back to comparatively analyse the aforementioned decisions of the Constitutional Court of Colombia and the JEP, it is clear that both jurisdictions diverged in their judicial methodologies to accommodate rights of Nature in Colombia's constitutional and legal order. Although the cases heard before both jurisdictions acknowledged the implications of colonialism, and, to varying degrees, intended to promote some form of reconciliation for their related historical grievances, their implementation of

[152] 'La JEP Acredita Como Víctima al Río Cauca En El Caso 05' <https://www.jep.gov.co/Sala-de-Prensa/Paginas/-la-jep-acredita-como-victima-al-rio-cauca-en-el-caso-05.aspx> accessed 17 September 2024.

[153] 'Con Un Acto Restaurativo, La JEP Notificó a Las Comunidades Del Río Cauca Que Este Afluente Fue Reconocido Como Víctima Del Conflicto' <https://www.jep.gov.co/Sala-de-Prensa/Paginas/con-un-acto-restaurativo-la-jep-notifico-a-las-comunidades-del-rio-cauca-que-este-afluente-fue-reconocido-como-victima-del-.aspx> accessed 17 September 2024.

[154] See Chapter 6, section 3, infra.

different judicial methodologies affected the accommodation of the latter. Significantly, the judicial methodology employed by the Constitutional Court entailed a rather top-down, doctrinal approach, which does not seem to consider or engage with the ethnic communities' legal epistemologies and ontologies to the same degree of intensity as the JEP. Arguably, this methodological approach hindered prospects for a genuine, future-oriented reconciliation between the ethnic communities and the State Government. By drawing on imported legal doctrinal constructs, instead of an anthropological investigation of the ethnic communities' epistemologies, ontologies, and cosmovisions, the Colombian Constitutional Court's reliance on 'biocultural rights' in the Atrato River case risks trapping IPLCs in a doctrinally defined, but anthropologically not warranted, role of stewards, linked and conditioned to, traditional lifestyles.[155] In my opinion, such a legal precedent is therefore ill-equipped to facilitate genuine reconciliation between IPLCs and the State. However, the precedent of the Constitutional Court's judgement in the Atrato River case has led to the progressive development of "ornamental" rights of Nature in Colombia, where the Atrato River legal precedents have influenced other rights of Nature developments – including the Superior Court of Medellín's recognition of the Cauca River as a subject of rights – in a highly decorative manner.[156] In comparison, the precedents set by the JEP in the Katsa Su case, the Cauca River, and other territorial macro-cases, thereafter, favoured a methodology of bottom-up pluralisation, by engaging directly with the IPLCs' legal cultures, and cosmovisions. The latter in turn, has facilitated the bottom-up integration of marginalised epistemologies, ontologies, and cosmovisions, in a more concrete manner, on account of being translated into bespoke legal resolutions devised and drafted by indigenous judges. Accordingly, the JEP has facilitated meaningful engagement with local legal knowledges – accommodated by the institutional mechanisms for open dialogues between the JEP and IPLCs - and has furthermore contributed to their embedding within law. In this regard, and because the JEP is specifically tasked with a judicial mandate to promote transitional justice, their judicial methodology for bottom-up pluralisation is better suited to fostering genuine future-oriented reconciliation between IPLCs and the State.

On the basis of the latter analysis, bottom-up pluralisations seem to be the judicial methodology more suited to supporting the genuine facilitation and integration of othered or marginalised epistemologies and ontologies. As a sharp contrast to top-down pluralisations, which have – at least in the above explored cases – drawn influence from doctrinal legal constructs, and have lacked the capacity for meaningful engagement with local legal cultures, bottom-up pluralisations are befitting to foster forms of reconciliation between parties in conflict, and to furthermore facilitate legal ecumenism. In addition to this specific judicial methodology, it is important to reiterate that the JEP additionally benefitted from a mandate geared towards transitional justice, a judiciary inclusive of indigenous judges, and institutional mechanisms to facilitate open dialogues between judges and indigenous communities. Collectively, these components have contributed to the capacity of the JEP to facilitate the genuine integration of IPLC's epistemologies and ontologies, and

155 See Chapter 4, section 3.2, supra.
156 See Chapter 4, section 3.2, supra.

in essence, encourage legal ecumenisms. Since the latter will contribute to the discussions in chapter 6, I will now conclude this chapter in the following section.

5. Conclusion

Whilst the Atrato River dispute was a pioneering case, catalysing the development of rights of Nature in Colombia, it has nonetheless brought with it, a sense of ornamentalisation. Moving beyond courts engaging with rights of Nature as solely a *trendy* legal discourse, we are seeing the JEP building upon rights of Nature to articulate legal resolutions which recognise territories and IPLCs as victims of armed conflict. In a divergence from top-down pluralisations embraced by the Constitutional Court in the Atrato River case, the JEP employed judicial methodologies for bottom-up pluralisation, to diversify legal concepts of territory, harm, and victim, and to furthermore create bespoke rights of Nature resolutions. Additionally, and perhaps in accordance with the judicial mandate to promote reconciliation, the JEP has produced legal resolutions to address the historical grievances of the internal armed conflict, which in the case of the Cauca River, marked a 'historic milestone in seeking justice for victims of forced disappearance in Colombia.'[157] Based on their structural composition and implementation of bottom-up judicial methodologies, the JEP appear well-placed to embed subaltern legalities into law, and to furthermore facilitate legal ecumenism. Whilst it is clear the JEP have made an earnest attempt to encourage legal ecumenism through the articulation of legal resolutions accordingly, it is important to caveat the relative success of the aforementioned resolutions, on account of requiring further empirical assessment (which is, however, outwith the scope of this thesis). Therefore, I will now turn to the final case study in the next chapter, in which I will trace the trans-jurisdictional diffusion of the innovative legal hybrids from Aotearoa New Zealand, in concrete disputes heard before the High Court of Uttarakhand, in India.

[157] 'Ríos de Vida y Muerte: Journalism That Brings Justice to Victims of Enforced Disappearance' (DW Akademie, 4 October 2023) accessed 19 March 2024; Decision auto 226 in Case 05.

Chapter 5

Activist Courts of India: Advancing rights of Nature or over-reaching in their powers?

1. Introduction

India is our final stop in this comparative analysis. This chapter will investigate the trans-jurisdictional diffusion of rights of Nature legal hybrids from Aotearoa New Zealand to the High Court of Uttarakhand. Specifically, I will trace the influence of the Aotearoa New Zealand legal precedents in two interconnected disputes heard before the High Court of Uttarakhand. To briefly contextualise these disputes, both cases heard before the High Court led to the recognition of Nature as a subject of rights, for the purpose of addressing environmental degradation and the negative impacts of pollution. Specifically, the first case heard before the High Court of Uttarakhand recognised two of India's most sacred rivers – the Ganges and Yamuna Rivers (hereinafter referred to collectively as the Ganges)- as juristic entities with the rights equated to those of humans. The High Court granted legal subjectivity to the Rivers as an 'extraordinary measure' to address the pressing concerns relating to the pollution in the Ganges.[1] Shortly thereafter, in what becomes the second case of focus for this chapter, the High Court of Uttarakhand recognised the Gangotri and Yamunotri Glaciers and the surrounding ecosystems as legal entities entitled to the rights, duties, and liabilities of a living person.[2] The High Court recognised the latter in response to a writ petition requesting the granting of juristic personhood to the Himalayas, glaciers, streams, and water bodies, to be equated to the status of the Ganges. As already outlined in chapter 1, the aforementioned cases are examples of the High Court of Uttarakhand engaging in a borrowing of legal norms from the jurisdiction of Aotearoa New Zealand. In the case leading to the legal subjectivisation of the Ganges and Glaciers, the High Court took inspiration from various sources. Whilst generally acknowledging rights of Nature developments globally, the High Court made special consideration of the legal precedents crafted in Aotearoa New Zealand following the passing of the 2017 Te Awa Tupua Act.[3] Then furthermore, in the case which

[1] Mohammed Salim v. State of Uttarakhand and Others, Writ Petition (PIL) No.126 of 2014 (December 5, 2016 and March 20, 2017), 4, (hereinafter referred to as Ganges case).
[2] Lalit Miglani v. State of Uttarakhand and Others, Writ Petition (PIL) No.140 of 2015 (March 30, 2017), (hereinafter referred to as Glaciers case).
[3] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

recognised the Gangotri and Yamunotri Glaciers and the surrounding ecosystem as living entities subject to rights, the High Court made an explicit reference to the jurisprudence of the Waitangi Tribunal. Within its judgement, the High Court noted that '[t]he New Zealand Parliament has enacted 'Te Urewera Act 2014' whereby the 'Urewera National Park' has been given the legal entity under Section 11 of the Act. The purpose of the Act is to preserve, as far as possible, Te Urewera in its natural state, the indigenous ecological systems, biodiversity and its historical cultural heritage.'[4]

This chapter explores the two above mentioned cases as examples of the High Court of Uttarakhand in India taking inspiration from the legal precedents originated in Aotearoa New Zealand. In line with the methodological framework, I will use the remainder of this chapter to explore the extent to which the High Court of Uttarakhand relied on the latter legal norms to construct their rights of Nature solutions accordingly. Whilst India becomes the third case study in this overall comparative analysis, an exploration of these concrete disputes will highlight how the High Court of Uttarakhand diverges from the first two case studies, in a very significant manner. Where the first two case studies highlighted the ability of national courts to rely on foreign legal precedents, to articulate a legal resolution which addresses the concrete facts of the disputes before them, the disputes explored within this case study suggests that the High Court of Uttarakhand may have engaged in a perhaps unwarranted transplant of legal norms. Recognising that the High Court of Uttarakhand may have drawn influence from the legal precedents of the Waitangi Tribunal because of the *trendiness* to engage with rights of Nature more generally, this case study will advance a critique on the risks of transplanting legal norms,[5] to thereafter emphasise the importance of process and method when articulating bespoke rights of Nature solutions.[6] A critical analysis of legal transplants will therefore be discussed in connection with the rise of judicial activism in India, to underscore that whilst judiciaries can play a significant role in the development of law, they must do so by adjudicating the concrete disputes that fall before them.

This chapter is structured as follows. Section 2 will outline the socio-legal context of the cases. To that end, it will briefly canvass India's experience with colonialism, and the impact of the caste system and religion on the creation of social hierarchies. Thereafter, section 3 will explore the cases which led to the legal subjectivisation of the Ganges and Yamuna Rivers, and, the Gangotri and Yamunotri Glaciers and surrounding ecosystems. This section will outline the manner in which the High Court of Uttarakhand relied on the legal precedents crafted in Aotearoa New Zealand to inform their own decision-making, whilst at the same time relying on their own pre-existing jurisprudence to frame these entities as juristic persons. Concludingly, section 4 will consider some of the advantages and disadvantages of increasingly activist Indian courts, analysing whether the legal subjectivisation of Nature was a concrete solution implemented

[4] Glaciers case (n 2), at 41-42.
[5] For a background on legal transplants, and the critical position taken herein, see Chapter 2, section 2.2, supra.
[6] A contextualisation of "bespoke" within this context has been outlined above. See Chapter 2, section 2.2, supra.

to address the pollution of Nature, or whether these cases demonstrate an example of Indian courts perhaps overreaching in their powers.

2. A rich history of exclusion: colonialism, the caste system, and religion

India has a rich, and complex history, which has been greatly impacted by British colonialism and imperialism, a traumatic process of decolonisation, and major ongoing geopolitical struggles with neighbouring powers. In order to set the historical context for the forthcoming analyses, I will trace key moments, in a non-exhaustive manner. I will therefore touch upon the influence of the British East India Company in India's colonial rule, the role of the British Government in promoting exclusion through the hardening of the caste system, the rise of Indian nationalism and the road to India's independence. Finally, I will briefly address the promotion of Hindu nationalism by the government under Narendra Modi.

The English Crown, like many of its European counterparts, engaged in trading expeditions to the East Indies since the late 16th, early 17th century. To finance and conduct such expeditions, the English (later British) East India Company was founded in 1600, as one of the first precursors of present-day multinational corporations.[7] Although the British were initially welcomed by the Mughal rulers, relationships eventually grew tense, leading to the Anglo-Mughal war from 1686-1690, and the defeat of the British by the Mughal emperor. A decisive turning point occurred during the Seven Years War from 1756 until 1763. It is largely considered that the Battle of Plassey (1757) marked the beginning of the British empire within India, through the company and the institution of the Mir Jafar as a puppet ruler under the aegis of the British East India Company. Faced with the increasing Westernisation of India, and the antagonization between imposed British standards and Hindu societal beliefs,[8] widespread resentment against British rule culminated in the Sepoy mutiny of 1857-58. With the defeat of the mutiny[9] the Government of India Act 1858 liquidated the East India Company and transferred official governing authority directly to the British Government.[10] From then on, a strong emerging middle class appeared throughout Indian society, along with an increasing prevalence of Indian nationalism.[11] With the British Raj

[7] George S Roukis, 'The British East India Company 1600-1858: A Model of Transition Management for the Modern Global Corporation' (2004) 23 Journal of Management Development 938.
[8] One example includes the implementation of political reforms, such as the introduction of a bill allowing Hindu widows to remarry. See The Hindu Widows' Remarriage Act 1856.
[9] Roukis (n 7), at 941-945.
[10] The Government of India Act 1858.
[11] Seth Sanjay, 'Rewriting Histories of Nationalism: The Politics of "Moderate Nationalism" in India, 1870–1905' (1999) 104 The American Historical Review 1.

officially established in 1858, and Queen Victoria recognised as Empress of India in 1876,[12] Britain went through processes of rehabilitation, to ensure India's imperial stability post-mutiny.[13]

Post-mutiny life, however, was still stained from the atrocities committed on both sides, fostering a deep mistrust between the Indians and British over the next century. Moreover, it has been suggested that the imposition of British colonial rule brought with it the entrenchment of social hierarchies and stratification between citizens, by implementing hard boundaries using the caste system. In brief, the caste system has origins in Hinduism, and relates to the social ordering and regulation of society in accordance with caste designation.[14] Albeit recognised as an unfair and inequitable system, the categorical designation of castes in pre-colonial India were more flexible, as social identities were of limited importance, and were malleable, meaning individuals could move more freely from one caste to another.[15] However, once Britain assumed control over India, a census was implemented to try and simplify the pre-existing system of social organisation, through the creation of a single governance system for India under common law. Using the caste system, and making the latter a defining feature of India's social construction, Britain played a hand in the hardening of social categories, and the perpetuation of caste-based discrimination.[16]

Confronted with the consequences of colonialism – political oppression, poor economic development, devastating famine, and poverty – calls for Indian nationalism grew stronger in reaction to the consolidation of British rule and the increasing Westernisation of India.[17] Promoting Indian independence, the Indian National Congress first convened in 1885 and grew gradually more influential. Eventually, after the end of World War II, the Indian Independence Act of 1947 brought with it the long-awaited independence. However, the process of decolonisation was anything but an easy and smooth ride. To the contrary, the partitioning of India and Pakistan (later also of Bangladesh) and of Muslim, and the Hindu and Sikh populations respectively, was a deeply traumatic process, the scars of which are felt to the present day. India maintains border disputes with Pakistan and Bangladesh. After the occupation and annexation of Tibet in 1950-51 by the Peoples Republic of China, India also maintains an unresolved border dispute with that country. The Indian state of Uttarakhand is directly concerned by the border conflict with China.

Although it is outwith the scope of this thesis to comprehensively trace the political shifts within India following independence, I would like to briefly mention the position of the current government under Modi.

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[12] Royal Titles Act 1876.
[13] For more information on the rehabilitation of India post-1857 mutiny, relating to 'military reconstruction, administrative arrangements, and financial organization'. See Robin J Moore, 'Imperial India 1858-1914' in Andrew Porter and Roger Louis (eds), The Oxford History of the British Empire (Vol 3 Oxford University Press 1999).
[14] Sasha Riser-Kositsky, 'The Political Intensification of Caste: India under the Raj' (2009) 17 Penn History Review 31.
[15] ibid, at 32
[16] ibid, at 33, 37-49.
[17] Bipan Chandra and others, India's Struggle for Independence (Penguin UK 2016), see Chapter 36 and 37.

Narendra Modi rose to power as India's prime minister in 2014, under the Bhartiya Janata Party (BJP). Modi then went on to win his third consecutive term in 2024, and with it, 'boosted the country's global standing and propelled strong economic growth while consolidating power and galvanizing majoritarian support for his Hindu nationalist agenda.'[18] Before discussing Modi's promotion of Hindu nationalism, or what became to be known as the political ideology "Hindutva" (with "saffronisation" relating to the right-wing policy approach to implement the Hindu nationalist agenda), it is important to mention that Modi's prior appointment as Chief Minister of the state of Gujurat was already stained with controversy, and in some instances, has been classed as "anti-Muslim". During the riots in Gujurat in 2002, over 1,000 people – mostly Muslims – were killed, in what has been described as a 'retaliatory bloodbath' following the deaths of 58 Hindu passengers of a train which was set on fire in Godhra.[19] Modi was accused of condoning said violence, and was criticised by both the United States and the United Kingdom for his inaction in addressing the riots. However, Modi escaped indictment, whilst his administration faced charges, and ultimately, sentencing.[20] Nevertheless, based on a political campaign focussed on improving India's economy, Modi was elected to power, however bringing with his election a surge in Hindu nationalism across parts of India. Accompanying the political ideologies of Hindu nationalism was the passing of laws and reforms to appeal to Hindu beliefs, including an attempted ban on selling cows for slaughter. However, a significant feature of rising Hindutva – a political ideology justifying Hindu hegemony in India – was the increasing segregation and exclusion of Indians belonging to other religions, and in particular, Muslims.[21]

Through this brief historical tracing, we can see how the imposition of colonial rule, the hardening of the caste system, and the perpetuation of Hindutva and saffronisation, has contributed to the exclusion of a variety of marginalised groups. In this regard, India can be classed as a country inclusive of complex, pluralistic societies, which has furthermore experienced various forms of conflict. The latter conflicts have manifested in the clashing of rival normativities, including through challenges to Hindu beliefs by the increasing Westernisation of India, which have furthermore created asymmetrical relationships of power between hegemonic and non-hegemonic groups that typically define contact zones. However, it is important to mention that the cases herein explored do not arise out of explicitly perceived conflicts between hegemonic and non-hegemonic groups, or on attempts to reconcile historical grievances. In this manner, this case study not only diverges from the previous ones on account of reflecting instances in which the judiciary have engaged in a perhaps unwarranted transplant of legal norms, but also diverge on account of their different contextual foundations.

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[18] 'India, Modi, and Hindu Nationalism | Council on Foreign Relations' <https://www.cfr.org/podcasts/india-modi-and-hindu-nationalism> accessed 16 October 2024.
[19] Chandra and others (n 17).
[20] Ashutosh Varshney, 'Understanding Gujarat Violence' 4 Social Sciences Research Council 1, at 2; Sangeeta Kamat and Mathew Biju, 'Mapping Political Violence in a Globalized World: The Case of Hindu Nationalism' (2003) 30 Social Justice 4.
[21] ibid.

Nevertheless, and despite the aforementioned divergences which will be explored throughout this chapter, the High Court of Uttarakhand relied on the legal precedents from Aotearoa New Zealand when granting legal subjectivisation to the Ganges and Yamuna Rivers, and the Gangotri and Yamunotri Glaciers. These are the final cases to be explored for the overall comparative analysis of this research project.

In the next section, I will unpack the trans-jurisdictional diffusion of legal norms from Aotearoa New Zealand to India. In section 3, I will therefore contextualise the background to the aforementioned disputes, outlining the legal argument heard before the High Court of Uttarakhand, and frame the eventual construction of both rights of Nature legal resolutions. When unpacking the latter, I will highlight the extent to which the High Court of Uttarakhand relied on the legal precedents crafted in Aotearoa New Zealand to inform their rights of Nature approach, relating to the construction of legal personality using subaltern epistemologies and ontologies, and, the operationalisation of rights through a guardianship body. However, this section will emphasise, that whilst the High Court of Uttarakhand has drawn influence from these legal precedents to inform their decision-making, they furthermore relied on their own pre-existing jurisprudence which recognises idols and deities as juristic persons, to frame legal personality for Nature.

3. Rivers and Glaciers: Ecosystems, deities, and tourist attractions

The Ganges is one of India's largest rivers, with its main channel spanning 2,525 kilometres, covering ground from the Himalayas down to the Indian sea levels and Bangladeshi coast.[22] The Ganges encompasses around 20% of Indian land, and together with the Yamuna as its main tributary,[23] are key features of India's ecosystem. The Ganges and Yamuna Rivers are valued for their ecological importance, and socio-economic relevance. Some, in addition, revere them for their spiritual significance. As the main source for the Ganges and Yamuna (hereinafter referred to collectively as the Ganges), the Gangotri and Yamunotri glaciers are indispensable features of the Indian ecosystem. In recent decades, the Ganges have increasingly been exposed to alarming rates of pollution, exacerbated by the development of industries, agriculture, and the urbanisation of cities in India. In fact, the Ganges has often been described as one of the most polluted rivers on Earth.[24] Faced with the additionally looming crisis of climate change and threats of longer exposure to higher temperatures, the Gangotri and Yamunotri Glaciers have been shrinking rapidly, and '[a]ccording to the images of NASA, over the last 25 years, Gangotri glacier has retreated more than 850 meters, with a recession of 76 meters from 1996 to 1999 alone.[25] In recognition of the perverse

[22] Nabeela Siddiqui, T. Faiyaz, and Vinaya Satyawan Tari, 'Ganga and Yamuna Rivers: Through the lens of the National Green Tribunal' (2022) 21 Natural Environment and Pollution Technology: An International Quarterly Scientific Journal 4, 1657-1664, 1657.
[23] ibid.
[24] Sanjay Dwivedi, Mishra Seema and Rudra Deo Tripathi, 'Ganga Water Pollution: A Potential Health Threat to Inhabitants of Ganga Basin' (2018) Environmental international 327.
[25] Glaciers case (n 2), at 5.

degradation of the Ganges and Glaciers, and the risks that such pollution poses to the biodiversity within these ecosystems,[26] there have been calls to address this environmental crisis.

Their preservation, and the preservation of the environment more broadly, are part of India's constitutional agenda. Indians are entrusted with the duty to 'protect and improve the natural environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures' in accordance with Article 51A(g) of the Constitution.[27] This constitutional duty is also accompanied by the Directive Principles of state policy contained within Article 48A, which 'encourages states to protect and improve the environment and to safeguard the forests and wildlife of the country'.[28] Justice K.N. Singh, even emphasised the 'pollution of the river Ganga is affecting the life, health and ecology of the entire Indo-Gangetic plain, [and how] it is the sacred duty of all those who reside or carry on business around the river Gange to ensure the purity of Ganga'.[29] Whilst the call to preserve India's environmental landscape is a shared constitutional duty by all Indians, the protection of these natural entities has often had a deeper cultural and religious significance for Hindus. The protection of the Ganges in particular is of high importance for Hindus, as the Ganges is personified as a goddess in Hindu cosmologies. In fact, the Ganges, which has also been referred to as 'Ganga Maa' or Mother Ganges[30], is…

> …'conceived by all as a Mother and provider; devotees bathe in her waters to be cleansed of their sins; the ashes of the dead are immersed in her waters and lead the departed soul to a higher birth; and the name is chanted with the belief that it will bestow freedom from poverty and protection and lead to liberation. Yamuna is the daughter of Surya (the sun god) and Saranyu. The Lord of death, Yama, is her brother.'[31]

The Gangotri and Yamunotri Glaciers also hold religious significance for Hindu-Indians, as two of the four sites[32] of the 'Char Dham Yatra', a sacred pilgrimage of the "Four Abodes".[33] The Gangotri and Yamunotri Glaciers are home to temples dedicated to the Goddesses Ganges and Yamuna,[34] and many devotees embark on a pilgrimage through the Indian Himalayas to visit the temples resting within. However, it is not

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[26] For example, there has been increasing attention to protect the Ganges River dolphins (Platanista gangetica), which are exposed to the threat of pollution and fishing. There have been legal developments in India to increase the protection of this species of dolphin, with the passing of the Indian Wildlife Protection Act (1972), and the ratification of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, and the Convention on Migratory Species (1973). See Brian Thomson, *'Swimming blindly down the Ganges',* (15th March 2005), WWF, https://wwf.panda.org/wwf_news/?19110/Swimming-blindly-down-the-Ganges (accessed 29th January 2024).
[27] The Constitution of India (1950), Art.51A(g).
[28] ibid, Art.48A.
[29] Moe Nakazora, 'Environmental Law With Non-Human Features in India: Giving Legal Personhood to the Ganges' (2023) 43 South Asia Research 172, at 177.
[30] Ganges case (n 1)
[31] Kelly. D. Alley, 'River Goddesses, Personhood and Rights of Nature: Implications for Spiritual Ecology' (2019) 10 Religions, 502, at 506.
[32] The other two sites include Kedarnath, which is the site dedicated to Shiva, and Badrinath, which is dedicated to Vishnu. See: Knut Auckland, 'Pilgrimage expansion through tourism in contemporary India: the development and promotion of a Hindu pilgrimage circuit', (2017), 32 Journal of Contemporary Religion 2, 283-298, at 285.
[33] ibid, at 284.
[34] Brian K. Pennington, 'Hinduism in North India', in Brian. A. Hatcher (ed), *Hinduism in the Modern World*, (Routledge 2015).

just Hindu-Indians who embark on the Char Dham Yatra. The popularisation of the pilgrimage and the creation of the pilgrimage package tour in 1970s has led to a de-emphasis of the Char Dham Yatra's religious sentimentalities in favour of 'social and economic regeneration' by secular agencies.[35] It has since become a tourist destination for both religious and non-religious people, as a site for trekking and cultural heritage. In consideration of the latter, the Ganges and the Glaciers are important for many Indians, albeit for different reasons. They are key features of India's natural ecosystem, deities capable of washing away sins, and touristic sites contributing to the socio-economic rejuvenation of India. However, one thread that connects all these different perspectives is the call to preserve the Ganges and Glaciers against the threat of pollution and environmental destruction.

In two high-profile writ petitions, *Mohammed Salim v. State of Uttarakhand and Others* and *Lalit Miglani v. State of Uttarakhand and Others,* the High Court of Uttarakhand engaged with the concerns pertaining to the preservation and protection of the Ganges and Yamuna Rivers, and the Gangotri and Yamunotri Glaciers. Following the adjudication of these concrete disputes, the High Court recognised the Ganges and Yamuna Rivers as juristic entities,[36] and the Gangotri and Yamunotri Glaciers and surrounding ecosystems,[37] as legal entities with the rights, duties, and liabilities of a living person. In delivering these judgements, the judiciary emphasised the necessity to take extraordinary measures to ensure the preservation and conservation of the Ganges and Glaciers. In both cases, yet more emphasised in the Ganges case, the High Court of Uttarakhand affirmed the relevance of these natural entities for Hindus, highlighting their reverence for these ecosystems, and their dependence on the Ganges and Glaciers for cultural and spiritual fulfilment.[38] To articulate their rights of Nature resolution, the High Court drew inspiration from three sources, from (1) Aotearoa New Zealand jurisprudence on rights of Nature, (2) broader rights of Nature developments which recognise the subjectivisation of natural spaces, more generally, and (3) Indian legal jurisprudence which recognises deities and idols as juristic entities since British colonial rule. In this regard, both cases demonstrate 'an earnest attempt by petitioners, advocates and judges to enforce river and broader resource conservation by creatively combining religious and legal concepts of deity and person with a rights of nature approach.'[39] In the following section, I will unpack these two cases, assessing the manner in which the High Court crafted the legal subjectivisation of these entities in reliance of the aforementioned jurisprudence. In section 3.1, I will outline the legal arguments heard before the High Court of Uttarakhand, which led to the legal subjectivisation of the Ganges and Glaciers. Then in sections 3.2 and 3.3, I will deconstruct key components of the High Court's legal resolution. Where section 3.2 will discuss the use of the *parens patriae* doctrine to create guardianship, section 3.3 will outline the manner in which the High

[35] Auckland (n 32), at 298.
[36] Ganges case (n 1).
[37] Glaciers case (n 2)
[38] For references to the relevance of the Ganges, and therefore also the glaciers as the main source of the Ganges, see Ganges case (n 1), at 4,5, & 7; Glaciers case (n 2), at 6.
[39] Alley (n 31), at 502.

Court framed legal personality of the Ganges and Glaciers, by relying on Indian jurisprudence which recognises deities and idols as juristic entities.

3.1. Rivers and glaciers: ecosystems with rights, duties, and liabilities

The High Court of Uttarakhand recognised the legal personality of the Ganges and Yamuna Rivers in 2017, one week after the passing of the Te Awa Tupua Act.[40] The latter resolution responded to the writ petition brought before the High Court by Mohammed Salim, a resident of the state of Uttarakhand, who used public interest litigation (PIL) to assert his land rights. Salim approached the High Court to challenge the Uttarakhand Government for the environmental degradation of the Ganges Riverbed, asserting that the presence of illegal encroachments and constructions, and the impact of mining operations on the degradation of the riverbed, violated his land rights.[41] In his claim, Salim did *not* request the High Court recognise the legal personality of the Ganges.[42]

Salim challenged the Uttarakhand Government on two separate occasions. To briefly summarise, Salim approached the High Court in the first instance to challenge (1) the illegal constructions and encroachments along the Ganges River, and (2) the failure of the Uttarakhand Government to coordinate with the Central Government to create the Ganga Management Board, in accordance with section 80 of the Uttar Pradesh Reorganisation Act 2000.[43] In response, the High Court issued a judgement, '1) ordering officials to evict two private parties from government land; 2) requiring the central government to constitute the Ganga Management Board within three months; and 3) banning mining in the river bed and floodplain.'[44] Following the government's non-implementation of the aforementioned orders, the High Court noted its 'serious displeasure', relaying the governments' inaction as a 'sign of non-governance.'[45] The writ petition was brought back before the High Court for the second time. As part of the second round of petitioning, the advocate brought the Te Awa Tupua (Whanganui River Claims Settlement) Act – which recognises the legal subjectivisation of the Whanganui River – to the attention of the High Court. The petitioner alerted the High Court to the recent rights of Nature developments in Aotearoa New Zealand in their plea for 'directions on river protection and coordination of river management among state administrators.'[46] The High Court then acted on their own merits to recognise the juristic personality of the Ganges, whilst making

[40] Te Awa Tupua Act (n 3).
[41] In fact, the Ganga was declared a national river in 2008, by Prime Minister Manmohan Singh. See: Rashmi Sanghi, Our National River Ganga: Lifeline of Millions (Springer 2014), at 35.
[42] Alley (n 31), at 507.
[43] In accordance with section 80, '(1) The Central Government shall constitute a Board to be called the Ganga Management Board (hereinafter referred to as the Board) for administration, construction, maintenance and operation of projects referred to in sub-section (1) of section 79 for any or for a combination of the following purposes, namely:— (i) irrigation; (ii) rural and urban water supply; (iii) hydro power generation; (iv) navigation; (v) industries; and (vi) for any other purpose which the Central Government may, by notification in the Official Gazette, specify.' See: Uttar Pradesh Reorganisation Act (2000), s.80.
[44] Ganges case (December 5, 2016) (n 1).
[45] Ganges case (March 20, 2017) (n 1), at 4.
[46] Alley, (n 31), at 507.

references to the recent parliamentary decisions in Aotearoa New Zealand,[47] and broader rights of Nature developments.[48] The High Court then relied on their 'long-standing theories of legal personhood and earlier [Supreme Court of India] decision that defined juristic persons to hold the river Ganga to be a legal living entity.'[49] In addition to the creation of legal personality, the High Court also requested the establishment of a guardianship body to act as the human face of behalf of the Ganges in accordance with the *loco parentis* doctrine (an English common law doctrine granting an individual or organisation the legal duty to act on behalf of a minor or young adult by taking on the responsibilities of a "parent", discussed in more depth in section 3.2, alongside the *parens patriae* doctrine).[50] However, in a contrast to rights of Nature approaches framed by the Waitangi Tribunal (and also the Constitutional Court of Colombia and JEP) the guardianship body requested by the High Court of Uttarakhand was to be comprised of state officials. The guardianship body designated to act on behalf of the Ganges would therefore include the Director of NANAMI Ganga, the Chief Secretary of Uttarakhand, and the Advocate General of Uttarakhand.[51]

Shortly after the legal subjectivisation of the Ganges, Lalit Mignali, an advocate in the High Court,[52] brought a miscellaneous application to the High Court of Uttarakhand. The petition by Mignali was based on a previous application brought before the High Court which concerned the pollution of the Ganges, but was eventually disposed of as 'directions and orders to control and reverse [the] pollution were issued'.[53] However, in response to the recent recognition of the Ganges as a legal person with all the rights, duties, and liabilities of a living person, Mignali approached the High Court for a second time. In the resubmission of their petition, Mignali requested a declaration of juristic personhood of the Himalayas, glaciers, streams, water bodies, be granted, to the same status as the Ganges. In the pursuit for better environmental protection, the High Court recognised the legal subjectivity of the Glaciers, entitling the latter to the corresponding rights, duties, and liabilities of a living person. Significantly, the court extended legal subjectivisation beyond the Gangotri and Yamunotri Glaciers, to encompass the surrounding ecosystem, including the 'rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests, wetlands, grasslands, springs and waterfalls'.[54] Again, the court invoked their *parens patriae* jurisdictions to establish a guardianship body based on *loco parentis doctrine*.[55]

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[47] See Chapter 3, section 3.4 and 4.4, supra.
[48] The judgement does not explicitly refer to the jurisprudence surrounding the Te Awa Tupua Act, however, it has been communicated in interviews that the judges considered the legal precedents set by New Zealand and also considered broader rights of nature developments occurring globally. See ibid, at 507.
[49] Stellina Jolly and KS Roshan Menon, 'Of Ebbs and Flows: Understanding the Legal Consequences of Granting Personhood to Natural Entities in India' (2021) 10 Transnational Environmental Law 467, at 469.
[50] ibid, at 469.
[51] Ganges case (n 1), at 11-12.
[52] Erin L O'Donnell, 'At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India' (2018) 30 Journal of Environmental Law 135, at 136.
[53] ibid at 469.
[54] Glaciers case (n 2), at para 62.2.
[55] The court declared the following people to act as persons in *loco parentis* (members of the guardianship body to act on behalf of the Glaciers and surrounding ecosystem): 'The Chief Secretary, State of Uttarakhand, Director NAMAMI Gange Project, Mr. Praveen Kumar, Director (NMCG), Mr. Ishwar Singh, Legal Advisor, NAMAMI Gange Project,

In accordance with the explicit citations and references to Aotearoa New Zealand jurisprudence when subjectivising the Rivers and Glaciers, a trans-jurisdictional diffusion of legal norms has taken place.[56] Contextually, however, the latter diffusion can also be traced within the High Court of Uttarakhand's construction of rights of Nature, which has been modelled after the framework adopted in Aotearoa New Zealand. Both frameworks are strikingly similar in the following two regards, firstly by personifying Nature, as in recognising Nature as an entity subject to the rights, duties, and liabilities of a legal person, and secondly, by operationalising the rights, duties, and liabilities granted to Nature through a guardianship body.[57] In a divergence from Aotearoa New Zealand's rights of Nature framework, the High Court of Uttarakhand also relied on pre-existing Indian jurisprudence which recognises deities and idols as juristic entities to subjectivise Nature, and furthermore on the doctrine of *parens patriae* to construct a guardianship body to act on behalf of Nature. I will expand upon these latter two points in sections 3.2 and 3.3.

Although the resolutions delivered by High Court of Uttarakhand were indeed innovative rights of Nature rulings, signalling a potential paradigmatic shift in India's human-centric environmental governance nexus, the Supreme Court stayed both judgements,[58] following an appeal by the Government – who did not want to assume liability on behalf of these natural entities, as guardians acting in *loco parentis*.[59] The High Court's rulings were stayed on account of the ambiguity pertaining to the full legal status of rights, duties, and liabilities of the river, and the guardians; the uncertainty of the practical implementation of the judgement; and, the increased risk of complicated legal situations. Within the resolution itself, the judgement lacked the necessary operational provisions to support legal subjectivisation, including an inter-institutional management body to manage the Ganges, inclusive of stakeholders, state governments, and other parties across the relevant states. Moreover, the construction of an inter-institutional management body was found to be outside the scope of the High Court of Uttarakhand's jurisdiction, as High Courts of India are limited in their judicial mandate to address issues within their territorial ambit. In other words, whilst the High Court of Uttarakhand had constitutional authority to deliberate on the substance of the case, as the Ganges originates and flows through the State of Uttarakhand, the High Court had no authority to construct an inter-institutional management body involving other States where the Ganges flows. Therefore, even if the legal resolution had not been stayed by the Supreme Court, it would have nonetheless fallen short of incorporating an effective and participatory management strategy in the absence of an inter-institutional management body. Furthermore, failure to concretise operationality within a piece of legislation could be perceived as a limitation, insofar as legal personality requires a law to have normative force.

Advocate General, State of Uttarakhand, Dr. Balram K. Gupta, Director (Academics), Chandigarh Judicial Academy and Mr. M.C. Mehta, Senior Advocate, Hon. Supreme Court…' See Glaciers case (n 2), at 64.

[56] See Chapter 1, section 4, supra.

[57] See Chapter 3, section 3 and 4, supra.

[58] State of Uttarakhand and Other v. Mohammed Salim and Others, Special Leave to Appeal (C) No.016879/2017, Order dated 7 July 2017 (staying the ruling in the Salim case); Union of India v. Lalit Mignali, Special Leave Petition (Civil) Diary No.34250/2017.

[59] Alley (n 31), at 513.

Despite the eventual staying of the Ganges and Glaciers judgements, the (attempted) subjectivisation of these natural entities illustrated a willingness of the judiciary to learn from, and be influenced by, foreign legal precedents when adjudicating concrete disputes before them. In fact, Indian courts have often demonstrated a readiness to borrow legal precedents created in other jurisdictions, a feature which aligns with their reputation of being activist judiciaries.[60] However, the willingness of Indian courts to internalise diffused sets of norms has sometimes led to, at least in the case of the Ganges and Glaciers, a transplant of legal norms. Before advancing a critique of activist judiciaries, and the implementation of legal transplants to recognise rights to Nature in section 4, the following section will firstly deconstruct key legal components of the High Court's rights of Nature resolution. Section 3.2 will therefore analyse the judiciary's construction of guardianship through the *parens patriae* doctrine, and section 3.3 will highlight the High Court's construction of legal personality, based on the Indian jurisprudence which personifies idols and deities. When considering the latter, I will also briefly discuss the extent to which relying on the jurisprudence which recognises (Hindu) idols and deities as juristic entities, has promoted a saffronisation agenda.

3.2. Parens Patriae

Guardianship is not a new concept within rights of Nature discourse, especially when reflecting on Stone's seminal work, *Should Trees Have Standing.*[61] When Stone proposed that natural entities should be granted legal rights equal to that of the natural person, he proposed these rights (and corresponding duties) should be enacted through an appointed guardian who, in essence, would give a voice to the voiceless.[62]

In subjectivising the Ganges and the Glaciers, the judiciary invoked the jurisdiction of *parens patriae* to establish a body of guardians to act on behalf of these natural entities, as 'human faces' responsible for upholding their rights. *Parens patriae* is a legal doctrine 'rooted in the understanding of the state's guardianship of common resources and its sovereign interest in the protection of citizens, particularly when the citizens are incapable of protections themselves'.[63] The High Court used the *parens patriae* doctrine to create a guardianship body to act on behalf of the Ganges,[64] Glaciers,[65] and the surrounding ecosystems,

[60] Implications of judicial activism in relation to the risks of blurring the separation of powers will be discussed below. See Chapter 5, section 4, infra.
[61] Christopher D Stone, 'Should Trees Have Standing ?- Toward Legal Rights for Natural Objects' (1972) 45 Southern California Law Review 450.
[62] Christopher D Stone, Should Trees Have Standing?: And Other Essays on Law, Morals, and the Environment (1996), at 12-13.
[63] Jolly and Menon (n 49), at 482-3.
[64] The Chief Secretary of State of Uttarakhand, the Director of NAMAMI Gange, and the Advocate General of the State of Uttarakhand were declared *persons in loco parentis,* as guardians acting on behalf of the Ganges and Yamuna, to 'promote the health and wellbeing of these rivers'. See Ganges case (n 1), at 11-12.
[65] The guardianship body for the glaciers were to be composed of: The Chief Secretary, State of Uttarakhand, Director NAMAMI Gange Project, Mr. Praveen Kumar, Director (NMCG), Mr. Ishwar Singh, Legal Advisor, NAMAMI Gange Project, Advocate General, State of Uttarakhand, Dr. Balram K. Gupta, Director (Academics), Chandigarh Judicial Academy and Mr. M.C. Mehta, Senior Advocate, Hon. Supreme Court. See Glaciers case (n 2), at 64-65.

by appointing state entities to act as *persons in loco parentis*. However, when considering Stone's conceptualisation of legal guardianship, which emphasised the desirability of having a third-party independent guardianship body, the courts' designation of state entities as the sole guardians for these Natural entities appears somewhat controversial. Stone emphasised that 'a guardian outside the institution [as in, a government] becomes especially valuable. Besides, what a person wants, fully to secure his rights, is the ability to retain independent counsel even when, and perhaps especially when, the government is acting "for him" in a beneficent way.'[66] Stone underscored the benefit of having non-governmental representatives within a guardianship body, in order to hold governments, and governmental actors, to account, when their acts and omissions violate Nature's rights.[67] The decision by the High Court of Uttarakhand to construct a guardianship body solely of state officials thus appears somewhat controversial, if we consider the Government's acts and omissions to have contributed to environmental pollution.[68] Significantly, whilst the Government have attempted to address the pollution of the Ganges, they have omitted in taking effective-enough action to mitigate the degradation of the River. For example, Government initiatives include the creation of the Ganga Action Plan[69] in 1986, and more recently, the National Ganga River Basin Authority (NGRBA) in 2009.[70] To which the remit of the NGRBA has been financially assisted by a $1 billion investment from the World Bank under the National Ganga River Basin Project,[71] operationalised through the 2014 Nanami Gange Programme (also known as National Mission for Clean Ganga (NMCG)).[72] However, '[t]he absence of adequate infrastructure, along with weak environmental governance and little technical expertise to manage these extreme pollution pressures, has resulted in the rapid deterioration of the water's quality in recent decades.'[73]

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66 Stone 'Should Trees Have Standing ?- Toward Legal Rights for Natural Objects' (n 61), at 472.

67 See for example the co-management, which in the case of Aotearoa New Zealand, we have seen guardianship bodies created with dual representation for both the Māori and the Crown Government. See Chapter 3, section 3.4 and 4.4, supra.

68 Jolly and Menon (n 49), at 483.

69 The core objectives of the GAP were 'to abate pollution and improve water quality…[but also]…gave importance to (a) conserve biodiversity, (b) developing an integrated river basin management approach, (c) conducting comprehensive research to further these objectives, and (d) gaining experience for implementing similar river clean-up programs in other polluted rivers in India.' See Indian Institutes of Technology, 'SWOT Analysis of Ganga Action Plan: Ganga River Basin Environment Management Plan' (2011), at 8.

70 The NGRBA was set up by the Gazette notification of the Government of India (Extraordinary) No. 382 (February 20, 2009), with the 'objectives of (a) ensuring effective abatement of pollution and conservation of the river Ganga by adopting a river basin approach to promote inter-sectoral co-ordination for comprehensive planning and management; and (b) maintaining environmental flows in the river Ganga with the aim of ensuring water quality and environmentally sustainable development.' See 'National Mission for Clean Ganga | NMCG' accessed 14 February 2024.

71 Whose remit was to support the NGRBA 'in building capacity of its nascent operational-level institutions, so that they can manage the long-term Ganga clean-up and conservation program; and (b) implementing a diverse set of demonstrative investments for reducing point-source pollution loads in a sustainable manner, at priority locations on the Ganga.' See 'Development Projects: IN National Ganga River Basin Project - P119085' accessed 14 February 2024.

72 'The National Ganga River Basin Project' <https://www.worldbank.org/en/news/feature/2015/03/23/india-the-national-ganga-river-basin-project> accessed 14 February 2024.

73 ibid.

Hence, where Governments and governmental entities are responsible for violating Nature's rights, or for omitting to take effective action in upholding Nature's rights, guardianship bodies containing non-governmental representatives are highly desirable for the following two reasons. Firstly, to act on behalf of, and in the best interest of, Nature, and secondly, to hold governmental actors to account when they are violating Nature's rights. Bottom-up co-management or community-based management strategies hence appear better suited for the sustainable management of Nature – over top-down governmental-led forms of management – insofar as they accommodate the shaping of management strategies through locally defined, traditional practices, and facilitate the inclusive participation of relevant local communities.[74] Thus, where the judiciary noted the importance of giving a voice to the 'local inhabitants living on the banks of rivers, lakes and whose lives are linked with rivers and lakes',[75] co-management or community-based protocols in the governance of Nature, are arguably better suited. In this regard, co-management – perhaps modelled similarly to the approach taken in Aotearoa New Zealand[76] - would accommodate the (1) participation of non-governmental entities within the guardianship body, and (2) promote the inclusion of local communities' knowledges and best practices, which have been internationally recognised as a fundamental method for conserving and enhancing Nature's life cycles.[77]

In the next section, I will outline the second component of the rights of Nature approach articulated by the High Court of Uttarakhand, relating to the creation of legal personality for the Ganges and Glaciers. I will use this section to outline the manner in which the High Court relied on pre-existing Indian jurisprudence which personified idols and deities as juristic entities, to grant legal subjectivity to Nature. However, to preface the latter, I will firstly discuss the contentions around the High Court promoting a "saffronisation agenda", to instead situate the court's motivations as focussed on improving environmental protection for Nature.

3.3. Personification of idols/deities

A unique feature of the High Court rulings which granted legal subjectivisation to the Ganges and Glaciers is the combination of a rights of nature approach with religious legal concepts. In particular, the combination between environmental protection and religious epistemologies and ontologies have been reflected in the High Court's approach which builds upon pre-existing Indian jurisprudence recognising deities as juristic entities, in an environmental context. Although the jurisprudence developed over time to

74 David C Natcher and Clifford G Hickey, 'Putting the Community Back Into Community-Based Resource Management: A Criteria and Indicators Approach to Sustainability' (2002) 61 Human Organization 350; Melissa Leach, Robin Mearns and Ian Scoones, 'Environmental Entitlements: Dynamics and Institutions in Community-Based Natural Resource Management' (1999) 27 World Development 225.
75 Glaciers case (n 2), at 61.
76 See Chapter 3, section 3.4, supra.
77 For example, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognises 'that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment', see United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 13 September 2007 (UN Doc. A/RES/61/295, 2 October 2007), at preamble.

overcome conflicts between Indian legal structures and the inherited British model in relation to property and land (as we will see below), courts have since adapted this jurisprudence to innovate better strategies to protect Nature against environmental degradation. However, this approach has been criticised for blurring the boundaries between environmental protection and deification, by attaching Hindu values which recognise deities as juristic entities, to legal resolutions which protect Nature's rights. Developing legal jurisprudence in such a manner has sparked discussions on whether this approach promotes a 'saffronisation' agenda, as in, the promotion of a right-wing policy, or Hindu nationalist agenda in India.[78] The prospects of trickling saffronisation into Indian jurisprudence hence comes under the critical eye of analysis, especially since the concept of the juristic person, as noted by the Supreme Court of India, has been in response to the collective interests of Indian society which 'respond to human development and stood subservient to the needs and faith of society.'[79] Furthermore, and as we have explored over the last two chapters, it is not uncommon for rights of Nature constructs to rely on spiritual, cultural, or religious cosmovisions to frame the legal subjectivisation of Nature. For example, in Aotearoa New Zealand, the Waitangi Tribunal relied on Māori cosmovisions which relate to nature, to frame legal personality for both the Whanganui River and Te Urewera Forest.[80] Then furthermore, Latin American countries such as Ecuador and Bolivia have embraced their respective countries' indigenous cosmovisions, *sumak kawsay* and *buen vivir,* to conceptualise living well in harmony with Nature.[81] Nevertheless, the reliance on Hindu cosmologies has been treated more cautiously and with more scepticism, due to the complex history, and current political influence, of Hinduism in India, outlined above.[82] In the New Zealand and Latin American context, the invocation of indigenous epistemologies, ontologies and cosmovisions has been one of promoting reconciliation, to protect counter-hegemonic groups and their normativities in contact zones. In comparison, the application of Hindu cosmologies in the Indian context provokes further consideration as to whether Hindu religion is being applied as a tool of marginalisation of non-Hindu ontologies, to promote Hindu hegemony amidst the dangers of looming saffronisation. In this regard, the agenda of the court, in this instance would be considered to be one of legal hegemonism, not, legal ecumenism.

In spite of the aforementioned scepticism, however, the narrative of the High Court of Uttarakhand was arguably not centrally focused on promoting a "saffronisation agenda" when considering the motivations of the courts in the adjudication of these disputes. Although the High Court considered the sacredness of these natural entities for Hindus and relied on the jurisprudence which embraces such reverence, in my

[78] See Chapter 5, section 2, supra.
[79] Jolly and Menon (n 49); Shiromani Gurudwara Prabandhak Committee v. Som Nath Drass, 2000 Tax Pub (DT) 1319 (SC).
[80] See Chapter 3, section 3 and 4, supra.
[81] *Sumak kawsay,* and *buen vivir,* both relate to their countries' respective indigenous communities' cosmovisions, which mean to live well and in harmony with nature. As highlighted in the introduction, and chapter 1, these cosmovisions were integrated into Ecuador's constitution alongside the constitutionalisation of Pachamama, and concretisation in Bolivia's national legislation. See here: Constitution of the Republic of Ecuador (2008); Framework Law of the Rights of Mother Earth (Ley Marc de la Madre Tierra y Desarollo Integral para Vivir Bien), Plurinational Legislative Assembly, Law 300 of the Plurinational State. 15th of October, 2012.
[82] See Chapter 5, section 2, supra.

view, they were primarily concerned with articulating a legal resolution to address the negative impacts of pollution. In fact, one of the senior advocates relayed that '[the] gist of the judgement, the main judgement…forget about the status of the Goddess, etc. The whole concern of the court is to maintain the free flowing of the river, irrespective of the community needs, etc. But the main concern is to maintain the piousness as well as the free flowing of the Ganga and its tributaries.'[83] In this regard, it is important to stress that whilst the environmental preservation of the Ganges (and the Glaciers) may be rooted in religious significance, *for some*, this is not a universally shared value amongst all Indians,[84] or by members of their judicial system. Nevertheless, what does connect all Indians, is their constitutional duty to preserve and conserve their natural environment (and the living creatures within) in accordance Article 51A(g).[85]

Recognising that the High Court were driven by intentions to improve environmental protection - and not by the promotion of Hindu nationalism - we can now unpack the legal jurisprudence used by the High Court. Specifically, the jurisprudence which recognises (Hindu) idols and deities as juristic entities. For context, the latter jurisprudence has been shaped in response to colonial interactions with British rule. In fact, the legal subjectivisation of deities first appeared in India as a method to settle land, property, and entitlement disputes between British officials and religious communities.[86] The recognition of deities as juristic entities was employed by British courts as a method to overcome conflicts between long standing, complex Indian practices (across different castes and communities), which oftentimes clashed with the instituted British model. For example, British courts were increasingly hearing disputes over temple property based on the latter conflicts. In an effort to balance respect for long standing beliefs which recognised deities as living entities, and to avoid complex claims of ownership from different castes and communities, British courts recognised a temple as a legal person, and therefore an entity in whom ownership could rest. In 1869, the Privy Council declared the Shebait – person appointed in 'guardianship' – as an individual to act in trustee on behalf of the deity, within the case *Maharanee Shibessouree v. Mothooranath Acharjo*.[87] Further case law also 'held that duties of the shebait representing the idol are akin to those of the manager of an infant heir's estate'.[88] However, it was not until 1887 that Hindu idols were explicitly recognised as juridical subjects and equated the status of legal person by the Bombay High Court in the Dakor Temple case.[89] Accordingly, the development of juristic personhood in India has become (1) 'a legal

[83] This quote has been drawn from Alley's article, and was collected by the author through a series of interviews with the High Court and Supreme court petitioners in October 2018: Alley (n 31), at 509.
[84] Kelly D Alley and Tarini Mehta, 'The Experiment with Rights of Nature in India' (2021) Sustainability and the Rights of Nature in Practice 365, at 376.
[85] The Constitution of India (n 27).
[86] Alley (n 31), at 506.
[87] Judgement of the Lord of the Judicial Committee of the Privy Council on the Appeal of Maharanee Shibessouree Debia v. Mothooranath Acharjo, from Bengal, (18th December 1869).
[88] Geetanjali Srikantan, 'Reexamining Secularism: The Ayodhya Dispute and the Equal Treatment of Religions' (2017) 5 Journal of Law, Religion and State 117, at 131; Hanooman Persaud Pandey v. Mussumat Babooee Munraj Koonweree 1856 M.I.A. 393; Manohar Ganesh Tambekar v. Lakhmiram Govindram 1887 12 ILR Bom 247; ibid.
[89] Facundo Gonzalez Alvaredo, Augustin Bergeron and Guilhem Cassan, 'Income Concentration in British India, 1885–1946' (2017) 127 Journal of Development Economics 459, at 460-1; Sailesh Neelakantan and Sriram D

shell, employed to argue for a deity's property claims', (2) a method for 'the preservation of temple endowments for public use, as well as for their removal for the commercial sphere', and (3) a legal tool 'for temple land acquisition'.[90] In the context of the Ganges and the Glaciers case, the High Court relied on the aforementioned jurisprudence, to build upon the legal tools which recognise sacred idols and deities as juristic entities, as a method of crafting 'extraordinary measures to preserve and conserve' Nature.[91] The judiciary leaned on this body of jurisprudence and case law to emphasise that a 'Hindu idol is a juristic entity capable of holding property and of being taxed through its Shebaits who are entrusted with the possession and management of its property',[92] one with the rights and obligations equal to that of any other natural person.[93]

Indian jurisprudence has provided the foundation for the subjectivisation of the Ganges and Glaciers, allowing national courts to draw on specific epistemologies and ontologies which personify and grant rights, duties, and liabilities to Nature, equal to those of a human being. Although the High Court of Uttarakhand drew influence from rights of Nature frameworks adopted in Aotearoa New Zealand, and from rights of Nature more broadly, the court ultimately based the creation of legal personality on Indian jurisprudence which recognises idols and deities as juristic entities. The court then furthermore relied on the doctrine of *parens patriae* to establish the guardianship body to uphold the rights, duties, and liabilities of Nature. Nevertheless, in the face of operational ambiguity and a failure to concretise these rights within legislation, the Supreme Court stayed both judgements.[94]

As mentioned in the introduction, the disputes herein explored diverge from the disputes traced in the jurisdictions of the Waitangi Tribunal, the Constitutional Court of Colombia, and the JEP, insofar as the cases heard before the High Court of Uttarakhand hint towards a transplant of legal norms. The latter statement is based on the forthcoming critique of the High Court of Uttarakhand granting rights to Nature, without engaging in the concrete facts of the disputes heard before them. In this instance, there is a point of contention between the role of the courts and the role of the legislature, in line with the separation of powers. To briefly summarise the separation of powers (as chapter 6 engages in an in-depth discussion of the concept[95]), the latter speaks to the careful division of powers between the executive, the legislature, and the judiciary, as the three branches of government tasked with ensuring democratic governance. In line with the separation of powers, the judiciary are tasked with interpreting and applying the law when dealing with concrete disputes before them, whereas the legislature are tasked with the creation of law. On the basis

Hemmige, 'Hindu Idols as a Juristic Person' (2022) 5 International Journal of Law Management and Humanities 2193; Shankarlal Purshottam Gor and Ors vs Dakor Temple Committee and Ors AIR 1926 Bom 179.
[90] Alley (n 31), at 506.
[91] Ganges case (n 1), at 4.
[92] Ganges case (n 1); Yogendra Nath Naskar vs Commissioner Of Income-Tax, (1969) SC; Ram Jankijee Deities & Others vs State Of Bihar and Others (1999) SC.
[93] AIR 1972 Allahabad 287.
[94] Lidia Cano Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' (2018) 7 Resources 13.
[95] See Chapter 6, section 2.2, infra.

of the latter, we must then consider whether the High Court of Uttarakhand has blurred the separation of powers, by delivering a legal resolution which does not deal with the concrete facts of the dispute before them. In other words, has the High Court of Uttarakhand overreached in their role as law articulator, and instead, become the law creator?

In the next section, I unravel this line of thought by firstly accounting for the rise of PIL in India and the tendencies of courts to operate in an activist capacity. After exploring the presence of judicial activism in India, section 4.1 considers whether the High Court's articulation of rights to Nature in the above explored cases is an example of well-intentioned activism, or a more controversial overreaching of powers. To conclude, this section will relay the importance of crafting bespoke legal resolutions when relying on foreign legal precedents in concrete disputes, instead of opting for a transplant of legal norms.

4. Judicial activism or overreaching courts?

Signalling their independence from British colonial rule in 1947, India's new Constitution was adopted with the intentions of establishing a 'sovereign socialist secular democratic republic' to secure for all citizens, justice (social, economic and political), liberty (of thought, expression, belief, faith and worship) and equality (of status and of opportunity).[96] As part of their mandate for social change, the basic structure of the Constitution has been built upon justiciable Fundamental Rights and non-justiciable Directive Principles of State Policy. These provisions work in harmony, as Fundamental Rights are perceived as a 'means to achieve the goals' indicated in the Directive Principles.'[97] Enshrining Fundamental Rights and Directive Principles into the Constitution created a foundation for robust PIL in India (in relation to constitutional litigation).[98] PIL in India has developed since the mid-1970s and has steadily evolved with the assistance of legal actors. Judges in particular have been responsible for 'modifying the traditional requirements of locus standi, liberalizing the procedure to file writ petitions, creating or expanding F[undamental] R[ights], overcoming evidentiary problems and evolving innovative remedies.'[99] In this regard, courts have (1) extended the notion of standing to include anyone who has a genuine interest in redressing a legal violation, to allow more scope for representative standing on behalf of the person(s) whose rights have been violated,[100] (2) developed the epistolary jurisdiction jurisprudence by accepting writ petitions by telegrams and letter,[101] and (3) expanded Fundamental Rights by reading non-justiciable rights (including the right to the environment) into the justiciable right to life.[102] All these factors have contributed to an increase of PIL

[96] The Constitution of India (n 27), at preamble.
[97] Surya Deva, 'Public Interest Litigation in India: A Quest to Achieve the Impossible?' in Po Jen Yap and Holning Lau (eds), *Public interest litigation in Asia* (Routledge 2010), at 58.
[98] ibid, at 58-64.
[99] For more information on the role of judges in developing public interest litigation discourse, see ibid, at 59-60.
[100] S P Gupta v. Union of India (1981) Supp. S.C.C. 87, at 210.
[101] Sunil Batra v. Delhi Administration, A.I.R. (1980) S.C. 1579; Dr Upendra Baxi v. State of UP (1982) S.C.C. 308.
[102] The role of courts in reading rights into Article 21 has been fundamental in expanding justiciable rights in India. For example, [t]he ever-widening horizon of Article 21 is illustrated by the fact that the court has read into it, inter-alia, the right to health, livelihood, free and compulsory education up to the age of 14 years, an unpolluted

in India, which have in turn, elevated judicial activism in both the Indian Supreme Court[103] and High Court.[104]

Indian judiciaries have played a significant role in the improvement of environmental protection since the 1980's, by relying on a robust constitutional framework which accommodates their environmental activism. In fact, India's Constitution has created a legislative foundation to support environmental protection activism since 1976, since the passing of the Forty-Second Amendment to the Constitution, in response to the International Conference on Human Environment's Stockholm Declaration in 1972.[105] This amendment was responsible for the concretisation of Article 48A, which directs State's policy to better environmental protection and conservation, and the above mentioned Article 51A(g), which constitutionalises all citizens duty to protect and improve the environment.[106] Furthermore, both 48A and 51A 'impose an obligation on the Government and the courts to protect the environment for the people and the nation.'[107] Focussing specifically on the role of the judiciary, Indian courts have been fundamental in developing the law around environmental protection in two regards. First, by fleshing out the constitutional right to life[108] in connection with the right to the environment. Second, by expanding the notion of harm in connection to the environment under the remit of the National Green Tribunal.[109] To reflect on the former, the Supreme Court of India has contributed to the development of environmental jurisprudence since 1985. In the case of Rural Litigation & Entitlement Kendra v State of Uttar Pradesh,[110] the Supreme Court expanded the fundamental right to life, which is guaranteed by Article 21 of the

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environment, shelter, clean drinking water, privacy, legal aid, speedy trial and various rights of under-trials, convicts, and prisoners.' See Deva (n 97), at 60.

[103] Individuals/groups of individuals can access the Supreme Court to pursue remedies for the enforcement of their rights guaranteed by the constitution, in accordance with Article 32. The Supreme Court 'have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.' In fact, Article 32 guarantees the petitioner access to the Supreme Court for the enforcement of fundamental rights, without having to wait for adjudication at the High Court. See Constitution of India (n 27), Article 32(2); Shyam Divan and Armin Rosencranz, Environmental Law and Policy in India: Cases and Materials (3rd edn, Oxford University Press 2022), at 200.

[104] The High Court have the power of issuing writs in accordance with Article 226 of the Constitution. Which, '[n]otwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including [writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.]' See: Constitution of India (n 27), Art 226(1).

[105] The Stockholm Declaration includes the principle that '[m]an has the fundamental right to freedom, equality, ad adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.' See Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Doc.ACONF. 48/14, at 2 and Corr. 1 (1972), at principle 1.

[106] Lovleen Bhullar, 'Environmental Constitutionalism and Duties of Individuals in India' (2022) 34 Journal of Environmental Law 399.

[107] Kelly D Alley, 'Legal Activism and River Pollution in India' (2009) 21 The Georgetown International Environmental Law Review 793, at 795.

[108] Constitution of India (n 27), Art 21.

[109] Jolly and Menon (n 49) at 488-90.

[110] Rural Litigation & Entitlement Kendra v State of Uttar Pradesh AIR 1985 SC 652.

Constitution, by extending its scope to include a right to the environment.[111] Prior to this judgement, environmental rights were guaranteed under the Directive Principles of the Constitution, and were therefore, non-justiciable. By reading the right to the environment into the fundamental right to life, the Supreme Court (and thereafter the High Court) strengthened a form of environmental constitutionalism in India, by recognising the right to the environment as a constitutional right.[112] The Supreme Court catalysed the development of the constitutional right to the environment within other Indian courts, including in the High Court of Andhra Pradesh which has since recognised the right to life in connection to the 'protection and preservation of nature's gifts'.[113] However, the Supreme Court has significantly contributed to the development of this constitutional right. For example, the Supreme Court has recognised the right of citizens to have recourse to the remedies contained within Article 32 of the Constitution where 'pollution of water or air which may be detrimental to the quality of life';[114] referred to 'the constitutional mandate to protect and improve the environment' and; recognised a person's right to clean water and pollution-free environment'.[115] Recognising the need for a specialised forum to tackle the multi-faceted nature of environmental problems, India's first specialised environmental court was created in 2010.[116] The National Green Tribunal was created 'as a 'fast-track' court for effective and expeditious disposal of cases relating to environmental protection and conservation.'[117] The Tribunal is tasked with addressing violations of environmental law – in addition to providing 'compensation, relief and restoration of the ecology'.[118] Significantly, the Tribunal has expanded the notion of harm in connection to the environment by applying the polluter pays principle.[119] Which, for example, courts have applied to recognise that harm suffered to the environment should be compensated on account of the environmental damage itself, and not solely be compensated on account of the harm suffered by the (human) victim.[120]

Relying on constitutional foundations, judicial actors have played an active role in fleshing out environmental related jurisprudence within India. In response to the increasing volume of writ petitions, especially those that concern the environment as a primary or secondary issue, judges in the High Courts and Supreme Court of India have, and are, contributing towards the development of law by adjudicating

[111] Lord Carnwath, 'Judges and the Common Laws of the Environment—At Home and Abroad' (2014) 26 Journal of Environmental Law 177, at 180.
[112] Bhullar (n 106), at 407.
[113] See T Damodhar Rao and Others v The Special Officer, Municipal Corporation of Hyderabad and Others AIR 1987 Andhra Pradesh 171, at 24.
[114] Alley, 'Legal Activism and River Pollution in India' (n 107), at 795; M C Mehta v. Union of India AIR 1997 SC 734 (Taj Trapezium case); M C Mehta. v. Union of India (Ganges Pollution Case), A.I.R. 1988 S.C. 1115.
[115] Vellore Citizens' Welfare Forum v Union of India and Others (1996) 5 SCC 647, at 13 & 16.
[116] Australia and Aotearoa New Zealand have also created specialised environmental courts, with India becoming the third country to follow suit. See: Alley, Legal Activism and River Pollution in India' (n 107).
[117] 'Green Tribunal | WWF India' <https://www.wwfindia.org/about_wwf/enablers/cel/national_green_tribunal/> accessed 16 February 2024.
[118] ibid.
[119] The National Green Tribunal also uses the precautionary principle; however, this section will focus on the polluter pays principle. See ibid.
[120] Indian Council for Enviro-Legal Action v Union of India, (1996) S.C.C (3) 212; Vellore Citizens' Welfare Forum v Union of India and Others (n 115); A.P. Pollution Control Board v. Prof M.V. Nayudu, (1999), AIR S.C.W 43.

disputes that fall before them. However, these courts are increasingly being recognised as activist courts, insofar as they appear to be going beyond the application of law to deal with the concrete disputes at hand. Instead, some courts are creating innovative legal precedents as a response to broader societal developments. One such example may include the High Court of Uttarakhand recognising rights to both the Ganges and the Glaciers. Whilst it is undeniable that increased PIL and judicial activism has contributed to the development of legal tools to better environmental protection, the activism of courts has not always been reflected upon in a positive light. Instead, critical responses have questioned whether these courts are overreaching in their role when adjudicating concrete disputes, by stepping into the role of the legislature. Further criticisms have even asserted that the Supreme Court is 'becoming an "all-in-one" governance institution',[121] and even acting in the role of the executive by 'monitoring the implementation of guidelines or recommendation issued by them'.[122] Whilst PIL is a powerful tool for social change, it has also been complicit in blurring the separation of powers. The final section of this chapter looks specifically at this latter critique within the context of the writ petitions which recognised the subjectivisation of the Ganges and Glaciers.

To recapitulate, the first dispute herein explored unpacked the petition submitted by Salim, who approached the High Court seeking an assertion of land rights. In his petition, Salim challenged the Government's failure to effectively regulate the pollution in the Ganges, and therefore submitted a PIL before the High Court to resolve a violation of property rights. Following the government's non-compliance with previous orders, and the re-submission of the writ petition before the High Court, the judiciary found it necessary to take extraordinary measures to preserve these natural entities.[123] Accordingly, the court sought to address the issue of pollution, by recognising the Ganges and Yamuna Rivers as juristic persons. Thereafter, based on the reasoning of the aforementioned dispute, the High Court recognised the Glaciers as entities with the rights, duties, and liabilities equated to that of a living person. However, it remains to be considered why the High Court deemed applying the legal subjectivisation of Nature to be an appropriate resolution to addressing pollution. Then connectedly, why did the High Court of Uttarakhand draw influence from the legal precedents in Aotearoa New Zealand to inform the adjudication of these disputes?

As has been discussed throughout the preceding sections, the High Court took broad inspiration from rights of Nature developments globally, but made special consideration of the legal precedents crafted in Aotearoa New Zealand following the passing of the 2017 Te Awa Tupua Act.[124] The High Court furthermore made an explicit reference to the passing of the Te Urewera Act 2014 in the Glaciers' judgement.[125] In recognising the legal subjectivisation of the Ganges and Glaciers, the High Court drew

[121] Deva (n 97), at 65.
[122] For more information on this critique, see ibid, at 65 – 72.
[123] Ganges case (March 20, 2017) (n 1), at 4.
[124] Te Awa Tupua Act (n 3); Alley 'River Goddesses, personhood and rights of nature (n 31), at 507; see Chapter 1, section 4, supra.
[125] Glaciers case (n 2), at 41-2; see Chapter 1 section 4, supra.

influence from the epistemologies and ontologies crafted in Aotearoa New Zealand, and modelled their rights of Nature approach accordingly.[126] However, if the diffusion of legal norms from Aotearoa New Zealand to India is assessed in a more critical light, we could assume that the High Court's approach - which was essentially crafted overnight[127]- emulates a sense of ornamentalism discussed in chapter 4.[128] I refer to ornamentalism here, to elucidate the manner in which the rights of Nature legal resolution framed by the High Court lacks the substantive legal mechanisms to address the concrete facts of the dispute heard before them, as in, the violation of property rights. Accordingly, the legal resolution which grants rights to the Ganges and Glaciers appears more decorative in nature, and raises questions as to whether the High Court of Uttarakhand engaged with rights of Nature because it is a fancy or trendy discourse.[129] The latter point becomes even more apparent when considering the disconnect between the application of a legal resolution designed as a reconciliatory mechanism to address the years of colonial conflict between the Māori and Crown Government in Aotearoa New Zealand, and the application of the latter legal precedents to address an issue of property rights in India. For example, the resolution recognising the Te Awa Tupua (and thereafter the Te Urewera) as a legal person was the result of years of careful negotiation,[130] crafted by the Waitangi Tribunal to reflect a legal tool grounded in Māori philosophies, epistemologies, ontologies, and cosmovisions. The legal subjectivisation of the Te Awa Tupua and the Te Urewera represented legal resolutions designed to respond to the years of colonial injustices and the 'irreparable spiritual and socio-economic losses'[131] caused by the Crown. Individually, both resolutions are bespoke rights of Nature legal mechanisms, built upon the social and cultural localities which define the relationships and kaitiaki obligations of each respective Māori group and natural entity. In this manner, transplanting the latter legal precedents to resolve a violation of land rights in India, without tailoring or adapting these legal mechanisms to the local context in which the dispute was heard, becomes problematic on account of not addressing the concrete issues at hand. There is thus a point to be made about the importance of creating resolutions as bespoke legal mechanisms.[132] When courts engage in the diffusion of legal norms, and apply the latter to adjudicate concrete disputes, legal resolutions should be adapted to the "internaliser's" local settings to effectively address the facts of concrete disputes that fall before them. Such a process has been explicitly practiced by the Waitangi Tribunal, who triggered the articulation of legal resolutions by carefully teasing

[126] However, the High Court of Uttarakhand diverged from the approach taken in Aotearoa New Zealand when constructing the guardianship bodies, as the guardianship bodies for Ganges and Glaciers were to be composed solely of state entities. Conversely, the Waitangi Tribunal opted for a co-management approach between the Māori and Crown Government.
[127] Ipshita Chaturvedi, 'Why the Ganga Should Not Claim a Right of the River' (2019) 44 Water International 719, at 731.
[128] See Chapter 4, section 3.2, supra.
[129] María Ximena González-Serrano, 'Rights of Nature, an Ornamental Legal Framework: Water Extractivism and Backbone Rivers with Rights in Colombia' (2024) Journal of Peasant Studies 1.
[130] Despite the resulting opinion of the Waitangi Tribunal and their recommendation to create legislation recognising the legal personality of the Te Awa Tupua being included in the Whanganui River Report in 1999, the negotiation of such was not settled until 2012. Thereafter, the legislation was not enacted until 2017. See section Chapter 3, section 3.2 to 4, supra.
[131] Chaturvedi (n 127), at 731.
[132] See Chapter 2, section 2.2, supra.

out the contours of Aotearoa New Zealand's entrenched historical and socio-cultural setting. Accordingly, the Waitangi Tribunal expressed unique resolutions, specific and concrete to the localities of Aotearoa New Zealand, and also, to the facts of the dispute before them. Drawing comparisons between the judicial methodologies of both jurisdictions, we can assume the High Court of Uttarakhand favoured a rushed and artificial transplant of legal norms – instead of the tailoring of a bespoke legal resolution - when subjectivising the Ganges and the Glaciers. Transplanting the carefully crafted legal solutions designed to address complex colonial injustices experienced by the Māori, thus appears somewhat disjointed and ill-suited to effectively address the pollution of the Ganges and the concurrent violation of the petitioner's property rights. The resolution offered by the High Court thus appears to go beyond addressing the concrete facts of the dispute pertaining to a violation of property rights, by focussing on the creation of 'extraordinary measures'[133] to preserve and conserve Nature. In consideration of the latter, these cases are arguably examples of the High Court of Uttarakhand being motivated by an activist agenda, and consequently, points to their overreaching in the role of law applier, by instead, becoming the law creator.

Whilst judicial activism has played a significant role in furthering the green agenda in India, such activism can be controversial where it encourages judges to increasingly blur the separation of powers. The judiciary are the unelected branch of government, and therefore stepping into the role of law creator may infringe upon core democratic ideals. Whilst there is a role for judges to be creative in the development of law, especially in response to ever-evolving societal contexts, democratic frameworks dictate that there should be limits to this power. I will discuss the latter points in more detail in chapter 6.[134] However, it is reasonable to conclude that the (attempted) legal subjectivisation of the Ganges and Glaciers are arguably instances of judicial overreaching, demonstrated by the creation of an innovative legal precedent using a transplant of legal norms, as opposed to the delivery of a concrete and meaningful resolution to the violation of property rights caused by the pollution of the Ganges. In fact, the relevance of attributing legal subjectivisation of the Ganges and glaciers has even been questioned as an effective resolution when considering the availability of other institutional and regulatory frameworks which may have been better suited to resolving this dispute. For example, it has been suggested that the remit of the National Green Tribunal may have been better suited to provide a concrete and effective solution to address the pollution of the River.[135]

In consideration of the latter, we can approach the conclusions of this chapter on the assumption that the High Court of Uttarakhand engaged in a perhaps unwarranted transplant of legal norms when recognising legal subjectivity to the Ganges and Glaciers. Without meaningful engagement with the parties and the facts of the dispute heard before them, the High Court avoided the creation of bespoke legal mechanisms, and instead, perpetuated a sense of ornamentalisation within their rights of Nature resolutions. Albeit stayed on account of operational ambiguity, the legal resolutions in themselves lacked the substantive legal

[133] Ganges case (20th March 2017) (n 1), at 4.
[134] See Chapter 6, section 2.2 and 2.3, infra.
[135] Alley and Mehta (n 84).

mechanisms to address the issues of property rights violation, caused by the perverse pollution of the Ganges.

5. Conclusions

In sight of the ongoing phenomena of transnational norm diffusion, as in the phenomenon where judicial actors are increasingly engaging in inter-judicial exchanges and relying on foreign legal epistemologies and ontologies to inform their own decision-making, we must be aware of the limitations of transplanting legal norms.[136] Where this case study diverges significantly from the conclusions drawn in the previous chapters, it has nonetheless been vital in highlighting the risks of legal transplantations in the perpetuation of ornamental law. In fact, the above explored cases have demonstrated the importance of tailoring transplanted legal norms to the "internaliser's" local settings, in order to provide the appropriate legal tools, equipped with addressing the root issues of concrete disputes heard before courts.

Accordingly, this chapter raises two important points that will be discussed in the final substantive chapter of this thesis. First, that legal transplantations pose challenges to the creation of legal resolutions capable of facilitating legal ecumenism, by failing to capture the necessary historical, social, and cultural localities required by legal ecumenism. Second, that we must consider why national courts are key agents in the trans-jurisdictional diffusion of innovative legal hybrids, and what influences their agency in the latter regard.

[136] Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 Maastricht Journal of European and Comparative Law 111; Pierre Legrand, 'On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations' (2002) 10 European Review of Private Law 61.

Chapter 6

The Trans-jurisdictional Agency of Courts

1. Introduction

Over the last three chapters, I have traced the trans-jurisdictional diffusion of legal norms across four jurisdictions in three countries, highlighting the extent to which the Constitutional Court of Colombia, the JEP, and the High Court of Uttarakhand have taken inspiration from the innovative legal solutions devised by the Waitangi Tribunal. Where the latter has focussed on addressing the first research question - assessing the extent to which courts are taking inspiration from innovative legal solutions devised in other jurisdictions -, in what follows, I shall tackle the second part of this research agenda: assessing whether and to what extent courts are bringing about forms of legal ecumenism in concrete disputes that have fallen before them. In what could be described as the crux of this research investigation, this chapter will discuss the agency of courts in the bottom-up pluralisation of global law, and their pivotal contribution towards subaltern cosmopolitan transitions of law.

Accordingly, I will explore the agency of courts in section 2, by critically analysing the extent to which national courts – more generally - can be described as suitable, or well-placed actors, to articulate legal compromises known as innovative legal hybrids. This section will focus on outlining the "pros" and "cons" of national courts as agents of change, whilst furthermore touching upon the choice description of courts as actors in pivotal positions. In accordance with the latter description, I will highlight the ability of national courts to promote certain agendas, depending on the context-dependent situations, and their motivations, as producers of (global) law.[1] Section 3 will thereafter draw some conclusions on the conditions which facilitate national courts in the promotion of cosmopolitan legalities across contact zones, by looking at the influence of reconciliatory mandates, and judicial composition. In this section I will use examples from the case-studies, to highlight the extent to which the Waitangi Tribunal, the Constitutional Court of Colombia, the JEP, and the High Court of Uttarakhand have facilitated genuine legal ecumenism, in the concrete disputes over the last three chapters. Section 4 will then re-engage with the theoretical and methodological

[1] Neil Walker, 'The Gap between Global Law and Global Justice' in Nicole Roughan and Andrew Halpin (eds), In Pursuit of Pluralist Jurisprudence (Cambridge University Press 2017; Neil Walker, Intimations of Global Law (Cambridge University Press 2015), at Chapter 2.

framework, drawing on examples from the case studies to outline the agency of courts in the bottom-up pluralisation of global law. In particular, section 4 will explore the agency of national courts from a global law perspective, through the compositive lens. By outlining a theory on the agency of courts in the bottom-up pluralisation of law, I will frame the practical applications of this research. In particular, I will reflect on the ability of national courts to trigger processes of embedding subaltern legalities, by working in tandem with other branches of government to entrench subaltern localities in concrete legal resolutions. Lastly, in section 5, I will round up this chapter on the agency of courts in the subaltern cosmopolitan transition of law, by concluding with a reflection on the latter's role in re-imagining alternative social visions vis-à-vis hegemonic globalisation.

2. The agency of courts

Considering the four case studies in parallel, we can argue there is a role for national courts in promoting subaltern cosmopolitan legalities across contact zones. The thread that runs consistently throughout the preceding chapters, has been the manner in which judiciaries – with varying degrees of success - are capable of triggering, if not articulating, a compromise of conflicting – hegemonic and subaltern – legal norms, when adjudicating concrete disputes that have fallen before them. The recommendations issued in 1999 by the Waitangi Tribunal with respect to the dispute over the ownership of the Whanganui River suggested a compromise formula, which was eventually written into law after a lengthy political negotiation between the Māori communities and the Crown Government.[2] They were also seminal, in that courts in other jurisdictions took up the compromise formula to settle conflicts brought before them. However, rather than issuing recommendations, the Constitutional Court of Colombia and the High Court of Uttarakhand took a more activist or interventionist approach, relying on doctrinal creativeness (biocultural rights[3] and *parens patriae,*[4] respectively) to articulate concrete legal-institutional measures inspired by the compromise formula of the Waitangi Tribunal. As a transitional justice jurisdiction, the JEP, in turn, seems to follow an approach that resembles more that of the Waitangi Tribunal.

As part of the latter process, I have stressed that national courts are in pivotal positions to articulate legal compromises, which mirror legal ecumenism (to varying degrees). Using the terminology "pivotal", however, has been carefully selected, to relate to the capacity, or agency of national courts, to facilitate subaltern cosmopolitan transitions of law. In spite of these capabilities, however, we should not assume, much less take for granted, that national courts will facilitate this agenda. In fact, national courts are described as agents in pivotal positions, as their motivations, and receptivity to their historical, political, and cultural environment, will impact the degree to which certain agendas are promoted or impeded. For example, as we shall see below, national courts who are receptive to the historical grievances of colonialism, and are motivated by promoting forms of reconciliation (or aspirationally, conviviality), are more likely to

[2] See Chapter 3, section 3.3, supra.
[3] See Chapter 4, section 3.2, supra.
[4] See Chapter 5, section 3.2, supra.

create subaltern cosmopolitan legalities in the form of innovative legal hybrids. This in turn, would work towards a subaltern cosmopolitan transition of law, through the gradual and incremental embedding of subaltern legalities within law. In recognition of the pivotal role of courts, and the agency of national courts in subaltern cosmopolitan transitions of law, we should however remain aware of the risks associated with feeding too much power and trust into the judiciary. More specifically, the risks associated with the judiciary blurring the separation of powers, as the unelected branch of government.

To critically consider the agency of the courts, section 2.1 will discuss the well-positioned nature of courts to promote subaltern cosmopolitan legalities across contact zones, as bottom-up "producers of global law". Section 2.2. will then level this discussion by cautioning against the overinflation of the judiciaries' power, particularly by reiterating the role of the legislature and executive, and the risks associated with disturbing the separation of powers. Section 2.3 will then conclude by highlighting how the pivotal positioning of national courts relates to both their ability to promote, or impede, subaltern cosmopolitan transitions of law.

2.1. The well-positioned nature of national courts

Where this research has traced the - more or less - successful diffusion of legal norms from national courts in Aotearoa New Zealand, to Colombia and India, this is not an isolated phenomenon. Instead, we are seeing courts across the globe readily demonstrating their appetite to engage in the diffusion of legal norms across jurisdictions.[5] In what could be described as a growing form of 'transjudicialism',[6] we are seeing the receptivity of national courts to a 'greater openness to mutual information and dialogue between different judiciaries and [the] development of an intricate web of personal and institutional relations'.[7] The increasing interconnectivity between legal institutions and operators could be recognised as the gradual realisation of Slaughter's 'global community of courts',[8] mentioned in chapter 1.[9]

However, in accordance with the criticisms raised by González-Serrano and Viaene,[10] outlined in chapter 4,[11] the global profusion of rights of Nature has been questioned for promoting the diffusion of "shallow"

[5] This trend is very apparent within the international climate regime, as the literature continues to note the role of national courts in the transnationalisation of climate change litigation and of climate law. For more information, see: Phillip Paiement, 'Urgent Agenda: How Climate Litigation Builds Transnational Narratives' (2021) Transnational Environmental Law in the Anthropocene 121; Jacqueline Peel, 'The Land and Environment Court of New South Wales and the Transnationalisation of Climate Law: The Case of Gloucester Resources v Minister for Planning' in Elizabeth Fisher and Brian Preston (eds), An Environmental Court in Action: Function, Doctrine and Process (Bloomsbury 2022).
[6] Natasha Affolder and Godwin EK Dzah, 'The Transnational Exchange of Law through Climate Change Litigation' in Francesco Sindico and others (eds), *Research Handbook on Climate Change Litigation* (Edward Elgar Publishing 2024), 1-2.
[7] Walker, 'Intimations of Global Law' (n 1), at 34.
[8] Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191.
[9] See Chapter 1, section 3, supra.
[10] María Ximena González-Serrano, 'Rights of Nature, an Ornamental Legal Framework: Water Extractivism and Backbone Rivers with Rights in Colombia' (2024) Journal of Peasant Studies 1; Liselotte Viaene, 'Can Rights of Nature Save Us from the Anthropocene Catastrophe? Some Critical Reflections from the Field' (2022) 9 Asian Journal of Law and Society 187.
[11] See Chapter 4, section 3.2, supra.

formulations of legal norms. In other words, the perceived trendiness of rights for Nature has led to a "snowballing" effect of legal subjectivisation, which in some cases, have been articulated in a more "ornamental" manner.[12] In recapitulation, chapter 4 highlighted that the recognition of the Cauca and Magdalena Rivers as subjects of rights, in accordance with the legal precedents set by the Atrato River case, were in fact ornamental.[13] González-Serrano used the latter description to highlight the manner in which these legal resolutions did 'not meaningfully extend constitutional environmental law',[14] and instead, emulated decorative, rather than substantive, rights of Nature legal resolutions. Considering the demonstrated willingness and aptitude of national courts to engage in the global diffusion of legal norms, we must then distinguish between courts engaging in the fanciness and trendiness of rights of Nature, with those courts engaged with rights of Nature for the purpose of offering concrete resolutions to disputes. Interconnectedly, we must further consider what make courts - in particular, national courts – key actors in the latter regard, and also, in subaltern cosmopolitan transitions of law.

Taking into account the theoretical framework, in particular, the section which refers to Walker and his "Intimations of Global Law",[15] we have dubbed national courts as producers of global law. In this manner, national courts have been framed as contributing towards the normative development of law when adjudicating concrete disputes that fall before them, by interpreting and applying the law. When placed within the overarching narrative of encouraging a subaltern cosmopolitan transition of law, there are certain factors which have supported national courts to meet such intentions. In this regard, national courts have been considered "well-placed" to facilitate such transitions, as (1) bottom-up actors*,* who because of their position are able to take into consideration essential localities, and as (2) legal translators of political and cultural ideologies.

National courts can be described as bottom-up actors, on account of their clear proximity to the parties and the facts of the disputes that fall before them. In this position, national courts are well-placed to catalyse legal resolutions which take into consideration the historical, social, and cultural localities of the environment in which the dispute is heard. As outlined in chapter 2, a crucial part of the subaltern cosmopolitan transition of law is grounded on the bottom-up pluralisation of law, with a particular focus on the integration of excluded and marginalised epistemologies and ontologies.[16] These excluded epistemologies and ontologies are often subaltern in nature, defined by their diverse historical, social, and cultural underpinnings. When adjudicating these concrete disputes, national courts are hence well-placed, as conduits for these embedded localities. This in turn, places national courts in pivotal positions to take into consideration local subaltern epistemologies and ontologies, whilst opening up spaces for the inclusion of the subaltern epistemologies and ontologies through innovative legal hybrids.

[12] Viaene (n 10).
[13] See section Chapter 3.2, supra.
[14] González-Serrano (n 10), at 11-12.
[15] Walker, 'Intimations of Global Law' (n 1).
[16] See Chapter 2, section 3 and 4.2, supra.

Interconnectedly, national courts are well-suited to facilitate subaltern cosmopolitan transitions of law because of their ability to act as legal translators. The latter role relates to the ability of national courts to translate political and cultural ideologies into the language of law. It also relates with what Legrand has termed the 'unbearable localness of law',[17] when he expounded the idea of the inherent plurality of law, on account of the responsiveness of legal norms and doctrines to their historical, social, and cultural environment. Such localness dictates that epistemologies and ontologies are born out of, and diversified by, their various political and cultural ideological foundations. In order to feed local epistemologies, ontologies, and cultures into normative legal phenomena, the latter must go through processes of legal translation to become embedded within law. The practice of legal translation is important where legal phenomena – especially subaltern legal phenomena, including some indigenous practices or traditional knowledge[18] – have not formally been recognised by law, and thus require a degree of embedding. As part of the promotion of subaltern cosmopolitan legalities, national courts can therefore play an important role in the translation and consequential embedding, of subaltern localities. Within this thesis, national courts have demonstrated their agency in this regard, by attempting to translate indigenous cosmovisions which perceive Nature as an intrinsic being, into concrete legal resolutions through processes of legal subjectivisation. Examples of the latter include the enactment of the 2017 Te Awa Tupua Act, and the 2014 Te Urewera Act, on the basis of the recommendations contained in the 1999 Waitangi Tribunal Report. Another set of examples are provided by the bespoke resolutions articulated by the JEP, which recognise territories and IPLCs as victims of armed conflict.[19]

When speaking about the overarching intentions of subaltern cosmopolitan transitions of law in this context, we are referring to the genuine integration and embedding of non-Western epistemologies and ontologies into law. National courts are well-placed to contribute to the latter, as legal operators, who because of their positions as bottom-up agents, who are in command of legal language, can embed marginalised legal phenomena into legal vernacular. National courts are therefore able to articulate local imaginaries of law, inclusive of subaltern epistemologies, ontologies, and cultures. Moreover, based on their ability to embed said local imaginaries, national courts are in a unique position to facilitate the pluralisation of legal cultures, or what could be described as the pluriculturalisation of law. At the same time, the capacity to embed subaltern legalities into mainstream legalities requires transcending degrees of positivism and excessively doctrinal approaches, as arguably demonstrated by the ornamental and dysfunctional judgements of the Constitutional Court of Colombia in the Atrato River case,[20] and of the High Court of

[17] Pierre Legrand, 'On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations' (2002) 10 European Review of Private Law 61.
[18] Saskia Vermeylen, 'Comparative Environmental Law and Orientalism: Reading beyond the 'Text' of Traditional Knowledge Protection' (2015) 24 Review of European, Comparative & International Environmental Law 304.
[19] Waitangi Tribunal Report 1999: The Whanganui River Report; Case 002, Auto SRVBIT 079, 12 November 2019 (Awa territory, Katsa Su); JEP, Case 005, Auto 002, 17 January 2020 (Nasa territory called Cxhab Wala Kiwe); JEP, Case 002, Auto SRVBIT 079, 12 November 2019 (Awá territory Katsa Su); JEP, Case 002, Auto 094, 10 June 2020 (Esperara Siapiara territory Espere Eugja); JEP, Resolution SRVBIT, Caso 002, Auto 018, 24 January 2020 (Tumaco territory); JEP, Auto SRVR 226, 11 July 2023 (Cauca river).
[20] See Chapter 4, section 4.2, supra.

Uttarakhand in the Ganges and Glacier cases.[21] Rather, the capacity to genuinely 'embed' and reconcile such legalities, requires engaging in legal pluralism as an empirical method.

Despite the capabilities of national courts to embed subaltern localities, and translate political and cultural ideologies accordingly, it is important to stress the key points made in chapter 2, relating to the dual ability of courts to either facilitate, or in fact, hinder, certain agendas.[22] In reiteration, courts are influenced by their internal agendas, but also respond to situational dynamics, including external political pressures exerted by governments or otherwise. For example, courts in Namibia have been reluctant to engage with ancestral land claims, on account of being dismissed by the Namibian government as a 'politically undesirable' topic, that would 'cause various ethnic groups to fight over the rights to ancestral land and as a result, undermine national unity'.[23] In instances such as the latter, some courts have demonstrated their reluctance to go against the position of the government, in response to their political pressures, and have consequently led to certain claims – and therefore, certain types of claimants - being excluded from the judicial process. Thus, where courts are unwilling to go against the government, and hence, unwilling to uphold key tenets of the rule of law which includes having an independent judiciary, individual(s) may be restricted from using the courts to access their constitutional rights.[24] Moreover, in addition to the susceptibility of some courts to external political pressures, courts may further be constrained by the internal, structural, limitations of the adversarial process, in the form of access to justice. To briefly contextualise the issues surrounding access to justice, Austin Sarat outlined the typical barriers to include: the cost of litigation in terms of time and money; the inappropriateness of the formal adversarial process, where 'courts lack the resources, capability, and flexibility necessary to provide effective remedy and redress', and; the inability of parties to recognise 'they possess a legally enforceable right and to understand and use available means of redress'.[25] In a similar vein to the exclusion of specific claims and claimants as a result of external pressures exerted by political agendas, issues surrounding access to justice may exclude parties and their claims in a comparable manner. In this regard, I would like to emphasise that the conclusions reached in this thesis cannot be overstated, and are in fact, context dependent. Whilst the cases discussed within the context of this thesis have demonstrated a degree of willingness by these courts to engage in, and facilitate, subaltern cosmopolitan transitions of law, I stress that this situation is not shared by all jurisdictions, and are therefore specific to this analysis. In consideration of these caveats, I now turn to the next section, which considers

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[21] See Chapter 5, section 4, supra.
[22] See Chapter 2, section 3.3, supra.
[23] Willem Odendaal, 'Ancestral Land Claims and the Law in Namibia | University of Strathclyde' (25 June 2020) <https://www.strath.ac.uk/humanities/lawschool/blog/ancestrallandclaimsandthelawinnamibia/> accessed 4 December 2024.
[24] Political pressure can also be exerted more broadly. For example, in Namibia, the Supreme Court issued a landmark ruling 'ordering the government to interpret the country's immigration laws so as to recognise same-sex marriages concluded abroad.' However, the ruling was met with mass protests against LGBTQI+ people, and included 'a petition calling for the removal of judges responsible for it and for the Minister of Justice to be fired'. Accordingly, 'such public attacks on judges [have] threaten[ed] judicial independence and, in turn, undermine[d] the rule of law.' See: 'Namibia: Attacking Judges for Upholding Human Rights Threatens Judicial Independence and the Rule of Law | ICJ' (16 June 2023) accessed 4 December 2024.
[25] Austin Sarat, 'The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions' (1984) 37 Rutgers Law Review 319, at 323-324

the risks associated with feeding too much power and trust into the judiciary, against the backdrop of the criticisms of the courts blurring the separation of powers.

2.2. Over-inflating the power of the courts

Within the boundaries of the nation state, the government is comprised of three core branches: the executive, the legislature, and the judiciary. Collectively, these branches make up the political authority of the modern constitutional state, divided by the separation of powers. In fact…

> …'[o]nly in the modern constitutional state do we find, as we have just noted, a sharp division of function and separation of legal powers. More specifically, only in the modern age do we find such a clearly articulated divide between those involved in the generation and execution of law on the one hand and those involved in its declaration, interpretation, systematisation, rationalisation and dissemination on the other. Where the former activities are viewed as the proper domain of the political branches of government – the legislature for law creation and the executive for the exercise of legal powers – the latter are understood as the proper domain of those with expertise in the law, whether judges, professional legal practitioners, teachers or others learned in legal science."[26]

Where the separation of powers speaks to the clear division of responsibilities between each branch of government, there exists an additional "checks and balances" role shared by all three branches. Checks and balances are the mechanisms implemented to ensure the equal distribution of power between all three branches of government, to prevent the monopolisation of power by one branch. Although checks and balances are often referred to together, there are subtle differences between both roles. For example, '[c]hecks are the mechanisms which allow political institutions to limit one another's power – for example by blocking, delaying or simply criticising decisions. Balances, meanwhile, ensure that a wide variety of views and interests are represented in the democratic process.'[27] Although the branches of government operate collectively as a single governing unit, the separation of powers dictates that a careful balance must be struck between each institution, to ensure democratic governance.

What then happens if one branch of government oversteps in their role, and is not adequately checked by the others? More specifically, what happens if the judiciary overstep into the role of law creator, as in, the role designated to the legislature? This question has in fact, remained 'among the most central and most contested questions of modern jurisprudence', on '…whether, and to what extent, judges can or should avoid 'making' new laws when interpreting, declaring and applying general norms in particular cases…"[28] When considering the ethicality of the judiciary stepping into the role of the legislature, we are reminded that the judiciary are the unelected branch of government, as opposed to the legislature and the executive. As part of the modern democratic system, the legislature has been charged with the role of law creation, as

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[26] Walker, 'Intimations of Global Law' (n 1), at 47-48.
[27] Lisa James, Alan Renwick and Meg Russell, 'Checks and Balances: What Are They, and Why Do They Matter? | The Constitution Unit Blog' (*The Constitution Unit*, 19 January 2023) <https://constitution-unit.com/2023/01/19/checks-and-balances-what-are-they-and-why-do-they-matter/> accessed 26 July 2024.
[28] Walker, Intimations of Global Law (n 1), at 48.

the body elected by the people, for the people, to represent their values, aspirations, and normative visions in processes of democratic law making. The judiciary alternatively, as the unelected branch of government, who are tasked with adjudicating concrete disputes that fall before them by interpreting and applying the law, are appointed based on their legal expertise. Problems hence arise where the judiciary become empowered to the extent of stepping into the role of the legislature, as they are often not representative of society. Depending on the selection criteria of judicial appointments specific to each nation-state, the judiciary have generally been more representative of the middle-upper classes of society. The limits placed on the judiciary's power are thus important from the perspective of ensuring democratic legitimacy. In this regard, it is wise to leave the legislating for the legislature, in order to uphold the structures supporting representative democracy,[29] and to prevent a tailoring of legal normativities to a minority of elites.

Pondering this question further, we can contextualise the risks associated with the blurring of the separation of powers within the context of this research, by touching on the examples of case law heard by the High Court of Uttarakhand, in chapter 5. Specifically, within these cases, the High Court of Uttarakhand arguably over-reached in their powers when granting legal subjectivisation to both the sacred Rivers and Glaciers.[30] The latter conclusion was grounded upon the understanding that the High Court drew influence from, and borrowed, the legal precedents by the Waitangi Tribunal to recognise rights to both the Ganges and Yamuna Rivers and the Gangotri and Yamunotri Glaciers. The High Court then issued a rights of Nature legal resolution, somewhat on their own merits, granting legal subjectivisation to these entities, instead of issuing a legal resolution addressing the concrete dispute pertaining to a violation of property rights. Albeit presumed to be part of the activist agenda that is characteristic of Indian judiciaries, this "overstepping" has been associated with the blurring of the separation of powers, and the promotion of the judiciary – at least in the context of the Supreme Court of India - 'becoming an "all-in-one" governance institution.'[31] The centralisation of power within this context, and others, therefore becomes problematic on two fronts. First, as it infringes upon core democratic ideals of the separation of powers, by leaving the power of the courts – as the unelected branch of government – unchecked. Second, as it encourages judges to overreach in their role and become innovators of new legal precedents, instead of adjudicators of disputes, tasked with the role of applying the law to offer concrete legal solutions accordingly.

In this regard, there are clear risks associated with feeding too much power and trust into the judiciary. Although national courts play a crucial role in the normative development of law, as laid out in section 2.1, there are still limits on their powers of law creation – or at least there should be in line with the separation of powers. Although this research has primarily focussed on the pivotal role of national courts in the

[29] For more information on democratic frameworks, and in particular, the differences between representative and participatory democracy, see Chapter 2, section 3.3, supra.
[30] Mohammed Salim v. State of Uttarakhand and Others, Writ Petition (PIL), No.126 of 2014 (December 5, 2016 and March 20, 2017); Lalit Miglani v. State of Uttarakhand and Others, Writ Petition (PIL), No.140 of 2015 (March 30, 2016).
[31] Surya Deva, 'Public Interest Litigation in India: A Quest to Achieve the Impossible?' in Po Jen Yap and Holning Lau (eds), *Public interest litigation in Asia* (Routledge 2010), at 65; see Chapter 5, section 4, supra.

bottom-up pluralisation of law, and their agency in subaltern cosmopolitan transitions accordingly, this has not been in disregard of the equally important role of the legislature and executive. In fact, the elected branches of governments support the judiciary in the latter role, by ensuring the concretisation of these political ideologies, and the diverse historical, social, and cultural realities from which they originate. In section 4.2 I will further analyse the important role of the legislature in embedding innovative legal hybrids into law, through the concretisation of legal precedents in national legislation. The judiciary and the legislature work together in this regard. Where the judiciary translates competing normative visions into law, and balance the latter to form innovative legal hybrids, the legislature embeds these political compromises into law by passing legislation. One clear example includes the eventual enactment of the 2017 Te Awa Tupua Act, as the legislature embedded the articulated political compromise by the Waitangi Tribunal, following years of careful negotiation to balance competing epistemological visions of Nature as property.

Whilst is it undeniable that national courts are well-placed to promote the subaltern cosmopolitan transition of law, we should not turn a blind eye to the risks of over-empowering the judiciary. With respect to the separation of powers, we should perceive courts as essential translators of political compromises between hegemonic and counter-hegemonic groups, whilst remaining acutely aware of the legislature and executive's role in concretising and embedding legal hybrids accordingly. Although the preceding discussion has highlighted the agency of courts with respect to their ability to facilitate subaltern cosmopolitan transitions of law, this does not guarantee that courts will act in such a manner. In fact, and as we shall now turn to, the pivotal role of national courts becomes most clear, when outlining the inclination of judges to promote certain agendas, depending on context-dependent situations, and their motivations, as producers of (global) law.[32]

2.3. The will of courts to embed political compromises

To discuss the pivotal role of national courts in promoting or impeding certain agendas, it is important to contextualise the influence of external impulses, and how the latter can shape the trajectories of judicial pursuits. I would therefore like to revisit the concept of double normativity.

To briefly reiterate, double normativity indicates the reflexivity of global law, and how the latter is shaped in accordance with 'the diversity of other forms of law by acting upon some of these diverse other forms of law.' It speaks to the ability of 'every species of global law [as being] predicated on the existence of these diverse other forms of law, and would lack both orientation and traction in their absence.'[33][34] When

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[32] Walker, 'Intimations of Global Law' (n 1).

[33] ibid, at 132-133; also see Chapter 2, section 4, supra.

[34] In brief recapitulation, Walker categorised seven species of global law, three convergence-promoting approaches (structural, formal, and abstract-normative), three divergence-accommodating approaches (laterally co-ordinate, functionally-specific, and hybrid), and one species which simultaneously subscribes to both convergence and divergence approaches (historical-discursive). In simple terms, convergence-promoting approaches are variations of law with greater capacity for universality, unity, and homogeneity, whereas divergence-accommodating approaches

referring to double normativity, conceptions of global law are seen as being receptive and responsive to external conditions. When speaking about the reflexivity of global law, we should assume that national courts, as producers of global law, are also responsive and reflexive to forms of double normativity. Within this context, and in their role of contributing towards the normative development of law through the adjudication of concrete disputes, the latter relates to the ability of national courts to respond to the impulses of their external environment. More specifically, their ability to internalise, and then reflect, their surrounding historical, political, socio-economic, and cultural realities. National courts, as agents of the nation state (i.e., bottom-up actors), are products of their domestic setting. Whilst they are in key positions to take into consideration these domestic localities, as outlined above, it furthermore makes them susceptible to the political inclinations of their surrounding localities. Accordingly, judges' decision-making may naturally consider, and then reflect, these localities and the contextual settings in which these disputes are heard. If we consider the impartiality characterisations of the judiciary as a legal institution charged with upholding the rule of law, we must however consider whether national courts are at risk of promoting forms of bias, if influenced by these political externalities. In the face of such criticisms, should we then assume that all courts are completely devoid of such a bias, including political influence? Or, if national courts are influenced by certain political ideologies, relevant to the situational environment of concrete disputes adjudicated before them, should they not be?

National courts have often stepped into the realm of politics when responding to past grievances or evolving societal contexts.[35] Whilst the judiciary have been designated as the impartial branch of government - whose contribution to the normative development of law is based on the interpretation and application of law – the ability of national courts to take into consideration political elements has been essential for the adjudication of certain disputes. In fact, we could argue that there is room for courts to take into consideration broader sociological elements to effectively adjudicate concrete disputes, without stepping fully into the role of the legislature and blurring the separation of powers.

The latter is especially relevant for the inherently politicised disputes explored as part of this thesis. On a surface level, these cases concerned contestations over land, or assertions of property rights. At their core, these disputes were representative of deeper colonial conflicts, the manifestation of asymmetrical relationships of power, and clashes of rival normativities between hegemonic and counter-hegemonic groups (to stronger or weaker degrees). The role of national courts was therefore more complex, as their judicial mandate required broader consideration of the political and sociological elements relevant to these cases, to effectively address the concrete disputes before them. In the explored case studies, those courts who meaningfully engaged with these political elements, like the Waitangi Tribunal or the judges acting under the JEP, were more inclined to offer innovative legal resolutions resembling legal hybrids in the

encourage forms of heterarchy and pluralism. The historical-discursive species reflect variations of the law which can simultaneously embrace forms of convergence and divergence. For more information see Chapter 2, section 4.1, supra.

[35] Eric A Posner, 'Does Political Bias in the Judiciary Matter: Implications of Judicial Bias Studies for Legal and Constitutional Reform' (2008) 75 University of Chicago Law Review 853.

following two regards. First, by taking into consideration the historical background of the concrete disputes adjudicated before them, such as those associated with deeply rooted colonial grievances and civil conflicts. Second, by looking beyond positivistic, or excessively doctrinal, framings of law to articulate appropriate legal resolutions in the form of innovative legal hybrids, by internalising and translating essential epistemologies, ontologies, cultures, and cosmovisions, into the language of law. As part of their judicial mandate, these courts were able to adjudicate the concrete disputes before them, whilst working towards securing future oriented reconciliation between hegemonic and counter-hegemonic groups accordingly. For example, the cases versing over the ownership of the Whanganui River and Te Urewera Forest, found the Waitangi Tribunal take into consideration the historical injustices of colonialism which have caused 'irreparable spiritual and socio-economic losses'.[36] As part of their mandate to acknowledge the colonial harms perpetuated by the Crown, and furthermore reconcile relations between the Māori and Crown Government, the Tribunal had to engage with the political and cultural localities of these disputes. Accordingly, in receptivity to these latter considerations, the Tribunal was able to articulate an innovative legal hybrid which resolved the disputes over ownership on one hand, whilst furthermore promoting reconciliation and cooperation between the Māori and Crown Government, on the other. Importantly, these broader sociological considerations informed the creation of innovative legal resolutions, by striking a workable balance between Māori epistemologies, ontologies, philosophies, and cosmovisions and, hegemonic property rights inherited from colonialism.[37] Moreover, and as part of their transitional justice mandate to address the systematic humanitarian violations caused by the internal armed conflict, the JEP were able to offer tailored resolutions, by extensively engaging with IPLCs individual grievances and experiences of harm.[38] Accordingly, and whilst the approach taken by the JEP addressed the grievances originated immediately by the civil war, it furthermore, by extension, engaged with Colombia's legacy colonisation by Spain and the United States.

Meaningful engagement with the socio-political elements of these disputes, including the historical grievances associated with colonialism, is an essential part of the subaltern cosmopolitan transition of law, herein explored. This is on the basis that subaltern cosmopolitan transitions of law are inherently politicised projects. National courts receptive to these socio-political externalities are therefore in pivotal positions to (1) address the historical grievances associated with colonialism, and (2) articulate legal resolutions which promote reconciliation, or aspirationally, conviviality.[39] Engaging with these two components, national courts are able to accommodate clashing legal epistemologies into a common legal vernacular, which in turn, trigger processes of the political negotiation between communities in tension. Significantly, the judicial methodology employed by these courts influences the degree to which genuine reconciliation is fostered.

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[36] Ipshita Chaturvedi, 'Why the Ganga Should Not Claim a Right of the River' (2019) 44 Water International 719, at 731.
[37] See Chapter 3, section 3.4 and 4.4, supra.
[38] See Chapter 4, section 4, supra.
[39] Boaventura de Sousa Santos, Toward a New Legal Common Sense: Law, Globalization, and Emancipation (3rd edn, Cambridge University Press 2020).

Reflecting on the case studies, those courts – specifically the Waitangi Tribunal and the JEP - who engaged methodologically in a bottom-up pluralisation, were more likely to facilitate legal compromises with greater degrees for reconciliation, by seeking direct input from communities to feed their cosmovisions, epistemologies and ontologies into novel legal hybrids. In comparison, those engaging with top-down processes of pluralisation, such as by relying on doctrinal imports as was the situation in the Atrato River case, have nurtured the trendiness of rights of Nature more globally, and also, a disconnect with meaningful reconciliation. [40] I will discuss the latter points in more depth in section 4.

When inherently politicised disputes are brought to the courts, judges are not always apolitical. However, this does not mean that judges - as the unelected branch - should readily blur the separation of powers by stepping into the role of the legislature. Whilst the power of judges should remain checked and balanced by other branches of government, there is room for judges to be receptive to broader sociological considerations. In particular, there are spaces in which national courts can be creative in the normative development of law, by simultaneously addressing concrete disputes before them and the past grievances on which they are built. In the context of this research, judges who are receptive to these broader sociological considerations when adjudicating concrete disputes, such as past grievances related to colonialism, are in better positions to facilitate subaltern cosmopolitan transitions of law. This is on the basis that these courts are well-placed to translate political compromises into law, though the creation of innovative legal hybrids, which targets the deep colonial cleavages on one hand, whilst opening up opportunities for reconciliation, or future-oriented cooperation, on the other.[41]

I therefore take this opportunity to summarise the pivotal role of courts. National courts are in unique positions to trigger subaltern cosmopolitan transitions of law. They are well-placed insofar as they are bottom-up actors receptive to their localities, and as legal translators of political compromises. They are agents, who by articulating – and then translating – political compromises into the language of law, spark a process of embedding legal phenomena. This process is then accommodated with the concretisation of the latter compromises within legislation, with the assistance of the legislature, and executive. In the context of supporting subaltern cosmopolitan transitions of law, national courts can therefore play a unique role in embedding subaltern legal phenomena within innovative legal hybrids, whilst working towards encouraging forms of reconciliation, or aspirationally, conviviality. In this regard, the agency of national courts is reflected in their capacity to promote and embed subaltern cosmopolitan legalities across contact zones. However, national courts whose motivation acts contrary – or merely ambivalent - to the intentions of subaltern cosmopolitan transitions of law, are in pivotal positions to impede the latter. The motivation, and receptivity of national courts to consider their contextual environment therefore shapes their trajectory as producers of global law.

[40] This so-called "trendiness" of rights of Nature relates to what Gonzalez-Serrano termed "ornamentalisation", as discussed in Chapter 4, section 3,2, supra.
[41] ibid.

This discussion has focussed on the agency of national courts to promote certain agendas in accordance with their context-dependent situations, and their motivations as producers of (global) law.[42] Using this analysis as a baseline, the following section will discuss the capabilities of national courts to promote cosmopolitan legalities across contact zones, using examples from the case studies. Thereafter, I will discuss the extent to which the Waitangi Tribunal, the Constitutional Court of Colombia, the JEP, and the High Court of Uttarakhand, have facilitated a genuine legal ecumenism in the disputes adjudicated before them.

3. The conditions for promoting subaltern cosmopolitan legalities across contact zones

Thus far, I have portrayed national courts as producers of global law, as agents of change, and as actors in pivotal positions to support certain agendas, including, subaltern cosmopolitan transitions of law. Although harbouring the agency to support the latter transition, it is clear that both the motivation and receptivity of judges to their external environment, influences their inclinations to promote certain agendas. By reflecting on the case studies, I can, however, draw together some conclusions on the conditions which have facilitated the promotion of subaltern cosmopolitan legalities across contact zones. These conditions include instances in which (1) courts have been created with specialised reconciliatory mandates, which in turn, have promoted forms of decoloniality, and (2) where the creation of specialised courts has included indigenous judges, who through open dialogues with indigenous and local communities are able to articulate the subaltern epistemologies and ontologies into concrete legal measures. Accordingly, in section 3.1. and 3.2, I will rely on the findings of the four case studies to unpack the conditions for promoting subaltern cosmopolitan legalities across contact zones. Then in section 3.3, I will summarise the findings of the comparative case law analysis, to answer the second part of the research agenda, which assesses whether and to what extent courts are bringing about forms of legal ecumenism in concrete disputes that have fallen before them.

3.1. Mandates for reconciliation

Over the course of this investigation, I have analysed case law from four separate juridical bodies: the Waitangi Tribunal, the Constitutional Court of Colombia, the JEP, and the High Court of Uttarakhand. Where the Constitutional Court of Colombia and the High Court of Uttarakhand are national courts which are part of their jurisdictions' existing judicial architecture, the Waitangi Tribunal and the JEP are specialised jurisdictions.[43] Both the Waitangi Tribunal and JEP were created with specialised remits to respond to historical grievances, including those associated with colonialism and civil war. On one hand, the Waitangi Tribunal, which was created in 1975,[44] was established as a special jurisdiction to hear the claims brought

[42] Walker, 'The Gap between Global Law and Global Justice' (n 1).
[43] For more information on the differences between these legal entities in terms of legal status, role, and composition of members, see Figure 1 in Chapter 1, section 2, supra.
[44] Treaty of Waitangi Act 1975.

by the Māori community against the Crown, over interpretations of the Treaty of Waitangi.[45] On the other hand, the JEP, which was established during Colombia's push for transitional justice, was tasked with investigating and addressing the violent crimes of the internal armed conflict from 1st January 1990 to the 1st December 2016.[46] What noticeably splits these courts down the middle – the Constitutional Court of Colombia and the High Court of Uttarakhand on one side, and the Waitangi Tribunal and the JEP on the other - are their reconciliatory mandates.

When considering the articulation of rights of Nature legal resolutions offered by all four courts, those courts motivated by mandates of reconciliation, appear to have more meaningfully interacted with the problems underpinning these disputes. Specifically, both the Waitangi Tribunal and the JEP articulated legal resolutions which addressed the inequalities arising out of the historical grievances from colonialism, to promote varying degrees of retribution, reconciliation, or future oriented cooperation.

In the first example, the Waitangi Tribunal was constructed to give a voice to the Māori, and to relay their experience with the Crown[47] in the legal realm. The Waitangi Tribunal was particularly motivated by their conciliatory spirit to acknowledge the impacts of colonialism on one hand, and promote cooperation between the Māori and Crown Government, on the other. In the Whanganui River dispute, this notion was encapsulated in the eventual enactment of the Te Awa Tupua Act, by relaying that '[t]he Crown unreservedly apologises for its acts and omissions which have breached the Treaty of Waitangi and its principles and damaged the special relationship between the iwi and hapū of Whanganui and the Whanganui River'.[48] And that, '[w]ith this apology the Crown seeks to atone for its past wrongs, and begin the process of healing.'[49] As part of their reconciliatory mandate, the Waitangi Tribunal attempted to foster co-operation between the Whanganui iwi and the Crown, by carving out a role for both parties in the shared governance of the Whanganui River through co-management. This institutional design was then further replicated in the legal subjectivisation of Te Urewera, between the Tūhoe and Crown Government. Co-management is thus a reflection of the conciliatory spirit of the Waitangi Tribunal, and their efforts to instil cooperation as part of the 'renewed and enduring relationship between Whanganui Iwi and the Crown.'[50] However, in the same vein which recognises innovative legal hybrids as a compromise of epistemologies and ontologies, the institutionalisation of co-management is also a compromise, insofar as it gives authority to two parties in the shared governance of these spaces. In situations where the full emancipatory claims of parties seek the reclamation and sole "ownership" over dispossessed land – as reflected in the Tūhoe claims – the capacity of innovative legal hybrids to meet these demands, are therefore brought into question. The latter thus raises further questions as to the suitability of innovative legal hybrids to promote a subaltern

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[45] Te Tiriti o Waitangi (Treaty of Waitangi), 1840.
[46] Kristina Lyons, '"Nature" and Territories as Victims: Decolonizing Colombia's Transitional Justice Process' (2023) 125 American Anthropologist Association 63, at 64.
[47] In fact, contained within the Whanganui River Report, there are around 50 pages of the report dedicated to outlining different Māori perspectives, and also, Pākehā perspectives. See: The Whanganui River Report (n 19), at 55-104
[48] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, Article 70(c).
[49] ibid, Article 70(f)
[50] ibid, Article 70(f).

cosmopolitan transition of law, where legal resolutions crafted in the form of a compromise, may impede the fulfilment of subaltern projects of emancipation.[51]

Where this perceived limitation will be discussed later, I take this moment to stress that innovative legal hybrids in Aotearoa New Zealand have been beneficial for promoting subaltern cosmopolitan legalities, by (1) facilitating the genuine integration of Māori cosmovisions into law, and (2) promoting cooperation between the Māori and Crown Government, through co-management. In Santos terms,[52] the creation of these subaltern cosmopolitan legalities have promoted forms of reconciliation between the Māori and Crown Government. The Waitangi Tribunal has therefore benefited from a reconciliatory judicial mandate. Furthermore, with the institution of co-management, these legalities hint towards the prospects for future forms of shared authority between the Māori and Crown Government, mirroring essences of conviviality.[53] Nevertheless, in recognition of the highly aspirational motivations to pursue forms of conviviality - as there are larger and more complex political elements to achieving realistic forms of shared authority between hegemonic and counter-hegemonic groups -, striving for conviviality is desirable, insofar as it encourages long lasting forms of decoloniality.

In the second example, the JEP was built upon a mandate of reconciliation, with clear motivations to address some of the most serious systematic harms and violence experienced by IPLCs, over the course of the internal armed conflict.[54] Driven by the push for transitional justice, the JEP sought to address these individual claims, by meaningfully engaging through widely participatory proceedings with the cultural localities of each dispute, and by tailoring their resolutions accordingly. The JEP tailored their resolutions in response to IPLCs' experiences with the internal armed conflict, to (1) address their colonial grievances, and, to (2) articulate bespoke legal resolutions recognising territories and their IPLCs as victims of armed conflict, based on their respective cosmovisions. The reconciliatory mandate of the JEP was thus a driving force for the pluralisation of legal resolutions, leading to the inclusion of IPLCs cosmovisions. In stark contrast to the JEP, the Constitutional Court of Colombia has the mandate to ensure the primacy of the legal and political constitution of the Republic, which is indeed rooted on the values of pluralism and protection of indigenous peoples and communities. However, its mandate is broader and not uniquely devised to promote reconciliation. In the Atrato River case, the Constitutional Court noted (1) the impacts of colonialism on the social exclusion of the ethnic communities in the Chocó, and the consequent failure of the Government to set up the necessary political-administrative institutions to adequately regulate the extractive industries, and (2) the impact of illegal mining and logging on the fundamental rights of the ethnic communities and their territory. However, from a procedural and doctrinal perspective, the Constitutional Court did not engage with the ethnic communities' cosmovisions and individual experiences, to the same

[51] See Chapter 3, section 4.4, supra.
[52] de Sousa Santos (n 39).
[53] ibid, at 559-561.
[54] Laura Ordóñez-Vargas, LC Peralta Gonzalez and Enrique Prieto-Rios, 'An Econcentric Turn in the Transitional Restorative Justice Process in Colombia' (2023) 17 International Journal of Transitional Justice 107.

degree as the JEP. Although the Constitutional Court acknowledged the impacts of colonialism on the ethnic communities and their fundamental rights, their approach to tailor a legal resolution based on biocultural rights – a theoretical and doctrinal concept drawn in academia from the study of MEAs – may resonate with legal positivistic mindsets, but appears somewhat disconnected to addressing the root causes of this dispute. Instead, the legal resolution forgoes empirical anthropological engagement with the localities of the dispute, and the cultural cosmovisions, epistemologies, ontologies and experiences of the ethnic communities of the Chocó. Perhaps motivated primarily by the need to address the 'socio-environmental, ecological and humanitarian crisis in the Atrato River Basin',[55] the approach by the Constitutional Court falls short of targeting the deeply engrained, systematic implications of colonialism and civil conflict. By comparing the experiences of the JEP and Constitutional Court, and the degree to which they meaningfully engage with IPLCs' cosmovisions and collective experiences, we can assume that judiciaries with mandates to promote reconciliation, more meaningfully engage with the historical grievances from colonialism. It is especially important to note that the JEP have benefitted from the participation of indigenous judges, who have facilitated open dialogues with IPLCs as part of the mechanisms set up during the negotiation of the Peace Accord, to promote national reconciliation through restorative justice.[56]

Based on the preceding discussion, we can assume that courts motivated by mandates of reconciliation, are inherently more receptive to their external environment. Courts, including the Waitangi Tribunal and JEP, are demonstrating such receptivity by acknowledging, and addressing, the entrenched asymmetrical relationships of power between hegemonic and counter-hegemonic groups, as a result of colonialism and civil conflict. Based on that understanding, these courts are more likely to articulate legal resolutions, such as innovative legal hybrids, with the intentions to encourage forms of reconciliation, or aspirationally, conviviality. In the following section I will outline how the inclusion of indigenous judges within these courts has greatly contributed towards their reconciliatory remits. This is on the basis that indigenous judges have played a fundamental role in meaningfully engaging with, and translating, indigenous legal knowledges into law, by feeding the latter into the creation of innovative legal hybrids. In this regard, the composition of the judiciary is an additionally invaluable component, which promotes subaltern cosmopolitan legalities across contact zones.

3.2. The composition of the judiciary

In addition to the reconciliatory mandates of the Waitangi Tribunal and the JEP, both courts have benefitted from having indigenous judges sitting on their benches. In this position, indigenous judges have played a crucial role in the articulation of innovative legal hybrids and the promotion of subaltern cosmopolitan legalities across contact zones. In particular, indigenous judges have been indispensable in translating indigenous cosmovisions into the language of law. If we contrast the legal resolutions offered

[55] Constitutional Court of Colombia (2016), Judgement T-622/16 (The Atrato River Case), (Translation; Dignity Rights Project, Delaware Law School, USA), at 1.
[56] Gwen Burnyeat and others, 'Justice after War: Innovations and Challenges of Colombia's Special Jurisdiction for Peace | LSE Latin America and Caribbean' (3 April 2020) accessed 8 February 2024.

by the Waitangi Tribunal and JEP, against those offered by the Constitutional Court of Colombia and High Court of Uttarakhand, we can highlight the important role of indigenous judges in articulating local imaginaries from the indigenous perspective.

Throughout my research thus far, I have often spoken about the importance of articulating innovative legal hybrids, as bespoke legal mechanisms. I have used the terminology bespoke to refer to the creation of legal resolutions reflective of the specific historical, social, and cultural localities of the environment in which the dispute is heard.[57] The importance of the latter has been framed in connection with promoting a subaltern cosmopolitan transition of law, insofar, as the consideration of these essential localities promotes the inclusion of marginalised and subaltern epistemologies and ontologies. Concretising these (subaltern) localities within innovative legal hybrids, accordingly, would therefore have the potential of contributing to the bottom-up pluralisation of law, with further prospects for encouraging forms of decoloniality. An essential part of this process, in which national courts play a role, is through the translation of subaltern epistemologies and ontologies into concrete resolutions.

We have seen the influence of Māori judges within the Waitangi Tribunal, when analysing the legal precedents set by the judges which subjectivised the Whanganui River and Te Urewera Forest. Focussing on the dispute of ownership over the Whanganui River, we have seen the Waitangi Tribunal fundamentally change the narrative of the dispute, by engaging extensively with Māori cosmovisions. The receptivity of this court to the historical, social, and cultural localities of the dispute, and furthermore, to Māori customary law (Tikanga law), led to the conceptualisation of an innovative legal hybrid, and eventually, a rights of Nature resolution integrative of Māori cosmovisions. Based on the expertise of the court, the Waitangi Tribunal were able to meaningfully engage with Māori epistemologies, ontologies, and cultures, to carefully strike a balance between Tikanga and Pākehā law. The Waitangi Tribunal, as legal translator, thus contributed to an interweaving of worldviews, epistemologies and ontologies, as opposed to a unified 'merging of horizons, a "theory of everything" in which only one reality is possible and only one set of assumptions about the world can prevail.'[58] This sentiment of shared realities was then articulated through the creation of the innovative legal hybrid which granted rights to the Whanganui River, and bestowed a co-management role to both Māori and Crown Government alike.

We have furthermore seen the influence of indigenous judges within the JEP – specifically Judges Belkis Izquierdo and Ana Manuela – towards the bottom-up pluralisation of normative concepts of territories, victims, and harm, in line with IPLCs' cosmovisions. In a similar vein to the judges sitting on the Waitangi Tribunal, these judges have additionally contributed to the articulation of bespoke constructions of rights, by tailoring the legal norms of territory and harm in relation to the specific historical, cultural, and spiritual considerations of the communities and territories at hand. The role of indigenous judges in this regard has

[57] See Chapter 2, section 2.2, supra.

[58] Anne Salmond, 'Tears of Rangi: Water, Power, and People in New Zealand' (2014) 4 HAU: Journal of Ethnographic Theory 285, at 285.

been assisted by the facilitation of an open dialogue between the JEP and IPLCs as part of the restorative justice mandate, and also, from the recognition of indigenous and Black communities' justice systems within Colombia through Article 35 of the law which established the JEP, which further requires judges to coordinate with these communities over matters of their concern.[59] In this regard, indigenous judges are acting as legal conduits for subaltern localities, by translating subaltern legal phenomena into concrete legal resolutions.

In contrast to the former two examples, the absence of indigenous judges in both the Constitutional Court of Colombia and the High Court of Uttarakhand, have impacted the degree to which these courts engaged with subaltern legalities. As already noted, the Constitutional Court of Colombia did not engage with the ethnic communities' experiences, epistemologies and ontologies to the same degree as the JEP, which could arguably be related to the absence of indigenous judges, or legal mechanisms to facilitate dialogues with the affected IPLCs. By lacking engagement with the ethnic communities' epistemologies and ontologies, the legal resolution crafted by the Constitutional Court was characteristically top down, drawn doctrinally from international law. However, in the cases heard before the High Court of Uttarakhand – and albeit a clear absence of indigenous judges[60] - the judiciary engaged with, to an extent, local Hindu epistemologies and ontologies. Within these cases, the judiciary made efforts to draw on pre-existing jurisprudence which recognises legal personhood to sacred entities, such as Hindu idols, to articulate a rights of Nature resolution. However, when applying the latter jurisprudence to frame the rights of Nature resolution, it was clear that the court went above and beyond their role of dealing with the concrete dispute at hand, which was based on a violation of property rights. In this regard, the approach by the High Court of Uttarakhand has been criticised as arguably ill-suited to address the issue pertaining to a property rights violation, and therefore meaningful interaction with these local Hindu epistemologies and ontologies are perhaps misplaced, despite any good intentions. The Indian case study henceforth diverges from the previous case studies, as it was not grounded on a clear dispute between hegemonic and counter-hegemonic parties, and a clash of rival normativities based upon entrenched historical grievances. It is furthermore an interesting case, insofar as it arguably did not require the court to articulate a rights of Nature resolution, to appropriately adjudicate the concrete dispute before them.

Based on the preceding discussion, we can assume that courts with a reconciliatory mandate, whose compositional arrangement includes judges with bespoke legal-anthropological expertise, as well as an institutional mandate for open dialogues, are better placed to promote subaltern cosmopolitan legalities across contact zones. In consideration of the latter, and by relying on the analysis of the agency of courts thus far, we can draw some conclusions on the extent to which the courts herein explored, have facilitated a genuine legal ecumenism within their contexts.

[59] Ordóñez-Vargas, Peralta Gonzalez and Prieto-Rios (n 54), at 122.
[60] Additionally, there were no roles created for indigenous or local community representatives within the guardianship body for both the Ganges and Yamuna Rivers, and Gangotri and Yamunotri Glaciers. The guardianship body instead, was comprised of solely state entities. See Glaciers case (n 30), at 65.

3.3. Are national courts capable of facilitating a genuine legal ecumenism?

Over the last five chapters (including this discussion up until now), I have tried to illustrate the pivotal role of national courts in subaltern cosmopolitan transitions of law. To varying degrees of success, national courts have demonstrated their trans-jurisdictional agency in this context, as bottom-up actors and legal translators of political compromises, who have furthermore benefitted from reconciliatory mandates and the inclusion of indigenous judges. However, in consideration of the latter, to what extent are these national courts bringing about forms of legal ecumenism in the concrete disputes that have fallen before them?

In a brief reiteration, legal ecumenism was previously defined as, the mutual acknowledgement and non-dogmatic co-existence between hegemonic and counter-hegemonic worldviews, epistemologies and ontologies that coexist in plural societies, including contact zones.[61] As a concept which attempts to imbue deeper levels of pluralism, legal ecumenism relates to the creation of innovative legal hybrids, as in, legal resolutions which enable the balancing of hegemonic and counter-hegemonic epistemologies and ontologies. Within this context, legal ecumenism targets the colonial cleavages which have produced asymmetrical relationships of power between hegemonic and counter-hegemonic groups, in the pursuit of fostering cooperation and forms of reconciliation. The facilitation of legal ecumenism is therefore assessed in light of the production of innovative legal hybrids (paying attention to the inclusion of marginalised legal phenomena), and the extent to which these (subaltern) cosmopolitan legalities are able to further forms of reconciliation, with strides towards conviviality.[62]

Throughout this research, the Waitangi Tribunal has been placed as the "gold standard" for facilitating legal ecumenism. Albeit a slight over-exaggeration, the Tribunal's articulation of innovative (rights of Nature) legal hybrids have created legal precedence, with transnational impact. Within the context of Aotearoa New Zealand, these legal hybrids have been innovative for attempting to reconcile historical grievances between the Māori and Crown Government, whilst acting as a vehicle for the inclusion of Māori epistemologies, ontologies, and cultures. These legal hybrids have embraced the inclusion of subaltern epistemologies and ontologies in the pursuit of cooperation, by balancing Māori epistemologies, ontologies, philosophies, and cosmovisions on one hand, with hegemonic property rights inherited from colonialism, on the other. Albeit a painstakingly slow process – triggered in 1999 by the Waitangi Tribunal[63] then concretised in 2017[64] - I conclude that the Waitangi Tribunal facilitated a genuine legal ecumenism. However, although legal ecumenism has been facilitated by balancing competing epistemological and ontological visions, and operationalised through co-management, this innovative legal hybrid, at the end of the day, reflects a compromise, one which is still contested by significant parts of the Māori community itself, including the

[61] See Chapter 2, section 3.1, supra.
[62] See Chapter 2, section 3.2, supra.
[63] The Whanganui River Report (n 19).
[64] Te Awa Tupua Act (n 48).

Tūhoe.[65] Despite criticisms on the impact of the latter relating to the dilution of subaltern emancipatory claims, it is within the nature of legal ecumenism to demand degrees of compromise in the accurate balancing of competing normativities, in the pursuit of reconciliation (or perhaps conviviality). Achieving compromise is therefore part of achieving legal ecumenism. The dilution of emancipatory claims, however, is a critique on rights of Nature as a subaltern emancipatory project, a criticism which will be picked up in the conclusions of this thesis.

With clear mandates for reconciliation, and a judiciary comprised of indigenous judges, the JEP is another striking example of a national court which is seemingly pursuing a genuine attempt to facilitate legal ecumenism. In the same vein as the Waitangi Tribunal, the JEP engaged specifically with historical grievances on one hand – those relating to the internal armed conflict – and the subaltern epistemologies, ontologies, cultures, and cosmovisions of IPLCs, on the other. In this regard, the JEP has steadily been contributing to the pluralisation of bespoke legal resolutions. Indigenous judges have been indispensable in articulating the unique cosmological visions of IPLCs in connection with their territory, in order to articulate innovative legal resolutions tailored to their epistemologies, ontologies, and cultures. The JEP have henceforth been essential in the pluralisation of (subaltern) legal phenomena in Colombia, from the bottom-up.

In a noticeable divergence, the Constitutional Court of Colombia appears to have facilitated legal ecumenism to a lesser degree, in comparison to that of the Waitangi Tribunal and the JEP. Where the latter two courts – who benefited from reconciliatory mandates and the expertise of indigenous judges - opted for a bottom-up approach, to articulate innovative legal hybrids grounded in the embedded localities in which the dispute was heard, the Constitutional Court of Colombia, instead, opted for a top-down approach. This was demonstrated in the Constitutional Court's reliance on the problematic doctrinal construct of biocultural rights to articulate their rights of Nature resolution for the Atrato River. By opting for this top-down approach, the Constitutional Court lacked meaningful engagement with the ethnic communities and their cosmovisions, risking constraining them to doctrinally typified forms of traditional lifestyles. Their resolution therefore falls short of facilitating a genuine, empirically-based, legal ecumenism, by failing to capture the ethnic communities' epistemologies and ontologies in their resolution.

The High Court of Uttarakhand is another national court which has not benefitted from a reconciliatory mandate or a court inclusive of indigenous judges. The cases explored within this thesis, pertaining to the legal subjectivisation of the Ganges and Yamuna Rivers, and Gangotri and Yamunotri Glaciers, therefore did not facilitate legal ecumenism. The disputes heard before the High Court of Uttarakhand are, however, somewhat of a special case, insofar, as they both represent instances of what I call an unwarranted legal

[65] B Coombes, 'Nature's Rights as Indigenous Rights? Mis/Recognition through Personhood for Te Urewera' (2020) 1–2 Espace populations sociétés. Space populations societies; Mihnea Tănăsescu, *Understanding the Rights of Nature: A Critical Introduction*, vol 6 (transcript Verlag 2022), at 73-87; see Chapter 3, section 4 to 4.4, supra.

transplant, instead of the creation of bespoke legal mechanisms.[66] In other words, they are examples of the High Court engaging ornamentally with the trendiness of rights of Nature.[67] The High Court of Uttarakhand were therefore unable to facilitate legal ecumenism in this regard, by not tailoring the borrowed legal phenomena to the internal localities of the jurisdiction. Furthermore, the resolution articulated by the High Court of Uttarakhand arguably blurred the separation of powers, on the basis that the articulation of rights of Nature went above and beyond addressing the concrete dispute before them, as in, the violation of property rights.

When reflecting on the four case studies in tandem, we can reasonably conclude that the Waitangi Tribunal, the Constitutional Court of Colombia, the JEP, and the High Court of Uttarakhand, have facilitated legal ecumenism to varying degrees. All four courts have demonstrated their agency, however, their willingness to promote subaltern cosmopolitan legalities, their reconciliatory mandates, and their court compositions, have greatly impacted the degrees to which they have accommodated legal ecumenism. Noticeably, both the Waitangi Tribunal and the JEP have benefitted from the inclusion of indigenous judges on their benches, and the reconciliatory mandates of their courts. Due to these additional components, these courts appear to have facilitated legal ecumenism to higher degrees, in comparison to the Colombian Constitutional Court and the High Court of Uttarakhand, who both lack reconciliatory mandates and benches inclusive of indigenous judges.

The preceding discussion has importantly highlighted the extent to which the Waitangi Tribunal, the Constitutional Court of Colombia, the JEP, and the High Court of Uttarakhand have brought about forms of legal ecumenism in concrete disputes that have fallen before them. Based on these key takeaways, we are now at the juncture to consider what the genuine facilitation of legal ecumenism means for the bottom-up pluralisation of global law. The following section will therefore re-engage with the theoretical and methodological framework, to unpack these key findings in connection with the pivotal role of national courts in subaltern cosmopolitan transitions of law.

4. The role of diffusing subaltern cosmopolitan legalities in the bottom-up pluralisation of global law

In the gradual development of this research agenda, the driving force of this investigation has been premised upon the theoretical and methodological framework which reconceptualises law in a more cosmopolitan manner. In recognition of the stark asymmetry between hegemonic and counter-hegemonic societies, this reconceptualization challenges entrenched forms of universalism which have perpetuated monovisions of law, from a Western perspective. Engaging in the deconstruction of the Western bias, to confront

[66] For more information on the reasoning behind using India as a case study, and why it aligns with this methodological framework despite the different contextual foundations of the dispute and conclusions drawn, see Chapter 1, section 4, supra.
[67] González-Serrano (n 10); see Chapter 4, section 3.2, supra.

constitutionalised framings of law accordingly, this research attests that the bottom-up pluralisation of law has the potential of opening up spaces for the inclusion of subaltern emancipatory projects. With the caveats and nuances introduced in prior sections of this chapter in regards of the agency of courts, national courts have been placed as pivotal actors, who by articulating and diffusing subaltern cosmopolitan legalities, in the form of legal hybrids, play a significant role in a subaltern cosmopolitan transition of law. It is now time to re-engage and link up again with the assumptions set out in the theoretical and methodological framework of this thesis, prior to concluding.

This theoretical framework has engaged extensively with, and drawn influence from, Twining's visions on the diffusion of legal norms,[68] Santos' theories on subaltern cosmopolitanism and legal ecumenism,[69] and Walker's mappings of global law.[70] It has furthermore touched upon Watson's transplant thesis[71] and Legrand's proclamation on the unbearable localness of law.[72] Then finally, it has engaged in theories of utopianism, to outline my positionality, through a future-oriented mindset which attempts to understand the capabilities, and the role of law, in re-envisaging societal frameworks beyond their hegemonic realities.[73]

Where all contributions have played a significant role in this theoretical construction, with references to these theories woven throughout, the remainder of this section will be dedicated to the overarching global law analysis. Considering the key takeaways derived from the case studies, I intend to unravel the agency of national courts as producers of global law, focussing on their role in the bottom-up pluralisation of law. I will therefore re-engage with the compositive orientation to global justice, in section 4.1, to frame the agency of national courts in the bottom-up pluralisation of law, and the subaltern cosmopolitan transition of law. In section 4.2, I will then rely on the compositive orientation to highlight the agency of courts in embedding localities within global law. In particular, I will emphasise the role of courts – and other branches of government - in embedding subaltern epistemologies and ontologies into concrete legal mechanisms, and the role of the latter in the normative bottom-up pluralisation of law, in a cumulative, aggregative, and piece-meal fashion.

4.1. Compositive orientation to subaltern justice

Casting back to the theoretical framework, the compositive orientation is a bottom-up contribution to global justice. In this regard, it is a form of global law sourced amongst the local levels of institutional

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[68] William Twining, General Jurisprudence: Understanding Law from a Global Perspective (Cambridge University Press 2009); see Chapter 2, sections 2 and 5, supra.
[69] de Sousa Santos (n 39); see Chapter 2, sections 3 and 5, supra.
[70] Walker 'Intimations of Global Law' (n 1), see Chapter 2, sections 4 and 5, supra.
[71] Alan Watson, Legal Transplants: An Approach to Comparative Law (2nd edn, University of Georgia Press 1993); see Chapter 2, sections 2.2 and 5, supra.
[72] Pierre Legrand, Negative Comparative Law: A Strong Programme for Weak Thought (Cambridge University Press 2022); see Chapter 2, sections 2.2 and 5, supra.
[73] Philip Allott, *Eutopia: New Philosophy and New Law for a Troubled World* (Edward Elgar Publishing 2016); Ernst Bloch, The Principle of Hope. 1959. Translated by Neville Plaice, Stephen Plaice, and Paul Knight (1995); Thomas More, Utopia (1516). Translated by Paul Turner (2003); see Chapter 2, section 6, supra.

frameworks, influencing other spheres of governance in a cumulative and aggregative fashion.[74] Compositive orientations are piece-meal in nature, and are reflected in law's application of bespoke 'normative principles or orientations',[75] which are tailored to the demands of diverse claims. They are claims of global law which have also been described as operating in an uneven and disparate fashion, to illustrate the unique paths of global law, and their independent journeys towards forms of global justice. Contributing to compositive orientations are the producers of global law, who facilitate the creation of law, and work towards ultimate goals of global justice.[76]

Put simply, the compositive orientation within this context perceives national courts as bottom-up agents of change – or producers of global law -, who in their role of adjudicating concrete disputes before them, work towards a subaltern cosmopolitan transition of law, through the integration of diverse legal phenomena. As part of this subaltern cosmopolitan transition, there is hence a focus on the inclusion of subaltern legal phenomena.

In more complex terms, national courts contribute to the production of global law by engaging with the historical, social, and cultural localities of concrete disputes before them. As bottom-up actors, national courts are receptive to their localities, and contribute to the normative development of law by articulating local imaginaries into the legal vernacular through processes of translation. In this regard, courts immerse themselves in the embedded localities which define local laws, to articulate legal resolutions beyond their positivistic framings. They are hence articulators of legal tools which mirror their historical, social, and cultural environment. Specifically placed within the agenda of encouraging subaltern cosmopolitan transitions of law, national courts play a role in the inclusion of local imaginaries which have often been excluded or marginalised from law, due to competing (and often domineering) hegemonic normativities. In spaces in which these rival normativities co-exist – as in, contact zones – national courts are in pivotal positions to balance hegemonic and counter-hegemonic epistemologies and ontologies in the concrete disputes that fall before them. By balancing hegemonic and subaltern epistemologies and ontologies accordingly, national courts contribute to the production of innovative legal hybrids, which mirror legal ecumenism. National courts hence express local imaginaries of the diverse normativities of sociological groups in conflict, and translate the latter into epistemological and ontological foundations for legal hybrids.

In the production of subaltern cosmopolitan legalities, national courts contribute to the normative development of law in an uneven and disparate fashion. More specifically, by responding to the specificities of concrete disputes, and tailoring legal resolutions accordingly, national courts contribute to the bottom-up pluralisation of law by articulating subaltern cosmopolitan legalities as bespoke legal mechanisms. Legal hybrids are therefore embodied as bespoke 'normative principles or orientations',[77] which are created in a piece-meal fashion, and are tailored to their contextual environment and the unique claims of diverse social

[74] Walker, 'The Gap between Global Law and Global Justice: A Preliminary Analysis' (n 1), at 234.
[75] ibid, at 234-235.
[76] See Chapter 2, section 4.2, supra.
[77] ibid.

groups. Importantly, considering the capacity of innovative legal hybrids to influence other spheres of governance, they must be created as bespoke legal mechanisms, to avoid the issues associated with legal transplants.

In their individual pursuits, national courts are capable of facilitating the bottom-up pluralisation of law, through the integration of diverse normative visions. However, as outlined in the preceding discussion, the operational mandates of national courts – and their promotion of subaltern cosmopolitan legalities - are impacted by internal and external circumstances.

First, the creation of subaltern cosmopolitan legalities are dependent on the receptivity of national courts to the external impulses of their environment. Subaltern cosmopolitan legalities must therefore internalise, and then reflect, the relevant historical, political, socio-economic, and cultural realities in which the dispute is heard. Moreover, legal hybrids are defined by the inclusion of hegemonic and subaltern epistemologies, ontologies, and cosmovisions. In consideration of the underlying motivation behind subaltern cosmopolitan transitions of law are to open up spaces for the inclusion of subaltern emancipatory projects, national courts must therefore engage with subaltern localities. Whilst they must remain mindful not to blur the separation of powers, national courts are well-placed to translate these embedded localities, into subaltern cosmopolitan legalities.[78]

Second, the motivation of national courts determines their willingness to promote certain agendas, including those within subaltern cosmopolitan transitions of law. As agents of change and producers of law, national courts are therefore in a unique position to promote or impede certain agendas.

Third, the judicial mandate and composition of courts greatly impacts the degree to which national courts can facilitate legal ecumenism. Courts with a reconciliatory mandate, who furthermore benefit from the inclusion of indigenous judges on their benches, are more likely to facilitate legal ecumenism, and support the genuine integration of subaltern epistemologies and ontologies, on the basis of fostering forms of reconciliation, or even, conviviality.[79]

The compositive orientation neatly characterises the role of national courts in the bottom-up pluralisation of law. In particular, the compositive orientation captures the role of national courts in the diffusion of innovative legal hybrids, and frames how the latter ultimately contributes towards a subaltern cosmopolitan transition of law. A crucial aspect, however, is the agency of courts in embedding these localities within global law. Although this research has been grounded in theory, particularly that which reconceptualises law through the bottom-up pluralisation of its structures, the latter does not negate this research's prospects for practical application. Rather, if we strip back the complexities of its theoretical framings, this research at its core, speaks to a methodology of judicial processes for accommodating the inclusion of marginalised legal knowledges through the articulation of legal compromises. This in itself, bears prospects for a

[78] See Chapter 6, section 2.2, supra.
[79] See Chapter 6, sections 3.1 and 3.2, supra.

subaltern cosmopolitan transition, with further hope for furthering forms of decoloniality within law. It is at this juncture in which theory meets practice, and in fact, where we see this theoretical framework inform a methodology for concrete and transformative change.

4.2. The agency of court in embedding localities in global law

Taking into consideration the discussion thus far, I have come to the conclusion that national courts are actors in pivotal positions, especially when certain constitutional, as well as procedural and methodological conditions are met, that ensure an inclusive, participatory, and reconciliatory outset of their mandate. Under such conditions, they are uniquely placed to translate hegemonic and subaltern epistemologies and ontologies into innovative legal hybrids, triggering the embedding of political compromises within law.[80] National courts play an important role in kickstarting this process, by engaging with the embedded localities of concrete disputes and striking a workable balance between rival normativities, to mirror legal ecumenism. However, the "final stage", so to speak, demands the concretisation of these legal hybrids. In subaltern cosmopolitan transitions of law, the concretisation of legal hybrids is particularly important, insofar as accommodating the genuine integration of subaltern epistemologies and ontologies into law. The latter would hence be reflected in the normative pluralisation of law's deep structures, from the bottom-up, and would therefore lead to the broadening of narrow understandings of the "rule of law", which for example, as was discussed in chapter 2, has been shaped through processes of globalised localisms, including by global agencies such as the World Bank.[81] The bottom-up pluralisation would thus reflect a more integrative understanding of law, and the role of judiciaries, to hence accommodate a greater degree of judicial creativity in devising reconciliatory solutions.

The concretisation of innovative legal hybrids is a manifestation of legal ecumenism, in what could be described as a tangible realisation of epistemic pluralisation. In this sense, I pick up here the distinction I made in the introduction and the first two chapters, between legal pluralism as a theory, and as a method. Legal ecumenism speaks to both dimensions of legal pluralism, but relied critically on the latter, that is to say, on its understanding as a method. If we return to the examples of the case studies, national courts whose innovative legal hybrids were eventually concretised within law – such as through the creation of national legislation, or resolutions – facilitated higher degrees of legal ecumenism.

In the instance of the Waitangi Tribunal, the judiciary was responsible for triggering processes which eventually led to the creation of political compromises between the Māori and Crown Government. As previously discussed, the Waitangi Tribunal opened up spaces for the inclusion of Māori epistemologies, ontologies, and cosmovisions, by meaningfully engaging with the latter when adjudicating disputes over ownership. Fundamentally, the court framed the inclusion of subaltern epistemologies and ontologies through the expression of innovative legal hybrids, which carefully balances Māori epistemologies and ontologies on one hand, and hegemonic property rights inherited from British common law, on the other.

[80] See Chapter 6, section 2.1, supra.
[81] See Chapter 2, section 3.3, supra.

Whilst the Waitangi Tribunal initiated processes to embed political compromises within law, by articulating an innovative rights of Nature legal hybrid, the latter required concretisation to have normative effect. Henceforth, in the case of the Whanganui River, the courts triggered the painstakingly slow process of political negotiation, and reached a settlement in 2012.[82] However, this legal hybrid, and therefore Whanganui iwi cosmovisions, were not concretised until 2017 with the passing of the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.[83] Then again, in the case of the Te Urewera - albeit a shorter timescale between the inception of the legal hybrid by the court, and the eventual concretisation of the rights of Nature legal resolution - Tūhoe cosmovisions were concretised within law with the passing of the Te Urewera Act 2014.[84] Through the creation of national legislation based on the Waitangi Tribunal's articulation of innovative legal hybrids, Māori cosmovisions have slowly become embedded within the law.

However, a few critical points must be raised. The first, which I have already discussed, relates to innovative legal hybrids reflecting a compromise instead of a resolution based on the full emancipatory claims of the Māori. Legal hybrids have been criticised for falling short in fulfilling emancipatory claims in this regard, and furthermore raise the question as to whether resolutions based on compromise settle, rather than resolve, concrete disputes. Second, and despite the outlined benefits of facilitating the inclusion and integration of subaltern epistemologies and ontologies through the creation of innovative legal hybrids, there are risks associated with crystallising traditional knowledge or indigenous customary law within legislation. One, because the concretisation of specific epistemologies and ontologies fails to capture the ability of traditional knowledges or customs to naturally evolve and be shaped in accordance with their environment. Then two, there are concerns that the concretisation of traditional knowledges and customs may be subject to forms of recolonisation, by being re-shaped into hegemonic tools of oppression.

Legal hybrids thus remain an imperfect resolution, one which is perhaps not suitable to resolve all disputes. Where subaltern emancipatory projects demand the fulfilment of specific claims – such as Tūhoe's claim for the reclamation and sole ownership of the Te Urewera – innovative legal hybrids, as compromises, may impede such claims.[85] However, in situations which can be resolved by compromises*,* we must also assume there exists a willingness between parties to cede on certain normativities in conflict, in an effort to balance

[82] Whanganui Iwi and the Crown, Tutohu Whakatupua – Record of Understanding in Relation to the Whanganui River Settlement, (30 August 2012), at section 1.11.1.
[83] For example, the Te Awa Tupua Act recognises: 'Ko Te Kawa Tuatahi. Ko te Awa te mātāpuna o te ora: the River is the source of spiritual and physical sustenance: Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the health and well-being of the iwi, hapū, and other communities of the River', and 'Ko Te Kawa Tuarua E rere kau mai i te Awa nui mai i te Kahui Maunga ki Tangaroa: the great River flows from the mountains to the sea: Te Awa Tupua is an indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and all of its physical and metaphysical elements.' See Te Awa Tupua Act (n 48), s.13(a) and (b).
[84] For example, the Te Urewera Act recognises: '(4) For Tūhoe, Te Urewera is Te Manawa o te Ika a Māui; it is the heart of the great fish of Maui, its name being derived from Murakareke, the son of the ancestor Tūhoe. (5) For Tūhoe, Te Urewera is their ewe whenua, their place of origin and return, their homeland. (6) Te Urewera expresses and gives meaning to Tūhoe culture, language, customs, and identity. There Tūhoe hold mana by ahikāroa; they are tangata whenua and kaitiaki of Te Urewera.' See Te Urewera Act 2014, at s.3(4), s.3(5), and s.3(6).
[85] See Chapter 3, section 4.4, supra.

all parties' interests. Despite the apparent criticisms associated with innovative legal hybrids, we cannot, however, deny the impact of the latter in embedding subaltern cosmopolitan legalities within law. Although there are apparent costs and benefits associated with compromises, innovative legal hybrids at the end of the day, are tools with embed subaltern localities within law.

In the cases heard before the JEP, we have observed the special jurisdiction immerse themselves within the localities of individual disputes, to unearth the unique epistemologies, ontologies and cosmovisions defining IPLCs and the connection with their territories. Through open dialogues with IPLCs, indigenous judges have operated as legal translators to these normative visions, diversifying concepts of victimhood, territory, and harm, from the perspective of IPLCs, thus leading to a *pluriculturalisation* of law. Similar to the case of the Waitangi Tribunal, the articulation of these diverse normative visions went through processes of legal translation, leading to the eventual concretisation of these innovative legal hybrids within law. These individual resolutions, which recognise territories and IPLCs as victims of armed conflict, gave a voice to the IPLCs of Colombia within law. One example briefly mentioned above includes the JEP resolution which articulated the Nasa people's vision of the Great Nasa Territory of Cxhab Wala Kile. Based on the Nasa people's own submission, the resolution included their perspective, which relayed, '[f]or indigenous peoples and especially for the Nasa, the *Uma Kiwe* (territory) is conceived as a living being that forms an integral part of the Nasa; she feels, she must be nourish and cared for…'[86] The resolution then furthermore articulated their experience of harm in connection with the internal armed conflict, and how the latter has been understood as being akin to a severed link with mother earth. The resolution contained this notion, by iterating, '[o]ur ancestral and sacred territory has suffered violations, alterations, mutilations, occupations and harms, product of the armed internal conflict that have negatively transformed the bond that the indigenous communities had with their territory, violating the balance harmony, and autonomy of the Nasa indigenous people of the Northern Cauca…'[87] Where this example reflects the JEP's contribution to the articulation and concretisation of a bespoke normative vision of an IPLC and their territory within a legal resolution, this is but one example. The JEP has steadily been pluralising this field, by altering each resolution to IPLCs' unique epistemologies, ontologies, and cosmovisions.[88] However, cautioning against

[86] Alexandra Huneeus and Pablo Rueda Sáiz, 'Territory as a Victim of Armed Conflict' (2021) 15 International Journal of Transitional Justice 210; JEP Case 005-002/20 (n 19), at para. 13.5; see Chapter 4, section 4.1, supra.
[87] JEP Case 005-002/20 (ibid), para 13.5.
[88] Moreover, I would like to reiterate how the JEP was also responsible for diversifying the concept of territory, by tailoring each resolution to the differentiable understandings of territory, based on each IPLC's unique conceptualisation of such. For example, in the case of the Sia people and the Eperara Euja territory in Narino, the resolution states: 'In the world of the Siapidaara the figure of the 'Tachi Euha, Tachi Trua,' our mother earth, our world, dominates the activity of humans and their relations with nature, with animals, with other human beings. The earth, mother and origin of all human goods, is also the central element in the Sia worldview. The earth is the place where for hundreds of years our people have lived and worked. We have constructed our homes using and caring for natural resources. In our territories there exist places of which we tell stories that occurred long ago. In them our predecessors lived, and therefore we have a right to live, [as we are] its sons and daughters.' Then again, for the Black communities of Tumaco, also in Nariño, the resolution states: '[The Black communities of Tumaco] have established a permanent link with the rivers of the gulf and its estuaries, which integrate the populated centers with the remote settlements ... As the Hileros Organization has said, 'for Black communities, territory has a special meaning; it is the place where their worldview and cultural logic is created, and above all it is the space necessary for the survival of the

a sense of 'unanchored idealism',[89] in recognition to the limits of infinite pluralism within a constitutional system, we must consider the extent to which Colombia will be able to manage the increasing degrees of pluralism, in response to the continual production of resolutions by the JEP. In fact, where the JEP continues to expand the discourse on victims of armed conflict through the creation of these bespoke resolutions, issues around implementation, or conflicts between clashing resolutions, may arise.[90]

In this discussion, there has been an emphasis on the benefits of judicial methodologies which accommodate bottom-up pluralisations, with examples gleaned from the case law heard before the Waitangi Tribunal and JEP. However, it is additionally important to briefly stress the key points taken from the other case studies, as in, the case law heard before the Constitutional Court of Colombia and the High Court of Uttarakhand. In particular, the latter two case studies have made clear the limitations on top-down pluralisations, on account of leading to shallow, and ornamental formulations of rights of Nature legal hybrids. Then moreover, the High Court of Uttarakhand case study emphasised the limitations of legal transplants, and made clear that courts contribute to the normative development of law by adjudicating the concrete facts of the dispute before them, as opposed to going above and beyond their role of interpreting and applying the law, and putting at risk, the separation of powers.

Taking into consideration the preceding discussion, I conclude this section on the assumption that national courts are actors with the capacity to embed localities within global law. Not only are they well-positioned to unearth these localities, but their judicial mandate of translating political compromises into innovative legal hybrids demonstrates their agency of contributing to the normative development of law. In this regard, national courts maintain the agency to pluralise law's deep structures, by articulating, and then embedding, subaltern cosmopolitan legalities. They are hence actors in pivotal positions to facilitate a subaltern cosmopolitan transition of law, with further capabilities to promote forms of reconciliation, with aspirations for conviviality. In the final section of this chapter, I will provide an overarching summary, and conclude on the findings of this thesis. Additionally, I will use this concluding discussion to highlight that whilst this thesis is grounded in theory, it has nonetheless presented a methodological framework with translatable practical application.

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collective subject of the Black people [Pueblo Negro].' See: Huneeus and Sáiz (n 86); JEP Case 094/2020 (n 19), at para. 82; JEP Case 018/20 (n 19) at para. 116; see Chapter 4, section 4.1, supra.

[89] Referring here to Walker's concerns with "unanchored idealism", and how historical-discussive species of global strike a balance between forms of divergence (as in, pluralism), with convergence. For more information see Chapter 2, section 4, supra.

[90] Considering the limitations of the research here explored, a further research agenda would be required to fully unpack the implementation, management, and compliance on these resolutions in Colombia. In particular, it would be beneficial to conduct an empirical investigation into the implementation of JEP resolutions, and the management of pluralism accordingly.

5. Deconstructing the Western hierarchy: a concluding discussion on embracing legal pluralism

In spaces in which rival normativities exist and clash, there have traditionally been winners and losers. Where the "winners" have frequently set the tone for these spaces, setting the normative standards and visions for society, the "losers" have often had to subscribe to these normativities, and/or succumb to marginalisation and exclusion. As a narrative which has emulated the creation of asymmetrical relationships of power between hegemonic and subaltern groups, it is time to reset the scales.

Over the last six chapters, I have attempted to demonstrate the agency of national courts in subaltern cosmopolitan transitions of law. Within this section, however, I will reflect on the lessons learned from the case studies, whilst re-engaging with the overarching intentions of this thesis, which has sought to nuance an understanding of legal pluralism, through legal ecumenism, to (re-)conceptualise co-existing pluralism in spaces of conflict. In this regard, I will explore key elements which have led to the facilitation of this kind of pluralism, by looking at the creativity of judges in fashioning hybrid legal resolutions, as a response to societal traumas. Against this backdrop, I will argue for the necessity to embrace forms of legal pluralism, as a means of accommodating co-existing pluralism in post-conflict spaces. I will therefore consider that whilst there are various perspectives of legal pluralism, striking a balance between the two traditional schools of thought, outlined in chapter 2,[91] can bridge the gap between legal pluralism as theory, and legal pluralism as practice, or as a method. To conclude, I will return to a discussion on utopianism in relation to the kind of legal pluralism herein discussed, to highlight the benefit of the latter in re-envisaging the role of law within a decolonial context.

There are two sides to the legal pluralism discussed within the context of this thesis. On one hand, we have explored the manner in which historical conflicts, such as those associated with colonialism, have generated structures of plurality. These structures, which have led to the existence of diverse hegemonic and non-hegemonic socio-legal orders within plural societies, have oftentimes manifested in conflicts between rival normativities. These spaces, as we already know, have been dubbed as contact zones. On the other hand, within these contact zones, we have explored the potential for reframing legal pluralism through an ecumenical lens, as a vehicle for overcoming said conflicts in the pursuit of reconciliation, with aspirations for conviviality. Taking these two points in tandem, whilst reflecting collectively on the case studies, we can draw some conclusions on what has encouraged these courts to be creative in their legal resolutions, or in other words, what has inspired them to craft hybrid legal resolutions which facilitate legal ecumenism. In so doing, we must consider the judiciaries' motivations within the context in which these concrete disputes were brought before the courts. Which, collectively, were grounded on addressing the historical grievances associated with colonialism, to more or less obvious degrees. For example, in the cases heard before the Waitangi Tribunal and the JEP, the intentions to address the historical grievances associated with

[91] See Chapter 2, section 1, supra.

colonialism were made clear, especially when considering that both jurisdictions were created with the intent of promoting reconciliation. Reflecting on the case studies as a whole, we could reasonably conclude that those courts who were more responsive to the societal traumas of colonialism, who were motivated to address, and close down, their associated historical grievances, were more capable of crafting hybrid legal resolutions which facilitated legal ecumenism. Which, when correlated with the case studies explored within this thesis, correctly assumes that the legal resolutions offered by the Waitangi Tribunal and JEP better facilitated legal ecumenism, in comparison to those crafted by the Constitutional Court of Colombia and the High Court of Uttarakhand. Whilst the ability to facilitate legal ecumenism can, on one hand, be attributed to courts' intentions to address historical grievances, we must also emphasise the role of judicial methodologies, on the other. Which, in accordance with section 4, found that those courts who opted for methodologies of bottom-up pluralisation – as in, the Waitangi Tribunal and JEP – facilitated legal ecumenisms to greater degrees, by crafting resolutions which engaged with the localities of the facts and the parties of each dispute. In this regard, judicial motivation and methodology have been key components in facilitating the kind of pluralism demanded by legal ecumenism, which has correlatively, broadened judges' creativity when fashioning legal resolutions to promote reconciliation.[92]

Taking stock of the type of legal pluralism discussed within the context of this thesis, we must consider the benefits of facilitating legal ecumenism, against the backdrop of the two traditional schools of thought discussed in chapter 2.[93] When considering the latter, legal ecumenism adds a new dimension to legal pluralism, one which not only nuances perspectives on legal plurality, but also one which bridges the gap between the oppositional poles of the legal-theoretical and the empirical-anthropological traditions. Within the context of this thesis, legal ecumenism situates itself between the two traditional schools of thought in the following manner. Where the former tradition sketches the theoretical operations of legal pluralism, to drive the ideological conceptualisations of pluralism, and the creative role of courts in either facilitating or hindering such, in concrete disputes before them. The latter, empirical pluralist tradition, has allowed us to root the more general ideas of legal pluralism from the legal-theoretical lens, with the granular localities of the parties and the facts of said disputes. Legal ecumenism therefore creates a compromise between the two traditions, to open up spaces for the reenvisaging pluralism within specific and concrete realities. Accordingly, legal ecumenism bridges the gap between pluralism as theory, and pluralism as practice, allowing for a conceptualisation of co-existing pluralism within spaces of conflict, with tangible prospects for reconciliation, and aspirations for conviviality.[94]

Against this backdrop I would like to conclude this chapter by briefly re-engaging with the utopian mindset proposed at the end of chapter 2,[95] to frame the benefits of legal ecumenism for re-envisaging the emancipatory potential of law. In recapitulation, the utopian mindset has been used within the context of

[92] See Chapter 6, sections 3 and 4, supra.
[93] See Chapter 2, section 1, supra.
[94] See Chapter 2, section 3.1, supra.
[95] See Chapter 2, section 6, supra.

this thesis to re-imagine the role of law, in a subaltern cosmopolitan transition. When considering that subaltern cosmopolitan transitions of law are a structural transition, a utopian mindset seeks to re-envisage the role of law in deconstructing the Western hierarchy – which has perpetuated top-down, homogenic, and universalistic constructions of law – to instead, open up spaces for a cosmopolitan, plural, heterarchy. Aligning with the underpinning intentions to conceptualise normative pluralism in post-conflictual spaces, a cosmopolitan heterarchy would be inclusive of diverse normative visions 'while at the same time dispensing with the legal culture that creates a hierarchy of values.'[96] Accordingly, and as part of this structural transition, the re-interpretation of legal jurisprudence is key, as a methodology for accommodating the inherent plurality and diversity of the global demos to promote inclusivity within law. National courts have been placed as agents of change in this regard, as actors capable of unearthing subaltern localities, who are able to translate political and cultural ideologies into the language of law. However, whilst national courts are in the position to contribute to the pluralisation, or *pluriculturalisation,* of law, by triggering processes for the embedding of subaltern legalities,[97] their capacity to facilitate the subaltern cosmopolitan transition can be measured against the ability of these courts to facilitate legal ecumenism. Which, in consideration of the preceding discussion, legal ecumenism is often the consequence of national courts intent on closing down past grievances in the pursuit of reconciliation, with hopes for conviviality. Employing a utopian mindset, I have sought to bring theory and practice together, to understand the agency of national courts in the subaltern cosmopolitan transition of law. In a divergence from projecting false realities, I have hoped to demonstrate the genuine agency of national courts in embedding local legal cultures, which contribute to the normative development of law by facilitating legal compromises for accommodating co-existing pluralism in post-conflict spaces. However, in what has become a key emphasis of this thesis, the agency of national courts is a double-edged sword, one which can be wielded to facilitate, or hinder, certain agendas, including those of subaltern cosmopolitan transitions of law.

I now turn to the final conclusions of this thesis.

[96] Dorothy Makaza, 'Towards Afrotopia: The AU Withdrawal Strategy Document, the ICC, and the Possibility of Pluralistic Utopias' (2018) 60 German Yearbook of International Law 481, at 506.
[97] See Chapter 6, section 2.3, supra.

Arguing for legal pluralism as practice: a conclusion

This thesis has explored the articulation of innovative legal hybrids within the field of rights of Nature, to demonstrate the creative capacity of domestic courts in facilitating concessions between rival hegemonic and counter-hegemonic normativities. It has hence demonstrated the transjurisdictional agency of national courts in the following two ways: first, in diffusing innovative legal hybrids across jurisdictions, and second, in imbuing more intense forms of legal pluralism, by crafting resolutions which facilitate legal ecumenism. Within the context of this research agenda, I have appraised the role of the domestic courts in facilitating legal ecumenism, connecting the latter with the bottom-up pluralisation of law, and in turn, subaltern cosmopolitan transitions of law with prospects for furthering forms of decoloniality.

However, before turning to the final conclusions, which discuss the impact of this research going forward, I would like to firstly, consider the limitations of legal ecumenical resolutions as a "dirty compromise", and secondly, whether courts should be tasked with the duty to close down these historical grievances.

To take the former, and considering the diversity of emancipatory projects which fall under subaltern cosmopolitan agendas, it is only reasonable to presume that resolutions based on compromise are not always satisfactory to all members of contending factions across contact zones. The latter was clearest in the example outlined in chapter 3, in which the Waitangi Tribunal constructed rights of Nature for the Te Urewera, to promote co-management of the Forest between the Tūhoe and Crown Government.[1] In resolving the dispute, the Waitangi Tribunal facilitated a compromise between the two parties, but ultimately, hindered the Tūhoe's subaltern claim for the full repossession of native land. Hence, and although legal ecumenism(s) represent legal resolutions with the potential to promote reconciliation, and in turn, close down historical grievances, they are imperfect, insofar as they also possess the ability to impede subaltern emancipatory claims. On one hand, this point emphasises the dual capacity of national courts, to facilitate, or hinder, certain agendas, whilst on the other hand, highlighting that resolutions based on legal ecumenism are limited in their capacity to promote subaltern cosmopolitan transitions, where subaltern emancipatory projects are stunted by compromise. I have therefore referred to legal ecumenism as a "dirty compromise", as it demands concessions from both parties, and entails the risk of further stigmatising and marginalising those segments that lose out with the compromise. Such imperfections therefore beg the question on whether pursuing legal ecumenism is appropriate within the context of a subaltern cosmopolitan transition of law, as the dilution of subaltern emancipatory claims seems inevitable. Thus, and whilst legal ecumenism has played a role in elevating marginalised voices, to foster forms of pluralism in post-conflict spaces, the compromisory nature of legal ecumenism may limit the fulfilment of emancipatory claims. To effectively promote subaltern cosmopolitan transitions, we must then consider

[1] Tūhoe Claims Settlement Act 2014; Vincent O'Malley, 'Tūhoe-Crown Settlement – Historical Background' (Māori Law Review, October 2014) accessed 18 March 2024; see Chapter 3, section 4, supra.

alternative strategies to bypass these apparent limitations. At the same time, we must carefully consider and acknowledge the intrinsic value of pragmatism and reconciliation that come with compromise, however "dirty" it may be.

To take the latter point, whilst considering that this thesis has demonstrated the agency of courts to promote reconciliation by articulating legal compromises, we must contemplate whether courts should be imposed with such a duty, relating to the closing down of historical grievances associated with colonialism. More specifically, are courts the most effective, and appropriate body, to remedy these historical disputes? When considering whether courts are "effective", I reiterate the points made in chapter 6, relating to the issues surrounding access to justice.[2] The adjudicative process has often been criticised from this angle, in which issues, such as the cost of litigation in terms of time and money, and the appropriateness of the adversarial process to provide effective remedy and redress, has ultimately excluded certain parties and claims from achieving justice through the courts. In this regard, imposing additional duties may overburden the courts, and consequently affect their ability to provide appropriate redress in an effective and timely manner. Moreover, some courts have been exposed to external political pressures by their State government.[3] Despite the designation of courts as the impartial branch, the judiciary may be unwilling to go against the will of the government. In this regard, the political situation of the government may sway the motivations of the courts, thus, influencing the facilitation, or hindering of certain agendas. In these situations, the power to address historical grievances, essentially lies with the State. However, in consideration of the latter, I still attest that there is, or at least should be, space for courts to challenge the (past and present) actions of the State, as an essential part of democratic governance. To which the ability of courts to go against the political will of the government, would not only preserve the clear division of powers between the branches of government, but also protect the rule of law,[4] understanding the term 'law' in a pluralistic sense. In this regard, whilst there are barriers to accessing justice, and there are risks associated with overburdening the courts, the adversarial process still provides opportunities for parties to challenge the (in)actions of the State, in the pursuit of reconciling colonial harms. Whilst careful not to overemphasise the role of the courts, or the adversarial process, this research merely suggests the latter as one pathway in which subaltern emancipatory claims can be pursued.

Turning to the contributions of this thesis, the perspective of legal pluralism employed herein has sought to strike a balance between the legal-theoretical and the empirical-anthropological schools of thought. The intention behind striking such a balance has been in the pursuit of elevating a discussion about pluralism in the abstract, to engage with pluralism in context. This thesis has therefore relied on the legal-theoretical school of thought to construct a theoretical mapping in which the transjurisdictional diffusion of innovative legal hybrids occurs, whilst at the same time, drawing on the empirical-anthropological school to bring a

[2] Austin Sarat, 'The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions' (1984) 37 Rutgers Law Review 319, at 323-324; see Chapter 6, section 2.1, supra.
[3] Willem Odendaal, 'Ancestral Land Claims and the Law in Namibia | University of Strathclyde' (25 June 2020) accessed 4 December 2024.
[4] Lord Bingham, 'The Rule of Law' (2007) 66 The Cambridge Law Journal 67.

sense of granularity to this analysis. By contextualising concrete realities of pluralism, which have been specific and unique to each jurisdiction explored within, I have built upon theory, to provide a socio-legal lens in which pluralism can be assessed in local contexts. The latter has thus allowed for an enriched understanding of the societal implications of innovative legal hybrids, within these specific contact zones. I have investigated legal pluralism using the above lens, with the intentions of closing the gap between legal pluralism as theory, and legal pluralism as practice. Recognising that the distance between the two concepts has arguably been perpetuated by the broad nature of pluralism as a legal-theoretical discourse, one method for closing this gap is by rooting theories of legal pluralism in empirically grounded, concrete realities. The pluralism here discussed therefore veers away from grand, abstract theories, by instead, investigating local contextualisations. Such granularity has been essential within the context of the thesis, not only for understanding the ability of these legal norms to migrate, and the ability of legal norms to influence those in other societal contexts, but also, for understanding methods for facilitating co-existing pluralism in post-conflict spaces. This type of pluralism has been characterised by legal ecumenism, as the analytical benchmark for assessing co-existing pluralism within contact zones. Where legal ecumenism reflects the ability to balance rival hegemonic and counter-hegemonic normativities, it is a concept which has demonstrated the potential of courts to foster forms of reconciliation, with prospects for conviviality. Investigating such, I have nuanced an understanding of legal pluralism, through legal ecumenism, as a humble attempt at investigating pathways towards the decolonisation of legal scholarship. To which, and albeit the limitations of legal ecumenism in fulfilling subaltern emancipatory claims, I attest that it is nonetheless a concept, which by facilitating co-existing pluralism in post-conflict spaces, has demonstrated capacity to elevate marginalised voices within legal scholarship, with prospects for furthering forms of decoloniality.

To conclude, it is important to emphasise the perceptible benefits to nuancing an understanding of legal pluralism as a theory, and as a method. As a theory, the type of pluralism investigated allows for a reconceptualization of jurisprudence, whereby the facilitation of legal compromises promotes the bottom-up integration of norms. Whilst the latter has contributed to an inclusion of diverse epistemologies and ontologies, the impact of such goes one step further, by opening up spaces for the inclusion of various social and cultural normativities. Accordingly, where ecumenical pluralism within this context has focused on the pivotal role of courts, it has hence theorised the ability of judges to overcome narrow, positivistic conceptions of law, to re-imagine a more diverse, and inclusive, version of legal scholarship. Exploring legal pluralism as a theory has hence allowed for a critical rethinking of the role of courts in upholding the rule of law, whereby judiciaries deliver such, by listening, and responding, to the internal dynamics of the society in which they operate. Accordingly, and by reframing judicial practices as internally responsive, courts can insulate their authority – whilst careful not to blur the separation of powers - to withstand external pressures exerted by the political whims of the legislature and executive, or those which are part of the hegemonic agendas of globalisation (e.g., those part of the 'global call for the rule of law and the reform of judicial systems').[5] In this regard, it is possible to re-imagine the role of judiciaries as counter-hegemonic agents, who by reacting to the specific normative pulsions of their societies, can elevate local, subaltern emancipatory claims.

Moreover, and in practice, this theoretically driven pursuit has the potential to inform judicial methods for overcoming tensions between conflicting legal orders and norms. Recognising that there have been limitations to this project being desk-based, as opposed to empirically founded, there is scope to take this research further. Building upon the theoretical and methodological framework, the results from this thesis could be directly relevant for developing methods for judges to accommodate ontological tensions in plural societies with the rule of law, to then, hopefully, contribute to the decolonisation of justice systems accordingly. It therefore bears the potential of supporting training and capacity building in justice systems, whether from a Scottish national perspective, or in jurisdictions further afield. Looking forward, I intend to pursue this line of investigation using empirical research methods, where I will interview judicial practitioners, to discuss the results of this research, and unravel their cosmologies relating to the perceived benefits, limitations, and barriers, of fostering legal hybrid resolutions to overcome conflicts between opposing legal norms. Using these findings, I will be able to recommend concrete reforms for judicial reasoning and decision-making, where appropriate.

Overall, whilst this research has been a theoretically driven pursuit, it has created the essential methodological foundation in which future research will stem. With the intent of further investigating practical methodologies for facilitating co-existing pluralism in societies, this research opens up opportunities for the re-imaging and re-structuring of law, hopefully, in a more decolonial manner.

[5] Boaventura de Sousa Santos, Toward a New Legal Common Sense: Law, Globalization, and Emancipation (3rd edn, Cambridge University Press 2020), at 370; see Chapter 2. section 3.3, supra.

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