PERSONHOOD AS 'TRANSITIONAL JUSTICE': EMANCIPATING INDIGENOUS CLAIMS TO THE ENVIRONMENT

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ABSTRACT

The paper seeks to introduce theoretical concepts in environmental law and connect them with juridical practices to study the merits and possibilities of an environmental personhood regime. The first part of the paper explains the historical roots of environmental degradation, including mass extractive colonial practices and draconian protectionist laws, which pushed environmental stakes away from indigenous communities. The paper then introduces the reader to transitional justice as an alternative imagination to environmental law, focusing on reclaiming indigenous rights and claims over the environment. Finally, and most extensively, environmental personhood, i.e., vesting legal rights to environmental sites themselves, is analysed in the context of this environmental reclamation by indigenous peoples. Insight is offered into whether legal personhood to environmental sites has succeeded in indigenous protection and how the regime can and should evolve. By critically examining the prospect of environmental personhood in the Global South, the paper ascertains an alternative to the status quo of environmental courts and other policy practices in the Global South.

KEYWORDS: environment, personhood, transitional justice, Global South, environmental rights, indigenous peoples.

1. INTRODUCTION

Environmental degradation has increased manifold over the last two centuries. As a result, humanity must confront questions of responsibility for the damage, the mitigation of future damage, and the restoration of damaged natural resources. Rather than viewing these questions in isolation, this paper seeks to carefully position the history of land, air, and water degradation as both a historical wrong and a continuing process of hyper-capitalist

intervention. The primary focus is on the environmental destruction in the Global South, and by extension, on its basis in imperialism. By acknowledging the imperialist roots of this 'man-made' disaster, it becomes increasingly apparent that modern litigation modelled upon the Anglo-American tradition is inadequate in truly emancipating the environment and communities associated with it. Therefore, as an alternative legal imagination, environmental personhood – although unlikely to replace the developmental approach – fundamentally restructures the environmental legal system in the Global South by promoting litigation, transitional justice and reparations, and re-empowering indigenous communities, can potentially protect the environment.

Exploitative colonialist economic systems and the mass-scale plundering of resources from the colonies in the Global South have resulted in long-term challenges in post-colonial States, and the modern environmental crisis is a consequence of the historicity of these 'policies'. Even after the decolonisation of countries in the Global South, the remnants of imperialism last in the independent nation-States in newer forms, encompassing colonial-era laws, political systems, economic institutions, and neocolonialism, leaving them to tackle not only the travesties of the past but also their consequences in the present. The modern-day environmental challenges are not merely physical but also have the social, cultural, economic, and psychological underpinnings in the damages faced by the indigenous communities.[1] Hence, justice theories need to include the fourth dimension, the vitally important 'socio-ecological' realm, if they are to serve as conceptual resources for advancing indigenous peoples' rights and needs related to their environments.[2] It is important to understand the link between the environment and imperialism for a deeper understanding of the contemporary environmental crisis and to devise more pragmatic solutions to overcome the environmental problem. This root cause approach will help identify an accurate account of the origins of environmentalism in the post-colonies emanating from policies in the West. It will also provide an

[1] Joseph Murphy 'Environment and Imperialism: Why Colonialism Still Matters' (2010) Sustainability Research Institute University of Leeds 4,7.
[2] Lana D. Hartwig, Sue Jackson, Francis Markham and Natalie Osborne 'Water Colonialism and Indigenous Water Justice in South-Eastern Australia' (2022) 38(1) International Journal of Water Resources Development 30, 30

understanding of the legacy of colonialism and how it continues to shape contemporary environmental challenges through processes of imperialism operating today.[3]

2. THE COLONIAL ANTECEDENTS OF ENVIRONMENTAL DESTRUCTION:

Colonialism refers to a period of formal political control over lands and exploitation of their resources for economic gains. Colonisers saw themselves as chosen men of God.[4] The facade of Christian obligation behind their expeditions of seeking control of frontiers which they considered uncivilised, barbarous, and in need of saving.[5] George Muller, a Christian evangelist, was unmistakably clear of this notion and said:

> Humanity must not, cannot allow the incompetence, negligence, and laziness of the uncivilised peoples to leave idle indefinitely the wealth which God has confided to them, charging them to make it serve the good of all.[6]

Hence, the indigenous people of the colonised lands were seen as less than 'human' and material resources to be exploited. Such categorisation alienated indigenous communities from their ancestral lands and resources, allowing unquestioned damage to the environment and natural sites.

Moreover, an important process that connects environmental degradation to colonialism is the commodification of nature for the purpose of commerce. The colonial economy and productive enterprises depended on commodities, such as tea, coffee, cotton, wool, sugarcane, lumber, rubber, tobacco, gemstones, and metals, which were exported from the colonies to Europe, where they were consumed in high demand.[7] Productive frontiers created plantation and pastoral enterprises, resulting in adverse effects to indigenous people, the natural environment, and the land in different ways. Such appropriation of land, wholesale modification of the indigenous ecology, and

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[3] Murphy (n 1) 4.
[4] Roxanne Dunbar-Ortiz, *An indigenous peoples' history of the United States* (Beacon Press 2023) 48.
[5] ibid.
[6] Robin DG Kelley, Aimé Césaire, and Joan Pinkham, *Discourse on Colonialism* (New York Press 2000) 39.
[7] Dunbar-Ortiz (n 4) 24.

consumerism of natural resources - concepts unfamiliar to indigenous people – deprived them of their right to these resources of their indigenous lands. Moreover, the extraction, processing, and packaging of goods for export created a colossal environmental footprint, while colonialism's commercial endeavours extended to ports and shipping channels that polluted indigenous waters.

Technology and modern agriculture practices subjugated the environment to what benefitted the larger colonial agendas. Technology and infrastructure were particularly used to control the flow of water in the colonies. They were considered more efficient ways of water resource management than existing indigenous approaches. Similarly, European agricultural practices, techniques, and agro-chemicals were imposed to enhance agricultural production. While such interventions were initially efficient for colonial interests, they resulted in lasting consequences for the indigenous communities.

Such effects can be seen in former colonies which have modern day effects as well. For example, in India, the British colonial policies caused food insecurity by reorienting domestic agriculture towards overseas markets, prioritising cash crops like cotton, jute, and indigo over staple food crops that were essential to meet consumption needs of the local populations.[8] The commodification of land for cash crops often resulted in monoculture practices that depleted soil fertility. Moreover, over-vegetation in the pursuit of meeting the requirements of global markets also resulted in soil exhaustion and disruption of local ecosystems and biodiversity.[9]

Similarly, in Egypt, the construction of large dams by colonial administration contributed to salination problems, creating a dependency on agricultural chemicals to prevent the Nile's annual inundation of surrounding land and silt deposition.[10] This, in turn, significantly impacted the agricultural practices and sustainability in Egypt.[11] In the aftermath of colonial rule, many former colonies faced the challenge of rehabilitating degraded soils because of the

[8] David Washbrook 'The Commercialization of Agriculture in Colonial India: Production, Subsistence and Reproduction in the 'Dry South' (1994) 28 Modern Asian Studies 129, 130
[9] ibid 158.
[10] Lotte Hughes and William Beinart, *Environment and Empire* (OUP 2007) 130-147.
[11] ibid.

intensive cultivation for export-oriented agriculture. The prioritisation of profit over sustainable land management left a legacy of impoverished soils incapable of supporting diverse ecosystems or traditional agricultural practices.

It is crucial to note that colonialism strategically employed legal and policy frameworks in collaboration with State authorities and governments to legitimise commodification and exploitation of nature for colonial commerce to operate beyond mere piracy and plunder. The colonial authorities were aware of the unprecedented environmental degradation of the colonised lands, and quite paradoxically, the impetus to conserve the environment for longer-term human use was a product of the colonial mindset to ensure their economic advantage. However, the colonial environmental policy further alienated the land from indigenous communities through a process called 'ecological enclosure', under which local people were declared responsible for ecological destruction and incapable of managing their resources effectively.[12] Ecological enclosure encompasses various policies and practices with widespread and long-term consequences for indigenous communities and their land. European colonisers in southern Africa, particularly the Dutch East India Company and later European settlers, also introduced such policies and practices to effectively control the land resources which had profound ecological implications for indigenous people.[13]

The imposition of European land tenure systems, farming methods and the establishment of reservations disrupted traditional nomadic herding practices and indigenous agricultural systems. The Khoikhoi, San, and Bantu-speaking communities of southern Africa, who were traditionally pastoralists, were forcibly displaced and settled into fixed areas.[14] It also resulted in overgrazing and soil degradation of the lands in which natives were forced to settle in with their animals. As the European colonisation expanded into the interior of Africa, it encroached upon the previously untouched landscapes and caused dispossession of land and resources for the indigenous communities. Later,

[12] Robert Cribb 'Conservation in Colonial Indonesia' (2007) 9(1) Interventions 49, 50-61.
[13] Catherine M Coles 'Land reform for post-apartheid South Africa' (1993) 20 BC Envtl. Aff. L. Rev. 699, 703-704.
[14] ibid 703.

the establishment of reserves and the denial of land rights to black South Africans under land policies during the apartheid regime further severed the connection of native populations to the environment and traditional ways of living.[15]

European colonial powers subverted indigenous practices and knowledge in favour of extractive industries. In the Amazon rainforest, indigenous communities traditionally practiced agroforestry and cultivated crops beneath the canopy.[16] The arrival of European colonisers, however, led to mass clear-cutting for monoculture plantations, which disrupted not only the environment but also the intricate local knowledge systems of indigenous peoples. The alienation of indigenous communities from their lands during colonial rule was not only an act of dispossession but a deliberate strategy to weaken traditional connections to the environment. This perpetuated a mindset that prioritised economic gain at the expense of both indigenous communities and the environment. Colonisation, therefore, not only destroyed the landscape, but also distorted the relationship between indigenous peoples and their environment, leaving a legacy of environmental challenges that continues to be felt in the Global South.

This imperialist conceptualisation of environmental use and 'access' persists in more complex ways in contemporary times, both in terms of consumer-centric 'lifestyle choices' and the larger role of transnational corporations and their subsidiaries that function with relative impunity to wreak environmental havoc upon 'developing States'. This insatiable capitalistic appetite of global economies and corporations is firmly rooted in exploitative practices that prioritise profit over environmental sustainability. The exploitation of nature and degradation of the environment in the form of mining for raw material and mineral reserves which started during African colonisation continues even today under the banner of ecological imperialism. Large-scale mining in African countries serves the interests of modern day industrialism and capitalism, and has wreaked havoc on the ecosystem of mining communities,

[15] ibid 712-716.
[16] Nidia Catherine González and Markus Kröger 'The potential of Amazon indigenous agroforestry practices and ontologies for rethinking global forest governance' (2020) 118 Forest Policy and Economics 102257, 102258-102260.

their livelihood strategies, and their connection with their land.[17] Moreover, the neocolonial continuation of exploitative colonial agricultural and industrial practices further perpetuates environmental degradation in post-colonial landscapes in the form of deforestation, soil degradation, water pollution, depletion of biodiversity and disruption of ecosystems. These environmental challenges highlight the persistent influence of imperial economic interests on the ecological well-being of regions, particularly the Global South, that are striving to meet contemporary global market demands.[18]

3. MODERN CAPITALISM AND THE REGIME OF ENVIRONMENTALISM

The arguments presented above prove the critical and interdependent relationship between the environmental crisis and colonialism. Thus, it is imperative to acknowledge that the consequences of colonialism are prevalent for indigenous people and nature around the world, in the subtler form of imperialism today. and need immediate redress. Modern-day imperialism predominantly manifests itself in the form of global capitalism through both consumer choices and corporate endeavours. Societies and environments were modified by newer technologies, practices, and ideologies of living, which have become normalised around the world and contribute to maintaining the hegemony of colonialism. An illustration of these fundamental lifestyle changes can be witnessed in the evolution of wool consumption during colonisation, which continues to influence the modern-day consumer behaviour and demand under capitalism.

In the 19th century, increased wages and improved living standards enhanced people's purchasing power and modified consumer choices, thus shifting the notions of what is essential to live a normal and pleasurable life.[19] Industrial advancements enabled larger quantities and different types of cloth production, which caused a boom in wool exports from colonies to satisfy the demand. Hence, millions of fine-wooled merino sheep were introduced

[17] Jasper Abembia Ayelazuno and Lord Mawuko-Yevugah 'Large-scale mining and ecological imperialism in Africa: the politics of mining and conservation of the ecology in Ghana' (2019) 26(1) J Polit Ecology 243, 243-245.
[18] Washbrook (n 8) 155.
[19] C.B Macpherson, *The Political Theory of Possessive Individualism* (OUP 1962) 176, 177.

artificially in colonies and used for wool harvesting, which exhausted natural pastures as these sheep were more aggressive grazers than indigenous animals.[20] Over time, the cloth industry caused severe soil run-off and erosion, affecting the natural ecosystem and transforming the environment of colonies. The colonialism-driven changes in metropolitan centres were equally profound in the colonial periphery, and their mutual interactions were significant.[21] Such lifestyle changes extend to most commodities visibly because of the shift from a raw material-based industry to a manufacturing industry of readily accessible 'products'. The overarching observation of such a 'global' lifestyle shift is that the empire revolutionised the way of life of both the colonisers and the colonised, which remained a reality even after the colonies' independence. The consumerism that emerged during the Industrial Revolution has become an essential thread of the modern social fabric and causes different environmental challenges.

Furthermore, a new form of imperialism operates at the global level that defines the neo-colonial experience of the Global South due to the extra-territorial impact of multinational corporations (MNCs). The countries of the Global South are still recovering from the economic effects of colonisation and rely on industrialisation and foreign investment for their development. National development strategies exploit the peripheries of so-called post-colonies and have been likened to 'internal state colonialism'.[22] Developing countries are home to the global supply chains of multinational enterprises because of lower labour costs, cheaper raw materials, untapped natural resources, and ineffective domestic mercantile laws. The Bhopal Gas disaster in India and oil spills in Nigeria are a few examples of some of the deadliest ecological disasters caused by MNCs in developing countries.[23] However, the MNCs and their home countries turn blind eyes to man-made environmental catastrophes leaving the victims with devastated lands and inadequate compensation.

[20] Leigh Dale, *Empire's Proxy: Sheep and the Colonial Environment* (Brill 2007) 1, 2.
[21] Richard Drayton, *Nature's Government: Science, Imperial Britain, and the 'Improvement' of the World* (Yale University Press 2000).
[22] Murphy (n 1) 23.
[23] Martin Khor 'The Double Standards of Multinationals', *The Guardian* (London, June 25 2010).

Conventional litigation has had limited success in bringing about justice or compensation for communities and their natural environment. This is because of legal principles like *locus standi*, and a lack of litigatory and judicial awareness on the subject particularly in the Global South. MNCs have been held accountable in some instances, especially within their own States. A prominent example is one in which Walmart was asked to pay $81 million for handling hazardous substances in their stores as a violation of the federal Clean Air Act in the US.[24] Nevertheless, the existing environmental legal order has been insufficient in dealing with this transnational phenomenon despite some momentum in the Global North.

Consequently, environmental tribunals have attempted to fill the gap in the development of environmental law as specialised judicial and administrative decisions bodies. There is however a key issue with a regime that solely relies on specialised 'tribunals' as a universalist solution to the problem. In many instances of environmental policy creation, judges from ordinary courts would act as the presiding authorities for these tribunals. This is not a problem in itself; the judiciary, in the ordinary sense, is equipped to handle subject matters that are expansive and wide-ranging. Yet, it has been purported with the growing advent of climate science that, unlike most other subject matters, the environment requires a fundamental resort to technical science.[25] This is also in line with international law principles like the precautionary principle or sustainable development, which require a particular scientific and technical approach to the question.[26]

In the Global South, there is an inherent limitation in finding enough members of the judiciary (or otherwise) that have a sufficient understanding of handling questions of environmental disasters, climate justice and ascertaining the scientific evidence in the relevant case. This is primarily an issue of capacity-building noted in China following its move to protect its 'ecological civilization':[27] as China created specialised environmental panels,

[24] *The People v Walmart Inc* [2020] A155886 (Cal Ct App)
[25] Brian J Preston 'Characteristics of successful environmental courts and tribunals.' (2014) 26 Journal of Environmental law 365, 378.
[26] ibid 389.
[27] Rachel E Stern 'The political logic of China's new environmental courts.' (2014) 72 The China Journal 53, 58.

it faced the inevitable issue of creating a regime that, without a larger capacity in environmental litigation and justice, faced immense bureaucratic challenges. While China has since recovered to create one of the largest environmental circuit court networks in Asia, that is an economic question rather than simply one of improved policy since 2003. However, as of today, the Chinese environmental regime has been at the forefront of exercising criminal jurisdiction of environmental crimes[28] which has been successful in holding large corporations accountable. Nevertheless, this limitation of specialised expertise and knowledge in the Global South has inevitably meant that constitutional courts, with much more significant funding, access and capacity have been more instrumental in tackling legal environmental questions of significance.

Upon examining the environmental tribunals regime in numerous Global South States, it is evident that it operates closely in line with how constitutional courts function. Constitutional courts in the Global South have been the flagbearer of environmental justice, including expansive interpretations of constitutional rights to include a right to the environment.[29] Such interpretations are imperative to an environmental transitional justice model as it would require a similar creative interpretation of rights and responsibilities as the higher courts in States like Pakistan and the Netherlands have done.[30] Yet, a simple top-down approach by the higher constitutional courts is insufficient. The higher courts with immense case backlog in the Global South are not as accessible for personalised environmental claims as a small environmental tribunal may be. Secondly, in most of these cases, this liability is vested in governmental authority[31] that is pushed to do more. As a result, other contributors like MNCs are simply not deemed as relevant when superior courts interpret and create environmental 'rights'.

Therefore, environmental tribunals are merely administrative bodies, where investigative procedure trumps substantive rights. Therefore, the evidentiary

[28] ibid 67.
[29] Robert V Percival 'The Greening of the Global Judiciary.' (2016) 32 J. Land Use & Envtl. L. 333, 334.
[30] ibid.
[31] ibid 342.

requirements of an environmental suit, coupled with the lack of extra-territorial jurisdiction of these tribunals and even superior courts to indict MNCs, limit the efficacy of providing true 'environmental justice'.[32]

4. PERSONHOOD AND TRANSITIONAL JUSTICE AS AN 'ENVIRONMENTAL FRAMEWORK'

As gathered from the discussion, the environmental crisis requires pragmatic interventions to rectify historical injustices, improve the present, and ensure a sustainable future. Transitional justice is one theoretical model that justifies the need for rectifying these historical and current wrongs to the environment. Using this framework, environmental reparations can serve as restitution for indigenous communities, which will be highlighted later in the article. However, reparations are rooted in the past experiences of communities and hold a symbolic value instead of offering a futuristic solution to environmental issues. Within the model of transitional justice, the concept of granting 'environmental personhood' to natural sites offers an innovative approach to environmentalism, potentially establishing a new environmental order in the Global South. Unlike the post-colonial adoption of Anglo-American legal traditions and environmental policies that overlook historical environmental degradation and the rights of indigenous communities, 'environmental personhood' integrated with transitional justice can pave the way for real emancipation for both communities and nature.

Environmental personhood is the granting of legal personhood for environmental sites to grant them rights to initiate litigation. Similar to company law, environmental sites can, like companies, sue in their own right, and in turn, be sued. This legal 'persona' means that the site is registered, much like a company, and in some sense, is equivalent to the rights created by virtue of citizenship, which make 'citizens' of a State legal subjects.[33]

[32] Marilyn Grace Lee 'How Environmental Tribunals Contribute To Important Advances in Environmental Laws' (2012) University of Toronto 43
[33] Matthew Miller 'Environmental Personhood and Standing for Nature: Examining the Colorado River Case' (2018) UNHL Rev 17, 355-357.

The historical injustices both to the environment and its indigenous caretakers meted out by the colonial expansionist project reflect several salient observations. Firstly, it reflects the inherent limitation of using the same colonial structures, like the law, as the sole mechanism to protect future environmental claims. This is because the colonial expansionary laws have themselves separated the individual from the environment as a disjointed subject, whose only interaction with the environment is then perceived to be a transactional one.[34] For example, the relationship of the national reserve parks in former African colonies is seen largely in the same structure as separating the indigenous claims to the environment and segmenting environmental subjects as objects of science and protectionism.[35]

A more pertinent example to this is the regime of riparian rights. In India for example, the principle of upper and lower riparian is legislated through the Madhya Pradesh Irrigation Act, the North India Irrigation and Drainage Act and other similar statutes.[36] The underlying important point is highlighted as 'a vested right to the water' as 'a form of private property'.[37] Therein, private property replaced any indigenous claim to the river or any other natural body for that matter. Consequently, owning property was made the condition precedent for claiming a right to the access to resources and to the water itself. One sees this a century later too in the much-celebrated *MC Mehta v Union of India*,[38] which reaffirmed the riparian rights to the Ganges in a claim against pollution, although contingent to the petitioner possessing land title bordering the Ganges.

Transitional justice must be understood as an essential process to this decolonisation attempt. Colonial policies at large were not just instrumentally harmful to the environment but also to indigenous communities which benefited from the river pre-colonialism, but also in turn protected it. In the

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[34] ibid 357-358.
[35] Paul A. Garber, Alejandro Estrada, Vinícius Klain, and Júlio César Bicca-Marques. 'An urgent call-to-action to protect the nonhuman primates and Indigenous Peoples of the Brazilian Amazon.' (2023) American Journal of Primatology.
[36] Christopher V. Hill 'Water and Power: Riparian Legislation and Agrarian Control in Colonial Bengal.' (1990) 14 Environmental History Review 12, 20.
[37] ibid 14.
[38] *MC Mehta and Others v Union of India* [1987] AIR 1086.

vast Hindu exegesis on rivers, the Ganges and the Yamuna were the life of the community, the site for pilgrimage, for rituals and for subsistence of the communities themselves.[39] Whether it was fishing, or moving across inaccessible areas of the country, it is evidently clear that the river was beyond mere hydration for the indigenous collective.[40]

At its inception, the model for transitional justice is a move towards restoring the indigenous imagination to the river itself. It uses the corpus of modern policy-making to enshrine further rights. Personhood is an important way in which the modern legal regime can still support the disenfranchised relationships to the environment. By creating a 'living Ganges', for example, it moves the river away from the language of private property into a lexicon of indigeneity, of a living and breathing environmental entity itself.

While this lexical step is important, a far more radical future imperative is the redistribution of the rights themselves. Once again, the *MC Mehta*[41] example is relevant. By granting personhood to the Ganges, the petitioner is no longer a landowning subject whose only claim lies in his property and damage to it. Rather, the right itself shifts to a less transactional imperative, which is more inherent to the river form. The appointed guardians to the river are then subjects which protect the river in its own right and, in turn, increase the possibility of claims arising in courts upon any pollution or environmental degradation. By transitioning justice to mean an indigenous claim, personhood protects the most vulnerable and offers to the court a means to enforce the rights that go beyond a transactional anthropocentrism,[42] and into further possibilities of claims arising against multinational corporate actions and unsustainable development projects. In the ideal sense, personhood means that the river itself is the central question, and the balancing act of environmental harm and economic development that many courts in the Global South have carried out is only secondary to it.

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[39] Cristy Clark, Nia Emmanouil, John Page, and Alessandro Pelizzon 'Can you hear the rivers sing: Legal personhood, ontology, and the nitty-gritty of governance' (2018) 45 Ecology LQ 787, 790.
[40] ibid.
[41] *MC Mehta and Others v Union of India* (n 38).
[42] Nidia Catherine González and Markus Kröger 'The potential of Amazon indigenous agroforestry practices and ontologies for rethinking global forest governance' (2020) 118 Forest Policy and Economics 102257, 102258-102260.

However, at the policymaking level, several questions as to how the environment is actually equipped in its 'legal persona' remain answered. Perhaps the most rudimentary question is what constitutes these 'environmental sites to protect'. A purview suggests that entities like rivers, basins and reefs have been at the centre of this movement; however, because the threshold offered by most jurisdictions is the level of degradation, the principle can undoubtedly be extended to include trees, forests and even the air, as illustrated by the Ecuadorian Constitution. The larger question, however, remains: who brings about a claim on behalf of the environment?

There are broadly two approaches to this. Firstly, the model followed in New Zealand and the Whanganui River entrusts the custodian role to the indigenous Maori tribe, which has its own councils that are specifically entrusted with the protection of the river. The second model, which India adopted in the case of the Ganges River, entrusts litigation to three officials who are, in turn, appointed by the mayoral authority of the towns enclosing the Ganges. The former is an instance of indigenising modern law because it acknowledges the basis of granting personhood to the sacredness of tribal law prior to colonisation[43] and recognises the colonisation of New Zealand as a historical wrong to the environment as well as to its people. In contrast, the Ganges model is an attempt to co-opt personhood with modern litigation, where the local government is deemed the primary stakeholder in representing the environment.[44] The concern with this has much to do with limited State interests and the enticing alternative of 'development'. Moreover, this approach sidelines indigenous stakes in the environment. This is imperative because of the harm afforded to indigenous communities by environmental degradation, and secondly, because the radical re-imagination of the purpose of personhood that indigenous communities envision firmly lies in creating a transitional justice model that locates environmental degradation in its imperialist roots.

[43] Toni Collins and Shea Esterling 'Fluid Personality: Indigenous Rights and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 in Aotearoa New Zealand' (2019) 20 Melb. J. Int'l L 197, 202.
[44] Clark et al. (n 39) 790.

Transitional justice is a robust jurisprudential tool in its own right and therefore warrants discussion before illustrating the role of environmental personhood in its larger paradigm. Arguably, it emerged after the trials of Nuremberg to redress a reeling Jewish community from the Holocaust. The fundamental question that transitional justice posits is how to usher a new socio-legal regime after successful emancipatory struggles, which have more often than not, been marred with violence legitimised by pre-conflict laws.[45] Considerations of transitional justice can be contextualised in the post-Algerian liberation movement period in 1972: how was the independent Algerian State going to transition from a violent colonial history of law and policy to a modern sovereign economy? What will the role of France be in redressing the wrongs of its colonising history? How will the new State be equipped to offer recompense to millions of lives permanently affected by imperialism? The transitional justice model offers tangible solutions to propel this new socio-legal regime, and for the purposes of this paper, this model albeit focused on human rights violations by the coloniser, can and should be extended to include environmental wrongs by the same imperialist order.

There are two distinct approaches in transitional justice that can explain the role of environmental personhood in transitioning the Global South into a sustainable present and future. Firstly, the restorative model seeks to 'restore' a turbulent present into a state of relative stability through various means including 'rights', reparations, and the formation of commissions.[46] The purpose is not to restore a 'tranquil' pre-conflict state of affairs, but rather to acknowledge the violence imposed by the imperialist, and to move forward by reaffirming the dignity and rights of affected parties. In the context of environmental violations, the model offers nuance because it is impossible to revert to the pre-industrial and pre-imperial State because of both the level of permanent damage afforded to the natural environment and the sheer rate at which modern development continues to occur. Rather, the restorative model is useful because it acknowledges the man-made nature of this catastrophe inflicted by the imperialist order, before offering solutions in restoring the plight of the environment.

[45] Scott Veitch and Emilios Christodoulidis, *Jurisprudence: Themes & Concepts* (Routledge 2017) 253.
[46] ibid.

Article 14 of the Ecuadorian Constitution[47] is a useful example, which uses the words, '*sumac kawsay*' or 'clean living' as the basis for providing environmental personhood to nature,[48] in turn, indigenising environmental protectionism and decolonising environmental discourse at a rudimentary level. Restorative justice may not 'restore' nature to the era of indigenous civilisations, but it provides an alternative in understanding the role of imperialism and the unique cultural outlook of protecting the environment that lies firmly in the idea of a living and breathing natural world which warrants legal 'personhood'. Nature, or 'Mother Earth', was most often imagined as alive and autonomous by indigenous communities through stories of river goddesses, for instance,[49] and a restorative model of justice helps preserve and codify this belief system through creating legal personhood for these rivers.

Within the model of restorative justice also exists the idea of retrospective effect, which, when combined with the operation of personhood, can tangibly benefit indigenous communities. The retrospective effect of the law refers to action that is taken after the occurrence of catastrophes, in spite of the fact that the catastrophe may have been legally sanctioned. The most common way this operates is through economic reparations, where aggrieved communities are monetarily compensated for the wrong inflicted upon them by a past socio-legal regime.[50] Reparations are a common feature of post-genocide regimes, and should be extended to parties like environmental refugees aggrieved by man-made environmental catastrophes. This is because of the systemic nature of the latter, often sanctioned by economic policies like building dams that dislocate river-based communities for example. However, the Global South being plagued with problems of corruption and political instability has often meant that reparative programs have failed to trickle down to aggrieved parties, especially where reparation funds have been procured and managed by government officials.

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[47] Constitution of the Republic of Ecuador 2008, art 14.
[48] Erin Fitz-Henry, *Decolonizing personhood" in Wild Law—In Practice* (Routledge 2014) 133-148, 139.
[49] Kelly D Alley 'River goddesses, personhood and rights of nature: implications for spiritual ecology.' (2019) Religions 109, 502-503
[50] Veitch and Christodoulidis (n 45) 252.

In the case of environmental reparations, which, although rare, are not unheard of, environmental personhood mitigates the risks that are rife in governmental reparation programs. If the New Zealand model of indigenous guardians is adopted, reparations from corporations and potentially 'developed states' would directly be given to the environmental site itself.[51] This, in turn, means that reparations are aimed at economically helping restore the environment, i.e., funds for massive plantation drives would be entrusted to the indigenous guardians of the environment. Because these guardians have an active stake in the plight of the environment, this presents a greater possibility of the reparations being utilised for environmental site preservation and benefits to the local community, as compared to the alternative of governmental management. If the communities that are directly impacted by climate change are involved in the utilisation of these funds, environmental personhood can bring tangible benefits to the community.

The second model of transitional justice relevant to this discussion is the distributive justice model, which seeks to 'distribute' rights and liabilities through gauging individual needs and outcomes.[52] A billionaire tax akin to the Scandinavian model is one example, where to distribute resources in an egalitarian way, billionaires are charged a higher percentage of tax. When distributing environmental rights across society, legal personhood for the environment can potentially lead to a distributive model to the extent of rights, if not resources. Generally, an individual needs to possess *locus standi* or a right to sue that is conferred upon the cause of action. What this means is that in conventional environmental litigation, one needs to be an aggrieved party, i.e., having lost one's house to flash floods to bring a suit in court. Whilst this takes into account general principles of equality, it ignores wider issues of access to justice, especially because of litigation fees.

However, environmental personhood offers an alternative to the rigidity of 'cause of action', and, instead, grants the right to litigation to stakeholders most impacted. This has already emerged through public interest litigation, where concerned members of civil society can bring an environmental suit

[51] Collins and Esterling (n 43) 212.
[52] Veitch and Christodoulidis (n 45) 256.

without a cause of action.[53] Nevertheless, public interest litigation is a phenomenon that requires social and economic capital and thus remains restricted to the upper strata of society. With environmental personhood entrusted to indigenous guardians, the scope of litigation is extended to include the concerns of parties that are disproportionately affected by climate change. This has been further extended by the potential argument that damages won in civil suits can be dispensed to the guardians of environmental sites directly, facilitating investment into climate action efforts or future legal expenses.[54] Personhood therefore creates a more egalitarian model that distributes these rights to all aggrieved parties, even parties that would ordinarily not possess them,[55] both by extending the right to bring a claim to more individuals as well as to those with little access to an expensive judicial system.

5. LIMITATIONS TO ENVIRONMENTAL PERSONHOOD IN ACTION

Despite its benefits, environmental personhood is not an airtight solution to a significant issue. It is only as successful as those who implement it – the Ganges in India, despite the new legal model, continues to be one of Earth's most polluted rivers. The premise to 'development' is the oft-stated question: if the West could 'develop' through industrial policies that had no regard for the environment, why must the Global South, as many of its States emerge as key economic players, be restricted by modern environmental regimes? This, coupled with an incessant need to develop large-scale industries, which have lax environmental protocols and energy sources to save costs, pushes back against any environmental action.[56] Simultaneously, States within the Global South have incentivised companies to invest into their local economy, which has again created environmental violations with impunity. The Thar Coal Project in Pakistan is an astute example; Chinese companies have been incentivised to help Pakistan produce energy through coal, an air pollutant.

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[53] Christian Schall 'Public interest litigation concerning environmental matters before human rights courts: A promising future concept?' (2008) 20 Journal of Environmental Law 417, 444

[54] Kaitlin Sheber 'Legal Rights for Nature: How the Idea of Recognizing Nature as a Legal Entity Can Spread and Make a Difference Globally' (2020) 26 Hastings Envt'l L. J 147, 165.

[55] RiverOfLife, Martuwarra, Alessandro Pelizzon, Anne Poelina, Afshin Akhtar-Khavari, Cristy Clark, Sarah Laborde, Elizabeth Macpherson, Katie O'Bryan, Erin O'Donnell, and John Page 'Yoongoorrookoo: The emergence of ancestral personhood' (2021) 30 Griffith Law Review 505, 518

[56] Clark et al. (n 39) 802.

While the rest of the world moves away from coal projects, the need for investment and fulfilling the energy requirements of an emerging economy has pushed environmental action as secondary to 'development' and 'modernisation'.[57] This makes environmental personhood unlikely to be adopted as a legal right, to protect companies that provide a positive rate of investment to the government from the 'hurdle of litigation'. But more importantly, even if environmental personhood is granted, the jurisprudence of courts is likely to favour future investments into the local economy rather than rights of the environment or of indigenous communities, which already have little to no access to justice in the Global South.

A second limitation to environmental personhood is linked with the preceding point on the conflicting interests of other stakeholders. If governmental control is vested in the legal right of personhood, as with the case of the Ganges River in India, the glaring issue of conflicting interests becomes more apparent. Governmental action that prioritises industrial development inevitably creates a conflict of interest with governmental interest in litigating on behalf of the environment. In States like India, where commission cuts for governmental authorities are regular features of major industrial projects, governmental authorities that benefit from environmentally exploitative projects are not incentivised into launching a suit on behalf of the environment upon those very companies. Arguably, the New Zealand model mitigates this conflict of interest where the interests of the indigenous community are often markedly different from governmental interests in pursuing large-scale industrial projects.[58] Similarly, one can argue that the threat of lobbying by corporate groups has always persisted against radical changes in environmental law; yet, popular movements, like the Colombian fight against dictatorship, have successfully implemented rights like environmental personhood through collective action and constitutional overhaul. Whilst courts in the Global South have generally shown varying support for environmental suits, the fight for protecting the environment could continue through street protests rather than court battles, until

[57] Muhammad Amir Raza, Krishan Lal Khatri, Muhammad Ali Memon, Khalid Rafique, Muhammad Ibrar Ul Haque, and Nayyar Hussain Mirjat 'Exploitation of Thar coal field for power generation in Pakistan: A way forward to sustainable energy future' (2002) 40 Energy Exploration & Exploitation 1173, 1180.
[58] Collins and Esterling (n 43) 208.

community interests of saving the environment are prioritised over urban 'development', or a mutually inclusive path between environmental protection and industrial 'development' is found.

6. CONCLUSION

To conclude, this article attempts two ambitious interventions into an environmental discourse that is heavily tilted towards the 'developed world'. Firstly, it grounds disastrous environmental consequences of the contemporary Global South in a historical and ongoing existence of imperialism, which continues to systemically act as a barrier to change. Secondly, it offers a radical reconceptualisation of environmental justice through the avenue of 'environmental personhood', and seeks to couple it with transitional justice models, to delineate what a 'transition' to an inclusive model of climate justice will look like. The law is only one tool, amongst many, that must therefore be instrumentalised to prevent history books from reflecting upon the 21st century as the darkest of all ages, with a complete and utter disregard for nature, and by extension, humanity's preservation.