9

Corporations and the Duty of Care for Nature? An *Amicus Curiae* for the Case of *Lungowe & Others v Vedanta Resources PLC & Konkola Copper Mines*

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Introduction

The case of *Lungowe & Others v Vedanta Resources PLC & Konkola Copper Mines* was examined by the UK Supreme Court in 2019.[1] The case concerns the impact of mining in Zambia and the liability of corporations for human rights violations and environmental damage. The claimants were 1,826 Zambian citizens who brought proceedings against Vedanta, a UK-domiciled multinational company, and its Zambian subsidiary, Konkola Copper Mines (KCM). The case followed the high level of pollution of the watercourse in the area surrounding Nchanga Copper Mine, one of the largest copper mining sites in the world. In their pleadings, the claimants argued that they had suffered loss of income through damage to their land and waterways due to the defendants' toxic effluent discharges. They also claimed that they suffered personal injuries as a result of having to use and consume polluted water.

The claimants sought damages, remediation and cessation of the pollution, which was having a huge impact upon their daily lives. When starting the proceedings in August 2005 in the English Court, both defendants (Vedanta and KCM) contested the authority of the English courts and filed an application seeking a declaration that the English Technology and Construction Court did not have jurisdiction to try the case.[2] In its 2016 judgment, the Court ruled in favour of

[1] *Lungowe & Others v Vedanta Resources PLC & Konkola Copper Mines* [2019] UKSC 20.

[2] The English Technology and Construction Court is a subdivision of the High Court of Justice (King's Bench Division).

England as the most appropriate jurisdiction for the resolution of the claims, which it allowed to proceed. However, both defendants appealed the first-instance decision and their appeals were heard by the Court of Appeal in 2017, which upheld the decision of the lower court. The defendants then appealed to the Supreme Court. After the hearing, which took place in January 2019, the Supreme Court declared that the claimants did have a good arguable case that Vedanta owed them a duty of care, and that the case could be examined by the courts in England.

At the heart of this judgment on the duty of care of parent companies lies the key question of whether Vedanta had sufficiently intervened in the management of the mine (owned by KCM) such that it assumed a duty of care to the claimants. The liability of a UK parent company had been considered in two previous cases by the UK courts,[3] where proceedings were issued in England against the UK parent company for events that occurred in Nigeria and Kenya, respectively. In both cases, it was found that there was no good arguable case that a duty of care existed. The case against Vedanta examined by the Supreme Court highlights the need for multinational companies to be aware that non-UK claimants may be able to bring claims against them in the English courts where they have a UK parent company.[4]

From this perspective, this judgment is at the centre of the ongoing legal battle about ensuring more accountability for multinational corporations acting under the guise of subsidiary companies in countries where the rule of law is less enforceable. A serious gap exists concerning the liability of companies for such extraterritorial environmental harms. Hence, this case is often seen as a breakthrough, opening doors for liability in English courts where arguably some of the most powerful multinational corporations are domiciled or listed, offering potential legal remedies for damage to the environment on a global scale.[5]

Our Approach: Decolonising the Duty of Care Towards Nature

Despite environmental damage and the duty of care being at the heart of the proceedings, the case did not engage with the damage done to the relevant ecosystem. The judgment focused on the technical issue of the duty of care of corporations and did not engage with whether a duty of care was owed to nature. Surfing on

[3] *Okpabi and others v Royal Dutch Shell PLC and another* [2018] EWCA Civ 191; *AAA and Others v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532.

[4] For analysis, see Tara Van Ho, '*Vedanta Resources plc and another v Lungowe and others*' (2020) 114 *American Journal of International Law* 110.

[5] Carrie Bradshaw, 'Corporate Liability for Toxic Torts Abroad: *Vedanta v Lungowe* in the Supreme Court' (2020) 32 *Journal of Environmental Law* 139; Samvel Varvastian and Felicity Kalunga, 'Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after *Vedanta v Lungowe*' (2020) 9 *Transnational Environmental Law* 323.

this groundbreaking opening by the Supreme Court, we explore how the judgment could have expanded the duty of care of the holding company (Vedanta) towards the claimants into an ethics of care towards nature. We bring to the fore a more ecological theoretical framing of an ethics of care towards nature by integrating African customs and concepts. We use recent approaches recognising legal personality of rivers as a framework to expand the duty of care of the company into an ethics of care that explicitly recognises the Kafue River as a legal entity with rights to hold the company responsible for its actions. This expanded duty of care shifts the attention away from a premise of conflict between opponents to a more relational approach between humans and non-humans which is more in tune with an Earth law perspective.[6] Since the Supreme Court decision was 'only' about establishing the competence of the English courts, instead of rewriting the judgment we have written an amicus curiae brief for a potential future court to propose a less anthropocentric approach to the issues at stake, focusing on the nature–human relationship.

It is uncertain whether there will be a further case on the merits, or whether the issue of damages and remedies could be examined in detail by the English courts in future. Since the decision of the Supreme Court was published, Vedanta has been locked in a protracted dispute with the Zambian government (which owns 20 per cent of KCM through state mining investment firm ZCCM-IH) after the Zambian government handed control of the mine to a liquidator.[7] Moreover, in parallel more than 2,500 Zambian villagers received an undisclosed settlement from Vedanta Resources in respect of their pollution claims.[8] This amicus curiae brief has been written on the basis of a possible future claim on the merits. This could help us understand what might happen if a less anthropocentric and a less Western-centric approach to law was applied in such a judgment.

One argument we want to put forward to the court is the fact that if it were to embrace the language and approach of recognising rights of nature – in this case the polluted river – this could also support a postcolonial recognition of key African approaches to justice. A good example of where ancestral jurisprudence overlaps with eco-jurisprudence can be found across different communities in West Africa. For example, the Gurene community use *Tiŋa* (Earth) as a concept for a legal system that extends subjectivity and agency to multigenerational humans, plants, animals and inanimate things.[9] Our amicus curiae brief explores the interaction between rights of nature and decolonisation of English law by suggesting that the

[6] Kyle Whyte and Chris Cuomo, 'Ethics of Caring in Environmental Ethics' in Stephen Gardiner and Allen Thompson (eds), *The Oxford Handbook of Environmental Ethics* (Oxford University Press, 2016).

[7] 'Zambian Court Denies Vedanta Attempt to Halt Konkola Copper Mines Split', *Reuters News*, 1 February 2021, reuters.com/article/us-zambia-mining-vedanta-idUSKBN2A12IO.

[8] 'Vedanta Mine Settles Zambian Villagers' Pollution Claim', *BBC News*, 19 January 2021 bbc.co.uk/news/world-africa-55725305.

[9] Anatoli Ignatov, 'The Sovereign Order of *Tiŋa*. Enduring Traditions of Earth Jurisprudence in Africa' In Peter Burdon and James Martel (eds) *The Routledge Handbook of Law and the Anthropocene* (Routledge 2023).

English courts could draw upon African legal concepts in the same manner that courts use precedent from Western jurisdictions.

This is not, as the commentator to our amicus curiae rightly points out, without its own problems or indeed a sense of irony that we argue for the English courts to widen their perspective to include and learn from non-Western perspectives. Our suggested approach is based on two facts. First, in this case the claimants could not gain any access to justice in their home country against a very powerful multinational corporation that was headquartered in the United Kingdom.[10] Secondly, despite decades of decolonisation, most legal systems in Africa are still very influenced by Western legal concepts. As the Ugandan scholar Sylvia Tamale highlights, the decolonisation of the legal system is still an issue that needs to be embraced by the judiciary in most African countries even more than fifty years after independence.[11]

Although many African constitutions, including Zambia's, recognise customary law and embrace legal pluralism, most judgments are still dominated by Western – mostly common law – principles. Therefore, despite the irony of arguing for an English court to embrace a postcolonial approach about a case concerning communities in Zambia, we feel that it is important to invite the courts in England to embrace a different approach to the responsibility of these corporations when their action leads to the destruction of ecosystems abroad. As we have argued elsewhere, whether the case were to be heard in an English or Zambian court, similar barriers to justice would exist.[12]

[10] For reflection on this complexity of accessing justice, see Janine Ubink and Joanna Pickering, 'Shaping Legal and Institutional Pluralism: Land Rights, Access to Justice and Citizenship in South Africa' (2020) 36 *South African Journal on Human Rights* 178; Adaeze Okoye, 'Promoting Access to Justice for Corporate Human Rights Violations in Africa: The Role of African Regional and Sub-regional Courts' in Damilola S Olawuyi and Oyeniyi Abe *Business and Human Rights Law and Practice in Africa* (Edward Elgar, 2022).

[11] Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press, 2020).

[12] 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.

Amicus Curiae Brief

Lungowe & Others v Vedanta Resources PLC & Konkola Copper Mines

The aim of this amicus curiae brief is to propose an ecological duty of care that explicitly recognises the Kafue River as a legal entity with rights, enabling the company to be held liable for its actions to the river itself. This less anthropocentric approach recognises that suffering caused by pollution to the river from the Nchanga Copper Mine extends beyond the local communities, and considers how the health of the river is equally impacted. In part 1 of this brief, we argue for recognition that harm has been committed to the riverine ecosystem applying rights of nature principles. In part 2 we explore how the court could and should embrace local African concepts that are relevant to understanding relationships between the local communities and the concerned river.

1. Recognising the Damage Done to the Kafue River and its Communities

The Kafue River is at the heart of this case, yet it has been quasi-invisible in the legal proceedings so far.[13] The Nchanga mine pumps out approximately 75,000 m^3 of water per day, a component of which is derived from inflow through the open pits during the wet months. According to Action for Water and Water Witness International, a 2014 Zambian government report on the impact of copper mining in Zambia stated that:

> KCM's mining operations in Chingola regularly released effluents and discharge that contained copper, cobalt, sulphates, manganese, and other metals and solids that exceeded standard limits. KCM's mining operation has also been found to cause excessive siltation of the Kafue River and its tributary the Mushishima stream, which flows near Chingola, impacting aquatic ecosystems and agriculture in the area.[14]

Despite the river being one of the main victims, the judgment of the Supreme Court only mentions the river in one paragraph:

> The Google satellite images not only show the two parts of the Nchanga copper mine, but they also show the waterways in the area of the mine and in particular the Kafue

[13] The Kafue River is the longest river lying wholly within Zambia at about 1,576 kilometres (979 miles) long. It is the largest tributary of the Zambezi, and one of Zambia's principal rivers. More than 50 per cent of Zambia's population live in the Kafue River Basin.

[14] Water Futures Programme, *Case Study Briefing: The Crisis of Industrial Water Pollution and Poor Quality Water Supply – Evidence from Chingola*, 19 May 2016, cited in Linda Scott Jakobsson, *Copper with a Cost. Human Rights and Environmental Risks in the Mineral Supply Chain of ICT: A Case Study from Zambia* (Swedwatch 2019), 27.

> River, into which the subsidiary waterways flow. It is this river and these waterways which are at the heart of the claimants' claim in these proceedings. (para 17 of the judgment)

Anchoring ourselves on this sentence from Lord Briggs, 'It is this river and these waterways which are at the heart of the claimants' claim in these proceedings', we are suggesting to the Court that it should recognise the legal personality of the Kafue River and its surrounding waterways and its status as a victim in this case. This builds on a growing body of case law and legal academic commentary recognising the legal personality of natural entities. The idea of extending legal personhood to natural entities stems from the work of Christopher Stone who argued in 1972 that for nature to be better protected, law needed to recognise non-human natural entities such as trees as rights-holders, extending legal standing and recognising them as direct beneficiaries of legal redress. He argued that guardians could act on behalf of natural entities, including receiving collective relief that could be used to preserve and restore them.[15] In his famous dissenting judgment in *Sierra Club v Morton* (1972) in the United States, Justice William O Douglas reflected that: 'the river … is the living symbol of all the life it sustains or nourishes. … The river as plaintiff speaks for the ecological unit of life that is part of it.'[16]

Recognising legal personhood of rivers is a reaction to the long-standing propertisation of nature. There is a significant body of academic commentary on the rights of rivers movement in transnational litigation.[17] Here we include a summary of three key case studies where legal personhood and legal standing were extended to rivers: the Vilcabamba River in Ecuador, the Whanganui River in Aotearoa New Zealand, and the Atrato River in Colombia. We present a brief summary of the approaches followed in each case in order to indicate possible pathways to recognising legal personality of the Kafue River in Zambia. For the sake of clarity, we wish to establish at the outset that there has been some conflation between recognising legal personhood of rivers and rights of nature.[18] While

[15] Christopher D Stone, 'Should Trees Have Standing? – Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450.

[16] *Sierra Club v Morton* 405 US 727 (1972) 743, cited in Linda Sheenan, '"Water as the Way": Achieving Wellbeing through "Right Relationship with Water"' in Michelle Maloney and Peter Burdon (eds) *Wild Law – In Practice* (Routledge 2014) 167.

[17] See Craig M Kauffman and Pamela L Martin, 'How Courts Are Developing River Rights Jurisprudence: Comparing Guardianship in New Zealand, Colombia, and India' (2019) 20 *Vermont Journal of Environmental Law*; Stellina Jolly and KS Roshan Menon, 'Of Ebbs and Flows: Understanding the Legal Consequences of Granting Personhood to Natural Entities in India' [2021] *Transnational Environmental Law* 1; Catherine Magallanes, 'From Rights to Responsibilities Using Legal Personhood and Guardianship for Rivers' in Betsa Martin, Linda Te Aho and Maria Humphries-Kil (eds), *ResponsAbility: Law and Governance for Living Well with the Earth* (Routledge, 2019).

[18] See Cristy Clark et al, 'Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance' (2019) 45 *Ecology Law Quarterly* 787; Erin O'Donnell, 'Re-setting Our Relationship with Rivers: The High Stakes of Personhood' in Yenny Vega Cárdenas and Daniel Turp (eds), *A Legal Personality for the St Lawrence River and Other Rivers of the World* (Éditions JFD, 2023).

both share the belief that new approaches are urgently needed to better protect nature, there are different options available to do this. Here, we mainly focus on attributing legal personhood to rivers. This is part of the rights of nature movement but is by no means a synonym because legal personality confers both rights and responsibilities.

Rights of the Vilcabamba River in Ecuador

In 2008, the Loja provincial government dumped materials that were accumulated when widening the road near the river, causing the river to flood in 2009 and 2010. Two residents from the United States filed a protection action against the provincial government on behalf of the Vilcabamba River.[19] In 2011, the Provincial Court of Loja ruled in favour of the plaintiffs for the river, recognising the 'democracy of the Earth'. Establishing that Nature has rights, the Court stated:

> [T]here are some premises that are fundamental to advance what can be identified as the 'democracy of the earth'; [this requires recognising that]: a) individual and collective human rights must be in a relation of harmony with the rights of other natural communities in the Earth; b) ecosystems have a right to exist and to carry on their vital processes; c) the diversity of life, as expressed in nature, has a value of its own; d) ecosystems have a value independent of their utility to human beings; and e) a legal framework in which ecosystems and natural communities have an inalienable right to exist and flourish would situate Nature at the highest level of value and importance.[20]

The Court concluded that the dumping of materials violated Nature's rights under Article 71 of Ecuador's Constitution as well as the 'right to be restored … apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems' under Article 72. But while the Court recognised the rights of nature, it also balanced these rights with the needs of humans (ie road widening). As such, the Court missed the opportunity to recognise the rights of Nature beyond the river (ie the provincial government was allowed to uproot trees but not to dump them in the river).[21]

The Whanganui River, Aotearoa New Zealand

In March 2017, the New Zealand Parliament extended legal personhood to the Whanganui River as part of a process of treaty settlement between the Crown

[19] *Wheeler and Huddle v Gobierno Provincial de Loja*, 11121-2011-0010 Provincial Court of Loja, 30 March 2011.

[20] These statements, originally published on the website of the National Constituent Assembly of Ecuador (29 February 2008) were then reproduced in *Peripecias* No 87 (5 March 2008) and cited in Joel Colón-Ríos 'The Rights of Nature and the New Latin American Constitutionalism' (2015) 13 *New Zealand Journal of Public and International Law* 107, 111 as cited in Magallanes, 'From Rights to Responsibilities'.

[21] Magallanes 'From Rights to Responsibilities'.

and Māori iwi (tribes). Iwi regard the river as their *tupuna* (ancestor) which reinforces the idea that the people are inseparable from the river and that iwi and hapū (subtribes/descent groups or clans) have a responsibility to care for and protect the river, expressed as 'Ko au te awa, ko te awa ko au' (I am the River and the River is me).[22] The 2017 Act recognises that 'Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person.'[23] Acknowledging the Māori principle of *kaitiakitanga*, or guardianship, the Act appointed legal guardians, in the form of a management body known as Te Pou Tupua comprising one Crown and one Whanganui iwi representative to speak on behalf of the Whanganui River and protect its interests.[24] The Act also provides for the development of Te Heke Ngahuru, a whole river strategy that protects the well-being of the river, including a river fund, Te Koroteke o Te Awa Tupua, to support this.[25]

Atrato River, Colombia

The Atrato River ecosystem is one of the most diverse in the world and home to Afro-Colombian and Indigenous communities. There have been numerous environmental and humanitarian crises in this region, many due to the contamination of the river with toxic substances such as mercury and cyanide because of illegal mining operations. In 2015 a number of community organisations filed a motion for protection in the Administrative Tribunal of Cundinamarca on behalf of the affected communities and argued, initially unsuccessfully, that the state had an obligation to remove the mining operations. However, Colombia's Constitutional Court later ruled in favour of the communities' claim and went one step further, recognising the river itself as a legal person with its own rights that needed protection.[26] Three different rights were recognised in the decision: individual, community and biocultural rights. It is particularly the latter that are of importance for our case.

The Court used the concept of biocultural rights that are recognised in Colombia's Constitution to acknowledge the interdependence between nature and local communities:

> Biocultural rights are the precondition for the rights of ethnic and indigenous communities to exercise territorial autonomy in accordance with their own laws and customs. This includes the right of communities to administer the natural resources in the territories in which they have developed their culture, traditions and their special relationship with the environment and biodiversity.[27]

[22] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 69(3).
[23] ibid s 14(1).
[24] ibid ss 18–19.
[25] ibid s 57.
[26] *Tierra Digna v Republic of Colombia* (10 November 2016), Constitutional Court, T-622 of 2016, translated by and quoted in Magallanes 'From Rights to Responsibilities'.
[27] ibid 133.

The Court ordered the establishment of a Commission including two guardians – one from the local community and one from the government – and an advisory panel of experts, similar to the New Zealand model in the Te Awa Tupua Act. The Court also ordered the government and other specified research institutes, and non-governmental and community organisations to collectively implement a plan to clean the river and combat mining activities.[28]

Synthesis

Most current environmental laws regulate how much destruction nature can cope with, based on a perception of ecosystems, including rivers, as property. Recognising legal personhood of rivers means that they are no longer perceived as property but as rights-bearing entities. This means that local communities are also given legal authority to enforce and defend the river's rights, and damages may be awarded for violations of the river's rights, including full restoration of the river's pre-damaged status. A key element of recognising the legal rights of rivers is in highlighting connection and relationality between ecosystems and local communities. Living entities are relatives not resources. Attributing legal personality to a river implies that the river can have legal relations with other subjects. This is reflected in the concept of kincentric ecology, which refers to the idea that 'humans are part of an extended ecological family that shares ancestry and origins',[29] putting the emphasis on relationality between humans and nature.[30] In recognising the legal personality of the Kafue River it is important that this element of relationality should not be overlooked, especially in this Zambian context where local communities have their own relationships with nature. Here we are inviting the Court to embrace a relational approach that recognises the entanglements between nature and humans.

2. Decolonial Restorative Justice

In African contexts law is not just derived from common law, but also from laws of the Earth within African customary law. As Ng'anga Thiong'o testifies:

> In Africa we have a cosmovision of where there are no objects within the context of customary law. Everything is living. The sky is part of us, so is the Earth, air, water, the plants and the animals. We have to keep the balance between all these aspects for the community to survive. The community is not just human community. It is a community

[28] Craig M Kauffman and Pamela L Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future* (MIT Press, 2021) 195–98.

[29] See eg Enrique Salmon, 'Kincentric Ecology: Indigenous Perceptions of the Human–Nature Relationship' (2000) 10 *Ecological Applications* 1327.

[30] Justine Townsend et al, 'Right for Nature: How Granting a River "Personhood" Could Help Protect It', *The Conversation*, 3 June 2021, theconversation.com/rights-for-nature-how-granting-a-river-personhood-could-help-protect-it-157117.

> with many other subjects. Customary law is a source of law that contains all these principles, these have stood the test of time, since time immemorial, and they have been transmitted from one generation to another.[31]

There are multiple ways of relating to a river and these must be taken into consideration in restoration. Restoring the river requires first and foremost acknowledging the special relationship that exists between communities and the river. In Aotearoa New Zealand restoration of the Whanganui River has not just been about improving an ecological process; it is also about healing and restoring the relationship between people and the river.[32] In the words of Robin Wall Kimmerer, 'we need acts of restoration, not only for polluted waters and degraded lands, but also for our relationship to the world'.[33] This requires extending the duty of care of the corporation and the government towards the local communities to an ethics of care that includes the more-than-human.

In the context of Zambia, a similar relationality can be found amongst the Lamba (*AWalamb*) people. Although the Lamba comprise a small percentage of the total population in Zambia, the whole of the Copperbelt province is on Lamba land (*Ilamŵa*). Due to copper mining, *Ilamŵa* is now urbanised and many other groups, of which the Bemba people form a significant part, have moved to the area. Despite this influx, the Lamba people have continued to nurture deep cultural roots to the area and their culture is still anchored in traditional education and values.[34]

For the Lamba, the great source for their law is *Lesa*, the creator of all things, of the people and everything else that lives in the realm of the *Lesa*. *Lesa* first created the sun before the moon, and then the stars. *Lesa* also arranged the whole country: rivers, mountains, anthills, grass, trees and lakes.[35] For the Bemba, *Lesa* is also the creator of all things, including heaven and Earth, and is considered both male and female. Before Christianity *Lesa* was seen as Mother-Earth, but with the arrival of Christianity became the Father-Sky God.[36] In addition to *Lesa*, other spirits also play an important role in Zambian cosmologies. For example, an important spirit for the Bemba people is *ngulu* who are considered the early inhabitants of the lands and residing in waterfalls, rocks, trees and anthills. Other spirits are *imipashi*, or the ancestral spirits, who are associated with the fertility of the bush and the gardens, and the lineage of the clan.[37]

[31] Ng'anga Thiong'o, 'Earth Jurisprudence in the African Context?' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011) 174.

[32] Jacinta Ruru, 'Listening to Papatūānuku: A Call to Reform Water Law', (2018) 48 *Journal of the Royal Society of New Zealand* 215; Linda Te Aho, 'Te Mana o Te Wai: An Indigenous Perspective on Rivers and River Management' (2019) 35 *River Research and Applications* 1615.

[33] Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge, and the Teachings of Plants* (Milkweed Editions, 2015).

[34] Rosemary Kalenga, 'The Lambas of the Copperbelt/Zambia's Behaviours and Taboos before Colonisation and Christianisation: A Literature Review to Accommodate Research in the Indigenous Realm' (2015) 14 *Indilinga – African Journal of Indigenous Knowledge Systems* 185, 187.

[35] ibid 186.

[36] Thera Rasing, 'Female Initiation Rites as Part of Gendered Bemba Religion and Culture: Transformation in Women's Empowerment' (2017/2018) 7 *Zambia Social Science Journal* 55, 58.

[37] ibid 59.

Given the importance placed on relationships with the creator god, the spirits and the ancestors in Zambian societal organisation and structures, polluting the Kafue River is seen as a provocative act that may aggrieve the ancestors, who are, after all, the ultimate arbiters and judges in Zambia's religions and cultures. Instead of seeing the river as a commodity or property belonging in trust to the state, it is important that the river is seen as belonging to a spiritual world that cannot be owned, let alone spoiled or polluted. This would, according to local communities' beliefs, equate to disrespecting gods, spirits and ancestors, which ultimately may have repercussions for the people themselves as this may create bad luck and hardship.

Taking these local cosmologies into consideration, future mining operations undertaken by Vedanta and its subsidiary in Zambia, KCM, must, in our view, incorporate ethics of care that respect the moral and spiritual relationships between local communities and the river. Instead of imposing a neocolonial moral framing, this ethics of care can be structured as an African moral obligation to care for the environment as an expression of interconnectedness between people, the biophysical world and the spiritual world. Using this approach to manage the future relationship between Vedanta, its subsidiary and the community living along the Kafue River, Vedanta and its subsidiary would have an obligation of care towards the community, its wider biophysical environment, and the creator gods, spirits and ancestors. For the Lamba people, human beings are always in close relationship with everything around them and are seen to play just a small part in the wider natural and spiritual world.[38] Ancestral and many other spirits live in the forests along the Kafue River, and are responsible for the welfare of the Lamba people. Destruction to the Kafue River and its surroundings results in people being cut off from their relationship with the deities and their spiritual worlds which can result in catastrophic consequences.[39] From this perspective, it is important that future relations between Vedanta and its Zambian subsidiary, and the community and the environment should recognise the importance of embracing different worldviews and spiritualities and be guided by these overarching local principles of relationality and relatedness.

Relationality requires taking into account how harms done to both the communities and the river create a cumulative effect of environmental harm. We refer the Court to arguments made by Chief Judge of the Land and Environment Court in New South Wales, The Hon Justice Brian J Preston that environmental statutes should take into account these cumulative environmental effects, especially in the case of waterways where activities/pollution should not be assessed in a self-contained manner.[40] Once it is acknowledged that part of the harm committed was to

[38] Lackson Chibuye and Johan Buitendag, 'The Indigenisation of Eco-theology: The Case of the Lamba People of the Copperbelt in Zambia' (2020) 76 *Teologiese Studies/Theological Studies* a6067.

[39] ibid.

[40] Brian J Preston, 'Internalizing Ecocentrism in Environmental Law' in Michelle Maloney and Peter Burdon (eds) *Wild Law – In Practice* (Routledge 2014).

the Kafue River itself, remediation requires a more holistic and restorative approach than only compensating the local river communities for the harm they suffered due to the river being polluted. We posit, taking into account African philosophy, local cosmologies and customary justice, that restoring the river must not just be conceptualised as an ecocentric right but also, importantly, include a sense of responsibility for '*restoring* [our emphasis] any damage and/or the cost of protecting the land and its resources from any harm'.[41] The example of Te Awa Tupua provides insights into how to repair these intergenerational, multispecies social–environmental relations, through paying respect to the cultural values underpinning relationships between humans and non-humans. As Hikuruo et al argue, restoring a river requires not only the recognition of legal pluralism or indeed acknowledging in this case the Māori's cultural legal norms and practices, but also fluvial pluralism, which can be best described as valuing rivers as 'holistic, historical, and cultural agents with lives and rights of their own'.[42] Learning from river communities in this way can create spaces 'for thinking about rivers pluralistically'.[43]

These principles should also form the basis of the remedies that are sought in this case, and we are of the opinion that these can be best achieved through a restorative justice conference. In Justice Preston's view restorative justice provides the right framing to broaden the identification of victims of environmental harm beyond the community and avoid harms being replicated in the future.[44] This also recognises that remediation will take many generations, particularly as the harm caused affects natural resources that cannot be replaced, and consequently, intergenerational relationships between humans and non-humans.

To achieve restoration of the river ecologies, the river must also be represented in the process of restorative justice. As Justice Preston confirms, rivers can indeed be successfully represented by a surrogate victim at restorative justice conferences. To paraphrase Justice Preston, by giving the river a voice and recognising and healing it as a victim, humanity's relationship with the river is also transformed.[45] The Court should therefore allow for the community that is dependent on the river for its subsistence and well-being to represent both the river and the community as victims of the harm caused. There is relevant common law precedent here. In the New Zealand case of *Waikato Regional Council v Huntly Quarries Ltd and Ian Harrold Wedding*,[46] the river was represented by the chairperson of the Waikato

[41] Nicole Graham 'Owning the Earth' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011) 266.

[42] Dan Hikuroa et al, 'Restoring Sociocultural Relationships with Rivers: Experiments in Fluvial Pluralism Restoring Sociocultural Relationships with Rivers' in Bertrand Morandi, Marylise Cottet and Hervé Piégay (eds), *River Restoration: Political, Social, and Economic Perspectives* (Wiley 2021), 67.

[43] ibid 67.

[44] Brian Preston, 'The Use of Restorative Justice for Environmental Crime' (2011) 35 *Criminal Law Journal* 136. Article based on a paper that was delivered to the EPA Victoria Seminar on Restorative Environmental Justice 22 March 2011, Melbourne.

[45] ibid.

[46] *Waikato Regional Council v Huntly Quarries Ltd and Ian Harrold Wedding*, Auckland District Court (McElrea DCJ) 30 July 2003 and 28 October 2003.

River Enhancement Society at a restorative justice conference to expose the harm that was committed through the illegal dumping of sediment-laden stormwater discharged from the offender's quarry, affecting the river quality of the Waikato River. The reason why we refer to this case is because it demonstrates the potential for restorative justice conferencing to address both the past and future behaviour of an offender. It allows for making reparations to victims for the harm caused both to humans and non-human biota such as the riverine ecosystem. We are of the opinion that restorative justice conferences are more in tune with this local African context where the Earth itself is a great source of law.

We invite the Court to recognise the concern of the applicants that undertakings may not be given legal effect and enforced under current Zambian environmental legislation. Therefore, restorative justice conferencing is the preferred route to come to an agreement about the future behaviour of the company. The company's promises obtained in the restorative justice conferencing could be incorporated into the orders made by a sentencing court and we recommend that the court follows the approach to restorative justice outlined by Justice Brian Preston and provide that the offending company must:

- Prevent, control, abate and mitigate harm to the riverine ecosystem caused by the activities of the company;
- Pay the costs for the restoration of the harm caused;
- Pay compensation for the loss of income, and damage to the natural and cultural environment of the communities living along the river;
- Carry out and pay for the restoration and enhancement of the environment along the river for the benefit of the communities;
- Adapt their practices in order to prevent the continuance or recurrence of the offences;
- Carry out and pay for the environmental audit of activities of the company.

The moral principles that have framed the restorative justice conferencing should also be applied through this ruling to the future management of the natural resources. This means that:

- According to the beliefs of the community, past, present and future generations are all part of the moral community that set out the rules of engagement for the behaviour and management practices of the company and its subsidiary;
- The fundamental relatedness of beings includes a relatedness with other natural entities.

It is timely for this Court to express its opinion that the healing for past and current colonial and neocolonial mercantile practices should be guided by acknowledging African worldviews that are not guided by separatism between humans and nature. To conclude our amicus curiae, we would like to quote the great Zimbabwean writer and illustrator Credo Mutwa:

> In old Africa we … believe that we had nature within and beyond ourselves. By making us believe that the highest gods were part animal and part human being, we were taught to look upon animals with great reverence, love and respect. … The native people of Africa regarded them as a blessing from the gods – as something unbelievably sacred and vital for the continued existence of human beings. Black people believed that animals were the blood of the earth and that as long as there were migrations criss-crossing the country, human existence on Earth was guaranteed.[47]

[47] Credo Mutwa, *Isilwane: The Animal* (Struik, 1996) 13–15, cited in Kai Horsthemke '*Isilwane: The Animal – Ubuntu, Ukama* and Environmental Justice' in Rainer Ebert and Anteneh Roba (eds), *Africa and Her Animals: Philosophical and Practical Perspectives* (Unisa Press, 2018), 4.

Commentary

Felicity Kayumba Kalunga

Introduction

The amicus brief proposes two main innovations in approaches to environmental litigation. First, the authors advance an ecocentred duty of care that includes ethics of care owed to nature, in this case the Kafue River. The second key contribution is a decolonial restorative justice perspective that emphasises the restoration of the river, over and above compensatory relief to the people affected by the acts of the corporation. The authors develop their arguments, discussing the rights of nature using various sources including Zambian traditional and customary norms. The second argument emphasises the value of restorative justice as an appropriate remedy in instances involving damage to nature. At first glance, these innovations appear problematic in the context of a case involving the exercise of jurisdiction by English courts over torts committed on foreign soil by a foreign defendant. It may seem ironic to advocate for a decolonial approach to conceptualising the duty of care within the context of transnational litigation which typically symbolises neocolonial practice. It also appears difficult to imagine how a restorative justice order would be implemented in the context of transnational litigation against a defendant domiciled in England due to the difficulties of enforcing foreign judgments that issue non-monetary orders.

A Decolonial Concept of the Duty of Care

The apparent irony in the proposed approach seems to stem from the fact that instituting claims in an English court for torts committed in Zambia by both Vedanta Resources and KCM seemingly perpetuates a neocolonial approach to litigation that esteems English courts over their Zambian counterparts. Critics of existing principles governing the application of foreign law in English courts have faulted English courts for presenting English legal principles as superior to foreign ones when developing rules to guide the admission of foreign law, which is admitted as evidence rather than law.[48] English courts are cognisant of this criticism and therefore approach cases involving foreign competing jurisdiction with caution. For instance, the trial judge in the case of *Lungowe and Others v Vedanta Resources Plc & Konkola Copper Mines* cautioned that 'I am conscious that some of the foregoing paragraphs could be seen as a criticism of the Zambian legal system. I might even be accused of colonial condescension. But that is not the intention or

[48] Anthony Gray, 'Choice of Law: The Presumption in the Proof of Foreign Law' (2008) 31 *UNSW Law Journal* 136, 139.

purpose of this part of the judgment.'[49] With this background, one might wonder what value could be gained from the arguments presented in this chapter in favour of a decolonial concept of a duty of care owed to rivers which incorporates African customary and religions norms. Would the case not best be resolved in Zambia where courts would be more inclined to apply customary norms as law?

The above concerns notwithstanding, transnational litigation remains of tremendous value in securing access to justice for victims of environmental violations by multinational corporations in countries with weak access to justice. In any event, there is no guarantee that a Zambian court is more likely to apply a decolonial concept of the duty of care, chiefly on account of the legacy of colonialism on the development of law in Zambia. Zambian courts, like their English counterparts, would potentially apply a duty of care based on propertisation of rivers. A previous and similar case decided by Zambian courts, in which liability was established, was overturned on appeal on account of failure by the claimants to prove both causation and loss and to value their loss. The case is illustrative of the approach taken by courts establishing liability and loss in such cases.[50] This is what makes the arguments presented in this brief compelling as it challenges our conception of the duty of care, which is key in establishing liability in environmental rights claims. The novel arguments advanced in the brief are admissible in English courts within the existing legal principles governing reception of foreign law as I demonstrate below.

Courts in England and Wales have long entertained cases of torts occurring in foreign jurisdictions against defendants domiciled in England and Wales or in a foreign country. Where such cases are admitted, the court would ordinarily apply the law of the foreign state. In *Vedanta Resources Plc and Another v Lungowe and Others*, Lord Briggs stated that 'the level of intervention in the management of the mine requisite to give rise to a duty of care upon Vedanta to persons living, farming and working in the vicinity is (as is agreed) a matter of Zambian law'.[51] English courts ordinarily accept foreign law as evidence to be proved in court but not as law.[52] Where foreign law is not proved, the courts have historically applied English law or would presume that the foreign law is the same as the forum law.[53] Anthony Gray argues that this assumption that the law of the foreign country is the same as English law is a legacy of imperialism and colonialism and need not continue in the current age.[54] This colonial conception of the superiority of English law and its attendant principles must pave the way to the reality of legal pluralism, including

[49] *Lungowe and Others v Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975 (TCC) para 198.

[50] *Nyasulu and 2000 Others v Konkola Copper Mines Plc* [2015] ZMSC 33.

[51] *Vedanta Resources Plc and Anor (Appellants) v Lungowe and Others (Respondents)* [2019] UKSC 20, para 17.

[52] Gray 'Choice of Law', 143.

[53] Jack Wass, 'The Court's In Personam Jurisdiction in Cases Involving Foreign Land' (2014) 63 *ICLQ* 103, 107.

[54] Gray, 'Choice of Law', 140.

by modifying key concepts such as the duty of care as is argued here, to admit other normative perspectives.

In addition to the arguments on a flexible concept of the duty of care that have been advanced by the arguments in this brief, the decolonial concept of the duty to the river can also be deduced from Zambian statutory law which recognises customary law norms. For instance, section 4 of the Environmental Management Act 2011 which provides for the right to a clean, safe and healthy environment, states that the right includes 'the right of access to the various elements of the environment for recreational, education, health, spiritual, cultural and economic purposes'. This law can be relied upon to support a claim by people who depend on the Kafue River for their spiritual well-being to seek restorative remedies on behalf of the river. Another example of Zambian environmental legislation which recognises customary norms is section 5(2) of the Water Resources Management Authority Act 2011 which requires authorities to ensure that 'traditional practices as recognised in customary areas and which are beneficial to water resource management are taken into account in the management of water resources'. Further, the conception of statutory liability under Zambian law should give effect to the constitutional morality of Zambian law under which customary law is recognised and respected.

Enforceability of Restorative Justice Orders

The amicus brief proposes that in addition to awarding compensation to the communities who have suffered damages, the court should include restorative justice as an important element in the case, both as a way to deal with the harm committed to the community and the river, and importantly to include provisions that avoid harms being replicated in the future. The argument proposes a format that the order could take, drawing on the arguments by Justice Brian Preston on restorative environmental justice. The proposal is progressive. However, some of the examples of such restorative justice orders bear the characteristics of injunctive relief. The problem here stems from the challenges of enforcing non-monetary orders in a foreign country. Elena Merino Blanco and Ben Pontin argue that compared to a monetary judgment that can be enforced on the assets of a defendant within the jurisdiction of the determining court, a non-monetary remedy such as an injunction would put a defendant in a stronger position to oppose the jurisdiction of English courts on grounds of comity and exorbitant jurisdiction because it is difficult to enforce such a judgment on foreign soil.[55]

The authors here suggest an innovative way to address challenges of enforcement by proposing a restorative forum drawn from the example of the case of

[55] Elena Merico Blanco and Ben Pontin, 'Litigating Extraterritorial Nuisances under English Common Law and UK Statute' (2017) 6 *Transnational Environmental Law* 285, 305.

Waikato Regional Council v Huntly Quarries Ltd.[56] Such a forum can be structured so that the restorative orders issued by that forum are in the form of an agreed to judgment similar to a consensual judgment such as the one reached in the case of *The Bodo Community and Others v Shell Petroleum Development Company of Nigeria Ltd*[57] in Nigeria. The restorative conferencing forum could then be conducted in Zambia by parties and other experts who would take on the interests of the river from a customary and religious perspective.

[56] *Waikato Regional Council v Huntly Quarries Ltd and Ian Harrold Wedding*, Auckland District Court (McElrea DCJ) 30 July 2003 and 28 October 2003.

[57] *The Bodo Community and Others v Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 1973 (TCC).