

# THE MARAÑÓN RIVER MORATORIUM & ROAD TO RIVER RIGHTS



## CBMM

CONSULTANCY BODY MARAÑÓN MORATORIUM



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## *PREAMBLE*

The portfolio that you have in front of you consists of individual “report” style sections constructed along the lines of an assignment for both the course Environmental Justice in Practice (WRM-51806) at Wageningen University & Research situated in the Netherlands, and our case facilitator/broker: the Marañón Waterkeeper. This NGO is concerned with protecting “The source of the Amazon” by safeguarding the connectivity of the Marañón River and the Amazon. This connectivity is not merely the physical connectivity among the rivers but also the connectivity of thousands of indigenous people and the many endangered species with the river. This connectivity and the resulting vast biodiversity and states of species of the Marañón are threatened by the construction of planned hydroelectric dams, among other extractivist practices in and around the river. The Environmental Impact Assessment (EIA) of two of the planned dams in the Marañón has expired. Our assignment builds upon this and analysis on what grounds a moratorium (legal instrument for the stoppage of an activity for an agreed amount of time) can be proposed that would create physical time for an initiative related to the rights of rivers philosophy to be initiated and implemented. The role of us as students is that we engage with real word cases of resource competition in order to achieve the set learning goals while providing the facilitator with the “desired” output. Our contact persons within the organisation are Vera Knook and Luigi Marmanillo Cateriano.

To finish the preamble we would like to define who we are, by introducing our team members in which we provide you (the reader) with an overview of our expertise etc.

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- Robin Maljaars – Master of Environmental Sciences (Specialisation Policy Track) at Wageningen University & Research
- Maaïke Oude Veldhuis – Bachelor of Cultural Anthropology and Development Sociology at Leiden University & Wageningen University & Research
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## *DEFINITIONS*

**ANA:** National Water Authority Peru

**CBMM:** Consultancy Body Marañón Moratorium

**EIA:** Environmental Impact Assessment

**FPIC:** Free Prior and Informed Consent

**IDL:** Legal Defense Institute

**MSJ:** **Multi-Species** Justice

**NGO:** Non-Governmental Organization(s)

**ONAMIAP:** Organisation of Andean and Amazonian Indigenous Women in Peru

**RoN:** Right(s) of Nature

**RR:** River Rights

**SDPA:** Peruvian Society of law and Environmental

**WUR:** Wageningen University & Research

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# CBMM Report Section 1 - Introduction

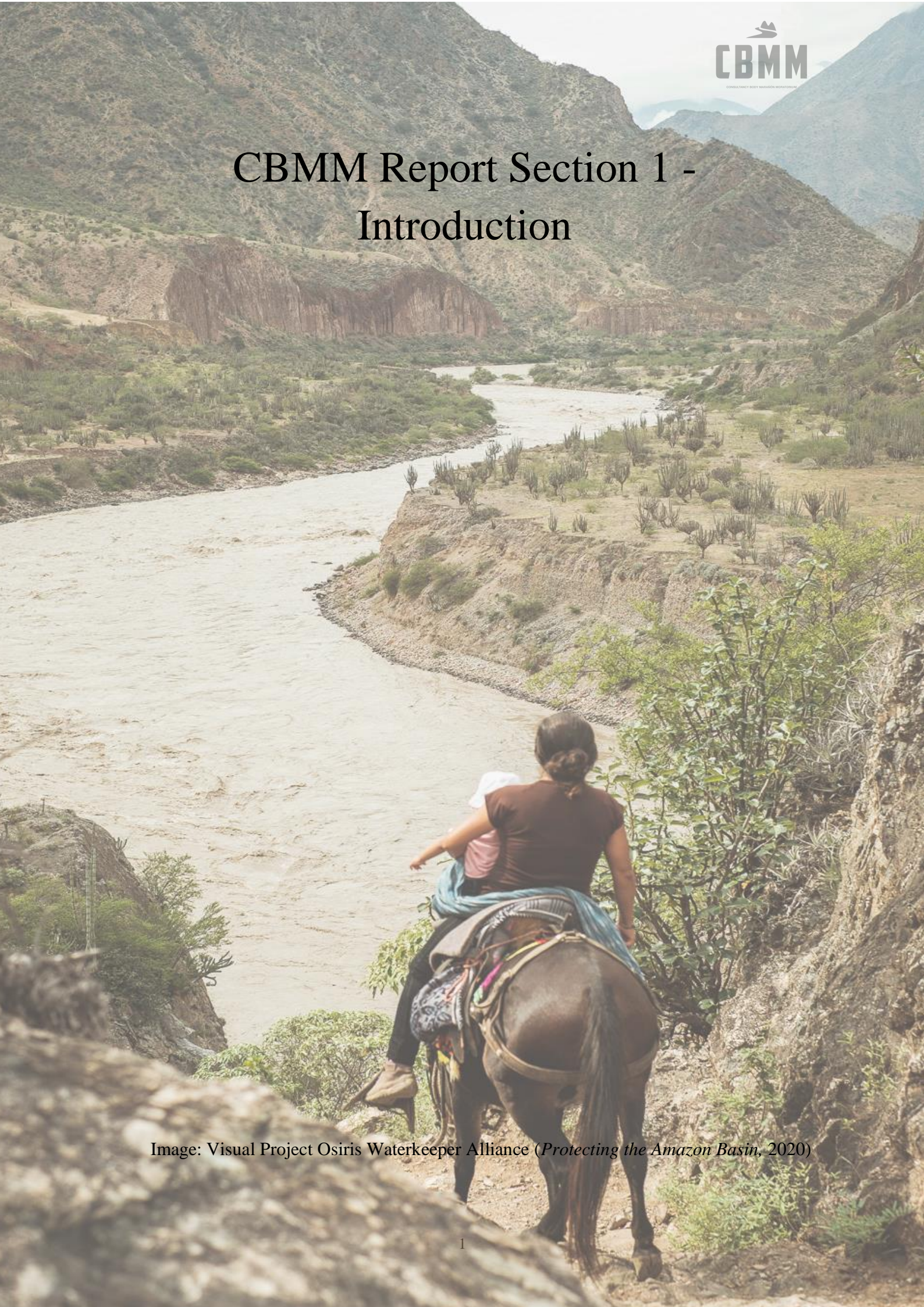


Image: Visual Project Osiris Waterkeeper Alliance (*Protecting the Amazon Basin*, 2020)



# 1. Portfolio Introduction

## 1.1. CBMM & The Marañón Waterkeepers

With regard to this case, we as a group would like to identify ourselves as a consultancy team. Our team, *Consultancy Body Marañón Moratorium (CBMM)*, will primarily focus on proposing a moratorium directed at the (further) protection of the Marañón river and the obstruction of dam construction. Our facilitator has moreover requested proposing the moratorium while using the philosophy of River Rights (RR) and assessing to what extent the moratorium can be the basis of future RR for the Marañón river and how this should/could be achieved. The CBMM will be working on behalf of the Marañón Waterkeepers, based upon their indicated belief that a moratorium proposal is the most effective and realistic short-term solution to protect the Marañón. Furthermore, the CBMM and the Marañón Waterkeepers share the vision on how RR could be a reasonable and effective long-term solution for the protection of the river, stopping extractive practices and restoring indigenous knowledge. Our team will use its multi-disciplinary nature to provide the Marañón Waterkeepers with the results of a multi-faceted analysis, that builds up to a moratorium proposal for the grounds of a moratorium that is effective, realistic and has the highest chances of becoming “successfully” adapted within the legal and political framework of Peru. The consultancy-oriented lens from which we depart has both reasoning behind it as well as implications related to our positionality moving forward. We are neither a company nor experts, which makes us adopt a humbler approach in the things that we write. We feel that even though consulting from a global north perspective on a global south issue raises certain implications, especially because our study is (in)directly related to local communities. We will keep this in mind while working on the case and try to be transparent about our own positionality and how this, in turn, influences our engagement with the case.

## 1.2. Problem Statement & Research Purpose

The Marañón River is one of the vastest and most important bodies of water in aspects like biodiversity and is one of the most significant tributaries of the Amazon, fueling an ancestral and indissoluble linkage between indigenous groups and the river in Peru (Press Release | Coalition of International Organizations Files an Amicus Curiae Brief Calling for the Recognition of the Intrinsic Rights of the e Marañón River in Peru, 2021). One of the major threats that is looming over the Marañón River is that due to the construction of hydroelectric dams the free flow of the river, the riverine communities, and the ecosystems around the river are in danger. The construction of dams will displace local communities, alter sediment flows and develop roads that will bring the destruction of highland clouds and lowland rain forests (Grandez et al., 2020). Two dams passed the environmental impact assessment stage, these being, the Veracruz and Chadin II dams. Construction of the dams has not started, and thereby the projects passed the deadline in their concession contracts. However, the government has not yet clearly annulled the projects and it remains uncertain whether these dams will be built (Grandez et al., 2020). In October, the Peruvian government announced that several dams proposed for the Marañón River, a major tributary of the Amazon, are now off the table during the current administration (Earth Law Center, 2018). The Marañón Waterkeepers are looking into the option of calling for a temporary halt to any dam construction, based on the current legal system, to combat the ecological and social environmental injustices that dam construction would result in. These injustices would be highlighted in the case analysis section later.

To protect the Marañón River, Marañón Waterkeeper is currently considering ways to legally protect the river through a moratorium. We aim to provide the Marañón Waterkeepers with grounds upon which we believe a successful moratorium could be formulated. These grounds should be both inspired by the RR philosophy as well as serve as a measure to which extent RR could be applicable to the Marañón. From this, we formulated our purpose for this analysis:

*"Our purpose is to conduct an analysis contributing to the design of pathways for constructive engagement by using the concept of a moratorium and River Rights. Within the exploration, if a moratorium and River Rights could help to protect the river, we will reflect on several aspects (legal, environmental, social, economic) in order to arrive at a better understanding of the complexities of the quest for Environmental Justice"*



Flowing from our purpose is the following research question that will be centralized in the upcoming sections:

*Could moratorium and River Rights initiatives contribute to a short-term and long-term paradigm transformation toward environmental justice around the Marañón and how should these be structured to best combat current and future environmental injustices?*

### 1.3. Methodology

Within our research project, we will adopt a mixed methods approach to get a complete image of the problems at stake. The normative contents of RoN mean that they are simultaneously constructed but differ as they are applied in practice in distinct contexts (Kauffman & Martin, 2021). To analyze the needed Nature's rights governance approach, instead of examining the phenomenon of nature's rights approaches and their attempt to secure justice for humans and nature, we are adopting a comparative method that allows for greater generalization regarding said phenomena than a single case study (Rihoux & Ragin, 2008). The analysis underlying the eventual moratorium proposal and the structured road to river is made two-fold. On the one hand, we will analyze the injustices that result from the impact of two hydroelectric dams being constructed, the Chadin 2 & Veracruz. These two cases will highlight injustices that follow the construction of the dams and be the basis of the claims we propose to be incorporated into the Moratorium. The cases will underline upon which grounds and claims a Moratorium could be based that has the greatest chance of achieving its goal within the Peru political landscape.

Data is collected through secondary data collection (Literature reviews e.g. case study, study of policy, study of law). We will carry out literature reviews to get more scientific knowledge of the problem at stake. Within the problem analysis, there are multiple dimensions, such as the economic, ecological and social impact of constructing dams and other extractive practices that result in environmental injustices occurring. In order for us to arrive at a conclusion, it is salient to read and use literature on topics such as "moratorium", "rights for rivers" and environmental justice in general. Another example of primary data collection is that we will compare different cases from an international context, performing an analysis of how the concept of a moratorium is put into practice within different contexts. This method will be used within the moratorium analysis and act as a base for our moratorium proposal section. This also entails that while we define the scope of our case analysis and stakeholder/conflict analysis strictly to the Marañón and two dams, the scope of analysis for the other analysis is defined by the relevant case studies available and applicable.

### 1.4. Terminology & Positionality

#### 1.4.1. Terminology

We are aware of the fact that this study and its related terms and norms can be conceived as abstract or vague. In the terminology and positionality, we will build upon the described methodology and not only describe the contents that will be used within the methodology, but maybe even more importantly highlight how our methodology defines our positionality related to this report. It will define how we see environmental justice; what elements we want to address and what concepts are needed for this by elucidating on the terms we will use and the norms that are constructed in the realm of earth jurisprudence, rights of nature and River Rights.

*Environmental justice* – or a justice between humans in nature – is ultimately concerned with the equitable distribution of environmental goods (benefits) and bads (burden, risks) across human society (Gleeson & Low, 1998; Gudynas, 2016). In essence, the term environmental justice originates from the resistance against social inequality and the worsening of environmental quality as a result of the before-mentioned distribution of environmental goods and bads. Environmental justice is said to be achieved when cultural norms and values, regulations, rules, policies, behaviours and decisions are implemented and generated to support sustainable communities in which the environment is safe, nurturing and productive for the people (Ramos, 2021). It is essential to note that it consists of multiple elements (distribution, recognition and participation) and expresses itself in multiple ways which are relevant to this case (distributive environmental justice, participatory

environmental justice and multispecies justice). *Distributive environmental justice* demands that any unequal distribution of environmental loads must first be justified, and any humans subjected to environmental bads due to a project's execution must be fairly compensated (Ramos, 2021). For us, the construction of dams would be an example and expression of a violation of the human right to a healthy environment. Hydroelectric dams use the power of nature as a to be extracted source of energy that doesn't benefit nature and all (non) humans that live off and in the river. This creates an unequal distribution between environmental goods and bads while the construction of dams simultaneously severely negatively impacts the "healthy status" of the environment around it. The status of this environment is under earth jurisprudence norms directly linked to the well-being of all (non) human actors. *Participatory environmental justice* entails creating opportunities for those potentially affected by a project with environmental implications to represent their interest in decision-making processes (Gellers & Jeffords, 2018; Wesselink et al., 2011). This representation is built to a certain degree on the access to the legal system in Peru, it encompasses the right to access information relevant to decision-making, the right to participate in decision-making processes and the right to defend one's interest through the justice system (UNEP Annual Report: Letter From the Executive Director - 2019 in Review, n.d.).

To our understanding, all these aspects are still lacking around the Marañón River, e.g. local communities are not aware of the status of the dam construction, its EIA expiring and the fact that Peru's Bill 6957 was ignored when it was first put forth to the new parliament, which assumed leadership in late July 2021 (Ramos, 2021).

One counter norm to the before mentioned injustices is *multispecies justice*. At the heart of multispecies justice (MSJ) lies the recognition of the relationship and entanglement of the functioning of humans and nonhuman systems (Multispecies Justice: New Approach to a Growing Environmental Threat, 2019). It is about the understanding that humans, other animals, trees, rivers, soil and more are interdependent and depend on the viability of ecological systems. It challenges the traditional western view that human success will be won through neglecting and exploiting other beings' interests, needs, or viability instead, MSJ states that human success is dependent on the status of that same nature we neglect and exploit. As is the case for dam construction in Peru, the consensus centered around the exploitation of the valley for electricity production that on top of everything was meant for export. The theory we embrace is based on a more holistic approach to environmental issues, taking into account the ethics of care and responsibility towards the natural world and realizing and acknowledging that the extractive capitalist complex has been the engine driving human-induced climate change (Davis, 2022).

A *moratorium* is defined as "a stopping of an activity for an agreed amount of time" (Cambridge Dictionary, 2022b). It entails a temporary suspension of an activity or law until future considerations warrant lifting the suspension, such as if and when the issues that led to the Moratorium have been resolved (Moratorium, 2022). The Marañón Waterkeepers envision it being used as a way to further block and prevent the construction of the dam(s) to the point that RR are adopted, in one form or another, and takes over the "preservation" of the river for the long term. This Moratorium will focus on just dam construction as mentioned before, the eventual RR philosophy will have a broader scope that could also encompass other extractive practices. A moratorium is most often invoked during times of distress, such as war or natural disaster ('Moratorium', n.d.). The construction of dams is seen as an expression of the latter. We align with the Marañón Waterkeeper and other definitions in the fact that we envision the Moratorium as a response to a short-term crisis that disrupts the normal routine of a business surrounding the Marañón (Moratorium, 2022b).

#### 1.4.2. Positionality

Positionality defines how the researchers relate to the subject, it defines the relationship we have with the subject and defines how our socio-political-cultural-racial-ethical-moral location or position shapes our relationship with the subject of the project. Positionality is not merely about this though, it addresses (potential) ethical issues (Dondanville, 2021). A critical conversation of reflexivity, positionally and reciprocity is important to guide this research in an anti-ethnocentric and reflexive manner. By better understanding our position within we equip ourselves to reciprocate the information that was provided during the course of the project better.

Part of the social sciences acknowledgements is the understanding of the interconnections and mutual influence between the researchers and those being researched (Toro-Morn et al., 2002). During this project, we strive to uphold strong reflexivity by keeping an open conversation with each other, looking back on the things we have learned along the way and try our best to incorporate these altering views into our report. When elucidating our core positionality geographically speaking it is not our position to research the Marañón River, being even more critical there is a clear hierarchical superiority of us as researchers and the ethical dilemmas that actually take place around the Marañón. From our perspective, it's hard not to 'research down' when looking at the dilemmas of local communities on the other side of the world. We preach from a paternalistic and imperialistic hegemonic country as highly educated people. By providing an NGO with advice on legal instruments, we inherently impose a position of power and inadequately involve those truly affected by the consequences of our instruments. We will take a humble approach in this case, giving our perception on the case which the Marañón Waterkeepers can resultingly then use to inform their decisions or actions, and to which degree they want to engage and how they see fit for this engagement. European- based legal systems have been a tool for exploiting indigenous people for centuries and many indigenous people are understandably sceptical about lawyers' plans to codify Earth Jurisprudence principles by enshrining new rights within legal systems (Kauffman & Martin, 2021). This is a fact we should be aware of and centre our positionality around.

We should be aware of the connectivity we have with the river itself and the people involved; we can't touch the water, can't smell the nature. This, in turn (subconsciously) influences how we engage with the case, being limited by time and place. The fact is that global North scholars have the tendency as non-minoritized groups to create 'cultural frames' through which we ask questions and analyse data (MASSOUD, 2022). We feel that within this project, we are on the edge of thinking too much for the people involved, but we intend to counter this by critically reflecting on our own positionality and what MASSOUD (2022) calls the burdens of positionality. We hope to bypass the risk of retraining our scholarly lens on certain aspects by adapting to what MASSOUD (2022) refers to as position sensibility and the fact that we advise the facilitator, and they can add another ethical layer to our work.

## 1.5. Portfolio Outline

Generally speaking, this portfolio will outline to what extent RR could be applied to the Marañón River. This consists of a case site analysis, a stakeholder and conflict analysis, a study of the current river right initiatives and current moratorium proposals. The case site analysis will consist of a study of the current social, ecological and economic status of the Marañón itself and its surrounding environment (including humans). Following this introductory chapter, the following chapter will encompass both a stakeholder and conflict analysis. In order to set the basis for a Moratorium proposal and the road to River Rights definition later, chapter 3 will complete the theoretical background by analysing current Moratorium and RR efforts globally.

The moratorium proposed in the following section will highlight on which grounds and claims we believe a successful Moratorium should be based. This chapter together with the road to river rights chapter functions as the core advising body of the portfolio. Finally, the portfolio will be concluded by a chapter critically analysing our own study and positionality besides providing a general conclusion. In annex I of the portfolio, a graphic infographic will be provided that has been constructed as an outreach product from the Marañón Waterkeepers.



# CBMM Report Section 2 - Analysis

Image: Ayacucho and Millpu Peru (Lamatta M., 2019)



## 2. Case Analysis

This particular chapter will start with a short introduction to the case site and the current ecological & social/cultural status of the Marañón River. These sections will lead to a description of the injustices that would follow as a result of the construction of the dams and other extractive practices. The case analysis will be closed off by describing the current social status around the Marañón and the reaction and needs of local communities underlying the need for guardianship.

### 2.1. Case Site

The connection between the Andes mountains to the Amazon river is one of the last major free-flowing tributaries of the Amazon. This 1800 km long river runs from its source at the Nevado de Yapura glacier high up in the Andes Mountains located in the Northwest of Peru eastwards into the Amazon plains where it meets with the Ucayali River to form the Amazon River (Press Release | Coalition of International Organizations Files an Amicus Curiae Brief Calling for the Recognition of the Intrinsic Rights of the Marañón River in Peru, 2021). This river is referred to as the Marañón River. The figure below highlights the Marañón area which encompasses one of the vastest and most important bodies of water in Peru. The river is important for the wider ecological system of the Amazon basin as it carries nutrient-rich sediments downriver and plays a key role in fish migration. The river is notable for its rich, native biodiversity that lives in the forests directly surrounding the Marañón, housing some of the highest levels of endemism in Peru (Grandez et al., 2020). Besides its ecological value to Peru and the Amazon River, the Marañón also has immense social and cultural value. It's the home to diverse Amazon indigenous groups in its basin like the Kukama Kukamiria, Awajún, and Wampis, all of whom have an ancestral and indissoluble relationship with the river. These social/cultural dimensions make the construction of dams and the simultaneous obstruction of the river disastrous as the riverside communities depend on the free-flowing nature of the river for transportation and fishing for food and income.



FIGURE 1 LOCATION MARAÑÓN RIVER SOURCE: (AGUAS AMAZONICAS, 2022)

Peru, like many other water-rich countries in Latin America, has turned to hydropower as a source for (sustainable) electricity. Hydropower for a long time has been seen as a cheaper and arguably less pollutant alternative for electricity production moving forward. In the last decade, the Peruvian Energy sector has been growing at a constant rate due to the increase in internal demand due to economic development in the country. The Peruvian government believed that an unprecedented increase in hydroelectric dams in Peru was the most responsible answer to the increasing energy demand. They furthermore believed that by increasing the hydropower capacity, Peru diminished its reliance on (imported) fossil fuels, and they were seen as essential for Peru to meet any kind of emission reduction goal (Zinngrebe, 2016). To play into the expected continuing growth of electricity and water demand due to the increase of mining practices, industrial projects, and agriculture practices besides the need to supply the growing population, the Peruvian government and large multinational companies developed plans to develop twenty hydroelectric mega-dams on the mainstream of the Marañón river (Clarke et al., 2018).

The grounds of this national interest however remain vague and are anything but holistic. Many locals and NGOs perceived the law as more having an economic motivation as the construction of the dams would result in Peru having a surplus of energy, which it could then export for economic gains. The actual principal reason for the construction of the dams was that the electricity it generated was meant to fuel the expanding mining industry and to export the electricity to neighbouring countries, in particular Brazil. The before-mentioned 2011 law favoured economic development over nature conservation. This is not uncommon in South American countries, which have been shown to struggle with the interplay between economic growth, sovereignty over resources and social degradation (Zambrano-Barragán, 2012). Peru has chosen to follow a resource-intensive economic path to development in which the favouring of environmental protection is strongly polarized (Zinngrebe, 2016). The construction of hydro dams for Peru fitted right in this niche. It could fuel its economic development in an apparent sustainable manner while upholding bilateral energy deals signed in the past. Due to the efforts of locals and NGOs stirring up the debate about the dams, investment funds not wanting to be related to funding infrastructure projects in the Global South, and globally serious doubt to what extent hydro dams are environmentally and economically sustainable led to none of the 20 prioritized hydropower projects been given a definitive or temporary concession for construction (Grandez et al., 2020).

In general, the government lacks a clear system through which the interested population or potential investors can be informed about the validity of EIAs (Grandez et al., 2020). Besides this lack of a clear communication system for the directly affected people, there is no system in place at all for the inclusion of downstream communities that are considered not to be within the radius of impact (Grandez et al., 2020). On the more ecological aspect, blocking free-flowing rivers with dams has shown to be catastrophic as it obstructs the upstream-downstream continuum that is essential for maintaining healthy environmental, social, and economic conditions along the route of the river (Hill 2015). The dams would flood the lands of the indigenous communities along the river and impact the fishing, food production, transport and water availability aspects on which the people living alongside the river depend (Marañón Waterkeepers, 2021). It will moreover destroy fish migration, increase methane emissions in the area, and disconnect normally linked ecosystems. The connectivity between ecosystems is critical for the functioning of the ecosystem and the ability of the ecosystem to adapt to change (Hill 2015). Breaking the link between the Marañón River and the Amazon Forest would be disastrous. One of the most important functions of the Marañón is to fertilize the soil of the Amazon Forest with nutrient-rich sediments each year, which makes the forest suitable for agricultural purposes and maintains its natural biodiversity (Marañón Waterkeepers, 2021). To conclude this case site description, we would like to point towards figure 2 on the next page for an overview of the proposed location of the hydro dams in the Marañón. The following chapter will highlight the ecological and social status around the Marañón, highlighting aspects like the inherent link and dynamics of rivers with the biodiversity of an area and the people whose livelihood depends on the river.





## 2.2. Literature Review Ecological, Economic, and Social/Cultural status Marañón River

Nestled between the Andean peaks lies a deep and rugged canyon, known as the Grand Canyon of South America, which is recognized as one of the most biologically diverse areas within the Andes (Aguas Amazonicas, 2022). The inherent dynamism of the Marañón river along elevational and longitudinal gradients underpins its freshwater biodiversity, and ecosystem functioning and the ecosystem serves in the Andean–Amazon (Living Rivers: Importance of Andes-Amazon Connectivity and Consequences of Hydropower Development, n.d.). Even though the Marañón covers just a small part of the entire Amazon Basin its influence on downstream ecology, biogeochemistry and human well-being are disproportionately greater than its relative size (Living Rivers: Importance of Andes-Amazon Connectivity and Consequences of Hydropower Development, n.d.).

The Andes mountains act as a barrier, preventing humid air from the Amazon from reaching the Marañón. These conditions in the region have allowed unique species to adapt and evolve along the canyon and mountain slopes (Heard, 2021). The dry forests of the Marañón boast a unique microclimate and landscape that is home to at least 65 species of plants, 55 species of birds and five species of mammals. The area’s plant diversity helps maintain biological equilibrium in the Marañón, reduce soil erosion and regulate the region's climate (Aguas Amazonicas, 2022). This region’s climate is characterized by seasonal flow pulses from Andean rivers, which help to maintain habitat, signal migratory fishes, and export sediment, nutrients and organic matter to distant ecosystems (Living Rivers: Importance of Andes-Amazon Connectivity and Consequences of Hydropower Development, n.d.). The regimes seem to be highly connected to the extent that their vitality and sustainability depend on one another. They are interwoven regimes that when interrupted (by a hydro dam) cause severe issues in the context of climate change and land use in the region. This alludes to the impact dam construction could potentially have. In a study by (Sutherland et al., 2013), it is pointed out that breaking the connection between the headwaters in the Andes and rivers and with the Amazonian lowlands themselves can be considered one of the most urgent conservation problems in the world.

Besides that, the river also has social and cultural value. First, fishing is a vital source of food and income among households with nearly universal participation rates, and fish contributes to about one-third of the mean total household income (COOMES et al., 2010). Second, economic specialization in fishing is evident around the Marañón River, with certain households earning more than their total income from fishing (COOMES et al., 2010). Third, fishing can provide an important financial and social safety net which protects households from the idiosyncratic effects of flooding of crop loss (COOMES et al., 2010). These results indicate the high economic importance of fishing. When faced with adversity, forest people in the upper Amazon turn more to fishing than to hunting or extracting forest products not only as a source of sustenance, nutrition and cash but also as natural insurance that helps rainforest dwellers cope with adversity (COOMES et al., 2010).

It’s a fact that the construction of dams would both harm the ecological status of the Marañón but also impact the before mentioned social and cultural aspects. And while the next chapter dives more into these consequences, the construction of dams would severely hamper the vulnerability of the rural poor to adverse shocks, particularly under conditions of increasing economic and environmental change.



### 2.3. Literature Review Impact of Dam Construction & Status Dam Construction Marañón River

Once being a symbol of ingenuity and engineering prowess the latest research shows that dams destroy river ecosystems and adversely affect human health and well-being (Earth Law Center, 2018). Dams are shown to alter river ecosystems from one that's cold, flowing and connected, to one that's warm, stagnant and fragmented. This development has devastating consequences both in the ecological realm as well as the social realm. This chapter will review the impact of dam construction generally but also specifically directed at the Marañón after which a review of the status of dam constructions in the Marañón will be used to bridge this chapter to the legal efforts to protect the Marañón reviewed in the next chapter.

In this case, hydro dams are built without the free, prior and informed consent of affected indigenous groups, as was mentioned before the lack of communication only worsens the situation ethically speaking without construction even taking place. The flooding from dams can displace entire communities and inundate their homes, food sources and sacred areas (Earth Law Center, 2018). As mentioned in the chapter *Methodology* this study will take a more case study approach, and while the consequences and impact of dams could be generalized along certain lines the actual impact is mostly depended on the situation the dams are constructed in. In particular, the Chadin 2 and Veracruz (highlighted in figure 2) pose a major threat to the Marañón. Their legal context and resulting status, which will be discussed later, make them the main focus of the Moratorium proposal.

For now, we will focus purely on the ecological and social impact of the construction of the Chadin 2 and Veracruz dams in the middle basin of the Marañón river. The construction of the Chadin 2 would flood 32.5 km<sup>2</sup> of land while the Veracruz dam construction would result in the flooding of 36 km<sup>2</sup> of land. In total this would mean that 319,17 ha of agricultural land would be flooded (Grandez et al., 2020). This would include 21 villages, populated areas and ecological areas with high biodiversity and species endemism, leading to 1500 people being displaced (Grandez et al., 2020). Besides this immense social impact, both dams would obstruct nutrient transport to the Amazon river. The expected 10.14 million tons of nutrient-rich sediment reduction in the Amazon basin further downstream as a result of the construction of both dams would have severe negative effects on the ecosystem (Grandez et al., 2020). Another result of breaking the connectivity within the river and among the rivers is the altering of the aquatic system of the river which will result in hindering the passage of fish and people along the entire river section (Grandez et al., 2020). General economic activities among the Marañón like agriculture and tourism would also take a devastating blow by the construction of the dams (Grandez et al., 2020). As alluded to before on top of the direct impact of the dams themselves they also house indirect effects on the Marañón like supplying the expanding mining sector which would results in the release of tons of toxic, heavy metal-laden tailings into the Amazon tributary (Elbein, 2019).

Following the analysis of the environmental legal status of the Veracruz and Chadin 2 hydroelectric projects in the Marañón river, it was concluded that the Environmental Impact Assessments (EIA) were severally lacking in identifying the potential ecological and social impacts the dam constructions would cause. The EIA of the Veracruz and Chadin 2 projects were evaluated on an individual basis, not accounting for the additional impacts of multiple dams breaking the connectivity within the Marañón.



Environmental Impacts	Social Impacts
<ul style="list-style-type: none"> <li>• Air pollution through gases and particles, product of the transport of materials, excavation for the installation of structures, etc.</li> <li>• Risk of affecting archaeological remains and rock art found in the area.</li> <li>• Alteration of soil quality, which can cause the loss of the vegetation cover and alteration of the wildlife habitats.</li> <li>• Effects on the quality of the soil, resulting from of the contamination and erosion of the soil of the river bank.</li> <li>• 10.33 million tons of sediment would be retained annually in the dam reservoir, on which the EIA has not put forward any mitigation measures that will be adopted (for example, the reduction percentages in its silting, the percentages of sediments that are would be returned to the river, etc.) (CSF, 2017).</li> <li>• 36 km<sup>2</sup> of area would be flooded, within which 74.37 ha of agricultural area would be lost, valued at S / 950 thousand soles (CSF, 2017).</li> <li>• Emission of greenhouse gasses caused by the inundation of forests.</li> </ul>	<ul style="list-style-type: none"> <li>• Possibility of involuntary resettlement of surrounding populations.</li> <li>• Impact on current economic activities, such as agriculture and tourism as a potential source of income for populations (CSF, 2017).</li> <li>• 11 populated areas in the lower middle Marañón basin would be flooded (CSF, 2017)</li> <li>• Fishing is a subsistence activity of local populations in the area, and could be affected by the alteration of 334 kilometers of migratory fish routes, and by obstruction of the entire river section, which would hinder the passage of the fish (CSF, 2017).</li> </ul>

Environmental Impacts	Social Impacts
<ul style="list-style-type: none"> <li>• Alteration of the landscape and risk of affecting cultural heritage, such as archaeological remains and pictographs found in the area.</li> <li>• Alteration to the quality of the soil, which can cause the loss of vegetation cover and alteration of wildlife habitats.</li> <li>• Impact on the quality, oxygen content and turbidity of the water due to the reservoir.</li> <li>• Effects on the fertility of the soil by the flooding of agricultural land and natural vegetation.</li> <li>• Change in flow and morphology of the Marañón river bed.</li> <li>• Erosion and accumulation of organic matter due to the creation of a barrier in the Marañón river.</li> <li>• An area of 32.5 km<sup>2</sup> would be flooded, within which 244.8 ha. of agricultural area would be lost, valued at S / 3.5 million. Likewise, the reservoir would generate the emission of greenhouse gases (CSF, 2017).</li> <li>• Annually 10.14 million tons of sediments would be retained in the dam. The EIA does not provide methods for mitigation (for example, percentage of reduction of siltation, percentage of sediments planned to be returned to the river (CSF, 2017)).</li> </ul>	<ul style="list-style-type: none"> <li>• 9 villages in the lower middle Marañón basin would be flooded (CSF, 2017).</li> <li>• Fishing is a subsistence activity of local populations in the area, and could be affected by the alteration of 182 km of migratory fish routes, and by the obstruction of the entire river section, which would hinder the passage of the fish (CSF, 2017).</li> <li>• Disordered human migration to the area, which can cause alteration to the current way of life of the populations close to the project (CSF, 2017).</li> <li>• Impact on current economic activities, such as agriculture and tourism as a potential source of income for populations (CSF, 2017).</li> </ul>

**FIGURE 3 SOCIAL AND ENVIRONMENTAL IMPACT ASSESSMENT CHADIN 2 (U) AND VERACRUZ (D) SOURCE: (GRANDEZ ET AL., 2020).**

The EIA for none of the 20 proposed dams does not mention their cumulative environmental impacts (Grandez et al., 2020). In the same study by Grande et al. (2020), the following cumulative principal social and environmental impacts for the Veracruz and Chadin 2 respectively were identified.

There has been zero consideration from the Peruvian government of its social responsibility, who moreover underestimated or just plainly miscalculated the economic viability of hydro dams (Ibarra, 2018). A study titled Marañón: The Social and Environmental Costs of Five Hydroelectric Projects | Conservation Strategy Fund, (2022) finds that the main economic cost caused by a total of five hydroelectric projects would result in the loss of 190.000 hectares of agricultural land, which translates to losing a net present value of \$1.44 billion over the course of 30 years. The analysis also estimates the value of greenhouse gas emissions (\$123 million), and the reduction of fishing income would cost the state an additional (\$103 million). The estimated losses presented in

the analysis don't even value all the social and environmental impacts of the hydroelectric projects. And even so, the losses amount to almost \$1.7 billion (Marañón: The Social and Environmental Costs of Five Hydroelectric Projects | Conservation Strategy Fund, 2022). This is a significant number that should be considered by the decision-makers charged with planning the energy infrastructure in Peru. One of the difficult-to-value social and environmental impacts of dams is those impacts on factors that are still in development. Over the last few years, eco-tourism has been identified (especially by local stakeholders) to protect the Marañón. The construction of hydro dams would wreck an embryonic tourist industry around the Marañón (Peru's Mega-dam Projects Threaten Amazon River Source and Ecosystem Collapse, 2020). The Marañón has been called the "most precious river" in Latin America and "one of the finest in the world" for rafting and kayaking. Rocky Contes, a paddling excursion organizer and director of SierraRios says, "The Marañón is on a par with the Colorado River and the Grand Canyon". These harmless activities would be a great motivator to let the river keep its free-flowing nature and could also be presented to the Peruvian government as a more comically viable option compared to hydro dams.

We want to acknowledge that we are aware there are dam projects in the world that use principles like the "free flow principle". And yes, these dams have been shown to have fewer environmental impacts, but they still generate impacts on the environment and locals. They have just been structured in a manner of trade-offs. The dam construction company must regulate the flow of the river, which leads them to produce less energy and the locals get some of the free-flowing nature and all its benefits back.

#### 2.4. Literature Review on Environmental Justice around the Marañón River and Previous Efforts to protect/ restore the Marañón River

The dichotomy between environmental well-being and economic development projects such as mining or infrastructure is an issue present in many parts of the world. Environmental justice has become more relevant to the reality of marginalized people that have not been accessed by capitalistic expansion. This final section of the case study will analyze how the conflict around the issue of environmental justice is currently shaping up around the Marañón river. Even the anticipated dam constructions around the Marañón already have had a massive impact on the mental and overall well-being of people around the Marañón. The sheer unknowing factor for local communities related to the construction is maybe one of the more obvious forms of environmental injustices that have taken place. The lack of inclusion and involvement of the local population is besides being unjust also a missed opportunity for all actors involved to generate a more accurate account of the situation and take local experiences and knowledge into consideration (Peters, 2015).

In the Marañón case, the indigenous people who live downstream were not included in the decision-making process because they don't live in the "impact zone" the Peruvian frameworks for EIA describe. B. Monteferrri has mentioned in personal communication to a previous project group at the Wageningen University and Research (WUR) that the Peruvian framework for EIAs solely allows people to participate who are directly affected by the construction of the dams. Around the Marañón River, an Environmental Justice "movement" started as a response to the proposed dam construction, because besides the expiring EIA and the questions about the economic viability of hydropower. Local opposition against the dams played an important role in delaying the construction. Particularly in the case of the Chadin 2 dam, the local population whose homes would have flooded as part of the construction showed strong resistance to the project (Grandez et al., 2020). This took the form of people organizing themselves into defense groups and using protests, statements, campaigns, and petitions to show their strong stance against the project. Eventually, this pressured Odebrecht to cancel the project. This makes this case one of the many successful examples of stopping projects and developing alternatives, testifying to the existence of a rural and urban global movement for environmental justice (Martinez-Alier et al., 2016).

Besides the fact that environmental justice expresses itself as mentioned before, we would also triangulate the status of the dam constructions, the environmental justice "achieved" by the current legal provisions and the current legal framework and seeing this as efforts to protect/restore the Marañón river. As previously mentioned, both the Veracruz and the Chadin 2 projects were in the possession of approved EIA issued in 2013 and 2014

respectively. An EIA is meant to evaluate the possible impact of economic activity in the form of a project on the environment and how the impacts can be minimized, avoided, mitigated and/or compensated (Grandez et al., 2020). After 3 years of the construction not starting both ENEL and Odebrecht requested an extension. Senate granted this extension, however, two years later construction was still not started.

The newly initiated EIA must include a mechanism that ensures they are informed of the project's legal status. The 2019 Regulation for Environmental Protection in Electrical Activities has now included three distinct changes in the new EIA: Discuss project alternatives in their EIA, include mechanisms and guidelines for citizen participation, Environmental compensation and a stricter assessment of the project's environmental viability. These changes are meant as an instrument that boosts the environmental justice perspectives related to infrastructural and electricity-generating projects. The project's alternatives would need to compare the environmental, economic and social factors of the new plans with those of the current plans. The comparison always favors the project with minimum social impacts, which includes the health risk to local populations, the implications of relocation of populations and the impacts on other economic activities carried out in the project's area of influence (Grandez et al., 2020). Citizen participation is intended to promote greater participation of the affected populations as well as the regional, local, and communal authorities and representative entities (Grandez et al., 2020). This is intended to better understand these actors' perceptions and analyze observations and suggestions about the environmental and social aspects. Environmental compensation measures are seen as necessary for those negatively impacted but could not be prevented or mitigated. Environmental compensation is part of the mitigation hierarchy (Grandez et al., 2020).

Lastly, the "new" assessment of the project's environmental viability entails that the project cannot go ahead if it's deemed as not environmentally viable. This viability is based upon the risks of loss of the ecosystem, e.g. the flora and fauna present, based on rarity, vulnerability, the impossibility of replacement, complexity and fragility of the ecosystem, and furthermore, an assessment of the indicators of the success of the environmental compensation related to the significance of the impact, availability of areas to compensate and feasibility of the compensation. If Senate concludes that there is an unacceptable risk of permanent and irreplaceable loss of ecological and social value in the areas, the investment projects will not be environmentally viable (Grandez et al., 2020). Besides the vast amount of initiatives and developments around the EIA, especially the Veracruz and the Chadin 2, other initiatives have arisen to protect the Marañón river. Nature and Culture International has managed to create a new conservation area around the Marañón. The newly established Bosques Secos del Marañón Regional Conservation Area (or Dry Forests of the Marañón RCA) protects 53,855 acres of tropical dry forest along the Marañón River in Cajamarca, Peru (Heard, 2021). With the new conservation area, the government of Cajamarca will promote sustainable production activities to protect the area's rich biodiversity. It is also meant to boost local economies through tourism, in the form of birdwatchers and water sports, which will benefit local communities by creating jobs, encouraging sustainable development, and providing additional economic opportunities. The Dry Forests of the Mara RCA have been the results of seven years of collaboration between Nature and Culture, the Regional Government of Cajamarca, local communities and authorities, and the Peruvian Service for Natural Protected Areas (Heard, 2021). Supporting this initiative is the training of 16 'indigenous conservation promoters' from the local communities so that they can help harmonize the conservation ideas of native communities and the concepts contained in Peruvian legislation on natural protected areas ('The Incredible Condor,' 2004). Slowly but surely, the community has begun to perceive its territory as an integrated unit which they can positively or negatively impact. This development has also expressed itself in a more violent manner. An indigenous leader in Peru's Amazon region around the Marañón had his community detain 98 riverboat passengers – 23 of them foreigners – overnight as a protest to demand government attention to complaints of oil pollution (Euronews, 2022). These initiatives show the severity of the situation, but that doesn't justify them.

The global movement seeking to recognize the rights of rivers has rapidly advanced, implementing effective protection and restoration to damaged and threatened basins (Figelis, 2021). The Marañón river seeks to integrate this list of natural entities that have their intrinsic rights recognized. To build upon the theoretical



background, the next chapter will describe the stakeholder & conflict analysis, after which the empirical background is completed by an analysis of the current moratorium or River Rights initiatives.

### 3. Conflict and Stakeholder Analysis

This section provides an in-depth analysis of all the stakeholders related to the case of the Marañón river. Besides depicting which stakeholders are involved or affected by the construction of hydroelectric power dams, we will elaborate on the relationship and power dynamics between different stakeholders. Building upon this, a section about existing conflicts will follow, further clarifying how stakeholders interact with each other and how they deal with issues related to the dam construction.

We will dive further into the following questions: How are stakeholders related to one another within the context of the Marañón River, and what kind of power dynamic evolves from how they interact? And how does this, in turn, fuel conflict between different stakeholders? Building upon the two previous groups that worked on issues revolving around the Marañón River, we will determine key stakeholders. The methods we use are consulting relevant literature, news articles and personal communication with some of the stakeholders. Due to time constraints and limited access to local communities, we cannot form a complete image of the power dynamics that are at play. Furthermore, we know that we are not directly involved or affected in this case. At the same time, our position as outsiders can shed new light on the problem at hand and might contribute to a broader understanding of how a certain power dynamic influences disputes concerning the Marañón River.

#### 3.1. Conflict Analysis:

Within this conflict analysis, which includes multiple scale levels, it is important to state that the scale level applied in a certain context determines what becomes visible. For instance, conflicts within organizations might remain invisible if one does not look at the group level but merely at the national level. Moving between scales on a vertical and horizontal level is salient to expose how specific power dynamics are maintained by certain actors. Moreover, an analysis of power dynamics can give insight into how time and space are shaped and claimed by human and non-human actors that are involved in the Marañón River case. To begin with, we will reflect on the scales of power using the concept of the power cube by Gaventa (2009), which can be seen in figure 4. According to Gaventa, one can identify three different dimensions of power, namely the level, space and form of power. This concept can be applied to the actors involved in the Marañón River case, as the parties involved not only operate at just one power level. Besides, how they relate to each other in the realm of power is not static; it can change over time and is not homogenous. Beginning with the dimension of power levels, it becomes clear that the case includes actors operating at different levels. Within a transnational or global context, geo-political processes influence the choices that the Peruvian government makes. For example, Brazil and Peru agreed to work together in the energy sector (Israel & Herrera 2020).

Furthermore, discourses and practices about how to treat nature inform the choices governments make regarding projects that can potentially damage natural habitats on which human and non-human populations depend. There tends to be a narrative that is dominated by western rational thinking that perpetuates the exploitation of natural resources, not taking other epistemologies into account. Applying this notion to the concept of environmental justice, it becomes clear that these epistemic limitations not only marginalize other ways of advocating for environmental justice, e.g., upholding a different cosmovision, but also has the power to create new forms of injustices, for example by the fact that there is a top-down approach of what environmental justice should be (Alvarez & Coolsaet 2018: 63).

Another actor that operates across the boundaries of nation-states is the private sector, encompassing multiple stakeholders in different countries around the world. This makes it challenging in some cases to hold companies accountable for their actions, as they often try to put responsibility on others.

The 'power cube': the levels, spaces and forms of power

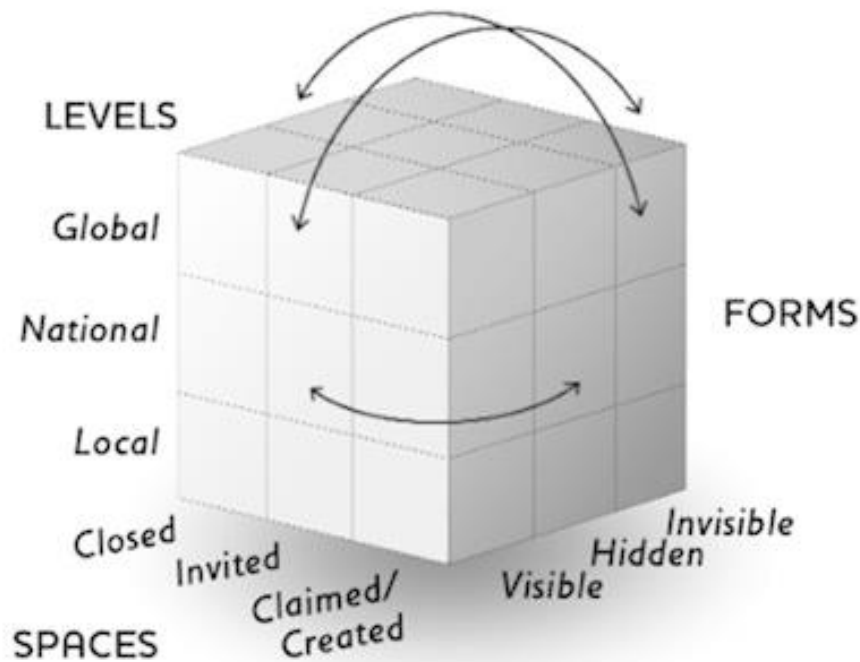


Figure 4 Power cube by Gaventa Source: researchgate.net

Extending this argument beyond the scope of Latin America, one could argue that western countries are responsible to a certain extent for environmental injustices happening in countries like Peru. By creating a demand for precious minerals like gold and silver, mainly used for electronic and technical devices, western companies and governments enrich their own industries whilst at the same time deepen economic differences between the Global North and South. On the other hand, mining brings economic prosperity to many Peruvians and accounts for 60% of the export products (de la Flor 2014). This makes clear that there is not one way to look at mining, but it remains important to recognize the environmental impacts that come with these kinds of extractive industries. Consequently, the NGOs operate dominantly on a local level and hold a dialogue with residents that live in proximity to the Marañón River. In this case, the NGOs that are involved are the Marañón Waterkeepers, Conservamos por Naturaleza and the Peruvian society for environmental law (SDPA). The SDPA can be viewed as an overarching organization and is in close contact with citizens, covering multiple scales of power at the same time. Other organizations like IUCN zoom in on local conflicts revolving around water bodies or natural areas and try to protect these natural resources by legal means. One drawback could be that they adopt a more top-down approach, since they are a larger organization that is not set up in Peru itself.

In this case, nature is an entity that crosses all scales and operates at multiple levels at the same time. Nature doesn't stop at the global, national or local level, but moves in circles and seasons. The transboundary character of natural entities makes it hard to install legal measures to protect natural areas. Still, at the same time, it provides countries with a chance to work together. In the future, the need to overcome geo-political conflicts will grow as temperatures rise, forcing governments to rethink their ontological and epistemological approach in favour of future generations (human and non-human). Lastly, the fact that actors, in this case, operate at different scale levels can complicate communication and influence the power dynamic; in the sense that national organizations can have more leverage than local bodies. Gaventa mentions not only focusing on one power level, as the global, national and local levels are more interrelated than ever (Gaventa 2009: 28). Relating this back to the main research question, looking at different scale levels and the power embedded in this, is relevant in the sense that a moratorium will cover multiple scale levels as well. It is meant to stop localized measures, in this case hydroelectric dams, but considered at a national level in the legal system of Peru. Ultimately, looking

across multiple scales can promote a more holistic approach instead of a fragmented one, because actors are forced to take the impacts into account on multiple levels, not only on the scale level in which they operate.

### 3.2. Differences, contradictions and incompatibilities

Besides looking at the differences in scale and how that affects the power dynamic, it is also salient to see which differences, contradictions and incompatibilities add to conflicts revolving around the Marañón River. Looking again at the Gaventa power cube in figure 4, power is not only distributed on a scale level, but also in various spaces. These spaces can be closed, invited or created, depending on the degree of power an individual actor holds. Moreover, spaces are not a neutral container waiting to be filled, but the result of a power dynamic that materializes itself into spaces. Power relations also determine the boundaries between spaces, on who may enter a certain space and what is allowed in the space itself (Gaventa 2009: 26).

Additionally, there are several ways to describe power: "Power 'over' refers to the ability of the powerful to affect the actions and thoughts of the powerless. The power 'to' is important for the capacity to act, exercise agency and realize the potential of rights, citizenship or voice. Power 'within' often refers to gaining the sense of self-identity, confidence and awareness that is a precondition for action. Power 'with' refers to the synergy which can emerge through partnerships and collaboration with others, or through processes of collective action and alliance building." (Gaventa 2009: 24) It becomes clear that the actors involved in this case do not all have an equal amount of power 'over', power 'to', power 'within' or power 'with'. This can be explained through several differences that exist between the stakeholders that will transform some actors into subjects and others into objects. However, it depends on the standpoint of view and the narrative that is told. Local communities can be seen as objects by the Peruvian government (power 'over'), but at the same time, they have the power 'to' speak up and raise their voice against the construction of dams. Thus, they are neither only an object nor a subject, and have the power 'within' to raise awareness for the injustices they face. They are aware of their rights and are eager to continue protesting against the dam construction, since it is still not off the table (Luigi Marmanillo, personal communication, 22-11-2022).

Going back to the three different forms of spaces in which power exists, it is certain that there are some contradictions to be found in the discourse around how to consult certain stakeholders. According to Peruvian law, local communities always need to be consulted before any project if this involves replacement, like the construction of hydroelectric dams, can be realized. However, we learned that this is more an exemption than the rule. Local residents indicate that they weren't contacted to attend the consultation evenings as part of the Environmental Impact Assessment performed by the state (Luigi Marmanillo, personal communication, 22-11-2022). This means that the consultation space becomes closed, while it should be a space of invitation to create a higher level of participation. Another example of this is selectiveness, which can be found at the consultation nights that are held by the companies. Only proponents are allowed to enter, silencing the majority who oppose the dam construction (Marañón waterkeepers documentary). A consequence of this is the creation of new spaces from a bottom-up approach, in which marginalized groups can voice their opinions in a space that centralizes their perspective. These created spaces mostly exist outside of the realm of institutions (Gaventa 2009: 27). It is important to realize that the organizations (NGOs, governments and local residents) involved in this case not only differ from each other, but that there are also certain power relations within social groups. The homogenization of stakeholders involved can give a clouded image of relationships between them and eventually runs the risk of stereotyping people. This can create a situation in which actors become incompatible with each other because they differ too much from each other, or at least that is what the consensus is. In fact, stakeholders might have more in common than they think they do.

Thus, it is important to account for inter-group (between groups) and intra-group (within a group) differences by keeping in mind that power is dispersed in more ways than one; it exists and is materialized on different scales and in different spaces. Once again relating this back to the main research question, in the light of the realization of a moratorium, it is important to that stakeholders are aware of how power plays out in space. Being aware of how spaces become places of invitation or the opposite, become closed spaces by utilizing or abusing power, can create more opportunities to break power structures through constructive engagement, meaning that people get the opportunity to voice their ideas.



### 3.3. Causes, core issue(s) and consequences:

Within the conflicts existing around the potential construction of hydroelectric dams, there are multiple factors that spark these conflicts between different stakeholders. This section will elaborate on causes, core issues and the consequences of disputes between different actors.

The main causes for conflict point towards the differences in ontologies and epistemologies that exist between stakeholders. Different ways of life create a certain way of knowing the world around you; knowledge can be based on different grounds, such as a rational approach or a more emotional/embodied experience of knowledge. This existing difference in ways of knowing and experiencing the world between stakeholders can also be traced back into time, as becomes clear in the Skull Valley case in the US. Ishiyama (2003). This case depicts how current conflicts around land usage and environmental justice are informed by historical colonialism that produces a certain landscape of injustice (Ishiyama 2003: 119). What is important here, is the fact that historical and current forms of colonialism (think of neocolonialism in which western parties force people to cooperate into economic projects that ought to 'develop' rural areas), limit the agency people can exert when it comes to issues that impact the environment they live in. It becomes clear that the Peruvian government operates in a fast-growing world where economic and social interests are more and more intertwined, informing their decisions about how to engage in the geo-political relationships in order to keep up with other countries, and thereby potentially clashing with more local economies and livelihoods of the people living close to the river.

Furthermore, the perception or epistemology of the Marañón River can be considered as socially constructed; the river has different meanings in different contexts. For the construction companies, the river has an economic value. For the Peruvian government, the river can be a means to bring more prosperity to the nation and could be part of a bigger political project. Thirdly, people living along the river might give the river more spiritual meaning, since the river is part of their lifeworld, and they depend on it. We could say that there is a certain political ontology employed by the different actors, meaning that they fall back on different meanings given to the river to defend the plans they want to carry out. Additionally, another cause of conflict could be access to knowledge. As stated before, the government is not transparent about their decision-making process regarding the construction of hydroelectric dams, which creates social unrest among local communities. Communication between different levels of power (global, national and local) is not without problems, in this case where local communities are not updated regularly about the current status of the dam construction. It became clear to us that Rondas play an important role in providing communities with the right information. Still, we don't know how the Rondas gather their information and to which degree the government provides them with information (Luigi Marmanillo, personal communication, 22-11-2022).

Moreover, differences in interest and needs further spark conflict between stakeholders, as they strive towards different goals and are willing to manipulate others to reach their preferred outcome. Construction companies are known to create disputes amongst local communities to get more proponents for their projects. Likewise, opponents of the projects face criminalization by the state or public media, and even risk of being killed. Besides direct threats of the dam construction, it is important to consider to which degree this form of slow violence is a potential source of negative psycho-social effects. While most environmental disasters have an immediate negative effect on the victims, this case stretches itself over a longer time, turning into a form of slow violence where the people are slowly faced with the negative consequences of dam construction. A case study by Cline et al. (2014) demonstrates how slowly evolving environmental disasters put pressure on communities, adding to more negative social dynamics and greater psychological stress, as they spread out across time and space. Going back to the notion of criminalization, it is important to understand how and why state actors criminalize social movements. Doran (2017) describes how governments of countries like Mexico and Chile exert violence against social movements, for example, by the imprisoning or forced removal of individuals that are involved in activism or the defence of human rights. While the state criminalizes social movements to suppress violence and uproar, it often has the opposite effect, as the killing of Berta Cáceres in Honduras

demonstrated. Instead of silencing the social movement, her death sparked more opposition to the construction of a dam (Middeldorp & Le Billon 2019: 333).

Thus, the process of criminalization reveals how democratic states fail to counter narratives of violence and instead fuel conflicts between different actors. In the case of Peru, criminalization might play a smaller role than in Mexico or Honduras, but that doesn't mean it is not happening. One of the local leaders and an opponent of the construction plans for the dams, Hitler Rojas Gonzales, was murdered by someone that sold their property to the Brazilian company Odebrecht (Hill 2018). This makes it clear that there isn't a unified consensus amongst local residents about the dam construction plans. The looming threat and the fact that someone was killed for voicing their opinion, adds to an environment in which some people might not feel safe enough to speak up against injustices that affect their lifeworld, eventually fueling the conflict. Lastly, it is important to stay critical of how different actors engage with this case and to what degree they do so. To what extent do they have the agency or power to engage, and how does the decision-making process include and exclude certain groups of people? Within this, it remains necessary to reflect on the positionality you have as a stakeholder in the case, making sure that you are aware of what kind of power you have and engaging with other actors in a way that doesn't deepen already existing inequalities. Instead, one should try to find common ground and make sure that the playing field is levelled, for example, by having meetings in a neutral space. Surely this is easier said than done but becoming aware of the power dynamics that are at play can help with creating more consciousness about how people are impacted by the choices made concerning the Marañón River. With the conflict analysis in mind, the next focus is on the stakeholder analysis, where a power-interest grid will show how the different stakeholders relate to each other.

### 3.4. Stakeholder Analysis

#### 3.4.1. Governmental institutions

According to (Israel & Herrera 2020) the Peruvian and Brazilian governments signed an agreement to work together in the energy sector. The idea was that Brazil would import the energy produced by the hydropower dams located in Peru. This makes the Brazilian government an important stakeholder. Moreover, the Brazilian government was one of the initiators and financing parties in the building of the dams. Due to the agreement, we could argue that this stakeholder has a large influence. The importance of energy import in this region makes this stakeholder also relatively high in interest. Another important stakeholder, in this case, is the Peruvian government. The planned building of dams for hydropower was initiated by a 'supreme decree' that was issued by the prior president of Peru, Alán García (Israel & Herrera 2020),(Grandez et al. 2020). The Peruvian government is a large stakeholder with a high amount of power. In the power-interest grid provided in this document, shows that the Peruvian Government has more power than the Brazilian government, due to the fact that it is Peruvian territory and thus they are the ones deciding what will happen. This power can be used to prevent the building of hydropower plants, but on the other hand, provides them with the power to give permission for construction. The interest of the Peruvian government is logically also rather high, considering the range of economic interests in the project. Natural and social interests play a significant role, as stated in this portfolio and will come back in the moratorium proposal. Besides, a governmental institution of Peru is the National Water Authority (ANA). This governmental organization provides legal permits (Grandez et al. 2020). ANA, therefore, has a high degree of power. The interest of ANA is that water in the region is put to good use (Grandez et al. 2020). This stakeholder, therefore, has a high interest in the case of building the dams, since this case focuses heavily on water use.

#### 3.4.2. Local communities

The local people that live near the river have, as one would expect, a very high interest in this case. The news article by (Hill 2015) describes the situation of indigenous people near the river and how they see no value in selling their land to construct a dam. (Coomes et al. 2010) have studied the economic income of indigenous people in Peru. According to (Coomes et al. 2010), the sampled indigenous communities that live near the Marañón River, have their livelihoods heavily dependent on agriculture and fishing. Where more than 97% of the sampled households participate in agriculture and more than 94% participates in fishing, this shows that the river is crucial for their survival and the high dependence indigenous people have on the Marañón River. Social

and cultural components were not considered with other projects around the Marañón River (AIDSEP et al. 2019).

These previous actions suggest that the indigenous people have relatively low power in the decision-making process and as a stakeholder. According to our interview with Vera Knook and Luigi Marmanillo (Marañón Waterkeeper 2022), the local people do have some influence and therefore power, since local people need to be consulted when the proposal of projects arises, but as what became clear in the previous section, this often doesn't happen. The area where the Marañón Waterkeeper operates is an area where the Mestizo live. These local people have leaders in their communities called Rondas. These leaders have connections with the more developed part of Peru. According to Vera Knook, people from around the Marañón River often work for months in cities before arriving back to their homes near the Marañón River.

#### 3.4.3. NGO's

Marañón Waterkeeper is a non-governmental organization focused on preserving the Marañón River. This actor is also our case facilitator. Their interest in the case is high since the mission of this organization is to preserve the river, which is brought in danger by the potential construction of hydroelectric dams. Their power, in this case, is not as significant as that of the governmental bodies. What they can do is prevent the building of hydroelectric dams by legal means or protest against decisions being made in favour of the dam construction. Another NGO is the international organization for the conservation of nature and natural resources (IUCN), they focus not only on Marañón River but on the conservation of nature across the world. The fact that they also focus on the Marañón River makes them a stakeholder in this case. IUCN is a large organization, which gives us reason to suspect that they perhaps have a relatively high power in comparison with other NGOs.

During the IUCN congress of 2020, a motion was proposed. In this motion, the director general of the IUCN sent a letter to the president of Peru, urging him to rethink the importance of free-flowing rivers (IUCN World Conservation Congress 2020). The last NGO we have identified as a stakeholder is International Rivers. This NGO is specifically concerned with the value of rivers. Furthermore, they try to 'defend the people that depend on them' (International Rivers 2021). There are many more NGO stakeholders involved in the case of the Marañón River, but these three stakeholders are the most salient in this case. During our interview with Vera Knook and Luigi Marmanillo (Marañón Waterkeeper 2022), we found that NGOs themselves do not have much power in the case. What often happens is that NGOs work together and combine forces to gain influence, but this comes with certain challenges on their own. NGOs have different entry points from which they operate and don't always agree on which approach they want to take to solve a problem.

#### 3.4.4. Private sector

Odebrecht is a Brazilian construction company that is involved in the case of the construction of hydro dams according to (Israel & Herrera 2020) & (Waterkeeper Alliance). The waterkeeper alliance mentions in their report that Odebrecht is questioned due to corruption scandals. Financial reasons make the company have a high interest in the building of hydro dams. Intimidation towards local communities is common to ensure there is less resistance against the building of the dams. The construction has not been started yet. Therefore, we reason that the company's power is relatively low in the broader perspective, since they cannot make their own decisions about starting the building. According to (Israel & Herrera 2020), the Brazilian building companies play a role in the reason why Peru and Brazil signed an energy agreement in the first place. Therefore, they are a key driver for the construction of hydro dams in Peru. From this perspective, we see them as rather powerful. Another important component of the private sector is the companies that finance the building. The Norwegian 'Sovereign wealth fund' has divested from the building of hydro dams in Peru (Grandez et al. 2020). This results in a problem for the project since the financing of the projects is a crucial component.

#### 3.4.5. Nature

The river Marañón itself naturally has the highest interest in this case. The surrounding area of the Marañón River is heavily dependent on the river in relation to the ecosystem. Therefore, the interest in nature is high. In the chapter on the rights of rivers, it will be defined in what way a river could potentially have any



power. For example, being recognized as a legal entity. Currently, nature does not have any power in the context of legal or social power. We feel that nature itself is powerful in bringing people together.

Fortunately, nature inspires people all over the world to take care of the planet and to rebel against companies and institutions that are unsustainable. There exist 29 protected regional areas in Peru. These areas are formed by the Peruvian government (Actualidad Ambiental). According to Vera Knook, regional governmental bodies are involved in protecting these areas. An area which is designated as protected is likely to be safe from any destruction caused by humans; to conserve the different types of ecosystems, species and nature in general (Actualidad Ambiental). From our interview with the NGO International Rivers, we conclude that the local communities feel that the rights of nature are obviously basic rights. Rights that local communities think are undebatable and do not necessarily have to be made legal because these are just basic ‘worldly’ rights.

### 3.5. Perception of relevant stakeholders

To summarize the situation of the case of the Marañón River, in context with the stakeholder analysis and the power-interest grid, we think that the governmental institutions have the highest power, since they can make crucial decisions. Furthermore, we see that companies such as construction companies have a relatively high power due to the financial means they have at hand and their interest in receiving the contract to construct the dam. Local people have a very high interest in the case, as their livelihood depends on it, but have relatively low power. NGOs try to tackle this problem by helping empower them by supporting their case. In the end nature has arguably the highest interest, but little power. The power that could be given to nature is a concept we are exploring more in this portfolio.

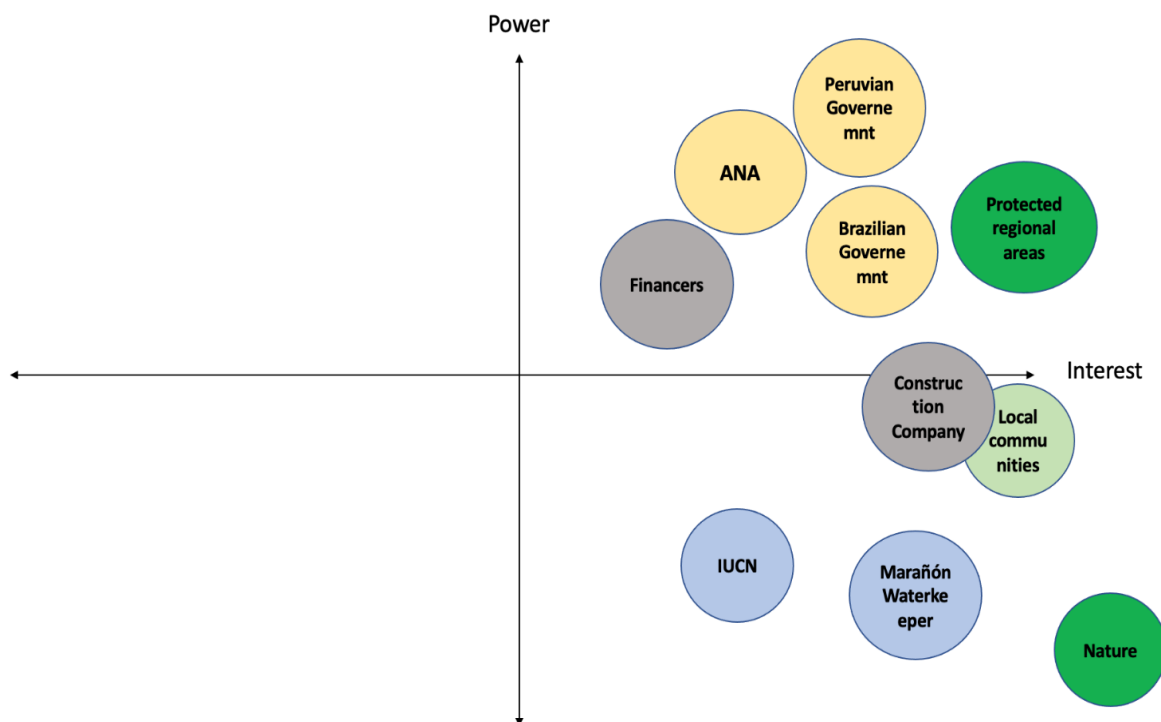


Figure 5 Power-Interest grid in the case of building the Veracruz and Chadin2 dams in the Marañón river

### 3.6. Future Steps for the Relevant Stakeholders

The current case of the construction of Veracruz and Chadin2 dams in the Marañón River is now in a stage of great uncertainty. According to (Grandez et al. 2020) the environmental impact assessments of these projects have expired, and in order to proceed with the projects, there needs to be a new environmental impact assessment. NGOs are battling to prevent the construction of the dams. In the end, the goal is that the Marañón River will be named a legal entity. According to Marañón Waterkeepers, a moratorium is a short-term solution

for a few years, so that the case for nature rights can be made. Other stakeholders focus on different interests such as social and economic factors.

The Peruvian government is as mentioned a powerful stakeholder with a relatively high economic interest. Although their main focus should be the well-being of all Peruvian citizens, they focus mostly on the development of projects that does the opposite, as the dam construction potentially displaces people living along the riverbanks. However, there is always another choice to make if you want to change the narrative. The Peruvian government must decide if economic growth is more important than nature and the negative impact on the local communities of the Marañón River.

This brings us back to our main research question: *Could moratorium and River Rights initiatives contribute to a short-term and long-term paradigm transformation toward environmental justice around the Marañón and how should these be structured to best combat current and future environmental injustices?*

In the next chapters, examples of moratoria will be explained to aid in our proposal of a Moratorium for the Marañón River. The stakeholders that can initiate a moratorium are a combination of NGOs and the local people, as explained in the moratorium of the Assam region. A collaboration of NGOs and local people is necessary to accomplish this.

## 4. Moratorium Analysis

Over time moratoria have been used more and more often in environmental issues. They are being called upon to halt deforestation, to prevent overexploitation by fisheries, or to halt large infrastructural projects. Furthermore, multiple moratoria have already been specifically established to prevent dam constructions, and as such protecting the river, its surrounding habitat and local people living around the river.

In this section we discuss three cases in which moratoriums have been called upon to protect the river from damming. We chose specifically for these three cases since they differ in scale, initiators, focus and grounds. In that way we can provide an overview of different possibilities. This chapter thus provides a basis for the moratorium proposal later in this portfolio. There we will also discuss, from the lessons we learned in this analysis, how these existing moratoria can be used as inspiration for our proposal. This chapter also provides the Waterkeepers with a literary review that they can use in their road towards a moratorium. Although the three cases have the same aim, their approach differences to environmental justice, which will be clarified by looking at the content and the context of each moratorium. Lastly, I will reflect on how environmental justice may or may not have been enacted in each case.

### 4.1. Yellowstone Moratorium – 1974

The Yellowstone river is appreciated for its scenic beauty, its biodiversity, recreational value, local economy, fisheries and to provide future resources. Moreover, the Yellowstone remains the longest free-flowing un-dammed river in the lower 48 states of America (American Rivers, 2022). The 1974 Yellowstone Moratorium played a part in ensuring this status. The Yellowstone was at risk of being depleted by industrial activities, at the expense of agricultural, recreational and conservational water use (Sweetman, 1980). Coal mining and water intensive electricity plants were considered, for which damming the river was required (Lang, 1985). Thus in 1974, the moratorium was proposed stating that for 3 years or until 1) existing rights of the river are accurately determined and 2) reservations of water have been made for future beneficial use and preservation, any action is halted and permits cannot be granted for water use and diversion projects (Sweetman, 1980; O'Keefe, 1984).

Furthermore, the moratorium contained a reservation priority scheme, in which public water use and future reservation should be prioritized over industrial water requests (Sweetman, 1980; O'Keefe, 1984). The moratorium was even successfully extended till 1978 (Sweetman, 1980; O'Keefe, 1984), thus preventing any dam construction for four years. During these four years, the moratorium played in tandem with a request from the Montana Fish and Game Department. The department requested 'water remaining in the river' to be

considered as future beneficial use, for the health of the river (Lang, 1985). The required water flow that should be maintained in the river to meet these requests puts limits on removal of water. This would then directly prohibit dam construction. The board approved this request and as such dam construction was successfully prevented (Lang, 1985).

#### 4.2. Manibeli declaration - 1994

Another approach to preventing the harmful effects of dams on the environment and people was taken by preventing funding for such projects. This case enacts on a different scale as the case before: the World Bank was targeted. In 1994, the Manibeli Declaration, formed by 326 NGOs from 44 different countries, called upon a moratorium on the funding of dams by the World Bank (Fujikura, & Nakayama, 2009). Funding for planning or construction of large dams was prohibited until they complied with the following nine criteria summarized below (Manibeli Declaration, 1994, cited in International Rivers, 2007):

1. The bank needs to establish a fund, and an independent institution in charge of it, to 'provide reparations to the people forcibly evicted' and other affected communities by projects funded by the World Bank (Manibeli Declaration, 1994, cited in International Rivers, 2007).
2. Change policies and practices to guarantee that the Bank will not fund dam projects in which communities are displaced, in countries where 'restoration of the living standards' of these peoples are not assured. Affected communities have to be involved throughout all phases of the project. Informed consent need to have been given before displacement can happen or the project can start.
3. The Bank implements recommendations of an independent review on the economic, environmental and social costs and the actual benefits of World Bank funded projects.
4. The bank needs to cancel owed debts for projects in which costs have outweighed realized benefits.
5. Develop techniques in which cost & benefit, risk & impact estimates are based on real past experiences of Bank funded dams.
6. Any large dam that is considered needs to be part of a 'locally-approved comprehensive river basin management plan' and it is a 'last resort after all less damaging and costly alternatives ..... are exhausted.'
7. Make all, past and current, information on projects or their consideration 'freely available to the public.'
8. Independent and systematic monitoring, evaluation and auditing on preparation and implementation of large dam projects.
9. The bank needs to take a formal decision 'to permanently halt all funding of large dams', since it is 'inconsistent with the IDA-10 donor agreement' (Manibeli Declaration, 1994, cited in International Rivers, 2007).

The World Bank announced an internal review of its funded dams after this Declaration, concluding that around 70% of the dams were acceptable 'under the Bank's current guidelines' (Fujikura, & Nakayama, 2009). Moreover, they stated that dams can be built 'while protecting the environment and restoring the livelihood of people who must be resettled' (World Bank, 1996, cited in Fujikura, & Nakayama, 2009). In 2000, another moratorium was proposed to halt dam funding by the World Bank (Fujikura, & Nakayama, 2009). The World Commission on Dams (WCD) had released a report with guidelines and core principles: equity, efficiency, participatory decision-making, sustainability, and accountability. NGOs took these guiding



principles as literal requirements, stating that a moratorium should be placed on all funding of dams until compliance with these principles could be demonstrated.

This moratorium was simply rejected by the World Bank by citing a WCD statement, explaining that constantly calling on moratoriums leads to paralysis, and that dams are still needed for growth and development (Fujikura, & Nakayama, 2009).

Though in this case the NGOs call on the moratorium was not correctly grounded, the persistent attitude in the World Bank, of rejecting these critiques and not improving their operations bases on WCDs voluntary principles, is worrying. It shows little hope for actual change.

#### 4.3. Moratorium in the Assam region - 2010

The Krishnak Mukti Sangram Samiti (KMSS) is a farmers rights organization that fought for years against damming in the Assam Region, in Northeast India (Bosshard, 2011). They were backed by activists and NGOs and together they sought an audience with the Indian environmental minister. This turned out to be a successful move; the environmental minister proposed a moratorium to the Prime Minister (Bosshard, 2011). The KMSS called for a moratorium on all clearances to large dams and hydropower projects in Northeast India (Krishak Mukti Sangram Samiti, 2010; Bosshard, 2011). Their demands were the following (Krishak Mukti Sangram Samiti, 2010);

1. Withdraw clearances on three specific dam projects which were granted without consent of the people and without a downstream impact assessment (Krishak Mukti Sangram Samiti, 2010).
2. An independent review group that studies ‘the environmental and social impact of all the existing dams in Assam’.
3. A review of pre-construction clearances that are already granted
4. Future steps on dam and hydropower projects may only be taken after Full, Prior, Informed Consent has been given by the people living of the basins.
5. Future development needs to respect both the social and the environmental sensitivity of the area. The river and its tributaries need to be protected as a cultural and natural heritage (Krishak Mukti Sangram Samiti, 2010).

On 6 May 2010, half a year after the moratorium was installed, the company gave in and decided to move to another country (Bosshard, 2011). This case shows a successful moratorium approach through a bottom-up mobilization of action.

#### 4.4. Environmentally just moratoria?

In these cases, environmental justice manifests in different ways, through different approaches and on different scales. In the Yellowstone case, environmental justice can be found in the focus on preserving the river and its resources for future generations. Moreover, justice is enacted through the priority scheme, by ensuring water availability for the public instead of letting it be hijacked by big industrial companies who often hold more power. If we look at the Manibeli Declaration, we find a strong wish for environmental justice through the articulation of certain human rights in the moratorium. This moratorium aims to prevent forced displacement, to compensate for consented displacement, to make information accessible and for prior informed processes. Furthermore, environmental justice can be found in the focus on impacts in all dimensions; economic, social and environmental costs and benefits have to be taken into account. The declaration has honest intentions, but how compliance, of such a big organization as the World Bank, be assured? How do we know for certain if communities were behind resettling elsewhere, and their consent was not frauded, as has been often the case with big mining companies? In the Assam case, environmental justice has been achieved. This approach is interesting since it really came from the people themselves; they mobilized and they made their demands heard at higher levels, who did have the power to make change.

#### 4.5. Comparing the cases

From these cases, we can learn how to incorporate justice in the Maranon Moratorium. Furthermore, we can look for shared characteristics and differences, see table 1. First, all cases demand independent reviewing of all impacts, from the perspective of three dimensions (social, economic, ecological). This is a demand that could also be used in the Maranon case. These dimensions also give us insight into how to structure our proposal. Secondly, if we compare scales and levels, the Yellowstone River and the Assam case fit more with the Maranon River than the Manibeli Declaration. However, the elaborate contents of the Manibeli Declaration can still be used as inspiration for this case. Third, we can look at initiators. The Yellowstone moratorium was drafted and implemented by (governmental) departments, in the Manibeli declaration, NGOs took the lead, while in the Assam Case, local farmers mobilized bottom-up. For the Maranon case, NGOs, such as the waterkeepers, take the lead in the drafting and implementation of the moratorium. It would be ideal if this could be combined with a bottom-up approach from the affected communities living around the river. This will be elaborated on in the Moratorium Proposal chapter.

Table 1, characteristics of the three analyzed moratoria.

	<b>Yellowstone Moratorium</b>	<b>Manibeli Declaration</b>	<b>Assam Moratorium</b>
<i>Scale</i>	Whole river basin still freeflowing, moratorium started in the state Montana.	All World Bank funded dams	River basin in Assam region
<i>Players/initiators</i>	Initiator unclear, Montana Fish and Game Department played important role.	NGOs worldwide came together and initiated and drafted a moratorium.	The Krishnak Mukti Sangram Samiti farmers rights organization initiated and drafted.
<i>Region</i>	United States, Montana	Worldwide	India, Assam
<i>Focus</i>	Free-flowing river, future preservation of water.	Mostly about social injustices. Economic and ecological impacts also considered.	Social injustice and environmental impact.

Furthermore, we can divide all the demands from excising moratoria into the three dimensions, to use as inspiration for what could be considered per dimension, or as we call them in our proposal; pillars. This overview is shown in table 2. We believe that we need to consider all dimensions to achieve environmental justice. This will be elaborated on in the proposal.

Table 2, The demands from the existing Yellowstone Moratorium, the Manibeli Declaration and the Assam Moratorium divided over the three dimensions.

<b>Dimensions</b>	<b>Demands from excising moratoria</b>
<i>Economic dimension</i>	<ul style="list-style-type: none"> <li>• Reparation fund for forcibly evicted and other affected</li> <li>• Cost-benefit estimates based on real past experience</li> </ul>
<i>Social dimension</i>	<ul style="list-style-type: none"> <li>• Respect social sensitivity and protect as cultural heritage (Assam)</li> <li>• Priority scheme, to give public more power against big industries (Yellowstone)</li> <li>• Free Prior Informed Consent, before initiation the project or before displacement. Involvement in all phases (Manibeli &amp; Assam)</li> <li>• Freely available information about all considerations, past and current (Manibeli)</li> <li>• Dam should be part of ‘locally-approved comprehensive river basin management plan’ (Manibeli)</li> </ul>

<i>Ecological dimension</i>	<ul style="list-style-type: none"> <li>• Future beneficial use and preservation (Yellowstone)</li> <li>• Priority scheme (Yellowstone)</li> <li>• Free-flowing, water remaining in the river (Yellowstone)</li> <li>• Respect natural sensitivity and protect as natural heritage (Assam)</li> <li>• (Downstream) Impact assessments (Assam)</li> </ul>
<i>Overarching demands</i>	<ul style="list-style-type: none"> <li>• Dams as last resort (Manibeli)</li> <li>• Independent review of all economic, social and environmental costs and benefits. For all existing dams and future projects. (Assam &amp; Manibeli)</li> </ul>

## 5. River Rights Analysis

The environmental phenomenon of River Rights is increasingly becoming a heated topic among policymakers and politicians and is gaining speed in its implementation worldwide. Although our overall goal is to propose the grounds for a moratorium, we believe that providing a short analysis of River Rights can help create a link that could be used to protect the Marañón River in a more concrete and long-term way. As a brief recap on what River Rights entails, it stemmed from the idea of environmental personhood, which means that the “river is now considered by law, by code, a living entity, so you will have to face the consequence by law if you do anything that kills [or harms] the river” (as cited in Westerman, 2019). A critical element in this definition is the reoccurring word “by law.” Granting River Rights enables a river the security that has only been given to humans (and some corporations recently) so far in human history. This is an incredibly recent concept used in legal conversation and implementation. The first country to do this was New Zealand, with the Whanganui River in 2017, quickly followed by India, which granted the Ganges and Yamuna Rivers the same legal rights as human beings in 2017 (Safi, 2017).

In this analysis, we will look more in-depth into the New Zealand and India cases since we have found that some elements can be used in the Marañón River case with the most effectiveness. Although we could spend pages upon pages outlining each RR case from different countries, we will outline these specific cases as they seem to grasp the process and results of many of the other examples. Additionally, we'll concentrate on a case where we think we can learn the most from what we would characterize as a success story, followed by a case where we think we can learn the most from what we would characterize as a failure story. We will also analyze some specific aspects of the Marañón River case that are critical in establishing a baseline in not only enacting a River Rights law but implementing and sustaining it successfully, including some information.

### 5.1. New Zealand River Rights

The Whanganui River in New Zealand is the “first river in the world to be recognized as an individual and living being” (Lurgio, 2019). This was a big deal, and rightfully so. The Māori tribes who live along the Whanganui River have been in disputes with the New Zealand government for decades about the positionality and importance of the river in terms of not just its ecological value but its spiritual significance and how those values translate to the reality of the usage and pollution of the river. The river was named “Te Awa Tupua” and is now *legally* recognized as an “indivisible and living being,” with the new law putting forward “new intentions to uphold the mana (prestige) and mauri (life force) of the river” (Lurgio, 2019). It is crucial to note that the RoN implementation happened “not through lawsuits but through the creation of a new governance system tasked with governing the forest ecosystem according to traditional Māori knowledge, values, and customs that are consistent with Earth Jurisprudence” (Kauffman, C., M, Martin, P., L, 2021). What we can take away from this is that much of the success of this case is that the *framework* was changed to uphold the knowledge and expertise of the Indigenous group in a certain location. Furthermore, the cornerstone of the Rivers guardianship is the principle of this case, which might apply to the Marañón River. The act states that the “Whanganui River is a living entity and a legal person with rights that can be judicially enforced by appointing guardians” (Argyrou., Hummels, 2018). The two guardians appointed were one state representative chosen by the New Zealand government and one Māori representative selected by the Māori communities. These guardians work together to form the Rivers voice and uphold what giving the River legal personhood expresses and entails. As well, a ‘strategy group’ was implemented.



This group, called the Kōpuka, includes “Māori community representatives, local authorities, the government, commercial and recreational users and environmental groups, with the purpose to act collaboratively to advance the health and well-being of the river” (Argyrou., Hummels, 2018). The guardianship and the strategy group are both crucial elements in upholding the River Rights' legal position. We think pieces of these components could be used in the Marañón River case. Tāmami Kruger, a Māori advocate, summarizes the heart of the issue brilliantly.:

“We realized that we were starting in the wrong place. That guardian-ship is not in the board room, in those that were mandated. I think we were projecting from modern society, from Pākehā Western culture, that [the Te Urewera Board] are the guardians. Slowly we figured out that no, they are not. The guardians are [the bush crews]. These are the people who probably are not educated in the Western definition. They don't have diplomas and degrees. They probably suffered through the education system. They probably have some literacy issues. They don't like meetings. They don't like agendas. They don't like papers. But they love the land and they love living there, working there, sensing it and being part of it. Now *that's* a guardian.” (as cited in Kauffman, C., M, Martin, P., L, 2021)

## 5.2. India River Rights

Shortly following the implementation of the River Rights in New Zealand, India granted the Ganges and Yumana Rivers the same legal rights as people, and it became the first “non-human entity in India” to be given this title (Safi, 2017). After this judgment from the Indian High Court, it was suspended by the Supreme Court of India shortly after (Chaturvedi, 2019). Why did this push for River Rights fail so quickly? From an outside perspective, it may seem that the New Zealand case and India cases are similar, but they differ quite substantially. Although the court ruling appointed guardians in India's case, similar to New Zealand, it differed in who they appointed. For example, “rather than having local stakeholder groups in the watersheds nominate guardians to protect rivers, the court-appointed state officials to serve as guardians” (Kauffman, C., M, Martin, P., L, 2021). This difference substantially weakened the efforts to safeguard India's River Rights, and the question of how these laws would be implemented when the consequences are not felt immediately was raised. As well, “unlike the Whanganui River legislation, which provides clear structures, rules and funding for implementation, after eight years of careful negotiation that gave everyone plenty of notice of the coming changes, the recognition of the Ganga's and Yamuna's legal personality occurred almost overnight” (Chaturvedi, 2019). And finally, perhaps the most important difference between the two cases was the “reason for the development of nature's rights” (Chaturvedi, 2019). The *reason* is an extremely crucial element when deciding if nature rights will be *successful* or not. In India's case, the rights were advocated based on the “right to access and worship the river,” while in New Zealand's case, the rights were put in place primarily to “resolve a previous colonial injustice” (Chaturvedi, 2019).

A key factor we want to take away from this case is the connection to the spiritual and religious elements that strongly influenced granting of legal rights to these rivers. In the case of the Yumana and Ganges Rivers, the government recognized that in “Hindu cosmology, the rivers are regarded as holy and personified as divine bodies” (Kinkaid, 2019). It is noteworthy that despite the long history of this idea and its spiritual significance, it does not become imperative until influential individuals make it so. However, is this not the primary key to the Rights of Nature? This is the theme that we see recurring in many RoN cases. The value of these lands and waters has been there for centuries for those who have resided there. The connection and partnership many Indigenous people and groups feel toward the lands and waters is a fundamental principle, so evident that there is no need for terms, definitions, or laws to explain or implement. In India's case, the “argument for the legal personhood of the rivers is significantly informed by Hinduism, legal codes surrounding idols, and concepts of human development and faith” (Kinkaid, 2019). But perhaps legal personhood is not the answer to India's case? As Ipshita Chaturvedi explains, perhaps it would “be more meaningful to explore and articulate the procedural aspects of other established principles and focus on proper implementation than to come up with new rights, at least in the Indian context (2019). It seems that generally, legal personhood cases rest on either religion or recovery of ancestral/indigenous knowledge. Moreover, a significant factor in granting rights to rivers is the understanding that one model will not fit all; it must be area specific, but it is also essential to take note of the evident reasons why a RR example was so successful as well as unsuccessful.

### 5.3. Marañón River Rights

We believe the Marañón River in Peru has the grounds to create a successful River Rights story. We can significantly learn from New Zealand's (Whanganui River) and India's (Ganges and Yumana Rivers), from the notion of guardianship to the idea of taking spirituality and religious importance into effect. However, there is no place on earth like the Marañón, just as there is no place on earth like Ganges and Whanganui rivers. Factors like the geographical borders of the Marañón, the political framework of Peru, how many Indigenous groups reside along the river, and their specific ideologies are just a few elements that call for critical attention and exploration. To understand how ideas like "rights of nature" are interpreted and mobilized within specific governance projects, we must emphasize the location's cultural specificities and political implications. In conclusion, it must be understood that the road to River Rights will not be a straight path, thinking this will undoubtedly be the first step to failure. Issues will arise, as the very principle of River Rights is at odds with the current extractive processes. The frameworks will need to change, and we would argue, are currently changing. In the following sections, we will delve more into the specific elements that we think can aid in the Roads to River Rights, specifically with the Marañón River.

# CBMM Report Section 3 – Moratorium Proposal & Road to River Rights

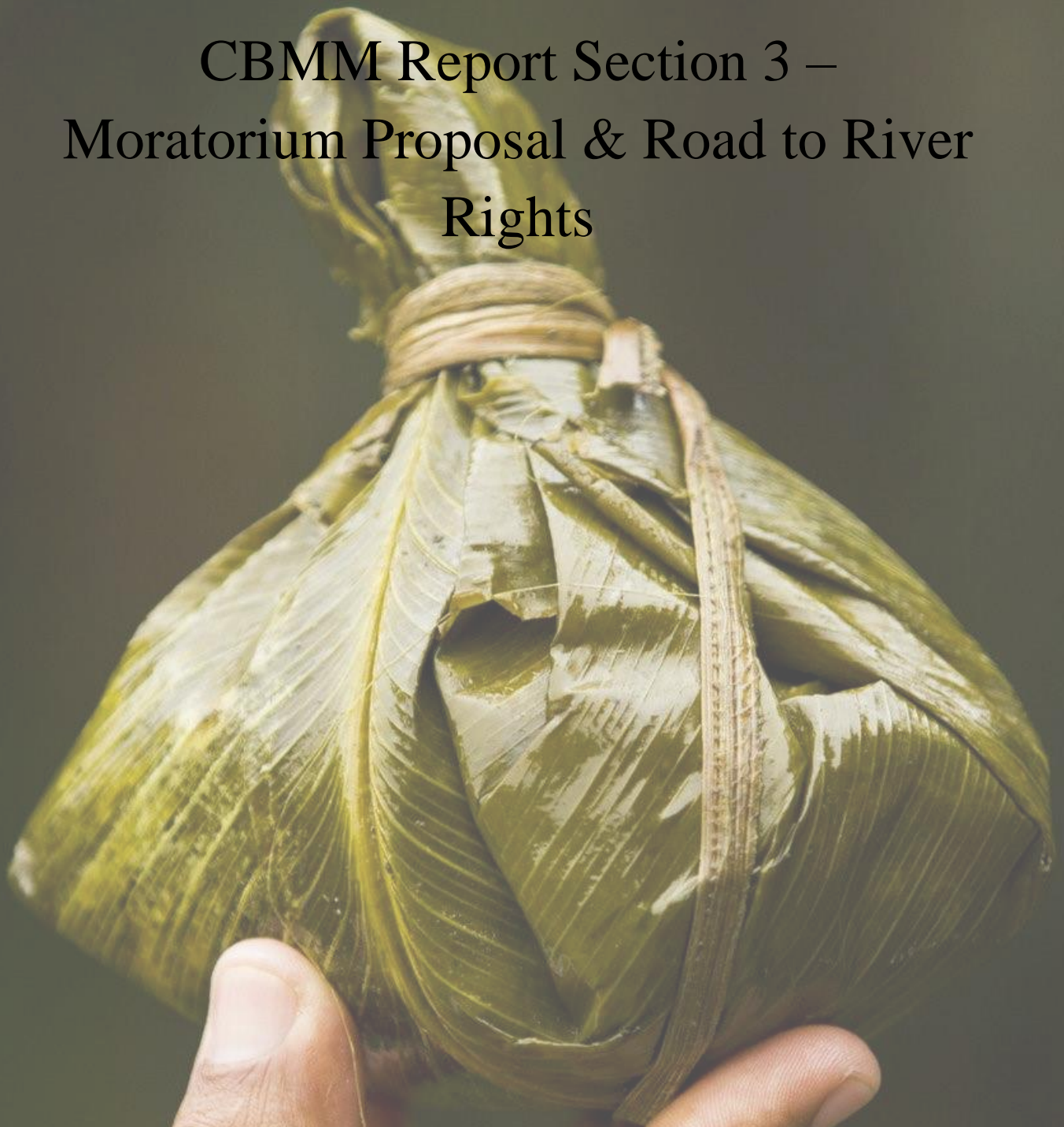


Image: Juanes a traditional dish widely consumed throughout the Peruvian Amazon, especially the High Amazon. (Buesst, 2020)



## 6. Moratorium Proposal

In this chapter we will propose grounds on which a moratorium for the Marañón could be based. This proposal is derived from both findings and lessons from existing moratoria (see previous chapter), which is combined with our perspective on environmental justice. Because a moratorium is a legal instrument which goes over the heads of the affected communities, the issue of justice is sensitive. Instead of disregarding this powerful instrument of moratoria altogether, we argue that a moratorium for the Marañón which is aware of these considerations. These will be discussed below. After this, we will move on to our moratorium proposal. Lastly, we discuss more in depth how we came to these demands, derived from the analysis earlier in this portfolio.

This moratorium proposal is divided into three different dimensions, social, economic and ecological, because we believe that in order to achieve justice, impacts on everything and everyone should be included. That is why we call them the three ‘pillars’ of this moratorium. Unfairness in each of these dimensions as such can be a ground for calling upon a moratorium. Secondly, the moratorium can enable justice by being a tool to address power relations between the damming companies and the communities. Just as we have seen in the example of the ‘prioritization’ scheme for the Yellowstone River, which gives a lever of power to the people instead of to industries. In the same way, justice and power can be given to future generations. Third, the moratorium, or communication around it, should attempt to involve the affected local communities. Is bottom-up mobilization possible as was done by the farmers in Assam? Or are there other ways for involvement, through explaining and showing what the Waterkeepers are doing? So that at the minimum they understand, but ideally, they can participate and stand up for their own rights now that they understand what they are. Is it possible that they take part in formulating grounds for the moratorium, based on what values they find most important? Or should they not, since it's a legal tool that needs to be drafted by lawyers? Lastly, the moratorium should demand prevention of forceful evictions, and should only allow displacement after an FPIC process. However, a consideration that complicates this is the issue of land rights. Those who are not registered should also be protected from displacement, but how to do that is a complex issue. Then how to enforce forced displacement? How can people stand up for themselves when they don't have the legal documents that gives them a leverage position? And when they do have land registration documents, how do we prevent ignorance or fraud by companies? As mentioned, we don't know the answer to all these questions, but it is raising the questions and attempting to address them that is already the first step towards environmental justice. We urge the Waterkeepers to consider these questions in the whole moratorium process, to prevent having a successful short-term instrument which brings unintended negative long-term consequences.

### 6.1. Moratorium Proposal for The Marañón River

There are a lot of different directions the Marañón moratorium can go. In the next sections, we discuss potential elements, findings and injustices from which legal grounds can be drafted for the moratorium. Below is a concrete overview of potential grounds on which the moratorium can be based. Maybe the most important, derived from the Manibeli declaration: Dams can only be constructed as a ‘last resort after all less damaging and costly alternatives are exhausted.’ Thus, the Marañón moratorium halts any dam construction until the following conditions have been met;

1. An independent review of all social, ecological and economic benefits and costs has taken place and these results have received a central role in decision-making processes. This demand includes a sufficiently carried out Environmental Impact Assessment;
2. The Marañón river and surrounding habitat has outstanding biodiversity values, with numerous (threatened) endemic species. Until we fully understand the irreversible damage these dams do to the ecosystem and species preservation both locally and globally, dam construction should not be permitted;
3. All efforts are being made to maintain the unique sediment flows;
4. Dam construction is halted until the Peruvian government has established a long-term viable and sustainable economic model for the country. The economic future should be articulated, and that of damming and mines, before allowing any more dam construction;

5. The dams should not harm the local economy through loss of livelihoods from tourism, agriculture and fishery. As last effort, a fair and FPIC agreed upon compensation fund should be installed to compensate for the loss of livelihood, and for the provision a new way of living;
6. A mechanism is installed to equally distribute social, ecological, and economic goods and bads;
7. Prevention of displacement is guaranteed. Only after Full Prior Informed Consent has been given with a fair compensation displacement may be allowed;
8. The dam cannot have effect mental, emotional and social well-being of the surrounding communities;
9. Full Prior Informed Consent has been given by all (potentially) affected actors, and their norms, interests, values and knowledge is included in the whole process;
10. Environmental reproductive injustice is prevented; no cultural or religious traditions are eradicated and the communities are protected from pollution or other damage to their bodies and mind.

These grounds encompass all dimensions, or pillars, and aim to the prevention of further injustices as we have observed in these domains. Besides addressing injustice through the moratorium itself, there should also be looked for justice in the implementation process of this moratorium, as was explained in the introduction. If those two are considered, we believe that the moratorium can prove to be a powerful tool in halting the dam construction, thus moving towards justice for all.

#### 6.1.1. Environmental Pillar

In this section, we will cover the environmental grounds from which we propose the moratorium for the Marañón River. This report has previously spoken in depth about River Rights, Nature Rights, Earth Jurisprudence, and Multispecies justice. We want to take the ideologies and lessons from these terms and processes and create a distinct basis for the Marañón River. We should begin by labelling what we mean by creating an *environmental pillar*. In this category, we want to underline that we are speaking about the natural environment elements, referring to the “ecological units that operate as natural systems (such as soil, vegetation and so on)” and “universal natural resources (such as air and water)” (Natural Environment, 2022). In short, we will speak about the non-human aspects of what this moratorium could be based on.

Dams around the world differ in both their environmental impacts and consequences. Dams have not only been shown to “destroy river ecosystems,” but they can also “adversely affect human health and well-being” (Lee, 2017). This seems to be an obvious statement and one that we already stated in the introduction of our report. We do not have an adequate amount of data referring to the damage that the dams will have on the Marañón, which is enough to halt the construction of the dams, at least so far. This data should be gathered through Environmental Impact Assessments. We can demand for further assessment, and for clarification of exact impacts before construction can start. We also already know that “dams alter a river’s ecosystem from one that’s cold, flowing and connected, to one that’s warm, stagnant and fragmented,” and this has “devastating consequences for wildlife” (Lee, 2017). This cannot be justified under the Universal Declaration of River Rights (Earth Law Centre, 2017). Moreover, although River Rights are not in place *yet* for the Marañón river, there are many hints that this is where the process of protecting the Marañón river is leading too. Thus, in the proposed moratorium, these unique natural and biodiversity values, and the consequently irreversible damage that will occur if dams are constructed, can be used as a reason to ban dam construction.

A central question, in this case, is, in which ways does the Marañón hold the most value? If we are looking directly at the environmental value, it goes down with implementing these dams. The dams will affect more wildlife and plant life than is imaginable. The particular river flows through some of the unique ecosystems in the world for 1,400 km before joining the Ucayali River and leading into the Amazon River (Amazon Waters, 2020). On its journey, it carries with it the extremely important sediments that make it so the Amazon can continue being one of the most biodiverse and vital ecosystems on the planet. Moreover, the environmental value will only continue to become more and more prevalent and idolized in the future. With the dams, you are halting a process that we don’t even know the full consequences we will face without it. Is that not enough reason to look more critically at any implementation that possibly holds such effects?

Although we are talking about the *environmental pillar* in this section, it is critical that we articulate how each pillar interacts with one another. One cannot exist without the other; one cannot succeed or flourish without the other. For example, when the dams affect the fish population, this will predominantly affect the lives of the farmers and fishermen on the Marañón, who rely heavily on fish for their lifestyles. When the dams in place inevitably flood Indigenous lands, it will destroy essential ecosystems and displace people into new lands that have never before left their specific locations. And the effects that many climate-related displacements of people are repeatedly linked to “conflict occurrences” and “political unrest” (Abel, J., Guy et al., 2019). In the moratorium it then can be demanded that the environment should not only be protected for its intrinsic value, but also for the provision of livelihoods.

This pillar calls for the recognition of Multispecies Justice and Earth Jurisprudence. The principles outline the importance of non-human entities and bring the Marañón River into a space that can be protected through law. Through this lens, we can more clearly see the river as an entity. A living, existing entity that must be heard before it is too late. Our proposed moratorium is derived from this philosophy, however actual implementation of this philosophy might be more suitable for rights for the river than as a ground for the moratorium.

### 6.1.2. Socio-cultural Pillar

In this section we will cover the most important socio-cultural considerations for the moratorium proposal. It became clear in the conflict and stakeholder analysis that there is a dissensus between several stakeholders about how to treat and interact with the river; where local residents have a close relationship with the river, government officials or company employees might have a more distant stance towards the Marañón. In order to defend the river in court and build a solid ground in order to use legal means that will convince higher judges, the following section will provide information and insights about the social aspects of the river. Not only does the river have ecological value; it is also a non-human actor in people's lifeworld's, providing those with spiritual and social meaning and therefore being an integral part of daily life. To begin with, we want to come back to the way we defined environmental justice, which is as follows: environmental justice is said to be achieved when cultural norms and values, regulations, rules, policies, behaviours and decisions are implemented and generated to support sustainable communities in which the environment is safe, nurturing and productive for the people (Ramos, 2021). To us, it is clear that cultural elements are important for the wellbeing of communities that live in close proximity to the river. This notion ties into the different forms of environmental justice, namely distributional, procedural and recognition justice. The first one is concerned with the distribution of environmental bads and the fair compensation of potential impacts, which in this case would be the effects of the hydroelectric dams on the Marañón river, meaning that people would have to find other ways of living and thus severely impact their daily lives. It becomes clear from the way governmental institutions and construction companies act that they are not taking this form of justice into account when making decisions about their plans situated in the river, as thousands of people would be negatively affected by the dam constructions. The communities impacted mostly by the dams would have to move elsewhere and don't enjoy any of the benefits, which creates a highly unequal situation.

Furthermore, local people, including indigenous communities that reside along the river, are structurally left out of the conversation concerning plans made for the hydroelectric dams. For instance, the indigenous people who live downstream were not included in the decision-making process because they don't live in the “impact zone”, as the Peruvian framework for EIA describes. Some companies decided to have a meeting or information night, where residents that want to enter and participate were not welcomed and sometimes even forcibly removed (documentary *The roar of the Marañón 2021*). Moreover, the lack of inclusion and involvement of the local population is besides being unjust, also a missed opportunity for all actors involved to generate a more accurate account of the situation and take local experiences and knowledge into consideration. Concretely, this means that if there is going to be a moratorium, all groups of people should be included in the conversation. The notion of taking other forms of knowledge into account ties into the last form of environmental justice, namely the right to be recognized as an individual and the different forms of knowledge people have. One thing to keep in mind when talking about different forms of environmental justice, is the power dynamic embedded within organizations that are involved in the particular case, meaning that there could be a top-down approach towards environmental justice if local people still don't have a say in what justice means for them and how they envision it to be reached in the future. Overall, we could say that the anticipated dam constructions around the Marañón river already have had a massive impact on the mental and emotional well-being of people living around the Marañón. The sheer factor of being left in the dark about the current status of the dams and the insecurity this brings to local people, is maybe one of the more obvious forms of environmental injustices that have already taken place.



Moving on, it is important to emphasize to what degree local communities depend on the river in a more spiritual way, that materializes itself in the way people interact with the river on a daily basis. Although we couldn't visit the riverbanks ourselves, we were able to form an image of how (indigenous) residents depend on the river in a social way. Note that the people who live along the river are diverse in their ways of doing things and cannot be reduced or homogenized into a singular community that agrees on everything. Once more, this makes clear that all people living close to the river should have the opportunity to voice their opinions about future plans for the river. Besides, one should be aware of the risk of essentializing cultures, meaning that cultural elements get enlarged and appropriated into something that takes away the agency of the original owners of the culture. Otherwise, communities in Peru, especially indigenous ones, could be harmed.

The last form of environmental justice that is concerned with the right to be recognized as individual and the forms of knowledge someone brings, is highly applicable to this case, in the sense that there is a lack of this form of justice. The reason why recognition justice is so important in the first place is because we live in a world that contains many forms of different knowledges. The dominant form of knowledge that is preached to be the best is western scientific knowledge and the political economy that is attached to this. From this form of knowledge, it is a priority to develop as a community in a linear way, with the Global north as the example of how developed countries should look like. The big problem that arises from this paradigm is the fact that other forms of knowledges, especially the ones upheld by indigenous people, don't get taken into account and remain on the fringes of decision-making systems.

Elizabeth Hoover (2018) elaborates on the consequences of environmental injustice for a Mohawk community in the US, that is faced with a polluted river from the car industry further upstream. Since the members of the community have a lot of fish in their diet, they consume toxic waste and have increased levels of cancer and heart diseases in their community. Moreover, the women of the tribe are less fertile and pass on pollutants through their breastmilk. Hoover introduces the term environmental reproductive justice, that includes the right to have biological and cultural reproduction. Members of the community were concerned about the disruption of the cultural and social elements revolving around the fishing practices, because the men caught less fish and less children were born to pass on the indigenous knowledge that they cherished for so many generations (Hoover 2018: 30). In this case, not only individual bodies were affected, but also the social body of the community, placing indigenous people in an even more precarious position. Another thing that became painfully clear is the fact that the company responsible for the pollution didn't take responsibility and placed this on the victims instead. In the case of Peru, it becomes clear that there is a lack of a victim centered justice system, which makes it very challenging for people to fight big companies in court. Coming back to the notion of environmental reproductive justice, installing hydroelectric dams would put this form of justice heavily at risk by potentially eradicating cultural traditions and polluting individual bodies. This would in turn have its effect on the community as a whole. The dams would flood the lands of the indigenous communities along the river and impact the fishing, food production, transport and water availability aspects on which the people living near the river depend.

Lastly, a risk if the moratorium doesn't get installed is further polarization between groups in Peruvian society, since there will be no clarification on what will happen next. This brings a lot of uncertainty for the people living near the river, but also prevents constructive engagement between the different stakeholders. The case would be stuck in this eternal temporal state where the construction company and the government hold their strong power position by not making clear decisions, and communities could use different means to raise attention to the injustices that are taking place. This could turn into a more violent conflict, which would draw negative attention towards Peru and would take away the attention on all the beauty the Marañón river has to offer.

### 6.1.3. Economic Pillar

This part of the moratorium concerning the construction of dam in the Marañón river focusses on the economic viability of the hydrodams and reflects on general economic theory concerning nature and a sustainable economy. To start off, the economic reasoning why the dam construction in the Marañón river should be stopped, we focus on the root of the problem. The reason why hydroelectric dams are proposed is for the energy provision the dams will provide. This energy will be used for the export to Brazil and the mining sector in Peru. The economy of Peru has a relatively high dependence on the mining industry. This shows the symptom of a broader problem: economic dependence on the mining industry. The Peruvian economy is dependent on the mining industry, and according to (Gylfason 2001), countries with great natural resources seem to develop their economy at a slower pace than countries that have no natural resources. This problem is caused by a false sentiment of security that is a result of precious natural resources (Gylfason 2001).

Hydropower is not the only the wrong answer but also the wrong problem of the economic choices made by the Peruvian authorities, by focusing their gross domestic product on the mining products and the export of these products. Peru has a positive Trade balance, and in the case that the export of energy to Brazil takes place, the export/import balance will grow even further. Has the Peruvian government thought about the pressure on the Peruvian Sol this will perhaps develop? The economic system of Peru, which is in support of the mining sector and now proposing a dam construction, are together symptoms of a system where nature is not taken seriously. This moratorium hopefully opens eyes to the importance of nature and how it should be taken care of.

The second argument why dam construction in the Marañón river has to be stopped is that of the local economic activity. In the article of (De Faria et al. 2017) researchers monitor the resulting local economic activity in regions where dams were constructed. In the cases monitored in Brazil, the increase in local economic activity was only limited and disappears in a maximum amount of 15 years. Next to the resulting economic activity of hydropower, researchers did not find evidence for an improvement on social indicators as well. As called upon in the moratorium of world bank funding of large dams (International Rivers 2007). A plan for construction should be reviewed and all the economic, environmental and social indicators should be reviewed. This should be done independently and the outcome of this objective research should play a key role in the decision-making process.

Peru currently has an oversupply of energy (Grandez et al. 2020). The construction of this highly debated project that has as mentioned in the natural and social section of this moratorium much more disadvantages besides economical is therefore not urgent. According to research of (Conservation Strategy Fund 2022) on the construction of five dams, the costs will be significant when the construction would be completed. 190.000 hectares agricultural land would be lost, which results in \$1.44 billion over the course of 30 years. In the same study it is shown there is also a significant loss of fishing income. Fishing is an important source of food and financial assets for the local communities (Coomes et al., 2010). According to (Ibarra 2018) local people that live near the Marañón river have to spend approximately \$3 (US dollar) a day on food due to the dam construction. The Marañón river is the ‘vein’ of nature that runs through the region. It provides the local communities with the possibility for agriculture, fishing and tourism. The construction of a dam would have significant impact on these three sectors, specifically for these local communities.

If nature is tamed by the construction of hydro dams, the financial profits should at least be distributed equally across the people involved. The current case of the construction of the Chadin 2 and Veracruz show a story of corruption. When this corruption was not discovered, the construction of Chadin 2 and Veracruz would result in profits from nature for the elite and not for the people most affected. Therefore, when the project proceeds, a fund should be opened to ‘provide reparations to the people forcibly evicted’ and other affected communities by the dam construction. This is as proposed by the moratorium on the construction of large dams funded by the world bank (International Rivers 2007). However, one could argue if this is environmentally just enough, in the sense that money won’t solve all the impacts people have to live with.

To summarize, the economic reasoning of not constructing hydroelectric power facilities in the Marañón river. Peru currently does not need more energy, since the country is in a surplus. The construction brings economic drawbacks and agriculture, fishing and the tourism industry in the region face significant damage when the construction of the dam proceeds. At the same time, research shows that the local economic benefits are not significant. The construction of the dam as explained is an answer to the wrong question. The Peruvian government should first decide what the economic future of the country will entail before it makes wild decisions on projects that result in non-reversible nature loss.

## 6.2. Future steps

To make the implementation of the moratorium a bit more concrete, we propose actions for the stakeholders involved and important processes to keep in mind while pushing for the moratorium. To begin with, we think NGOs and civil society organizations are in the leading position to push for change and have the tools to advocate for the moratorium in a legal way. They are in close contact with local residents and therefore they have a good image of what the different opinions entail, being able to bring voices together and create more leverage when speaking with government officials or company employees. Moreover, they don’t have money interests in the case. It remains important to be on good terms with each other within the organization itself, because in civil society groups, leaving has a big communal impact and can disrupt the unity of the group.

Whilst pushing for the moratorium, another thing to address is the concept of due diligence, meaning that the companies and organizations involved all take their responsibility within the process of decision-making. The points we raised in this section can be of guidance when considering the grounds for the moratorium.

In order to draw more attention to the injustices people in the area face, it could be fruitful to reach out to media outlets in Peru and on a global scale to create more awareness on this issue. Since the political situation in Peru is not very stable at the moment, this could be a good moment to bring the case of the Marañón river forward as a symptom of political indecisiveness. Although the environment might not be the biggest concern right now, it still remains important to keep generating thoughts on this and keep the conversation going, in order to not lose the momentum. Lastly, it is advisory to draw positive attention to the river and highlight the uniqueness of the area. This will potentially make it easier for people from outside to relate to the case and emphasize with the people living in the area.

## 7. The Road to River Rights

This section will build upon the moratorium proposal presented in the previous section and will try and propose a road towards River Rights. This encompasses if and the way in which we believe the Marañón River could become a legal entity which, through the phenomenon called guardianship, could be a platform for constructive engagement between the local (indigenous) communities and the Marañón. The chapter will be started off by introducing the current consensus around the protection of the Marañón, previous efforts to (legally) pursue protection for the Marañón and introduce Bill 6957 and linking its purpose to the moratorium and future River Rights. After this Bill 6957 and its relevant aspects for the Marañón will be introduced. After this, we would sum up the claims that we believe should be part of the proposed ordinance for the Marañón as a legal entity. As part of this proposal, we will discuss the remedies and compliances from (state) actors to local actors after. The chapter will be closed out with a description of how constructive engagement under the road to River Rights could be structured.

### 7.1. Introduction

The rights of rivers' movement, in particular, is grounded not only in the importance of aquatic ecosystems but also in their spiritual significance, especially for Indigenous peoples. The movement to recognize nature as having the same legal rights as people is rooted in the belief that the Earth and its ecosystems have intrinsic value that is, they are valuable in their own right, and not only because of what they are worth to humans who use or enjoy them. And while dam construction has been the focus not just for this report but also for the moratorium that was proposed, the previous “efforts” to legally protect the Marañón via mostly lawsuits or ordinances have been directed at the injuries resulting from water pollution as a result of the present oil industry (Is a River a Person? Advocates for the Legal Rights of Nature Say Yes, n.d.). In 2019 the national organisation of Andean and Amazonian indigenous women in Peru (ONAMIAP), who are working for the full exercise of their individual rights as women and indigenous peoples, filled a lawsuit seeking the protection of the Marañón from future injuries resulting from the present oil industry by declaring the Marañón River and its tributaries as rights-holders (IWGIA - International Work Group for Indigenous Affairs, n.d.).

In 2019 the ONAMIAP together with the Huaynakana Kamatahuara Kana (“Working Women”) and the Canaquiri contacted the Legal Defense Institute (IDL), a Peruvian legal aid NGO that advised them on the lawsuit. The lawsuit called for better maintenance of the Peruvian oil pipeline managed by the Petroperú company and updated environmental management instruments for their activities in the area. The main claim made to the governmental officials was that there should be a recognition of the inherent value of the natural world, that it's not just resources to be exploited. This statement is in line with other philosophical statements linkable to the norm of Earth jurisprudence. Therefore, the efforts already strongly align with this movement and its values but there was no mention yet of the future abandonment of extractive practices or how indigenous people/ perspectives could be included in decision-making processes (Is a River a Person? Advocates for the Legal Rights of Nature Say Yes, n.d.). Later in September of 2021, the same organization made a different proposal to the National Water Authority (ANA) to set up the Marañón River Interregional Basin Council with the participation of Loreto's Indigenous organizations, which would involve them in decision-making processes and considered as guardians and representatives of the river and its tributaries.



Similarly to the efforts by the ONAMIAP also in different provincial municipalities there where development on the River Rights aspect. In 2019 legal personhoods were assigned to the Ayaviri River and Llallimayo basin by an ordinance in the Melgar provincial municipality (Is a River a Person? Advocates for the Legal Rights of Nature Say Yes, n.d.). And although mining has stopped, the population there is still suffering the ravages of the environmental liabilities accumulated in the upper part of the basin, from years past. This shows that just instating River Rights doesn't suffice, there has to be a remediation plan and strategy put into place at the same time to ensure the conservation and sustainable management of the river.

In their initiative, the Melgar municipality sought to set a precedent for neighbouring provinces and to guide a national strategy. The rights of nature cases in Peru have followed a clear pattern established in the Atrato River case in Colombia. Which was revolutionary for including a remedies formula involved in the declaration of Rights of Nature, it furthermore appointed river guardians, advisory boards and monitoring agencies, all with a requirement to regularly report back to the court.

The implementation of Rights of Nature (RoN) has little need for the approval of Bill 6957 forwarded by ONAMIAP as there is no need for the configuration of a new right as the fundamental right to enjoy a balanced environment appropriate for life is already part of the constitution. The Peruvian Political Constitution, signed in 1993, contains the following principles relating to environmental matters.

*Article 2 establishes that every person has the fundamental right to live in a healthy and balanced environment, one which allows the full development of a person's life.*

*Articles 66 to 68 establish that: it is the state's duty to determine the National Environmental Policy, which must pursue the sustainable use of the country's natural resources (the Ministry of Environment published the National Environmental Policy on 23 May 2009); the state must promote the conservation*

The eventual Marañón legal entity ordinances proposal needs to both structure its claims in accordance to the three articles mentioned before as well as take inspiration from Bill 6957 as this Bill will probably be accepted by the new administration. This shows the train of thought within the current political framework in relation to this form of environmental protection. In particular, the consensus within the “Ministerio del Ambiente” (Ministry of the environment) is crucial. The Marañón legal entity ordinances proposal will be structured in a way that it aligns with the main activities of this particular ministry as well as the National Water Authority (Autoridad Nacional del Agua) (ANA).

## 7.2. Peru's Bill 6957

The history surrounding the Bill starts in 2011 when 30 indigenous women travelled from across the country to Lima to demand parliamentary approval for Bill 6957 which would legally recognize Mother Nature, ecosystems and species as right-holders and subjects for state protection (Is a River a Person? Advocates for the Legal Rights of Nature Say Yes, n.d.). This Bill, which is provided in the annex, took heavy inspiration from the constitutional approach in other South-American countries like Ecuador. As mentioned before the ONAMIAP and other national organizations and institutions prepared the Bill which was thereafter advanced in parliament by former congressman Leniz Bazán. The Bill itself can be found in appendix II.

The way in which indigenous cultures rely on nature and show their particular awareness of environmental harm has become more mainstream over the last few years as was mentioned before. People have an increasing recognition that the fact humans see themselves as superior is the reason, we face the disasters we face on planet Earth today. The bill in such reflected its times. The Bill was first ignored but is now still waiting in the docket of the new parliament since the assumed leadership in late July 2021. When the Bill is passed it would open up Peruvian citizens to be able to express guardianship and so legally defend the environment and seek reparations for harm done to it. This is the main value the Bill has to the River Rights movement, it opens up the legal system for indigenous communities and perspectives. There is lesser value in the protective nature of the Bill as this is already covered in the Constitution, something that hasn't stopped the extractive and economic developments in Peru. So, there is a need for more. Which is how the Bill is an underlying development of a wider RoN movement.

Opponents of Bill 6957 have argued that its approval would paralyze extractive activities and halt development, these opponents are afraid of this paradigm shift because it obstructs tier economic strives and possessions (Is a River a Person? Advocates for the Legal Rights of Nature Say Yes, n.d.). Lawmakers and public bodies have risen barriers, disputing the value of RoN and stating the economic damages the Bill would have.

And beside, the fact that we have shown before that the construction of extractive infrastructures e.g. dams, also has immense economic consequences on a national level the leader of ONAMIAP clarifies that the aim is to seek out alternatives in a move forward “buen vivir” (“Decenio de la Igualdad de oportunidades para mujeres y hombres” “Año de la Universalización de la Salud” & CONGRESO del la Republica, n.d.). Which entails a way of living that is centred around community living and recovering ancestral knowledge, again highlighting how the premise of the Bill already aligns with the norms and values of the nature rights movement. The Bill seeks to provide a better framework of legal and court protection and a better design of public policies for the management of nature. The Bill provides legitimacy to act and confers new powers on the Ministry of Environment (“Decenio de la Igualdad de oportunidades para mujeres y hombres” “Año de la Universalización de la Salud” & CONGRESO del la Republica, n.d.). So the passing of the bill is crucial for the pace at which River Rights (RR) could be implemented directed at the Marañón but it is however not the determining factor for success, as the ground for RR are already present in the constitution and could be pursued regardless of the Bill passing. Lenin Bazán as undersigned congressmen of the Republic could exercise the right of legislative initiatives that conferred by article 107 of the Political Constitution of Peru and which is in accordance with the established articles 23,74 and 76 (“Decenio de la Igualdad de oportunidades para mujeres y hombres” “Año de la Universalización de la Salud” & CONGRESO del la Republica, n.d.). This eventually led to the Bill being able to be directed at constitutional fundamentals. Without going into depth regarding these fundamentals the court did recognize the right to a healthy environment according to the standard of the Inter-American System of Rights (I/A Court HR) Mandatory, which entails mandatory compliance from Peru. This underlying legal basis regarding the right to a healthy environment could be an important factor for the Road to River Rights. The I/A Court HR took an essential step in recognizing nature as a subject of rights, which was also adapted under this bill:

*"This Court considers it important to highlight that the right to a healthy environment as Autonomous law, unlike other rights, protects the components of the environment, such as forests, rivers, seas and others, as interests legal in themselves, even in the absence of certainty or evidence about the risk to individual persons. It is about protecting nature and the environment. not only because of its connection with a utility for the human being or because of the effects that its degradation could cause other rights of people, such as health, life or personal integrity, but because of its importance to other living organisms with those who share the planet, also deserving of protection themselves.*

The proposals made in the Bill are based on the constitutional framework and could be used as explanatory proposals for the Marañón legal entity ordinances proposal, its proposals (if passed) do resemble the current political tendons.

As a cost-benefit analysis, Bill 6957 does not allocate any expenses to the national treasury. On the contrary, it shows benefits in significantly contributing to the construction of a new political, economic and social order necessary for new forms of relationships between human beings and other living entities of mother nature to take shape and constitute themselves. In this, the Bill shows the relationship it has with the current legislative agenda and the state policies expressed in national agreements (“Decenio de la Igualdad de oportunidades para mujeres y hombres” “Año de la Universalización de la Salud” & CONGRESO del la Republica, n.d.). It is linkable to Policy 111 of the “Agreement national” and Point 19 of the Sustainable Development and Environmental Management directive which both show the established responsibility of the state to balance ecosystems and provide environmental protection. Something that we would advise to heavily direct the claims of the Marañón legal entity ordinances proposal at.

### 7.3. Contents of Claim

As was mentioned before the claims of the Marañón legal entity ordinances proposal are based upon the proposals in Bill 6957, other cases in South America and our own moratorium proposal. We advise using the following claims to let a legal expert structure a legal document in the form of an ordinance's proposal directed at both the "Ministerio del Ambiente" (Ministry of the environment) as well as the National Water Authority (Autoridad Nacional del Agua) (ANA) ready to be submitted to the national court.

1. *Raise the issues of collective rather than individual rights. Mention how in the case of fundamental environmental rights collective and individual rights are so closely related they can be deemed inseparable.*

Make sure the community that underlines the Marañón legal entity ordinances has established that there has been irreparable damage done to their living environment and that their collective right to a healthy environment was violated. Also, make sure that the community is like-minded and that none of the claimants has accepted other forms of remedies.

2. *Raise the fact that besides the right to a healthy environment the constitution also describes rights to "water, food security, the healthy environment and the culture and the territory of the ethnic communities that inhabit the Marañón River Basin.*

The human right to a healthy environment globally encompasses all these facets. They are necessary prerequisites to the constitutional right to life. There is a duty of the state to secure (among other outcomes) the dignity, material equality and well-being of its citizens.

3. *The Peruvian Government needs to move away from an anthropocentric approach to constitutional law.*

The court should recognize and take an example from the Atrato River case in Colombia and just like its judicial peers conclude that Rights of Nature are the most effective legal expression of an ecocentric approach.

4. *The court should accept that factual evidence is present that shows that mining and the oil industry around the Marañón have had a disastrous impact on the river ecosystem and surrounding land.*

State authorities are responsible for violations of the fundamental right to life, health, water, food security, a healthy environment, and culture and the territory of the claimant(s) ethnic communities for their omission to not take effective actions at stopping the development of (illegal) extractive practices.

5. *Raise the fact that under the RoN movement the river is subjected to rights that imply its protection, conservation, maintenance and restoration.*

Cite the Aotearoa/New Zealand model in which the court ordered the creation of a body to exercise legal guardianship over the river, comprising representatives from both government and local communities in order to uphold and monitor these rights.

6. *The court should require state authorities to: develop a plan to decontaminate the waterways, carry out toxicology and epidemiological studies of the river, and create a set of environmental indicators.*

These requirements should be linked to the before mentioned state accountability. Executing these activities would set a new baseline for living standards around the river. And something to base the monitoring on for the foreseeable future when linked to an obligation to report progress to the court.



7. *The court should note that actions involving environmental rights violations also have the potential to affect the fundamental constitutional rights of future generations.*

By citing the Atrato River case as precedent the court should find (i) [t]hat future generations are subject to rights of very special protection; (ii) that they have fundamental rights to dignity, water, security, food, and a healthy environment; and (iii) that the Marañón River is a legal subject which implies, as with the River Atrato, its protection, conservation, maintenance and restoration, by municipal and state entities.”

8. *Raise to the court that in the case a new EIA is requested the company should be made aware that they would be responsible for the future breach of fundamental (human) rights.*

Part of the claim should also be directed at instating moral and financial barriers for aspiring companies that are trying to pursue dam construction around the Marañón River. They should be made aware that they would be in violation of fundamental (human) rights and the constitution of Peru.

9. *Pursue via this claim additional rights, protection and access to the judicial system in Peru for local (indigenous) communities that are located along the Marañón River basin.*

Motivate that the Marañón as a legal entity would safeguard (i) the protection of the fundamental rights to health, water, a healthy environment and dignified life for the communities adjoining the Marañón River (ii) Let designated local, national and relevant government agencies to exercise guardianship over the river through the creation of a commission of guardians (iii) the spiritual connection local (indigenous) have with the river and (iiii) the economic welfare of local communities by restoring their capabilities to fish also for future generations.

10. *Require that under the Marañón becoming a legal entity there should be the preparation of a publicly available plan setting out a strategy for mitigation and recovery of the Marañón River.*

As mentioned before the Marañón as a legal entity is not directed at recovering the state of the ecosystems, biodiversity and cultural aspects that have already endured harm or damage. This plan should encompass its tributaries and all affected areas and should furthermore investigate the option for the construction of a proper working (waste)water treatment facility to boost water quality around the Marañón.

11. *Claim to the court that eco-tourism should be further motivated and could be a strengthening underlying layer of protection and conservation for nature.*

The Marañón as a legal entity shouldn't harm the tourism and leisure activities around the river. They are neither physical extractive practices nor do they harm to the river even when seeing it as a spiritual being.

12. *Generally speaking, the RoN movement linked to the Marañón as a legal entity should be motivated when linked to the plays that Bill 6957 already made on the present constitution in Peru.*

(i) Recognize the link between the Marañón as a legal entity as a part of the rights of Mother Nature, its ecosystems and species as subjects of protection (ii) There should be the same mandatory compliance for the application of the rights as is the case in the rights for mother nature (iii) establish a mechanism highlighting the importance of international instruments and standards on the environment (iiii) Recognize the legitimacy to act of any citizens in the protection of the rights of the Marañón as part of mother earth and, (iiiiii) competencies are established in line with the Ministry of the environment.

## 7.4. Remedies & Compliance

Building upon the Contents of the claims we would advise taking the following remedies and compliance aspects into account when structuring the Marañón legal entity ordinances proposal. The court should be made aware of the fact that the government's environmental management of the river has been severely lacking in coordination and compliance with the constitution over the last decades. Building on this there should be a strive within the Marañón legal entity ordinances proposal to let the court order state authorities to adopt a holistic approach to its future conservation taking into account the profound relationship between the present biological and cultural diversity. The state should recognize a more ecocentric “biocultural” rights framework similar to the Atrato River’s legal personality case.

As part of the remedies, it should be requested to the court that the guardianship bodies are sufficiently funded for the foreseeable future to perform their tasks. Part of this could be that it uses this funding to oversee compliance with the court’s orders. As part of the compliance the commission of guardians (which includes the required state authorities) they should in case of the court ruling develop an appropriate institutional response to the court's findings. There should be a claim made that the commission, in order to further boost compliance and some sort of constructive engagement, be advised by civil society and a panel of experts.

## 7.5. Complexities of implementation and the role of Constructive Engagement

Constructive engagement has always been an important factor of the road to River Rights. Even though the moratorium could propose or indefinitely suspend dam construction it still wouldn’t boost the level of impactful engagement on a national level that is required to truly protect the Marañón for the future. Constructive engagement in this sense works two ways, the Marañón waterkeepers and other relevant actors that see benefits in pursuing River Rights for the Marañón need to be engaged more, and on the other hand, when setting up the commission of guardians constructive engagement should be made central in its design.

The Marañón waterkeepers and other relevant actors pursuing River Rights should get (even) more involved in the global movement surrounding River Rights. We still see immense value in networking on this revolutionary development to gather knowledge and insight from others. A first step for the waterkeepers should be to sign the “Universal Declaration of the Rights of Rivers” and to identify the relevant actors they are seeking to both pursue River Rights for the Marañón as well as interesting parties for the eventual commission of guardians. There should also be a decision made on what form this commission takes, in other cases, for instance, we have seen the creation of a watershed management committee as it fitted better to the needs and wishes’ of the indigenous communities that actively participated in the guardianship model. Also, this consensus should be indicated first.

Setting up a commission of guardians as a form of guardianship is the preferred way of having constructive engagement under an RoN approach. However, this approach has been shown to both have benefits as well as downsides. We feel that even though we advise in favour of the implementation of a commission of guardians it is necessary to discuss these aspects in this section. Guardianship bodies are obliged to some extent to represent the interest of the ecosystems and give ecosystems a voice in the decision-making processes governing it (Kauffman & Martin, 2021). Advocates of guardianship argue that the model is strong because it appoints representatives who are legally mandated to advocate for Nature’s interest also in policy and social areas and forums. As mentioned priorly this is where in our opinion the value of River Rights lies, instead of the legal personhood provisions it lies in the voice in governance arrangements. We envision that the commission of guardians is charged with developing a management strategy to ensure the environmental, social, cultural, and economic health and well-being of the ecosystems linked to the Marañón and as an extension, under Earth Jurisprudence norms, the well-being of the local (indigenous) communities. The commission would also be responsible for monitoring the management plan’s implementation and providing a forum for discussing issues related to the health and well-being of the river. The river itself would become a member integrated into the management bodies via its guardians, which would entail it participating directly in management decision related to the governing, conservation and protection of the river. These commissions are also mostly obliged to take decisions, particularly in regard to the local (indigenous) communities and the intrinsic values they represent (Kauffman & Martin, 2021).

Unfortunately, the guardianship model is not without its critiques and disadvantages. The particular identity of those humans chosen to govern and represent still defines and sets the subjects of justice of nature equal to how humans are seen as subjects of justice (Celermajer et al., 2020). Besides this concern, which is comparable to earlier claims made about the issues of guardianship and custody over nature is the concern that the inclusion of new classes of persons into personhood rests on a type of second-order exclusion, insofar as being other than humans must always be represented by, and rely on the accurate translation of humans (Kurki, 2019). The non-human entities, even if represented, must stay within the realm of the object. This is to the extent that the allocation of River Rights and guardianship is dependent on the reasoning processes of human subjects and not non-human ones. While everyone can represent nature to protect its rights, no one is obligated to do so. If there is no institutional framework created to enforce RoN through regulatory policy such enforcement requires someone to voluntarily undertake a lawsuit to protect RoN. This is even under the best of circumstances be proven difficult due to problems that have to do with collective action (Kauffman & Martin, 2021). The cost of a lawsuit for instance is difficult to bear for an individual, and the benefits a lawsuit would have are diffused in the process. Bolivia shows that RoN jurisprudence will likely not develop in this model unless people are forced to take action.

## 7.6. The Road to River Rights for the Marañón

To conclude and sum up our envisioned road to River Rights we would like to start off by triangulating River Rights a Moratorium and our vision on what environmental justice entails. We see a place and role for the Moratorium in being the starting point to the before mentioned institutional framework that has to be created in order to enforce RoN through regulatory policy. Acceptance of the Moratorium would safeguard the quality of the nature and the quality of life around the Marañón on a short-term basis, but as mentioned before, the moratorium isn't directed at other extractive and illegal practices that harms these same factors. The moratorium is therefore an initiative that contributes to some extent to achieving environmental justice but its more valuable in showing and further contributing to the desired paradigm transformation like was the case with Bill 6957. The proposed claims are similar to those of Bill 6957 and all link the negative impacts of extractive practices on the quality of life of those affected by the distribution of the bads of the environment. But again, even though this is limited to just dam construction what is preached are the same fundamentals as would be the base for a River Rights initiative.

The fact that in 2019 legal personhood was already granted to two water bodies in the Melgar provincial municipality shows that the necessary framework is present in Peru, it's just not yet directed at the Marañón in particular. We advise that these cases together with the Atrato River case in Colombia are taken as an example and lessons are taken from what shortcomings occurred there. In order to achieve environmental justice there has to be a clear remediation plan and management strategy put in place directed at the Marañón and as an extension, under Earth Jurisprudence norms linked to the well-being of the local (indigenous) communities. Regarding the commission of guardians, whom we envision being in charge of developing the before mentioned plan and strategy, we advise that it needs to at least include the Marañón River Interregional Basin Council, the provincial municipality, the Legal Defense Institute (IDL) and the river as a member integrated via its guardians. These guardians raise important questions on the road to River Rights and answering these questions is one of the main reasons that the moratorium has value. These questions include Who wants to be guardians? Who would be suited to do so? Is there a consensus around the Marañón on at least some relevant aspects of conservation and protection? Meeting or mapping these diverging views in combination with an assessment of valuable assent should be at the basis of the establishment of the commission of guardians.

The setting up of the commission of guardians in advance before the ordinances allows for consensus-making among relevant partners. We advise the Marañón Waterkeepers to identify these relevant actors and analyze if they want or could take charge of the RR proposal. We envision that the Marañón Waterkeepers within the road to River Rights take a mediating role and primarily focus on the integration of the river in the management process via the guardians. We would advise the Marañón Waterkeepers to contact the Legal Defense Institute (IDL) and let them take charge in the ordinances proposal and use their expertise in the road to River Rights.



# Road to River Rights

## The Marañón

### BROADEN OWN CONSTRUCTIVE ENGAGEMENT WITH RIVER RIGHTS

- Sign Universal Declaration for River Rights
- Networking to gather additional information

### IDENTIFICATION & MAPPING

- Identify relevant actors for the commission of guardians
- Map consensus and ideals regarding conservation
- Map consensus and ideals regarding restoration
- Map consensus and ideals regarding guardianship

### PROPOSE RIVER RIGHTS FOR THE MARAÑÓN RIVER

- Submit the ordinances proposal to the court
- Direct the proposal to the ministry of the environment and the ANA
- Enshrine the shift from seeing the Marañón as a legal subject to an object

### PREPARE MARAÑÓN LEGAL ENTITY ORDINANCES PROPOSAL

- Together with the commission set up a proposal
- Decide on the claims and request for the court to base their decision on, while using CBMM advise
- Add to desired remedies
- Decide on accountability and level of enforcement

### MEETING & ESTABLISHING

- Meet with relevant actors & communities
- Decide on the Remedies & Compliances desired
- Come to a consensus on the form and strive of the commission
- Establish a Commission of Guardians

# CBMM Report Section 4 – Conclusion, Discussion & Limitations

Image: Peru – Marañón River (Webb, 2021)



## 8. Conclusion

The findings in this portfolio can be understood as an answer to this research question. *Could moratorium and River Rights initiatives contribute to a short-term and long-term paradigm transformation toward environmental justice around the Marañón and how should these be structured to best combat current and future environmental injustices?*

To conclude, a moratorium can contribute to a (short-term) paradigm transformation towards environmental justice through its results, process and content. Justice considerations and questions need to be actively addressed in these three aspects to ensure this transformation. In terms of results, moratoria can be successful in achieving justice by halting dam construction. We deduced a main injustice implication of moratoria, that they often go over the heads of the affected people. Process wise, through a bottom-up approach the moratoria can be just if people are consulted in the right manner. We acknowledge the need for lawyers to formulate demands and brings this to court, but with bottom-up we mean that the legal demands are based on the actual wishes or problems from the communities themselves. If we link past cases to the Marañón case, we conclude that a bottom-up approach, in collaboration with NGOs, is feasible and has the potential to empower local communities living near the Marañón in Peru. Talking about content, we reckon that the Marañón moratorium should be structured in three pillars, economic, ecological and social, to best combat current and future injustices. Our moratorium proposal is structured as such and the demands are based on past and potential future injustices that can and will occur if dams are constructed around the Marañón. Consequently, content wise, justice can be achieved by an encompassing approach that considers all dimensions, thus accounting for all kinds of impacts. We cannot claim that a moratorium can fully achieve environmental justice (if such a thing can ever be achieved), but we see that a moratorium can effectively contribute to achieving (a transformation towards) environmental justice. Furthermore, we conclude that we shouldn't have a moratorium if the instrument itself is not just, thus questions need to be raised and considerations incorporated in process, content and results. Unfortunately, a moratorium is only a short-term instrument for contributing to environmental justice. We need a combination of a moratorium and the River Rights. The moratorium can serve as a guardian over the time needed for the RR movement to solidify and the road to River Rights to complete the long-term paradigm transformation towards environmental justice around the Marañón.

Within this report, we have covered multiple examples of how River Rights are implemented around the world. Multiple rivers have legal personhood, with “guardians” of the river, who can judicially enforce the protection of the river. In the case of the Ganges and Yumana rivers in India, spiritual and religious played a substantial role in making the rivers a legal entity. Every area where River Rights could be implemented is different, therefore there should not be a ‘one model fits all’ principle. Setting up a commission of guardians is our preferred way of guardianship for River Rights on the Marañón. This commission should be properly funded to ensure a safe future for the guardianship of the river. Two water bodies in Peru already have legal personhood, this shows that the possibility of protecting the Marañón by River Rights could be a realistic solution, due to the fact that the legal framework is already up. Moreover, River Rights could be a more comprehensive solution for the broader perspective of environmental justice. Why we believe that River Rights could be a contributing factor to a long-term paradigm shift, is grounded in the fact that the movement includes as well as contributes to both societal and

ecological growth by centralizing nature instead of economic gain. This vision is backed up by case studies around the world that show how indigenous people and local communities are taken up into decision-making processes, contributing to a paradigm shift to create a higher level of environmental justice. We should note here that not enough time has passed to fully see how River Rights contributes to the ecological growth in cases where RR are already implemented. That is why this portfolio proposes a combination of both moratorium and River Rights to end the environmental injustices related to the Marañón and fuel this paradigm transformation. However, with regards to environmental justice, the question remains if giving rights to a river will solve the issues people face on a daily basis. Bureaucratic processes and court cases can slow down the process of achieving environmental justice, meaning that the environment in which they live is safe, nurturing and productive. Thus, we believe that a moratorium on the short term and River Rights on the long term can add to a paradigm shift which views nature (in this case the Marañón River) as a subject instead of an object, thereby contributing to a more environmentally just world, as long as the people who get affected the most are centralized in the decision-making process.

## 9. Discussion, Limitations & Future Research

### 9.1. Discussion

The term earth jurisprudence and its expression as River Rights have aspects that can be put into discussion. The fact that an ecocentric norm is to be introduced into the current world order leads to the fact that the expressions of nature rights or river rights as a legal provision remain mostly symbolic. This symbolic nature can be fuel for the paradigm transformation that we researched but the way in which this symbolism is incorporated into the current world order leads to subpar enforceability. Economic values still out way social and ecological values in decision-making processes. Making nature a legal entity has lead to the (partial) stoppage of extractive practices around the world and thereby balancing the ecological and social values more with the economic ones. More specifically directed at Peru, take the legal personhoods that was assigned to the Ayaviri River and Llallimayo basin. People nearby still suffer from the problems that arise due to the past mining. The implementation of River Rights therefore proves not to be enough of a solution. Extractive practices might stop, and this can be seen as an ultimate goal of River Rights, but remediation and compliance remains an key and underdeveloped aspect. Remediation should occur by planning for how to restore the environment, which will result in a sustainable way of managing the Marañón river.

### 9.2. Limitations Study

We still feel that the nature of what was asked of us consisted of a complex output, that needed such a thorough basis, which makes the output and underlying basis now feel incomplete. We do feel that we used our knowledge to some valuable extent by adopting an approach which used our expertise to structure the theoretical background underlying our advice. We acknowledge that there is a lack of knowledge of legal instruments and some lacking factors in our data collection and analysis that have impacted our study. For instance, we feel that our study is lacking primary data. Secondary research is based on data already collected for purposes other than the specific problem you have (Mora, 2022). Related to the secondary research, it doesn't provide all the answers we need, take for instance the analysis of other moratorium and River Rights initiatives. However, it still provides useful insights by looking at commonalities and overarching aspects for inspiration but is never fully applicable because the political framework differs per country, what happens and is successful somewhere else is not guaranteed to work in Peru.

Furthermore, we feel that we were limited by our time and (physical) positionality in order to conduct interviews with members of local communities or relevant NGOs. This has for instance as result that the advice on the members of the commission of guardians being unsupported. We have no insight into what extent these proposed members are even willing to work on the River Rights for the Marañón or are willing to work with each other. Building upon the before mentioned (physical) positionality aspect we feel that due to our positionality we are missing a physical connection with the subjects of the study, which in our opinion is a limitation for fully immersed engagement. Questions arise e.g. to what extent were we competent enough to conduct a case study related to other people's lives as a form of exploratory research? And where are we qualified enough to illustrate theories about different aspects of the lives of people living on the other side of the planet? Our positionality in general, combined with the missing physical connection with the subjects, the use of secondary data and just having contact with the Marañón Waterkeepers generates a clouded view within the



study. This clouded view and their contributing factors for us summarize the main limitations of the analysis part of the study, combined with the lacking expertise on legal instruments. This leads to the fact that especially the claims we state for the moratorium and the road to River Rights sometimes feel unsupported and based upon a lacking notion if they would suffice in actual legal documents. We, therefore, want to reemphasize that the main takeaway for the facilitators of the case is using the claims in combination with the examples of moratoria and River Rights initiatives as concrete advice and input for the actual submittable legal documents. Our analysis is there to show to what extent both a moratorium and River Rights are environmentally just and in which way they could be structured to be “most” environmentally just. Building on this, due to the volume and selection of relevant (case) studies we would advise the Marañón Waterkeepers to still (as part of their networking in the road to River Rights) perform some more case study-related research, including the perspectives of people living along the river.

### 9.3. FUTURE RESEARCH

Future research on the topic of dam construction in the Marañón river might extend the explanation of the perception of local people on the construction of dams. Extensive fieldwork consisting of interviews with local people provides a good starting point for providing information from the bottom-up. Long-term effects of river rights should be explored as well to give future generations a tool for which the effects are well defined to conserve nature. This future research will hopefully lead to a solution for the environmental injustice in Peru and all over the world.



# CBMM Report Section 5 – References & Appendix

Image: No. 200 work of art by contemporary Chinese artist Hongyu Zhang (Zhang, 2021)

ZHANG  
HONGYU  
2021



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# 11. Appendix

## 11.1. Appendix I: Infographic Marañón Waterkeepers

### MORATORIUM DIRECTIONS

THESE CONDITIONS MUST BE MET PRIOR TO ANY DAM CONSTRUCTION

- 1

**REVIEW OF ALL SOCIAL, ECOLOGICAL AND ECONOMIC BENEFITS AND COSTS**

  - Results have a central role in decision-making processes.
  - Includes carried out Environmental Impact Assessment.
- 2

**BIODIVERSITY VALUES ARE TESTED AND UNDERSTOOD**

  - What endemic species reside here/how will they be affected
  - How will the sediment flows be maintained/affected
- 3

**UPDATED ECONOMIC MODEL BY PERUVIAN GOVERNMENT**

  - Must be sustainable and viable long-term
  - Economic future should be articulated
- 4

**LOCAL ECONOMIES SHOULD NOT BE NEGATIVELY AFFECTED WITHOUT PROPER COMPENSATION**

  - Loss of livelihoods from tourism, agriculture and fishery
  - Equally distributed goods and bads
- 5

**PREVENTION OF DISPLACEMENT IS GUARANTEED**

  - Unless Full Prior Informed Consent has been given
- 6

**MENTAL, EMOTIONAL AND SOCIAL WELL-BEING OF SURROUNDING COMMUNITIES IS NOT NEGATIVELY AFFECTED**
- 7

**FULL PRIOR INFORMED CONSENT HAS BEEN GIVEN BY ALL AFFECTED ACTORS**

  - Their norms, interests, values, and knowledge are included in the process
- 8

**ENVIRONMENTAL REPRODUCTIVE INJUSTICE IS PREVENTED**

  - No cultural or religious traditions are eradicated
  - The communities are protected from pollution or other damage to their bodies and mind

## THE MARAÑÓN RIVER

A MORATORIUM AND A ROAD TO RIVER RIGHTS

**OUR GROUNDS FOR A MORATORIUM:**

ENVIRONMENTAL PILLAR

The unique ecosystems that flourish here support countless plant and animal species, and the health of this environment has a cascading effects

SOCIO-CULTURAL PILLAR

It is important to recognize the unique cultural atmosphere around the river and consult to local people accordingly. One should be aware of how individual and collective bodies are connected through the river and will be negatively affected if the dam construction would take place

ECONOMIC PILLAR

Peru has an energy surplus, dam construction will harm agriculture, fishing and tourism. At the same time, the construction benefits for the local economy are not worth it

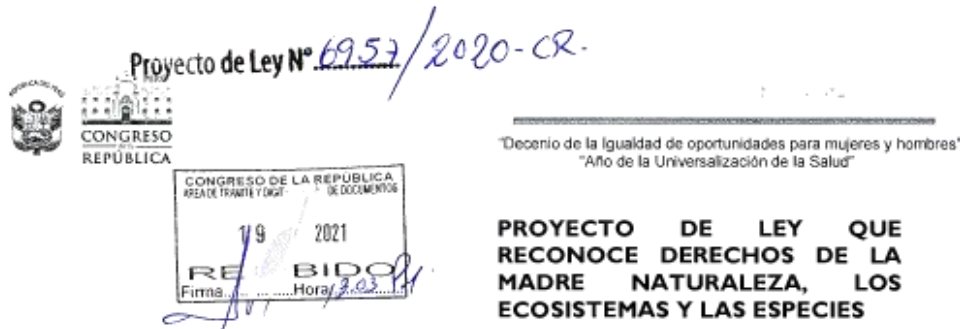
## ROAD TO RIVER RIGHTS



Based upon our claims, we believe that instating the Marañón River as a legal entity, integrating it in decision-making processes via its guardians, will not only open up the judicial systems in Peru to local (indigenous) perspectives, link the negative impacts of extractive practices on the quality of life but also prevent the (future) well-being of nature and people to be harmed



11.2. Appendix II: Bill 6957



Los Congresistas de la República que suscriben, a iniciativa del congresista **Lenin Fernando Bazán Villanueva**, ejerciendo el derecho de iniciativa legislativa que le confiere el artículo 107° de la Constitución Política del Perú y de conformidad con lo establecido en los artículos 23, literal c), 74 y 76°, numeral 2, del Reglamento del Congreso de la República, presentan el siguiente:

### PROYECTO DE LEY

#### LEY QUE RECONOCE DERECHOS DE LA MADRE NATURALEZA, LOS ECOSISTEMAS Y LAS ESPECIES

##### Artículo 1.- Objeto de la Ley

La presente Ley tiene por objeto reconocer que la Madre Naturaleza, los ecosistemas y las especies son titulares de derechos y sujetos de protección por parte del Estado; por tratarse de entes vivos, con valor intrínseco y universal, que tienen derecho a existir, desarrollarse naturalmente, regenerarse, restaurarse y evolucionar.

Cualquier persona, natural o jurídica, comunidades o pueblos indígenas, podrán exigir al Estado, cualquiera sea su nivel de gobierno, el cumplimiento de las disposiciones de la presente Ley.

##### Artículo 2.- Principios

Esta ley se rige bajo los principios siguientes:

- a. **Prevención:** el Estado debe adoptar todas aquellas medidas de carácter jurídico, político, administrativo y cultural que promuevan de forma anticipada la salvaguarda de los derechos de la Madre Naturaleza. Asimismo, el Estado debe establecer medidas frente a eventuales vulneraciones a la Madre Naturaleza, los ecosistemas y las especies, lo cual podrá conllevar a repercusiones y sanciones en el ámbito constitucional, penal, civil y administrativo.
- b. **Precautorio:** El Estado y cualquier persona natural o jurídica están obligados a prevenir y/o evitar de manera oportuna, eficaz y eficiente los daños a los componentes de la Madre Naturaleza, sin que se pueda omitir o postergar el cumplimiento de esta obligación alegando la falta de certeza científica y/o falta de recursos.
- c. **Garantía de restauración y regeneración de la Madre Naturaleza:** El Estado y cualquier persona, individual o jurídica, que ocasione daños de forma accidental o premeditada a los componentes, zonas y sistemas de vida de la Madre Naturaleza, está obligada a realizar una integral y efectiva restauración y/o rehabilitación de estos, de manera que se aproximen a las condiciones

preexistentes al daño, independientemente de otras responsabilidades que puedan determinarse.

- d. **Justicia social y climática:** el Estado considera las situaciones de injusticia económica y social que limitan el ejercicio efectivo de los derechos fundamentales, en particular, de las poblaciones en situación de vulnerabilidad como mujeres, niños, ancianos, pueblos indígenas u originarios, entre otros; las que se agudizan en un contexto de cambio climático.
- e. **Interdependencia, compatibilidad y complementariedad de derechos, obligaciones y deberes:** todos los elementos de la Madre Naturaleza están interconectados, y la afectación de un elemento afecta a todos los demás. Los derechos de la Madre Naturaleza son compatibles y complementarios con los derechos humanos, en particular, con los derechos de los pueblos indígenas.

### Artículo 3.- Enfoques

Esta ley se rige bajo los enfoques siguientes:

- a. **Enfoque ecocéntrico:** el reconocimiento de derechos a la Madre Naturaleza implica concebir su bienestar como un fin en sí mismo, independiente de valoraciones subjetivas y tasaciones basadas en el daño causado a los seres humanos. Las políticas públicas nacionales promueven el desarrollo sostenible, evitan la privatización y mercantilización de los sistemas de vida y de sus componentes naturales, y proscriben el aprovechamiento que ponga en riesgo su subsistencia y la del planeta.
- b. **Enfoque de integralidad:** La interrelación, interdependencia y funcionalidad de todos los aspectos y procesos sociales, culturales, ecológicos, económicos, productivos, políticos y afectivos desde las dimensiones del Buen Vivir son la base del desarrollo integral, de la elaboración de las políticas, normas, estrategias, planes, programas y proyectos, así como de los procesos de planificación, gestión e inversión pública, armonizados en todos los niveles del Estado.
- c. **Enfoque de interculturalidad:** el respeto, garantía y ejercicio de los derechos de la Madre Naturaleza dialogan, valoran e incorporan las diferentes visiones culturales, concepciones de bienestar y desarrollo de los pueblos indígenas u originarios y pueblos afroperuanos, para la generación de servicios con pertinencia cultural, promoción de una ciudadanía intercultural basada en el diálogo y con la atención diferenciada de estos pueblos.
- d. **Enfoque de derechos humanos:** los daños a la Madre Naturaleza tienen un impacto directo en el ejercicio de los derechos humanos, particularmente, de las mujeres, niños, pueblos indígenas u originarios, y otros grupos humanos en situaciones de vulnerabilidad.
- e. **Enfoque de interseccionalidad:** El Estado toma en cuenta que los daños a la Madre Naturaleza generan diferencias negativas que, a su vez, se intersectan y producen nuevas desigualdades que adquieren caracteres particulares.

### Artículo 4.- Definiciones

Para los fines de la presente Ley, se entiende por:

- a. **Biodiversidad:** la amplia variedad y variabilidad de formas de vida de cualquier fuente en nuestro planeta. Esta comprende la diversidad al interior de cada especie, entre las especies y de los ecosistemas.
- b. **Buen Vivir:** paradigma de la vida plena que consiste en un grado de armonía total entre la comunidad y la naturaleza. El Buen Vivir implica una relación de reciprocidad e interdependencia entre los seres humanos y la naturaleza.
- c. **Madre Naturaleza:** el sistema viviente dinámico integrado por la comunidad indivisible, interdependiente y complementaria de todos los sistemas de vida y seres vivos. Tiene valor intrínseco y universal; derecho a existir, desarrollarse naturalmente, regenerarse, restaurarse y evolucionar.
- d. **Ecosistemas:** sistemas de vida complejos y dinámicos existentes en el planeta y que se relacionan e interactúan entre sí como una unidad funcional, indivisible, interdependiente y complementaria.
- e. **Especies:** comunidades de animales, plantas, microorganismos y otros seres que se desarrollan en función de factores físicos, climatológicos, fisiográficos y geológicos que interactúan entre sí.
- f. **Gestión y aprovechamiento sostenible:** la utilización por personas naturales o jurídicas de los recursos y productos de la Madre Naturaleza sin que su capacidad de regeneración y restauración se vea deteriorada para el desarrollo integral.

#### Artículo 5.- Derechos de la madre naturaleza, los ecosistemas y especies

La madre naturaleza, los ecosistemas y las especies son titulares de los siguientes derechos:

- a. Vida e integridad, por los que se busca asegurar el mantenimiento y continuidad de los sistemas de vida y sus componentes naturales de forma integral, con la capacidad y las condiciones de regenerarse naturalmente.
- b. Salud, a través del cual se garantiza su protección efectiva frente a cualquier forma de contaminación y sobreexplotación por actividades humanas que altere los ciclos y procesos naturales que conlleven a su deterioro o extinción.
- c. Protección y garantía jurídica, por la que se garantiza el amparo efectivo frente a cualquier acto de violación de los derechos establecidos por Ley.
- d. A la paz y a no ser perturbado en sus ciclos y procesos vitales que les garantiza su conservación, preservación, restauración y transformación natural para un desarrollo normal y saludable.

Los derechos establecidos en esta Ley no restringen la existencia y goce de otros derechos.

#### Artículo 6.- Aplicación e Interpretación de la Ley

Al aplicar e interpretar el alcance de los derechos reconocidos en la presente Ley, se debe tener en cuenta los instrumentos internacionales sobre derechos humanos, pueblos indígenas y ambiente; así como el derecho internacional, los acuerdos

internacionales y los principios de precaución, prevención, equidad intergeneracional y solidaridad.

La protección de los derechos de la Madre Naturaleza, los ecosistemas y las especies prevalecen por sobre cualquier actividad humana y derecho adquirido.

#### **Artículo 7.- Prohibiciones**

En concordancia con el régimen de responsabilidad previsto en el Capítulo 2 del Título IV de la Ley 28611, Ley General del Ambiente, está prohibido:

- a. La alteración, disminución o interrupción de los ciclos biológicos y ecológicos de la Madre Naturaleza, los ecosistemas, especies y otras formas de vida, que afecten su capacidad de regeneración y restauración, de forma accidental o premeditada.
- b. La privatización y mercantilización de los sistemas de vida y de sus componentes naturales, a través del reconocimiento y/o otorgamiento de derechos de propiedad en favor de terceros sobre la Madre Naturaleza y/o las fuentes de los recursos naturales, como el agua, los ríos, la diversidad biológica, el aire, la atmósfera, entre otros.
- c. El aprovechamiento de los sistemas de vida y de sus componentes naturales que ponga en riesgo su subsistencia, la vida de futuras generaciones y la del planeta.

#### **Artículo 8.- De la legitimidad para obrar e interés difuso**

Cualquier persona, natural o jurídica, está legitimada para ejercer las acciones de protección y garantía jurídica a que se refiere la presente Ley ante las vías nacionales e internacionales correspondientes, cuando se ponga en riesgo o se ocasione una afectación a los derechos establecidos por Ley.

#### **Artículo 9.- Competencias para la protección de los derechos de la Madre Naturaleza**

Para garantizar los derechos y obligaciones establecidas en la presente Ley, el Ministerio del Ambiente ejerce las siguientes funciones:

- a. Articular las políticas, programas, proyectos y planes de desarrollo y gestión orientados a proteger los derechos de la Madre Naturaleza, los ecosistemas y las especies, con el fin de adecuarlos a la presente Ley.
- b. Desarrollar políticas públicas multisectoriales que permitan prevenir, proteger y conservar la Madre Naturaleza, los ecosistemas y las especies para evitar su deterioro y/o destrucción.



- c. Desarrollar políticas, planes y procedimientos que aseguren que todas las autoridades e instituciones del Estado, cualquiera sea su nivel y ámbito territorial, cumplan con garantizar los derechos y alcances de esta Ley.
- d. Generar propuestas que aseguren el uso, la gestión sustentable y aprovechamiento sostenible de la Madre Naturaleza, los ecosistemas y especies promoviendo prácticas de producción y hábitos de consumo responsables.
- e. Emitir directrices y brindar asistencia para que los planes estratégicos institucionales y sectoriales respeten los derechos de la Madre Naturaleza, los ecosistemas y especies.
- f. Emitir informes anuales sobre el estado del cumplimiento de esta Ley.

#### **Artículo 10- Derechos de los pueblos indígenas u originarios**

El Estado garantiza y respeta los derechos de los pueblos indígenas u originarios, así como su participación efectiva a través de sus organizaciones representativas y conforme a sus propias estructuras orgánicas y sistema de justicia consuetudinario, con la finalidad de proteger su relación intrínseca con la Madre naturaleza y su derecho al territorio integral ancestral.

Esta Ley garantiza el ejercicio de los derechos reconocidos para estos pueblos en el marco normativo internacional.

#### **DISPOSICIÓN COMPLEMENTARIA FINAL**

**PRIMERA:** Incorporase el Artículo XII en el Título Preliminar de la Ley 28611, Ley General del Ambiente, en los términos siguientes:

##### ***XII. De los derechos de la naturaleza***

***La madre naturaleza, los ecosistemas y las especies son titulares de derechos y sujetos de protección por parte del Estado; por tratarse de entes vivos con valor intrínseco y universal que tienen derecho a existir, desarrollarse naturalmente, regenerarse, restaurarse y evolucionar.***

***Cualquier persona, natural o jurídica, podrá exigir al Estado, en todos sus niveles de gobierno, el cumplimiento efectivo de estos derechos.***

**SEGUNDA:** Incorporase el numeral 1.20 en el Artículo IV del Título Preliminar del Texto Único Ordenado de la Ley del Procedimiento Administrativo General, aprobado por Decreto Supremo N° 004-2019-JUS, en los términos siguientes:

##### ***“Artículo IV. Principios del procedimiento administrativo***

***1. El procedimiento administrativo se sustenta fundamentalmente en los siguientes principios, sin perjuicio de la vigencia de otros principios generales del Derecho Administrativo:***

***(...)***

***1.20 Enfoque intercultural***




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Congreso de la República

"Decenio de la Igualdad de oportunidades para mujeres y hombres"  
"Año de la Universalización de la Salud"

**Las autoridades administrativas deben actuar aplicando un enfoque intercultural, lo que implica la adaptación de los procesos que sean necesarios en función a las características geográficas, ambientales, socioeconómicas, lingüísticas y culturales de los administrados a quienes se destina dicho servicio."**

**TERCERA:** Deróguense todas las normas que se opongan a la presente ley.

**DISPOSICIÓN COMPLEMENTARIA TRANSITORIA**


**PRIMERA:** Declárese de necesidad e interés nacional la denominación "Perú, país Amazónico y Andino", en el marco de las celebraciones del Bicentenario de la Independencia.

**SEGUNDA:** Esta Ley entrará en vigencia al día siguiente de su publicación en el diario oficial El Peruano.

**TERCERA:** El Poder Ejecutivo reglamentará la presente ley, en un plazo no mayor a sesenta (60) días hábiles, contados desde el día siguiente de su publicación, bajo responsabilidad.



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**CONGRESO DE LA REPÚBLICA**

Lima, 21 de ENERO del 2021

Según la consulta realizada, de conformidad con el Artículo 77° del Reglamento del Congreso de la República: pase la Proposición N° 6952 para su estudio y dictamen, a la(s) Comisión(es) de PUEBLOS ANANOS, AMAZONICOS Y AFROPERUANOS, AMBIENTE Y ECOLOGIA.



.....  
**YON JAVIER PÉREZ PAREDES**  
Oficial Mayor  
CONGRESO DE LA REPÚBLICA

## EXPOSICIÓN DE MOTIVOS

### I. INTRODUCCIÓN

Los Congresistas que suscriben la presente iniciativa declaran que su elaboración ha contado con el aporte y la participación protagónica de la Organización Nacional de Mujeres Indígenas Andinas y Amazónicas del Perú – ONAMIAP, de la Confederación Nacional Agraria – CNA, y de diversas organizaciones de la sociedad civil. A ellos nuestro reconocimiento y compromiso a seguir trabajando para que esta iniciativa se convierta en Ley.

### 2. DIMENSIÓN DEL PROBLEMA

Instancias internacionales han dejado en evidencia que nuestro planeta viene atravesando una grave y alarmante crisis climática, deforestación y de salud pública que se han originado como consecuencia del uso desmedido e irresponsable de la madre naturaleza, los ecosistemas y las especies. Así tenemos, por ejemplo, que en el Foro Económico Mundial del año 2019, se presentó el Informe de Riesgos Mundiales que señala, entre otras cosas que: "... el cambio climático está agravando la pérdida de biodiversidad" y que muchos ecosistemas, como los "océanos y bosques", que son importantes para absorber las emisiones de carbono, también están afectados. Incluso da cuenta que "la creciente fragilidad de los ecosistemas también plantea riesgos para la estabilidad social y económica", en tanto ello afecta a "millones de personas que dependen de los ecosistemas (...) para proteger sus medios de subsistencia y su seguridad alimentaria."<sup>1</sup>

El informe también nos recordó que en el año 2017, "los desastres relacionados con el clima causaron una inseguridad alimentaria aguda a aproximadamente 39 millones de personas en 23 países".<sup>2</sup> Y en octubre del 2018, el Grupo Intergubernamental de Expertos sobre el Cambio Climático (IPCC, por sus siglas en inglés)<sup>3</sup>, señaló de forma alarmante que tenemos cuando mucho 12 años para llevar a cabo cambios drásticos que son necesarios para evitar el aumento de la temperatura mundial promedio más allá de la meta de 1,5 °C que fue establecida en el Acuerdo de París, del que forma parte el Estado peruano.

El Informe de la Organización Meteorológica Mundial –OMM, presentado en noviembre de 2019<sup>4</sup>, también alertó sobre la gravedad de la crisis climática al dar cuenta que, "las concentraciones de los principales gases de efecto invernadero que atrapan el calor de la atmósfera alcanzaron una vez más niveles récord en 2018." Además, señaló

<sup>1</sup> Spalding, M. D., R. D. Brumbaugh, y E. Landis. 2016. Atlas of Ocean Wealth.

<sup>2</sup> Programa Mundial de Alimentos -PMA. 2018. "Food Crises Continue to Strike, and Acute Hunger Intensifies".

<sup>3</sup> Ver: IPCC, 2018: Resumen para responsables de políticas. En: Calentamiento global de 1,5 °C, Informe especial del IPCC sobre los impactos del calentamiento global de 1,5 °C con respecto a los niveles preindustriales y las trayectorias correspondientes que deberían seguir las emisiones mundiales de gases de efecto invernadero, en el contexto del reforzamiento de la respuesta mundial a la amenaza del cambio climático, el desarrollo sostenible y los esfuerzos por erradicar la pobreza [Masson-Delmotte V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor y T. Waterfield (eds).

<sup>4</sup> Informe de la Organización Meteorológica Mundial, presentado el 25 de noviembre de 2019.



que tales niveles de concentración de CO<sub>2</sub> habían ocurrido en la tierra hace 3 y 5 millones de años, *"cuando la temperatura era de 2 a 3 grados más cálida y el nivel del mar era entre 10 y 20 metros superior al actual."*

Ello evidencia que, las acciones hasta ahora adoptadas por los Estados para combatir el cambio climático no están siendo eficaces. De allí que Petteri Tala, secretario general de la OMM, haya señalado que "el futuro bienestar de la humanidad está en juego". Y en igual sentido, el año 2019, también lo han expresado los responsables de formular políticas y programa de las Naciones Unidas para el Medio Ambiente<sup>5</sup>, quienes señalaron *"se está desencadenando un importante proceso de extinción de especies, que pone en peligro la integridad planetaria y la capacidad de la Tierra para satisfacer las necesidades humanas"*.

Finalmente, la crisis sanitaria que venimos sufriendo en el mundo por el virus COVID-19, originado por transferencia zoonótica en un mercado de especies en China y cuyas consecuencias son de alcance global, nos está interpelando en la necesidad de generar cambios estructurales en la forma de cómo la especie humana se relaciona con la madre naturaleza, los ecosistemas y las especies.

En el año 2016, por ejemplo, el Programa de las Naciones Unidas para el Medio Ambiente (PNUMA), llamó la atención respecto al aumento mundial de las epidemias zoonóticas. En esa oportunidad, dicha instancia internacional señaló que el 75% de las enfermedades infecciosas que presentan los seres humanos son de origen animal y las afecciones están íntimamente vinculadas con la salud de los ecosistemas<sup>6</sup>. En ese sentido, la actual crisis provocada por la pandemia del Covid 19, también nos abre la oportunidad de reencuentro entre la especie humana con la madre naturaleza, los ecosistemas y las especies, y el Poder Legislativo no puede estar ajeno a este desafío.

Nuestro país necesita incorporar un marco normativo que permita valorar, proteger y garantizar el respeto de los derechos de la madre naturaleza, los ecosistemas y especies como sujetos de derecho y titulares de protección, tal como ya lo han venido haciendo muchos Estados, desde la primacía de un enfoque Constitucional Eocéntrico y vinculadas con la visión ancestral indígena.

### 3. DERECHO COMPARADO

Diversos países alrededor del mundo han reconocido, dentro de su marco normativo interno, derechos como entes vivos y titulares de derecho en sí mismos a la naturaleza, los ecosistemas, los ríos, las especies, etc. Ello, en atención a los nuevos desafíos y exigencias de que puedan ser protegidos y preservados para garantizar la supervivencia de las generaciones futuras de la especie humana y el planeta.

<sup>5</sup> Ver: Perspectivas del Medio Ambiente Mundial GEO 6, resumen para responsables de formular políticas, programa de las Naciones Unidas para el Medio Ambiente, del año 2019.

<sup>6</sup> Ver: <https://www.unenvironment.org/es/noticias-y-reports/reportajes/reportajes/coronavirus-ilego-para-quequedarse>

### (i) Ecuador

En el año 2008, Ecuador emitió una nueva Constitución Política, en cuyo artículo 71º, introduce por primera vez derechos de la Naturaleza o Pacha Mama, en los términos siguientes:

Artículo. 71.- “La naturaleza o Pacha Mama, donde se reproduce y realiza la vida, tiene derecho a que se respete integralmente su existencia y el mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos. Toda persona, comunidad, pueblo o nacionalidad podrá exigir a la autoridad pública el cumplimiento de los derechos de la naturaleza. Para aplicar e interpretar estos derechos se observarán los principios establecidos en la Constitución, en lo que proceda. El Estado incentivará a las personas naturales y jurídicas, y a los colectivos, para que protejan la naturaleza, y promoverá el respeto a todos los elementos que forman un ecosistema.”

En el año 2012, la Corte Constitucional de Ecuador, emite la sentencia N° 017- 12-SIN-CC, por la cual establece que las Islas Galápagos deben ser protegidas en su integridad para su preservación y conservación a perpetuidad. Ello debido a una particular atención a la Constitución Política, la cual establece los mayores estándares de protección ambiental que el Estado está obligado a proteger y garantizar.

En el año 2018, la Corte Constitucional de Ecuador emite la Sentencia N° 12- 2018, que confirma la Sentencia N° 11121-2011-0010 de la Sala Penal de la Corte de Justicia de Loja, quien había establecido, entre otras cosas, que la naturaleza tiene derecho a que se le respete integralmente su existencia y el mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos.

### (ii) Bolivia

En el año 2010, la Asamblea Legislativa Plurinacional de Bolivia aprobó la Ley de derechos de la Madre Tierra N° 071, donde en su Artículo 5º reconoce a la Madre Tierra como sujeto colectivo de interés Público, incluyendo a las comunidades humanas y particularidades de sus diversos componentes y otros derechos de la misma:

“Para efectos de la protección y tutela de sus derechos, la Madre Tierra adopta el carácter de sujeto colectivo de interés público. La Madre Tierra y todos sus componentes incluyendo las comunidades humanas son titulares de todos los derechos inherentes reconocidos en esta Ley. La aplicación de los derechos de la Madre Tierra tomará en cuenta las especificidades y particularidades de sus diversos componentes. Los derechos establecidos en la presente Ley, no limitan la existencia de otros derechos de la Madre Tierra.”

En el año 2012, la Asamblea Legislativa Plurinacional de Bolivia creó la “Ley Marco de la Madre Tierra y Desarrollo integral para el Vivir Bien” N° 300, que ha determinado en su artículo N° 9 (I), que la Madre Tierra es sujeto colectivo de interés público y ha limitado las relaciones económicas, sociales, ecológicas y espirituales a la capacidad de regeneración de sus componentes, zonas y sistemas de vida.

"Derechos de la Madre Tierra, como sujeto colectivo de interés público como la interacción armónica y en equilibrio entre los seres humanos y la naturaleza, en el marco del reconocimiento de que las relaciones económicas, sociales, ecológicas y espirituales de las personas y sociedad con la Madre Tierra están limitadas por la capacidad de regeneración que tienen los componentes, las zonas y sistemas de vida de la Madre Tierra en el marco de la Ley N° 071 de Derechos de la Madre Tierra."

### (iii) México

En el año 2014, el Estado Soberano de Guerrero realizó una reforma a su Constitución Política a través del Decreto N° 433, donde en su Título primero, artículo 2 reconoce los derechos de la naturaleza en este Estado.

Artículo 2: "(...) el Estado deberá garantizar y proteger los derechos de la naturaleza en la legislación respectiva."

En el año 2017, la Ciudad de México también reformó su Constitución Política. En esta reforma, el artículo 13° literal A reconoce el derecho a un ambiente sano donde precisa que no solo las personas gozan de tal derecho, sino también la naturaleza, y la protege como un ente colectivo sujeto de derechos posibilitando que tales derechos puedan ser ampliados por una ley secundaria.

Artículo 13° (A)(3): "Para el cumplimiento de esta disposición se expedirá una Ley secundaria que tendrá por objeto reconocer y regular la protección más amplia de los derechos de la naturaleza conformada por todos sus ecosistemas y especies como un ente colectivo sujeto de derechos."

En el año 2019, el Estado de Colima reformó igualmente su Constitución Política, donde en su artículo 2°, reconoce a la naturaleza como un ente colectivo sujeto de derechos.

"La naturaleza, conformada por todos sus ecosistemas y especies como un ente colectivo sujeto de derechos, deberá ser respetada en su existencia, en su restauración y en la regeneración de sus ciclos naturales, así como la conservación de su estructura y funciones ecológicas (...)"

Por otro lado, para proteger derechos de la naturaleza también se han venido promoviendo o modificando leyes, como es el caso de la Ley Ambiental de Protección a La Tierra del año 2013. En dicha Ley, el Distrito Federal, modifica su Capítulo I Bis, Artículo 86° BIS (3), para reconocer a la tierra como un ente colectivo y proteger sus recursos naturales y sus diversos componentes.

Artículo 86 Bis 3: "Para efectos de la protección y tutela de sus recursos naturales, la Tierra adopta el carácter de ente colectivo sujeto de la protección del interés público. En su aplicación se tomarán en cuenta las especificidades y particularidades de sus diversos componentes."

### (iv) Estados Unidos





**(vi) Colombia:** la Corte Suprema de Estados Unidos emitió la sentencia sobre el Caso Sierra Club vs Morton, donde la opinión en disenso del juez William O. Douglas sostuvo que los recursos naturales "deberían tener el derecho de ser mantenidos por la propia protección".

En el año 2016, la Corte Constitucional de Colombia emitió la sentencia T-622 por la cual reconoció los derechos del Río Atrato, su cuenca y afluentes como una entidad sujeta de derechos a la protección, conservación, mantenimiento y restauración y reparación por parte del Estado y las comunidades étnicas. Ello es entendido de que la protección de la naturaleza y el medio ambiente son un elemento esencial de la ordenamiento constitucional, no solo por la importancia y necesidad de que los seres humanos cuenten con un ambiente sano sino porque los demás organismos vivos con quienes se comparte el planeta son responsables de protección en sí mismos. "Every creature possesses a right to a healthy climate (...)"

En el año 2018, la Corte Suprema de Justicia de Colombia, emitió la Sentencia ES TC 3629-2018, por la cual reconoció el derecho fundamental del sujeto de derecho de acceso a un medio ambiente sano. Esta decisión significó para esta Corte la primera vez que se reconoció el derecho de acceso a un medio ambiente sano como un derecho fundamental que no puede ser desconocido o violado por el poder legislativo, ejecutivo o judicial. El medio ambiente sano es un derecho fundamental que garantiza la existencia de la familia, la sociedad y el Estado, en un medio ambiente saludable. El deterioro del medio ambiente agota los derechos conexos al derecho a la vida. Por ende, la defensa del medio ambiente sano, es la consideración del pueblo de la ciudad del Trujillo en Orito declaró la falta de derechos del ecosistema del lago Erie, sus afluentes, cuencas y precipitación, derecho de equidad intergeneracional y solidaridad.

Además, en el año 2017, el Tribunal Constitucional del Estado de Colorado, declaró la violación del artículo 2 de la Constitución de Colorado (libertad y dignidad humana) es el ligamento de existencia más apegado a la naturaleza y señaló que los seres humanos y los seres sintientes en general no pueden sobrevivir, ni mucho menos resguardar esos derechos, para sus hijos y las generaciones venideras, si no se garantiza la existencia de la familia, la sociedad y el Estado, en un medio ambiente saludable. El deterioro del medio ambiente agota los derechos conexos al derecho a la vida. Por ende, la defensa del medio ambiente sano, es la consideración del pueblo de la ciudad del Trujillo en Orito declaró la falta de derechos del ecosistema del lago Erie, sus afluentes, cuencas y precipitación, derecho de equidad intergeneracional y solidaridad.

En el año 2019, el Tribunal Constitucional de Colombia emitió la sentencia 076-2019, por la cual reconoce al río Cauca y sus afluentes como sujeto de derecho, que implica su protección, conservación y restauración, así como el agua que se hizo con el río Atrato. Además, esta decisión reconoció que las generaciones futuras son sujetos de derecho de especial protección y que tienen derechos fundamentales a la dignidad, al agua, a la seguridad; los cuales, están a cargo del Ente Público Municipal y del Estado.

**(v) Nueva Zelanda:** En el mismo año 2019, el Tribunal Administrativo de Tolima, emitió la Radicación N° 73001-23-00, por la cual ordenó, entre otras cosas, que pare la explotación, en el año 2014, en el marco de un enfoque único entre los Tūhōe (Tribu Maori) y la minería del río Coello, Combeima y Cocora, a quienes les reconoció junto con sus cuencas y afluentes como entidades individuales sujetas de derechos a la protección, conservación, mantenimiento y restauración; los cuales están a cargo del Estado y las comunidades, deberes y responsabilidades. En dicha Acta se definen que el "Te Urewera", es una fortaleza de la naturaleza con valor espiritual y con una identidad en sí misma desarrollados por la Corte Constitucional Colombiana, sentencia T- 622 y cita:

9.31. En otras palabras, la justicia con la naturaleza debe ser aplicada más allá del escenario humano y que para los neozelandeses se trata de un segmento de valores, naturales, culturales e históricos de importancia nacional. No dar un paso adelante en la jurisprudencia



hacia la protección constitucional de una de nuestras fuentes de biodiversidad más importantes: el río Atrato. Esta interpretación encuentra plena justificación en el interés superior del medio ambiente que ha sido ampliamente desarrollado por la jurisprudencia constitucional y que está conformado por numerosas cláusulas constitucionales que constituyen lo que se ha denominado la "Constitución Ecológica" o "Constitución Verde". Este conjunto de disposiciones permiten afirmar la trascendencia que tiene el medio ambiente sano y el vínculo de interdependencia con los seres humanos y el Estado."

En el 2019 también, el departamento de Nariño aprobó el Decreto N° 348, dónde en su artículo primero reconoce a la naturaleza como sujeto de derecho, en los términos siguientes:

"La gobernación de Nariño promoverá el respeto, protección, conservación y restauración de los ecosistemas estratégicos del departamento, las áreas de especial protección ecológica y de la naturaleza de su generalidad, adoptándolos como titulares de derechos y sujetos de protección"

#### (vii) **Australia**

En el año 2017, el Parlamento emite la Ley de Protección del río Yarra, para garantizar que este se mantenga vivo y saludable para las generaciones futuras y que obliga a la Corona respetar tal derecho. Para su protección, la Ley reconoce al río Yarra como una entidad natural y que, junto con sus parques, son importantes para la prosperidad económica, la vitalidad y habitabilidad de Melbourne, lo cual incluye entre otras cosas, la salud ecológica, cultural, social y ambiental.

#### (viii) **Brasil**

En el año 2017, el Municipio de Bonito, Estado de Pernambuco, realizó una Enmienda en la Ley Orgánica N° 01/2017, con el fin de reconocer el derecho de la naturaleza de existir, prosperar y evolucionar en el municipio de Bonito.

" (...)O Município reconhece o direito da natureza de existir, prosperar e evoluir, e deverá atuar no sentido de assegurar a todos os membros da comunidade natural, humanos e não humanos, do Município de Bonito, o direito ao meio ambiente ecologicamente saudável e equilibrado e à manutenção dos processos ecossistêmicos necessários à qualidade de vida, cabendo ao Poder Público e à coletividade, defendê-lo e preservá-lo, para as gerações presentes e futuras dos membros da comunidade da terra.  
Parágrafo Único. Para assegurar efetividade a esse direito, o Município deverá promover a ampliação de suas políticas públicas nas áreas de meio ambiente, saúde, educação e economia, a fim de proporcionar condições ao estabelecimento de uma vida em harmonia com a Natureza, bem como articular-se com os órgãos estaduais, regionais e federais competentes, e ainda, quando for o caso, com outros municípios, objetivando a solução de problemas comuns relativos à proteção da Natureza (...)"

En el año 2018, el Municipio de Paudhalo, Estado de Pernambuco, realizó una Enmienda a la Ley Orgánica N° 3, donde a través de su artículo 1° reconoce el derecho de la naturaleza de existir, prosperar y evolucionar en el municipio de Paudhalo.

"O município reconhece o direito da natureza existir, prosperar e evoluir e deverá atuar no sentido de assegurar a todos os membros da comunidade natural, humano e não humanos, do município do Paudalho, o direito ao meio ambiente ecologicamente saudável e equilibrado e a manutenção dos processos ecossistêmicos necessários a qualidade da vida, cabendo ao município e à coletividade, defendê-lo e preservá-lo para as gerações presentes e futuras dos membros da comunidade da terra."

#### (ix) Argentina

En el año 2018, la Ciudad de Santa Fe incorpora el artículo 5, en la Ordenanza 11.462, por la cual reconoce derechos de la naturaleza, en los términos siguientes:

Art. 5°: "Autoridad de Aplicación.

La Autoridad de Aplicación de la presente norma será la Secretaría de Ambiente y Espacios Públicos de la Municipalidad de Santa Fe o el organismo que en el futuro la reemplace, siendo la responsable de llevar a cabo las acciones de difusión, prevención, control y sanción de la presente ordenanza como así también de la promoción de medidas alternativas para el control de malezas y plagas, en armonía con el ambiente, la salud humana y los derechos de la naturaleza."

#### (x) En Uganda

En el año 2019, la Ley Nacional Ambiental, en el Artículo (4) (1) reconoce a la naturaleza los derechos de existir, persistir, mantener y regenerar sus ciclos vitales, estructura, funciones y sus procesos de evolución.

### 4. FUNDAMENTOS CONSTITUCIONALES

La propuesta de reconocimiento de los derechos de la Madre Naturaleza tiene fundamentos convencionales y constitucionales, por las siguientes razones:

#### a. Forma parte del contenido del derecho al medio ambiente sano según los estándares del Sistema Interamericano de Derechos Humanos de obligatorio cumplimiento para el Perú

Mediante la Opinión Consultiva OC 23/17 y la sentencia del Caso Comunidades indígenas miembros de la asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina<sup>7</sup>, la Corte Interamericana de Derechos Humanos (Corte IDH) ha dado un paso fundamental para reconocer a la naturaleza como un sujeto de derechos. Así, en esta jurisprudencia, la Corte IDH señaló lo siguiente:

"Esta Corte considera importante resaltar que el derecho al medio ambiente sano como derecho autónomo, a diferencia de otros derechos, **protege los componentes del medio ambiente, tales como bosques, ríos, mares y otros, como intereses jurídicos en sí mismos, aún en ausencia de certeza o evidencia sobre el riesgo a las personas individuales. Se trata de proteger la naturaleza y el medio ambiente no solamente por su conexión con una utilidad para el ser humano o por los efectos que su**

<sup>7</sup> Corte IDH. Caso Comunidades indígenas miembros de la asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina. Fondo, Reparaciones y Costas, sentencia de 6 de febrero de 2020, párr. 203.

degradación podría causar en otros derechos de las personas, como la salud, la vida o la integridad personal, **sino por su importancia para los demás organismos vivos con quienes se comparte el planeta, también merecedores de protección en sí mismos.**

(...) el derecho a un medio ambiente sano como derecho autónomo **es distinto al contenido ambiental** que surge de la protección de otros derechos, tales como el derecho a la vida o el derecho a la integridad personal.<sup>98</sup> (El subrayado es nuestro).

Como se puede advertir, la Corte IDH reconoce expresamente los elementos constitutivos del derecho al medio ambiente sano en los siguientes términos:

- **Autonomía:** es un derecho autónomo que puede ser ejercido con independencia a su grado de funcionalidad para los seres humanos;
- **El objeto de este derecho es la naturaleza y sus atributos en sí mismos:** protege los componentes de la naturaleza y medio ambiente, tales como bosques, ríos, mares y otros, como intereses jurídicos en sí mismos.
- **No es necesario probar la afectación de un derecho humano para protegerlo:** esta protección se ejerce aún en ausencia de certeza o evidencia sobre el riesgo a las personas individuales
- **Carácter teleológico orientado a la protección de la naturaleza:** este derecho se dirige a proteger a los demás organismos vivos con quienes los seres humanos comparten el planeta y quienes son merecedores de protección en sí mismos.
- **Es distinto del contenido ambiental de otros derechos:** este derecho no se deriva de otros derechos que pueden ser afectados por el menoscabo al medio ambiente, como el derecho a la salud o a la integridad. Es un derecho independiente.

Sobre el particular, se debe indicar que la Corte IDH desarrolló el contenido de este derecho a partir de la interpretación del artículo 26º de la Convención Americana de Derechos Humanos (CADH) y el artículo II del Protocolo de San Salvador que reconoce el derecho al medio ambiente sano en dos dimensiones:

1. Toda persona tiene derecho a vivir en un medio ambiente sano y a contar con servicios públicos básicos.
2. Los Estados parte promoverán la protección, preservación y mejoramiento del medio ambiente.

En esa línea, es importante señalar que los países bajo el ámbito de la jurisdicción de la Corte IDH, como el Perú, están obligados a cumplir con sus sentencias y con el marco interpretativo que se desprende de estas. Así, en reiterada jurisprudencia, como las sentencias de los casos Colindres Schonenberg vs. El Salvador, Gelman vs.

<sup>98</sup> Corte IDH. Obligaciones estatales en relación con el medio ambiente en el marco de la protección y garantía de los derechos a la vida y a la integridad personal. Opinión Consultiva OC-23/17 del 15 de noviembre de 2017, solicitada por la República de Colombia, párrs. 62 y 63.

Uruguay, Almonacid Arellano y otros vs. Chile, la Corte IDH ha establecido esta sujeción en los siguientes términos:<sup>9</sup>

"129. Esta Corte ha señalado que **todas las autoridades de un Estado Parte en la Convención, tienen la obligación de ejercer un "control de convencionalidad" entre los actos u omisiones y las normas internas y la Convención Americana**, de forma tal que la interpretación y aplicación del derecho nacional sea consistente con las obligaciones internacionales del Estado en materia de derechos humanos. Este control de convencionalidad debe realizarse en el marco de sus respectivas competencias y de las regulaciones procesales correspondientes y en esta tarea, **teniendo en cuenta no solo el tratado, sino también la interpretación que del mismo ha hecho la Corte Interamericana, intérprete última de la Convención Americana.**" (El subrayado es nuestro).

Esta vinculación también ha sido reconocida expresamente por el artículo V del Título Preliminar del Código Procesal Constitucional, que establece:

"El contenido y alcances de los derechos constitucionales protegidos por los procesos regulados en el presente Código deben interpretarse de conformidad con la Declaración Universal de Derechos Humanos, los tratados sobre derechos humanos, **así como de las decisiones adoptadas por los tribunales internacionales sobre derechos humanos constituidos según tratados de los que el Perú es parte.**"<sup>10</sup> (El subrayado es nuestro).

Asimismo, el Tribunal Constitucional en la sentencia recaída en el Expediente N° 2730-2006-PA/TC ha sido enfático en señalar la vinculatoriedad de la jurisprudencia de la Corte IDH para el Perú, con independencia de que provenga de sentencias donde haya sido parte o no:

"**La vinculatoriedad de las sentencias de la CIDH no se agota en su parte resolutiva** (la cual, ciertamente, alcanza sólo al Estado que es parte en el proceso), **sino que se extiende a su fundamentación o ratio decidendi, con el agregado de que, por imperio de la** [Cuarta Disposición Final y Transitoria (CDFT)] de la Constitución y el artículo V del Título Preliminar del [Código Procesal Constitucional], en dicho ámbito la sentencia resulta vinculante para todo poder público nacional, **incluso en aquellos casos en los que el Estado peruano no haya sido parte en el proceso.** En efecto, la capacidad interpretativa y aplicativa de la Convención que tiene la CIDH, reconocida en el artículo 62.3 de dicho tratado, aunada al mandato."<sup>11</sup> (El subrayado es nuestro).

En ese sentido, cabe recalcar que la presente propuesta justamente busca armonizar la legislación nacional con el contenido del derecho al medio ambiente sano reconocido por los instrumentos normativos del Sistema Interamericano de Derechos Humanos y la jurisprudencia de la Corte IDH, dando cumplimiento así a lo dispuesto por el artículo 2° de la CADH, que dispone:

**"Artículo 2. Deber de Adoptar Disposiciones de Derecho Interno**

<sup>9</sup>Corte IDH. Caso Colindres Schonenberg Vs. El Salvador. Fondo, Reparaciones y Costas. Sentencia de 4 de febrero de 2019. Serie C No. 373, párr. 129; Caso Gelman Vs. Uruguay. Fondo y Reparaciones. Sentencia de 24 de febrero de 2011. Serie C No. 221, párr. 93; Caso Almonacid Arellano y otros Vs. Chile. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 26 de septiembre de 2006. Serie C No. 154, párr. 124..

<sup>10</sup> Ley N° 28237.

<sup>11</sup> Fundamento 12.



Si el ejercicio de los derechos y libertades mencionados en el artículo 1 no estuviere ya garantizado por disposiciones legislativas o de otro carácter, los Estados Partes se comprometen a adoptar, con arreglo a sus procedimientos constitucionales y a las disposiciones de esta Convención, **las medidas legislativas o de otro carácter que fueren necesarias para hacer efectivos tales derechos y libertades.**" (El subrayado es nuestro).

Asimismo, mediante esta propuesta se da cumplimiento a la obligación de garantía establecida por el artículo 1° de la CADH, por la que los Estados Parte no solo deben limitarse a no incurrir en conductas violatorias de los derechos, **sino que deben adoptar todas las medidas que aseguren la existencia, en la realidad, de una eficaz garantía del libre y pleno ejercicio de los derechos y libertades previstos en la CADH**<sup>12</sup>. Una de estas medidas es adecuar el marco normativo y expedir normas conducentes a la efectiva observancia de los derechos que esta convención recoge<sup>13</sup>.

#### **b. Forma parte del contenido del derecho de los pueblos indígenas al territorio según los estándares del derecho internacional**

El derecho de los pueblos indígenas se encuentra expresamente reconocido por el Convenio N° 169, la Declaración de las Naciones Unidas sobre derechos de los pueblos indígenas (DNUPI) y Declaración Americana sobre derechos de los pueblos indígenas (DAPI). A nivel del Sistema Interamericano de Derechos Humanos, este derecho se encuentra protegido por el artículo 21° de la CADH que garantiza el derecho a la propiedad<sup>14</sup>.

En esa línea, debe indicarse que de acuerdo con el Convenio 169, el "territorio", abarca la totalidad del hábitat de las regiones<sup>15</sup>; es decir, engloba a los bosques, ríos, montañas y mares costeros, y tanto la superficie como el subsuelo<sup>16</sup>.

Asimismo, el artículo 25 de la DNUPI establece que los pueblos indígenas tienen derecho a **mantener y fortalecer** su propia relación espiritual con las **tierras, territorios, aguas, mares costeros y otros recursos que tradicionalmente han poseído u ocupado y utilizado.**

<sup>12</sup> Corte IDH. Caso Velásquez Rodríguez vs. Honduras. Fondo. Sentencia de 29 de julio de 1988, párr. 167.

<sup>13</sup> Corte IDH. Caso Fontvecchia y D'Amico vs. Argentina. Fondo, Reparaciones y Costas. Sentencia de 29 de noviembre de 2011, párr. 85.

<sup>14</sup> Corte IDH. Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2007, párr. 173 y 175; Caso de la Comunidad Mayagna (Sumo) Awas Tingni Vs. Nicaragua. Fondo, Reparaciones y Costas. Sentencia de 31 de agosto de 2001, párr. 148; Caso de la Comunidad Mowiana Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia 15 de junio de 2005, párr. 133 y 135; Caso Comunidad Indígena Yakyé Axa Vs. Paraguay. Fondo, Reparaciones y Costas. Sentencia 17 de junio de 2005; párr. 124.

<sup>15</sup> Artículo 13° del Convenio 169: "2. La utilización del término tierras en los artículos 15 y 16 deberá incluir el concepto de territorios, lo que cubre la totalidad del hábitat de las regiones que los pueblos interesados ocupan o utilizan de alguna otra manera."

<sup>16</sup> OIT, 2009. Los derechos de los pueblos indígenas y tribales en la práctica - Una guía sobre el Convenio núm. 169 de la OIT, P. 91.

Por su parte, la DAPI en su artículo XIX establece el "derecho a la protección del medio ambiente sano", que incluye el derecho de los "pueblos indígenas" a "vivir en armonía con la naturaleza y a un ambiente sano, seguro y sustentable" y a "conservar, restaurar y proteger el medio ambiente y al manejo sustentable de sus tierras, territorios y recursos".

Por esa misma razón, la misma Corte IDH ha reconocido que los derechos territoriales están relacionados con el derecho colectivo a la supervivencia como pueblo organizado, y con el control de su hábitat como una condición necesaria para la reproducción de su cultura, para su propio desarrollo y para llevar a cabo sus planes de vida<sup>17</sup>. Justamente, en reiterada jurisprudencia, la Corte ha señalado lo siguiente:

"El artículo 21 de la Convención Americana protege la vinculación estrecha que los pueblos indígenas guardan con sus tierras, así como con los recursos naturales de los territorios ancestrales y los elementos incorporales que se desprendan de ellos"<sup>18</sup>

Y es que los pueblos indígenas no tienen una relación con su territorio y la naturaleza que se limite a una perspectiva económica o productiva<sup>19</sup>. El vínculo indígena con todos los elementos del territorio se caracteriza por grado de interdependencia cultural y espiritual, que se deriva de la permanencia indígena en estos espacios desde tiempos inmemorables y de la prevalencia de la transmisión intergeneracional del conocimiento, las tradiciones, costumbres, lenguas, valores y, en general, del patrimonio inmaterial<sup>20</sup>. De ahí que el territorio sea un elemento material y espiritual del que deben gozar plenamente, inclusive para preservar su legado cultural y transmitirlo a las generaciones futuras<sup>21</sup>.

Como lo ha señalado la Corte IDH en el caso Caso Pueblo Indígena Kichwa de Sarayaku Vs. Ecuador, la destrucción o menoscabo de los diferentes elementos de la naturaleza genera profundas afectaciones a las relaciones sociales y espirituales que los integrantes de los pueblos indígenas pueden tener con estos elementos.

<sup>17</sup> Corte IDH. Caso Comunidad Indígena Yakyé Axa Vs. Paraguay. Fondo Reparaciones y Costas. Sentencia 17 de junio de 2005; párr. 146.

<sup>18</sup> Corte IDH. Caso Pueblo Indígena Kichwa de Sarayaku Vs. Ecuador. Fondo y reparaciones. Sentencia de 27 de junio de 2012; párr. 145. En el mismo sentido: Caso de los Pueblos Indígenas Kuna de Madungandí y Emberá de Bayano y sus Miembros Vs. Panamá. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 14 de octubre de 2014, párr. 111; Caso Comunidad Garífuna de Punta Piedra y sus Miembros Vs. Honduras. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 08 de octubre de 2015, párr. 165; Caso Comunidad Garífuna Triunfo de la Cruz y sus Miembros Vs. Honduras. Fondo, Reparaciones y Costas. Sentencia de 08 de octubre de 2015, párr. 100; Caso Pueblos Kaliña y Lokono Vs. Surinam. Fondo, Reparaciones y Costas. Sentencia de 25 de noviembre de 2015, párr. 129

<sup>19</sup> Corte IDH. Caso Comunidad Indígena Sawhoyamaya Vs. Paraguay. Fondo, Reparaciones y Costas. Sentencia de 29 de marzo de 2006; párr. 139.

<sup>20</sup> BERRAONDO LÓPEZ, Mikel. 2001. "Pluralismo Jurídico, Medio Ambiente y Pueblos Indígenas. Hacia un nuevo Derecho Humano al Medio Ambiente". En BERRAONDO LOPEZ, Mikel. *Políticas de Reconocimiento del Pluralismo Jurídico y el Derecho Indígena en América Latina*. Bilbao: Universidad de Deusto, pp. 6.

<sup>21</sup> Corte IDH. Caso de la Comunidad Mayagna (Sumo) Awás Tingni Vs. Nicaragua. Fondo, Reparaciones y Costas. Sentencia de 31 de agosto de 2001; párr. 149.

Por tal razón, esta propuesta no busca sino dotar de un marco institucional y legal que brinde protección a la Madre Naturaleza y sus elementos que son consustanciales al ejercicio del derecho al territorio de los pueblos indígenas en el Perú.

De ahí que esta propuesta sea un desarrollo de las protecciones convencionales y constitucionales que ya tiene la naturaleza por ser un elemento esencial del derecho al territorio de los pueblos indígenas.

### c. Se deriva de los avances en la jurisprudencia del Tribunal Constitucional

La Constitución Política del Perú establece que toda persona tiene derecho a gozar de un ambiente equilibrado y adecuado al desarrollo de su vida (artículo 2, inciso 22). Según el TC, este derecho debe ser entendido como **uno en el que sus elementos se desarrollan e interrelacionan de manera natural y armónica y si el hombre interviene no debe suponer una alteración sustantiva de la interrelación que existe entre los elementos del medio ambiente**<sup>22</sup>.

En esa misma línea, en la sentencia recaída en el Expediente 00042-2004-AI/TC, el TC indicó que este derecho comporta un deber de **actuar en armonía y en convivencia pacífica con los demás seres vivos que lo rodean**<sup>23</sup>, que tiene la siguiente implicancia:

" (...) asumir una actuación responsable frente a ellos; especialmente frente a los animales. Esta es una exigencia de la ética del respeto por la vida, **que une la necesidad de entender la vida en un sentido más amplio y no restringido**; responsabilidad obliga al hombre. **De ahí que se señale que el hombre es moral cuando considera sagrada la vida o tal, es decir, no sólo la vida del hombre sino también la de los demás seres vivos.**"

Es decir, para el TC, la vida de los componentes de la naturaleza, como los animales, tiene un valor constitucional en sí misma, por lo que está proscrito el maltrato o la crueldad. Así, el TC ha señalado que el no causar a los animales dolor y sufrimiento desproporcionado e injustificado es un deber que no solo pertenece únicamente al ámbito de los deberes morales, **sino que es un deber con fuerza normativa**, por lo que no es posible derivar un "derecho" de los seres humanos a tratar cruelmente o hacer sufrir a los animales no humano<sup>24</sup>, pues existe la obligación de respetar a los animales como si se tratara de los seres humanos mismos:

"(...) no existe ningún argumento racional que justifique el que el ser humano someta a torturas, tratos crueles y dé muerte, innecesariamente, a los animales; más aún si dichos actos se realizan por diversión en espectáculos públicos. Tal actitud es contraria con la ética y contra la dignidad y la naturaleza racional y emotiva del propio ser humano, **pues el respeto a los animales por parte de toda persona halla su fundamento también en el respeto mutuo que se deben los hombres entre sí**"<sup>25</sup>.

<sup>22</sup> Expediente N° 048-2004-PJ/TC, fundamento 17.

<sup>23</sup> Expediente 00042-2004-AI/TC, fundamento 25.

<sup>24</sup> Sentencia recaída en el Expediente N° 07392-2013-PHC/TC, fundamentos 24 y 34.

<sup>25</sup> Sentencia recaída en el Expediente 00042-2004-AI/TC, fundamento 28.

Sin embargo, el TC ha ido más lejos y **ha señalado con suficiente claridad que se tiene que superar la perspectiva tradicional que ve a los animales como simples cosas o bienes muebles objeto de apropiación.** A criterio del TC, este paradigma debe cambiar como en su momento se proscribió la esclavitud:

En ese sentido, frente a espectáculos -como el taurino y otros similares- que, encubiertos por lo "cultural", conlleven a un sufrimiento y tratamiento cruel, innecesario e injustificado, contra los animales, el Estado no tiene el deber de promover dichos espectáculos; por el contrario, **debe asumir un deber básico (...) que consiste en garantizar el que los animales no sean objeto de tratos crueles por parte de los seres humanos; tendiéndose a superar aquella perspectiva que ve en los animales como simples cosas o bienes muebles objeto de apropiación, al igual que en momentos anteriores lo fueron los esclavos con respecto de sus amos, o las mujeres con respecto a sus padres y esposos**<sup>26</sup> (El subrayado y énfasis es nuestro).

Como se puede apreciar, la siguiente propuesta es congruente con el desarrollo jurisprudencial del TC que reconoce la necesidad de ver al medio ambiente desde una perspectiva holística, de interrelación e interacción armónica con todos los elementos del ambiente, considerando el valor de la vida de los seres de la naturaleza en sí misma, lo que implica proscribir la tortura y la crueldad.

#### **d. Se deriva de otras obligaciones internacionales reconocidas por el Perú**

La Constitución Política del Perú establece que toda persona tiene derecho a gozar de un ambiente equilibrado y adecuado al desarrollo de su vida (artículo 2, inciso 22) y reconoce y protege la pluralidad étnica de la nación (artículo 2, inciso 19). Además, que el Perú es una República democrática, social, independiente y soberana (artículo 43), que está obligado a promover la conservación de la diversidad biológica y las áreas naturales protegidas (artículo 68).

Del mismo modo, establece que los tratados celebrados por el Estado y en vigor forman parte del derecho nacional (artículo 55°) y que el Estado está obligado a cumplir sus compromisos asumidos internacionalmente, conforme a lo dispuesto por los artículos 26° y 27° de la Convención de Viena sobre el Derecho de los Tratados.

Ello implica que no debe interpretarse de forma que restrinja, limite, suprima, el goce y ejercicio de un derecho o que excluya derechos y garantías que se derivan de la forma democrática de un Estado, de conformidad con lo dispuesto por los artículos 1 y 2 de la Convención Americana de Derechos Humanos. De allí que, el proteger los ecosistemas forestales, la naturaleza y las especies de su deterioro y posible destrucción por actividades humanas, constituya un interés superior y universal que debe ser atendido de forma prioritaria.

Por otro lado, debemos recordar también que el Estado, haciendo uso de su soberanía, ha venido adoptando compromisos internacionales para promover y respetar los derechos humanos y derechos de los pueblos indígenas; así como

<sup>26</sup> Sentencia recaída en el Expediente 00042-2004-AI/TC, fundamento 29.



también, para preservar la biodiversidad, la naturaleza y los ecosistemas. Ello, en razón de que estamos conscientes de que la especie humana viene causando graves daños a los bosques, al aire, al agua, la tierra, la flora y la fauna, las cuales deben preservarse en beneficio de las generaciones presentes y futuras<sup>27</sup>.

Además, porque el Estado se ha comprometido en adoptar medidas eficaces que impidan la degradación de la diversidad biológica, mediante la aplicación del criterio de precaución, cuando haya peligro de daño grave o irreversible.<sup>28</sup>

Del mismo modo, debemos destacar también, los compromisos asumidos por el Estado para combatir los impactos del cambio climático limitando el aumento de la temperatura a 1.5 ° C, el aumentar la capacidad de adaptación de los efectos adversos del cambio climático y a reducir las emisiones causadas por la deforestación y la degradación de los bosques.<sup>29</sup>

El Estado se ha comprometido además, en crear áreas protegidas que garanticen la conservación de la diversidad biológica, la protección de los ecosistemas y habitats naturales, promoviendo un desarrollo ambiental adecuado y sostenible que eviten efectos adversos a los mismos.<sup>30</sup> Sin embargo, debemos tener en cuenta que, el derecho internacional ha establecido que para la creación de las áreas protegidas los Estados, como es el caso del Estado peruano, deberá respetar no solo la dimensión biológica de tales áreas, sino también, su dimensión socio cultural que le exige que estas sean compatibles con el uso y goce efectivo de los territorios ancestrales de los pueblos indígenas<sup>31</sup>. De allí que, la conservación y utilización de los recursos naturales tenga que darse además, protegiendo y alentando prácticas culturales y tradicionales de los pueblos indígenas<sup>32</sup>.

## 5. PROPUESTAS ESPECÍFICAS

Las propuestas desarrolladas en la presente iniciativa son las siguientes:

- Reconocer que los derechos de la Madre Naturaleza, los ecosistemas y las especies son titulares de derechos y sujetos de protección por parte del Estado. Para este fin, se establece una lista, no taxativa, de derechos de la Madre Naturaleza.
- Establecer los principios y enfoques de obligatorio cumplimiento para la aplicación de los derechos de la Madre Naturaleza.

<sup>27</sup> Declaración de Estocolmo de 1972

<sup>28</sup> Conferencia de Naciones Unidas sobre medio ambiente y desarrollo, de junio de 1992

<sup>29</sup> Convención marco sobre cambio climático de París.

<sup>30</sup> Convenio de Biodiversidad Biológica, ratificado el 24 de mayo de 1993.

<sup>31</sup> Corte Interamericana de Derechos Humanos, caso Kaliña y Locono vs Surinam.

<sup>32</sup> Convenio de Biodiversidad Biológica.

mares y otros, como intereses jurídicos en sí mismos, aún en ausencia de certeza o evidencia sobre el riesgo a las personas individuales.

Esta norma es el desarrollo legal de estas normas de carácter constitucional.

## **7. ANÁLISIS COSTO BENEFICIO**

El presente Proyecto de Ley no irroga gasto alguno al erario nacional, y por lo contrario, contribuye de forma significativa en la construcción de un nuevo orden político, económico y social para nuevas formas de relacionamiento entre la especie humana y los demás entes vivos de la madre naturaleza, los ecosistemas y las especies, estableciendo la prevalencia del interés superior de su protección, como garantía para la supervivencia del planeta y asumida como una corresponsabilidad compartida con los pueblos indígenas en su cuidado y protección.

## **8. RELACIÓN DE LA INICIATIVA CON LA AGENDA LEGISLATIVA Y LAS POLÍTICAS DE ESTADO EXPRESADAS EN EL ACUERDO NACIONAL**

La presente propuesta legislativa tiene vinculación con la Política III del Acuerdo Nacional, referido a la Competitividad del País, punto 19 Desarrollo Sostenible y Gestión Ambiental concordante con el inciso e) referido a incorporar en las cuentas nacionales la valoración de la oferta de los recursos naturales y ambientales, la degradación ambiental y la internalización de los costos ambientales, con lo cual queda claramente establecido la responsabilidad del Estado de promover y defender el equilibrio de nuestro ecosistema; asegurando de ese modo la protección ambiental en todos sus ámbitos.

